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## CAB Regulation of Airline Reservation Oversales: An Analysis of Economic Regulation 1050

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# Comments

## **CAB REGULATION OF AIRLINE RESERVATION OVERSALES: AN ANALYSIS OF ECONOMIC REGULATION 1050**

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The Federal Aviation Act of 1958 requires the Civil Aeronautics Board (CAB) to regulate the airline industry in a manner that is consistent with the general public interest.<sup>1</sup> Adherence to this statutory mandate compels the CAB to promote the often conflicting interests of air travelers and the airline industry. This is readily apparent in the context of the problem of oversales. On the one hand, airlines seek to reduce reservation costs and to maximize passenger utilization of flight capacity to maintain their financial stability. On the other hand, air travelers demand reasonable fares,

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<sup>1</sup> Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. § 1302 (1976), formerly Civil Aeronautics Act of 1938, ch. 602, 52 Stat. 973. The Act provides:

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with 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 United States 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 air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the United States 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.

flexibility in making reservations, and assurance that their confirmed reservations will be honored. A solution to the oversales problem requires a regulatory policy that strikes a balance between these conflicting interests.<sup>2</sup> Economic Regulation 1050 (ER-1050) is the latest attempt by the CAB to construct such a regulatory policy.<sup>3</sup>

This comment examines the causes of oversales and past actions taken by the CAB and the public in response to the problem. Also, ER-1050 is reviewed and its effect on judicial remedies is analyzed. Finally, this comment offers an evaluation of the effectiveness of ER-1050 as a regulatory solution to the oversales problem.

### THE NATURE OF THE OVERSALES PROBLEM

An oversale occurs when the number of persons with confirmed reservations appearing to board a flight exceeds the number of seats available, thus necessitating a denial of boarding or "bumping" of one or more passengers.<sup>4</sup> The number of persons bumped as a result of oversales is small as compared with the total number of persons transported.<sup>5</sup> For example, 6.6 persons were bumped for every 10,000 passengers enplaned in domestic operations in fiscal year 1977.<sup>6</sup> The airline industry's rate of oversales, however, has

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<sup>2</sup> The regulatory power of the CAB is delineated at 49 U.S.C. § 1324 (1976). Section 204 of the Act provides:

(a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make . . . rules, regulations, and procedure, pursuant to and consistent with the provisions of . . . and to exercise and perform its powers and duties under, this chapter.

For a discussion of the statutory framework which prescribes the powers and duties of the CAB see Russell, *The CAB and the Consumer*, 40 J. AIR L. & COM. 51 (1974).

<sup>3</sup> ER-1050 appears at 43 Fed. Reg. 24,283-85 (1978) (to be codified in 14 C.F.R. § 250). It became effective on September 3, 1978 [hereinafter cited as CAB ER-1050].

<sup>4</sup> *Reexamination of the Board's Policies Concerning Deliberate Overbooking and Oversales: Notice of Proposed Rulemaking*, CAB Docket No. 29139, EDR-334, 42 Fed. Reg. 48,578 (1977) [hereinafter cited as CAB EDR-334].

<sup>5</sup> *Id.* at 48,582.

<sup>6</sup> *Part 250—Oversales: Comprehensive Amendment*, CAB Docket No. 29,139, ER-1050, 43 Fed. Reg. 24,277, 24,281 (1978). United States flag carriers denied boarding to 7.8 passengers per 10,000 enplanements on international flights. *Id.* The CAB made comments contemporaneous to its promulgation of ER-1050, *supra* note 3. These comments are found at 43 Fed. Reg. 24,277-83 (1978) [hereinafter cited as CAB Comments on ER-1050].

been increasing in recent years.<sup>7</sup> The absolute number of persons bumped as a result of oversales rose to 150,000 in fiscal year 1977.<sup>8</sup>

Oversales result from a variety of causes.<sup>9</sup> Airline personnel and travel agents may make errors in recording reservations. A computer malfunction in an airline reservation system may produce similar errors.<sup>10</sup> Reservation practices such as "free sale" or "block ticketing" arrangements may also cause an oversale. "Block ticketing" programs give travel agents or passengers ticket stock which each uses to issue confirmed reservations without notifying the carrier. "Free sale" is a procedure established by intercarrier agreement whereby a participating carrier may confirm reservations of another carrier without checking available space up to a specified time before departure.<sup>11</sup> The aforementioned causes of oversales produce "no record" passengers. These are passengers who appear at the boarding gate with a validated ticket when the carrier has no record of a reservation. Other carrier practices, such as last minute substitution of lower capacity aircraft for operational or safety reasons, cause oversales despite the existence of a record of a reservation having been made.<sup>12</sup>

The cause of oversales that has attracted the most attention from the CAB and the public is overbooking.<sup>13</sup> Overbooking is a carrier's intentional acceptance prior to flight time of a number of reservations for a specific flight in excess of the number of seats available on the aircraft.<sup>14</sup> A carrier utilizes this procedure when statistical analysis of a flight's reservation history indicates that an appreci-

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<sup>7</sup> *Priority Rules, Denied Boarding Compensation Tariffs and Reports of Unaccommodated Passengers: Reexamination of the Board's Policies Concerning Overbooking and Oversales*, CAB Docket No. 29,139, EDR-296, 41 Fed. Reg. 16,478 (1976) [hereinafter cited as CAB EDR-296].

<sup>8</sup> CAB Comments on ER-1050, *supra* note 6, at 24,278.

<sup>9</sup> CAB EDR-334, *supra* note 4, at 48,582.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> According to the CAB, overbooking is the reservation practice most responsible for the CAB's adoption of regulations in 1967 requiring airlines to pay compensation to passengers bumped because of an oversale. CAB EDR-296, *supra* note 7, at 16,478. These regulations are discussed in text accompanying notes 27-37 *infra*.

<sup>14</sup> CAB EDR-334, *supra* note 4, at 48,578.

able level of "no shows" or "reservation turnover" should be anticipated.<sup>15</sup> Passengers with reservations who fail to appear at departure time or to cancel their reservations are designated "no shows," while "reservation turnover" signifies the number of reservation cancellations that occur shortly before a flight's departure.<sup>16</sup> Thus overbooking is a means by which an airline can help assure that each flight departs with as few empty seats as possible.<sup>17</sup> While all carriers engage in the practice of overbooking,<sup>18</sup> the great majority of flights are not overbooked.<sup>19</sup> Moreover, a CAB investigation found no substantial abuse of overbooking by the airline industry in recent years.<sup>20</sup>

#### PRIOR EFFORTS OF THE CAB TO MINIMIZE THE OVERSALES PROBLEM

The CAB did little to scrutinize airline reservation practices that cause oversales until 1960.<sup>21</sup> At that time the CAB instituted a major investigation into the overbooking practices of trunkline carriers.<sup>22</sup> In 1962 the CAB approved a voluntary agreement

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<sup>15</sup> Comments of Ozark Airlines, Inc., on CAB EDR-334, *supra* note 4, submitted to the CAB on November 11, 1977. These comments are on file with the CAB in Washington, D.C. [hereinafter cited as Ozark's Comments].

