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Stanley B. Rosenfield

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A CASE FOR THE LEGALITY OF YOUTH STANDBY AND YOUNG ADULT AIRLINE FARES

BY STANLEY B. ROSENFELD†

I. INTRODUCTION

IN DECEMBER, 1965, American Airlines filed its youth standby fares, a no-reservation tariff providing a fare equal to 50% of the regular adult coach fare for youths at least 12 years of age and under 22 years of age.¹ At the same time, Allegheny Airlines filed its young adult tariff providing reservation for the same age group at a discounted fare of 66 2/3% of the regular jet coach fare.²

Since these fares were first introduced, they have been under constant legal attack. Complaints were filed with the Civil Aeronautics Board (hereinafter referred as CAB or Board) by Delta, Northwest, United, Western and Trans World Airlines, Transcontinental Bus System, Inc.,³ National Trailways Bus System⁴ and the American Society of Travel Agents. The complaints asked that the fares be suspended pending an investigation, and alleged that the proposed fares were, *inter alia*, unjustly discriminatory, preferential, prejudicial, unjust and unreasonable, in that an artificially selected class of traffic was created, that the only real difference between this fare and the regular fare was the "space available" provision and that such reason is insufficient for the difference in fares. The CAB determined the fares were not unjustly discriminatory and dismissed the complaints without an investigation, allowing the fares to go into effect on an experimental basis.⁵

TCO Industries, Inc.⁶ and National Trailways Bus System (hereinafter

† LL.B. (1951), University of Minnesota School of Law; LL.M. (1970), Southern Methodist University School of Law; Assistant Professor of Law, De Paul University Law School.

¹ American Airlines, youth standby fares, filed Dec. 20, 1965. The tariff is subject to "black out periods" during which it cannot be used, such as the days of heaviest travel during the Christmas and New Year's season. The youth is required to show an identification card when purchasing his ticket and when boarding the plane. This identification card is purchased from American on proof of age, for a fee of \$3.00, and remains valid until the holder's 22nd birthday. The standby passenger is boarded only after all reservation passengers and all military standby passengers are boarded, and the youth is subject to being "bumped" at an intermediate point to make room for a regular fare reservation passenger.

² Allegheny Airlines, young adult fares, filed Dec. 20, 1965. Allegheny provides for no "black out periods," so that a youth may ride under this plan on any flight on any day a reservation is available. Allegheny requires an identification card which is issued on proof of age at the cost of \$10.00 per year.

³ An organization composed of 46 independent motor carriers, licensed by the Interstate Commerce Commission.

⁴ A national trade association of motor bus operators.

⁵ American Airlines, Inc., Proposed Standby Youth Fares, C.A.B. Order No. E-23137 (Jan. 20, 1966); Allegheny Airlines, Inc., Proposed Young Adult Fares, C.A.B. Order No. E-23138 (Jan. 20, 1966).

⁶ The new name of Transcontinental Bus System, Inc. adopted after commencement of this proceeding.

jointly referred to as TCO) filed an appeal to the Court of Appeals which held that while the question of unjust discrimination is ultimately a fact question for determination by the Board, nevertheless it is an abuse of Board discretion to make such determination without an evidentiary hearing.⁷ The court determined that in deciding whether the circumstances and conditions affecting youth fares are substantially dissimilar to regular fares, the Board could consider only such circumstances and conditions as Congress has by statute deemed material and those factors which regulatory practice in the transportation industry have, through experience, found relevant.⁸ The court concluded that factors based on status of traffic, broad social policy or promotion of traffic may not be considered.⁹ It, therefore, remanded the case to the Board to make its determination after a full hearing.

Upon remand, the Board ordered an investigation, not only of the American and Allegheny fares but of all youth fares then in effect.¹⁰ On January 21, 1969, in an 83 page decision, the Hearing Examiner concluded that neither the youth nor the young adult fares were unjust or unreasonable, but that both fares were illegal because they were unjustly discriminatory.¹¹

Because of the intense public interest in this matter, the Board, on its own motion, issued an order for review by the full Board.¹² The Board rejected the examiner's conclusion of unjust discrimination. It also rejected the basis for the examiner's determination that the rates were just and reasonable. It remanded the matter to the examiner for further hearings on the question of rate reasonableness and also recognized that the further hearings could produce evidence which would require a further review on the question of unjust discrimination.¹³

After additional evidence is taken and a new determination made by the examiner, his findings will again be reviewed by the Board. Past history indicates the airlines are prone to accept the final decisions of the CAB. However, a ruling adverse to TCO will undoubtedly bring a new appeal to the court. Thus, after four and one half years of litigation, there is still no final determination of the legality of the youth and young adult fares, and final determination is not yet in sight.

