

The Georgia Aviation Flyer

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Editor's Squawk Box

By Jonathan R. Friedman, Editor
McKenna Long & Aldridge LLP

Thanks to the commitment and dedication of the State Bar of Georgia, the officers of the Aviation Law Section and the authors who submitted articles for publication, we are proud to present this inaugural edition of *The Georgia Aviation Flyer*. This issue covers a diverse collection of topics—from the Internet to bankruptcy to pending legislation—and includes an exclusive excerpt (the first in a series of four) from *Georgia Flight: The History of Aviation in Georgia*. A publication of the Wm. Robb Group, *Georgia Flight* should be available for purchase in June 2007 from the Georgia Aviation Hall of Fame.

While the *Flyer's* predecessor, *Preflight*, was smart, informative and well received by its readers, the *Flyer* will have an expanded role and an expanded readership. In fact, in an effort to make the *Flyer* relevant to all segments of the aviation community, including businesses, insurers and other stakeholders, future editions of the *Flyer* will—in addition to standard fare—include sections specific to airports, insurance, contracting, FAA compliance, and legislation. As a result, our circulation has grown to include business professionals, lawyers, lobbyists and regulators. And, we hope to continually increase our readership with each new edition of the *Flyer*, which will be published three times a year: April, August and December.

I want to thank Johanna Merrill, section liaison at the State Bar of Georgia, Jennifer Baxter at Georgia State University College of Law, and Linda Coleman at McKenna Long & Aldridge LLP, for their terrific assistance and support. The *Flyer* would not be possible without them. If you have questions, ideas or would like to submit an article for publication, please do not hesitate to contact me at 404-527-4731 or jfriedman@mckennalong.com. →

Photos from the April 2007 Sun 'n Fun Fly-in in Lakeland, Fla.



All Photos by Alan Armstrong

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Early Flight in Georgia

Excerpt from *Georgia Flight: The History of Aviation in Georgia*¹

The Balloon

Years before Georgia's aviation pioneers mastered powered flight, earlier aspirants set the stage with lighter-than-air aircraft. Georgia's first aircraft was the balloon; Georgia's first aircraft designer and manufacturer was noted balloonist, Charles Cevor; and Georgia's first military pilot, Major Edward Porter Alexander, C.S.A., used a balloon to observe movement of Union troops.

Evidence of balloon ascensions in Georgia appears in Georgia newspapers as early as 1835. One particularly well-documented flight occurred on March 8, 1860. Charles Cevor of Savannah launched his balloon, *Montpelier*, into a heavy gale. The balloon, Cevor, and a paying passenger, Mr. Dalton, were carried out to sea, but Cevor managed to successfully bring the balloon down along the coast, some 40 miles from Savannah.

A year later in April 1861, Cevor volunteered the services of his current balloon, *Forest City*, to the Confederate government, but the offer was refused. However, General Thomas Drayton, C.S.A., of South Carolina had for some time shown interest in the potential use of balloons for field observation. He authorized Capt. Langdon Cheves, C.S.A., to contract with Charles Cevor to construct a balloon, providing that gas and materials could be procured. With help from another Confederate officer, Capt. Pratt, Cevor successfully developed a hydrogen gas generating process, and General Drayton authorized construction of the balloon.

Construction began on the *Gazelle* at St. Andrews Hall in Savannah. Frequently referred to as the "Silk Dress" or "Petticoat" balloon, the *Gazelle* was created from every yard of fine silk fabric available in Savannah and Charleston. The Confederate financial records of Capt. Langdon Cheves reveal "eight pieces of colored silk totaling over 110 yards were purchased at \$ 1.50 per yard." Witnesses to the construction noted black, white, yellow, and green strips were utilized. Silk was selected due to its light weight and tight weave. Even so, the seal was not tight enough to hold air or

gas. A coating was developed by dissolving worn rubber rail car springs in naphtha, a flexible, varnish-like substance that was both airtight and light in weight.

The *Gazelle* was offered as ready for service around May 22, 1862. Initially considered for use in the defense of Savannah, there is no evidence that it was ever put to such use. (There were reports of a Union balloon near Fort Pulaski at that time, however.) The *Gazelle* was being inflated for ascension near Charleston when it was ordered to Richmond instead. Carried on a specially scheduled train, it

was to be used as part of Gen. Robert E. Lee's defense of Richmond against Union Gen. George McClellan.

Since efforts to develop a hydrogen gas generator for field use had not yet been successful, the *Gazelle* was filled with illuminating gas (used for street lights) at the Richmond gas works. The aircraft was then moved to the front on a cable tethered to a train locomotive.

Major Edward Porter Alexander was responsible for the operations of this balloon for observation at the Battle of Gaines Mill (near Richmond) from June 27-29, 1862. He ascended to an altitude of about 1,000 feet and reported, by semaphore signals, the location and strength of the enemy troops. Alexander had developed this semaphore system which was the basis for the formation of the Army Signal Corps. All U.S. Army aviation operations remained under the Signal Corps through the



First World War.

While the initial operations of this balloon were quite successful, the battle lines eventually moved away from the rail line and closer to the nearby James River. At that point, the balloon was transferred to a small Confederate gun boat, the *CSS Teaser*, to be towed upriver. The *Teaser* ran aground and was captured, with the balloon, by the Union gunboat *Maratanza*. Major Alexander escaped by swimming to the woods along the banks of the James.

Later promoted to General, Alexander has been claimed by many cities. His *Fighting for the Confederacy*, a volumi-

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Early Flight

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nous work finally assembled and published within the last 20 years, describes his early life in Washington, Ga. His previous highly regarded work, *Military Memoirs of a Confederate*, was published in 1907.

Charles Cevor did construct a replacement balloon in Savannah which was completed in late August 1862. By then the threat to Richmond was over, so the new balloon was used in the Charleston, S.C., area. Orders were issued directing Cevor and his balloon to Charleston and authority was issued to reimburse Cevor for his expenses in maintaining and deploying it. Records indicate that a number of successful reconnaissance flights were performed in the Charleston area. During such a flight in 1863, a high wind carried the balloon over Union lines and it was captured. That balloon was sent to the U.S. Patent Office where it was cut into pieces and distributed to many locations, including the Smithsonian Institution.

Augustus Moore Herring: Georgia Aviation Pioneer

The names of America's most prominent early aviation experimenters are well known: Langley, Chanute, Curtiss, and the Wright Brothers. Others who worked diligently in groups associated with these early pioneers are somewhat less known. One such unknown, Georgia-born Augustus Moore Herring, is the only one to have participated with every one of these pioneers.

In 1894, Herring built and tested two different Lilienthal-style (birdlike) gliders. One was fitted with a spring loaded movable tail that would lessen, or damper, the effect of wind gusts. He like the other pioneers, was addressing the problem of flight control. Based on his experience with these gliders, Herring was hired by Samuel Langley to assist with aeronautical experiments at the Smithsonian Institution. Herring resigned seven months later in a "fit of temperament".

The next documented appearance of Herring was as one of three assistants to Octave Chanute's glider experiments in 1896. Chanute, who might be regarded as the grandfather of American aviation, was a highly successful civil engineer. He had been informed by Langley that Herring's "reliability was as questionable as his discretion." In spite of that warning, Chanute designated Herring as supervisor for construction of a movable wing glider. Herring was also to reconstruct his Lilienthal glider for further testing under Chanute's guidance. In June 1896, Chanute and his three assistants showed up at the dunes of Indiana to experiment with these two gliders. With experiences remarkably similar to the later Wright Brothers at Kitty Hawk, a camp was established, flights made, and Chanute compiled a diary of it all. Most of the flights were by Herring.

The group established a new camp in August, after rebuilding the Chanute glider and adding two new gliders to the fleet. Like the Wrights, they sought privacy for their experiments. The most successful glider was a biplane design with a variation of Herring's movable tail. Some referred to this glider as the Chanute-Herring machine. A few weeks later Herring invited the press and had a show-down with Chanute. He also claimed to have made impressive flights without the observation of anyone on the Chanute team.