<sup>16</sup> *Id.* The problems of "no shows" and "reservation turnover" are heightened by those passengers who, for their own convenience, make multiple reservations with the intent of honoring only one. *Id.* In 1973, industry statistics showed that the number of "no shows" per flight was 24.7%. Comment, *Federal Preemption of State Law: The Example of Overbooking in the Airline Industry*, 74 MICH. L. REV. 1200, 1201 (1976).

<sup>17</sup> Brief for Certain Members of the Air Transport Association of America as Amicus Curiae at 3, *Nader v. Allegheny Airlines, Inc.* 14 Av. Cas. 18,312 (D.D.C. 1978).

<sup>18</sup> *Emergency Reservations Practices Investigation*, CAB Docket No. 26,253, Initial Decision by Robert L. Park, Associate Chief Administrative Law Judge, at 10 (June 10, 1974) [hereinafter cited as CAB ERPI].

<sup>19</sup> *Id.* at 39.

<sup>20</sup> *Id.* For a detailed discussion of airline overbooking practices see S. Tice, *Overbooking of Airline Reservations in View of "Nader v. Allegheny Airlines, Inc.": The Opening of Pandora's Box*, 43 J. AIR L. & COM. 1 (1977).

<sup>21</sup> CAB EDR-334, *supra* note 4, at 48,578.

<sup>22</sup> *Overbooking Practices of Trunkline Carriers Investigation*, CAB Order E-15615 (1960). The CAB had previously begun an enforcement proceeding against National Airlines to determine whether its overbooking practices were deceptive, *National Airlines, Inc. Enforcement Proceeding*, 31 CAB 390 (1960). The CAB later terminated this proceeding after concluding that an enforcement case against one carrier was too limited in scope to decide the issue of overbook-

among eleven trunkline carriers, which *inter alia* provided for payment of compensation to certain classes of persons who were bumped because of oversales.<sup>23</sup> Two years later the CAB deferred its investigation of overbooking by trunkline carriers.<sup>24</sup> In 1965 the CAB initiated a rulemaking proceeding directed specifically at the problem of oversales.<sup>25</sup> This proceeding ended in 1967 with the promulgation of the first regulations which attempted to grapple with the industry-wide problem of oversales.<sup>26</sup>

The 1967 regulations required all carriers to pay a fixed rate of compensation to persons who were bumped as a result of oversales.<sup>27</sup> Minimum and maximum levels of payment were specified, and exceptions to carrier liability to make such payments were established.<sup>28</sup> The rules also required carriers to formulate non-discriminatory boarding priority rules for determining which passengers should be denied boarding in the event of an oversale.<sup>29</sup>

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ing. Brief Amicus Curiae of the Air Transport Association at 17, *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) [hereinafter cited as A.T.A. Brief].

<sup>23</sup> CAB Order E-18064, 35 CAB 881 (March 1, 1962). The amount of denied boarding compensation was based upon the value of the first remaining flight coupon, with a maximum award of \$40. The average payment was \$20 per passenger. There were various exceptions to eligibility for compensation. No compensation was awarded a passenger denied boarding (1) because of equipment substitutions, etc., (2) when the carrier provided alternative transportation arriving within one hour of the previously planned arrival time, and (3) when the passenger was downgraded or upgraded on the same flight. *Id.*

<sup>24</sup> CAB Order E-20859 (May 25, 1964).

<sup>25</sup> *Passenger Priorities and Overbooked Flights: Notice of Proposed Rulemaking*, EDR-95, 30 Fed. Reg. 13,236 (1965).

<sup>26</sup> *Priority Rules, Denied Boarding Compensation Tariffs and Reports of Unaccommodated Passengers*, ER-503, 32 Fed. Reg. 11,939 (1967) (codified as 14 C.F.R. § 250). Despite subsequent amendments, these regulations remained substantially unchanged until the promulgation of ER-1050 in 1978. A.T.A. Brief, *supra* note 22, at Appendix 10a; Ozark's Comments, *supra* note 15. ER-1050 is discussed in the text accompanying notes 54-86 *infra*.

<sup>27</sup> An eligible passenger was paid 100% of the value of the first remaining flight coupon. 14 C.F.R. § 250.5 (1978). Acceptance of denied boarding compensation constituted liquidated damages and relieved the carrier of all liability for failure to provide the passenger confirmed reservation space. 14 C.F.R. § 250.7 (1978).

<sup>28</sup> The regulation specified a minimum payment of \$25 and a maximum payment of \$200. 14 C.F.R. § 250.5 (1978). A passenger was ineligible for compensation if he was denied his reserved space (1) because the government had requisitioned the space, (2) when substitution of aircraft was necessary for operational or safety reasons, or (3) when he accepted alternate transportation which was scheduled to arrive within two hours of his original arrival time or four hours in the case of foreign transportation. 14 C.F.R. § 250.6 (1978).

<sup>29</sup> 14 C.F.R. § 250.3(1978).

The policy underlying the 1967 regulations was to minimize the effects of oversales without regulating those reservation practices which cause oversales. This policy is clearly reflected in comments made by the CAB during the rulemaking proceeding.<sup>30</sup> For example, the CAB acknowledged that "block ticketing" and "free sale" arrangements not only cause but invite oversales. It declined, however, to interfere with these two practices because they reduce carrier reservation costs and facilitate the purchase of reserved seating.<sup>31</sup>

Concerning overbooking, the CAB stated that, even though overbooking is a cause of oversales, the practice enables the carrier to compensate for reduced load factors occasioned by "no shows" and "reservation turnover."<sup>32</sup> Thus, overbooking keeps fares lower, enables airlines to accommodate more passengers, and permits customers to make and break reservations freely. For these reasons the CAB concluded that regulation of overbooking would be unadvisable.<sup>33</sup>

This policy was reaffirmed in 1974 in the CAB's Emergency Reservation Practices Investigation (ERPI).<sup>34</sup> Through the ERPI the CAB considered the advisability of imposing controls on the reservation practices of carriers during an anticipated national fuel shortage. The objective of such controls is to maximize the utilization of aircraft capacity.<sup>35</sup> Ticketing time limits and refund penalties were two controls considered as means of reducing "no shows" and "reservation turnover," both of which lower load factors on flights.<sup>36</sup> Through the ERPI the CAB concluded that any regulation of reservation practices should be imposed only in a national

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<sup>30</sup> *Priority Rules, Denied Boarding Compensation Tariffs and Reports of Unaccommodated Passengers: Notice of Proposed Rulemaking*, CAB Docket No. 16563, EDR-109, 32 Fed. Reg. 459, 461 (1967) [hereinafter cited as CAB EDR-109].

<sup>31</sup> *Id.* at 461.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> CAB ERPI, *supra* note 18.

<sup>35</sup> *Emergency Reservation Practices Investigation: Order Instituting Investigation; Tentative Findings and Conclusions; and Notice of Proposed Rulemaking*, CAB Docket No. 26253, Order No. 73-12-93, EDR-260, 39 Fed. Reg. 823 (1974). The investigation was ordered on December 21, 1973. *Id.* An initial decision was reached in 1974. CAB ERPI, *supra* note 18.

