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# AIRLINE DEREGULATION—ONLY PARTIALLY A HOAX: THE CURRENT STATUS OF THE AIRLINE DEREGULATION MOVEMENT

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## I. INTRODUCTION

IN 1975, LONG before any legislation was passed, I wrote an article addressing various airline economic deregulation proposals setting forth a number of reasons why extensive deregulation was not necessary to achieve the professed goals of its supporters.<sup>1</sup> In short, I put forth the thesis that arguments for airline deregulation might be a hoax, because: (1) the prior Federal Aviation Act<sup>2</sup> was already procompetitive and, with the enlightened application which it had generally received, had fostered extensive although not unfettered competition; (2) the former law also provided for price competition and, while the Civil Aeronautics Board (CAB or the Board) had not been as liberal in this respect as it had been concerning route competition, there was considerable price competition in the airline industry with Americans enjoying the world's lowest airline passenger fares and air freight rates; and (3) the former statute also guarded against the other major ghost seen by the deregulators at that time, *i.e.*, the specter of anticompetitive agreements and practices adverse to the public interest.<sup>3</sup>

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<sup>1</sup> Callison, *Airline Deregulation—A Hoax?*, 41 J. AIR L. & COM. 747 (1975).

<sup>2</sup> Originally enacted as the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938), and later reenacted without significant change, after review, as the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1976).

<sup>3</sup> In other contexts, the author noted that the prior Act recognized the general public view that, in many respects, the airlines were public utilities. The

Despite the general absence of need for airline deregulation typified by these examples,<sup>4</sup> Congress ultimately passed the Airline

statute therefore imparted a degree of stability and reliability of service, with reasonable and steadily increasing but controlled degrees of competition, which the public found satisfying.

Concerns were also expressed that extensive deregulation (as contrasted to updating and modernizing the former statute, but retaining its basic approach) could lead to instability and general deterioration of service, perhaps with major airline services being concentrated in the hands of only a few strong, surviving carriers. It was further argued that this would cause those who viewed the airlines as a type of public utility to press for *new* forms of regulation in order to restore service—forms of regulation that, in the long run, would prove to be more burdensome than the general utility type of regulation which had existed since 1938. Indeed, there was a concern that serious deterioration of the system under extensive deregulation could ultimately lead to nationalization. *See, e.g., Proposed Amendments to the Federal Aviation Act of 1958: Hearings on S. 292 and S. 689 before the Subcomm. on Aviation of the U.S. Senate Commerce Comm., 95th Cong., 1st Sess. Part 2 at 861-933 (1977).*

Whether these various concerns were correctly held, or whether the deregulators were correct in their view that the drastic changes which they sought would improve the already good air transportation system in this country and result in a better allocation and use of resources, only time will tell. Until the transition has been made to *real* deregulation and until the airline industry has experienced a full cycle of good and bad economic conditions, the ultimate impact of extensive deregulation on the airline industry and on the public cannot be told.

<sup>4</sup>It might be asked then what caused the airline deregulation movement. There were many causes, but the main ones seem to have been as follows. First, for many years there existed fairly extensive academic interest in the subject. A number of economics professors had said for some time that transportation modes were in no sense public utilities, as they had been viewed in the past. *See, e.g., R. CAVES, AIR TRANSPORT AND ITS REGULATORS: AN INDUSTRY STUDY (1962); G. DOUGLAS & J. MILLER, III, ECONOMIC REGULATION OF DOMESTIC AIR TRANSPORT: THEORY AND POLICY (1974); W. JORDAN, AIRLINE REGULATION IN AMERICA: EFFECTS AND IMPERFECTIONS (1970); Keeler, Airline Regulation and Market Performance, 3 BELL J. ECON. & MANAGEMENT SCI. 399 (1972).* These writers felt that air carriers had no inherent tendencies toward monopoly, and that they could serve the public better at lower fares if they were not regulated as utilities.

Second, this academic position was allegedly confirmed by the early experience of intrastate carriers in California and, more recently, in Texas, which, operating without CAB regulation, were providing good service with low fares. There were many reasons why these intrastate experiences should not have been transposed into national economic models, as much of the academic thinking did. Nevertheless, while the situation ultimately was quite different, especially in California where the state eventually found it necessary to regulate more rigidly in some respects than the CAB ever did, the experiences of the intrastate carriers fed the early deregulation movement in the airline industry. *See, e.g., Levine, Is Regulation Necessary? California Air Transportation and National Regulatory Policy, 74 YALE L.J. 1416 (1965); Simat, Helliesen & Eichner, The Intrastate Air Regulation Experience in Texas and California, in REGULATION OF PASSENGER FARES AND COMPETITION AMONG THE AIRLINES 40 (P. Macavoy & J. Snow eds. 1977).*

Third, in the early 1970's the CAB made a number of moves which many

viewed as being unduly anticompetitive, despite the procompetitive nature of the Federal Aviation Act as it then existed. For example, because of the severe economic adversities which many carriers suffered in the early 1970's, the CAB, over objections by Delta Air Lines and others, temporarily approved a number of so-called capacity control agreements among northern transcontinental carriers, which enabled those carriers to limit the degree of competition among themselves in such markets as New York-Los Angeles, and to shift resources to other markets where they competed with carriers which had not entered into such anticompetitive agreements. For a history of these agreements see Capacity Reduction Agreements Case, CAB Docket No. 22,908 (Nov. 6, 1974). Again reacting to recessionary conditions, the CAB also imposed an informal "moratorium" on new route cases in the early 1970's. In addition, the CAB imposed an especially rigid set of fare controls on the air transport industry during the first half of the 1970's, not only over many objections by the carriers, but also over the objections of some of the economists who had been calling for deregulation. See, e.g., Domestic Passenger Fare Investigation, CAB Docket No. 21,866, Phase 9 (May 14, 1970).

During the same time period, 1970-1974, a number of the pro-deregulation economists found their way into the Ford Administration, and began to criticize the CAB's approaches, particularly concerning fares. This set the stage for a concentrated effort to amend the agency's enabling statute.

Three actors quickly came on stage. One was President Ford, who used deregulation in general and deregulation of the airline industry in particular, as a major campaign issue during the 1975-1976 campaign. Various Ford Administration deregulation proposals were advanced in those years, primarily the Aviation Act of 1975, submitted to Congress in October, 1975 as S. 2551, 94th Cong., 1st Sess. (1975).

Also in the 1975-1976 time frame, Senator Edward Kennedy's Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary jumped the gun on the Aviation Subcommittee of the Senate Commerce Committee before which the deregulation bills were pending. Senator Kennedy's committee held a widely publicized hearing in 1976 regarding airline deregulation, which further spurred the matter along. *Oversight of Civil Aeronautics Board Practices and Procedures: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 3 (1975).

The third actor was Senator Howard Cannon, then Chairman of the Senate Aviation Subcommittee, who introduced a number of deregulation bills of his own. His committee started a series of hearings in 1976 which, along with hearings on still more deregulation bills in the House, ultimately spread over three years, keeping matters at a high pitch. See *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 94th Cong., 2d Sess. (1976); *Reform of Economic Regulation of Air Carriers: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transp.*, 94th Cong., 2d Sess. (1976); *Hearings on S. 292 and S. 689 Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 95th Cong., 1st Sess. (1977); *Aviation Regulatory Reform: Hearings on H.R. 8813 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transp.*, 95th Cong., 1st Sess. 9 (1977); *Aviation Regulatory Reform: Hearings on H.R. 9297 and H.R. 11,145 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transp.*, 95th Cong., 2d Sess. (1978).

President Ford lost the 1976 campaign but the subject of deregulation had become so popular that President Carter also espoused the theory. With respect to the airlines, he was convinced by his staff shortly after he assumed office that he could exploit the movement, make a "quick hit," as they called it, by en-

Deregulation Act of 1978 (the Act)<sup>5</sup> with respect to domestic United States transportation. Congress has more recently passed

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dorsing the airline deregulation bills then in Congress. *Washington Star*, Feb. 3, 1977, at A-6, col. 5; *Washington Post*, Feb. 24, 1977, at C13, col. 2.

Then came Alfred Kahn, an economics professor from Cornell University, who was appointed Chairman of the CAB in June, 1977. He held essentially the same views as those academics who had started the deregulation movement. Therefore, without awaiting congressional action, he introduced such programs as wholesale grants of new route authority on a multiple/permissive basis in various markets, allowing market forces to decide which carriers would actually enter a market and which ones would remain—a sort of facsimile-in-advance of deregulation. *See Oakland Service Case*, CAB Docket No. 30,669, CAB Order Nos. 78-4-121 (Apr. 19, 1978) and 78-9-96 (Sept. 21, 1978); *Improved Authority to Wichita Case*, CAB Docket No. 28,848, CAB Order No. 78-3-78 (Mar. 16, 1978).

These CAB actions happened to coincide with an upturn in the economy and the consequent return of prosperous times to the airline industry—a rapid traffic growth and increasing profits. This quasi-deregulation by the CAB was given credit by many for this airline prosperity. There is good reason to question the causal connection between these CAB policies and the favorable economic results which the industry experienced at that time, but the conditions helped Senator Cannon move a strong deregulation bill through the Senate in early 1978. (S. 2493, 95th Cong., 2d Sess. 1978)).

Largely as a result of the work of Representative Elliott Levitas of Georgia, who introduced the concept of sunseting the CAB after a transition period (*see* H.R. 9297, 95th Cong., 1st Sess. (1977)), the first of the airline regulatory reforms to propose sunset, sponsored by Rep. Levitas) the House also passed a deregulation bill later that year. (H.R. 12,611, 95th Cong., 2d Sess. (1978)). Representative Levitas was the staunchest advocate of real deregulation on either side of the Congress.

During a time of continuing airline prosperity, the bill which came out of conference between the two chambers in the late fall of 1978 took many of the strongest deregulation positions from both the Senate and House bills, and forged them into what was clearly more deregulation than had been anticipated. This bill easily passed during the closing hours of the 95th Congress. Finally the congressional debates were over and the airline industry had new marching instructions with the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified at 49 U.S.C.A. §§ 1301-1542 (Supp. 1979)).

Viewed by hindsight, the leaders of the airline deregulation movement were Senators Cannon and Kennedy, Congressman Elliott Levitas, Dr. Alfred Kahn, and the Ford Administration, spurred on, of course, by the various academic economists who pushed the theory in the beginning and throughout. The Carter Administration also played a role, but its major contribution was appointing Alfred Kahn to the CAB.

The absence of a significant public role throughout this period is a most interesting facet of the airline deregulation movement. The impetus for change came almost entirely from the academics and politicians; the public never did call for deregulation of the airline industry. Various public opinion polls had shown that the airlines consistently ranked at the very top among all industries in terms of consumer satisfaction and confidence. *See* 236 *AV. DAILY* 118 (1978).

