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GOVERNMENT REGULATION
IN THE PRIVATE INTEREST

DR. K. G. JAN PILLAI*

In this article Dr. K. G. Jan Pillai argues that the Civil Aeronautics Board is a tool of the airline industry, that it has been indifferent to consumer needs, and that it has not strictly enforced all provisions of the Federal Aviation Act. Dr. Pillai, one of the nation’s foremost consumer advocates, focuses special attention on CAB regulation of transatlantic fares. He concludes that the Board should eventually be phased out of the transportation system entirely.

I. THE NATURE OF THE PROBLEM

THE FEDERAL AVIATION ACT,¹ which created the Civil Aeronautics Board and sustains the CAB-franchised airlines, was drafted at a secret meeting of air carrier representatives held in a Washington hotel in late January and February of 1937.² The Act requires the CAB, inter alia, to promote, develop, and encourage an air transportation system suitable to the needs of commerce, defense, and postal services, “to improve the relations between . . . air carriers,” and to prevent “unfair or destructive competitive practices.” The CAB was given authority by the Act to certificate air carriers, to make rates, to approve mergers, and to award subsidies. Air carriers and their ticket agents were given

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the exclusive right to complain against unfair or deceptive practices. The Act declares that in determining rates and fares the CAB should consider not only the public need for "adequate and efficient transportation [by air] . . . at the lowest cost consistent with the furnishing of such service," but also "the need of each air carrier for revenue sufficient . . . [to provide the necessary service] under honest, economical, and efficient management . . . ." In short, the Federal Aviation Act represents the maximum protection and benefits that any major industry can elicit from the federal government.

Apparently keeping faith with its original legislative mandate, the CAB has always shown self-sacrificing devotion to the interests of the airlines, often at the expense of the traveling public's welfare. In 1969 the CAB for the first time made a survey of consumer complaints received by airlines; it found that the baggage and personal belongings of more than 200,000 passengers were lost or damaged in the previous year. The CAB initiated a rule-making proceeding in order to establish a system of "uniform reporting of consumer complaint statistics," but after two years of deliberation the Board terminated the proceeding on the ground that the reporting requirement would be unduly burdensome for the Board and carriers, and that it might even "discourage the receipt of consumer complaints" by the carriers.

Flight delays and cancellations are the number one subject of consumer complaints. Recently a congressional study revealed that the airlines operate 75% of their flights late, disregarding their published schedules. In 1957 the CAB promulgated rules requiring carriers to establish "realistic schedules" and to perform at least 75% of their flights within schedules filed with the Board or published for the guidance of the public. At the behest of the airlines, however, the CAB defined a "scheduled time flight" as a scheduled flight "completed within the block-to-block time allowed in the schedule, plus 15 minutes." Block-to-block time is nothing but the

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period that begins when the aircraft starts moving at the destination point. In fact there is no need for the CAB regulation because the airlines seldom fail to operate within block-to-block time except when they face unavoidable mechanical failures or congestion in the runway—eventualities that no passenger would complain about if he could verify the cause of delay. The CAB regulation, however, is deceptive because it excludes those flight delays commonly experienced by passengers at airline terminals, and it tries to protect the airlines from possible legal liability for not operating flights within schedules shown in passenger tickets. In 1972 the Aviation Consumer Action Project petitioned the CAB to change the “flight delays” regulation and to impose penalties for failure to operate flights within scheduled times. The CAB dismissed the petition on the ground that any regulation that requires scheduled airlines to operate according to published schedules would jeopardize airline safety.

For years the airlines have engaged in the deceptive practice of systematically and intentionally over-booking flights by accepting more “confirmed reservations” and selling more tickets than the number of seats that are actually available on their aircraft. Despite repeated complaints from passengers, the CAB has not even attempted to prevent airline over-booking; instead, the CAB adopted a regulation requiring airlines to tender compensation to passengers who are denied boarding on the flight for which they hold confirmed reservations. By this regulation the CAB, in effect, endorsed the practice of over-booking, and as a result the domestic scheduled airlines deny boarding to approximately 250,000 passengers every year on flights for which they have confirmed reservations.

It is the practice of all airlines to justify cancellations and delays of flights on the ground by “mechanical and operational reasons,” even when such cancellations and delays are caused by deceptive scheduling practices or negligence of personnel. Therefore, the airlines should be required to report to the CAB the cause of delay or cancellations as and when it occurs.

In a companion complaint ACAP alleged that in 1971 and 1972 the domestic airlines failed to perform about 60% of their flights according to published schedules. See CAB Docket Nos. 24204, 24363.

It should be noted that the petition specifically stated that the airlines should be exempted from the proposed penalty provision when the delay was occasioned by safety reasons. See CAB Order No. 73-6-28 (June 8, 1973).