<sup>36</sup> CAB ERPI, *supra* note 18.

emergency and that the existing reservation system generally benefited the traveling public.<sup>37</sup>

Thus at that time the CAB viewed oversales as an unavoidable by-product of a reservation system that preserves maximum flexibility in making and altering confirmed reservations. Regulation directed toward eliminating the causes of oversales would jeopardize this flexibility.<sup>38</sup> Despite various amendments these regulations remained substantially the same until the promulgation of ER-1050 in 1978.<sup>39</sup>

### JUDICIAL REMEDIES AVAILABLE TO THE BUMPED PASSENGER

Acceptance of compensation provided in CAB regulations by a passenger bumped due to an oversale relieves the carrier from any further legal liability for failing to honor that passenger's confirmed reservation.<sup>40</sup> Often bumped passengers have rejected this regulatory remedy and used judicial process to recover compensatory and sometimes punitive damages.<sup>41</sup> For bumped passengers rejecting the compensation mandated by the CAB, two bases for judicial relief have been available, one statutory and one premised on common law.

#### A. *Statutory Remedy*

The Federal Aviation Act of 1958 (Act) does not prescribe private remedies for violations of its provisions.<sup>42</sup> Federal courts, however, have long recognized an implied private remedy under Section 404(b) of the Act.<sup>43</sup> A judicially cognizable claim arises

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<sup>37</sup> *Id.* at 6. The CAB affirmed Judge Park's Initial Decision and terminated the investigation in 1976. EDR-334, *supra* note 4, at 48,579.

<sup>38</sup> CAB EDR-109, *supra* note 30, at 461.

<sup>39</sup> Ozark's Comments, *supra* note 15. A.T.A. Brief, *supra* note 22, at Appendix 10a.

<sup>40</sup> 14 C.F.R. § 250.7 (1977).

<sup>41</sup> See Campbell, *Airlines' Responsibilities to Passengers: Recent Theories and Extensions*, 43 J. AIR L. & COM. 289, 292 (1977).

<sup>42</sup> *Id.* at 294.

<sup>43</sup> 49 U.S.C. § 1374 (1976):

No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, part, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port locality, or description of traffic in air transportation to any unjust



when an airline unjustly discriminates against any person seeking air transportation. In the context of oversales, an airline violates this statutory provision when it denies boarding to a passenger because it has failed to follow its boarding priority rules. Such rules are criteria established by each carrier for determining which passenger holding confirmed reservations will be denied boarding on an oversold flight.<sup>44</sup> This statutory remedy is based on tort rather than contract principles and provides the basis for an award of compensatory damages.<sup>45</sup> No court has implied a statutory remedy in favor of nonpassengers.<sup>46</sup>

Some federal courts have awarded punitive damages to passengers for violation of Section 404(b).<sup>47</sup> The awarding of punitive damages is significant in these cases because the actual damages borne by a passenger typically do not warrant the expense of instigating legal action.<sup>48</sup> Punitive damages are recoverable if there is evidence of intentional wrongdoing or conscious disregard for the passenger's rights, such as willful disregard of priority rules or

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discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Archibald v. Pan American World Airways, Inc., 460 F.2d 14 (9th Cir. 1972); Fitzgerald v. Pan American World Airways, Inc., 229 F.2d 499 (2d Cir. 1956); Kaplan v. Lufthansa German Airlines, 12 Av. Cas. 17,933 (E.D. Pa. 1973); Mortimer v. Delta Airlines, Inc., 302 F. Supp. 276 (N.D. Ill. 1969); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961).

<sup>44</sup> See Comment, *Discriminatory Bumping*, 40 J. AIR L. & COM. 533 (1974); Campbell, *Airlines' Responsibilities to Passengers: Recent Theories and Extensions*, 43 J. AIR L. & COM. 289, 294-97 (1977). Many courts have held that violations of boarding priority rules constitute statutory discrimination within the meaning of Section 404(b). S. Tice, *Overbooking of Airline Reservations in View of "Nader v. Allegheny Airlines, Inc.": The Opening of Pandora's Box*, 43 J. AIR L. & COM. 1, 13 n.62 (1977).

<sup>45</sup> The basis of the statutory cause of action is not breach of contract of carriage. Denied boarding compensation mandated by the CAB is the remedy for such breach. The remedy is pursued as a tort cause of action for discrimination evidenced by violation of boarding priority rules. Mortimer v. Delta Airlines, Inc., 302 F. Supp. 276, 281 (N.D. Ill. 1969). Until denied compensation was made mandatory by the CAB in 1967, passengers were awarded compensatory damages, but there was some confusion as to the theory of recovery utilized. 34 J. AIR L. & COM. 127, 129 (1968).

<sup>46</sup> See Campbell, *Airlines' Responsibilities to Passengers: Recent Theories and Extensions*, 43 J. AIR L. & COM. 289, 301-303 (1977).

<sup>47</sup> Smith v. Piedmont Airlines, Inc., 412 F. Supp. 641 (N.D. Tex. 1976), *modified*, 567 F.2d 290 (5th Cir. 1978); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961).

<sup>48</sup> See Comment, *Discriminatory Bumping*, 40 J. AIR L. & COM. 533, 536 (1974).

discourteous treatment of a passenger who is wrongfully denied boarding.<sup>49</sup> Early decisions held that the reservation practice of overbooking constituted malicious, willful, or wanton conduct sufficient to justify an award of punitive damages.<sup>50</sup> Subsequent decisions, however, have indicated that overbooking per se does not justify the imposition of punitive damages, but substantial oversales is evidence of malice to be considered in awarding punitive damages.<sup>51</sup>

In order to establish his cause of action, a passenger must show that he complied with the carrier's check-in and reservation confirmation requirements, and that the airline failed to honor the confirmed reservation. Once the passenger's prima facie case is thus established, the burden of proof shifts to the airline to demonstrate that it complied with its boarding priority rules.<sup>52</sup> The plaintiff also must demonstrate that a carrier's violation of its boarding priority rules proximately caused his damages. Thus a passenger must show that he would have been able to board the flight but for the airline's disregard of his particular boarding priority.<sup>53</sup>

### B. Common Law Remedy

In *Nader v. Allegheny Airlines, Inc.*, the Supreme Court held that airlines are not immune from common law tort liability to passengers with confirmed reservations who are bumped as a result

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<sup>49</sup> *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 549-50 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976), *remanded*, 14 Av. Cas. 18,312 (D.D.C. 1978); *Smith v. Piedmont Airlines, Inc.*, 412 F. Supp. 641, 643 (N.D. Tex. 1976), *modified*, 567 F.2d 290 (5th Cir. 1978); *Campbell, Airlines' Responsibilities to Passengers: Recent Theories and Extensions*, 43 J. AIR L. & COM. 289, 304-406 (1977).

<sup>50</sup> *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360, 367-368 (S.D. Cal. 1961).

<sup>51</sup> *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 550 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976), *remanded*, 14 Av. Cas. 18,312 (D.D.C. 1978); *Archibald v. Pan American Airways, Inc.*, 460 F.2d 14, 16 (9th Cir. 1972); *Kaplan v. Lufthansa German Airlines*, 12 Av. Cas. 17,933, 17,935 (E.D. Pa. 1973).