<sup>5</sup> Pub. L. No. 95-504, 92 Stat. 1705 (codified at 49 U.S.C.A. § 1301 (Supp. 1979)) [hereinafter cited only to the current code].

a companion bill concerning international air transportation.<sup>6</sup>

This article will show that in many respects, the 1978 Act was not entirely a hoax—it in fact extensively changed the system for regulating United States domestic air transportation. In addition, as administered by the CAB, the Act was far more deregulatory than anything contemplated in 1975 when I questioned the authenticity of the “reform” movement. On the other hand, this article will demonstrate that Congress was unduly timid in this early attempt at rolling back governmental regulation. Once Congress chose to accept the economic theories behind deregulation, it should have accepted them fully and boldly. The Act did only a partial job: it left a number of the former controls in place, at least temporarily; it imposed some *new* regulatory burdens upon the airline industry; and worse, it left the CAB in existence. As a consequence, relieved of its traditional responsibilities, the agency’s staff has in some respects turned its attention to new types of regulation.

The lesson to be learned is that real deregulation can be achieved only if the agency that has been responsible for the regulation is abolished. Congress, to its credit, has provided for abolition of the CAB in 1985.<sup>7</sup> Experience to date indicates, however, that when Congress chose the option of extensive deregulation, it should have abolished the agency immediately.

## II. THE MAJOR DECREASES IN REGULATION UNDER THE AIRLINE DEREGULATION ACT OF 1978

To understand the deregulation law, it is necessary to compare the economic theory of the law prior to 1978, and the theory that Congress purported to adopt in the 1978 Act. This comparison reveals that Congress only partially embraced the new economic theories. A total commitment to deregulation would have compelled the abolition of the CAB immediately, doing away with virtually all economic regulation of the transportation industry.

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<sup>6</sup> Pub. L. No. 96-192, 94 Stat. 35 (1980) (to be codified in scattered sections of 49 U.S.C.). For a discussion of the international changes, see notes 114-23 *infra* and accompanying text.

<sup>7</sup> 49 U.S.C.A. § 1551(a)(4) (Supp. 1979).

### A. *The Differing Theories of the Prior and the Present Law*

The prior law was patterned on the theory of transportation economics and regulation which had existed in this country since before the twentieth century. The theory held that common carrier transportation was in many respects a public utility. As such, it was believed that fairly extensive economic regulation of routes, fares, rates, intercarrier agreements, interlocking relationships, mergers and acquisitions, with limited immunities from the anti-trust laws, was necessary to insure that all portions of the public, in both large markets and small markets, would be adequately served.

At the heart of this prior system was the franchise or the licensing program. In the airline industry, the CAB was mandated to encourage airline competition. The basic statute was procompetitive: "It is significant that Congress, addressing itself to the air transport industry, deliberately fashioned this 1938 law [the Civil Aeronautics Act, later the Federal Aviation Act of 1958] so as to identify competition in express language as a key element of the public interest."<sup>8</sup> The competition envisioned by the prior law was not, however, to be unfettered competition: "[T]his was one of an emerging group of statutes that did not regulate the so called 'natural monopolies' that identified conventional public utility regulation, but instead called for 'regulated competition,' achieving the benefits of competition without the evils of unrestrained entry or undercost rate wars."<sup>9</sup> Indeed, the CAB was also mandated by the prior law to foster sound economic conditions in the industry in order to assure continuation and stability of service.<sup>10</sup>

In practice, while the CAB's policies were most often procompetitive, the Board limited the number of carriers in a given market to a level which it felt could operate economically.<sup>11</sup> In

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<sup>8</sup> *Continental Air Lines, Inc. v. CAB*, 519 F.2d 944, 953 (D.C. Cir. 1975).

<sup>9</sup> *Id.*

<sup>10</sup> 49 U.S.C. § 1302(b) (1976).

<sup>11</sup> Compare CIVIL AERONAUTICS BOARD, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 1969, at 2-8 (1969) (reflecting relatively rosy economic times, citing a large number of new route awards including extensive amounts of new competition) with CIVIL AERONAUTICS BOARD, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 1971, at 1, 3-6 (1971) (reflecting much more adverse economic conditions and thus exhibiting a period of CAB caution in establishing new routes). See also Callison, *Airline Deregulation—A Hoax?*, 41 J. AIR L. & COM.

this sense, the franchise system achieved the desired stability and continuity of service. This did, however, somewhat restrain competition even though by the early 1970's, *before* the deregulation movement got underway, over 79% of the nation's scheduled air passenger traffic was *already* competitively served<sup>12</sup> and, in most major markets, multiple carriers were certificated.<sup>13</sup> Moreover, the prior law specifically prohibited the CAB from restricting the right of an air carrier, once certificated, to add to or change schedules, equipment, accommodations and facilities for performing the authorized air transportation and service as the development of its business and the demands of the public required.<sup>14</sup> Thus, not only was competition fostered under the prior law, but once certificated, the carriers were allowed to compete in whatever manner they desired, generally free of governmental dictation as to the quantity or quality of their service. The licensing system nevertheless imposed some restraint on new entrants and on entry by existing carriers into new markets.

In return for this competitively oriented yet somewhat restraining licensing system, the old law imposed firm public service responsibilities on air carriers. Such responsibilities included: obligations to serve both large and small communities and both large and small markets except where the CAB relieved a carrier of responsibility at a specific city;<sup>15</sup> CAB control over airline rates and fares;<sup>16</sup> extensive control over airline accounts, with elaborate reporting requirements;<sup>17</sup> prohibitions against unfair practices and

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747, 769-71 n.71 (1975) (citing cases decided during varying economic conditions).

<sup>12</sup> Based on domestic scheduled carrier revenue passenger miles in 1972, 5 CAB O & D of Airline Passenger Traffic—Domestic (1972 addition).

<sup>13</sup> For example, three carriers were authorized to operate in each of the New York-Los Angeles, New York-Miami, Chicago-Atlanta, Chicago-Miami and Dallas/Ft. Worth-Los Angeles markets. In some markets, Atlanta-Miami/Ft. Lauderdale and New York-Chicago, as many as five carriers were authorized. CIVIL AERONAUTICS BOARD, CAB AIRLINE ROUTE MAPS AND AIRPORT TO AIRPORT MILEAGE (1978).

<sup>14</sup> 49 U.S.C. § 1371(e)(4) (1976).

<sup>15</sup> Even then, this could be done only after due process including hearings for all parties concerned, especially the communities involved. *Id.* § 1371(g), (j).

<sup>16</sup> *Id.* §§ 1373, 1374 & 1482.

<sup>17</sup> *Id.* §§ 1377, 1385.



unfair competition;<sup>18</sup> and various other controls and monitoring of airline operations.<sup>19</sup>

It was a balanced system—mild restraints on entry and competition in return for firm public service obligations of the carriers. The economic principles espoused by proponents of airline deregulation point 180 degrees in the opposite direction. These principles state that airlines are in no manner public utilities, but are just like any other business. The theories hold that these businesses are also of importance to the public, are not governmentally controlled, and yet their services and products are forthcoming at reasonable prices in an atmosphere where the absence of economic regulation and the interplay of free market forces allows for maximum efficiencies and allocations of resources. Hence, air transportation will react similarly and optimum air service will result if the government simply gets out of the way so that the marketplace determines the price, quality, variety, and quantity of services.

Senator Howard Cannon, a principal architect of the Airline Deregulation Act, stated that the increased, if "imperfect competition," which is supposed to result from extensive deregulation, should allocate resources better than the "imperfect regulation" that previously existed.<sup>20</sup> The "imperfect regulation" which existed under the prior law did produce the world's foremost air transportation system, with more service in more markets by more carriers with more competition with greater variety at lower rates and fares than existed anywhere else on earth. Only time will tell whether the new law will improve on this system.<sup>21</sup>

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<sup>18</sup> *Id.* § 1381.

<sup>19</sup> For example, rules and regulations for the carriage of mail and the setting of the rate of compensation therefor, *id.* §§ 1375 & 1376; CAB control over mergers, consolidations and acquisitions of control, *id.* § 1378; prohibitions against interlocking relationships, *id.* § 1379; CAB scrutiny of intercarrier agreements, *id.* § 1378; and a small number of broad investigatory and enforcement powers, *id.* §§ 1324, 1385 & 1482.

<sup>20</sup> Speech by Senator Howard Cannon before the National Association of State Aviation Officials (Aug. 22, 1979).

<sup>21</sup> There are some who cite the deregulation law as a major cause of current financial problems for many members of the air transport industry. *See, e.g.,* Speech by Frederick Bradley, Jr., Vice President of Citibank of North America, to the National Aviation Club, in Washington, D.C. (Jan. 17, 1980) *reprinted in* 247 AV. DAILY 97 (1980). But whether that be so or not, it is the major theme of this paper that because of congressional actions in the Act of 1978 and the

### B. *The Major Changes*

In any event, Congress has adopted the new theory in major respects and, as Alfred Kahn predicted, the industry has been thoroughly "scrambled."<sup>22</sup> It is now too late to return to the prior system, whatever the results. There has in fact *been* deregulation in many areas, and as a practical matter many profound changes have resulted in both the governmental system and in the industry. The following are a few of the highlights.

#### 1. *Future Abolition of Civil Aeronautics Board*

The 1978 Act has scheduled two major diminutions in the CAB's power, leading toward its eventual abolition. As of January 1, 1982, the CAB will lose virtually all of its power to control entry into the air transportation business or entry by carriers into new markets.<sup>23</sup> After that date, a regime of essentially *free* entry will exist within United States domestic air transportation.

One year later, on January 1, 1983, the CAB will effectively lose all of its power over airline passenger fares<sup>24</sup> (it has already lost most of its power over air freight rates).<sup>25</sup> At the same time the CAB's remaining authority over domestic airline mergers and interlocking relationships between domestic air carriers, and its remaining power to confer antitrust immunity with respect to agreements and arrangements between domestic air carriers, will be transferred to the Department of Justice.<sup>26</sup>

By no later than January 1, 1984, the CAB is required to report to Congress concerning the progress and effects of deregulation.<sup>27</sup> Assuming that Congress does not change its mind because of

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consequences thereof, it is impossible for the industry or the government to "go home again" to the old system of regulation and that the best course now is total deregulation and early abolition of the Civil Aeronautics Board. This, it might be noted, would largely satisfy Mr. Bradley's concerns, because he sees *the actions of the CAB* under the newly revised law as a significant cause of the post-deregulation financial woes of some carriers. *Id.*

<sup>22</sup> Kahn's prediction came while he was Chairman of the Civil Aeronautics Board and, in part, reflected deregulatory efforts by the CAB under his leadership, even before Congress amended the law to provide for such activities.

<sup>23</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. § 1551(a)(1) (Supp. 1979).

<sup>24</sup> *Id.* § 1551(a)(2).

<sup>25</sup> *Id.* § 1388(b)(2).

<sup>26</sup> *Id.* § 1551(a)(3).