14 C.F.R. § 250 (1967).

In 1972 Allegheny Airlines failed to accommodate Ralph Nader on a flight from Washington, D. C. to Hartford, Connecticut, for which he had a confirmed reservation. This resulted in the disruption of Mr. Nader's prearranged personal schedule, including a speech at a citizens' rally in Hartford. Mr. Nader and the organizers of citizens' rally sued Allegheny in federal district court; they were awarded $61.00 in compensatory damages and $50,000 in punitive damages.\(^5\) The court found that the airline had "intentionally engaged in substantial over-selling, and intentionally did not inform the public of this practice and the attendant risks, and intentionally sought to conceal such information from all its passengers... [and] acted not only wantonly but with malice."\(^6\) Within a few weeks after the decision the CAB issued a proposed rule\(^7\) that contemplates the imposition of advance ticket purchase requirements on passengers who make reservations, levies substantial penalties for non-cancellation of reserved tickets which the passengers fail to use, and increases the amount of compensation currently stipulated for denied boarding.\(^8\)

In 1973, without soliciting carriers' economic justifications or public comments, the CAB approved an intercarrier agreement which provided for a 5% increase in the transpacific air fares.\(^9\) The approval was for a limited period of thirty days, April 1 through April 30, 1973, and by its own terms the agreement expired on April 30, 1973. The carriers later filed another agreement seeking the continuation of the 5% increase through March 31, 1974.\(^10\) The CAB did not immediately rule on the new agreement.

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\(^{15}\) Id.

\(^{16}\) Id. at 127.

\(^{17}\) CAB Order No. 73-12-93 (Dec. 21, 1973).

\(^{18}\) The proposed penalty for non-cancellation of an unused reserved ticket is $25 minimum and $100 maximum. The proposed compensation for denied boarding is $500 maximum, rather than the existing $200.

\(^{19}\) CAB Order No. 73-3-137 (March 30, 1973). The approval order stated that "the new fares established pursuant to the agreement would be effective through April 30, 1973."

\(^{20}\) Along with this agreement the carriers filed another agreement seeking an additional 4% fare increase. CAB Order No. 73-7-54 (July 12, 1973).
but invited interested persons to submit comments, ordered the carriers to submit economic justifications to support the requested fare increase, and expressly directed that “tariffs implementing the subject agreement shall not be filed in advance of Board approval of the subject agreements.”

After receiving comments and justifications, the CAB disapproved the fare agreement on July 12, 1973, on the ground that the fare increase was not economically justified. The carriers refused to roll back the fares after the expiration of the first agreement; instead, they continued to implement the 5% fare increase from May 1 through July 12, 1973, without CAB approval. The CAB did not even consider ordering the airlines to refund the illegal overcharges, and the aggrieved passengers were denied judicial remedy on the ground that, under the Federal Aviation Act, only the CAB is empowered to investigate unfair and deceptive practices of airlines.

II. THE BOARD: CHAMPION OF INDUSTRY

The foregoing is a random sample from an infinitely long list of consumer related actions of the CAB. The CAB's interest in the traveling public is essentially remote and indirect—an interest derived from their status of being the inexhaustible source of airline revenues and a catalyst of infrequent congressional irritation. Nevertheless, during the first three decades of its regulation the CAB took meticulous care to spice its decisions with references to consumer interests, a ritual incantation deemed necessary to maintain its image as the guardian of public interest. But in recent years, the CAB has been endowed with a so-called Republican majority which repudiates the Board's past duplicity and adheres to the "strict construction" of the Federal Aviation Act. A few months ago, The Wall Street Journal outlined the Chairman's simple regulatory philosophy:

Mr. Timm has emphasized that 'every tool in our arsenal' should be used to help the industry. And the airlines know best what help

21 CAB Order No. 73-4-60, at 3 (April 12, 1973).
22 CAB Order No. 73-7-54 (July 12, 1973).
23 Clarence Ditlow, an attorney from Washington, D.C., sued the airlines after being charged the 5% excess fares for his trip between the West Coast and Tokyo made between May 15 and May 20, 1973. The district court granted the airline's motion for summary judgment. The decision has been appealed. Clarence Ditlow v. Pan American Airways, No. 73-2936, ___ F. Supp. ___ (D.D.C. 1973).
is necessary, he adds. 'We are going to have to run to catch up with the people we serve.'

At a recent hearing before the House Committee on Appropriations the same Chairman praised the "Congress' wisdom in framing legislation that insures a privately owned, free-enterprise airlines system that, to a large extent, is self-regulating," and reiterated the "Board's number one priority," to strengthen the system by taking bold and controversial actions which, in his opinion, means: "We are going to have to run to catch up with the people that we serve." The members of the Committee certainly applauded his concept of regulation.