The interest created by these fares is indicated by the fact that the CAB was receiving an average of more than 500 letters per day concerning these fares,¹⁴ and just prior to the Board hearing in March, 1969, over 10,000 letters and telegrams were received.¹⁵ These were mainly from young people

⁷ *Transcontinental Bus System, Inc. v. C.A.B.*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

⁸ *Id.* at 484.

⁹ *Id.* at 490, 491.

¹⁰ C.A.B. Order No. E-26317 (Feb. 5, 1968).

¹¹ Initial decision of Arthur S. Present, Hearing Examiner, Civil Aero. Bd., Doc. No. 18936 (Jan. 21, 1969).

¹² C.A.B. Order No. 69-1-106 (Jan. 27, 1969).

¹³ C.A.B. Order No. 69-8-140 (Aug. 27, 1969).

¹⁴ C.A.B. News Release (Feb. 13, 1969).

¹⁵ *The Wall Street Journal*, March 13, 1969, at 13, col. 4.

in the 12-22 age group and from parents of young people in the affected age group. However, interest in these fares is not limited to this group. All bus companies are concerned as direct competitors of the airlines. The general traveling public is concerned that regular rates not be increased to help defray the cost of the discount fares.

Finally, the fares introduced by American and Allegheny Airlines have expanded so that presently 24 air carriers are offering some form of youth fare. These include all 11 trunk airlines,¹⁶ seven local service carriers,¹⁷ and six miscellaneous airlines.¹⁸ Eleven of the carriers had only a standby fare,¹⁹ and the same number had only a reservation fare.²⁰ Two of the carriers had both a standby and a reservation fare,²¹ and three of the carriers also provided group fares.²² While some of the fares differed slightly, all standby fares are basically similar to the American plan, and all reserved fare plans are similar to Allegheny's plan.²³

While 24 airlines have some form of youth fare in force, only 14 of the carriers favor these tariffs.²⁴ Of the remaining ten, three opposed the fares,²⁵ and the remaining seven either took no part or have no official position.²⁶ Northeast supported the American tariff when it was first presented in 1965, but is now opposed to it. Delta and Northwest were among the group which originally petitioned the Board to suspend the tariff, and both, having instituted the fares defensively, now favor them.

The airlines opposed base their opposition on business judgment.²⁷ To allow standby fares prevents flights from leaving on time because the youths cannot be boarded until just before flight time. When there is luggage to be checked, additional delay is encountered. False reservations are made either to prevent full fare passengers from getting a reservation, thereby leaving space open for standbys, or to leave a reservation to fall back on, to insure getting space on a particular flight. The unknown num-

¹⁶ United Airlines, Inc., American Airlines, Inc., Trans World Airlines, Inc., Eastern Airlines, Inc., Western Airlines, Inc., Braniff Airways, Inc., Delta Air Lines, Inc., National Airlines, Inc., Continental Air Lines, Inc., Northeast Airlines, Inc. and Northwest Airlines, Inc.

¹⁷ Bonanza Air Lines, Inc., West Coast Airlines, Inc., Pacific Air Lines, Inc., Central Airlines, Inc., Frontier Airlines, Inc., Lake Central Airlines, Inc. and Allegheny Airlines, Inc.

¹⁸ Pan American World Airways, Inc.; two helicopter operators, New York Airways, Inc., San Francisco & Oakland Helicopter Airlines, Inc. and the two Hawaiian carriers, Alaska Airlines, Inc.

¹⁹ Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Hawaiian Airlines, Inc., New York Airways, Inc., Northwest Airlines, Inc., Pan American World Airways Inc., San Francisco & Oakland Helicopter Airlines, Inc., United Airlines, Inc. and Western Air Lines, Inc.