<sup>27</sup> *Id.* § 1551(c).

these reports, or for some other reason, the agency is scheduled to go out of existence on January 1, 1985.<sup>28</sup> At that time, the Board's authority with respect to foreign air transportation will be transferred to the Department of Transportation, which will have to exercise this new authority in consultation with the Department of State.<sup>29</sup> Simultaneously, the Board's authority concerning mergers, intercarrier agreements and antitrust immunities relating to *foreign* air transportation will be transferred to the Department of Justice, which will have received similar authority concerning domestic air transportation. The Board's power to determine rates for the carriage of mail in interstate and overseas air transportation will be transferred to the Postal Service, which will be obligated to exercise such authority through "negotiations or competitive bidding."<sup>30</sup> Jurisdiction over rates for foreign transportation of mail will be transferred to the Department of Transportation, which must exercise the authority in consultation with the Department of State.<sup>31</sup>

## 2. Route Entry

In the short span of just over one year since the airline deregulation law was passed, the domestic air transport route system has been completely opened. In contrast to the entry restraints which existed under the prior law, air carriers can now fly virtually any place they choose. There are indications in the Conference Report that Congress perhaps did not intend the transition to open route entry to proceed as rapidly as it has, but to have occurred gradually over the full period between 1978 and December 31, 1981.<sup>32</sup> Despite these indications, once the decision was made to adopt many of the free market theories and to deregulate significantly, this rapid transition was the only proper course of

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<sup>28</sup> *Id.* § 1551(a)(4).

<sup>29</sup> *Id.* § 1551(b)(1)(B).

<sup>30</sup> See generally *id.* § 1551(b).

<sup>31</sup> *Id.* § 1551(b)(1)(B).

<sup>32</sup> The statute does not call for totally open entry until January 1, 1982. *Id.* § 1551(a)(1). Even after December 31, 1981, a certificate will still be required unless the law is amended to eliminate this technicality, but the only prerequisite will be that the applicant be "fit, willing, and able to perform such transportation properly." Airline Deregulation Act of 1978, 49 U.S.C.A. §§ 1371(d)(1) & 1551(a)(1) (Supp. 1979).

action. Any slower pace would have resulted in discriminatory and unfair treatment of particular carriers and particular areas of the country.

Under the revised law, a certificate is still technically required, but freely given in the case of a fit applicant despite the existence of statutory standards other than "fitness" which go virtually unnoticed.<sup>33</sup> Utilizing the procedural reforms in the new statute, the current CAB employs non-hearing show cause procedures with respect to most domestic route applications, and grants them in a matter of weeks after issuing the initial show cause order. It soon became apparent that objections to show cause orders on grounds other than the applicant's fitness (*e.g.*, that the proposed service "is not consistent with the public convenience and necessity"<sup>34</sup>) were futile. As a result, very few objections are filed today with respect to applications for expansion rights,<sup>35</sup> and the "certification" process is especially swift.<sup>36</sup>

Multiple authorizations have been granted in numerous city

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<sup>33</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. § 1551(a)(1) (Supp. 1979).

<sup>34</sup> *Id.* §§ 1371(d)(1)(A), 1371(d)(9)(B), & 1371(d)(9)(C). See Iowa/Illinois-Atlanta Route Proceeding, CAB Docket No. 30,182, CAB Order No. 78-12-35, at 1-2 (Dec. 7, 1978).

<sup>35</sup> In a few cases involving wholly new entrants (carriers that did not formerly operate a significant volume of interstate or intrastate scheduled service or charter service), the examination of fitness consumes more time. See Application of Air North, CAB Order No. 79-10-25 (Oct. 11, 1979); Application of Altair, CAB Order No. 79-5-245 (May 31, 1979); Application of Empire, CAB Order No. 79-5-243 (May 13, 1979).

<sup>36</sup> There are other processes for swift certification provided in the new statute (although the show cause procedure is the most commonly used): (a) *The Automatic Market Entry Program*, which allows each certificated carrier to apply for any one domestic market during the first thirty days of each calendar year of 1979, 1980, and 1981, and which requires the CAB (with virtually no discretion) to grant the requested authority within sixty days, Airline Deregulation Act of 1978, 49 U.S.C.A. § 1371(d)(7)(A) (Supp. 1979); (b) *The Unused Authority Provisions*, which allow carriers to apply for and receive authority in markets for which another carrier is certificated but not providing service (these sections of the law require carriers awarded dormant rights to institute services within forty-five days of the award or forfeit the authority), *id.* § 1371(d)(5). These provisions were used extensively immediately after passage of the Act of 1978, but now, in view of the wide availability of other procedures lie largely dormant.

pairs.<sup>37</sup> While some of the former intrastate carriers<sup>38</sup> and some of the former charter-only carriers have expanded into scheduled interstate markets, most new route awards have been made to carriers previously certificated as scheduled interstate operators. The high cost of new jet aircraft, the long lead time involved in their purchase, and the large pre-inaugural investment required to operate extensive airline services have discouraged the new entrepreneur in most markets of significant size.<sup>39</sup>

### 3. *Service Obligations*

Interestingly enough, however, the bulk of the new certifications has not been utilized. By and large, air carriers are simply banking new authorities to have maximum flexibility until 1982, when the deregulation law strips the CAB of all authority over domestic airline route entry, except for determinations of "fitness."

As this indicates, under the new law, much more than was so under the prior system, certificates carry no obligations either to begin or maintain services, except in the case of certain small communities: "Under the new Act, mandatory authority, whether in domestic or foreign air transportation, no longer exists; airlines are not required to institute newly authorized service or obtain Board permission before terminating or suspending operations as long as they provide the statutory notice under section 401(j)."<sup>40</sup>

### 4. *Route Exit*

The corollary to deregulation of route entry is freedom to exit

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<sup>37</sup> See, e.g., Pacific Northwest-St. Louis-East Show Cause Proceeding, CAB Order No. 79-11-144 (Nov. 21, 1979); Improved Authority to Wichita Case, CAB Order No. 79-11-98 (Nov. 15, 1979); Florida Service Case, CAB Order No. 79-9-177 (Sept. 27, 1979); California-Arizona Low-Fare Route Proceeding, CAB Order No. 79-9-176 (Sept. 27, 1979); Denver-Alaska Service Investigation, CAB Order No. 79-8-16 (Aug. 2, 1979).

<sup>38</sup> For example, Air Florida, whose operations were confined to the state of Florida prior to passage of the deregulation act; Air California and Pacific Southwest Airlines, which operated solely within California; and Southwest Airlines, which confined its operation to the state of Texas.

<sup>39</sup> Commuter carriers have been authorized to serve a number of markets, usually in fairly confined geographic areas, which have been exited by the larger air carriers. See, e.g., Certificate of Air California, CAB Order No. 79-6-187 (June 28, 1979); Chicago-Midway Expanding Service Proceeding, CAB Order No. 79-9-55 (Sept. 13, 1979).

<sup>40</sup> CAB Order No. 79-5-56, at 2-3 (May 3, 1979).

markets. The basic economic theory that the government should step out of the way and that market forces should govern air services can be implemented only if air carriers have both exit and entry freedom. The marketplace cannot function unless carriers are given discretion not only to exit unprofitable markets, but also to shift resources from a market where profits are being realized, to markets where greater profits can be realized.

The revised law does in fact afford air carriers increased flexibility to exit markets. In contrast to the prior law's requirement that an application for suspension or termination be filed, and that CAB approval first be granted after full administrative proceedings, including hearings, the new procedure allows an air carrier to terminate all services at a community simply by giving ninety days' advance notice.<sup>41</sup>

While there are procedures which permit the registering of objections to proposed terminations and suspensions,<sup>42</sup> in most cases the ninety-day notice is all that is required before a carrier can exit a community and its air transportation market. This is true even though the CAB is authorized in certain cases to require continued service beyond the ninetieth day where the exiting carrier is the last air carrier serving a particular community and a replacement is not readily forthcoming.<sup>43</sup>

On the whole, and to the extent Congress permitted, the CAB has implemented liberalized exit in accordance with the free market economic theories. This has been beneficial to existing air carriers because, in many instances, new authorities obtained under deregulation have been exercised only as a result of a shifting of resources away from markets previously served.<sup>44</sup> In some instances, more than one carrier has terminated service at the same point,<sup>45</sup> and at some of these communities service has dropped from

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<sup>41</sup> "Under the Deregulation Act, the requirement for prior Board approval in order to suspend or terminate service has been eliminated, and replaced with a notice requirement." Notice of Intent of Pan American World Airways, Inc. to Suspend Nonstop Service (San Juan-Madrid), CAB Order No. 79-12-197, at 2 (Dec. 28, 1979).

<sup>42</sup> 14 C.F.R. § 323 (1979).

<sup>43</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. § 1371(j)(1) (Supp. 1979).

<sup>44</sup> The approach has also helped new entrants, of course, especially commuter carriers which are entering many of the smaller markets being vacated.

<sup>45</sup> See, e.g., Notice of Delta Air Lines, Inc. to Terminate Service to Asheville,

two or three or more carriers to a single carrier.<sup>46</sup> In some cases, replacements, mostly small commuter carriers, have stepped in to fill service gaps.<sup>47</sup> While exit rights have been significantly increased by the new law, the restrictions placed on exit exhibit serious misgivings by Congress about the free market theories upon which it professed to rely in passing the Airline Deregulation Act of 1978. These congressionally imposed restrictions have severely circumscribed exit rights at small communities.

During a ten-year transition period, the CAB (and after it goes out of existence in 1985, the Department of Transportation) has been given power to require the last air carrier serving any community to maintain what is called "essential air service"<sup>48</sup> until a

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North Carolina, CAB Docket No. 33,907 (Nov. 1, 1978); Notice of United Air Lines, Inc. to Terminate Service to Merced, California, CAB Docket No. 34,117 (Nov. 28, 1978); Notice of United Air Lines, Inc. to Terminate Service to Asheville, North Carolina, CAB Docket No. 34,119 (Nov. 11, 1978).

<sup>46</sup> See, e.g., Notice of Delta Air Lines, Inc. to Terminate Service to Asheville, North Carolina, CAB Docket No. 33,907 (Nov. 1, 1978); Notice of United Air Lines, Inc. to Terminate Service to Merced, California, CAB Docket No. 34,117 (Nov. 28, 1978); Notice of United Air Lines, Inc. to Terminate Service to Asheville, North Carolina, CAB Docket No. 34,119 (Nov. 11, 1978).

<sup>47</sup> Notice of Delta Air Lines, Inc. to Suspend Service to Presque Isle/Houlton, Maine, CAB Docket No. 34,742 (Feb. 13, 1979).

<sup>48</sup> The Small Community Program of the Deregulation Act guarantees "essential air service" to two groups of points which Congress feared might lose vital air service if left to the mercy of market forces. Airline Deregulation Act of 1978, 49 U.S.C.A. § 1389 (Supp. 1979).