<sup>52</sup> *Campbell, Airlines' Responsibilities to Passengers: Recent Theories and Extensions*, 43 J. AIR L. & COM. 289, 295-96 (1977).

<sup>53</sup> *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 541 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976), *remanded*, 14 Av. Cas. 18,312 (D.D.C. 1978).

of oversales.<sup>54</sup> Thus a bumped passenger may pursue any available common law remedy, even if the airline has not violated its boarding priority rules. As a practical matter, the decision by the Supreme Court in *Nader* enabled bumped passengers to sue in tort for misrepresentation.<sup>55</sup>

If a carrier affirmatively represented that a seat was guaranteed a passenger holding a confirmed reservation, and he was subsequently bumped, a case of misrepresentation would be relatively easy to establish. In perhaps all but a handful of cases, however, the carriers would make no such representation. The passenger would then be forced to contend that he reasonably believed that a confirmed reservation precluded the possibility of his being bumped and that the carrier had breached a duty to disclose that its reservation practices, such as overbooking, could result in an oversale. This latter contention was made in *Nader*, and the district court on remand found that a duty of disclosure did exist and was breached by the carrier, justifying the imposition of compensatory and punitive damages for misrepresentation.<sup>56</sup>

### ECONOMIC REGULATION 1050

A developing industry-wide trend toward a higher rate of oversales, growing numbers of consumer complaints about CAB regulation, and an increasing number of lawsuits instituted against carriers by bumped passengers persuaded the CAB to initiate a reexamination of its policy regarding oversales.<sup>57</sup> This two-year reexamination culminated in the promulgation of Economic

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<sup>54</sup> 426 U.S. 290, 305 (1976). The disposition of this case by various federal courts has raised many interesting and complex issues that are beyond the scope of this comment. For a thorough discussion, see generally 42 J. AIR L. & COM. 881 (1976); Campbell, *Airlines' Responsibilities to Passengers: Recent Theories and Extensions*, 43 J. AIR L. & COM. 289 (1977); S. Tice, *Overbooking of Airline Reservations in View of "Nader v. Allegheny Airlines, Inc.": The Opening of Pandora's Box*, 43 J. AIR L. & COM. 1 (1977); Comment, *Federal Preemption of State Law: The Example of Overbooking in the Airline Industry*, 74 MICH. L. REV. 1200 (1976).

<sup>55</sup> Campbell, *Airlines Responsibilities to Passengers: Recent Theories and Extensions*, 43 J. AIR L. & COM. 289, 300 (1977).

<sup>56</sup> *Nader v. Allegheny Airlines, Inc.*, 14 Av. Cas. 18,312, 18,316 (D.D.C. 1978).

<sup>57</sup> CAB EDR-296, *supra* note 7.

Regulation 1050 in 1978.<sup>58</sup> ER-1050 has changed existing regulations regarding oversales in the following respects:

*A. Denied Boarding Compensation Increased*

The percentage rate of compensation available to a bumped passenger has been raised from 100 percent to 200 percent of ticket value. The minimum and maximum levels of payment have been increased to \$75 and \$400 from \$25 and \$200, respectively.<sup>59</sup> The definition of ticket value, moreover, has been expanded beyond the value of the first remaining coupon to include all remaining flight coupons up to a passenger's next stopover, if four hours or longer, or his destination. United States transportation taxes are included in this new definition of ticket value.<sup>60</sup>

ER-1050 eliminates a major exception to a passenger's eligibility for denied boarding compensation. Under the 1967 regulations, a passenger was ineligible for compensation if a carrier provided him with alternative transportation that arrived at his next stopover or destination within two hours of his originally scheduled arrival time, or four hours in the case of foreign air transportation.<sup>61</sup> The CAB estimates that over fifty percent of all bumped passengers were ineligible for any compensation because of this alternative transportation exception in the superseded regulation.<sup>62</sup> These passengers are now eligible for one-half of the compensation otherwise payable.<sup>63</sup> The CAB justified these changes by concluding that the amounts and availability of compensation were inadequate and that increased compensation to bumped passengers would create an additional economic incentive for carriers to reduce oversales.<sup>64</sup>

*B. Solicitation of Volunteers Required*

Under ER-1050, carriers are required to seek persons who will volunteer to relinquish their confirmed reservations before any

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<sup>58</sup> CAB ER-1050, *supra* note 3.

<sup>59</sup> CAB ER-1050, *supra* note 3, at 24,283 (to be codified in 14 C.F.R. § 250.5).

<sup>60</sup> *Id.*

<sup>61</sup> 14 C.F.R. § 250.6(b) (1978).

<sup>62</sup> CAB Comments on ER-1050, *supra* note 6, at 24,280.

<sup>63</sup> CAB ER-1050, *supra* note 3, at 24,283 (to be codified in 14 C.F.R. § 250.5).

<sup>64</sup> CAB Comments on ER-1050, *supra* note 6, at 24,280.

passenger may be bumped against his will.<sup>65</sup> The objective of this requirement is to reduce "involuntary" bumping to the smallest practicable level in the event an oversale cannot be avoided.<sup>66</sup> The CAB declined to prescribe a method for soliciting volunteers; rather, carriers were encouraged to experiment in finding the most effective methods.<sup>67</sup>

While the CAB has required carriers to pay a significantly higher rate of denied boarding compensation to passengers bumped involuntarily, it refrained from specifying the level of compensation payable to volunteers. This determination was left to the discretion of each carrier because of disagreement over the amount or type of compensation that would be sufficient to attract volunteers.<sup>68</sup> One carrier argued that compensation much lower than that prescribed for nonvolunteers would be sufficient to attract enough volunteers to eliminate involuntary bumping almost entirely.<sup>69</sup> It further argued that compensation for volunteers must be significantly lower than that offered to nonvolunteers if carriers were to have an economic incentive to make a genuine effort to solicit volunteers.<sup>70</sup> Several other carriers took the opposite position, arguing that compensation for volunteers should be higher than that for nonvolunteers. They contended that passengers would not volunteer if they learned that compensation was higher for those passengers bumped involuntarily.<sup>71</sup> The CAB conceded the possibility that, once passengers became familiar with the alternative amounts of compensation available, carriers might be forced

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<sup>65</sup> CAB ER-1050, *supra* note 3, at 24,283 (to be codified in 14 C.F.R. § 250.2b).

<sup>66</sup> CAB Comments on ER-1050, *supra* note 6, at 24,278.

<sup>67</sup> *Id.* at 24,279.

<sup>68</sup> *Id.* It appears that the CAB was greatly influenced by the comments of American Airlines in reaching this decision.

<sup>69</sup> American Airlines submitted studies indicating that volunteers might be readily obtained by offering persons relatively small sums of money. Comments of American Airlines, Inc., upon CAB EDR-334, submitted to the CAB on November 17, 1977. These comments are on file with the CAB in Washington, D.C. [hereinafter cited as American's Comments].