Now that the delirium about the inveterate regulatory trait of the CAB seems to be over, an impartial evaluation of its role in developing an efficient air transportation system is called for. Even according to the CAB, the airline industry is financially sick, beset by substandard earnings and by lack of "investor confidence." The de facto ownership and management of airlines have been taken over by a handful of banks and insurance companies through carefully contrived techniques of control such as stock ownership, interlocking directorships, lease transactions, and long term debts. The Chase Manhattan Bank exercises multiple control over sixteen CAB-certificated carriers. The very survival of these airlines, let alone the job security of airlines' top executives, is dependent on the continuing good will of the illegal owners. Eight local service carriers will be given $65.5 million in fiscal year 1974 as direct federal subsidies, and all other twenty-six certificated carriers will receive indirect subsidies in the form of remuneration for mail carriage and performance of military and naval contracts. Pan American World Airways, the largest U. S. international airline, has ad-

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29 CAB Order No. 73-10-1 (Oct. 1, 1973).
vised its stockholders that the airline will become insolvent unless the federal government soon bails the carrier out with a substantial direct subsidy. There are other airlines waiting on the line to follow the tailspin course of Pan American.

Since 1969, the air fares have been increasing at a spiraling rate. For instance, between 1969 and 1973 the Washington-New York air shuttle fare has gone up from $17.14 to $26, an increase of roughly 52%, and the Washington-Cleveland coach fare was increased 52% from $23 to $35. According to most reliable statistics, the direct operating costs (about 50% of the total costs) of a Boeing 747 are about one cent per seat-mile or a total seat-mile cost of $50 from New York to Los Angeles. The CAB, however, permitted the airlines to increase the coach fare for New York-Los Angeles from $145 to $176 or by 21.3% during the 1969 through 1973 period. Since the quasi-public National Railroad Passenger Corporation (Amtrak) took over responsibility for much of the nation's passenger rail traffic in 1971, the use of Amtrak trains increased by 12% in each of its first two years and by about 25% during the last months of 1973. This upturn came after a steady twenty-year drop that paralleled the decline of train services. This booming railroad passenger traffic has a direct relation to the ever-increasing cost of air travel. In 1970 domestic trunk airline traffic increased only 0.3% over the previous year, and during the three years ending 1972 it grew at a discouraging annual rate of 4.2% in terms of revenue passenger miles. The estimated increase in domestic trunk traffic in 1973 is just around 7%, compared with the annual growth rate of 18% in the sixties.

The CAB's frantic actions that boosted the air fares began in 1969 when the airlines' net income dwindled to $52 million, com-

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31 American Airlines and Eastern Airlines are two carriers in deeper financial trouble.
32 CAB tariff files.
34 CAB tariff files.
37 Handbook of Airline Statistics (1971 ed.).
pared with $210 million in 1968 and $415 million in 1967. After a secret meeting with airline executives, the CAB granted a 6% increase in domestic fares in 1969. Upon reversal by the U. S. Court of Appeals for the District of Columbia on procedural grounds, the CAB remedied the alleged procedural irregularities and permitted the carriers to refile the same fare increases that took effect on October 15, 1970. Before doing so the Board ordered a general domestic passenger fare investigation in order to insulate its future approvals of fare increases from judicial intervention. In the investigation, the Board collected expense, income, and investment statistics from all carriers, put them under various bureaucratic accounting molds, and produced enormous computer printouts. The Board, however, never made any comparative study of the differing degrees of efficiency and productivity of individual carriers, nor did it examine the reasonableness of the airlines' expenses. In the process the Board determined that the industry as a whole is entitled to a "reasonable rate of return" of 12.0% to 11.35%, that the reasonable load factor standard should be 55%, and that the discount fares should be abolished unless they meet certain standards stipulated by the Board.

While the domestic passenger fare investigation was in progress, the CAB-certificated route air carriers registered a net loss of $200.5 million in 1970. Four domestic trunk carriers (Continental, Delta, Northwest and Pan American) and two local service carriers (Allegheny and North Central), however, still made profits in 1970. The CAB expedited the passenger fare investigation and handed down its historic decision on April 9, 1971, declaring that the then existing level of fares for domestic passenger services was "unjust and unreasonable, and therefore unlawful." The Board granted "fare relief" in order to permit the carriers to increase their

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88 Id.
90 Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970).
91 CAB Order No. 70-7-128 (July 28, 1970).
92 CAB Order No. 71-1-147 (Jan. 29, 1970).
93 CAB Order No. 71-4-58 (April 9, 1971).
94 CAB Order No. 71-4-54 (April 9, 1971).
95 CAB Order Nos. 71-4-59, 71-4-60 (April 9, 1971).
97 CAB Order Nos. 71-4-59, 71-4-60 (April 9, 1971).
yield by 12% over the fare levels that existed on October 15, 1970, and such increased fares were simply declared “the lawful maximum fares.” In 1971 the industry showed a profit of $31.4 million, but the net income of Delta and Northwest dropped considerably from their 1970 levels, and Allegheny which made a nominal net profit of $.528 million in 1970 sustained a loss of $1.2 million in 1971.

In granting the massive, unprecedented fare increase, the CAB made a number of assumptions and predictions—all leading to the conclusion that the industry would be strong and healthy in 1972. The Board and the carriers agreed that the domestic trunk traffic would have increased more than 26% from 1970 to 1972 at the October 15, 1970, fare level. Based on a 0.7 elasticity, however, the Board concluded that the 12% fare increase would have no appreciable impact on the movement of traffic and that with such an increase the trunk traffic would still grow 16.4% in 1972 from the 1970 level. The actual traffic increased only 12.7% or twelve billion revenue passenger miles from 1970 to 1972, more than 3.7% short of the growth predicted by the Board.