The first group of cities are those named in air carrier certificates which received service from one or more certificated carriers as of October 24, 1978, the date of the deregulation law's enactment. As of that date, there were 555 such communities, including 228 points in Alaska. Part 398, CAB Docket No. 34,650, at 1 (May 3, 1979). For these points, Congress guaranteed essential air service, including subsidized service where necessary. See generally Airline Deregulation Act of 1978, 49 U.S.C.A. § 1389 (Supp. 1979). According to the statute, the CAB has the discretion to determine essential air service, but, for points other than those in Alaska, the statute requires a minimum of at least two round trips five days per week, or the level of service in 1977, whichever is less. *Id.* § 1389(f)(1). The standard is lower for Alaskan points. *Id.* § 1389(f)(2). Any carrier proposing to withdraw essential air service must provide notice of its intent (ninety days, if it is a certificated carrier; thirty days, if not), and the CAB may require it to continue serving the point until a willing replacement carrier can be found. *Id.* § 1389(a)(3)(b). Similarly, essential air service must be determined and guaranteed for any point whose service is reduced to one certificated carrier after October 24, 1978. *Id.* § 1389(a)(2)(B).

The second group of cities are those which the CAB designates as eligible points among communities which were deleted from carriers' certificates between July 1, 1968, and October 24, 1978. *Id.* § 1389(b). The agency has recently implemented procedures to determine eligible points under this phase of the

suitable replacement can be found and judged fit by the CAB. This power exists even though the effects of free entry elsewhere on a carrier's system might dictate an earlier shifting of resources away from the community in question.<sup>49</sup> Distrustful of the marketplace, Congress also gave the CAB new powers to define "essential air service" within parameters laid down by Congress itself, and authorized the agency to pay compensation to the incumbent for losses incurred during any period of *required continuance* of service beyond the carrier's planned termination date.<sup>50</sup>

This small community program was a major excuse for continuing the CAB in existence despite so-called deregulation, and the CAB is exercising considerable watchdog activities in this area. Indeed, as the number of service terminations has mounted, officials of small and medium-sized communities, where the greatest loss of service has occurred, and their congressmen and senators, have begun to bring pressure to bear on the agency to become more restrictive concerning exit. To its credit, the CAB has endeavored to resist these pressures, but it nevertheless has gradually begun to impose stricter standards.<sup>51</sup> If general economic conditions were to turn even more sour than they are today, the existing, rather elaborate federal machinery for the protection of "essential air

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Small Community Program. 14 C.F.R. § 270 (1979). Like the other eligible communities, those made eligible under this program will have essential air service determined, with federal subsidies supporting the service where necessary, but in the normal situation the CAB cannot order a carrier to commence service at a point not being served by the carrier. *Id.*

Still on the drawing board is a White House program to sponsor developmental air services for isolated or depressed areas of the country. Discussions have taken place between administration officials and other governmental officials, including representatives of the CAB and Congress, concerning the prospects for development of federal/state or local cost-sharing arrangements to support such developmental services. No concrete proposals have yet been advanced for such programs, however.

<sup>49</sup> There is no law, of course, which directly forbids a grocer from closing one or more of his stores if he desires. If airlines are to be equated to corner groceries and other members of the normal business community, as they were by the deregulation theories upon which Congress relied, they should enjoy, but have been denied similar freedom.

<sup>50</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. § 1389(a)(7) (Supp. 1979).

<sup>51</sup> See, e.g., Application of Delta Air Lines, Inc. to Suspend Service, CAB Docket No. 34,742 (Feb. 13, 1979); Application of United Air Lines to Terminate or Suspend Service, CAB Docket No. 34,812 (Feb. 23, 1979); Application of Hughes Air Corp. to Suspend Service, CAB Docket No. 34,148 (Dec. 1, 1978).



service" could be used to regulate air carriers anew in many ways.

In addition, there are indications that efforts may be made to amend the existing statute to *withdraw* some of the new exit rights.<sup>52</sup> Thus far, the major congressional supporters of deregulation have resisted these efforts, but as air carriers exercise their exit rights, which will often be an economic necessity, especially in view of the fuel crisis,<sup>53</sup> added pressures to amend the statute could materialize.

Any such withdrawal of exit freedom would be disastrous for air carriers. It would be extremely difficult to operate successfully under a regime where entry was free, but exit rights were severely curtailed. Senator Cannon has expressed the problem this way:

An important understanding which I wish to emphasize . . . is that there is no half-regulation, half-deregulation solution which is feasible. We cannot, for example, go back and re-regulate exit, leaving entry and rates deregulated. Carriers cannot be told both that they must maintain services which result in losses, and that they are free to enter new markets at low fares to out-compete airlines which in turn cannot change their services in response to the new competition. Such an irrational economic basis would not be feasible.<sup>54</sup>

In theory a return to the prior system, where both entry and exit were regulated, would be preferable to a change which only tightened up the exit side of the equation. The nation's air transport system has been so transformed as a result of deregulation, however, that there is no practical way to return to the past. Indeed, the best course of action now would be to complete the deregulation effort, and totally abolish the CAB at an early date, removing *all* regulation of entry and exit, and freeing the industry from all other types of specialized economic and consumerist regulation now exercised by the CAB. Whether that happens or not, and despite objections by some and increasing caution by the CAB, airline market exit rights have been increased significantly by the revised law.

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<sup>52</sup> H.R. 4185, 96th Cong., 1st Sess. (1979).

<sup>53</sup> Deregulation has exacerbated the effects of the fuel crisis on airlines, both in terms of supply and the price which air carriers must pay.

<sup>54</sup> *Impact of Airline Deregulation on Service to Small and Medium Sized Communities: Hearing Before the Subcomm. on Aviation, Senate Comm. on Commerce, Science and Transp.*, 96th Cong., 1st Sess. (1979).

### 5. Rates and Fares

In domestic air transportation, air freight rates, airline all cargo service, and in most respects cargo service provided on combination passenger/cargo aircraft, are now almost *totally* deregulated.<sup>55</sup> Airlines have always acted individually in setting prices for domestic air freight and passenger service, rather than by conference as is done in some other transportation modes. Under the new law, however, airlines can set each individual air freight rate at any level any particular carrier desires, without significant governmental control or interference.<sup>56</sup>

Even the official air freight tariff system has been abolished,<sup>57</sup> although airlines still maintain a private system of air freight tariffs. The private system, however, does not have the force of law that official CAB tariffs had, and the new tariff system is severely circumscribed by the antitrust laws.<sup>58</sup>

With respect to passenger fares, the CAB's powers of suspension and investigation have been modified by providing for "zones" within which a carrier may raise or lower fares without CAB interference, subject to certain notice conditions and residual CAB jurisdiction over predation, unjust discrimination and undue preference or prejudice. The law provides for an upward no-suspend zone in "non-monopoly markets" of 5% above the "standard industry fare level" (SIFL), defined as the fares in effect on July 1, 1977, as adjusted for cost changes since that time. The law also permits carriers to reduce fares as much as 50% below the SIFL, unless the CAB finds that the reduced fares violate the federal antitrust laws.<sup>59</sup>

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<sup>55</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. § 1388(b) (Supp. 1979).

<sup>56</sup> The agency retains jurisdiction over "unjustly discriminatory" and "unduly preferential or unduly prejudicial" (and now "predatory") rates and fares, *id.* § 1482(d) but, in theory at least, this should not give it control over rate or fare levels per se.

<sup>57</sup> Cargo tariffs abolished in Amendment to Part 291, CAB Docket No. 33,093; upheld by *National Small Shipments Traffic Conference v. CAB*, No. 78-2163 (D.C. Cir. Feb. 11, 1980).

<sup>58</sup> As discussed *infra* at notes 100-05 and accompanying text, as economic regulation of routes, rates, fares, intercarrier agreements and the like abates with respect to any form of transportation, so should the immunities from the antitrust laws which usually accompanied such regulation.

<sup>59</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. § 1482(d)(4) (Supp. 1979). The CAB also has the power to expand the range. *Id.* § 1482(d)(7).

Even before the new Act was passed, the CAB had revised its fare policies in order to permit increases in fares without CAB interference by as much as 10% above the then-prescribed ceiling fares in markets authorized to four or more carriers, by as much as 5% in markets authorized to two or three carriers, and up to 5% for 58 days in one year in "monopoly" markets.<sup>60</sup> These expanded ranges of flexibility (broader than the statute in some respects) are proposed to be restated so that they will relate to the revised Act's SIFL.<sup>61</sup> The CAB is also continuing to encourage lower fares by allowing carriers to reduce fares even below the statutory zone—up to 70% below the SIFL on 40% of total available seat miles.<sup>62</sup> More recently, the agency has discussed yet another rulemaking that is designed to encourage peak and off-peak pricing by removing the ceiling entirely in "short haul markets" and, with respect to other markets, by removing the ceiling as to 20% of the total seats in any given city pair. This would allow carriers to raise fares in a market on peak days such as a Friday, in order to encourage travel on other days. At this time the proposal has simply been discussed in a "sunshine meeting," and a notice of proposed rulemaking has not yet been issued.

As indicated, the SIFL starts with the coach fares which were in effect July 1, 1977, adjusted on the basis of industry cost changes between that date and July 1, 1979, when these legislative provisions of the law took effect. From that date forward, the CAB is obligated to raise or lower the SIFL semiannually for changes in reported airline costs, without any adjustment to those costs.<sup>63</sup> The requirement that *actual* costs be considered without regulatory adjustment is essential to the establishment of airline managerial freedom and discretion over fares.

Under the prior law, even though the industry was characterized by low fares and extensive price competition, the CAB used many

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<sup>60</sup> CAB Policy Statement PS-80, CAB Docket No. 33,237 (Aug. 25, 1978), published at 43 Fed. Reg. 38,064 (1978).

<sup>61</sup> Proposed CAB Policy Statement PSDR-61, CAB Docket No. 31,290 (May 17, 1979). Pending finalization of this proposal, the CAB is already applying the new policies on an *ad hoc* basis.

<sup>62</sup> Proposed CAB Policy Statement PSDR-61, CAB Docket No. 31,290 (May 23, 1979).

<sup>63</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. § 1482(d)(6)(B) (Supp. 1979).

techniques to hold down the rate and fare level. The legal powers most often used were the powers to suspend proposed rates and fares, to investigate them, and to order changes in rates or fares believed by the agency after investigation to be unlawful under one or more of various statutory standards. These powers have been circumscribed by the "zone of reasonableness," within which the agency is powerless to suspend, investigate, or order changes.<sup>64</sup> The practical device most often used under the prior law was to "disallow" airline costs which the agency concluded were improperly incurred.<sup>65</sup> This device is no longer available to the agency with respect to the SIFL, which thus increases or decreases in accordance with general economic conditions and with the actual cost experience of the airlines.

Currently, because of the rapidly escalating cost of aviation fuel, the CAB is using its remaining powers over the passenger fare level to allow changes more frequently than semiannually in the SIFL. Thus, the SIFL is adjusted semiannually to take account of *all* changes in airline costs, with interim modifications based solely on changes in airline fuel expenses.<sup>66</sup> Although there are differences of opinion between the air carriers and the CAB as to whether the agency is actually permitting recovery of all increases in fuel expenses, or is acting speedily enough in view of the rapidity with which fuel costs are escalating, these various adjustments in the SIFL are nevertheless the bases for the current, necessarily repetitive increases in airline passenger fares. This general condition of mildly increased freedom with respect to passenger fares will continue to exist until January 1, 1983, at which time the passenger tariff system will cease to exist and the CAB will lose virtually all control over airline fares.<sup>67</sup>

The foregoing relates to the industry's "basic fares," that is,

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<sup>64</sup> *Id.* § 1482(d)(4).

