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# **ECONOMICS, POLITICS AND LAW: RECENT DEVELOPMENTS IN THE WORLD OF INTERNATIONAL AIR CHARTERS**

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## **INTRODUCTION**

**A**S SPRING turned into summer in the first year of the Carter presidency, the Laker Skytrain was still only a proposal; the Super-Apex (the cheapest of the Advance Purchase Excursion Fares) and other deep-discount promotional fares were hardly even on the drawing boards; the Civil Aeronautics Board's (CAB) charter rules were growing more expansive but were still quite limiting; and the CAB's new chairman, Alfred Kahn, was just beginning to make his presence known as a central figure in the drama of international air transportation.

A year later when the bulk of this article was written, Skytrain had weathered the winter and was fanning out to other cities; the Super-Apex fare was accepted throughout the transatlantic market; ever cheaper budget and standby fares promised to be available between virtually every United States and European gateway point; the International Air Transport Association (IATA) had essentially lost its impact on passenger rate-making over the North Atlantic; the U.S.-origin charter rules had been so liberalized as to move CAB Member O'Melia to call them "scheduled charters"; and the charter carriers were seriously questioning whether all of

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\* This article is adapted and brought up to date from a report submitted to the Tenth International Congress of Comparative Law, held in Budapest in August, 1978. Mr. Lowenfeld is a Professor at New York University Law School, and Mr. Mendelsohn is a partner in the Washington, D.C., law firm of Glassie, Pewett, Beebe and Shanks. Both authors have been closely involved in all phases of international aviation since their work in the U.S. State Department during the 1960's.

these changes might not work to bring about their own demise. Not since the close of World War II had there been a period so marked by institutional changes in international civil aviation as was the time span of 1977 to 1978.

Each side of the Atlantic Ocean has its views and predictions as to what will ultimately emerge from these changes. The American side, or at least the United States government, views them as healthy examples of competition and free enterprise. The European side, or at least some of Europe's vocal aviation leadership, seems to view them as another unpleasant example of how the United States is again unilaterally throwing its weight around and disrupting "orderly development."

This article undertakes to spell out some of the essential aspects of the changes in United States charter law and policy. Because the changes occurred so rapidly, we begin by tracing the development within United States law of the air charter concept—from the original concept of the affinity charter to the most current version of the public charter approach. We end with an epilogue to take account of the sudden departure from the aviation scene of Chairman Kahn, and of the passage, after years of effort, of a deregulation bill.

#### I. DEVELOPMENT OF THE CAB'S CHARTER RULES— FROM AFFINITIES TO PUBLIC CHARTERS

The carriage of passengers for hire by enterprises other than scheduled airlines got its major start in the United States after World War II, when a large number of surplus aircraft and of trained but unemployed pilots came on the market. In the first fifteen years after the war, there was a continuous battle in the United States between so-called "irregular carriers" and the major airlines about the scope of charter operations, with the CAB changing sides as the technical issues (and the membership of the Board) varied.<sup>1</sup> In 1962 the Congress enacted legislation creating a new class of "supplemental carriers" and setting forth severe restraints on individual ticketing applicable to "supplemental transportation" performed by supplemental carriers.<sup>2</sup> In 1964 as aircraft were be-

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<sup>1</sup> A summary of the events and some of the litigation in this period is given in A. LOWENFELD, *AVIATION LAW*, ch. IV, § 1 (1972).

<sup>2</sup> See Act of July 10, 1962 Pub L. No. 87-528, 76 Stat. 143, 49 U.S.C. §§ 1301(32), (33), 1371(d)(3). See also [1962] U.S. CODE CONG. & AD. NEWS 179.

coming progressively larger, the CAB (with Presidential assent) authorized so-called "split charters" in transatlantic service, whereby two groups consisting of a smaller number of passengers than make up a full plane-load would be permitted to share in the charter of a plane.<sup>3</sup> These were still affinity groups (i.e., members of a club, society, university, etc.), but the decision marked the beginning of heightened competition between supplemental and scheduled carriers for tourist travel over the North Atlantic.

In 1966 the CAB decided to extend its charter rules to permit so-called "Inclusive Tour Charters."<sup>4</sup> The Inclusive Tour Charter, or ITC, was not really a package or "all-inclusive tour," but it required some ground services, stopovers in at least three cities fifty miles or more apart, a minimum stay of ten days (in its international version), and a price at least 110 percent of the lowest fare charged by a scheduled air carrier for comparable individually ticketed travel. In retrospect, one wonders why such a massively conditioned form of transportation could ever have been viewed as a threat by the scheduled carrier industry, but it was. And though sustained for domestic transportation by the U. S. Court of Appeals for the District of Columbia in *American Airlines, Inc. v. CAB*,<sup>5</sup> the ITC was disapproved for foreign transportation by the Court of Appeals for the Second Circuit in *Pan American World Airways, Inc. v. CAB*<sup>6</sup> on the ground that the CAB had exceeded its authority in blurring the distinction between individually ticketed and bulk transportation. Following these inconsistent interpretations of the same statute and a four to four deadlock in the Supreme Court, the Congress adopted an amendment to the Federal Aviation Act, expressly permitting ITC's, but—a fact not widely appreciated at the time—authorizing scheduled as well as supplemental carriers

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<sup>3</sup> Transatlantic Charter Investigation, 40 CAB 233 (1964), *aff'd*, *American Airlines, Inc. v. CAB*, 348 F.2d 349 (D.C. Cir. 1965). The split charter rules were originally published at 29 Fed. Reg. 6005 (1964), *former* 14 C.F.R. § 208.6(c).

<sup>4</sup> Supplemental Air Service Proceeding, 45 CAB 231 (1966); Reopened Transatlantic Charter Investigation (All Expense Tour Phase), 45 CAB 425 (1966). The ITC rules were originally published at 31 Fed. Reg. 4779 (1966), *former* 14 C.F.R. Part 378.

<sup>5</sup> 365 F.2d 939 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

<sup>6</sup> 380 F.2d 770 (2d Cir. 1967), *aff'd by an equally divided court*, 391 U.S. 461 (1968).

to engage in this form of charter service.<sup>7</sup> Because of the restrictions attached to the ITC, it continued to be eclipsed by traditional affinity charters even as the affinity requirements for those charters proved, in practice, to resemble more and more the requirements for so-called "clubs" in places where alcoholic beverages may not be sold to the public.

In 1972, in order to make charters available to persons who were not interested in ground packages, the CAB came up with so-called "Travel Group Charters" (TGC's). Like ITC's, TGC's did away with the requirement of prior affinity among the members, but they still required a group of at least forty, a ten-day minimum trip outside the United States, a sixty-day advance payment, and a pro rata cost-sharing plan that only the experts and readers of microscopic print were ever able to understand. Perhaps because of its complexities (and also because illicit affinity charters were still flourishing during this period), the TGC was very nearly a still-birth.<sup>8</sup> But it was an important part of the liberalizing trend, and on legal challenge by the scheduled carriers, it was sustained by the U.S. Court of Appeals for the District of Columbia Circuit in *Saturn Airways, Inc. v. CAB*.<sup>9</sup>

Following these two largely unsuccessful experiments, the CAB in 1975 adopted a new Part 378a of its Regulations, providing for a "One Stop Inclusive Tour Charter" (OTC).<sup>10</sup> The OTC, like the ITC, depended on no specific affinity, required a ground package, and required a minimum group of forty; but the OTC required only one stopover rather than the three required under the ITC. In addition, it required (for transatlantic travel) a minimum duration of only seven days and prepayment only thirty days before de-

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<sup>7</sup> See Act of September 26, 1968 Pub. L. No. 90-514, 82 Stat. 867, 49 U.S.C. §§ 1301(33), 1371(e)(6). See also [1968] U.S. CODE CONG. & AD. NEWS 1007, 3594.

<sup>8</sup> Between 1955 and 1969, charter revenues of U.S. certificated air carriers grew at an average annual rate of some 22%. The vast majority of this growth through the mid-1970's was in either affinity charters (some legal but many not) or single entity charters. In 1973, for example, ITC's and TGC's accounted for only 13% of all charter passengers on U.S.-origin domestic and international flights. See Notice of Proposed Rulemaking to Liberalize Charter Rules, CAB Docket No. 32242 (Mar. 14, 1978) at nn.1, 3.

<sup>9</sup> 483 F.2d 1284 (D.C. Cir. 1973). The TGC rules were originally published at 37 Fed. Reg. 20,808 (1972), former 14 C.F.R. Part 372a.