²⁰ Air West, Inc., Allegheny Airlines, Inc., Braniff Airways, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Frontier Airlines, Inc., National Airlines, Inc., North Central Airlines, Inc., Ozark Air Lines, Inc., Southern Airways, Inc. and Trans-Texas Airways, Inc.

²¹ Continental Air Lines, Inc. and Northeast Airlines, Inc.

²² American Airlines, Inc., Braniff Airways, Inc. and Delta Air Lines, Inc.

²³ The youth standby fares have remained at 50% of the adult coach fare. On Oct. 1, 1969, the young adult fares were increased from 66⅔% to 75% of the adult coach fare.

²⁴ Air West, Inc., Allegheny Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., North Central Airlines, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Southern Airways, Inc., Trans-Texas Airways, Inc. and Trans World Airlines, Inc.

²⁵ National Airlines, Inc., United Air Lines, Inc. and Northeast Airlines, Inc.

²⁶ Alaska Airlines, Inc., Braniff Airways, Inc., Eastern Air Lines, Inc., Pan American World Airways, Inc., Western Air Lines, Inc., New York Airways, Inc. and San Francisco & Oakland Helicopter Airlines, Inc.

²⁷ The only airline not basing its opposition on business consideration is Northeast Airlines, which claims the fare is uneconomic on its basically short (such as New York-Boston) routes.

ber of standbys presents a problem of carrying sufficient food, and when a standby youth does not get a served meal, though he will be given a meal ticket to be used in the airport on arrival, it is a cause of embarrassment to the youth and causes ill-will to the airline. Parents do not understand the fares, and object when a child may be required to take a plane 24 or more hours after intended departure. Finally, these airlines claim there are many phone calls from prospective standby travelers trying to determine the probability of getting on a certain flight. That the objection for the airlines is business judgment is further enforced by the fact that United, while opposing the fares, admits that economically youth fares are successful, providing a profit for United.²⁸

The Board has recognized not only the widespread interest in these fares, but also their importance, by taking the unusual step of allowing two different groups to intervene and file briefs in the remanded proceedings even though their petitions were not timely filed. The basis of this action was that the petitioners were user groups, and no user group had previously been represented in the proceedings.²⁹

The bus companies, the affected age group and parents, the general public, the airlines in favor and the airlines opposed each have their own opinion according to their particular interest. The final determination, however, will eventually rest on fare lawfulness, whether the rates are just and reasonable, and, even if the rates are discriminatory, whether or not they are unjustly discriminatory. Just and reasonable is a determination that rate level has some reasonable relationship to attainable cost level.

This article is directed to the question of discrimination. It is the thesis of this writer that there are legal bases for the youth standby and young adult fares. It will be shown that legal history, precedent and analysis suggest that these fares are not discriminatory in the first instance, but even if they are discriminatory, they are still lawful in that they are not unjustly discriminatory.

II. STANDARDS OF FARE LAWFULLNESS

A. In General

Section 404 (a) of the Federal Aviation Act (hereinafter referred to as the Act) spells out the duty of every air carrier to establish just and reasonable rates.³⁰ Section 404 (b) prohibits undue or unreasonable preference

²⁸ Oral testimony of manager of tariffs, United Air Lines, Inc., before Arthur S. Present, Hearing Examiner, Civil Aeronautics Board, Doc. No. 18936.

²⁹ C.A.B. Order No. 69-2-76 (Feb. 14, 1969), accepting the petition of National Student Marketing Corporation, a corporation engaged in the distribution and sale of youth fare identification cards pursuant to a contract with American Airlines.

C.A.B. Order No. 69-2-106 (Feb. 20, 1969), accepting the petition of National Students' Association, an educational and cultural non-profit corporation with membership of 1,300,000 students from 350 colleges and universities.

