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THE CAB AND THE CONSUMER

HAROLD L. RUSSELL*

In this article Mr. Harold L. Russell urges that the consumer's true interests lie in the availability of sound air service at a reasonable cost. From this premise Mr. Russell argues that the Civil Aeronautics Board can best serve the consumer by adopting a regulatory system within the present statutory framework that will allow the commercial airlines to develop the strong financial base necessary to draw capital into the field, and to insure stability in the industry. Mr. Russell also suggests that the Board adopt more efficient rulemaking methods.

I. INTRODUCTION

THE PRINCIPAL consumer expressions of concern with air service actually relate to matters largely beyond control, direct or indirect, of the CAB and, are typically based upon the consumer's personal experience which may be limited. Every day several airlines and the CAB will receive complaints from passengers who have experienced flight cancellations, been offered no meal, have missed connections, or had their baggage lost. These consumers will maintain that the entire air transportation system, and *Brand X* airline in particular, have not been properly prepared to respond to consumer interests. And the CAB is actually unable to respond effectively to those specific complaints except by discharging its economic regulatory functions faithfully, imaginatively, and expeditiously.

It is pertinent to note at the outset that the basic consumer interest lies in being able to buy the "best" air service (safe, convenient,

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dependable, comfortable, expeditious) at the lowest possible price. Air carriers have made countless surveys of what the consumer expects of them. Safety is an absolute requirement. Convenience, the ability to go and return in harmony with other demands upon the consumer's time, is an important factor in the traveler's choice of service. Dependability is also sought, but the consumer's choice in this area is more likely to be based upon subjective evaluations since factual data for making a choice upon the basis of carrier achievement in schedule completions or on-time performance are inadequate to support objective analysis. The consumer demands comfort, and will choose that carrier and/or flight which provides him with the most pleasing environment and amenities. The consumer also demands promptness and, although airlines no longer seek to lure customers with claims of "fastest" service, the traveler will, given a choice, choose a nonstop flight in preference to a one-stop flight.

Within and between the fifty United States and to and from Puerto Rico, the consumer has better service at lower cost than anywhere else in the world.¹ This is not to say that the CAB has always effectively protected consumer interests, but it would be correct to say that the CAB has been a positive contributor along with, among others, the Congress which enacted the regulatory acts of 1938 and 1958, our private, free enterprise airline and aircraft manufacturing industries which have led world aviation, the FAA which has provided world leadership in safety and in operational controls, the United States Weather Service, the builders and operators of airports, the stockholders and lenders who have had an egregiously poor return on their dollar (compared to other investments they might have made),² and the airline employees who have proudly produced and sold a superior product.

II. THE STATUTORY FRAMEWORK

The congressional prescription of the powers and duties of the

¹ The testimony of Robert D. Timm, Chairman of the CAB; *Hearing on S. 455 and S. 1739 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 93rd Cong., 1st Sess. (1973)*. The CAB released the report at that time.

² During the five years ending December 31, 1972, the average return on investment for the domestic trunkline industry was less than five percent. CAB, *HANDBOOK OF AIRLINE STATISTICS (1971)* (updated by CAB statistical report for 1972).

Civil Aeronautics Board places major emphasis upon consumer protection. The Federal Aviation Act provides:

DECLARATION OF POLICY: THE BOARD

Sec. 102. In the exercise and performance of its powers and duties under this Act, *the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:*

(a) *The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;*

(b) *The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by air carriers;*

(c) *The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;*

(d) *Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;*

(e) *The promotion of safety in air commerce; and*

(f) *The promotion, encouragement, and development of civil aeronautics.*³

In all of its duties under the Act, the Board must take into account those public interest factors. Those requirements apply to all route actions; all rate and tariff actions; all actions upon mergers and acquisitions; all approvals or disapprovals of interlocking relationships; the Board's regulation of competitive practices; the Board's approval, conditional approval, or disapproval of all carrier agreements with respect to pooling, traffic, service, equipment, rates, fares, charges, for enhancing safety, economy, or efficiency, for the avoidance of destructive or wasteful competition, for the regulation of stops, schedules, or character of service, or for other cooperative working arrangements; and any and all other actions of the Board.