<sup>10</sup> The OTC rules were originally published at 40 Fed. Reg. 34,089 (1975), former 14 C.F.R. Part 378a.

parture. As with every bulk fare promulgated by the CAB, the validity of OTC's was challenged in court by the scheduled carriers. The United States Court of Appeals for the Second Circuit upheld the OTC in *Trans World Airlines v. CAB*.<sup>11</sup>

On September 1, 1976, the CAB adopted still another idea, this one borrowed from the British, the Advance Booking Charter (ABC).<sup>12</sup> ABC's included air transport only, without the need to purchase ground services from or through the tour operator. An ABC required a minimum group of forty travellers, a minimum duration of seven days, and prepayment in full at least forty-five days before the date of departure. The tour operator was permitted to make substitutions in the passenger list up to a limit of twenty percent of the seats contracted for.

We will never know how successful the ABC or OTC would have been on their own, because their introduction coincided with a sharp and continuing enforcement program by the CAB and the Justice Department against illegal affinity charters. The statistics show that by 1977 the CAB had finally managed to create a successful substitute for the affinity charter. The third quarter of 1977 experienced roughly the same twenty-two to twenty-three percent annual increase in charter travel over the comparable period of the prior year, but now ABC's and OTC's accounted for over two-thirds of U.S.-origin charter passengers, while affinity charters accounted for only some twelve percent.<sup>13</sup>

It is quite likely that the ABC-OTC duo would have remained the prevailing regime for several years had it not been for the arrival of Freddie Laker in New York and Alfred Kahn in Washington. Once Skytrain, the no-reservation no-frills service offered by Laker, caught on in the fall of 1977 and was more or less matched by "budget" and "standby" fares offered by the major scheduled carriers, the CAB began to be concerned that the U.S. supplemental carriers might not be able to compete. It was now essential, the Board decided, to further liberalize the sale of charter transportation so that the supplemental industry could remain viable.

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<sup>11</sup> 545 F.2d 771 (2d Cir. 1976).

<sup>12</sup> The ABC rules were originally published at 41 Fed. Reg. 37,763 (1976), former 14 C.F.R. Part 371.

<sup>13</sup> See CAB Docket No. 32242, note 8 *supra*, at n.4.

Starting with decisions handed down in November and December 1977,<sup>14</sup> the Board: (1) eliminated the thirty-day advance purchase requirement for international OTC's; (2) reduced the advance purchase ABC requirement from forty-five to fifteen days; (3) eliminated entirely the seven-day minimum stay requirement of both the ABC and OTC; (4) reduced the ABC and OTC requirement of minimum group size from forty to twenty; and, (5) allowed a fifteen percent last-minute fill-up sale on ABC's.

By January 3, 1978, the scheduled carrier industry had filed its appeal from these decisions with the United States Court of Appeals for the District of Columbia Circuit.<sup>15</sup> There may never be a decision on this appeal, however, because on March 14, 1978, the Board announced that its earlier surgery had been insufficient: as of July 25, 1978, unless it could be persuaded otherwise, the Board intended to do away with the entire alphabet game of ABC's, OTC's, TGC's, and even affinity charters (as well as the less well known but still used study group charters and special event charters), and substitute for all these a single "Public Charter."<sup>16</sup> A Public Charter, as the Board proposed, would require no minimum group size, no advance purchase requirement, no requirements for ground accommodations, no length of stay rules, no minimum charter price, and no round trip requirement. In addition, all bases for discount pricing permitted on scheduled services (e.g., for children, senior citizens, standbys, etc.) were to be allowed for Public Charter service.<sup>17</sup>

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<sup>14</sup> See *One Stop ITC Elimination of Advance Purchase Requirement*, CAB Docket No. 29926, Part 378a (Nov. 3, 1977); *ABC's Interim Liberalization of Charter Rules*, CAB Docket No. 31520, Part 371 (Dec. 15, 1977).

<sup>15</sup> The seven carriers joining this appeal were American, Eastern, National, Northwest, Pan American, TWA, and Western. See *American Airlines v. CAB*, No. 78-1009 (D.C. Cir., filed Jan. 3, 1978).

<sup>16</sup> CAB Docket No. 32242, note 8 *supra*.

<sup>17</sup> For those with families, the discounted children's fares, available on scheduled services but usually not available with the per seat pricing on charter services, often meant that the total family cost for a scheduled flight was sufficiently close to the charter price as to make scheduled service, with its advantages of flexibility and much greater choice of schedules, the more attractive option. It will be interesting to see what pricing approach the charters will use to attract families. Given an approach based on fully distributed costs, any reduction for children's seats should mean some proportionate increase in adult seat prices.

## II. THE FIRST RESPONSE TO THE PROPOSAL FOR PUBLIC CHARTERS—THE TOUR OPERATORS AND SUPPLEMENTAL CARRIERS RETHINK THEIR STRATEGIES

Even before the ink was dry on the proposal for Public Charters, the supplemental carriers and the tour operators were declaring that the whole bulk transportation industry was on the "brink of extinction." What seems to have happened is that the British government, which had held the line against extending the budget and standby fares beyond London or from any United States point other than New York to London, abandoned its stand in the face of a new low-fare (or rather non-restraint) air service agreement between the United States and the Netherlands.<sup>18</sup> One could expect that other European scheduled carriers—and the growing number of U.S.-flag scheduled carriers serving the Continent—would now match the United States-Amsterdam and United States-London fares. But if this happened, the price advantage of the supplementals would practically disappear. In response to the anguished cries of the supplementals and the tour operators, the Board let it be known (in one of its now famous "Sunshine Meetings") that it might be willing to let most, if not all, of the Public Charter rules enter into effect immediately rather than awaiting the earlier announced date of July 25, 1978.<sup>19</sup> The scheduled carriers replied almost immediately with the threat of an injunction proceeding, which at the least would have delayed the start of Public Charters until mid-summer; thereafter the Board backed off from the idea of an accelerated starting date. On April 19, 1978, however, the Board on an emergency basis temporarily waived some other important restrictions previously applicable to OTC's, ITC's, ABC's and other existing charters.<sup>20</sup> This step too was almost immediately challenged by the scheduled carriers in the Court of Appeals, but they did not succeed in obtaining a stay of the Board's order.<sup>21</sup>

<sup>18</sup> See N. Y. Times, Mar. 15, 1978, at 1; *id.*, Mar. 18, 1978, at 29; 236 Av. DAILY 82 (1978). See Protocol [adopted *ad referendum* on March 10, 1978] Relating to U.S.-Netherlands Air Transport Agreement of 1957, T.I.A.S. No. 8998.

<sup>19</sup> TRAVEL WEEKLY, Apr. 10, 1978, at 1. See CAB Order 78-4-49, Docket Nos. 32397, 31091 (Apr. 11, 1978).

<sup>20</sup> See CAB Order 78-4-122, Docket No. 32397 (Apr. 19, 1978).

<sup>21</sup> The appeal by the scheduled carriers was filed on June 1, 1978. American Airlines v. CAB No. 78-1485 (D.C. Cir. filed June 1, 1978). The stay was denied by the Court on June 29, 1978, and the appeal was later withdrawn. See note

Tour operators, meanwhile, were undertaking major advertising campaigns throughout the country to try to convince the American public that charters still offered the cheapest fares. They were also trying, unsuccessfully as it proved, to persuade the Board to require that scheduled carriers advertise the precise number of discount seats available in a market, so that the public would understand that the chances of picking up low-price seats on scheduled flights were very limited and that charters were therefore more dependable.<sup>22</sup> In addition, the supplemental carriers claimed that the Super-Apex and budget fares of the scheduled carriers required substantial advance booking, while the new charter rules would permit almost a last-minute decision for passengers using supplemental transportation. It used to be, of course, that claims about dependability, reliability, and last-minute decisions to travel were all the hallmarks of scheduled service. But by 1978, hardly anyone could tell which was the cart and which was the horse.