³⁰ 49 U.S.C. § 1374(a) (1958) provides: "It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carrier; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices

or advantage, unjust discrimination, or undue or unreasonable prejudice or disadvantages.³¹ These prohibitions have been divided into three rules, the language for which has been taken from the statutory section giving the Board the power to prescribe rates and practices of air carriers whenever it finds that a rate or practice is:

- (1) unjust or unreasonable,
- (2) unjustly discriminatory,
- (3) unduly preferential or prejudicial.³²

It is not unusual for the Board or a court to speak of "unjust discrimination" when it really means "unjust and unreasonable" or "unduly preferential or prejudicial." This is due to the use of loose language, and the failure to make what is, in many instances, a very fine distinction. In addition, analysis indicates that while the term "discrimination" from its historical basis in the Interstate Commerce Act relates specifically to the practice of rebate,³³ its use in the airline industry has followed the laymen's definition of a distinction in treatment.³⁴ The result is that, in fact, each of the above prohibitions is a discrimination, but the distinction between each is based on the type of discrimination. Thus, rates that are unjust and unreasonable are rates that are discriminatory based on rate structure; unjust discrimination is discrimination which is based on service or to persons; and undue preference or prejudice is discrimination which is based on distance or location.

A typical example of undue preference or prejudice is the practice of common faring, *i.e.*, the practice of charging the same fare to two points which are different distances from the point of origin.³⁵ The Board has, however, limited undue prejudice and preference to this type case only, and it is not, therefore, a factor in the youth standby or young adult fare. Accordingly, this chapter will be limited to a consideration of what is "unjust and unreasonable" and "unjustly discriminatory."

relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer to prejudice any of such participating air carriers."

³¹ 49 U.S.C. § 1374(b) (1958) provides: "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

³² 49 U.S.C. § 1482 (1958) provides: "Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective . . ."

³³ See VI.

³⁴ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, 411, col. 1 (Unabr. ed. 1967).

³⁵ Hilo Mainland Temporary Service Investigation, C.A.B. Order No. E-25252 (June 6, 1967); Northern Consolidated Airlines, Inc., Proposed Fares, 33 C.A.B. 440 (1961); The Hawaiian Common Fares Case, 10 C.A.B. 921 (1949).

B. Statutory Provisions

In addition to Section 404 of the Act, discussed in the preceding section, several other provisions must be considered to determine just and reasonable rates which are not unjustly discriminatory. Section 403 sets out the requirements placed on an air carrier, and requires that all tariffs shall be filed with the Board and shall be kept open to public inspection.³⁶ In addition, an air carrier is required to charge the rates set out in its tariff, and cannot vary from its tariffs except in the instance of certain specified persons, as listed therein.³⁷ Finally, no change may be made in any rate or tariff until after appropriate notice and publication of the proposed changes.³⁸

Sections 403 and 404 spell out the obligations of air carriers in regard to tariffs. Nowhere in these sections, or anywhere else in the Act, is a definition of either "unjust and unreasonable" or "unjustly discriminatory" provided. It has, however, been determined that in any interpretation and application of these terms the declaration of policy set out in Section 102 and the rules of ratemaking set out in Section 1002 must be considered.³⁹

Section 102 is entitled "Declaration of Policy: The Board," and provides

³⁶ 49 U.S.C. § 1373(a) (1960) provides: "Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void . . ."

³⁷ 49 U.S.C. § 1373(b) (1960) provides: "No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. Nothing in this Act shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduce-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any air carrier or foreign air carrier), the parents and immediate families of such officers and employees, and the immediate families of such directors; widows, widowers, and minor children of employees who have died as a direct result of personal injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Board may prescribe, may grant reduced-rate transportation to ministers of religion on a space-available basis."

³⁸ 49 U.S.C. § 1373(b) (1960) provides: "No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section . . ."

³⁹ National Airlines, Inc., DC-6 Daylight Coach Case, 14 C.A.B. 331 (1951); Hawaiian Common Fares Case, 10 C.A.B. 921 (1949).

that the Board shall consider, among other things, the following as being in the public interest:

- (1) the encouragement and development of air transportation;
- (2) the recognition and preservation of the inherent advantages of air transportation;
- (3) the promotion of adequate, economical and efficient service at reasonable rates and without unjust discrimination or undue preference;
- (4) competition necessary to assure sound development of air transportation;
- (5) promotion of air safety; and
- (6) promotion and development of civil aeronautics.⁴⁰

The language of this provision that the Board shall consider among other things the six policy considerations shows clearly the congressional intention that these considerations should not be exclusive. The Board has confirmed this interpretation and determined that this section provided only some of the elements to be considered in the public interest.⁴¹

The other section of the Act which the Board is required to take into consideration in a determination of rates is Section 1002 (e),⁴² titled "Rule of Ratemaking," and providing that among other considerations, that the Board shall consider the following in determining air rates:

- (1) effect of rate on movement of traffic;
- (2) need for adequate and efficient service at lowest cost consistent with such service;
- (3) standards of service to be rendered;
- (4) inherent advantages of air transportation; and
- (5) need of each carrier for revenue sufficient to provide adequate and efficient air service.