In December 1896, Herring applied for a patent on a powered glider similar to the successful Chanute-Herring machine. This patent application was rejected in 1898 as unable to be proven...only a theory. Herring set about actually building the machine. Herring, a self-professed expert in lightweight engines, was unable to produce what he needed for this aircraft. He mounted a compressed air motor and claimed success in October 1898. Chanute was invited to witness a demonstration of a powered flight, but the craft did not fly.

Herring essentially disappears until 1902, when news of a large prize for a flying machine to be awarded at the 1904 St. Louis Exposition got his attention. First he approached Chanute, then American Hiram Maxim in London, with intention to assist in building a prize-winning aircraft. Letters between Chanute and Maxim describe Herring as "possessing considerable ability, knowledge and mechanical instinct ... but he cannot be easily managed."

Chanute, well along in years, offered to donate his gliders to the Wright Brothers for testing at Kitty Hawk in 1902. Part of the deal was for Herring, knowledgeable about the Chanute machines, to join the Wrights in North Carolina. Wilbur Wright wrote Chanute, "several things I had heard about Mr. Herring's relations with Mr. Langley ... indicate a jealous disposition..." Chanute, Herring, and two gliders arrived at the Wright Brother's Kitty Hawk camp. While this was the flight control breakthrough year for the Wrights, neither Chanute glider ever performed well in their few flights.

The Chanute party left for Washington, the Smithsonian, and specifically Langley. Chanute was planning to pay a courtesy call but it appeared that Herring was attempting to gain employment with Langley by offering information about the latest Wright developments. This early version of industrial espionage was fairly obvious and after Langley spent a few minutes with his friend Chanute, he refused to see Herring at all.

Well over a year later, following the Wright Brother's successful first flight, a congratulatory letter from Herring reached the Wrights. Herring apparently had filed a patent request for a machine remarkably similar to the Wright 1903 Flyer. In "consideration for the brothers ... and to avoid litigation and competition," Herring proposed a joint compa-

ny to market the Flyer. That company would provide one-third ownership to three participants, Wilbur, Orville and Herring. This offer fueled a number of letters among the Wrights, the Smithsonian and Chanute. It was the final straw for Chanute, who never communicated with Herring again.

The first Aero Club of America show in 1904 did include Herring's two propellers that had been utilized on his compressed air-driven 1898 "first flight" machine. Again, Herring fades away. In December 1907, the U.S. Army Signal Corps advertised for bids for a "Heavier-Than-Air Flying Machine." This was regarded as merely a formality to ordering a Wright Flyer. Instead, 41 bids were received. Only two bids met all the legal requirements—the Wrights and the elusive Herring.

In spite of giving every evidence of establishing a shop and constructing a flying machine, Herring continued to receive extensions for delivery to the Fort Myer trials in 1908. He "delivered" some suitcases that purported to hold much of his radical machine. It was never assembled or flown at Fort Myer. Herring received permission from the Signal Corps to demonstrate his craft elsewhere. He was purported to have done so at Hempstead, Long Island, N.Y., although there were no witnesses.

All through this period, Herring had courted and won the support of the leadership of the Aero Club of America. It would be through this alliance that Herring would be most successful.

The other significant American aviation inventor, Glenn Curtiss, had moved his operations to the Alexander Graham Bell laboratory in Nova Scotia, Canada. There, organized as the Aerial Experiment Association (AEA), Curtiss avoided the constant patent battles with the Wrights and was successful with a number of powered aircraft. At this point, Herring and many of the Aero Club leaders approached Curtiss to create the first American company to build and sell airplanes. The Herring-Curtiss Company was incorporated in 1909.

Later that year, Curtiss traveled to Reims, France, to participate in the world's first aviation event. His "Reims Racer" was the star of the event. Herring made the most of this success by renting the airplane for display at Wannamaker's Department Store. This action deprived Curtiss of his best mount for the Hudson-Fulton celebration. This celebration was to be the first direct flying confrontation between the Wright and Curtiss aircraft in America. That never occurred, as Curtiss' backup aircraft failed to perform.

The confrontation that did take place, however, was the beginning of the patent wars. At this point the Aero Club and Curtiss discovered that Herring had grossly mislead both about his patents, developments, and other matters. Eventually Herring was confronted by the Herring-Curtiss board of directors and forced out of the company.

Over the years that immediately followed, Herring was involved with a Herring-Burgess Airplane Company. He also continued to hold stock in Curtiss which had thrived after reforming without Herring. This stock became the object of a legal fight which was only resolved after Herring and Curtiss had both died.

No Herring designs, aircraft, or other significant artifacts have ever been seen.

Georgia's Pioneer Aviator: Ben T. Epps (1888 – 1937)

Among the sand dunes of Kitty Hawk, N.C., in 1903, Wilbur and Orville Wright proved to the world that flight in a heavier than air apparatus was possible. Papers all over the world heralded the feat as one of man's great accomplishments, and one young reader from Athens, Georgia took the news particularly to heart. In 1904, inspired to study engineering, 16-year-old Ben T. Epps headed off to the Georgia Institute of Technology. Unfortunately, the cost of living in Atlanta was too high and Ben returned to Athens to set



Ben T. Epps (1888-1937)

up shop as an electrical contractor.

In short time, Ben expanded the small business on Washington Street to include automobile and motorcycle service. Business was good, but Ben's interest was aviation. He tinkered with different ideas about how to build a flying machine. If he worked from drawings, none have survived, but finally, in 1907, four years after the Wright Brother's first flight, 19-year-old Ben Epps wheeled his prototype out of the garage to the edge of town and prepared for flight. (Unlike the Wright's aircraft, Ben's flying machine had wheels.)

There were many differences between the Epps aircraft and the Wrights' aircraft. Most obvious was that the Epps plane was a monoplane (one wing). The pilot sat upright, not prone. Similarities included a pusher propeller located behind the wing that "pushed" the airplane. Epps also employed a large canard up front which acted as the elevator and allowed up and down movement and wing warping to facilitate turning.

With townspeople looking on, Ben began the first takeoff roll ever in the state of Georgia. To everyone's amazement,

the contraption lifted off the ground, albeit for only about 15 feet before it crashed. Undaunted, Epps made a few adjustments and corrections and tried it again. On the second take-off roll ever in Georgia, Ben T. Epps flew more than 100 yards and reached an altitude of nearly 50 feet. The flight lasted at least as long as the Wrights' first flight, and the 1907 Epps flyer and its pilot inaugurated Georgia's aviation history.

Ben Epps went on to design, build and fly eight different airplanes. The question always lingers, "Why isn't he better known?" The answer speaks volumes about the man. For one, Ben was a loner. When others were battling for the aviation limelight and constantly looking for financial backing, he went it alone. There are no records that he ever corresponded with the other aviation pioneers or ever solicited any individuals or corporations for assistance. His automobile, motorcycle and bicycle service and repair business financed the fledgling aviation enterprise until it could finance itself through barnstorming flights on the weekends.

Family members attest to the fact that he would work on a new idea during the week and on the weekend put the idea into play. If it worked, it was incorporated into a new design. If it didn't, it frequently resulted in a crash. Research and development during the first few decades of aviation were straightforward; it either worked and the airplane flew higher, faster, farther, or it didn't and the airplane crashed. Of the eight airplanes Ben Epps designed, built and flew, he crashed every one of them. Being an aviation pioneer was a risky and dangerous pursuit.

By the time Ben met and married Omie Williams in 1913, he had already built and flown four airplanes and incorporated some significant design changes. Photographs of his 1909 monoplane show the removal of the canard and the establishment of the elevator on the tail assembly. This action was necessary so that he could mount a tracker propeller on the front, making it the first airplane to fly in the United States with the propeller in the front.