One more point: if the horse and the cart (scheduled and supplemental transportation) were by now almost indistinguishable, it is no wonder that the coachman did not know where to sit. Most tour operators had once been comfortably in the camp of the supple-

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43 *infra*, and accompanying text. See also 236 Av. DAILY 301 (1978), TRAVEL WEEKLY, Apr. 27, 1978, at 1. Whether the courts would hold that Public Charters are individually ticketed transportation and therefore inconsistent with Section 101(36) of the Federal Aviation Act, 49 U.S.C. § 1301(36) (1976), is a troublesome question. The major remaining difference between individually ticketed and supplemental transportation is that the Public Charter must be sold through a middleman, the tour operator. But possibly as many as 75% of all scheduled carrier seats are sold through a middleman, the travel agent, and in many instances tour operators are also licensed travel agents. On the other hand, a major difference between "scheduled" and "supplemental" transportation is that the travel agent, when booking a seat on a scheduled carrier takes no risk, while a tour operator contracting for charter space takes the risk that he might not be able to resell the space. Largely because of this distinction, the U.S. Department of Justice holds to the view that all charter rules are legal so long as they "do not permit public sales of individual tickets by the direct air carrier." TRAVEL WEEKLY, Nov. 14, 1977, at 3. Balanced against this, however, is the judicially declared authority of the CAB to evolve a definition of charter service in accordance with experience and changing circumstances "as long as the integrity of scheduled service traffic is not vitiated." *Trans World Airlines, Inc. v. CAB*, 545 F.2d 771, 774 (2d Cir. 1976). It is perhaps ironic that, if read literally, this test is much the same *ex post facto* type test that was so well known in the era of Bermuda I. In other words, whether "integrity . . . is not vitiated" can probably be determined only after, not before, the event.

<sup>22</sup> One tour operator even suggested that the scheduled carriers be required to keep their cheap fares in effect for five years as a condition for their approval. See TRAVEL WEEKLY, Apr. 10, 1978, at 1.

mentals (indeed the Board had from time to time looked into the independence between tour operators and supplemental carriers, as required by law). But in the summer of 1978 a falling out between the tour operators and the supplementals seems to have taken place that may be irreconcilable: apart from "Inclusive Tour Charter Trips" which the supplementals asserted were virtually defunct, could supplemental carriers now sell tickets directly to the public? Could they thus bypass the tour operators, or establish their own tour operators, and in any case, compete directly on even terms with the scheduled carriers? Under the statute, the answer is not easy. The argument advanced by the supplementals that they do have this right may have some basis, reasoning by analogy from a precedent-setting 1976 court decision holding that supplemental carriers are eligible for scheduled carrier certificates.<sup>23</sup>

Still another development worth watching is whether the charter carriers will intensify their efforts to become scheduled carriers. Trans-International Air Lines (TIA), perhaps the most powerful of the supplemental carriers because it is owned by a major financial conglomerate, Transamerica, was actively attempting in 1978 to secure rights to conduct both a scheduled Laker-type operation between Los Angeles and London, and a low fare scheduled service across the Pacific.<sup>24</sup> Also, the three major surviving United States supplemental carriers, World, Capitol, and TIA, each made applications (differing in their details) to operate scheduled low-fare transcontinental services in the United States.<sup>25</sup> In addition, World Airways had made an arrangement early in 1978 with the Greyhound Bus Company to provide a feeder service from thirty-three cities to World's terminals at Newark, Baltimore, Oakland, and Los

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<sup>23</sup> *World Airways v. CAB*, 547 F.2d 659 (D.C. Cir. 1976). On April 11, 1978, the CAB opened an examination into the question of whether supplemental carriers should be permitted under existing law to sell individual tickets to fill up planes, otherwise dedicated to charter flights. See CAB Order 78-4-50, Supplemental Carrier Fill-Up Case, Docket No. 32398 (Apr. 11, 1978). If this inquiry results in an affirmative decision, one may wonder whether the concept of "supplemental" transportation will retain any distinctive meaning. It is significant, however, that when it came time in late May, 1978, for the supplementals to comment on the CAB's proposal, they were distinctly unenthusiastic, arguing that it would be of limited usefulness and far less important than granting the supplementals the scheduled rights they were then seeking. *TRAVEL WEEKLY*, May 29, 1978, at 5.

<sup>24</sup> See CAB Docket Nos. 31297, 30917.

<sup>25</sup> See *Transcontinental Low Fare Route Proceeding*, CAB Docket No. 30356.

Angeles airports.<sup>26</sup> If World could implement an ambitious plan of this type for transcontinental service, one could expect that a comparable transatlantic plan would not be far behind; and indeed, by the end of April, 1978, World had applied to the CAB for low-fare scheduled transatlantic authority between the United States and the Netherlands.<sup>27</sup> Finally, Seaboard World Airways, which throughout its history had been an all-cargo carrier only, also asked the CAB for authority to operate scheduled transatlantic passenger services, arguing that it was the lowest cost scheduled carrier flying the Atlantic and that it could and would offer a \$100 one-way New York-London fare.<sup>28</sup>

### III. CHARTER RULES AND BILATERAL ACCORDS—THE UNITED STATES, THE DUTCH, AND THE BRITISH

With all of the developments described in the preceding section, the single largest problem for United States-based supplemental carriers became whether Europe would accept the new, liberalized American charter concepts.

In brief, the United States proposed that for charters—typically round-trip (or circular) group travel—its rules be accepted as a matter of course by the state of destination, in return for acceptance by the United States, without review, of whatever rules that state prescribed for charters originating there with the United States as the destination. The agreement between the United States and the Netherlands of March 10, 1978,<sup>29</sup> was the first bilateral acceptance of this “country of origin” principle, at least since the prospect of “public charters” became apparent.<sup>30</sup>

The question of which European destinations would be open to liberalized U.S. charters became critically important because, even

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<sup>26</sup> 235 AV. DAILY 275 (1978).

<sup>27</sup> See U.S.-Benelux Proceeding, CAB Docket No. 30790. See also 236 AV. DAILY 314 (1978); TRAVEL WEEKLY, May 1, 1978, at 4.

<sup>28</sup> See CAB Docket No. 30790; 236 AV. DAILY 11 (1978).

<sup>29</sup> See note 18 *supra*.

<sup>30</sup> Two earlier “country-of-origin” understandings had been signed by the United States, with Belgium in June, 1977, T.I.A.S. No. 8618, and with Yugoslavia in June, 1977, T.I.A.S. No. 8972. Certain other understandings between the United States and Spain, Portugal, Switzerland, and Austria could be construed to provide for country-of-origin rules, but this was not clear. See TRAVEL WEEKLY, Dec. 29, 1977, at 1; *id.*, Mar. 13, 1978, at 95.

as the ratio of chartered to scheduled U.S. citizen passengers to Europe increased from thirty-two percent in 1976 to forty percent in 1977, nearly half of all Americans travelling on charters in 1977 turned out to be travelling to only two destinations—the Federal Republic of Germany (twenty percent) and Great Britain (thirty percent). Only some five percent were destined first to the Netherlands (see Chart I). The agreement with the Netherlands was still

## CHART I

## U.S. CITIZEN DEPARTURES TO EUROPE

	<i>Scheduled</i>		<i>Charter</i>	
	1976	1977	1976	1977
Europe	2,531,483	2,675,558	819,791	1,067,873
Austria	10,934	13,155	7,429	8,230
Belgium	51,523	54,131	15,688	9,337
Berlin	181	19	770	1,438
Bulgaria	n.a.	0	n.a.	115
Czechoslovakia	4,789	4,308	597	521
Denmark	91,571	94,506	5,239	10,114
Finland	9,614	9,564	2,846	2,755
France	223,889	231,148	65,972	89,674
Germany	307,311	316,515	164,138	200,663
Greece	103,858	111,640	26,794	32,805
Hungary	2,142	1,630	1,867	1,593
Iceland	68,136	58,941	613	261
Ireland	85,275	81,992	50,950	73,976
Italy	236,345	252,832	66,701	87,552
Luxembourg	17,254	17,557	117	578
Malta	0	0	166	578
Netherlands	128,553	141,695	41,864	53,124
Norway	14,308	15,885	6,478	4,450
Poland	10,400	10,392	10,260	12,047
Portugal	39,003	45,941	4,004	19,285
Rumania	2,892	2,665	3,419	2,624
Spain	124,044	129,264	62,957	59,995
Sweden	9,773	4,901	7,357	7,570
Switzerland	126,721	143,119	52,208	65,336
U.S.S.R.	9,354	4,901	7,357	7,570
U.K.	849,711	921,075	213,782	313,863
Yugoslavia	3,902	6,889	5,671	7,394

Source: U.S. Immigration and Naturalization Service.

a major breakthrough. However small its share of past U.S.-origin charter travel, Holland is not only a country of considerable aviation significance, but, more important, it is a major potential substitute competitive destination point in Western Europe. As a hub for onward travel on the continent, it clearly has the potential of equalling and possibly even exceeding the U.K. Moreover, to the extent that the Netherlands accepted (or shared) the United States approach, the agreement between the two countries could certainly have substantial value in other countries of Western Europe, both as an inducement and as a precedent. Not only do Articles 2 and 4 of the 1978 Agreement between the United States and the Netherlands prescribe a full-fledged country-of-origin rule, but Article 6(a), quoted in full below, sets out a philosophy of competition that seems unprecedented in the history of international aviation.