Both of the above sections were first enacted in the original Civil Aviation Act of 1933.⁴³ In fact, all four sections here considered, were derived from the original Act of 1938 with only minor changes in phrasing and no substantive changes. Major changes were made in the Act in 1958, but still without material change in these sections.⁴⁴

The Board has held that Section 1002 gives the Board authority to enforce the provisions of 404(a) prohibiting unjust and unreasonable rates and 404(b) prohibiting unjust discrimination and undue preference. In exercising this authority,⁴⁵ the Board shall consider, among others, those factors set out in Section 1002 (e). In addition, the Board must also be guided by the elements of the public interest in air transportation as set out in Section 102.⁴⁶

C. Unjust or Unreasonable Rates

It is not necessary to be an economist or to cite legal precedent for the proposition that a rate must be economically sound. A rate must cover all

⁴⁰ 49 U.S.C. § 1302 (1958).

⁴¹ Air Passenger Tariff Discount Investigation, 3 C.A.B. 242 (1942).

⁴² 49 U.S.C. § 1482 (e) (1958).

⁴³ Federal Aviation Act, 49 U.S.C. § 1301, 1542 (1958), formerly 52 Stat. 980 (1938).

⁴⁴ 2 U.S. Code Cong. & Ad. News 3767 (1958).

⁴⁵ U.S.C. § 1482 (d) (1958).

⁴⁶ National Airlines, Inc., DC-6 Daylight Coach Case, 14 C.A.B. 331 (1951); the Hawaiian Common Fares Case, 10 C.A.B. 921 (1949).

of the direct and indirect costs involved in doing business and, in addition, must provide a reasonable profit to the investors. It is simply not sound business policy to provide a product or service without adequate compensation. This policy applies to any type of business, whether private or public.

The accepted principle in transportation ratemaking, to insure the continued existence of transportation service, is that the rate levels must have a reasonable relationship to attainable cost levels.⁴⁷ While it is not necessary that a rate meet all costs of operation at all times, it must nevertheless be reasonably related to the cost of doing business,⁴⁸ and it must at all times be reasonably related to an expected future level of costs.⁴⁹ If a rate is uneconomically low, it will place an undue burden on other types of traffic without compensatory benefit.

In basic types of service, such a regular first class or coach service, the proposed fare must be capable of meeting the "fully allocated" costs of the service,⁵⁰ *i.e.*, all costs of doing business, of whatever nature, must be covered.

In addition to this test, the Board had developed the "profit-impact" test. A fare designed to increase traffic during off-peak hours or during periods of low-load cannot be expected to meet the test of full allocation of costs, because the capacity is not geared to reduce fare traffic.⁵¹ With promotional fares, the "profit-impact" test is applied and it is required that a "... promotional fare must generate sufficient new traffic to offset the loss of revenue from self-diversion plus the added cost of carrying the additional traffic."⁵² As early as 1948, the Board said that rates need not meet fully allocated costs at all times, although they must be reasonably related to costs.⁵³

The key factor in determining whether the profit-impact test should be applied is whether the carrier schedules for the traffic involved. The basis of this type promotional fare is that it will utilize otherwise empty seats. Promotion of the otherwise empty seat is an important consideration because air traffic is inflexible as to capacity. While a train can add or remove cars according to demand, an airline can only add or remove airplanes, and because of the tremendous investment in each airplane, it is not economically feasible to have extra sections "standing by" for possible use.

It was argued that because the space is available whether or not used, there is no additional cost involved.⁵⁴ The added cost must, however, be fully covered if it is not to become a burden on other types of traffic. Promotional rates must be fixed, if they are sound, not only with due re-

⁴⁷ Pittsburgh-Philadelphia No Reservation Fare Investigation, 34 C.A.B. 508 (1961); Air Freight Rate Investigation, 9 C.A.B. 340 (1948).

⁴⁸ Air Freight Rate Investigation, 9 C.A.B. 340 at 345 (1948).

⁴⁹ *Id.* at 345.