In his first three designs, fabric covered only the bottom half of the wing and struts, while cables and wire flapped noisily in the breeze passing over the top. Aerodynamics had not yet progressed far enough for inventors to understand the significance of the curved upper wing. It was not until Ben's 1912 monoplane that he radically re-designed the wing. The 1912 airplane incorporated fully covered wings as well as his first use of ailerons. Ben did not invent any of these features for the 1912 airplane, nor did he collaborate with other inventors or designers. He was an avid reader of scientific and aviation magazines and kept abreast of advances and accomplishments. He then incorporated those ideas into his own designs and constructions.

Daughter Evelyn was born prior to the outbreak of World War I and Ben's status as husband and father exempted him from military service. Now 26, he had begun the family he

wanted, and he also maintained a successful auto business. However, his love for aviation could not be quelled. With the full support of Omie, Ben bought a commercially-built biplane with a passenger cockpit and continued flying.

This particular airplane incorporated many technological advances of the day, and Ben's interest was simply to learn how they worked. He flew the plane regularly for over a year before building his first biplane in 1916. Instead of connecting the ailerons to the trailing edge of the wings for this design, he deployed them between the upper and lower wings as a separate airfoil. The design worked very well for at least six flights and finally nosed over on takeoff and crashed. Ben never rebuilt the airplane. It would be nine more years before another Epps design flew.

With the war over, there was no shortage of surplus airplanes on the market, and Ben kept his aviation interest alive by buying, refurbishing, flying and selling surplus Jenny aircraft. Ben became acquainted with a French war veteran named L. M. "Monte" Rolfe who happened into town, and they soon became friends and business partners in The Rolfe-Epps Flying Service. The enterprise specialized in passenger service, aerial photography, flight training and sales. Ben's relationship with Rolfe was the closest thing to collaboration he had experienced in his career, and the knowledge he gained from listening to Monte's experiences and their joint tests on surplus aircraft led Ben to design and build a controllable pitch propeller, the mainstay for his 1924 light monoplane.

Weighing in at 340 pounds with a two cylinder motorcycle engine for power, the 1924 light monoplane could sustain 60 miles per hour and averaged 25 miles per gallon. Ben believed that this plane was ready for mass production and began advertising it for \$1,000. As good as the airplane was, records indicate that only one was ever sold.

The last Epps-designed airplane was a light biplane finished in 1930. It was technologically and aerodynamically equal to any production airplane of the time, and was the primary trainer for the oldest Epps children. Ben came from a family of ten children, and he fathered ten of his own. Nine survived to adulthood and eight became pilots and/or involved in the aviation business. Eldest son, Ben Jr., soloed at 13 and gained some notoriety, being introduced to President Hoover as America's youngest aviator.

In 1935, Ben took two young people for a ride over Athens. No one knows exactly what, but something happened and the flight controls became stuck. The airplane plummeted to the ground, critically injuring Ben and fatally injuring a female passenger. Ben was hospitalized with a broken hip and other injuries. He was unable to make the rent payment on his automobile business and was evicted from the building. Responsibility for cleaning out the shop

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The Aero Domain

By Chip Parker
Senior Legal Counsel, SITA

While most everyone but the most stringent luddite knows the term “.com”, the past five years saw a new Internet domain naming suffix issued that is specific to the aviation industry. The intent of this note is to provide a brief explanation of what the “.aero” domain name is and what it offers members of the aviation community.

March 2, 2007, marked the fifth anniversary of the launch of the “.aero” suffix; the first top level Internet domain specific to an industry sector. This universal resource locator (URL) suffix is exclusive to companies, organizations, associations, government agencies and individuals certified as working within aviation and related industries.

This domain is sponsored by Société Internationale de Télécommunications Aéronautiques SC (SITA), a cooperative entity providing network services to its members from the air transport community. SITA, working with Internet Corporation for the Assigned Names and Numbers (ICANN) formed “.aero” on the belief that the aviation transport community would benefit from establishing a top level domain specific to the aviation. The premise is that “.aero” is governed by the air transport community for the air transport community. The domain is not available to the general business community or to the general public. Usage is exclusive to qualified members of the aviation community as defined by classification within one of the 19 approved registrant groups.

SITA originated as a cooperative entity in 1949 by 11 airlines that realized the economic efficiencies of pooling telegraphic resources across international networks as a shared system. It was more cost effective to share a telegraphic network than such development would be if each airline built the network on its own. SITA is now owned by more than 700 airlines and related businesses including airport, aerospace companies and logistics operators. SITA’s establishment of an industry specific domain was a natural progression to adapt Internet based technology with a specific focus on aviation.

The use of abbreviated address designators is common to aviation. Anyone flying commercial flights experience the use of these designators in the form of airline abbreviations codes, (i.e. BA for British Airways, DL for Delta Airlines or ATL for Hartsfield-Jackson International Airport). The two, three and four digit codes origin dates back to the 1950s when the International Civil Aviation Organization (ICAO), the International Air Transport Association (IATA) and SITA established industry standards for telegraphic message content and protocol. The broad acceptance of the Internet

resulted in many of the designators and codes common to aviation legitimately being used by companies or organizations sharing a common abbreviation but having nothing to do with aviation. Combined with the advent of domain “squatters” who made speculative name reservations in the hope of cornering a valuable Internet address resulted in virtual exhaust of the ability of aviation to continue to use its two, three and four digit codes and designators without conflict. “.aero” changes this. In fact, SITA has pre-registered all existing airport codes and airline codes and reserved those for use by the designated code holder for the “.aero” suffix. The “.aero” address provides a readily identifiable name associating the web address with aviation. The goal is to provide an efficient, safe and easy standard address that can be used globally by the aviation community to develop business to business or intra-company applications via the Internet.

The domain is administered by the Dot Aero Council (DAC) comprised of the ICAO, IATA, the Airport Council Institute (ACI), Federation of Airline general sales Agents (FAGSA), the National Business Aviation Association (NBAA) and other member of the air transport community. The participation by many of these agencies facilitates the integration and implementation of this domain with new technological development and solution implemented to facilitate aviation.

IATA issued recommended practice (Recommended Practice 1784, Structured Domain Names) delineating an industry standard practice addressing Internet communications between airlines and business partners. RP 1784 is a good reference for how the “.aero” suffix can be implemented to deploy an Internet based system for aviation users.

Structured naming using the “.aero” domain allows for simplification in URL addresses. By way of example, a route to a current airline’s reservation website can be simplified. Qantas moving from http://www.Qanta.com.au/flyer_ir1.htm can become <http://rm.qf.aero>. The smaller URL is easier to remember and has advantages for use with personal data application devices where screen space is a premium.

The aviation community can also use the “.aero” suffix in e-mail addresses as to readily identify the address as a part of the “.aero” community. United Airlines has implemented this domain for lost luggage at Los Angeles International Airport with laxll@ua.aero.

Use of the “.aero” domain in accordance with an industry standard naming convention affords the aviation communi-

ty the ability to develop Internet based interfaces specific to aviation with the potential to have the utility often achieved with vanity telephone numbers.

The utility of this domain is not limited to large carriers but affords the same functional use for smaller operations or even shared ownership of a private craft. A fractional ownership group could easily adapt this naming structure to implement a cost effective web based scheduling tool for coordination of use of the shared aircraft.

The use of this top level domain holds significant promise for the aviation community. If all ICAO airport codes, using the four letter designations used by civil aviation pilots, are allocated to code.airport.aero naming convention, then each airport could configure pointer to authoritative weather information or even allow voiceover Internet protocol to reach the airport or the service provider issuing the data. A pilot could use his or her mobile device via the Internet to plan a route and then obtain weather information for a relevant airport. Using VoIP, the pilot could place a call or send a text message for more detailed information. Building upon the current ICAO system of designators, the effective use of this domain could be a significant tool in obtaining and exchanging information.