Article 6(a): Both Contracting Parties desire to facilitate the expansion of international air transportation opportunities over the routes specified in the Schedule attached to the Agreement, as amended by Article 3 of this Protocol, as well as in charter transportation. This objective can best be achieved by making it possible for airlines to offer the traveling and shipping public a variety of service options at the lowest fares, rates, and prices that are not predatory or discriminatory and do not tend to create a monopoly. In order to give weight to this objective, each Contracting Party shall encourage individual airlines to develop and implement competitive fares, rates and prices. Accordingly, the Contracting Parties agree that such fares, rates, and prices should be set by each designated airline based primarily on commercial considerations in the marketplace and that governmental intervention should be limited to prevention of predatory or discriminatory practices, protection of consumers from the abuse of monopoly power, and protection of airlines from prices that are artificially low because of direct or indirect governmental subsidy or support.

To be sure, the United States paid a price for these provisions, in the form of a grant to the Netherlands of new traffic rights for KLM at Los Angeles and also at any one other city in the United States to be later selected by the Netherlands. This kind of liberality in "giving away" points in the United States was perhaps even more unprecedented in post-war aviation history than the policy of inviting competition. But the United States-Netherlands agreement was a clear signal that the United States was prepared to stand

firm on the principle that fares should depend only on the country-of-origin rules and that for the United States this included promotional fares. Further, the United States was prepared to pay for acceptance of its positions in the currency of route grants. In the words of the Carter administration, today's objective is to "trade rights, not restrictions."

Some airline critics in the United States have argued that the U.S. government need not give away nearly so much simply to secure acceptance of country-of-origin charter rules. They argue that in trading landing rights for charter liberality, the United States is exchanging permanent rights for nothing more than promises of future performance. On the other hand, some Europeans have been heard criticizing the Dutch for breaking ranks in favor of competition rather than control.

It is very difficult to judge the value of exchanges such as those between the United States and the Netherlands. As to the new routes, one may recall that Italy negotiated for almost ten years to obtain rights to serve Los Angeles, only to have Alitalia totally ignore the city once the route was secured. Similarly, Spain negotiated hard for the right to serve Boston and Washington, only to have Iberia abandon service to both cities. Moreover, as the United States continues to open new U.S. cities to different foreign carriers, the value of any given traffic right necessarily diminishes, simply because of the increasing competition—in price as well as participants—that the new entrants will be facing in those markets. Moreover, the series of services by new United States-flag entrants into international transport, such as the new Braniff service from Dallas to London, the new Delta service from Atlanta to London, and National's expanded service from Florida to Frankfurt, Amsterdam, Paris, and London, all add to the competition. The one salient factor that emerges from the mass of predictions and innovations is (for once) a consistent philosophy—something not always apparent in past United States aviation policy. In 1978, the United States committed itself to a program of opening up all varieties of competition, between traditional and new gateways, between domestic and foreign carriers, between scheduled and charter services, and between different destinations for the American tourist in Europe.

Within a few days after conclusion of the agreement between the United States and the Netherlands, a somewhat comparable liberalizing charter agreement was signed by the United States and Great Britain.<sup>31</sup> But this agreement, like Bermuda II,<sup>32</sup> is ambiguous in result. An annex, which will remain in effect for two years, provides for a twenty-one day advance purchase requirement for ABC's, a fifteen-day advance purchase for OTC's, a seven-day minimum stay period for both, and considerably more limited substitution rights than are provided for in the CAB's Public Charter rules. Moreover, after expiration of the two-year period, negotiations are required before any country-of-origin rules can apply. In short, the British did not go nearly as far as the Dutch in agreeing to United States country-of-origin rules. One might attribute the difference to the fact that only one year before, in Bermuda II, Great Britain had satisfied most of its route objectives in the United States. But it is also probably true that the Netherlands—at both airline and governmental levels—is much more disposed to encourage free competition than is Great Britain.

If Britain failed to accept American ideas on charters, it more than met United States demands on fare reductions—which for the supplemental carriers immediately turned out to be not a prize but a problem. During the weeks prior to the March, 1978, negotiations and agreement between Great Britain and the United States, the British government had effectively prevented Pan American, TWA, and Braniff from offering budget and standby fares to London from any United States city other than New York. This meant that from all interior United States cities, the American supplemental carriers would be shielded from the low-fare competition of the majors' budget and standby fares. But even as Britain accepted portions of the liberalized United States charter rules, it proposed budget/standby fares from each of the other United States cities (Philadelphia, Washington, Detroit, Chicago, Miami, Los Angeles, and San Francisco) to which British Airways operates.<sup>33</sup> This action immediately entitled all the United States

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<sup>31</sup> United States-United Kingdom Air Service Agreement, Amendment Concerning Charter Services of April 25, 1978, — U.S.T. —, T.I.A.S. No. 8965.

<sup>32</sup> Bermuda II Agreement, July 23, 1977, United States-United Kingdom, — U.S.T. —, T.I.A.S. No. 8641.

<sup>33</sup> See TRAVEL WEEKLY, Mar. 2, 1978, at 2; N.Y. Times, Mar. 15, 1978, at 1; *id.*, Mar. 18, 1978, at 29.

scheduled carriers operating to London to implement their own standby and budget fares, all told making such fares (which were often as much as sixty percent less than basic economy fares) available from some fourteen U.S.-gateway cities. This news was hardly a welcome development for the U.S. supplementals—a fact which the British must have viewed with some glee. But to the American traveller and the CAB, the news was hailed as a major success in providing the travelling public, as President Carter put it, “with a wide choice of low fares in scheduled service.”<sup>34</sup>

#### IV. THE ECONOMICS OF SUPPLEMENTAL CARRIERS

The American supplemental air transportation industry has always claimed that there must be at least a fifty dollar differential in price between the charter fare and scheduled carriers' individually ticketed fare in the New York-London market (more for more distant markets) in order for charter carriers to be able to compete for the passenger.<sup>35</sup> Assuming this is true, then the following chart, prepared by the U.S. supplemental carriers, suggests that even as to Super-Apex fares (i.e., \$290 New York-London round trip with at least a twenty-one day advance purchase and a stay of seven to sixty days), competition on international routes by supplemental carriers seemed possible only during the summer of 1978, and not in the off-seasons.<sup>36</sup> When the Super-Apex fare is compared to the

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<sup>34</sup> See N.Y. Times, Mar. 18, 1978, at 29. There is a report, since confirmed, that the British government was even prepared, as part of its agreement with the United States, to allow “part charters,” which would permit scheduled carriers to devote up to 15% of the space on any flight to charter-type passengers. But the United States supplemental industry, evidently feeling that this would give the scheduled carriers too great an edge, insisted that this portion of the agreement be put aside, and the United States delegation acceded to the supplementals' demand. When this occurred, the chief British delegate, Sir Patrick Shovelton, commented that “when it doesn't suit this great country of free enterprise and competition to be competitive, down come the shutters of protection.” See Remarks of Alfred E. Kahn before a Symposium on the Changing Environment of International Air Commerce, Georgetown University, Washington, D.C. (May 4, 1978); 3 AIR LAW 163, 166-67 (1978). Not to be outdone, Kahn, then Chairman of the CAB, replied that while he got “cold feet” about allowing part charters this time, he was not going to protect the supplementals if it turned out they could not compete. *Id.*

<sup>35</sup> See, e.g., Overview Presentation before the U.S. Civil Aeronautics Board and U.S. Department of Transportation and U.S. Congress on the Supplemental Industry, by Edward J. Driscoll, President and Chief Executive, National Air Carriers Association (Jan. 25, 1978), at 20.

<sup>36</sup> APEX stands for “advance purchase excursion,” an individually ticketed

round-trip fare of approximately \$235 offered by the Laker Skytrain or the round-trip budget/standby fare of \$256 (or \$299 peak) offered by the scheduled carriers, one could understand the serious concern of the supplementals.

CHART II  
RELATIONSHIP OF SUPER-APEX FARES  
TO RETAIL CHARTER PRICES  
(New York to London Round Trip Prices)

	<i>Winter 1977/78</i>	<i>Summer 1978</i>	<i>Winter 1978/79</i>	<i>Winter 77/78 (At Cost Ops.)*</i>
Super Apex Fare	\$290	\$429	\$349	\$269
Average Retail Charter	\$285	\$347	\$299	\$247
Differential	\$ 5	\$ 82	\$ 50	\$ 43
Ratio	1.02	1.24	1.17	1.17

\* Only possible with DC-10.