The statutory mandate comprehensively encompasses all aspects

³ Federal Aviation Act of 1958, 49 U.S.C. § 1302 (1970) (emphasis supplied).

of consumer interest. The Board must encourage and develop an air transportation system properly adapted to the needs of commerce and the postal service.⁴ The Board must preserve the inherent advantages of, and assure sound economic conditions in air transportation and coordinate transportation by air carriers.⁵ The Board must promote adequate, economical, and efficient services with reasonable charges without unjust discrimination, undue preferences or advantages, or unfair and destructive competitive practices.⁶ The Board must provide for competition to the extent necessary to assure the sound development of the air transportation system, and promote, encourage and develop civil aeronautics.⁷

In addition the Act imposes upon air carriers certain specific duties which may be enforced by the Board either upon its own motion or upon complaint by any interested and affected person.⁸ Carriers must charge for air transportation and services connected therewith precisely the sums specified in their tariffs,⁹ which, in turn, are approved by the Board either affirmatively or by omission to exercise its powers of disapproval.¹⁰ Carriers must provide air transportation upon reasonable request, including reasonable through-service in connection with other carriers.¹¹ They must provide safe and adequate service, equipment, and facilities. They must establish and observe just and reasonable rates, fares, classifications, rules, regulations, and practices.¹² Carriers must not afford undue or unreasonable preferences or advantages, nor cause any unjust discrimination nor any undue or unreasonable prejudice or disadvantage whatsoever.¹³

The consumer is the air traveler and the user of air cargo and postal services. With a statute so pointedly oriented to the advancement of his interests, it seems somewhat incongruous to single out

⁴ Federal Aviation Act of 1958, § 102(a), 49 U.S.C. § 1302(a) (1970).

⁵ Federal Aviation Act of 1958, § 102(b), 49 U.S.C. § 1302(b) (1970).

⁶ Federal Aviation Act of 1958, § 102(c), 49 U.S.C. § 1302(c) (1970).

⁷ Federal Aviation Act of 1958, § 102(d), 49 U.S.C. § 1302(d) (1970).

⁸ Federal Aviation Act of 1958, § 1002, 49 U.S.C. § 1482 (1970).

⁹ Federal Aviation Act of 1958, § 403(b), 49 U.S.C. § 1373(b) (1970).

¹⁰ Federal Aviation Act of 1958, §§ 403(c), 1002(g); 49 U.S.C. §§ 1373(c), 1482(g) (1970).

¹¹ Federal Aviation Act of 1958, § 404(a), 49 U.S.C. § 1374(a) (1970).

¹² *Id.*

¹³ Federal Aviation Act of 1958, § 404(b), 49 U.S.C. § 1374(b) (1970).

for particular study the performance of the Civil Aeronautics Board in the "consumer protection" area. The only other interest which the Board may consider is that of the national defense, and then only on an equal, not superior, basis to that of the consumer.¹⁴ If the Board performs its duties under the Act, and if the carriers respond to their duties under the Act, what further measure of "consumer protection" may be asked?

The basic question which is involved in any analysis of the Board's response to "consumer protection," then, is whether the Board has performed well its duties under the Act.

III. BOARD PERFORMANCE

A. *Consumer Protection in General*

In keeping with the fashions of the times, the Board has established an Office of Consumer Affairs,¹⁵ and it has publicized that office's Complaint Section¹⁶ which receives consumer complaints. The registering of complaints with the Board has been encouraged by Board personnel and others.¹⁷ The complaints are dutifully categorized by types; *e.g.*, flights cancelled or delayed, baggage mishandling, faulty flight information, etc.¹⁸ But the statistical sample is so small,¹⁹ and it is generated under such diverse marketing and operating conditions, that the figures provide neither a guide to airline management for eradication of service defects nor to consumers for selection among competing carriers. Moreover, while undoubtedly providing a useful public service in affording a forum for ill-treated customers to "blow off steam" and also in stimulating carriers to settle claims quickly, and occasionally perhaps, more generously than otherwise would be the case, the Board's

¹⁴ Federal Aviation Act of 1958, §§ 102(a), 102(d), 49 U.S.C. §§ 1302(a), 1302(d) (1970).

¹⁵ The Office of Consumer Affairs was established December 19, 1970. CAB Press Release No. 70-146.

¹⁶ The Board issues monthly press releases on its handling of complaints. Press Release No. 73-222 (Dec. 5, 1973) for example, covered complaints received during the first ten months of 1973.

¹⁷ The Board regularly publicizes its role in receiving and handling complaints.

¹⁸ See the monthly releases.