As with all Internet-based exchanges, security is a concern. The information age brought forth the same chicanery inherent with other social changes through technological innovation. However, the Internet is no worse than a private network from a security standpoint if prudent steps are followed. The “.aero” domain can be implemented with any other Internet security protocols and procedures, such as public key cryptography. By the aviation community controlling the “.aero” domain, it may be that the aviation community can unify its approaches to security and set a standard for effective but user-friendly implementation of cryptography. The airline community has always been on the cutting edge of using technological developments, and there is little doubt the aviation community and the brain power of this community can use this platform to lead the way.

Resources

All the information needed to learn more about “.aero” and how to obtain a “.aero” domain is available at <http://www.information.aero>. The author also adapted much of this article from materials with the kind consent of Marie Zitkova of SITA, who has worked extensively on this effort and the related website. She can be reached for further information at marie.zitkova@sita.aero. →

Aviation Case Law Update

By Rebecca Franklin
Scherffius, Ballard, Still & Ayres

The following list of cases represents many of the recent decisions from various jurisdictions affecting current aviation legal issues.

Preemption/General Aviation Revitalization Act

Preemption refers to the displacing effect that federal law may have on conflicting or inconsistent state law. In the field of aviation law, courts are often faced with the question of whether the Federal Aviation Act (FAA) preempts, or precludes, independent state law claims arising out of an aviation incident. Similarly, the General Aviation Revitalization Act (GARA), 49 U.S.C. § 40101, imposes an 18-year statute of repose on claims against aircraft and component part manufacturers. The following recent cases discuss one or both of these related issues.

Monroe et al. v. Cessna et al.,
417 F.Supp.2d 824 (E.D.Tex. 2006)

This case involved the crash of a Cessna 172S after a flight instructor and a student pilot struck a bird during a training flight. The plaintiffs claimed that Cessna, the aircraft manufacturer, failed to ensure that the aircraft manuals addressed how to respond to such an incident. The plaintiffs also alleged that Cessna failed to design and manufacture its aircraft to safely operate in all foreseeable conditions. Cessna argued that the FAA governs the entire field of aviation safety and thus preempts all state law claims. The Texas federal district court disagreed, holding that there was no evidence of a “pervasive regulatory scheme,” which demonstrated Congress’s intent to preempt the entire field of aviation safety. The court considered GARA as one indicator of Congress’s intent not to preempt state law tort claims. “GARA’s statute of repose implies Congress’ recognition of the continuing viability of state law tort claims against aircraft manufacturers.” The court also held that the plaintiffs’ claims did not conflict with the broad minimum standards set out by relevant federal regulations.

Sheesley v. Cessna, 2006 WL 1084103 (D.S.D. 2006)

This case involved the crash of an aircraft manufactured by Cessna in 1977. In 1986, both engines on the aircraft were “upgraded,” which included the replacement of the wastegate elbow on the exhaust of the left engine. Teledyne originally designed and manufactured the engine and Cessna manufactured the new wastegate elbow. After the crash of the subject aircraft in August 2000, plaintiffs filed

suit alleging that the crash was caused by a crack in the left wastegate elbow. Cessna and Teledyne argued that the plaintiffs' claims were barred by the 18-year statute of repose provided under GARA. The court held that the replacement of the wastegate elbow rolled the repose time period and thus GARA's repose provision did not bar claims against Cessna. The court also held that because Teledyne did not manufacture the replacement wastegate elbow, plaintiffs' claims against the engine manufacturer were barred by the statute of repose.

The plaintiffs also alleged that the pilot's flight training course, FlightSafety, was negligent in failing to include in its curriculum safety procedures for an exhaust failure. They also claimed that FlightSafety negligently used a training flight simulator that failed to replicate the actual handling of a Cessna 340A during the loss of power to one engine. FlightSafety argued that Congress intended to preempt all state law affecting the field of aviation safety, including pilot training. The federal district court disagreed finding that Congress empowered the FAA to adopt minimum safety standards. "Minimum standards of aviation safety do not preclude a finding of negligence where a reasonable person would take additional precautions." However, the court found the negligence claim based on FlightSafety's failure to include additional emergency procedures in its curriculum was preempted because the FAA dictates what material FlightSafety must teach. In other words, the court held that although the FAA does not preempt the entire field of aviation (and thus no "implied" or "field" preemption), plaintiffs' claim relating to the curriculum was barred based on the doctrine of "conflict preemption" because FlightSafety could not have included exhaust failure emergency procedures without violating Federal Aviation Regulations.

Blazevska v. Raytheon Aircraft Co.,
2006 WL 1310455 (N.D. Cal.)

This case involved a Super King Air 200 aircraft that crashed in Bosnia. The parties disputed whether GARA's statute of repose applied to foreign accidents. Ruling in favor of the defendant, the court held that GARA is intended to regulate litigation against aircraft manufacturers in the United States, regardless of where the accident happened, and thus the statute of repose barred the plaintiffs' claims.

Holliday, et al. v. Extex et al.,
547 F. Supp. 2d 1112 (D. Haw. 2006)

This case involved a helicopter crash in June 2003 that was due, in part, to an in-flight failure of an engine. Defendant Rolls Royce manufactured the engine in 1984 and reworked it in 1993. This subject engine was bought in 1988 and overhauled in 2002. During the overhaul, a component part of the engine was modified. The federal dis-

trict court granted partial summary judgment to Rolls Royce based on GARA, finding that the component part was modified but never replaced. The Court held that modification to an existing part does not invoke GARA's rolling provision.

Pridgen v. Parker Hannifin Corp.,
916 A. 2d 619 (Penn. 2007)

In this case, the plaintiffs sued an aircraft engine manufacturer after the crash of a Piper aircraft in Ohio. Plaintiffs contended that the crash was caused by a failure of the engine and fuel system components and argued that the rolling provision of GARA's statute of repose was triggered when a component part of the engine was replaced. However, the defendant did not make or supply the replacement part. The Supreme Court of Pennsylvania held that although the defendant manufacturer was the original manufacturer, type-certificate holder and/or designer of the engine, the rolling provision would not apply because the defendant did not make or supply the replacement parts.

Federal Jurisdiction

Bennett v. Southwest Airlines Co.,
2006 WL 1987821 (N.D. Ill. 2006)

Plaintiffs filed suit in Illinois state court for personal injuries arising out of an aviation crash. The defendant airline and aircraft manufacturer removed the case to federal court whereupon the plaintiffs moved to remand the cases back to state court. The district court held that federal subject matter jurisdiction existed because of the federal issues embedded in the plaintiffs' state law claims and because federal statutes pertaining to takeoffs and landings preempt any concurrent state law relating to the same issues. Recognizing the potential for "substantial ground for disagreement" relating to such preemption / jurisdiction issues, the district court certified its order for interlocutory review and requested a definitive ruling from the federal appellate courts relating to jurisdiction. The 7th Circuit has agreed to hear the issue and the appeal is currently pending.

Glorvigen v. Cirrus, 2006 WL 399419 (D. Minn. 2006)

In this case, a Cirrus SR-22 aircraft crashed in Minnesota. Both the pilot and the passenger were killed. The plaintiffs filed suit alleging that Cirrus failed to provide the pilot with adequate ground and flight training on SR-22 operations. Cirrus contended that the FAA completely preempts all state law claims based on the failure to provide adequate pilot training and thus the claims involved "federal questions" for jurisdiction purposes. The federal district court considered the question of "whether Congress intended for a federal statute to preempt a field of law so completely that the state law claims convert into federal causes of action." The court held that the presumption of a federal preemption defense does not make a case removable to federal court.

McCarty v. Precision Airmotive Corporation, et al.,
2006 WL 2644921 (M.D. Fla. 2006)

Plaintiff filed a lawsuit in a Florida state court alleging negligence and products liability design claims in connection with an airplane crash. The defendants removed the case contending that federal question jurisdiction controlled because “significant federal issues” were implicated. The federal district court disagreed, concluding that the plaintiffs’ claims remained a “garden variety state law tort” which does not raise a significant or substantial federal issue.