Source: Overview Presentation before the U.S. Civil Aeronautics Board and U.S. Department of Transportation and U.S. Congress on the Supplemental Industry by Edward J. Driscoll, President and Chief Executive Officer, National Air Carriers Association, Jan. 25, 1978, at 25.

It is too early to judge how serious the impact of the new scheduled fares will be on the supplemental carriers. An aviation industry in the United States without at least some of the carriers that grew prominent as supplemental carriers—Capitol, World, TIA, and ONA—is hard to imagine. But in April, 1978, ONA announced the suspension of its operations in the face of massive operating losses;<sup>37</sup> and, as previously mentioned, all the other major supplemental carriers were actively seeking throughout 1978 to lay the foundations for various types of scheduled services.

In viewing the role of the supplementals, the 1977 year-end statistics on aircraft ownership are helpful. Compared to Pan American, which owned ninety-eight aircraft (including forty B-747's), and TWA with 203 aircraft (including nine B-747's, thirteen DC-10's and twenty-four L-1011's), or even National with fifty-

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fare available between the United States and some countries in Europe. Super-Apex was a lower priced version of APEX with some variation in the requirements for advance payment and permissible duration of stay.

<sup>37</sup> See 236 AV. DAILY 289, 318, 339 (1978); TRAVEL WEEKLY, Apr. 27, 1978, at 95.

three aircraft (including fifteen DC-10's),<sup>38</sup> the four major U.S.-flag supplemental carriers are quite small and operate fairly old fleets (see Chart III). On the other hand, in terms of passenger statistics the supplemental carriers have been meaningful competitors for tourist traffic (see Chart IV).

### CHART III

U.S. SUPPLEMENTAL AIR CARRIERS  
(Certificated by Civil Aeronautics Board)  
Fleet Reported to FAA as of Dec. 31, 1977

#### AIR CARRIERS

<i>Aircraft Models (Number)</i>	<i>December, 1977</i>
CAPITOL INTERNATIONAL      DC-8 (13)	13
EVERGREEN INTERNATIONAL DC-8 (4); DC-9 (3); CV-580 (5); L-188 (2); C-46(1)	15
MCCULLOCH INTERNATIONAL AIRLINES L-188 (3)	3
OVERSEAS NATIONAL AIRWAYS DC-10 (2); DC-8 (6)	8
RICH INTERNATIONAL C-46 (3); DC-6 (2)	5
TRANS INTERNATIONAL DC-10 (3); DC-8 (7); L-188 (7); L-382 (12)	29
WORLD AIRWAYS B-747 (1); DC-8 (5)	6
ZANTOP INTERNATIONAL AIRLINES DC-8 (2); CV-640 (14); L-188 (8); DC-6 (12)	36
<b>TOTAL</b>	<b>114</b>

Source: 236 AVIATION DAILY 151 (1978).

<sup>38</sup> 236 AV. DAILY 151 (1978) (figures reported by airlines to FAA as of December 30, 1977).

CHART IV  
SUPPLEMENTAL AIRLINES TRAFFIC  
1976-1977

	<i>Rev. Passenger Miles</i>		<i>Passengers</i>	
	<i>1977</i>	<i>(000) 1976</i>	<i>1977</i>	<i>(000) 1976</i>
<i>Domestic</i>				
Capitol	333,873	222,844	181,233	124,586
Evergreen	88,151	26,046	117,678	30,286
McCulloch	17,114	80,006	15,107	34,870
Overseas	261,786	402,510	96,364	152,090
Rich	—	—	—	—
Trans. Intl.	120,901	106,955	67,954	51,044
World	185,004	74,100	77,112	31,187
Zantop	—	—	—	—
Total	1,006,829	912,461	555,448	424,063
<i>International</i>				
Capitol	1,762,388	1,085,915	518,981	324,625
Evergreen	60,766	—	32,048	—
McCulloch	2,699	21,879	403	7,138
Overseas	1,603,435	1,218,085	445,579	340,169
Rich	—	—	—	—
Trans Intl.	2,173,344	2,492,034	511,705	552,096
World	1,758,652	917,326	398,165	219,560
Zantop	—	—	—	—
Total	7,361,284	5,735,239	1,906,881	1,443,588
Civilian Total	8,368,113	6,647,700	2,462,329	1,867,651

Source: 236 AVIATION DAILY 168 (1978).

Scheduled airlines have themselves become large and successful charter carriers. For the twelve-month period ending September 30, 1977, CAB figures show that scheduled airlines carried two-thirds of all charter passengers.<sup>39</sup> When one adds the charters performed by foreign-flag carriers, it turns out, that the share of charter traffic carried by U.S.-supplemental carriers amounts to something between twenty and twenty-five percent of the international charter market. Of course, this is still a substantial number of passengers. Moreover, one may expect that the flexible and innovative character of the U.S. supplemental carriers will permit at least some of

<sup>39</sup> CAB Docket No. 32242, *supra* note 8, at 9.

them to survive in one form or another. But it seems reasonable to suggest that the golden age of charters may be over in the current age of price competition for all categories of air transport service.

#### V. THE CHANGING PHILOSOPHY OF THE CAB APPROACH TO CHARTERS

It is difficult to see a consistent approach to charters in the economic regulatory climate of the United States over the past ten years. Initially, the CAB seems to have welcomed the idea of having a few relatively small airlines which could provide lower cost service by operating with full plane-loads and which would be free from the strictures of IATA rate-making machinery. So long as affinity charters were limited in their ability to attract passengers, there was a pleasing balance from the point of view of the United States government—just enough competition to be able to say that free enterprise was still around (and to put some pressures on the IATA rate-makers), but not so much competition as would threaten either the scheduled carrier establishment or the conference system of rate-making under IATA. This balance continued throughout the 1960's but began to come apart as the affinity concept was stretched and finally submerged in a sea of legally questionable activity on the part of both the supplemental and the scheduled carrier industries. Everyone was selling affinity charters, no matter the affinity, and the only question was how best to hide all the arrangements from the CAB and from IATA.

In retrospect, one may say that the vast but illegal sale of affinity charter transportation in the late 1960's and early 1970's was the first real example of price competition in the transatlantic market. But it was a form of competition which the CAB could not quite tolerate. In small stages, the CAB began to introduce charter liberalization (ITC's, TGC's, etc.), as much to provide a response to the rampant gray and black markets accompanying the sale of affinity charters as to serve the purpose of increasing competition. There is no reason to believe, however, that this liberalization was part of a master plan, for until recently, no one could really tell whether the Board's principal object in liberalizing charters was to promote competition or to bring some kind of a halt to the illegal activities that were prospering around the affinity charter market.

In the middle of 1977, however, the CAB's approach seems to have changed. With the arrival on the scene of its Democratic Chairman, Alfred Kahn, and its Republican Member, Elizabeth Bailey, the Board seems to have adopted a philosophy and direction favoring deregulation and competition on all fronts. The CAB no longer thinks in terms of alternatives to affinity charters or even of the threat of diversion from the scheduled industry. It seems rather to think in terms of how charter transportation, whether provided by the scheduled or supplemental industry, can work to assure that competition and all of its advantages (as well as disadvantages) are made available to air travellers to and from the United States.

## VI. EPILOGUE

In retrospect, it may now be said that the first six months of 1978 represented a period of relatively orderly progress by the United States towards a more competitive domestic as well as international aviation community. The last six months, on the other hand, was a period of largely unexpected events, thrusting the United States beyond anyone's predictions as to the pace and scope of competition. To review all of the relevant events of the second half of 1978 would take us beyond our present focus—the supplementals and international aviation. A brief mention of the turbulence of autumn 1978 is necessary, however, to set the stage for this epilogue.

### *A. The New Environment*

First, Chairman Kahn resigned from the CAB to become President Carter's chief inflation fighter. For better or worse, Kahn not only had a greater impact on aviation than perhaps anyone else on the world scene since the Second World War, but he also brought to an end the pervasive system of regulation that had guided United States aviation policy for thirty years.