The Board unanimously adopted a long-term trunkline load factor standard of 55% to be attained from April 1973. In 1971 the trunk carriers operated with an average load factor of 48.3%. In order to help carriers attain the CAB-stipulated load factor standard, the Board encouraged airlines to enter into joint capacity-cutting agreements. In August 1971, the CAB approved a year-long agreement among American, TWA, and United that reduced the number of weekly, non-stop flights by an average of 28% in four major transcontinental routes, New York-Los Angeles, New York-San Francisco, Washington-Los Angeles, and Chicago-San Francisco. Pursuant to that agreement the number of weekly, non-

\[48\text{ CAB Order No. 71-4-59 at 85.}\]
\[49\text{ CAB, Air Carrier Financial Statistics (Dec. 1971).}\]
\[50\text{ Id.}\]
\[51\text{ CAB Order No. 71-4-59, at 16-22 (April 9, 1971).}\]
\[52\text{ The elasticity of demand of .7 means that a 1% increase in fares will result in a 0.7% decrease in traffic.}\]
\[53\text{ CAB Order No. 71-4-59, at 16-22 (April 9, 1971).}\]
\[54\text{ CAB, Air Carrier Traffic Statistics, XVII-12 (1971), XVIII-12 (1972).}\]
\[55\text{ CAB Order No. 71-4-54 (April 9, 1971).}\]
\[56\text{ CAB Order No. 71-8-91 (Aug. 1971).}\]
stop round-trips between New York and Los Angeles, for instance, was cut from 185 to 132. In one year the carriers reduced about 6.4 billion seat miles and 7,250 flights in the four markets. When it approved the agreement with "extreme reluctance," the Board stated that "in view of the Federal Aviation Act's insistence on a competitive air carrier system, and because over the long run that system will operate most efficiently if carriers are required to make capacity decisions unilaterally" no capacity cutting agreement will be approved in the future. Nevertheless, the Board not only repeatedly permitted the carriers to agree on renewed flight cutting in the transcontinental market, but also approved similar agreements among American, Eastern, and Pan American in the New York-San Juan market.

Because of the transcontinental capacity limitation agreement, the three carriers showed a cost saving of $78.5 million in 1972. In response to a request of the Department of Transportation to reduce the fares in the agreement markets, the CAB stated that "lower fares in the agreement markets might have ripple effects throughout the air transportation system, perhaps unduly affecting non-agreement carriers." During the seven months from November 1972 through May 1973, TWA, American, and United operated 1132 flights in the agreement markets with a 95% or more load factor. The CAB, however, was not convinced that operating few flights with all seats filled will result in inadequate service for travelers because the Board had not received a significant number of complaints from passengers. Despite the artificially elevated load factor levels in the agreement markets, the average trunk load factor remained far below the 55% aspired to by the Board in the domestic passenger fare investigation. During the twelve months ending October 31, 1973, the average domestic trunk load factor

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57 CAB Order No. 72-11-6, at 10 (Nov. 2, 1972) (concurring opinion of Member Timm).
59 CAB Order Nos. 72-11-6 (Nov. 2, 1972); 73-7-147 (July 27, 1973).
60 CAB Order Nos. 72-6-70 (June 16, 1972); 72-11-7 (Nov. 2, 1972); 73-8-59 (Aug. 10, 1973).
62 Id. at 10.
63 Id. at App. H.
64 Id. at 9, App. G.
in fact declined to 51.2% from 51.9% for the comparable period in 1972.\textsuperscript{45}

The CAB in 1971 estimated that the 12% fare increase would produce for the trunk airlines an average 11.8% rate of return on investment in 1972, assuming that the carriers operated at a minimum load factor of 52.5%. In order to arrive at the average figure of 11.8%, the Board even conceded to five trunk carriers a rate of return ranging from 13.3% to 22.1%.\textsuperscript{46} The airlines’ profitability actually experienced in 1972 demonstrates that the CAB estimate was just another device to justify the fare increase. During the twelve months ending in September 1972, the trunk carriers, after operating at a 51.8% load factor produced only an average 6.1% rate of return on investment.\textsuperscript{47}

Despite the dissipation of its perverted economic formulae, the CAB has not deviated from the basic determination to “strengthen the air transportation system” with further fare increases. In December 1972 the CAB declared the then existing family and youth discount fares unlawful.\textsuperscript{48} Nevertheless, the Board declined to order those fares cancelled immediately because their removal would “significantly burden the traveling public.”\textsuperscript{49} After five months the CAB reversed its decision and directed the carriers to cancel the discount fares without compensating adjustments in the normal fares on the ground that “the future financial outlook at current fare levels for the domestic trunkline industry is at best uncertain.”\textsuperscript{50} The elimination of discount fares was an indirect fare increase of approximately 5.5%.\textsuperscript{51} Even after increasing the passenger fares by almost 24% since 1970, the domestic trunk airlines produced a 5.2% average return on investment during the twelve months ending in September 1973.\textsuperscript{52}