Aircraft Noise and “Takings” Issues

Biddle et al v. BAA Indianapolis LLC,
860 N.E. 2d 670 (Ind. 2007)

A group of residents living near the Indianapolis International Airport sued the airport’s owner and operator alleging that they were subject to overflights and increased noise from a relatively new airport runway. The Indiana Supreme Court acknowledged that the noise from the aircraft was no doubt considerable, but that the trial court was warranted in finding that such noise does not amount to a “practical destruction” or “substantial impairment” of the homeowners’ use of their properties. Accordingly, the Court held that the noise from aircraft flying within navigable airspace does not constitute an uncompensated taking.

McCarran International Airport v. Sisolak,
137 P. 3d 1110 (Nev. 2006)

A jury returned a \$16.6 million verdict for a landowner who claimed that height restrictions within the approach zone of a Las Vegas airport constituted a “taking” of airspace above private land. The Nevada Supreme Court upheld the verdict and the United States Supreme Court refused to review the state court’s decisions.

Foreign Aviation Incidents

Van Schijndel et al. Boeing Co. et al.,
434 F. Supp. 2d 766 (C.D. Cal. 2006)

Citizens of the Netherlands brought a products liability suit against U.S. manufacturers arising from a crash of a Singaporean-owned airplane in Taiwan. The defendant manufacturers filed a motion to dismiss based on forum non conveniens. The federal district court held that both private interest factors and public interest factors favored dismissal and that Singapore was an adequate alternative forum.

Da Rocha et al v. Bell Helicopter Textron Inc. et al.,
2006 WL 2619880 (S.D. Fla. 2006)

This case arose out of an air taxi crash in the Amazon jungle, killing or injuring the Brazilian passengers and pilot. The plaintiffs filed claims against the American helicopter and engine manufacturers. The federal district court held that public and private interest factors favored bringing the lawsuit in Brazil and dismissed the action.

Baah v. Virgin Atlantic Airways Ltd.,
2007 WL 424993 (S.D. N.Y. 2007)

Plaintiff, a resident of the United Kingdom brought suit after his infant son was burned by a hot beverage while traveling from London to New York. Plaintiff contended that the New York federal court had subject matter jurisdiction pursuant to the Montreal Convention’s provision allowing a plaintiff to bring suit “at the place of destination.” Plaintiff contended that, although the infant’s airline ticket provided for round trip to and from London, the court should consider the subjective intent of the parties to determine “place of destination.” However, the federal district court refused to interpret the phrase “place of destination” in the Montreal Convention differently than how that provision was routinely interpreted under the Warsaw Convention (the international treaty which preceded the Montreal Convention). Accordingly, the court held that the United Kingdom was the “place of destination” for purposes of jurisdiction under the Montreal Convention.

In Re Crash Near Athens, Greece,
No. 06-C-3439 (N.D. Ill. Feb. 28, 2007)

This case arose out of the crash of a Boeing 737-300 near Athens, Greece in August 2005. The plaintiffs filed their lawsuit against Boeing in Illinois claiming that the aircraft’s pressurization system was defective. The federal district judge found that Greece and Cyprus were more appropriate forums and dismissed the lawsuit.

Discovery

Monroe v. Cessna, 2006 WL 1765905 (E.D. Tex. 2006)

This case, as discussed above, involved the crash of a Cessna 172S aircraft due to a bird strike shortly after take-off. Plaintiffs filed a motion to compel Cessna to produce documents and witnesses to discuss bird-strike testing relating to the stabilizer sections of different model aircrafts manufactured and designed by Cessna. Cessna argued that the plaintiff’s request was overly broad and irrelevant. The federal district court disagreed, holding that the bird-strike tests, although performed on a different model aircraft, may lead to the discovery of admissible evidence. The court also determined that the plaintiffs were entitled to depose the requested corporate representatives. →

The NextGen Financing Reform Act of 2007: Opening Pandora's Box

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The NextGen Financing Reform Act of 2007 lays the groundwork so that we can meet the challenges of transforming the aviation system to meet future demand. Our nation depends on a safe, efficient air transportation system, and this legislation delivers.¹

In what poses to be one of the most highly debated issues in the history of the United States' air traffic control (ATC) system, the Bush Administration proposed a Federal Aviation Administration (FAA) reauthorization package in February 2007 that could transform the current excise tax funded ATC system into a primarily user fee funded system. The Next Generation Air Transportation System Financing Reform Act of 2007 proposal (the NextGen Act), sets the stage for a highly politicized debate on Capitol Hill among the airlines, the general aviation (General Aviation)² industry and the associations that represent these interests.

This article discusses the current excise tax ATC system and proposed changes to the system under the NextGen Act. In addition, the article discusses the positions of stakeholders whose interests will be at the forefront of this highly politicized debate.

Current System – Excise Taxes

The Airport and Airway Revenue Act of 1970 (the 1970 Act)³ was enacted to finance the current and future capital costs of the ATC system and to fund the activities of the FAA through a system of aviation-related excise taxes. Since the passage of the 1970 Act, several enactments have been passed to extend the 1970 Act or implement modifications to the excise taxes under the 1970 Act. One of the recent legislations, the Taxpayer Relief Act of 1997 (the 1997 Act),⁴ extended the excise tax system until Sept. 30, 2007, and broadened the excise tax revenue base. Under the 1997 Act, the ATC system and the FAA are funded by the following taxes and revenues:

1. passenger ticket tax for domestic airline flights;
2. domestic flight segment tax;
3. passenger ticket tax for flights that begin or end at a rural airport;

4. international passenger arrival and departure taxes for airline flights;
5. passenger ticket tax for flights between the continental U.S. and Alaska or Hawaii;
6. a tax on awarding air travel benefits (e.g., frequent flyer miles);
7. the air cargo waybill tax (i.e., tax assessed on the domestic transportation of air freight); and
8. various aviation fuel taxes.⁵

The commercial airlines pay for their aviation fuel by paying the commercial fuel tax at a rate of \$0.043 per gallon.⁶ General Aviation pays for its fuels by paying either the aviation gasoline tax at a rate of \$0.193 per gallon or the jet fuel tax at a rate of \$0.043 per gallon.⁷ The fuel taxes account for approximately \$500 million in annual revenue contributions to the Airport and Airway Trust Fund (the Trust Fund).⁸ The Trust Fund, which was also established as part of the 1970 Act, is used to keep track of the ATC system excise taxes and to account for how the revenues are expended on aviation programs.⁹

While the burden of paying the passenger-related excise taxes falls solely on passengers, the taxes are collected by the commercial airlines and remitted to the Trust Fund three months after their collection.¹⁰ The revenues from excise taxes account for approximately 77 percent that are contributed to the Trust Fund.¹¹ The remaining 23 percent contributed to the Trust Fund are derived from the public's tax dollar contributions to the General Fund.¹²

The NextGen Act

Under the NextGen Act, financing for the ATC system would be based primarily on user fees instead of excise taxes. Beginning on the Oct. 1, 2008 (the transition date), the NextGen Act would eliminate the following taxes:

1. the passenger ticket tax for domestic airline flights;
2. the domestic flight segment tax;
3. the tax on air travel benefits; and
4. the air cargo waybill tax.¹³

In addition, the NextGen Act would reduce the international passenger arrival and departure tax by more than half,

from \$15.10 (the fiscal year 2007 amount) to \$6.39.¹⁴ Also, the passenger ticket tax for Alaska or Hawaii flights would be eliminated, as flights originating or ending in Alaska or Hawaii would instead pay user fees.¹⁵

With the elimination or reduction of the excise taxes, the NextGen Act would present a new funding scheme by which revenues would be generated from three primary sources:

1. fuel taxes;
2. a variety of user fees; and
3. contributions from the General Fund.