⁵⁰ Summer Excursion Fares Case, 11 C.A.B. 218 (1950).

⁵¹ Family Fare Tariffs—Complaint of Transcontinental Bus System, Inc., C.A.B. Order No. E-26431 (Feb. 29, 1968), 2 Av. L. REP. ¶ 21,782, at 14,555 (1968).

⁵² *Id.* at 14,558.

⁵³ Air Freight Rate Investigation, 9 C.A.B. 340, 345 (1948).

⁵⁴ *Id.* The no cost theory.

gard to the traffic they are expected to generate, but also with sufficient regard for attainable costs to assure that the rates will not have to be raised when the expected volume of traffic is realized.⁵⁵ Once the stimulation of the discounted fare has resulted in enough new traffic to require expansion of the operations to accommodate it, unless the fare is then reasonably related to the fully allocated costs of the service, it becomes unreasonable.⁵⁶

When it is determined that the profit-impact test is appropriate, then it must be determined whether the additional traffic gained by the promotional fare is sufficient to affect the loss that will be occasioned by the diversion from full fare traffic, together with the added cost of carrying the additional traffic.⁵⁷ The additional cost of carrying the promotional traffic is the sum of the costs directly attributable to this fare. Such items as the advertising for this fare and the costs of ticketing people are allocated to this traffic. Those items of cost not directly attributable to this traffic, such as the cost of unused space still remaining, are not included.

The much more difficult problem is the determination of the generation-diversion ratio, *i.e.*, does the additional traffic generated by the promotional fare offset the diversion from full fare traffic. This involves only a determination of the facts, but the facts are difficult to determine. As the Board stated in the recent *Family Fare Tariffs* case,

In the absence of some indication to the contrary it is reasonable to assume that the carriers would not urge the continuance of . . . tariffs unless, as corporations operated with a profit motive, it was to their advantage to do so.⁵⁸

D. Unjust Discrimination

The fact that a fare is different from another fare is not sufficient grounds to bring it within the proscription of the Act, providing such fare is offered at the same price to the general public. When National Airlines filed a tariff providing, for the first time, for daylight coach service, the fare was lower than the fare for first class carriage on the same flight. However, the fare was available to any member of the public desiring to travel by coach and the Board held that while the tariff filed may present a problem of whether such rate is just and reasonable, there was no issue of discrimination.⁵⁹

Under Section 404 (b) a rate is not illegal merely because it is discriminatory. The prohibition applies only to a rate that is *unjustly* discriminatory. There is no absolute rule to be rigidly applied and requiring absolute uniformity. It is, rather, a rule of reason, one requiring that the circumstances and conditions surrounding the discrimination be examined before determining that a rate comes within the prohibition of the Act.⁶⁰ As the

⁵⁵ Air Freight Rate Investigation, 9 C.A.B. 340, 345 (1948).

⁵⁶ Trans World Airlines, Inc., Rates for Phonograph Records, C.A.B. Order No. E-22935 (Nov. 26, 1965).

⁵⁷ Family Fare Tariffs—Complaint of Transcontinental Bus Systems, Inc., C.A.B. Order No. E-26431 (Feb. 29, 1968), 2 Av. L. REP. ¶ 21,782 (1968).

⁵⁸ *Id.* at 14,558.

⁵⁹ National Airlines, Inc., DC-6 Daylight Coach Case, 14 C.A.B. 331 (1951).

⁶⁰ Texas & Pacific R.R. Co. v. I.C.C., 162 U.S. 197 (1896); Transcontinental Bus System v. C.A.B., 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

Act itself does not define an unjust discrimination, the Board has taken the definition of the Interstate Commerce Act⁶¹ (ICA), which provides that a rate is unjustly discriminatory if it grants different treatment to like traffic for like and contemporaneous service offered under substantially similar circumstances and conditions.⁶²

The fundamental rule in unjust discrimination is the rule of equality. The Supreme Court affirmed the rule of equality in referring to the ICA as follows: "The great purpose of the Act to regulate commerce . . . was to secure equality of rates as to all, and to destroy favoritism . . . by prohibiting . . . forbidden rebates, preferences and all other forms of undue discrimination."⁶³