Second, the Congress confirmed the American public's weariness with regulation by finally passing, after years of effort, the first basic overhaul of the economic provisions of the Federal Aviation Act.<sup>40</sup> For domestic aviation, the new legislation mandates a policy

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<sup>40</sup> Pub. L. No. 95-504, 92 Stat. 1705, approved October 25, 1978 (amending various sections of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301 *et seq.* (1976)). It is indicative of the mood of the Congress that the Senate version of the bill was entitled "Air Transportation Regulatory Reform Act of 1978" and the

of completely open entry by 1981, and elimination of the CAB itself by 1985. For foreign (*i.e.*, international) air transportation, the policy mandate of the new legislation is essentially unchanged, but the procedures for securing certification are required to be speeded up and the exemption authority is broadened. In the area of charters, the new law endorses the public charter rules by prohibiting the Board from adopting charter rules more restrictive than those of the public charter type.<sup>41</sup> The new law also eliminates the word "supplemental" from the statute, substituting "charter carrier" and "charter certificates." As to the sale of tours by charter carriers directly to the public without resort to independent tour operators, the new law adopts a compromise which calls for the Board to submit a report on the subject to Congress by May 1, 1979.<sup>42</sup> Within days of the new law's enactment, the scheduled carriers withdrew all the court challenges previously filed against the Board's Public Charter rules and the Board's interim charter liberalizations of late 1977 and early 1978.<sup>43</sup>

Third, Pan American World Airways, long the country's (and the world's) leading international airline, announced that it would suspend scheduled services to nearly all its European gateways except London, Frankfurt, and Rome.<sup>44</sup> At the same time, Pan Am undertook a major effort to gain entry into the domestic market

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House version was entitled "Air Service Improvement Act of 1978." In its final version, the legislation was renamed the "Airline Deregulation Act of 1978."

<sup>41</sup> Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 20, 92 Stat. 1705 (amending 49 U.S.C. § 1371(n)(2) (1976)). *See also id.*, Title XVI.

<sup>42</sup> Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 5(a), 92 Stat. 1705 (amending 49 U.S.C. § 1308 (1976)).

<sup>43</sup> The Board finally adopted the Public Charter Rules formally on August 14, 1978. *See* 43 Fed. Reg. 36,604 (1978) (to be codified in 14 C.F.R. § 380). By then, however, their adoption caused almost no stir—except for the usual court challenge which the scheduled carriers (Americans, Eastern, Northwest, TWA and Western) filed in September, 1978. *See American Airlines v. CAB*, No. 78-1873 (D.C. Cir., filed Sept., 1978). The only significant difference between the rules as formally published and as originally proposed in March, 1978, was that (in addition to single entity and overseas military charters) affinity charters were retained. Otherwise the whole alphabet of earlier charters was abolished as of December 31, 1978.

<sup>44</sup> This meant abandoning Amsterdam, Ankara, Lisbon, Paris, Vienna, Moscow, and all of Eastern Europe (except Warsaw). In addition, Pan Am simultaneously abandoned its transatlantic service from Portland and Boston and its non-stop service to Brussels. Pan Am had earlier dropped its services to the Scandinavian countries. Braniff, which had earlier begun serving Europe from Dallas, moved to take up some of the routes abandoned by Pan Am.

through a proposed merger with National Airlines. In one swoop, Pan Am thus was not only attempting to establish itself as a major domestic trunk carrier but it was also bringing to a definitive close the never-quite-ended debate over the chosen instrument theory in United States international aviation policy.

Fourth, IATA, responding to challenges from all sides, came up with a novel plan designed to preserve the Association and even its rate-making Traffic Conferences, while at the same time allowing the United States and those countries sharing the American view to enjoy open rates and free competition over the North Atlantic and possibly elsewhere as well. Further, IATA proposed a two-tier system of membership whereby carriers could participate in the highly useful technical and clearing house functions of the organization without also participating in all of its rate-making functions.<sup>45</sup> Whether any of the charter carriers would now join IATA as they began to open their scheduled services, remained unclear at year-end.

Fifth, the United States Government followed up its breakthrough with the Netherlands by negotiating a series of bilateral agreements on the same pattern—a trade-off of new U.S. points in return for liberal country-of-origin rules for both charters and fares, unlimited airline designation rights for the United States, and increasing flexibility for U.S. carriers to serve any points in, between, and beyond the foreign country from any points in the United States. First came Israel in July, 1978; then came West Germany and Belgium in the course of the fall.<sup>46</sup> Other countries,

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<sup>45</sup> As this article went to press, the CAB had pending before it an Order to Show Cause proceeding looking to the possible disapproval of IATA's rate-making Traffic Conference machinery. See C.A.B. Order No. 78-6-78 (June 12, 1978). IATA's proposed plan was filed in that proceeding on Nov. 3, 1978, and was entitled *Implementation of [IATA] Executive Committee Recommendations on Traffic Conference Procedures and Objectives, and Proposed Provisions for the Conduct of IATA Traffic Conferences*. On January 31, 1979, Pan American officially announced that, effective March 31, 1979, it was resigning from all of IATA's traffic conferences, but would continue to participate in IATA's clearing house and other interline activities. See 241 AV. DAILY 177 (1979) and TRAVEL WEEKLY, Feb. 8, 1979, at 1. Northwest and Delta Airlines had previously also resigned.

<sup>46</sup> The agreement with Israel was the first to adopt a new type of rate article which assured full rate competition by prohibiting rate suspensions on the part of either party unless the other party first consents. Israel's new landing rights in the U.S. were at Chicago, Miami, and two additional points to be selected next year. See Protocol Amending the United States-Israel Air Transport Agree-

too, were negotiating new air arrangements with the United States, in the realization that the longer it took to come to terms with the new American approach, the less the United States would be likely to concede in regard to gateways.<sup>47</sup> At the close of 1978, only France, Italy, and Great Britain, among the major North Atlantic aviation powers, were holding to their prior policies.

### *B. The Supplementals in the New Environment*

If the first half of 1978 marked the period when the supplementals were giving serious thought to becoming scheduled carriers, the last half of 1978 was the period when the thought was translated into action. On September 5, 1978, the Board granted temporary exemption authority for World Airways to operate scheduled services to Amsterdam and for Capitol to operate scheduled services to Brussels, the first time scheduled route authority had ever been awarded to supplemental carriers. Both carriers spoke of a start-up time in early 1979.<sup>48</sup> Within days of this historic action, the CAB

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ment, signed August 16, 1978 — U.S.T. —, T.I.A.S. No. 9002. West Germany obtained new landing rights at Miami, Atlanta, San Juan, and three other points yet to be named. The United States let it be known, however, that it would have been even more generous with U.S. points but for West Germany's reluctance to accept an Israeli-type rate article. See Protocol of November 1, 1978 relating to the U.S.-Federal Republic of Germany Air Transport Agreement of 1955, — U.S.T. —, T.I.A.S. No. 8918. The Agreement with Belgium was hailed as "the most liberal" pact yet to be reached. It included all the open skies opportunities of the Israeli and West German pacts plus virtually open skies for cargo services, and the opportunity for U.S. airlines to operate charter services out of Belgium for Belgian residents but under liberalized U.S. charter rules. Belgium received three U.S. points yet to be named and Atlanta-Mexico-beyond rights. Protocol of November 8, 1978 Relating to U.S.-Belgium Air Transport Agreement of 1946, — U.S.T. —, T.I.A.S. No. —.

<sup>47</sup> In late October, the U.S. and Peru also agreed on a new pact which, though not as liberal as the U.S. would have wished, represented one of the first liberalizing breakthroughs by the U.S. in the traditionally restrictive South American market. See Memorandum of Understanding of October 21, 1978 on Air Transport Relations Between the U.S. and Peru, — U.S.T. —, T.I.A.S. —. See also 239 Av. DAILY 284 (1978). In addition, by mid-November, the U.S. had also reached a liberalized agreement with Poland. Agreement of November 9, 1978 to Amend and Extend the U.S.-Poland Air Transport Agreement of 1972, — U.S.T. —, T.I.A.S. No. —. See The Washington Post, Nov. 13, 1978, § D, at 14, col. 1.