\textsuperscript{45} QUARTERLY AIRLINE INDUSTRY ECONOMIC REPORT (Sept. 1973).
\textsuperscript{46} CAB Order No. 71-4-59, at 76 (April 9, 1971).
\textsuperscript{47} QUARTERLY AIRLINE INDUSTRY ECONOMIC REPORT (Sept. 1973).
\textsuperscript{48} CAB Order No. 72-12-18 (Dec. 5, 1972).
\textsuperscript{49} \textit{Id}. at 75-76.
\textsuperscript{50} CAB Order No. 73-5-2 (May 1, 1973).
\textsuperscript{51} \textit{Id}. at 9.
\textsuperscript{52} This is based on the Board’s estimate that the discount fares cause a 5.5% dilution in the yield of airlines. In fact, a calculation based on revenues shows that the elimination of discount fares is worth more than a 6% across-the-board fare increase.

\textsuperscript{53} QUARTERLY AIRLINE INDUSTRY ECONOMIC REPORT (Sept. 1973).
In September 1973 the domestic trunklines requested another fare increase of 5% to 8%. They claimed that the traffic growth rate had fallen below the anticipated level, that costs had risen at a rapid rate, and that their rate of return on investment had fallen "far short of the Board's standard." The CAB suspended the increased fares and ordered an investigation of their reasonableness, stating that the carriers had failed (i) to attain the load factor standard of 55%, and (ii) to demonstrate the alleged cost increases. Astonishingly, within weeks the carriers again requested a 5% general increase in domestic passenger fares, and the CAB simply approved that increase in November 1973. Of course no cataclysmic events occurred in the airline industry that would justify a fare increase in November that the CAB had declared unjustifiable in September. The CAB, however, made calculations to show that the airlines' unit cost had increased by 4.7% in 1973 and that the carriers needed "revenue improvement" to earn a rate of return over 12%.

The Board claimed that the carriers' cost of operation is known to have increased during the past year, whereas facts available to us do not establish with the same certainty that five per cent increase in fares will have such an adverse effect upon traffic as to minimize the revenue improvement which has been demonstrated as necessary.

It should be noted that the adverse effect of fare increases on traffic is relevant to CAB rate-making only inasmuch as it reduces airlines' revenues.

The Federal Aviation Act requires the CAB to consider three major elements in domestic rate-making: (i) the effect of rates on the movement of traffic; (ii) availability of such service; and (iii) sufficient revenues to provide the service under honest, economical, and efficient management. The history of domestic "rate hiking" from 1970 through 1973 amply demonstrates that the CAB consistently failed to consider the first two elements. The CAB misconstrued the third element by assuring sufficient revenues to all carriers, irrespective of the honesty, economy, or efficiency of their

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5 CAB Order No. 73-11-93 (Nov. 20, 1973).
6 Id. at 4 (emphasis added).
management. In the CAB's language, "the basic approach to determination of the allowable fare increase is to match revenues and expenses" of the entire industry."

The Board's 'wishy-washy' regulation has already inflicted severe injury to the health of U.S. international airlines. In 1946 the CAB permitted U.S. carriers to associate with a secret price-fixing cartel, the International Air Transport Association (IATA). Ever since, the Board's role has been limited to rubber-stamping IATA agreements that periodically prescribe rates and conditions of service for international airlines." In 1950 the U.S.-flag airlines carried 65.7% of all transatlantic traffic. In succeeding years the U.S.-flag carriers' participation has steadily declined while the European carriers made rapid inroads into the transatlantic market. The three U.S. carriers' share of transatlantic traffic was 54.5% in 1970 and less than 47% in 1973, although U.S. citizens comprised over 67% of the total airline passengers flying between the United States and Europe."

During the last five years, Pan American World Airways sustained huge financial losses. From 1969 to 1972, the carrier showed a net loss of $161.5 million, and in the year ending in June 1973 its net loss was $25.2 million." In their transpacific operations, American and TWA suffered losses in the past two years, and Northwest's profit was reduced by one-half. At the same time the passengers were paying higher and higher air fares. The North Atlantic normal economy and short-term excursion fares have been raised by an average of 25% and 30% respectively since March 1971. For instance, the New York-London peak season, normal round trip economy fare was hiked from $510 to $685, and the short term excursion fare went up from $350 to $457. IATA increased the transpacific fares three times and the Caribbean and Latin American fares four times since 1971.