Beginning on the transition date, the aviation gasoline tax would more than triple from \$0.193 to \$0.70 per gallon and would generally apply to commercial and General Aviation.¹⁶ In addition, the jet fuel tax rate would increase from \$0.043 to \$0.136 per gallon.¹⁷ Under the NextGen Act, fuel taxes would account for approximately 28 percent of the revenue contribution to the Trust Fund.¹⁸

The NextGen Act would also implement several user fees which would be imposed on aircraft owners and operators. The user fees may include:

1. user fees for en route and oceanic flights based on the distance traveled;
2. user fees based on the weight of the aircraft;
3. user fees for departures and arrivals at airports which are frequented by more than 100,000 passengers each year;
4. user fees based on nighttime operations;
5. user fees to address congestion concerns at the largest airports in the country; and
6. user fees to pay for certification and registration activities.¹⁹

The actual amount of fees would be based on the data that the FAA has compiled from its cost accounting and allocation systems. Under the NextGen Act, user fees would account for approximately 53 percent of the revenue contributions to the Trust Fund.²⁰ The remaining 19 percent would continue to come from General Fund.²¹

The Stakeholders Voice Their Position on User Fees

The FAA's Position

The FAA presents several arguments to explain why reform is needed and how the NextGen Act would bring about this necessary reform. First, relying on studies which have been conducted by the organization over the last 30 years, the FAA argues that the current excise tax system is not aligned with the costs that are incurred by the FAA to provide services to users.²² Specifically, the FAA looks to cost allocation studies that show that while General Aviation is responsible for at least 11 percent of air traffic costs, it only pays 3 percent of the excise taxes that are deposited

into the Trust Fund.²³ Second, the new funding system would raise the capital necessary to accommodate expected growth by providing the funding necessary to fund long-term capital improvement projects and to implement new ATC system technology.²⁴ Third, the FAA points to the vulnerability of the current system and to uncertainties concerning the future of the ATC system which could result in a decrease to Trust Fund revenues and an increase to ATC system costs.²⁵ Last, since the current system of excise taxes and funding authorizations for the FAA will expire on Sept. 30, 2007, the FAA sees this as an opportune time to implement changes to the ATC system which would secure the viability of the Trust Fund and to meet future demands.²⁶

The Commercial and Cargo Airlines' Position

In a response that took no one by surprise, the Air Transport Association of America, Inc. (ATA), the trade organization that represents the major U.S. commercial and cargo airlines,²⁷ released a statement which endorsed certain aspects of the NextGen Act, including the implementation of user fees. For a number of years, the airlines have claimed that they pay more than 90 percent of ATC system taxes while they only use approximately 68 percent of the system.²⁸ The ATA applauds the NextGen Act as recognizing that a blip on the ATC system screen is a blip, regardless of whether the blip is from a 300 passenger commercial airline flight or a 30 passenger General Aviation aircraft.²⁹ The ATA embraces user fees as a step towards ensuring that General Aviation finally pays its fair share.

General Aviations' Position

The General Aviation industry and the associations that represent the industry have formed a collective effort to fight against the user fee system proposed under the NextGen Act. General Aviation has grounded its opposition on arguments concerning the fairness of the current system, the impact that a user fee system would have on General Aviation in the U.S., and the impact that the user fee system has had in Europe. The National Business Aviation Association, Inc. (NBAA), which membership includes companies that rely on General Aviation aircraft business, believes that the current ATC system of funding is fairly assigned because the aviation fuel taxes that are paid by system users are an appropriate measure of users' heavy or light use of the ATC system.³⁰ Second, in an effort to counter the airlines' "fair share" argument, the Aircraft Owners and Pilots Association (AOPA), which represents aircraft owners and pilots, has stated that the airlines do not "pay" an unfair share of taxes because the passengers pay the bulk of the excise taxes in the form the taxes on tickets and international travel.³¹ NBAA also views the NextGen Act's user fee system as the result of a continuous lobbying effort by ATA on behalf of the airlines, the goal of which is to shift \$2 billion of the airlines' costs to General Aviation.³²



Photo by Johanna B. Merrill

In considering the potential impact of a user fee system in the U.S., General Aviation has considered the impact on General Aviation pilots and the U.S. General Aviation market. The General Aviation Manufacturers Association (GAMA), which represents manufacturers of general aviation aircraft engines and related equipment, warns that General Aviation pilots would be one of the most affected groups because the implementation of a user fee system would significantly increase the costs associated with certification training and aircraft ownership.³³ In addition, AOPA believes user fees would hurt the U.S. economy because airports in many communities are only serviced by the General Aviation industry.³⁴ Furthermore, the implementation of user fees would significantly reduce or eliminate certain functions, such as disaster relief, weather and air traffic reporting, business travel and personal travel because of the increased costs of operations.³⁵ Essentially, General Aviation views the transition to a user fee system as a severe blow to its present stability and future growth.

General Aviation has also considered the impact that the user fee system has had in European countries. For example, common types of user fees paid in Europe include:

1. landing fees assessed for each touch down. (Frankfurt Airport in Germany—\$518; London’s Heathrow Airport—\$1,000; and Amsterdam’s Schiphol Airport—\$518);
2. noisy and heavy landing fee, which is based on the type of aircraft (Germany: Beechcraft A36 Bonanza —

\$42, turboprop twins—\$200, and large business jets — \$624);

3. approach fees (United Kingdom—\$34 per approach); and

4. fees for weather briefings (\$3 per minute).³⁶

These user fees are on top of the already staggering aviation gasoline tax, which is currently \$8 to \$9 per gallon, but is poised to rise to \$11 per gallon based on European Commission review.³⁷ The implementation of user fees in several of the aforementioned countries has not created stability in the systems. Instead, the implementation of user fees has resulted in the repeated upward and downward adjustment to the fee amounts and in response to major events (e.g. Sept. 11, 2001).³⁸ As GAMA has recognized, the beginning of user fees in the U.S. ATC system would only “open a ‘Pandora’s Box’ of user fees which . . . Congress [may not] be able to slam shut.”³⁹

Not a Conclusion, Just the Beginning

With the current ATC funding system set to expire on Sept. 30, 2007, the stakeholders on both sides of the debate are only at the beginning of a long and arduous battle. The battle that lies before the General Aviation industry is the task of convincing Congress and other industry officials of the evils of a user fee system and the adverse affect that such a system could have on the otherwise vibrant ATC industry. The battle before the commercial and cargo airlines is a less challenging one because the Bush Administration and the

FAA have proposed a system that captures what the commercial and cargo airlines have preached for over a decade: the implementation of user fees promotes an equitable system. In addition, the hefty dollars that the commercial and cargo airlines contribute to political campaigns and lobbying efforts on the Hill will help to make their battle that much more attainable. While the outcome of the battle remains to be seen, one thing is for sure: all eyes will be on the ATC industry and Congress over the next several months. →

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A Year of Difficult Decisions: Bankruptcy, Labor Law and the Airline Industry

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The last few years have ushered in great changes for the airline industry. Major airlines have entered, exited, and sometimes even re-entered, bankruptcy. However, some of the most significant and prominent stories have been the bankruptcy hearings during which airlines have asked courts to reject their collective bargaining agreements. Under § 1113 of the Bankruptcy Code, debtors may petition the bankruptcy court for approval to reject collective bargaining agreements. These hearings combine some of the more complex elements of bankruptcy and labor law, and the stakes for both sides are always immensely high.

This article will outline three of the most prominent § 1113 cases of the previous year involving airlines. It will describe the background of these three cases and examine the courts' rulings. The courts' reasoning in these cases presents very thorough judicial analysis, and offers some insight into an area of the law that will no doubt continue to play a prominent role in the airline industry.

Examination of Recent Court Rulings

The three most publicized cases this year were those involving Comair, Northwest Airlines and Mesaba Airlines. These cases were intriguing not only because the stakes were so high, but also because they combined complex areas of bankruptcy law, labor law and the Railway Labor Act (RLA). These three decisions not only held serious consequences for the airline industry, they also forged new law in the area of labor relations under the RLA.

Northwest Airlines

After entering bankruptcy, Northwest Airlines sought to achieve \$747.3 million in savings from its unions. After months of negotiations, Northwest was able to reach agreements with Air Line Pilots Association (ALPA) and the International Association of Machinists (IAM). However, the carrier was unable to negotiate a binding agreement with the Professional Flight Attendants Association (PFAA).