¹⁹ During the first ten months of 1973, the Board received some 8,672 passenger complaints about airline service. During that period those airlines carried some 200,000,000 passengers. The complaints were about 4.3 per 100,000 passengers.

“consumer protection” program would appear to concentrate upon matters of peripheral concern to consumers rather than upon matters of fundamental interest.

For example, while the Board is commanded by the Act to “foster sound economic conditions in” air transportation, for several years some of the nation’s trunklines and its principal international carrier have been fiscally ill.²⁰ During the some thirteen years since the Board first made a finding of a fair and reasonable rate of return,²¹ the airline industry has never achieved it²² and shows no prospect of achieving that stated goal of financial health in the foreseeable future. It is undeniably true that a fiscally sick air carrier cannot finance the equipment and facilities necessary to respond adequately to consumer needs. Since investor confidence is essential to the achievement of consumer requirements, and since “sound economic conditions in” air transportation are a *sine qua non* of investor confidence, can the Board’s response to “consumer protection” here be deemed adequate?

In fairness it must be said that the Board in recent years has not been any more able than airline management to take action to assure adequate earnings for the air transportation industry. The first twenty-some years of the Board’s regulation of air transportation reflected, almost without break, tremendous increases in the demand for air transportation.²³ During this period, the Board decided scores of route certification cases upon the assumption that increased demand would always equal or surpass increases in capacity and that the statutory admonition to consider “competition to the extent necessary to assure the sound development” of the nation’s air transportation system meant the authorization of as many competitive services over a given route as the route could possibly sustain. As a result, almost all major markets were certificated not merely for two competing carriers, but for service by three, four, or even five carriers. Competition in the airline industry, nominally a “public utility” industry with restricted entry (because of route certification requirements) and Board-controlled

²⁰ See the financial reports of the carriers during the five-year period ending December 31, 1973.

²¹ *General Passenger Fare Investigation*, 32 C.A.B. 291 (1960).

²² Except perhaps marginally in two years. See CAB, *HANDBOOK OF AIRLINE STATISTICS* (1971) and later CAB statistical releases.

²³ See CAB, *HANDBOOK OF AIRLINE STATISTICS* 47 (1967 ed.).

rates and charges²⁴ is intense, but largely expresses itself at the level of predominantly subjective factors such as, for example, which carrier has the "best" meal service. Any poll of passengers using competitive carriers would produce protagonists for all competitors, but the basic results of the poll would bear relationship not to the quality of the food service, but more likely to the relative use of competing carriers who spend approximately the same amounts for food service and, in many cases, use the same caterers. In other words, passengers would indicate a preference for the carrier they use, not for the food service itself. The same observation would be true with respect to many other aspects of customer preference such as promptness of response, courtesy and efficiency in handling reservations, ticketing procedures and baggage check in, the provision of inflight amenities, schedule dependability, and the return of baggage at destination. Carriers also compete through advertising, seeking through diverse approaches to lure customers to their basically similar services. But advertising creates no basic consumer advantage nor any consumer harm.²⁵ There is, however, one aspect of airline competition which has directly affected consumer interests, and that is competitive scheduling.

B. *Competitive Scheduling*

Competitive scheduling has been a fact of air transportation life largely ignored until recent years and largely uncontrolled until recent months when the energy crisis produced a growing number of carrier agreements, approved by the Board, for reducing and controlling schedules in competitive markets. When several carriers serve a major market, scheduling has been an effective competitive weapon. All competitors find a "need" to match the convenient hour departures and frequencies of others in the market to garner their "competitive shares." As a result, considerably less than half the seats operated in some major markets were actually occupied by revenue passengers, and the consumer was, loosely speaking, paying for two seats in order to occupy one. The competitive carriers themselves felt helpless to act individually, fearing that unilateral schedule reductions would only invite competitors to in-

²⁴ No competing carrier ever has any significant advantage over another because of more attractive rates since all match the rates of their competitors.

²⁵ Instances of airline advertising unfair to the consumer have been practically unknown in airline history.

crease schedules and advertise "most flights" or "the only convenient late afternoon departure." Because of antitrust considerations the carriers could not act collectively without CAB approval, which was granted less than whole-heartedly (there being dissenting votes) to early capacity control agreements; those of transcontinental carriers were first approved in 1971²⁶ and those of New York-San Juan carriers in 1972.²⁷ More recently, however, the Board acting under new leadership has served notice on the carriers that they are expected to implement agreements for capacity controls.²⁸ This admirable development is unfortunately being resisted by the Department of Justice and consumer groups, but will probably be advanced because of fuel shortages. Although this development must be recognized as a major move in the direction of consumer protection because it can help deliver all service reasonably needed at less cost, it unfortunately comes at a time when any savings involved will be offset by rising expenses, including overwhelming increases in fuel prices.