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78 CAB Order No. 73-11-93, at 2 (Nov. 20, 1973).
80 CAB, Handbook of Airline Statistics 572 (1971 ed.).
Until recently, the CAB attributed its misregulation of international fares to lack of statutory authority to suspend fares filed by individual carriers. The power to disapprove intercarrier agreements under Section 412\textsuperscript{85} and to remove unjust discrimination under Section 403(b)\textsuperscript{86} was considered insufficient to deal with international fares. The CAB explained the need for additional power to Congress:

At the present time, the Board's alternatives are limited when it is presented with a (I.A.T.A.) Conference agreement containing rates which are objectionable. If the Board disapproves, it risks creating an open rate situation in which it has no influence at all, and the carriers may file individually the same rates to which the Board objected, or even less desirable ones.\textsuperscript{87}

In 1972 the Congress amended the Act to give the CAB authority to suspend and investigate fares that are unjust, unreasonable, or unjustly discriminatory.\textsuperscript{88} The Congress believed that the new amendment would “arm the CAB with sufficient authority to exercise broad influence on international rate making,”\textsuperscript{89} and “to resist the threats and dictates of foreign governments with respect to international air fares”\textsuperscript{90} in the event of an open rate situation. The legislative grant of power, however, did not alter the historical orientation of the CAB regulation. The Board’s pro forma regulation of transatlantic fares will illustrate the point.

### III. Transatlantic Fares: A Case Study

In the early 1960s the IATA airlines embarked on a policy of offering predatory discount fares with the avowed purpose of eliminating extraneous competition from non-IATA charter airlines. Within a few years, a multiplicity of discount fares set at 30\% to 50\% discounts from normal fares became imbedded in the transatlantic fare structure. The scheduled passengers who

\textsuperscript{85} 49 U.S.C. § 1382(b) (1970). This section requires that “the Board shall by order disapprove any (intercarrier) contract or agreement . . . that it finds adverse to the public interest.”
\textsuperscript{86} 49 U.S.C. § 1373(b) (1970).
\textsuperscript{87} Statement of Secor D. Browne before the Aviation Subcommittee of the Senate Commerce Committee in April 1971.
\textsuperscript{89} S. Rep. No. 92-593, 92d Cong., 2d Sess. 3-21 (1972).
\textsuperscript{90} Id. at 7-9.
traveled on normal fares on IATA transatlantic airlines were reduced from about 67% to 30% of the total traffic during the ten years from 1963 through 1973. In 1972, 70.4% of Pan American's transatlantic traffic used discount fares, as compared to 56.8% in 1970. Because of the complex and restrictive conditions associated with their use, the discount fares failed to generate sufficient new traffic to offset the erosion of carrier's average revenue yields that resulted from diversion of passengers from the normal fare to the discount fare category. As a result, the IATA carriers repeatedly increased the normal fares to recoup losses sustained from discount fares. The CAB belatedly realized that the only cure for the financial ills of the U. S. carriers was an overhaul of the transatlantic fare structure. In September 1971 the CAB issued a "policy statement" providing:

The Board is convinced that the sound development of Civil air transportation in the long term will be greatly enhanced by, and indeed may well depend upon, the offering of fares and rates for the various services which are closely attuned to the full economic costs of providing those services. Conversely, we have substantial doubts that a fare structure composed of multiple discounted fares, applicable in periods of peak demand, and used by a majority of travelers can hope to have that result.

IATA filed its 1972 fare agreement that provided for the continuation of the existing fare structure and general fare increases; the CAB approved the agreement, its policy statement notwithstanding. The Board stated that "while the fare structure falls far short of meeting [its] criteria . . . it serves to resolve for the interim highly controversial issues among carriers as to fare structure which had threatened to create an open rate situation." The Board's approval was definitely based on the U. S. carriers' contention that the IATA fare agreement was only a "stop-gap measure" of 1972, aimed at avoiding an "open-rate situation."

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91 IATA Commercial Research Committee, The North Atlantic Study (June 1971).
92 Pan American's Justification submitted to the CAB on Dec. 20, 1972, App. D.
94 CAB Order No. 72-3-104, at 6 (March 30, 1972).
1972, IATA airlines filed individual tariffs with the CAB, alleging that their negotiations for 1973 fares had deadlocked on the issue of still lower discount fares. The tariffs of foreign carriers were remarkably more reasonable and simpler than the 1972 IATA fares. The CAB, utilizing its newly acquired powers, suspended the lower fares of eleven foreign carriers and approved the relatively higher fares of Pan American and TWA. Some of the European governments reciprocated to the CAB's arbitrary action by approving the fare proposals of their national carriers and rejecting those of the U. S. carriers. The individual tariff filings and the governmental actions thereon, however, were just bargaining techniques employed by the IATA airlines. The IATA airlines eventually agreed on the 1973 transatlantic fares, and the U. S. carriers withdrew their CAB-approved fares.