Although the union and the airline reached an agreement, the union's members failed to ratify the deal. The carrier then filed under § 1113 seeking to reject the Flight Attendant collective bargaining agreement.

In *In re Northwest Airlines Corp.*, 346 B.R. 307 (Bankr. S.D.N.Y. 2006), the Bankruptcy Court examined the following factors:



Photo by Travis Church

1. whether the rejection of the collective bargaining agreement was necessary;
2. whether the parties engaged in good faith bargaining;
3. whether the union rejected the proposal for good cause;
4. whether the union received fair and equitable treatment; and
5. a balancing of the equities.

In examining the first element, the court stated, “no party to these § 1113 proceedings contended that the debtors could reorganize if they continued to be liable to pay the wages and benefits in their current collective bargaining agreements.” As the court noted, the carrier lost approximately \$4 billion between 2001 and Northwest’s Chapter 11 filing. In fact, when Northwest filed the § 1113 motion, they were losing approximately \$4 to \$5 million per day. Thus, the carrier demonstrated that rejection of the collective bargaining agreement was necessary.

Regarding the requirement that the debtor meet with the union in good faith, the court noted that PFAA never really challenged this issue. Therefore, the court found Northwest had easily satisfied this element.

Next, the court examined whether the carrier required the flight attendants to bear more of a burden than the other employees. On this point, the court found that the flight attendants bore no more of a burden than any other employee group. Rather, the court noted that even management suffered a decrease in compensation. As it stated, “management base pay was cut up to 15 percent and cash compensation for officers was reduced by approximately 20 percent in December 2004.”

The court then examined whether the PFAA rejected Northwest’s proposal for good cause. Key to the court’s analysis was that while the union had accepted the carrier’s proposal, its members rejected the deal. As it stated, “The union’s rejection ‘without good cause’ is evidenced by the fact that the union leadership agreed on March 1, 2006, to a new contract. The membership rejected the agreement that its leadership had negotiated, but § 1113 does not require ratification of an agreement.”

Finally, the court examined a balancing of the equities. When analyzing this factor, the court used a detailed six-prong analysis, which included

1. the likelihood and consequences of liquidation if rejection is not permitted;
2. the likely reduction in value of creditors’ claims if the bargaining agreement remains in force;
3. the likelihood and consequences of a strike if the bargaining agreement is voided;
4. the possibility and likely effect of any employee claims for breach of contract if rejection is approved;

5. the cost-spreading abilities of the various parties; and
6. the good or bad faith of the parties in dealing with the debtor’s financial dilemma.

After examining the facts through these six factors, the court found that a balancing of the equities clearly favored Northwest.

The court then ruled in Northwest’s favor, but stayed the final order rejecting the collective bargaining agreement for fourteen days. The court felt that by postponing such an order the parties could continue negotiating and hopefully ratify an agreement. If no progress occurred, the court stated it would reject the parties existing agreement.

Following this decision, the flight attendants replaced PFAA with the Association of Flight Attendants (AFA) as their union representative, and the carrier and the union reached a tentative agreement regarding the disputed issues.

Comair, Inc.

Comair, Inc. is a regional airline and wholly-owned subsidiary that flies routes for Delta Air Lines, Inc. Delta pays Comair for operating its flights according to a schedule and rate structure, and Comair receives 100 percent of its revenues from Delta. Thus, Comair relies a great deal on this relationship.

When Delta entered bankruptcy it sought cost reductions from all of its regional carriers. Comair, in turn, sought reductions from three of its largest employee groups, i.e., pilots, flight attendants, and mechanics, and began negotiations with their corresponding unions. After a series of negotiations, Comair and the ALPA signed a letter of agreement (LOA) in January 2006 that committed the pilots to \$17.3 million in cost reductions if all other employee groups reached agreements equaling the cost reduction targets provided in the restructuring documents. However, Comair and the International Association of Teamsters (IBT), which represented the flight attendants, were unable to reach an agreement equaling the \$8.9 million target set in November, and the pilots repudiated the January 2006 LOA. Comair and ALPA then commenced further negotiations in an attempt to reach an agreement regarding cost reductions. When these discussions proved unsuccessful, Comair filed a § 1113 motion to reject the pilots’ collective bargaining agreement in December 2006.

In *In re Delta Air Lines, Inc.*, 2006 WL 3771049 (Bankr. S.D.N.Y. 2006), the Bankruptcy Court first examined whether the requested modifications were “necessary to permit the reorganization.” In evaluating Comair’s claim of necessity, the court ultimately found that the “proof on the issue . . . was overwhelming.” Comair had lost almost half of its 70-seat-jet flying, and its share of Delta Connection flying declined from 52 percent to 32 percent due to its non-



Photo by Travis Church

competitive cost structure. Further, although ALPA argued that Comair had become profitable without § 1113 relief, the “profit” it achieved was actually what Delta paid them, which was not a useful metric to determine “necessity” under § 1113. The court ruled that Comair’s November proposal for cost reductions were “absolutely ‘necessary’ within the meaning of § 1113(b)(1)(A) if Comair [was] to compete successfully in the marketplace.”

The court then examined whether “all of the affected parties [were] treated fairly and equitably.” The court noted that the pilots were the only employee group that had not contributed a concession in wages, benefits or work rules. Although ALPA argued that Comair had already achieved sufficient concessions to reach its reorganization goals, the court found that the requested concessions from the pilots were fair and proportionate.

Since ALPA did not argue that Comair failed to confer in good faith, the court examined whether the union refused to accept the company’s proposal without good cause. The court concluded that ALPA’s concessions were insufficient to bring costs to levels competitive with Comair’s other regional competitors. Further, although ALPA argued that Comair did not offer future wage increases, the court noted that the carrier actually promised a 1 percent increase after 12 months, 1.5 percent after 24 months, and 1.5 percent after 36 months. Therefore, the court held ALPA lacked good cause to reject Comair’s proposal.

Finally, the court balanced the equities. Here, the court found that the trial evidence compellingly weighed in Comair’s favor. While the court noted that granting the

motion would have serious implications for the pilots, the very nature of bankruptcy means that the debtor often cannot meet pre-petition contract rights and expectations. The court found that the November proposal was proportionate and “fair and equitable.” It therefore granted Comair’s motion to reject the pilots’ collective bargaining agreement. After a series of negotiations, Comair and ALPA were able to reach a mutually beneficial agreement.

Mesaba Airlines

Mesaba is a regional carrier that operates as a wholly-owned subsidiary of MAIR Holdings, Inc. The carrier has also flown exclusively for Northwest Airlines since 1996. Due to increased financial pressure, Northwest informed Mesaba that it would have to reduce its prices in order to retain Northwest’s flying. Mesaba then hired Mercer Management Consultants to analyze Mesaba’s options. Mercer created the “Mercer Model” to project Mesaba’s financial performance. When Northwest issued a request for proposals in December 2005, Mesaba submitted a bid contingent upon a 19.4 percent reduction in labor costs. The company then made proposals to replace the existing collective bargaining agreements in place with each of the three unions—AFA, ALPA, and the Aircraft Mechanics Fraternal Association (AMFA). Since the parties could not agree, Mesaba filed a motion to reject the agreements under § 1113. However, the court held that while Mesaba met most of the requirements to reject the Agreements, it failed to provide the unions with the relevant information they needed to evaluate the proposals by failing to provide them with a working or electronic copy of the Mercer Model.

At the end of March 2006, Mesaba finally provided a dynamic working version of the Mercer Model to the union although this model forecasted Mesaba's revenues and expenses in a different manner than the original Mercer Model. The company then presented on May 31, June 1 and June 2, 2006, renewed § 1113 proposals. On July 14, 2006, the bankruptcy court issued its decision on the record, granting Mesaba's renewed § 1113 motion and authorizing Mesaba to reject its agreements with the unions upon 10 days' notice. On July 18, 2006, the unions filed a notice of appeal from the bankruptcy court to the District Court of Minnesota and on July 20, they requested an expedited appeal.