<sup>65</sup> For examples of the use of these techniques, see the many decisions in the CAB's comprehensive Domestic Passenger Fare Investigation, CAB Docket No. 21,866 (1971-1975) (decided in 10 phases).

<sup>66</sup> *See, e.g.*, Establishment of the Interim Standard Industry Fare Level, CAB Order Nos. 79-12-162 (Dec. 21, 1979), 79-10-172 (Oct. 25, 1979), 79-8-184 (Aug. 31, 1979) and 79-6-96 (June 14, 1979).

<sup>67</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. §§ 1551(a)(2) & 1388(b)(2) (Supp. 1979). As mentioned above, the law vests residual power in the CAB over predatory, unjustly discriminatory or unduly preferential fares, rates and charges.

day coach, night coach, and first class fares. In addition to the new and gradually increasing freedoms the industry has with respect to these fares, the new law increased the freedom which air carriers had under the prior law to engage in differential or discount pricing.<sup>68</sup> Discounted fares are made available under limitations, rules and regulations which distinguish the discounted fare traveler from the full fare passenger (for example, by requiring advance purchase of tickets and restricting the times of permissible travel). The discount fares are designed to attract passengers who would not otherwise travel, to fill seats which would otherwise fly empty to shift traffic from peak to off-peak travel, or to promote and develop a new market. The CAB's Bureau of Consumer Protection exhibits a growing tendency to engage in "consumer protection" regulation with respect to discount fares, but the freedom to engage in such differential pricing is essentially guaranteed and enhanced by the whole thrust of the new law.

Thus, the new law has given the airlines significantly increased pricing flexibility, with more freedom to come after January 1, 1983. Until at least that date, however, upward pricing flexibility is not as extensive as it should be in view of the rapid pace at which the CAB has been proceeding in opening route entry and in greatly increasing competition through the agency's extremely liberal application of that facet of the new law. Through its present control over the timing and, to some degree, over the extent of changes in the SIFL, its control over fare changes outside the zone of reasonableness, and otherwise, the CAB continues to regulate airline pricing so far as carrier managements seek price increases required by inflation and fuel cost escalation.

The way to hamstring any industry, promote dislocation of resources and distort productivity, is to control prices. The adverse effects of the remaining CAB control are exacerbated because of the bureaucratic time lag which, although decreasing, is still impeding recovery of significant cost increases over which the airlines have no real control, most notably the astronomical and rapid increases in the price of aviation fuel. Delta Air Lines and many other air carriers look forward to 1983 when the CAB loses virtually *all* control over airline passenger fares, as it has

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<sup>68</sup> *Id.* § 1482(d)(4).

over air freight rates. Then, airline deregulation will deserve the "hoax" label far less than it does today.<sup>69</sup>

#### 6. *Reduced Reporting Requirements and CAB Staffing*

While the Deregulation Act itself did little to reduce the airline industry's burdensome reporting requirements, the CAB does appear to be moving in that direction on its own, through interpretation of the statute. Thus, the Board is conducting a comprehensive evaluation of its reporting requirements and financial and statistical information publications in order to restructure its regulatory information activities in light of the procompetitive directions of, and the hoped-for decrease in governmental involvement with, the industry.<sup>70</sup> The Board's efforts are designed to improve the quality of the information both received and disseminated by it, but it is too early to tell the results of those efforts. Indeed, the Board has increased some reporting requirements while reducing others.<sup>71</sup>

Similarly, while the continued existence of the CAB's bureaucracy is antithetical to deregulation, there are indications that the agency's leadership is committed to reducing the size of its staff between now and 1985, when it is currently slated to go out of existence. For example, the current Chairman of the CAB, Marvin S. Cohen, is unequivocal about his commitment to dismantle the agency. In an appearance before the House Appropriations Subcommittee for the agency's current fiscal year budget, Mr. Cohen was greeted by questions from congressional members implying skepticism that the CAB would ever sunset:

Mr. Duncan (Oregon, Chairman):

After all, 1985 is a long time away. Is there an air of disbelief that it ain't really going to happen, that somehow or other you will

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<sup>69</sup> The label will have to remain, however, even after fare regulation is diminished further in 1983, until the industry is also taken out from under the yoke of the new "consumer protection" regulation that deregulation has spawned. See notes 89-97 *infra* and accompanying text.

<sup>70</sup> CAB Press Release No. 79-186 (Aug. 20, 1979).

<sup>71</sup> For example, in CAB Docket No. 37,088, the Board proposed to make mandatory an extensive, very expensive passenger statistic reporting requirement that was voluntary prior to deregulation. On the other hand, in CAB Docket Nos. 34,015 and 35,514, the Board is proposing to reduce or eliminate certain statistical reporting and travel agency commission filing requirements.

follow the long and honorable tradition of Government agencies and refuse to fade away?

Mr. Cohen. Well, I have heard some skepticism. [Laughter.]

Mr. Duncan. I bet you did.

Mr. Cohen. Both in and out of the agency. Everytime I do, I tell them that if I am around I am going to do my best to see that it happens because I strongly believe it should. But, it is a very healthy precedent and an historic precedent for the Government.<sup>72</sup>

On the other hand, and in spite of the CAB Chairman's announced objectives, the original CAB budget request for fiscal year (FY) 1980 actually called for *increased* appropriations of \$106.8 million (as opposed to a \$100.5 million actual budget for the prior year) and a reduction in permanent employee staffing of only *eleven* persons (830 persons in FY 1979 versus 819 requested positions in FY 1980).<sup>73</sup> In part these reductions are being accomplished by contracting with outside consultants to handle various CAB functions.<sup>74</sup> The budget proposal for FY 1981 shows a further reduction of 53 employees.<sup>75</sup> Ironically, the CAB's projections in its original budget request for FY 1980 called for a staff of 500 persons even in 1985, the year the agency is scheduled to sunset.<sup>76</sup> The May, 1979, amendment to the FY 1980 request proposed a \$2,263,000 reduction in the FY 1980 budget, but also requested a \$19,664,000 supplemental budget to cover subsidy requirements. The FY 1981 request proposes a budget of approximately \$105,000,000<sup>77</sup>—\$4,500,000 more than the FY 1979 Budget.

### 7. Differing Carrier Reactions

Before turning to the subject of added regulation under the new law, and particularly the increased application of the antitrust

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<sup>72</sup> Department of Transportation and Related Agencies Appropriations for 1980: Hearings Before the Subcomm. on Transp. of the House Comm. on Appropriations, 96th Cong., 1st Sess. 121 (1979).

<sup>73</sup> *Id.* at 108. See generally *id.* Part 2, at 143-641 (1980 Budget Justifications).

<sup>74</sup> *Id.* Part 6, at 118.

<sup>75</sup> Hearings Before the Subcomm. on Transp. of the House Appropriations Comm., 96th Cong., 2d Sess. (1980).

<sup>76</sup> Department of Transportation and Related Agencies Appropriations for 1980: Hearings Before the Subcomm. on Transp. of the House Comm. on Appropriations, 96th Cong., 1st Sess. Part 6, at 203 (1979).

<sup>77</sup> See note 75, *supra*.

laws to the air transport industry, it is both interesting and instructive to examine the varying reactions of air carriers to the new freedoms. The major reaction has been in the area of route entry. Because the CAB quickly, and correctly, gave the domestic air transport industry almost *total* freedom in this area, carriers have been able to move as rapidly or as slowly as they desired into new markets.

Some carriers have engaged in explosive modifications of their systems—expanding into new markets here, abandoning other markets there, and then abandoning some of the new markets. In some cases, the rationale for rapid system adjustments may be that only large carriers will survive deregulation, as many opponents of deregulation predicted,<sup>78</sup> and therefore a frantic effort must be made to expand and change quickly to prepare for the onslaught of open competition and avoid merger or other extinction.<sup>79</sup> Whatever the motivation, some of the carriers which have reacted to deregulation with erratic changes are suffering acute financial problems. Whether they will persist cannot yet be told.

Other carriers, including Delta, while using the new freedom to achieve orderly and significant growth and to streamline their systems, have proceeded in a more careful and deliberate fashion. Such an approach is important for companies like Delta which believe that reliability and stability of service (while accommodating growth and other operational changes) constitute an essential feature of common carrier operations, are important to the maintenance of good public relations, and are necessary to a successful business image.

Someplace between carriers reacting explosively and erratically and those reacting deliberately, lie the regional air carriers (form-

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<sup>78</sup> Even some of the proponents recognized the possibility that only a few large carriers might survive, but argued that it "would not be a problem." See Miller, *A Perspective on Airline Regulatory Reform*, 41 J. AIR L. & COM. 679, 696 (1975).

<sup>79</sup> Two of the former regional carriers, Southern Airways and North Central Airlines, have merged and taken a new name: Republic Airlines. In the trunk-line branch of the industry, National Air Lines has disappeared through merger into Pan American Airways. Another proposed merger, between Continental and Western, was disapproved by the CAB (contrary, some argue, to the theory of deregulation, that market forces should govern such decisions subject only to the antitrust laws, not an administrative agency). Rumors persist that there will be other mergers.



erly called the local service carriers). Most of these carriers were opposed to extensive deregulation, believing that they could not survive in the absence of public utility type governmental protection and controls. Regardless of their survival chances in the long term, these carriers are generally growing faster thus far under deregulation than are the larger carriers, and generally are doing so with relatively favorable financial results.<sup>80</sup> Deregulation has enabled these carriers to move rapidly into selected long-haul markets to balance their short-haul services, to enter vacation markets quickly, and to balance their business travel patronage with discretionary travel demand.<sup>81</sup>

All of this is as it should be under the theory of airline deregulation. Each carrier should respond to market forces in its own way, and should enjoy or suffer the consequences of its decisions, as the case may be. Greatly liberalized entry freedom (and relatively improved exit flexibility) are the principal regulatory changes which have made these varying carrier responses possible, and which do the most to validate the labeling of the new statute as "deregulation."

### III. NEW AND ADDED REGULATION UNDER DEREGULATION

Although the Airline Deregulation Act of 1978 was promoted and adopted on the theory that the government should get out of the way and allow market forces to shape the nation's domestic air transportation system, there are areas where the airline industry is ironically suffering from *new* and *added* regulation as a result of this law. Some of this is natural, such as the increased

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<sup>80</sup> Thus, during the twelve months ending September 30, 1979, the regional carriers' total revenue ton miles grew 21.9% compared to only an 8.5% growth for so-called domestic "trunklines," and the smaller carriers' net income declined 14.1% compared to a 68.0% decline for the "trunklines." CIVIL AERONAUTICS BOARD, CAB AIR CARRIER TRAFFIC STATISTICS AND QUARTERLY 6-7 (Sept. 1979); CIVIL AERONAUTICS BOARD, CAB AIR CARRIER INTERIM FINANCIAL STATEMENTS (Sept. 1979).