<sup>48</sup> 239 Av. DAILY 18, 28 (1978); TRAVEL WEEKLY, Sept. 14, at 1; *id.*, Sept. 18, at 3. CAB Order 78-9-2, Dockets Nos. 32523 and 32673 (Sept. 1, 1978). By September 21, 1978, Pan Am and TWA had announced that they would be appealing this action to the U.S. Court of Appeals. 239 Av. DAILY 108 (1978). Pan American and TWA v. CAB, No. 78-1880 and 78-1888 (D.C. Cir.). These appeals have since been withdrawn, presumably because both Pan Am and TWA

announced that it would also be granting World scheduled rights to the Far East.<sup>49</sup> By October, the Board had decided to grant Capitol and World the scheduled transcontinental authority both had previously sought.<sup>50</sup>

Also in October, World announced its purchase of three additional DC-10-30CF aircraft with options for still three more. At the same time, it announced a loss of \$616,000 for the first six months of 1978 compared to a \$595,000 profit for the same period in 1977. But World's president attributed this loss to non-operating factors and said that the low fares of the scheduled carriers had affected World "only to a limited extent."<sup>51</sup> Thereafter, with the newly liberalized U.S.-Germany bilateral agreement in mind, World applied for exemption and permanent authority to provide low-fare services from six U.S. cities to Munich, Frankfurt, Hamburg and Dusseldorf. On January 11, 1979, the CAB awarded to World exemption authority to Munich and Frankfurt.<sup>52</sup>

TIA was equally active. In addition to its earlier requests for Laker-type authority between Los Angeles and London, plus transcontinental and transpacific scheduled authority, TIA also applied

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have also recently received route awards under the CAB's exemption authority. The critical issue is whether the Board can rely on its power to grant exemptions in order to authorize temporary rights without a hearing, while withholding permanent rights until the lengthy hearing process is completed. When the Board used its exemption power to grant the temporary rights to World and TIA, it granted similar temporary rights to two scheduled carriers, National and Northwest. The proceeding in which a hearing will be held and a decision reached as to permanent rights has been renamed from the Miami-Luxembourg Low Fare Investigation to the U.S.-Benelux Proceeding. CAB Order 78-7-30 (July 10, 1978) consolidated the applications of 17 carriers, all seeking various types of permanent U.S.-origin authority to the three Benelux countries. *See* 43 Fed. Reg. 30,850 (1978); CAB Docket No. 30790. *See* EDITOR'S NOTE at 508.

<sup>49</sup> 239 AV. DAILY 34 (1978). *See* CAB Order 78-9-33, Docket Nos. 32634 and 32635 (Sept. 7, 1978).

<sup>50</sup> 239 AV. DAILY 293 (1978). On January 12, 1979, the Board issued its formal order granting transcontinental authority to both Capitol and World, but denying World its requested temporary exclusivity. In the same order, the Board issued similar authority to American and Pan American. CAB Order 79-1-75, Docket 30356 (Jan. 12, 1979). *See* 241 AV. DAILY 74, 82 (1979).

<sup>51</sup> 239 AV. DAILY 244 (1978).

<sup>52</sup> CAB Docket Nos. 33636, 33637. *See* 240 AV. DAILY 138, 154 (1978); TRAVEL WEEKLY, Oct. 16, 1978, at 131. *See* CAB Order 79-1-73, Docket No. 33637 (Jan. 11, 1979). At the same time, the Board also granted comparable authority to serve Frankfurt and other points in West Germany to TIA, Capitol, Seaboard, and Braniff. *See* 241 AV. DAILY 98 (1979). On the question of the legality of exemption authority, *see* note 48 *supra*.

for exemption and permanent authority to serve Vienna, and on October 27, 1978, this request was granted.<sup>53</sup> TIA also applied for and received exemption authority to provide scheduled services to Brussels and Amsterdam, Frankfurt, and Paris—all from various U.S. cities.<sup>54</sup> By year-end, TIA was awaiting a Board decision on its requests to provide low fare scheduled service to Tel Aviv from Los Angeles, Chicago, and New York via Amsterdam and Zurich.<sup>55</sup>

Like World, TIA also announced new aircraft purchases, including two B-747's, with options on an additional six.<sup>56</sup> As though to complete its game-plan, TIA was simultaneously seeking Board approval, on an interim-exemption basis, to create a wholly-owned subsidiary charter tour operator. TIA argued that such vertical integration may be the wave of the future, even as several established tour operators (e.g., Arthur's Travel, Carefree Travel, and International Weekends) had already asked the Board for direct carrier permits. Within days, World announced it would be supporting TIA's request.<sup>57</sup>

Meanwhile, it was reported that a Boston tour operator was seeking to purchase ONA's certificates for \$500,000, and the Board's staff was advising the Board that, except for inclusive tours, the Board ought not to prohibit the supplementals from selling tickets for transportation-only charters directly to the public or indirectly through wholly-owned tour operators.<sup>58</sup> If there were any doubts about whether the supplementals were going to continue pushing charters, TIA announced an ambitious eighteen million dollar public charter program to Europe and Israel, while World's president

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<sup>53</sup> 239 AV. DAILY 324 (1978). TWA was granted the same authority simultaneously. CAB Order 78-10-132 (Oct. 26, 1978).

<sup>54</sup> 240 AV. DAILY 154 (1978). TIA formally received its authority on January 11, 1979. See note 52 *supra*.

<sup>55</sup> See CAB Order 78-12-174, Docket Nos. 33209, 31217, and 33838 (Dec. 26, 1978).

<sup>56</sup> 239 AV. DAILY 307 (1978).

<sup>57</sup> TRAVEL WEEKLY, Nov. 20, 1978, at 51; 240 AV. DAILY 116 (1978).

<sup>58</sup> 239 AV. DAILY 108 (1978), 240 AV. DAILY 150 (1978). By early February, 1979, it was reported that the \$500,000 sale of ONA's certificate had collapsed, and ONA was searching out new prospective buyers. 241 AV. DAILY 206 (1979). Given the relative ease with which new authority can now be obtained from the Board, it will be interesting to see what continuing market value ONA's certificate will have. Chairman Kahn once said that one of his goals at the Board "was to reduce the value of these monopoly franchises (route certificates) to zero". The Washington Star, March 29, 1978, A-3, col. 5.

was making public assurances that, despite its newly obtained scheduled authority, World still intended to be the largest supplemental carrier and was planning on "an increase of twenty percent in charter sales next year."<sup>59</sup>

Capitol was initially somewhat less ambitious in its expansion plans, apparently preferring to implement its transcontinental and Benelux exemption authority before biting off anything more. In mid-year, 1978, Capitol had announced a loss of about two million dollars but expectations of a "little profit and perhaps a break-even" at year-end.<sup>60</sup> By late November, however, its appetite increased, and it filed for exemption authority for scheduled services to Frankfurt via Brussels.<sup>61</sup> Meanwhile, Seaboard, which had earlier applied for Benelux scheduled-passenger authority from some fifteen cities in the United States, decided in August to apply for scheduled rights between the United States and nine points in the Far East and India; by November, Seaboard had also applied for exemption authority to serve New York-Frankfurt, Cologne, and Munich.<sup>62</sup> Another of the supplementals, Evergreen, was seeking scheduled Benelux and transpacific rights, even as the Board was using expedited show-cause procedures to award Evergreen what would amount to virtually world-wide charter rights.<sup>63</sup>

As though even this amount of activity were not enough, the Board instituted a mammoth proceeding, the "Former Large Irregular Air Service Investigation," in which more than sixty companies filed applications to become supplemental carriers.<sup>64</sup> In anticipation of this proceeding, the Board on January 11, 1979 granted substantially all the transatlantic exemption authority requested

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<sup>59</sup> 239 Av. DAILY 244 (1978); 240 Av. DAILY 116 (1978).

<sup>60</sup> 238 Av. DAILY 217 (1978).

<sup>61</sup> 240 Av. DAILY 90 (1978). Capitol received its authority on January 11, 1979. *See* note 52 *supra*.

<sup>62</sup> 240 Av. DAILY 90 (1978). Seaboard received its New York-Frankfurt/Cologne/Munich authority on January 11, 1979. *See* note 52 *supra*. Seaboard's application for the Far East is pending in CAB Dockets 33264 and 33068.

<sup>63</sup> *See* CAB Docket Nos. 30790 and 33068. On February 1, 1979, the Board formally granted the requested charter authority to Evergreen. CAB Order 79-2-3, Dockets 31147 and 31837.