<sup>70</sup> *Id.*

<sup>71</sup> Comments of Delta Airlines, Inc., on CAB EDR-334, submitted to the CAB on November 21, 1977 [hereinafter cited as Delta's Comments]; Comments of Eastern Airlines, Inc., on CAB EDR-334, submitted to the CAB on November 21, 1977 [hereinafter cited as Eastern's Comments]. These comments are on file with the CAB in Washington, D.C.

to offer greater compensation to volunteers to implement the program effectively.<sup>72</sup>

Although the CAB declined to prescribe a method for soliciting volunteers, it did require each carrier to give more information to passengers of a certain status when it attempted to execute its volunteer solicitation program.<sup>73</sup> If a passenger is in danger of being bumped involuntarily, the carrier must inform him of the compensation available to both passengers bumped involuntarily and passengers bumped voluntarily. Unless such passenger is fully informed, he may not be involuntarily bumped. If a passenger is not in danger of being bumped involuntarily, the carrier may request that he volunteer without informing him of compensation available to those who are involuntarily bumped.<sup>74</sup> Carriers can distinguish those passengers in danger of being bumped only by reference to their boarding priority rules. The method of soliciting volunteers selected by any carrier is therefore directly related to the character of the boarding priority rules it has adopted.

### C. Boarding Priority Rules Publicized

Under regulations superceded by ER-1050, carriers were required to file with the CAB nondiscriminatory boarding priority rules to be used by the carrier to determine which passengers holding confirmed reservations would be denied boarding on an over-sold flight.<sup>75</sup> The CAB, however, concluded that these rules were insufficiently publicized and often so broadly drafted that they invited arbitrary action by airline personnel.<sup>76</sup> ER-1050, as adopted on May 30, 1978, requires boarding priority rules to be written in a clear and specific manner so that the average passenger can ascertain the approximate likelihood of his being bumped.<sup>77</sup>

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<sup>72</sup> CAB Comments on ER-1050, *supra* note 6, at 24,279.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> 14 C.F.R. § 250.3 (1978).

<sup>76</sup> CAB Comments on ER-1050, *supra* note 6, at 24,281; Comments of the Aviation Consumer Action Project upon CAB EDR-334. These comments were submitted to the CAB on November 22, 1977, and are on file with the CAB in Washington, D.C. [hereinafter cited as ACAP's Comments on CAB EDR-334]. For example, some boarding priority rules allowed carrier personnel to bump "the most logical passenger" or "the least inconvenienced passenger." CAB Comments on ER-1050, *supra* note 6, at 24,281.

<sup>77</sup> CAB Comments on ER-1050, *supra* note 6, at 24,281; CAB ER-1050, *supra* note 3, at 24,283 (to be codified in 14 C.F.R. § 250.3).

To insure that this standard is met, ER-1050 requires boarding priority rules to be filed as tariffs so that the CAB and the public will have an opportunity to evaluate them.<sup>78</sup> In addition, airlines are required to make copies of their boarding priority rules available at ticket counters and boarding points<sup>79</sup> and to make reference to their availability in notices posted at ticket counters and enclosed within ticket coupons.<sup>80</sup>

Prior to September 3, 1978, the effective date of ER-1050, most carriers had attempted to comply with the new regulations by filing their proposed boarding priority rules as tariffs. The CAB, however, rejected the two types of boarding priority rules most frequently submitted in an order issued on August 17, 1978.<sup>81</sup> Proposed rules which gave priority to passengers in a higher fare category were suspended. The CAB stated that such rules would be valid only if specific notice of boarding priority rules was given to lower fare passengers. The CAB also suspended all proposed rules determining boarding priority on a first-come, first-serve basis. These rules were suspended because they were ambiguous and inconsistent with actual check-in procedures. For example, some carriers specified the departure area as the location at which to establish priority instead of the locations where tickets or boarding passes are issued. Other boarding priority rules were unclear or failed entirely to specify where a passenger must present himself to establish priority.<sup>82</sup>

Another reason for suspension of proposed tariffs concerning boarding priority rules was the CAB's concern about check-in procedures and how they affected a passenger's eligibility for increased levels of compensation payable under ER-1050. ER-1050, as adopted on May 30, 1978, did not require that check-in procedures be included in the tariffs concerning boarding priority rules or that notice of such procedures be given to passengers. Check-in requirements established by each carrier, however, must be met by a passenger regardless of his carrier's boarding priority

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<sup>78</sup> CAB ER-1050, *supra* note 3, at 24,283 (to be codified in 14 C.F.R. § 250.3).

<sup>79</sup> CAB ER-1050, *supra* note 3, at 24,284 (to be codified in 14 C.F.R. § 250.9).

<sup>80</sup> CAB ER-1050, *supra* note 3, at 24,284 (to be codified in 14 C.F.R. § 250.11).

<sup>81</sup> CAB Order No. 78-8-98 (August 17, 1978).

<sup>82</sup> *Id.*

rules if he is to confirm his reservation and be eligible for denied boarding compensation in the event he is bumped involuntarily.<sup>83</sup>

The order of August 17 was followed by an order issued on September 1, 1978, which temporarily waived the requirement imposed by ER-1050 that boarding priority rules be filed as tariffs.<sup>84</sup> In this order, the CAB made clear its concern that passengers be fully informed about boarding priority rules and check-in time limits and procedures. It stated, however, that any further action required of carriers pertaining to these issues would be specified in a subsequent order.<sup>85</sup> Such an order was issued on February 15, 1979.<sup>86</sup>

#### *D. Public Disclosure of Information Related to the Oversale Problem Required*

In March of 1977 the CAB adopted on an interim basis a rule requiring all carriers to give actual notice of their overbooking practices.<sup>87</sup> Those notice requirements were substantially incorporated into ER-1050.<sup>88</sup> Carriers are now required to post signs at their ticket offices and include printed messages in their ticket envelopes which contain a statement of notice approved by the CAB.<sup>89</sup> This statement alerts the passenger to the carrier's deliberate overbooking practices and to the possibility that his flight may be oversold. It advises the passenger that the carrier must seek volunteers before involuntarily bumping any passenger and that the carrier must adhere to its boarding priority rules in determin-

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<sup>83</sup> *Id.*

<sup>84</sup> CAB Order No. 78-9-6 (September 1, 1978).

<sup>85</sup> *Id.*

<sup>86</sup> CAB Order No. 79-2-105 (February 15, 1979). The CAB's waiver of the requirement of ER-1050 that boarding priority rules be filed as tariffs was revoked effective May 2, 1979. Carriers are required to give special notice to passengers of boarding priority rules which are not on a first-come, first-served basis. ER-1050 did not specifically deal with check-in procedures; the agency declined to require specific notice of check-in procedures to passengers. The CAB, however, strongly encouraged carriers to voluntarily give such notice in order to obviate rulemaking and enforcement action concerning this issue in the future.

<sup>87</sup> *Construction, Publication, Filing and Posting of Tariffs of Carriers and Foreign Air Carriers: Reexamination of the Board's Policies Concerning Deliberate Overbooking and Oversales*, CAB Docket No. 29,776, ER-987, 42 Fed. Reg. 12,420 (1977).

<sup>88</sup> CAB ER-1050, *supra* note 3, at 24,284 (to be codified in 14 C.F.R. § 250.11).