<sup>81</sup> E.g., Applications of U.S. Air for Phoenix-Pittsburgh Authority, CAB Order No. 78-11-41 (Nov. 9, 1978), Cincinnati/Baltimore-Orlando Authority, CAB Order No. 79-3-14 (Mar. 1, 1979), Pittsburgh-Tampa Authority, CAB Order No. 79-10-44 (Oct. 9, 1979); Application of Piedmont Aviation for Charlotte-Dallas-Ft. Worth/Houston Authority, CAB Order No. 79-3-14 (Mar. 1, 1979); Application of Republic Airlines for Chicago-Houston Authority, CAB Order No. 79-3-14 (Mar. 1, 1979).

application of the antitrust laws to the air transport industry as the public utility controls fall away. Some of it, however, is contrived and unnecessary, and largely results from Congress' failure to abolish the CAB when the deregulation law was passed.

#### *A. Continuing CAB Bureaucracy*

The entire CAB staff was left intact even though the deregulation law relieved it of its major, traditional responsibilities in the areas of route licensing and rate/fare regulation. With "time on its hands" the agency has already turned to some new forms of regulation, in an effort seemingly to shape the nature of the carrier's responses to the new law.

This has not been a universal reaction by the entirety of the agency's staff, and the effort to shape airline responses and to become increasingly solicitous of the airline consumer has been opposed by a number of staff members. This was particularly true of Michael Levine, who was General Director prior to his departure from the agency at the end of 1979, and who was a major advocate of eliminating most of the old forms of public utility control *and* of avoiding the introduction of excessive "consumer protection" regulation.<sup>83</sup> Nevertheless, the tendency to move toward increased regulation in the name of consumer protection is definitely there on the part of other staff members.

#### *B. Regulation of Day-to-Day Business Conduct*

Especially troublesome is the developing tendency to prescribe detailed rules for the conduct of air transport business, for example: rules regarding how the airlines are to handle passengers who, in the airline's good faith effort to deal with the costly and serious no-show problem, suffer the inconvenience of an oversale;<sup>83</sup> detailed prescription as to how the industry is to handle smoking versus non-smoking passengers, a subject over which the CAB has dubious jurisdiction;<sup>84</sup> a proposal for hideously detailed and costly rules for the carriage of handicapped passengers, an-

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<sup>83</sup> 246 Av. DAILY 209 (1979).

<sup>83</sup> 14 C.F.R. § 250 (1978).

<sup>84</sup> A new rulemaking proposal threatens to increase the carriers' administrative difficulties of accommodating the smoking and no-smoking preferences of air travelers. EDR-377, CAB Docket No. 29,044 (May 16, 1979).

other subject over which the agency has questionable jurisdiction;<sup>85</sup> edicts as to what special notices are to be given concerning service availability;<sup>86</sup> and proposals to intervene in contractual and financing arrangements between air carriers and airports.<sup>87</sup> All of this is contrary to the theory that market forces, not the government, should determine the quality and variety, as well as the quantity and location, of air service, and constitutes an unnecessary burden on carrier managements, impeding efficiency and productivity and increasing costs that could have been avoided if the CAB had been abolished when the Act of 1978 was passed.

### C. *New Congressional Programs*

Congress itself is to blame in many respects for the added regulation. In its fear that deregulation might cause too many transitional problems, Congress imposed some burdensome new requirements. The small community program discussed above is one. Another is a new requirement that each time an airline changes a schedule to eliminate the last nonstop or single-plane service in a market, the carrier must serve formal notice on numerous persons, including state and local civic and aviation authorities.<sup>88</sup> Such routine schedule changes have been made for many years, with no noticeable objection from the public. Yet because of the new notice requirements, the airlines are now burdened with needless new paper work, which creates unnecessary confusion and concern for most cities. Unfortunately, as in the small community program, the CAB has rigidly applied the new statutory provisions, a stance wholly inconsistent with deregulation theory and one which would have been avoided had the CAB been abolished at the time the new law was passed.

### D. *Increased "Consumer Protection" Activity*

Perhaps the most troublesome area is the sudden increase in

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<sup>85</sup> Notice of Proposed Rulemaking Regarding Nondiscrimination on the Basis of Handicap. Special Regulations SPDR-70, CAB Docket No. 34,030 (May 31, 1979).

<sup>86</sup> See CAB Order Nos. 78-9-34, 79-3-99 and 79-5-249.

<sup>87</sup> The Atlanta Constitution, Feb. 8, 1979, at 10-D; The Atlanta Constitution, Feb. 15, 1979, at 10-D.

<sup>88</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. § 1371(j)(2) (Supp. 1979); 14 C.F.R. § 323 (1979).

so-called consumer protection activity, and a related Big Brother tendency to investigate, monitor and control relations between the airlines and their customers, by a relatively new CAB unit called the Bureau of Consumer Protection.<sup>89</sup> At a time when free market forces are supposed to be determining the quantity, variety and quality of service, this particular bureau is ironically engaging in increasingly rigid, detailed surveillance of the carriers' relationships with their customers. Indeed, the Bureau even boasts about its aggressive new role as allegedly consistent with deregulation, and contends that the new regime justifies imposing fines on the industry of a "traffic ticket" nature.<sup>90</sup> This is the sort of federal government regulation that is doing so much to undermine the efficiency and productivity of this country and even to undermine the individual freedoms which made this country unique and envied for so many years.

These "consumerist" activities are directed at such diverse subjects as airline advertising, airline application of the CAB's unnecessary "no smoking" regulations, the timeliness of schedule performance, and the handling of customer claims, refund requests

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<sup>89</sup> The predecessor staff arm of the CAB was the Bureau of Enforcement; the change in name to a broader "protective" function signifies the determination of this unit to go beyond mere enforcement of the law to an activist watchdog role not called for by any known consumer grievances against the industry nor by the language of the revised statute.

<sup>90</sup> In response to several isolated complaints during 1979 from passengers concerning Delta's application of the CAB smoking regulations, the Director of the Bureau of Consumer Protection concluded that Delta had infringed the regulations and offered to settle the matter without enforcement action if Delta would submit payments of \$500 per violation. Delta replied that payment of such fines for isolated incidents was inappropriate, especially in light of Delta's exemplary record of satisfying passengers and in light of the procompetitive, anti-regulatory thrust of the deregulation law. To these statements, the Bureau's Director responded:

Our policy of seeking 'traffic ticket' civil penalties by negotiation or litigation for failing to comply with basic rules established by the Board—like assuring every passenger who wants one a seat free from unwanted smoke—is in no way inconsistent with the Deregulation Act or procompetitive Board policies. The approach sets a basic target and leaves to the carriers how to meet it, without attempting to tell them in detail how to do so. *Missing the target, however, can cost money in particular cases.*

Letter from Reuben Robertson, Director of Bureau of Consumer Protection, Civil Aeronautics Board, to Delta Air Lines, Inc. (Dec. 6, 1979) (letter available at the office of the *Journal of Air Law and Commerce*) (emphasis added).

or other complaints.<sup>91</sup> There is nothing in the new law which calls for this sort of policing of the carriers. To the contrary, the new law expressly requires the CAB to rely on "actual and potential competition to provide . . . the variety [and] quality . . . of the air transportation system."<sup>92</sup>

The Bureau's Director, a former Ralph Nader associate, claims support for this increased policing and investigatory activity on the theory that the deregulation law gives the CAB the power, for the first time, to assess civil penalties for statutory violations on its own, without having to resort to the federal courts.<sup>93</sup> This was merely an attempt by Congress to streamline procedures, not to create a new and strengthened specialized consumer protection agency. Indeed, such an interpretation of a mere procedural change flies in the face of Congress' rejection of efforts to create an omnibus consumer protection agency, and is anything but consistent with the general trend toward deregulation, the curtailment of the Federal Trade Commission, the abolition of the Civil Aeronautics Board and, hopefully, other federal agencies and departments as well.

Nor was there any public clamor for the sudden imposition of this sort of consumer protection activity. The airline industry has for years had one of the highest ratings among all major industries in terms of passenger satisfaction with both basic product and complaint handling.<sup>94</sup> Why then, when Congress has said that the airlines' conduct is to be governed by free market forces, is this industry suddenly singled out and faced with a specialized group of bureaucrats who have arrogated to themselves the task of protecting the consumer just against the airlines?

The danger is that this bureau may be attempting to create an empire sufficient to cause Congress to change its mind about the planned abolition of the CAB in 1985, or to prepare for a massive transfer of personnel to a sister agency with a specialized and

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<sup>91</sup> The Bureau of Consumer Protection is in almost daily contact with airline personnel regarding the disposition of the most minor customer grievances. These contacts include inquiries concerning claims procedures, and requests for extensive amounts of internal company memoranda and files.

<sup>92</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. § 1302(a)(9) (Supp. 1979).

<sup>93</sup> *Id.* § 1471.

<sup>94</sup> See note 4, *supra*.

unique mission of regulating the business conduct of airlines. Indeed, these objectives were enunciated rather clearly by the Director of the Bureau of Consumer Protection in testimony before the House Appropriations Subcommittee in March of 1979:

We certainly do not foresee any increase in the current level of resources. If it becomes apparent that the airlines have taken the consumer interest to heart and are effectively dealing with consumer problems we will reduce our staffing accordingly. However, volume of consumer complaints has been rising at a rate of 30 percent for the past year and we do not anticipate that it will level off or decrease.

We are directing our efforts toward putting in place a system of rules to protect the consumer after the demise of the Board, although there is no provision in existing legislation to transfer consumer protection regulations to another agency. We cannot assume that the airlines will protect the consumer at the expense of profit in an unregulated environment. Among the major areas of concern are oversales, baggage liability, advertising, adequate disclosure of rules governing discount fares, smoking, and airline liability to passengers when schedules are changed or flights are delayed or cancelled for reasons other than safety. The rules we are developing in these areas should be incorporated into the regulations of another agency (Department of Transportation or Federal Trade Commission) during the last years of the Board's existence. Consumer staff who are knowledgeable about these rules can be transferred to another agency to handle air transportation problems.<sup>85</sup>

The premises in this testimony are absurd—that it is not yet “apparent” that “the airlines have taken the consumer interest to heart” and a stubborn, blind, refusal by the bureaucrat to “assume” that the airlines will protect the consumer without oppressive governmental hand-holding and dictation. Remember that the airlines ranked number one in consumer satisfaction *before* the bureaucrats thought it necessary to intervene with so-called consumer protection regulation. The absurdity of the premises is

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<sup>85</sup> *Department of Transportation and Related Agencies Appropriations for 1980: Hearings Before the Subcomm. on Transp. of the House Comm. on Appropriations, 96th Cong., 1st Sess. Part 6 at 269-270 (1979).* The claim that consumer complaints to the CAB are increasing in volume is questionable, because in some respects the Bureau of Consumer Protection has encouraged such complaining just as it has also encouraged consumers to litigate against the airlines without regard to the degree of merit in their complaint.

further shown by the testimony of CAB Chairman Cohen at the very same hearing, which recognized that these consumer polls "indicate a high level of satisfaction with airline services."<sup>96</sup> Indeed, after making the above-quoted statement, the Director of the Bureau of Consumer Protection recognized the *effectiveness* of airline consumer affairs offices in resolving grievances, but nevertheless still seemed to feel compelled to use his staff to badger the airlines into doing it the government's way:

In the last few years most of the major airlines serving the United States, both foreign and domestic, have established consumer affairs offices.