The new IATA agreement sought to rerun the 1972 transatlantic fares through December 31, 1973, with an additional 6% across-the-board increase attributed to the devaluation of the U. S. dollar. The CAB was told that under the 1972 fare structure 65% of Pan American's and 77% of TWA's total transatlantic passengers would travel on discount fares in 1973. At the same time the carriers predicted a decline in their load factors. None of the carriers, U. S. or foreign, submitted data showing revenues earned and expenses incurred in U. S. dollars and foreign currencies in order for the Board to evaluate the alleged effects of devaluation. The record indicated that the U. S. airlines would make windfall profits from their sales abroad in revalued foreign

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98 CAB Order Nos. 73-2-101—73-2-104 (Feb. 14, 1973); 73-3-63—73-3-69 (March 8, 1973).
97 CAB Order No. 73-1-76 (Jan. 26, 1973).
99 The U. S. airlines and the CAB were not serious about the approved fares. The CAB, for instance, stated in its order that approved the Pan Am-TWA fare package that it still expected IATA to come up with an agreement. The Board also ordered the U. S. carriers not to advertise the approved fares.
100 Justification in support of Pan American North Atlantic Fare Structure (Dec. 20, 1972); TWA Justification (Dec. 22, 1972).

currencies. The Aviation Consumer Action Project (ACAP) filed a complaint which protested the continuation of the status quo fares and requested the CAB to disapprove the proposed 6% increase and to order a general investigation of the transatlantic fare structure. 102

The CAB promptly approved the IATA agreement and the proposed fare increase, without even giving the airlines an opportunity to answer the ACAP complaint. 103 The Board stated that disapproval of the IATA fares and establishment of a fare structure proposed by the U. S. carriers would create an open rate situation leading to "intergovernmental confrontation [and] cessation of air services," and causing "considerable inconvenience" to the traveling public. 104 The Board was convinced, however, that the maintenance of the status quo "will only serve to perpetuate the un-economic situation which has developed on the North Atlantic" and will not constitute "a rational and economic basis for provision of transatlantic service." 105 The Board called upon IATA to "promptly and effectively resume its historically accepted role in the area of international rates" with a view to produce a rational fare structure for 1974. 106 The 6% increase did not "appear unreasonable" to the Board in light of the "acute consequences" of the dollar devaluation for foreign carriers. The Board was "unable to conclude that a formal and broad scale investigation of transatlantic fares would serve a meaningful purpose at this time." 107

ACAP challenged the CAB order in the U. S. Court of Appeals for the District of Columbia in Pillai v. Civil Aeronautics Board. 108 The court vacated the CAB order on the ground that it was vitiated by abuse of discretion and its conclusions were not supported by substantial evidence. The court said that the Board’s imminent vision of an open rate situation and the litany of horrors and bed-

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103 Under Subpart-E of Part 302 of the CAB’s Economic Regulations, 14 C.F.R. § 302.505 (1973), formal complaints against tariffs must be answered within six days.
104 Id. at 3.
105 Id. at 5.
106 Id.
lam resulting therefrom would not absolve the Board of its responsibility to make an informed assessment of the public interest, and that the agency could not "wrap its decision in some mystique of foreign policy or purported expertise in international negotiation to achieve a non-reviewable status for the facts underlying its most important and sensitive decisions." The consequences of an open rate situation were a mutual and reciprocal decision for the United States and foreign governments who had enormous stakes in the continuance of air traffic across the Atlantic, and there was no evidence to suggest the possibility of a complete break-down of such traffic. The court examined the legislative history of the 1972 amendment to the Federal Aviation Act that conferred on the CAB the power to suspend international fares to show that the "legislation was specifically designed to lessen the terror of an open rate situation and to strengthen the Board's hand in reviewing IATA agreements." The 1972 amendment contemplated bilateral negotiations between the U. S. Government and individual foreign nations, and therefore the Board's apparent feeling that "almost any [IATA] agreement was preferable on an open-rate situation" amounted to failure to make a reasoned choice of alternatives within a class of permissible actions. Without reaching the issues of the reasonableness of a 6% fare increase and the propriety of a general investigation of the transatlantic fare structure the court remanded the case. Nevertheless, the court strongly condemned the CAB's historical practice of rubber-stamping IATA agreements as follows:

In weighing the duty of the CAB to consider alternatives other than unanimity by IATA agreement, it should not be forgotten that the whole IATA concept as the most desirable and so far inevitable outcome of negotiations is definitely contrary to the philosophy of antitrust laws, contrary to our usual view of the public having the benefit of either competitive rates or rates set by a regulatory body in the public interest.

On October 15, 1973, the CAB, after fulfilling the formality of inviting additional comments from the airlines and other interested

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108 Id. at 1023.
109 Id. at 1028.
110 Id.
111 Id. at 1029 (emphasis added).
parties, reapproved the IATA agreement. This time the Board wrote an eighty page order, compared with the original nine page order vacated by the court. The CAB admitted that the agreement was originally approved for the purpose of averting a "protracted open rate situation" and not to "deprive United States airlines of the additional, needed revenues which would be realized from the 6% currency adjustment." Apart from elaborating the familiar scenario of the impact of an open rate situation, the Board espoused a theory advanced in the new Comments filed by the Department of State that "it was by no means out of the question that some or all Europeans might have been able to work out among themselves an operating arrangement for North Atlantic services to a nearby country such as Canada . . . ." This theory is fallacious because it unrealistically assumes that the so-called European coalition's "operating arrangement" will work without the cooperation of U. S. citizens who constitute 67% of the total transatlantic passengers; that the European countries with their heavy dependence on the U. S. tourist dollar would risk the odium of U. S. public opinion and other economic ties with the U. S.; that the U. S. would be destitute of a partner in Europe to make its own operating arrangement; and that the neighboring countries like Canada would abandon the U. S. to make ad hoc alliance with more distant Europe. The injudicious CAB's nightmare about the imaginary open rate situation has now an added dimension: it is afraid that the future international fares would depend on the good will of Canada, rather than of the European countries as previously suspected.