<sup>89</sup> *Id.*



ing who will be bumped involuntarily. Finally, it informs passengers that copies of the carrier's boarding priority rules and CAB rules regarding denied boarding compensation are available at the carrier's ticket counters and boarding locations.<sup>90</sup>

#### EFFECTS OF ECONOMIC REGULATION 1050 UPON JUDICIAL REMEDIES AVAILABLE TO THE BUMPED PASSENGER

##### A. *Statutory Remedy*

The requirement of ER-1050 that boarding priority rules be written in a clear and specific manner will facilitate the establishment of the statutory claim under Section 404(b) of the Act. Many ambiguous boarding priority rules gave carriers almost unbridled discretion to select a passenger to be bumped and made it virtually impossible for an aggrieved passenger to verify that a carrier had acted in violation of its stated priorities. The standard of clarity imposed by ER-1050 should supply passengers with fixed criteria against which to measure the conduct of the airlines during the boarding process. The CAB's order of August 17, 1978, suspending many carriers' boarding priority rules indicates that the new standard will be enforced. Public dissemination of airlines' boarding priority rules will increase passengers' awareness of their rights and may encourage bumped passengers to utilize judicial remedies. Moreover, the threat of lawsuits based upon the statutory claim, combined with more intense CAB and public scrutiny of the rules, will induce carriers to adhere more strictly to the boarding priority rules they have adopted.

##### B. *Common Law Remedy*

ER-1050 requires each carrier to give its passengers actual notice of its practice of overbooking and of the possibility that a passenger with a confirmed reservation may be bumped because of an oversale. If an airline, presumably by mistake, affirmatively represents that a confirmed reservation guarantees passage on a particular flight, it would be extremely difficult for a bumped passenger to argue that he reasonably relied upon such a representation when he had received actual notice to the contrary. In the absence of an affirmative misrepresentation, the *Nader* case states

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<sup>90</sup> *Id.*

that liability may be imposed for breach of a duty to disclose that airline reservation practices could result in the bumping of passengers with confirmed reservations.<sup>91</sup> The requirement of ER-1050 that actual notice of such facts be given each passenger directly precludes a claim on these grounds. Therefore, a common law claim of misrepresentation appears untenable if each carrier complies with the requirements of the new regulations.

#### EVALUATION OF ER-1050 AS AN EFFECTIVE REGULATORY RESPONSE TO THE OVERSALES PROBLEM

ER-1050 reflects a significant change in the CAB's policy regarding oversales. The goal of the 1967 regulations was remedial. The CAB sought only to compensate the bumped passenger.<sup>92</sup> Oversales were viewed as an unavoidable by-product of a flexible reservation system that should be maintained. Consequently, any regulation which might interfere with carriers' control over their reservation practices was purposely avoided.<sup>93</sup> In contrast, the goal of ER-1050 is prophylactic. It seeks to create economic incentives of sufficient magnitude to compel carriers to control the causes of oversales.<sup>94</sup> ER-1050 and action taken by the CAB subsequent to its adoption, moreover, clearly indicate that the CAB is determined to reduce involuntary bumping to the lowest practicable level, even if effective regulation compromises the existing flexible reservation system.

Ample evidence exists to support this conclusion. For example, in 1967 the CAB withdrew a proposed requirement that carriers notify passengers of their overbooked status prior to flight time. The CAB withdrew this proposal because such a requirement would constitute *de facto* regulation of the reservation practice of overbooking.<sup>95</sup> At that time the CAB endorsed overbooking as a beneficial practice because it was regarded as an integral component of a flexible reservation system.<sup>96</sup> The CAB's change in policy is deflected in ER-1050's requirement of strict public dis-

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<sup>91</sup> *Nader v. Allegheny Airlines, Inc.*, 14 Av. Cas. 18,312 (D.D.C. 1978).

<sup>92</sup> CAB EDR-109, *supra* note 30, at 461.

<sup>93</sup> *Id.*

<sup>94</sup> CAB Comments on ER-1050, *supra* note 6, at 24,280.

<sup>95</sup> CAB EDR-109, *supra* note 30, at 461.

<sup>96</sup> *Id.*

closure of overbooking practices.<sup>97</sup> In its comments accompanying the promulgation of ER-1050, the CAB reserved the option of declaring overbooking illegal unless the oversales it occasions are reduced substantially below current levels.<sup>98</sup>

Change in policy is also evidenced by recent actions of the CAB regarding boarding priority rules. Under superseded regulations carriers were given almost complete discretion to formulate boarding priority rules. These rules were broadly drafted to give the airlines great flexibility in determining which passenger would be denied boarding on an oversold flight. Public disclosure of these rules was not contemplated.<sup>99</sup> In contrast, comments by the CAB accompanying the promulgation of ER-1050 and orders issued subsequent to the adoption of the new regulations indicate that boarding priority rules filed as tariffs must meet the strict standards of ER-1050 if they are to be approved by the CAB.<sup>100</sup> It is also reasonable to conclude that the CAB will soon require that actual notice of boarding priority rules and check-in deadlines and procedures be given to each passenger. Such notice will probably take the form of enclosures in ticket envelopes and signs posted at ticket counters, methods of notice identical to that required of carriers' overbooking practices.<sup>101</sup>

ER-1050's requirement that carriers solicit volunteers before involuntarily bumping any passenger is perhaps the most striking evidence of a change in CAB policy regarding oversales. This requirement marks the first time the CAB has directly imposed a new boarding procedure upon carriers and constitutes a major interference with the previously flexible reservation system. Because the CAB has demonstrated a willingness to regulate to the extent necessary to solve the oversales problem, the effectiveness of ER-1050 in controlling oversales and reducing involuntary bumping may determine whether the CAB feels compelled to

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<sup>97</sup> CAB ER-1050, *supra* note 3, at 24,284 (to be codified in 14 C.F.R. § 250.11).

<sup>98</sup> CAB Comments on ER-1050, *supra* note 6, at 24,279.

<sup>99</sup> CAB Comments on ER-1050, *supra* note 6, at 24,281; ACAP's Comments on CAB EDR-334, *supra* note 76.

<sup>100</sup> CAB Comments on ER-1050, *supra* note 6, at 24,281; CAB Order No. 78-9-6 (August 17, 1978).

<sup>101</sup> See CAB Order No. 78-9-6 (August 17, 1978).

exercise further and more direct controls over carrier reservation practices.

Given its new policy of attempting to control the causes of oversales, the CAB was prudent in choosing economic incentives as opposed to direct regulation of reservation practices. Direct regulation would be inappropriate because as yet the CAB has not determined the extent to which any single reservation practice causes oversales. When the CAB instituted its reexamination of the oversales problem in 1976, it requested data from the carriers to determine the relationship between reservation practices and oversales. At that time, it deemed some quantification of the relationship essential to sound regulatory policy.<sup>102</sup> The CAB, however, suspended this request prior to promulgating ER-1050 because of the burden of accumulating the necessary data.<sup>103</sup> Thus no precise knowledge concerning the magnitude of oversales occasioned by each of the known causative factors currently exists. For example, many assume that overbooking is the major cause of oversales.<sup>104</sup> Estimates of the percentage of oversales caused by overbooking, however, range from 15 percent to 65 percent.<sup>105</sup> Thus it is not certain that reducing or eliminating overbooking would have an appreciable impact on the number of oversales.