In general, these offices are effective in resolving individual complaints but lack authority to make policy in their companies. Our consumer staff monitors the handling of complaints and calls meetings with airline management when they feel that the airlines are not doing a good job.

The Bureau of Consumer Protection has underway a project to encourage airlines to set up mediation boards to resolve the complaints that cannot be resolved through the usual procedures.<sup>97</sup>

The empire building is obvious. The stage apparently is being set to persuade Congress either to continue the CAB in existence as a specialized consumer protection agency, or to create a specialized

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<sup>96</sup> *Id.* at 113. More recently, however, Chairman Cohen is reported to have told the New York Security Analysts that "There may be a need for further legislation of the deregulation policy to provide for continued consumer protection activities." 247 *AV. DAILY* 146 (1980). Hopefully this only refers to the fact that under the present Act, there is no provision for eliminating the airlines' exemption from Federal Trade Commission regulation when the Civil Aeronautics Board's authority goes out of existence, an exemption which probably should be terminated at that time, thereby generally subjecting the airlines to FTC jurisdiction in the same manner that other businesses are so subject. Hopefully it does *not* mean that Chairman Cohen has surrendered to the empire builders, so that he, too, is now advocating continued existence of the CAB as a specialized consumer protection agency or a massive transfer of airline consumerist interests to a specialized bureau within the FTC.

<sup>97</sup> *Department of Transportation and Related Agencies Appropriations for 1980: Hearings Before Subcomm. on Transp. of the House Comm. on Appropriations*, 96th Cong., 1st Sess. Part 6, at 270. It might be noted that Delta Air Lines, and probably other airlines as well, have had customer relations offices for many years. At Delta, whether or not the office "makes policy," it reports to a high ranking staff officer (Vice Chairman of the Board) and is thus in a position to make recommendations *openly* and *freely* for changes in policy and procedure by the operating and passenger handling departments of the company. In any event, if these offices are "effective" with the consumer, what does it matter whether they have "authority to make policy" within the company or not?

airline bureau in the Federal Trade Commission, with the sole responsibility of second-guessing airline managements. That hardly is deregulation!

If the CAB does go out of existence, it is only natural that the airlines should then become subject to Federal Trade Commission regulation. There is no need to create a special set of regulations just for the airlines, to be administered by career airline harassers.

#### E. Labor Protection

Labor protection provisions are another area where Congress added regulation rather than deregulation. In order to overcome labor opposition to deregulation, Congress included provisions which require federal payments to workers displaced by deregulation, if any. Even worse, the law purports to require airlines to give hiring preference to employees of other airlines who, for *any* reason other than cause, are laid off or terminated (the worker would retain seniority rights with his own company, and thus might prove to be temporary help at best).<sup>98</sup> The Department of Labor has proposed some gruesomely complex and burdensome regulations to implement this program,<sup>99</sup> which rival the worst this writer has ever seen a socialist government impose. There are serious questions as to the constitutionality of this program, but for the time being it is another area of potential added regulation that is totally out of tune with the concept of deregulation.

#### F. Antitrust Regulation

Under the prior law, any intercarrier agreement, merger or interlocking relationship approved by the CAB under sections 408 or 412 of the Federal Aviation Act was immune from the anti-trust laws.<sup>100</sup> The new law is considerably different; it states that immunity will be granted, *but only to the extent necessary*, to

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<sup>98</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. § 1552(a)-(d) (Supp. 1979).

<sup>99</sup> Airline Employee Protection Program, Part 638, 44 Fed. Reg. 19,148 (1979). Under section 43 of the Airline Deregulation Act, these proposed regulations, when finalized, must be submitted to Congress for review and are subject to disapproval by either house. *Id.* § 1552(f)(3). As of this time, a final proposal has not yet been submitted to Congress, although an earlier version was submitted for the preliminary thirty-day review also required by section 43. 20 C.F.R. § 638, Proposed Rulemaking, 44 Fed. Reg. 19,146 (1979).

<sup>100</sup> 49 U.S.C. § 1384 (1976).



transactions specifically approved by the CAB and transactions necessarily contemplated by such CAB order. Most importantly, under the new law immunity grants are *discretionary* with the CAB and will be made only if "required in the public interest."<sup>101</sup>

These statutory changes leave little doubt of Congress' intent that the antitrust laws should become more and more applicable to the air transport industry as the former economic regulation withers away. By leaving the CAB in existence, however, under a broad procompetitive policy statement and with discretionary powers as to antitrust and as to areas of inquiry to which it can turn its attention, the Congress has, perhaps unintentionally, imposed upon airlines a very *specialized* application of the antitrust laws.<sup>102</sup>

Antitrust units have been set up in three of the CAB's major bureaus: the Bureau of Consumer Protection, the Bureau of Domestic Aviation, and the Office of General Counsel. These units, and indeed the entire agency, are excessively suspicious that the airline industry was riddled with anticompetitive practices in the past, which must now be ferreted out and eliminated. These suspicions have already led to a number of formal and informal investigations and proceedings with which the industry must currently deal.

For example, the antitrust emphasis has led the CAB to move fairly rapidly toward a significant curtailment of the airline industry's basic trade associations. While the antitrust laws will permit the airlines (like other industries) to participate in trade association activities, much traditional and beneficial industry standardization, such as the system of uniform, industry-wide practices in many areas for the conduct of interline business (e.g., uniform ticketing, baggage handling) which were of special help to passengers using more than one airline, may disappear or at least be weakened.

An extensive investigation into the structure and mechanisms

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<sup>101</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. § 1384 (Supp. 1979). Even before passage of the deregulation act, the CAB was not favorably inclined toward requests for antitrust immunity. See Motion of Popular Latin Travel Agency, Inc., CAB Order No. 78-10-31, at 5 (Oct. 5, 1978); Texas International-National Acquisition Case, CAB Order No. 78-8-150, at 5 (Aug. 25, 1978); Applications of Frontier Airlines, Transworld Airlines and Ass'n of Retail Travel Agents for Discussion Authority, CAB Order No. 78-7-110, at 5 (July 21, 1978).

of the International Air Transport Association (IATA) was instituted with a view toward restructuring that organization.<sup>103</sup> The CAB initially set out to extinguish the most vital components of the IATA organization at least as they applied to transportation to and from the United States, the world's largest air transportation market. These components included mechanisms for determining international fares, commissions, accreditation of travel agents, and other programs for standardizing and regularizing international services. After holding a series of public inquiries in foreign countries into the ramifications of these United States objectives, the CAB was forced to retrench somewhat because of the almost uniform opposition of foreign governments.

The Board's initial objective of extensive dismantling of IATA structures has been revamped. Instead of a total disapproval of IATA fare-setting mechanisms, the Board now proposes to continue the antitrust immunity for the IATA rate-setting machinery, except that United States carriers will not be granted immunity as to United States-Europe operations.<sup>104</sup> The review of IATA mechanisms continues, although on a much less ambitious footing than that the CAB originally intended. In any event, the Board's policies stand to have a significant impact on various aspects of foreign air transportation.

Similarly, the Board has instituted an expansive investigation into all aspects of the marketing of both domestic and international air transportation which will involve a broad-scale examination of the existing marketing systems, including how they may

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<sup>102</sup>With or without the CAB, unless the Airline Deregulation Act of 1978 is amended the airlines will be in a somewhat unique position with respect to certain antitrust matters. Thus, while the antitrust laws will be generally applicable to the industry, especially if the CAB ceases to exist in 1985, the deregulation act contemplates that the Department of Justice will also administer sections 408, 409, 412, and 414 of the revised aviation statute which will continue to apply to the industry. Airline Deregulation Act of 1978, 49 U.S.C.A. § 1557(b)(2)(C) (Supp. 1979). These sections set forth governing principles for airline mergers and consolidations, interlocking relationships, intercarrier agreements, and antitrust immunity. Although it is likely that these sections will be interpreted along largely traditional antitrust lines, all of the sections vary to some degree from those traditional principles.

<sup>103</sup>Agreement Adopted by the International Air Transport Association Relating to the Traffic Conference (IATA Review Case), CAB Docket No. 32,851 (Sept. 11, 1979).

<sup>104</sup>See CAB Press Release No. 79-257 (Dec. 5, 1979).

be modified to increase competition.<sup>105</sup> This massive investigation encompasses many intercarrier arrangements for marketing air transportation, including such matters as travel agency accreditation standards and practices, distributive methods for selling air services, automated reservations system access and practices, and other industry mechanisms for doing business.

It is submitted that this specialized application of the anti-trust laws by the CAB could and should have been avoided. A natural transition to an antitrust regime could have occurred if Congress had simply abolished the agency and created a short transition period of a few years allowing existing antitrust immunities to remain effective. During that period, the industry would have been left free to restructure activities which had been handled on a cooperative, uniform, industry-wide basis for the public's benefit. There was no need for governmental prescription of the precise manner in which the industry should proceed, as is now being given by the CAB—and again, no reason to have continued the agency in existence. Hopefully, much of this specialized anti-trust regulation and other interference will disappear when the CAB is abolished, and let it come soon!