C. *Practice & Procedure*

It might erroneously be assumed that consumer interests do not encompass the areas of practice and procedure. In fact, consumers do have an interest in those matters because the fair and expeditious disposition of matters before the Board for its determination benefits not only the litigants, but also the public generally. On these points, the Board must be given top-ranking scores. Its Rules of Practice²⁹ are models of clarity and scope, and there has never been any quibble about a party's right to be represented by a spokesman of its choice. The Board was a leader among administrative agencies in the use of prehearing conferences and in according finality to the decisions of administrative law judges, subject to a certiorari-type review.³⁰ It has been alert to the recommendations of the Administrative Conference of the United States for improvements in practice and procedure, and its own practices and

²⁶ CAB Order No. 74-8-91 (Aug. 19, 1971).

²⁷ CAB Order No. 72-6-70 (June 16, 1972).

²⁸ CAB Order No. 73-4-98 (April 24, 1973).

²⁹ See CAB, RULES OF PRACTICE IN ECONOMIC PROCEEDINGS 1A CCH AV. L. REP. ¶ 11,591 (1973).

³⁰ See CAB Rules §§ 302.27 and 302.28, 1A CCH AV. L. REP. ¶ 11,596 and 11,596p (1973).

procedures have inspired recommendations by the Conference directed to other agencies. Moreover, its record of compliance with the letter and spirit of the Freedom of Information Act is probably as good as that of any federal agency or office.

The foregoing is not to say, however, that the Board has seriously and effectively tackled the problems of procedural delay inherent in the hearing, decision-on-the-evidentiary-record process used to resolve major economic regulation issues. Generally the Board uses that process which involves oral testimony, cross examination, briefs and reply briefs, and oral argument to decide route, adequacy of service, rate and acquisition issues, and investigations of carrier agreements. These kinds of cases are susceptible of being decided just as fairly and effectively, and far more expeditiously, under the notice and comment type of proceeding commonly used in rulemaking. It is our view that the Board should not undertake to decide issues before it through the formal, adjudicative, hearing-type proceedings unless required to do so by statute or the Constitution. This is simply a matter of economy and efficiency in procedure; in the thousands of cases decided by the Board the presentation of oral rather than written testimony has probably been determinative in fewer than a dozen decisions. The Board should seek any statutory amendment necessary to give it full procedural freedom to decide route, adequacy of service, rate, acquisition, and carrier agreement issues upon rule-making, notice and comment procedures, or upon such combination of rule-making and adjudicatory procedures as the Board may deem desirable for the fair and expeditious resolution of these issues. Upon the basis of the Board's prior response to its procedural opportunities, it could and would greatly reduce the time now required for decision in those kinds of formal proceedings which now often require several years from initiation to conclusion.

IV. CONCLUSION

In summary, the Board's failures to respond to the protection of consumer interests as Congress intended and as the needs of 1974 and future years require are found in the absence of effective action to foster sound economic conditions in air transportation so as to assure a system properly adapted to consumer needs. One of the

basic problems, largely inherited by the present Board, is a plethora of competition resulting from the multiplication of competitive franchises in the late 1950's. That, in turn, led to higher costs particularly because competitive scheduling depressed load factors. Recently, however, the Board has not only shown a determination to use restraint in granting competitive routes,³¹ but also to demand that the carriers act jointly to control capacity.³² In the area of rate regulation the basic factor is that the Board has not allowed the air carrier industry to charge enough to earn a fair return upon this investment dedicated to public service in more than fifteen years. In the procedural aspects of the discharge of its regulatory responsibilities, the Board's record is good particularly in comparison with other agencies. The foregoing matters are *basic* to consumer protection, so much so that the Board's handling of a consumer complaint about baggage handling, for example, is almost irrelevant to the subject.

³¹ Additional Service to San Diego Case, CAB Order No. 72-12-21 (Dec. 18, 1972).

³² CAB Order No. 73-4-98 (April 24, 1973).