Even if one or more reservation practices could be identified as the major causes of industry-wide oversales, an industry-wide uniform imposition of controls over reservation practices may not be efficacious because the primary causes of oversales can vary from carrier to carrier. While great reliance upon "free sale" arrangements or "block ticketing" programs by one carrier may be a chief cause of oversales, an inefficiently managed overbooking program may be the chief cause of another carrier's oversales. Assuming the accuracy of CAB estimates that human and computer error may be responsible for more than 50 percent of industry-wide oversales,<sup>106</sup> creation of economic incentives to upgrade the quality of

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<sup>102</sup> CAB EDR-296, *supra* note 7, at 16,479.

<sup>103</sup> CAB EDR-334, *supra* note 4, at 48,579.

<sup>104</sup> Comments on CAB EDR-296 by the Aviation Consumer Action Project, submitted to the CAB on October 15, 1976, at 13. These comments are on file with the CAB in Washington, D.C. [hereinafter cited as ACAP's Comments on EDR-296].

<sup>105</sup> CAB EDR-334, *supra* note 4, at 48,582.

<sup>106</sup> *Id.*, at 48,583.

carrier operations may be the only viable regulatory alternative.

An alternative method for controlling oversales has been suggested by Northwest Airlines and Allegheny Airlines. They propose that the CAB set a minimum standard of performance for the industry and initiate enforcement actions against carriers whose rates of oversales exceed that standard.<sup>107</sup> The basis of such a proposal is statistical evidence that the general increase in the rate of oversales is attributable only to a few carriers.<sup>108</sup> For example, in 1976 the domestic industry-wide rate of oversales was 7.0 passengers per 10,000 persons enplaned, yet Northwest's was 2.3 and Allegheny's was 4.4. In contrast, Aloha Airlines and Hawaiian Airlines had a combined average rate of 47.5.<sup>109</sup> Statistics indicate that nine carriers carrying one-third of domestic air travelers were responsible for 57 percent of all oversales in 1976.<sup>110</sup> The CAB has not responded publicly to this proposal. Whether it will be seriously considered by the CAB along with the possibility of more direct controls over carriers' reservation practices depends upon the effectiveness of ER-1050 as a regulatory solution to the oversales problem.

The effectiveness of ER-1050 will depend largely upon whether increased amounts of denied boarding compensation and expanded eligibility for such compensation will create an additional economic incentive of sufficient magnitude to persuade carriers to control the causes of oversales. Assuming that the number of bumped passengers remained constant, the total amount of compensation payable by the airline industry would certainly increase under ER-1050. The CAB estimates that approximately 50 percent of all bumped passengers were ineligible for any compensation because of the alternative transportation exception contained in the 1967 regulations.<sup>111</sup> Because these passengers are now eligible for

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<sup>107</sup> Comments on CAB EDR-334 made by Northwest Airlines, Inc., submitted to the CAB on November 16, 1977, at 3 [hereinafter cited as Northwest's Comments]; Comments on EDR-334 made by Allegheny Airlines, Inc., submitted to the CAB on November 22, 1977, at 5 [hereinafter cited as Allegheny's Comments]. These comments are on file with the CAB in Washington, D.C.

<sup>108</sup> Northwest's Comments, *supra* note 107, at 2; Allegheny's Comments, *supra* note 107, at 2.

<sup>109</sup> Northwest's Comments, *supra* note 107, at 2.

<sup>110</sup> Northwest's Comments, *supra* note 107, at 5.

<sup>111</sup> CAB Comments of ER-1050, *supra* note 6, at 24,280.

one-half the compensation otherwise payable under ER-1050 and passengers outside of the exception are now eligible for twice the percentage rate of compensation payable under the superseded regulations, total compensation payable could increase by at least 200 percent.

It is impossible, however, to estimate the magnitude of the additional economic incentive created by ER-1050 for two reasons. First, the definition of ticket value has been greatly expanded and is not presently quantifiable. Since compensation payable to a bumped passenger is based upon a fixed percentage rate of the ticket value, it is not possible to determine the total compensation payable by the airline industry. Second, the CAB accumulated no data on the amounts of denied boarding compensation actually paid to bumped passengers by airlines under the 1967 regulation. Consequently, there is no way to estimate the significance of the increases in the percentage rate of compensation payable under ER-1050 by ignoring the expanded definition of ticket value and using the average yearly payment of denied boarding compensation to bumped passengers as a basis of calculation.

ER-1050 does require each carrier to report how much compensation is paid to passengers who are bumped. It will therefore be possible for the CAB to ascertain the economic impact of the new regulations upon the airline industry. The foregoing analysis indicates, however, that the CAB may have had little basis when it promulgated the new regulations for concluding that ER-1050 would create an additional economic incentive of sufficient magnitude to induce carriers to control the causes of oversales. It seems imperative that the CAB monitor the situation closely in the months ahead to determine the economic impact of ER-1050. Without additional data, there is no basis for concluding that sufficient economic incentive has been created by ER-1050 to compel airlines to control the causes of oversales.

The requirement of ER-1050 that carriers solicit volunteers before bumping a passenger against his will may create temporary problems for carriers. In most cases, carriers do not discover that a flight has been oversold until just prior to its scheduled departure time.<sup>112</sup> Thus solicitation of volunteers at the boarding gate

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<sup>112</sup> Ozark's Comments, *supra* note 15, at 17; Allegheny's Comments, *supra* note 107.

would normally delay the flight's departure.<sup>113</sup> Under a conditional reservation system, however, volunteers may be obtained well in advance of departure time. Passengers under such a system are offered lower fares when they make their reservations if they consent to being bumped in the event of an oversale.<sup>114</sup> For example, Eastern Airlines offers such passengers a refund and free passage on the next available flight if they are bumped.<sup>115</sup> Even if an airline chooses to solicit volunteers at the boarding gate, establishment of earlier check-in deadlines would eliminate the possibility that solicitation of volunteers would delay a flight's departure at its scheduled time. Any difficulties in implementing the program would therefore appear to be solvable. The CAB obviously reached this conclusion during the rulemaking proceeding.<sup>116</sup>

Of greater significance is the possibility that the volunteer program may prove unworkable in the long run. ER-1050 sets high levels of compensation for passengers that are bumped involuntarily, but it allows carriers to determine what level of compensation they will pay volunteers. This was done on the assumption that volunteers could be obtained by payment of relatively small amounts of compensation, giving carriers an incentive to make a genuine effort to solicit volunteers. As passengers become more familiar with their options under the new regulations, however, they may decline to volunteer because of the higher rate of compensation payable to passengers bumped involuntarily. For example, conditional reservations might then become unattractive to passengers who might otherwise use them. In that event, airlines would be forced to raise compensation for volunteers to a higher level than for passengers who are bumped involuntarily. The CAB has acknowledged the possibility that this might occur and apparently believes such an eventuality would not be fatal to the success of the volunteer program.<sup>117</sup> Without an economic incentive, how-

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<sup>113</sup> This is precisely the objection to soliciting volunteers which was raised by carriers in the rulemaking proceeding. Ozark's Comments, *supra* note 15, at 18; Allegheny's Comments, *supra* note 107, at 5-6.