#### IV. FEDERAL PREEMPTION

Until 1978, the federal statutes contained no specific provision preempting state economic regulation of air transportation. As a result, a few states exercised jurisdiction over intrastate air transportation, including operations within a state by an interstate carrier even when part of a continuous journey. This state authority was especially exercised in connection with rates and fares. For example, in California, the state regulation sometimes required interstate carriers on flights between two points within the state to charge different fares for passengers whose flights were wholly within that state vis a vis passengers connecting to out of state flights. Nevada required carriers operating within the state to hold

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<sup>105</sup> Investigation into Competitive Marketing of Air Transportation, CAB Docket No. 36,595 (Sept. 13, 1979). In conjunction with the investigation, an order to show cause has already been issued which proposes to eliminate both standard travel agency commission levels for sales of domestic air transportation and certain restrictions on agent compensation. Investigation into Competitive Marketing of Air Transportation, CAB Order No. 79-9-65 (Sept. 13, 1979).

state certificates (or licenses) and regulated the carriers, including interstate carriers, in other ways as well.<sup>106</sup>

The deregulation statute contains an express preemption provision. Section 1305<sup>107</sup> provides that no state or political subdivision and no interstate agency shall enact or enforce any law or regulation concerning rates, routes, or services of any carrier having authority under Title IV of the Act to provide interstate air transportation.<sup>108</sup> The statute further provides that upon receipt of authority from the CAB, an intrastate carrier is deemed to have obtained *all* of its authority from the Board under Title IV.<sup>109</sup>

The first judicial test of this preemption provision is pending in the Ninth Circuit. After the deregulation act was passed, the California Public Utilities Commission (PUC) attempted to exercise rate jurisdiction (as it had in the past) by ordering Hughes Airwest (a federally certificated carrier) to maintain an existing level of fares in intra-California markets, despite CAB approval to increase such fares. Hughes Airwest, several other carriers, the CAB, and the Department of Justice filed suit against the PUC. In March, 1979, a permanent injunction was granted, preventing the PUC from regulating the routes, rates, and services of the plaintiff carriers. The PUC has appealed the decision to the Ninth Circuit Court of Appeals.<sup>110</sup>

#### V. OTHER ASPECTS OF CURRENT BOARD POLICY IN THE AFTERMATH OF THE DEREGULATION LAW

Other CAB activities in the aftermath of the deregulation act are interesting, some clearly deregulatory, and others only masquerading under that label. Examples in the deregulatory category

<sup>106</sup> NEV. REV. STAT. §§ 704.070, 704.100, 704.110, 704.120 (1977); 704.270, 704.280 (1973); and 704.330 (1975). See also Simat, Helliesen & Eichner, *The Intrastate Regulation Experience in Texas and California*, *supra* note 4.

<sup>107</sup> Airline Deregulation Act of 1978, 49 U.S.C.A. § 1305 (Supp. 1979).

<sup>108</sup> Alaska is excepted from the purview of the preemption provision where the authority conferred by the CAB on the intrastate carriers is not certificated. *Id.* § 1305(a)(2) (Supp. 1979).

<sup>109</sup> *Id.* § 1305(c).

<sup>110</sup> *Hughes Air Corp. v. Public Utilities Comm'n*, No. C78-2880-SW (N.D. Cal. Dec. 18, 1978). The PUC's principal argument is that the tenth amendment of the United States Constitution prohibits Congress from enacting legislation interfering with the regulation of purely intrastate air service by a state government. Oral argument on the appeal is expected during the spring of 1980.

include certain rulemaking changes to allow the carriers virtually unfettered discretion to grant free or reduced rate transportation to travel agents.<sup>111</sup> Also clearly in the deregulatory vein is a proposal to allow carriers complete flexibility to barter air transportation for goods and services (including but not limited to advertising services), and to allow carriers to grant free or reduced rate transportation to "persons promoting air transportation."<sup>112</sup>

Under the banner of deregulation, the CAB has issued another rulemaking proposal which would allegedly permit competitive negotiation between the carriers and the United States Postal Service (USPS) concerning payment for the carriage of mail.<sup>113</sup> The Board proposes to modify the traditional system of CAB prescribed mail rates so as to allow the USPS to negotiate rates with the carriers within certain zones fixed by the CAB. The proposal would produce a one-sided "open market," however, because the upper limit of the zone would be set at the level prescribed today by the CAB under the traditional rate-setting machinery for mail carriage rates. Thus, the USPS would be free to negotiate rates downward, and would retain its traditional powers to impose regulations requiring mail carriage on a priority basis, and to levy fines against carriers for failure to comply with USPS directives.

In response to the CAB proposal, Delta has filed a document strongly urging the CAB to permit a truly competitive, free market for the carriage of mail, by eliminating the airlines' duty to carry the mail, and the Postal Service's powers to issue regulations and levy fines.<sup>114</sup> Essentially, under Delta's proposal, the USPS would be treated like other shippers, and would engage in competitive bidding for air transportation in an open, unregulated environment.

## VI. INTERNATIONAL AIR TRANSPORTATION

In an effort to transpose some of the procompetitive principles and other provisions of the deregulation act to international air transportation, the Congress has recently enacted the International

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<sup>111</sup> 14 C.F.R. § 223.2(f) (1978).

<sup>112</sup> EDR-391, CAB Docket No. 35,392 (Nov. 1, 1979).

<sup>113</sup> EDR-387, CAB Docket No. 36,497 (Oct. 9, 1979).

<sup>114</sup> EDR-387/PDR-68, CAB Docket No. 36,497 (Oct. 9, 1979); Comments of Delta Air Lines, Inc. dated October 19, 1979.

Air Transportation Competition Act of 1979.<sup>115</sup> In addition to the strong enunciation of procompetitive policies and goals for international transportation like those now applicable to interstate and overseas transportation, the new law extends to international transportation fare flexibility and standard fare adjustment provisions similar to those adopted in the deregulation act. Thus, the law creates a "standard foreign fare level" (SFFL) comparable to the "standard industry fare level" (SIFL) in domestic and overseas service. The SFFL is based upon fares in effect on October 1, 1979, except that the CAB has discretion to establish a different SFFL for markets with as much as 25% of total traffic carried by United States carriers in foreign air transportation. Like the domestic SIFL, the SFFL must be adjusted periodically: in the case of fuel cost changes, every sixty days; and for other cost changes, at least semiannually.<sup>116</sup> Within the zone of 5% above the SFFL and 50% below, carriers would be free to adjust fares with limited provision for suspension by the CAB.<sup>117</sup>

The new law makes it clear that international authority for United States carriers may not be altered, modified, suspended or revoked through the simplified procedures now provided by subsection p of section 401 of the Act,<sup>118</sup> if the certificate holder requests an oral evidentiary hearing or if the Board determines that such a hearing is in the public interest.<sup>119</sup> On the other hand, the law would give the Board authority to revoke or suspend unexercised foreign rights, subject to certain notice requirements and an "opportunity" (without hearing) for the certificate holder to present its views.<sup>120</sup>

The legislation also authorizes carriage of interstate and over-

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<sup>115</sup> Pub. L. No. 96-192, 94 Stat. 35 (1980) (to be codified at scattered sections of 49 U.S.C.).

<sup>116</sup> *Id.* § 24 (to be codified at 49 U.S.C. § 1482(j)).

<sup>117</sup> *Id.* Some suspension powers have been left with the Board, including the right to suspend fares above the SFFL based upon findings of undue preference or prejudice, or unjust discrimination. Similarly, decreases below the SFFL can be suspended based upon predation or discrimination findings. In all cases, the CAB retains suspension power where it can find that the public interest demands suspension because of "unreasonable regulatory action of a foreign government." *Id.*

<sup>118</sup> *Id.* § 6 (to be codified at 49 U.S.C. § 1371(g) & (p)).

<sup>119</sup> *Id.* (to be codified at 49 U.S.C. § 1371(g)(1)-(2)).

<sup>120</sup> *Id.* (to be codified at 49 U.S.C. § 1371(g)(3)).

seas traffic by foreign carriers, under certain highly circumscribed conditions. Thus, foreign carriers may receive exemptions (not to exceed thirty days) to engage in overseas and interstate air transportation if the CAB finds after consultation with the Department of Transportation that an emergency exists "not arising in the normal course of business," and that all possible efforts have been made to have the traffic accommodated by United States carriers.<sup>121</sup>

Other changes include the application of the modified bank merger/local cartage test to *all* intercarrier agreements—domestic and international—with some recognition of international comity and foreign policy considerations as public interest factors which may be sufficient to justify otherwise anticompetitive agreements.<sup>122</sup> The revised law gives the Secretary of Transportation authority to permit foreign-registered aircraft to operate between United States points under a lease (without crew) to a United States carrier.<sup>123</sup> The law also extends the prohibition against "part charters" (the commingling of charter passengers with scheduled passengers) until December 31, 1981.<sup>124</sup>

## VII. CONCLUSION

So far, airline deregulation is a "mixed bag"—some deregulation, some new regulation, and great confusion from the regulators left around to deregulate! The central question is whether the CAB actually will go out of existence. Congress has slated the

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<sup>121</sup> *Id.* (to be codified at 49 U.S.C. § 1386(b)(7)). If this be considered to be the carriage of cabotage traffic by foreign flag carriers, the Chicago Convention may require that this privilege, if granted to any one foreign carrier, also be granted to *all* foreign carriers that desire to operate in the market in question. The American Bar Association suggested a provision which would have avoided any cabotage grants to foreign air carriers; a procedure whereby, in an emergency situation, United States carriers could lease blocks of seats on foreign air carrier flights, and therefore the U.S. carriers would hold the availability of these seats out to the public and would control the transportation. *International Air Transportation Competition Act of 1979: Hearings on S. 1300 Before the Subcomm. on Aviation of the Senate Commerce Comm.*, 96th Cong., 1st Sess. 247 (1979).

<sup>122</sup> Pub. L. No. 96-192, § 11, 94 Stat. 39 (1980) (to be codified at 49 U.S.C. § 1382)).

<sup>123</sup> *Id.* § 13 (to be codified at 49 U.S.C. § 1386(b)(7)).

<sup>124</sup> *Id.* § 26 (to be codified at 49 U.S.C. § 1371(n)(1)).

abolition of the agency for 1985, after two major reductions of its power, first, its loss of all route and entry control after 1981, and second, its loss of power over passenger fares after 1982.

Congress will, however, review the situation prior to 1985. Can Congress resist the inevitable pressures from the empire builders to continue the CAB as a consumer protection agency, or demands for exit restrictions from communities fearful of an unwanted service diminution? Will Congress give the agency a reprieve during some economic adversity so that it can regulate anew in the future? Many of those who are even now bringing such pressure to bear continue to call the airlines "public utilities," although the economic theory of deregulation clearly viewed the airlines as just a part of the general run of United States business. Congress' mistake in leaving the CAB in existence has exacerbated this problem, by providing a forum before which to continue the deregulation debate.

As a result, the airline industry has not been given full freedom to respond to market forces and to the changes which have been wrought in the regulatory environment. Deregulation cannot be achieved without immediate and total abolition of the regulatory agency involved.

Abolition of the CAB should occur as soon as possible. The airline industry has been thoroughly "scrambled" as a result of the deregulation law and CAB programs. It would be a grave injustice to both the industry and the public to attempt a return to a public utility regulatory system or to move so soon to a new system of regulation. Now that Congress has chosen the deregulatory course, it is only fair to proceed promptly to implement *real* deregulation to see if it will work and to assess the results.

It is therefore encouraging to hear Senator Cannon say that:

While airline deregulation is not perfect, it is the law and, in my opinion, will stay in the law for a long, long time. So let's turn our energies to maximizing its benefits and minimizing its dislocations, rather than continuing as some have to look over their shoulders and wonder if we should try to 'go home again.'<sup>125</sup>

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<sup>125</sup> Speech by Senator Cannon, Airport Defederalization, National Association of State Aviation Officials at San Diego, Cal. (Aug. 22, 1979) (printed text at 1) (copy available at office of *Journal of Air Law and Commerce*).



This writer and Delta agree. If the CAB in fact expires on schedule or earlier, that will hopefully emphasize the need for real deregulation throughout the government and real shrinkage of the bloated federal system.