The CAB's reapproval order was a virtual defiance of the prescriptions of the U. S. Court of Appeals. Since the order came just six weeks before the expiration of the IATA agreement there was no room for further court proceedings. During the twelve months ending October 31, 1973, Pan American's transatlantic load factor dropped from 57.5% to 56.2%. Pan American continues its operating losses and TWA's profit continues to decline. IATA, however, failed to produce the "rational fare

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114 Id. at 28-29.
115 Id. at 27.
117 CAB Order No. 73-11-132, App. 3 (Nov. 28, 1973).
structure" promised by the CAB. The 1974 IATA transatlantic agreement contained the same fare structure that was impugned by the CAB from 1970 through 1973 and, of course, an additional fare increase of 2% to 12%. The CAB rejected the increase proposed for normal economy fares and asked IATA to consider eliminating the lowest excursion fare. The old fare structure, including the lowest excursion fare, is in effect and alive. The CAB has never investigated the transatlantic fares during the thirty-eight years of its regulation, and as on previous occasions, the agency "deferred action" on a request made in 1974 by ACAP for an investigation. The CAB, the airlines, and the public are not sure what a reasonable fare structure should be for transatlantic travel; even if the CAB is sure, it remains a secret formula.

IV Conclusion

The CAB is an institutionalized restraint on the citizen's freedom to travel at reasonable prices, and an unnecessary burden on the nation's taxpayers. Its regulation is permeated by a penchant for secrecy and unbridled bias for the industry. According to its chairman, the CAB's function is "listening" to the industry, rather than "preaching" to it. But it does more. It legalizes all private industry actions, in particular price-fixing and other non-competitive agreements, and makes them litigation-proof. The rights of air travelers are analogous to those enjoyed by the European customers of oil producing nations of the Middle East; the travelers are subject to unilateral and spiraling price increases, spontaneous flight cancellation, unexplained delays, flight cutbacks and bumping at the whim of airlines.

One consoling fact is that the CAB, unlike other bureaucratic herds in Washington, no longer pretends to uphold, and at times even disclaims, any responsibility to protect the traveling public. The CAB feels that the consumers are the indirect beneficiaries of

117 Id. at 13-14.
118 Id. at 14. ACAP requested an investigation of the transatlantic fare structure on four occasions: (a) Comments of ACAP, Feb. 25, 1972, in Docket 23486; (b) Complaint of Pillai in Docket 25054 (Jan. 2, 1973); (c) Complaint of Pillai in Docket 25396 (April 9, 1973); and (d) Comments of ACAP in Docket 25661 (Nov. 1973). Similar requests were made by the Department of Transportation on several occasions.
119 See note 23 supra at 36, col. 1.
the "economical and efficient air transportation system" which it tries to protect and strengthen. The "system" strictly consists of the chosen few airlines, and the efficiency and economy are those available within the system.

The CAB Chairman recently told the Congress that "the airline industry is no longer a growing child, but a mature adult" and that "it should be afforded the same economic tools that other mature industries have, including a healthy and non-destructive competitive climate, responsible mergers, acquisitions, diversification, realistic pricing. . . ." True. The only question is whether the airline industry needs the CAB to acquire the "economic tools" if other mature industries like steel, automobile, oil, and insurance can do so without such an agency. After all, as one commentator stated in the 1950's, the CAB's protective regulation is not indispensable to the continued provision of air transport services any more than it is necessary to secure an adequate supply of "soap, doorknobs or automobiles."110

The concept of a competitive and flexible, nation-wide air transportation system, free from stringent and debilitating government control merits serious discussion and deliberation by the U. S. Congress. The Landis Report on Regulatory Agencies recommended to President Kennedy that the CAB be reorganized.111 The Ash Committee recommended to President Nixon that the CAB be abolished.112 Complete and total economic deregulation of the airline industry may be the ultimate and lasting solution to the "CAB-problem." But to the airline industry that was conceived and brought up under CAB patronage, abrupt deregulation would be shocking and disastrous. Therefore the appropriate and pragmatic solution is to phase out the CAB from the air transportation system. As a first step, the Congress should deprive the CAB of its powers over rates and fares, and intercarrier agreements. Of course, the

110 Statement of Chairman Timm before the Subcomm. for Department of Transportation and Related Agencies of the House Comm. on Appropriations at 3 (April 17, 1973).
CAB has a right to survival if it will “permit efficient airlines to offer cheap fares and allow the inefficient ones to lose money.”

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