1. *Like Traffic*

The first requirement of the rule against unjust discrimination is that the traffic receiving the same service at different prices be "like." This term has seldom been investigated by the Board, the Interstate Commerce Commission (ICC) or the courts. An indication of one allowable difference in traffic was noted by the ICC when it held that no discrimination was involved where one rate was charged for shipment in standard sized cartons (of a certain size), and another, higher rate set for over-sized cartons, because the different rates applied to different traffic, each kind of traffic being open on equal terms to all shippers.⁶⁴ Unjust discrimination of a like kind of traffic is prohibited, but there can be no discrimination where the traffic is of different kinds or classes not competitive with each other.⁶⁵

What makes differences in traffic? There are many different tariffs under the ICC regulation, which apply to many different commodities and different types of goods. Nevertheless, it does not appear that there has ever been a studied analysis of what constitutes different types of traffic, and how far such differences may extend. Can different persons or groups of persons be "unlike" traffic, *i.e.*, can children, or a specified age group be "unlike" traffic vis-a-vis regular fare adults? No cases under the ICC or the CAB have so far considered the question.

2. *Like and Contemporaneous Service*

It is difficult to separate like and contemporaneous service from substantially similar circumstances and conditions, and in many instances no attempt is made to distinguish these factors. Even if the services are not like and contemporaneous, a question still remains as to whether there is sufficient difference between the services offered to treat each differently without involving a discrimination.

The CAB has held that a sacrifice of convenience and the risk that space

⁶¹ 49 U.S.C. § 102 (1964).

⁶² *Wight v. United States*, 167 U.S. 512 (1897); *Transcontinental Bus. System, Inc. v. C.A.B.*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968); 11 C.A.B. 218. (1950).

⁶³ *New York, New Haven & Hartford R.R. Co. v. I.C.C.*, 200 U.S. 361, 391-92 (1906).

⁶⁴ *National Knitted Outerwear Association v. Akron, Canton & Youngstown R.R. Co.*, 156 I.C.C. 629 (1929).

⁶⁵ *Pa. Miller's State Ass'n v. Philadelphia & Reading Ry. Co.*, 8 I.C.C. 531 (1900).

will not be available on the flight desired by the passenger is sufficient to distinguish the service and make it "unlike."⁶⁶

In *Family Fare Tariffs*,⁶⁷ the Board found that the services were "unlike" even with a reservation under a family fare plan because the family fare rates were limited to certain days of the week even though a passenger traveling under the family fare plan is entitled to all of the inflight services and amenities accorded regular fare passengers. The Board found the inconvenience and restrictions attendant upon use of the plan only on certain days of the week sufficient to differentiate it from regular fare traffic.

The Supreme Court rejected the contention that the ICA did not prohibit more service to one than to another, but only provided that where the same service was provided the charge should be equal. The Court held that it was an unjust discrimination to charge different rates to different shippers for the same service.⁶⁸

The same result is reached when a special service is provided, but it is offered only to a select group. Offering a special excursion fare to groups of 25 students would unjustly discriminate against groups of 25 who were not students, no evidence having been offered to prove that the costs of selling the service to the student group would be less than to any other group.⁶⁹ This result was again reached by the Supreme Court where a railroad offered warehousing to some customers at one cost and at another cost to other customers.⁷⁰

3. Substantially Similar Circumstances and Conditions

Assuming that a rate provides like service to like traffic, nevertheless if the circumstances and conditions are substantially different, it may be sufficient to justify the discrimination and to allow a finding that such is not unjustly discriminatory.

The question is which circumstances and conditions may be taken into consideration. In *Tour Basing Fares*,⁷¹ the Board, in affirming the result of the Examiner, excepted to his conclusion that only factors directly relating to the carriage itself could be relied upon. The Board said that, at least where the justification is ascribed to the direct competition of another transportation medium, the Supreme Court has made it clear that the Board must look outside the facts of carriage.⁷²

There is no question that circumstances outside those directly relating to carriage should be considered. This is confirmed by a reading of Sections 102 and 1002.⁷³ The items listed are not all directly related to the

⁶⁶ American Airlines, Military Fares, 38 C.A.B. 1038 (1963); Pittsburgh-Philadelphia No Reservation Fare Investigation, 34 C.A.B. 508 (1961).