In *Ass'n of Flight Attendants, et al. v. Mesaba Aviation, Inc.*, 350 B.R. 435 (D. Minn. 2006), the district court began its analysis by examining whether Mesaba

1. had made a proposal to modify the agreements;
2. whether its proposal was based on the most complete and reliable information available at the time of the proposal;
3. whether Mesaba provided the unions with relevant information "necessary to evaluate the proposal";
4. whether it met with the unions at reasonable times; and
5. whether they conferred in good faith.

The court concluded that Mesaba satisfied all but the third and fifth elements.

The court found that the company did not provide the unions with the information necessary to evaluate the proposal because it withheld the Mercer Model. Mesaba argued that the model was undergoing refinements, which could lead to erroneous results, and that providing the model could have been "distracting" to the pre-motion negotiations. The court, however, found that it was customary to share such information in a § 1113 proceeding, and that the company failed this procedural requirement.

The court then evaluated whether Mesaba met and conferred with the union in good faith. The court found that Mesaba satisfied its duty to meet with the unions. However, when examining Mesaba's refusal to bargain over the inclusion of "snap backs" (clauses that return concessions to the original terms) in the new agreements, the court took a more critical stance. It stated that "[Mesaba] has not shown any evidence that snap backs would be so detrimental to its reorganization that its complete failure to consider them was justified. Under these circumstances, the court concludes that Mesaba demonstrated bad faith by wholly refusing to negotiate regarding snap backs." The court then ruled against Mesaba on this prong.

Additionally, the court found that the unions had good cause to refuse the proposal submitted by the company. The court found that the company "had not given [the unions]

the informational wherewithal to raise their comfort level to an acceptance of the core of the proposal"

The court concluded that "the debtor met most of the procedural prerequisites and substantive requirements to obtain court authorization for it to reject its collective bargaining agreements with its unions. Because it did not establish the bases for every last one, however, the motion at bar must be denied as it pertains to those agreements."

Interestingly, although the court ultimately denied the motion, it also levied heavy criticism toward the unions. When addressing the unions' decision to strike if the motion was granted, the court compared this approach to "standing under a high bridge, and hearing a voice coming from above: 'If you don't give me what I want, I'm going to grab you and take us both over the edge!'" In the end, however, the court found the company did not carry its burden.

Mesaba later rectified the issues noted by the bankruptcy court and both sides were able to reach a final agreement.

Conclusion

Woody Allen reportedly once said, "More than any other time in history, mankind faces a crossroads. One path leads to despair and utter hopelessness. The other, to total extinction. Let us pray we have the wisdom to choose correctly." No doubt, bankruptcy judges have felt this same sentiment when trying to decide whether to grant recent § 1113 motions. Although granting such a motion might mean serious wage reductions for employees, the consequences of denying the motion would often spell financial ruin for the airlines.

Based on the above cases, it seems that courts have tried to cut past the complexity of the issues and determine which side has made the best good faith effort to offer a reasonable resolution. As evidenced in Mesaba, if the court believes the company has not been completely forthcoming, it may rule against the carrier regardless of its feelings toward the union's own efforts. These cases will continue to arise as carriers attempt to complete the process of reorganization, and judges' final rulings on these issues promise to be difficult ones. ➔

Vectors From the Chair

By Alan Armstrong

The Georgia Aviation Flyer has been compiled and assembled by our new Editor Jonathan R. Friedman. Johnny has taken over editor duties from Mark Stuckey to whom we owe a debt of gratitude for his service. In speaking with Johnny, I sense enthusiasm for this new opportunity and suspect our members will enjoy the new newsletter as it falls under Johnny's guidance and leadership.

While spring is upon us, as we think about the fall, I hope all of our members will make plans to attend our 2007 Aviation Law Seminar currently scheduled for Oct. 25. Section Vice Chair Lisa McCrimmon has been hard at work dealing with matters that relate to the planning of the seminar. We have an impressive faculty and an interesting array of topics:

- Johnny Friedman will speak on recent developments in aviation law;
- Lisa McCrimmon will make a presentation on ethics;
- Tom Strueber from McKenna Long & Aldridge LLP will speak on the doctrine of forum non conveniens;
- Edward McCrimmon from McCrimmon & McCrimmon will give a presentation on professionalism;
- John McClune from Schaden, Katzman, Lampert & McClune will give a presentation on preemption in aviation litigation; and
- L. J. Overman, an active lawyer and retired air traffic controller, will give a presentation on air traffic control procedures and policies.

In addition to these speakers, I understand that Lisa McCrimmon has coerced Sewell K. "Kip" Loggins from Mozley, Finlayson & Loggins into "appointing" one of his associates to give a talk on an aviation law topic. The seminar should prove to be fun and informative, so please mark your calendars for Oct. 25.

Having returned from the Sun 'n Fun Fly-In (see photos on page 2) enjoying the good flying weather this spring, I'm sure I speak for all of us when I recognize the sadness we feel here in America for the tragic loss of life and senseless killing at Virginia Tech. Our sympathy goes out to all those affected by that terrible tragedy. Also, we should remember a pilot gone west in the form of Lt. Cmdr. Kevin J. Davis who flew position number six for the Blue Angels. This accomplished aviator died while performing in an air show at Marine Corps Air Station Beaufort on April 21.

I look forward to seeing our members either in a courthouse or at the airport in the months ahead. Happy landings! ➔

Diary Dates

MAY 4, 2007

GBAA Annual Member Meeting & Golf Classic
Stone Mountain Golf Resort
Stone Mountain, Ga.
www.gbbaa.org

JUNE 19-22, 2007

Air Race Classic
www.airraceclassic.org

JULY 23-29, 2007

EAA AirVenture
Oshkosh, Wis.
www.eaa.org

AUG. 1-5, 2007

Lawyer Pilot Bar Association
Summer Meeting
Chateaux at Silver Lake
Park City, Utah
www.lpba.org

AUG. 21, 2007

GBAA 2007 Safety Day
Marriott Century Center
Atlanta, Ga.
www.gbbaa.org

SEPT. 25-27, 2007

NBAA 60th Annual Meeting & Convention
Atlanta, Ga.
www.web.nbaa.org

OCT. 25, 2007

Aviation Law Seminar
State Bar of Georgia
www.iclega.org

Early Flight

Continued from page 6

fell to Ben Jr., age 16. Although he survived the crash, Ben Sr. was unable to continue in the automobile business. He eventually took a job with the University of Georgia, but as soon as he was able, he went back to flying.

Two years later, October 1937, late in the afternoon, Ben, age 49, and a student took off from the field later to be named in his honor. The engine quit and the airplane stalled then spun into the ground, taking the life of Georgia's first aviator. Ben's 12-year-old son Charles was at the field and witnessed the crash. He was one of the first people on the scene and helped as his father was removed from the wreckage.

Ben T. Epps dedicated three decades to the history of aviation personally, but he also left behind a legacy of three generations of aviators who have become legends in their own right. Sons Ben Jr., Harry, Charles, George, Douglas and Pat all went on to military and/or civilian flying careers. His two daughters, Evelyn and Virginia, taught instrument ground training to Navy pilots via the link trainer at NAS Atlanta. →

Endnotes

1. *Georgia Flight: The History of Aviation in Georgia* is due to be published by the Wm. Robb Group in June 2007. This excerpt is the first in a series of four.

Call For Articles

The Georgia Aviation Flyer is published three times a year in April, August and December. We welcome all articles and essays relevant to the aviation and aerospace community, whether related to law, business or a passion for flight.

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Did You Know. . .

You can find more information about the State Bar of Georgia and the Aviation Law Section, including previous editions of this publication and its predecessor, *Preflight*, at http://www.gabar.org/sections/section_web_pages/aviation_law.

The Georgia Aviation Flyer

Aviation Law Section

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