<sup>64</sup> TRAVEL WEEKLY, July 31, 1978, at 43. The case has since been divided into three separate proceedings—one involving applicants who once operated air services but no longer do so (Docket No. 33361), a second involving applicants who now operate air services (Docket No. 33362), and the third involving all other applicants (Docket No. 33363).

by the supplemental carriers.<sup>65</sup> And though not quite lost in the shuffle of all these developments, Freddie Laker—one year to the day after Skytrain I began its London-New York service—inaugurated his Skytrain II between London and Los Angeles. To underscore his confidence, Laker spoke of the 265,000 passengers carried, and the five million dollar profit earned, by Skytrain I in its first full year of service.<sup>66</sup>

While the scheduled United States carriers virtually all enjoyed a banner year, the profit picture for the large supplementals seemed mixed. According to figures released by the Board in November, 1978, covering the first eight months of the year,<sup>67</sup> only TIA showed an improved operating profit over the same period in 1977. World showed a profit but reduced from 1977, while Capitol went from a 1977 profit to a 1978 loss. At the same time, however, World increased its U.S.-Europe passengers by over forty percent during both June and July over the same months in 1977. TIA showed decreases in its European traffic of 28.8 percent and 8.5 percent during these two months, while Capitol showed an increase of 5.7 percent in June and a decrease of 1.4 percent in July. If the supplementals' profit pictures had changed, therefore, it was probably impossible to attribute those changes to the number of passengers they carried over the North Atlantic. Moreover, system-wide the Board's data showed that their business "compared favorably with 1977, a very good year, at least through the second quarter of 1978." And for the third quarter, the Board's data showed that (excluding ONA) Capitol, TIA, World, and Evergreen together enjoyed an eight percent increase in their system-wide traffic over the third quarter of 1977.

To be sure, transatlantic charter traffic fell during the third quarter by some twenty-three percent for all carriers, with a thirty-seven percent decrease in charter passengers for the scheduled carriers

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<sup>65</sup> See CAB Order 79-1-73, Docket No. 33637 (Jan. 11, 1979). In early February, the Board also granted new or additional authority to serve various West German points to TWA, Delta, World, and Aeromerica. See CAB Order 79-2-60. Standing in the wings until they could prove their fitness were two other U. S. carriers—Lelco, Inc. d/b/a Air Berlin USA, and Davis Air Lines. 241 AV. DAILY 226, 235 (1979).

<sup>66</sup> TRAVEL WEEKLY, Oct. 12, 1978, at 2.

<sup>67</sup> See CAB, MEMORANDUM, TREND AND OUTLOOK FOR CHAPTER OPERATIONS AND COACH AND DEEP-DISCOUNT TRANSATLANTIC TRAFFIC (Nov. 6, 1978) [hereinafter cited as CAB MEMORANDUM]; See also 239 AV. DAILY 184 (1978).

(compensated by an almost twenty percent increase in their scheduled traffic).<sup>68</sup> The supplementals (including ONA) showed a ten percent drop in their North Atlantic traffic during the third quarter. Excluding ONA and Evergreen, however, the July data showed a gain for World of forty-five percent in its U.S.-Europe charter traffic, with percentage losses of only 8.5 percent for TIA and 1.4 percent for Capitol.<sup>69</sup>

While several different conclusions could be drawn from these statistics, they make clear that contrary to the fears of the first half of the year, the U.S.-flag supplementals were not on the brink of extinction by the end of the third quarter of 1978. Indeed, the real victims of the new approach may well have been the foreign supplementals, whose U.S.-Europe traffic showed almost a thirty-eight percent decline in July, 1978, from July, 1977. Moreover, by late November, 1978, the U.S. supplementals were predicting fourth quarter gains of fifty-nine percent system-wide and sixty-five percent over the North Atlantic, attributing their change in fortunes to "growth and aggressive sales."<sup>70</sup> By the time this article is published, the picture may have changed again. But as of year-end 1978, it looked as if the supplemental carriers would be able to

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<sup>68</sup> See CAB MEMORANDUM, note 67 *supra*, Tables 3 and 9; 239 AV. DAILY 239 (1978).

<sup>69</sup> See CAB MEMORANDUM, note 67 *supra*, Tables 3, 9, and 11. In a follow-up Memorandum of January 16, 1979, the Board's staff concluded that, while deep discount fares had cut total charter traffic from the 1977 highs "especially in the transatlantic markets," they "have not imperiled the charter carriers generally." The staff pointed out, however, that after a great 1977, "charter carriers' transatlantic charter passengers . . . have been declining deeply in recent periods and the decline continued in the third quarter—the top of the season." Statistically, the third quarter decline of 1978 over 1977 on U.S.-Europe charter traffic by U. S. supplementals was 14.5%. The Board's staff added that "[t]he negative figures are deeper in the New York-London market, where competition of standby and deep-discount fares is sharpest." At the same time, however, the staff concluded that collectively the U. S. supplementals had "maintained their total system traffic through the charter season" and that, all things considered, it was no longer necessary for the Board to continue the periodic reporting requirements which had originally been promulgated in late 1977 as a means to gauge the impact of discount fares on the U. S. supplemental carriers. See also 241 AV. DAILY 191 (1979); TRAVEL WEEKLY, Feb. 8, 1979, at 3.

<sup>70</sup> TRAVEL WEEKLY, Nov. 23, 1978, at 1; CAB MEMORANDUM, note 67 *supra*, Table 3. The Memorandum submitted to the Board by its staff on January 16, 1979, note 69 *supra*, contained a Table 3, showing that the U. S. supplementals operated 52% more seats systemwide and 84% more seats on the North Atlantic during October and November, 1978 than in the same two months of 1977.

continue to compete with the majors, both in bulk and in individually ticketed transportation.<sup>71</sup>

### CONCLUSION

Some have said that in aviation as elsewhere the United States may finally have bitten off more than it can chew. The ultimate outcome, they predict, is that the United States will have given away to foreign carriers too many important United States traffic points while presiding over the demise of its own supplemental airline industry. Even if IATA no longer sets transatlantic fares, as this scenario goes, the scheduled carriers of all nationalities will be able to raise their transatlantic rates with impunity, because there will be no supplementals to push prices down. In our judgment, this scenario is quite unlikely.

In the first place, once IATA's transatlantic rate-making functions are replaced by CAB-mandated forces of competition, there is no likely possibility that there will be any generally agreed-upon transatlantic rates, especially of the promotional type. Second, with or without charters, there will be enough carriers operating across the North Atlantic over different routes and with different classes of service to make fixed prices unlikely. Moreover, if a pattern of price fixing seems to be reappearing, the CAB could well certificate a new "low-price" carrier, and so long as the prospect of new entry is real, such a threat will itself reinforce the unlikelihood of fixed prices. If the industry shows signs of recession, restraints are more likely in capacity than in prices.

Over time, then, we would expect the distinctions between charter and scheduled services and carriers to become ever more

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<sup>71</sup> Perhaps more important than any of the charter statistics were the data reported by the INS for the second quarter of 1978, showing a 5.6% increase in U.S. citizen departures to Europe over the same period in 1977 (from 1,176,196 to 1,242,313) but a 26.8% increase in foreigners arriving in the United States from Europe (from 613,315 to 777,863). See *TRAVEL WEEKLY*, Oct. 23, 1978, at 88. For the first five months of the year, the U.K. and Italy showed increases of 37.6% and 31.4% (respectively) in their tourist departures for the United States. See 239 *AV. DAILY* 199 (1978). These increases seem to be attributable both to the low air fares and to the declining value of the U.S. dollar. Statistics for the latter half of 1978 showed continuing sharp increases. *TRAVEL WEEKLY*, Jan. 15, 1979, at 1. By mid-January, 1979, it was learned that Pan American was obtaining more than 50% of its passenger revenues from overseas sales. 241 *AV. DAILY* 113 (1979). If this trend continues, the day will come soon when the historic U. S. tourist imbalance approaches equilibrium.

blurred. Quite likely, some system in the nature of the "open skies" that the United States proposed at the Chicago Conference almost thirty-five years ago will emerge.<sup>72</sup> No one would have dreamed five years ago, let alone thirty-five years ago, that by the spring of 1978 some twenty-five cities in the United States would be available to serve as gateways across the North Atlantic. Nor, we think, would anyone have predicted the pace of developments sketched in this Epilogue, all of which occurred after the bulk of this article had been written. It turns out, after all, that competition is possible in international air transport—not only as to sandwiches and stewardesses' smiles, but as to flexibility of service, conditions of booking, and above all as to price. What the charter carriers' final role will be, we do not know. As the agent of change, the charter carriers' place in history is secure.

EDITOR'S NOTE: On February 23, 1979, as this article went to press, Administrative Law Judge Burton S. Kolko issued a decision in the U.S.-Benelux Proceeding, recommending that all the applicants be given permanent authority to serve all Benelux countries from any U.S. point. This decision will now be reviewed by the C.A.B.

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<sup>72</sup> In January, 1979, the U.S. State Department announced that, while it would be offering open skies bilateral agreements to all takers, the long range goal was a liberal multilateral pact with "Europe as an entity rather than pecking away on the bilateral approach." 241 *AV. DAILY* 9 (1979). The same goal was later voiced also by the CAB. 241 *AV. DAILY* 51 (1979).