<sup>114</sup> ACAP's Comments on EDR-296, *supra* note 104, at 14; CAB EDR-296, *supra* note 7.

<sup>115</sup> Eastern's Comments, *supra* note 71, at 1.

<sup>116</sup> CAB Comments on ER-1050, *supra* note 6, at 24,279.

<sup>117</sup> *Id.*

ever, it seems doubtful that any carrier would make the effort necessary to obtain an optimal number of volunteers.

Public disclosure of information concerning oversales may pose additional problems for carriers. ER-1050 requires that each passenger be given actual notice of airline overbooking practices, the possibility of an oversale, the volunteer solicitation program, and the availability of copies of each carrier's boarding priority rules and the CAB rules requiring the payment of compensation to passengers bumped involuntarily.<sup>118</sup> Both the CAB and commentators have noted that disclosure of such information could encourage travelers to book multiple reservations to protect themselves against the prospect of being bumped.<sup>119</sup> ER-1050's disclosure requirements may create an unfortunate impression in the public mind of a higher possibility of being bumped than is actually the case. If this situation develops, "no shows" and "reservation turnover" will increase. This may necessitate increased reliance by the carriers on overbooking, which could result in increased oversales. At the present time, there is no available data from which to evaluate the likelihood of this occurrence.

Aside from questions concerning its workability and effectiveness, ER-1050 has raised important issues of international law. The CAB gave its new oversales regulations extraterritorial application in order to give protection to U.S. travelers abroad. Thus ER-1050 covers all passengers with confirmed reservation space verified in the United States traveling on any flight originating or terminating or serving any point in the United States.<sup>120</sup>

A number of foreign carriers, however, have not filed tariff rules

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<sup>118</sup> CAB ER-1050, *supra* note 3, at 24,284-85 (to be codified in 14 C.F.R. § 250.11).

<sup>119</sup> CAB EDR-109, *supra* note 30, at 461; ACAP's Comments on EDR-296, *supra* note 104.

<sup>120</sup> CAB Comments on ER-1050, *supra* note 6, at 24,281. When 14 C.F.R. Part 250 was adopted in 1967, it applied only to United States flag carriers. In 1974, it was extended to foreign air carriers. CAB EDR-334, *supra* note 4, at 48,582. United States oversales regulations were then made applicable to any flight originating or terminating or serving any point in the United States. Portions of flights originating or terminating in the United States which occurred wholly outside the United States were excluded. Only passengers with confirmed reservation space verified in the United States were protected. 14 C.F.R. § 250.2 (1978). The CAB chose to retain these provisions and to give ER-1050 the same extraterritorial application as the superceded regulations. CAB Comments on ER-1050, *supra* note 6, at 24,281.



required by ER-1050.<sup>121</sup> They contend that U.S. oversales regulations should not apply to flights departing foreign countries for the United States because oversales are subject only to the laws of the country in which they occur.<sup>122</sup> Foreign governments also have objected to the extraterritorial application of ER-1050 and have registered complaints with the Department of State. They contend that the CAB has no authority to impose regulations unilaterally upon activities in foreign nations and that such action may only be taken pursuant to bilateral agreement.<sup>123</sup> Moreover, carriers and foreign governments contend that ER-1050 alters existing bilateral agreements. Great Britain, for example, argues that Bermuda II prohibits the CAB from requiring British carriers to file any particular form of tariff.<sup>124</sup>

In response to these developments, the CAB has adopted a new rule that applies to all carriers engaged in foreign transportation which have failed to comply with ER-1050.<sup>125</sup> This rule requires such carriers to give actual notice in any advertisement circulated in the United States that they do not comply with U.S. Government rules on oversold flights. Carriers are also required to include this notice in each ticket sold by it or its agents in the United States.<sup>126</sup> The CAB stands firm on the validity of the new rule. It asserts that any sovereign state has the authority to regulate the advertising and sales practices taking place within its borders to insure adequate protection for its citizens, regardless of any bilateral agreement. Therefore, it unilaterally may require foreign carriers

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<sup>121</sup> Part 250—Oversales: Advertising Disclosure of Noncompliance With Oversales Rules, CAB ER-1078, 43 Fed. Reg. 50,164, 50,165 (1978) [hereinafter cited as CAB ER-1078].

<sup>122</sup> *Id.*; See Comments of Aeromexico on CAB EDR-334, submitted to the CAB on November 22, 1977, at 2. Comments of Compania Mexicana De Avia-cion, S.A. (Mexicana) on CAB EDR-334, submitted to the CAB on November 22, 1977. These comments are on file with the CAB in Washington, D.C.

<sup>123</sup> CAB ER-1078, *supra* note 121, at 50,165. Many foreign carriers urge the CAB to waive extraterritorial application to facilitate the negotiation of inter-nationally uniform oversales regulations. Comments of certain members of the International Air Transport Association on CAB EDR-334, submitted to the CAB on November 21, 1977, at 8. These comments are on file with the CAB in Washington, D.C.

<sup>124</sup> CAB ER-1078, *supra* note 121, at 50,165.

<sup>125</sup> CAB ER-1078, *supra* note 121, at 50,166 (to be codified in 14 C.F.R. § 250.12).

<sup>126</sup> *Id.*

doing business in the United States market to conform to its domestic laws.<sup>127</sup>

The repercussions of this recent action taken by the CAB with regard to ER-1050 are as yet uncertain. The CAB undoubtedly has the power to regulate the sales and advertising practices of foreign carriers within the United States. Thus the CAB can attempt to compel foreign carriers to fully comply with the requirements of ER 1050. Public disclosure of a foreign carrier's failure to comply with CAB regulations could result in a substantial loss of revenue to that carrier if a sizable number of U.S. passengers choose to travel abroad with airlines that adhere to the CAB's new oversales regulations. These foreign carriers may, however, continue to refuse to comply with ER-1050. Foreign governments may seek instead to protect their airlines from the prospect of economic loss by taking retaliatory action affecting flights of U.S. carriers entering their territory. Future developments will reveal whether foreign carriers eventually choose to comply with ER-1050 or attempt to take retaliatory action through their respective governments.

#### CONCLUSION

Past experience and the various proposals submitted by the industry and the CAB suggest that, short of direct controls over airline reservation practices, the problem of oversales cannot be eliminated. Because the CAB has a continuing commitment to a reservation system which allows for as much flexibility as possible in the making and altering of reservations, a policy decision was made in ER-1050 to preserve this flexibility while at the same time making clear that reductions in oversales must be effected. Whether the provisions of ER-1050 will be successful in reducing oversales to an acceptable level remains to be seen. The CAB, however, has made explicit its intention to reduce the flexibility inherent in current reservation practices should this prove necessary to reduce oversales.

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<sup>127</sup> CAB ER-1078, *supra* note 121, at 50,165.