⁶⁷ Family Fare Tariffs—Complaint of Transcontinental Bus Systems, Inc., C.A.B. No. E-26431 (Feb. 24, 1968), 2 Av. L. REP. ¶ 21,782 (1968).

⁶⁸ Wight v. U.S., 167 U.S. 512 (1897).

⁶⁹ Capital Group Student Fares, 25 C.A.B. 280 (1957).

⁷⁰ Baltimore & Ohio R.R. v. United States, 305 U.S. 507 (1930); Seaboard Airline Ry. Co. v. United States, 254 U.S. 57 (1920).

⁷¹ 14 C.A.B. 257 (1951).

⁷² Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944).

⁷³ See II (B).

carriage itself, and yet these are factors which Congress has specifically authorized the Board to use in consideration of rates. Confusion as to the type of factors to be considered has been caused by looking to the ICA when it was not applicable. Unlike the CAA, the ICA has two separate sections in which it considers unjust discrimination—Section 2, which was originally only charging of different rates for like service,⁷⁴ and Section 3, covering the charging of different rates for different service to a limited class.⁷⁵ In the early cases, the ICC made a distinction and held that under Section 2 only those circumstances directly relating to the carriage itself could be considered, while in a proceeding under Section 3 outside factors could also be considered.⁷⁶ However, there have never been multiple sections in the CAA which required differentiation. Any question of unjust discrimination must be considered under Section 404(b), and it is clear that the distinction in the ICA is inapplicable to the CAA.

While there has been some confusion on the factors to be considered, the Board held early in its existence that it could look at factors outside the carriage. In *Air Passenger Tariff Discount Investigation*,⁷⁷ a case questioning the validity of the air travel card, evidence was allowed showing that in 1939 50% of the air passenger revenue was based on card holders. The Board sustained the discriminatory rate because the "impetus subscribers have given to development of air transportation." The Board further concluded that the amount of the discount was relatively small in relation to the amount of travel purchased by the subscribers and, therefore, any discrimination would not be unjust.

In *Tour Basing Fares*, the Board stated that (speaking specifically of overruling the Examiner and going outside the carriage itself) if there was any language in any previous decisions that appeared contrary to this holding, such decisions should be considered overruled. While the Board went outside the carriage itself, it found that the only possible effect of the rate was to increase revenue for the carrier, and even this effect was doubtful. In finding this not a sufficient consideration in itself to justify a discriminatory rate, the Board said:

We do not mean, however, to say that an air carrier may never establish a rate differential . . . on the basis of business considerations. And as we have previously pointed out, the Supreme Court has held in cases involving surface carriers, that inter-carrier competition . . . may be a justification for a rate discrimination . . . there may be other ascertainable factors of like import to the welfare of the air carrier or to air transportation generally which may offer an adequate reason in the public interest for a departure from the public utility concept embraced in the rule of equality.⁷⁸

In *Free and Reduced Rate Transportation Case*,⁷⁹ the Board said:

⁷⁴ 24 Stat. 379, § 2 (1887).

⁷⁵ 24 Stat. 379, § 3 (1887).

⁷⁶ I.C.C. v. Alabama Midland Ry. Co., 168 U.S. 144 (1897); *Wight v. U.S.*, 167 U.S. 512 (1897).

⁷⁷ 3 C.A.B. 242 (1942).

⁷⁸ *Tour Basing Fares*, 14 C.A.B. 257, 259 (1951).

⁷⁹ *Free and Reduced Rate Transportation Case*, 14 C.A.B. 481 (1951).

. . . we may not properly deny consideration at the threshold to a carrier's asserted justification for a discriminatory fare merely because it stems from factors outside the carriage itself. However, there was left the problem of determining what weight we would give to the carrier's reasons for fare discrimination.⁸⁰

The Board went on to discuss the carrier contention that management should be left as free as possible to meet business problems with such promotional devices as their business judgment dictates. The opposition argument was that all fares must be judged solely in the public utility light of equal treatment for all. The Board view was that both policies merited attention. The Board would permit departure from the rule of equality and thus validate a discriminatory fare "only when an extraordinarily important and serious business interest of the carrier or of air carriers generally was involved."⁸¹

The Board has here indicated that the carriers should be entitled to present any reasons for the proposed tariff, and that upon such presentation the Board would determine the weight to be given each. Any business considerations should be heard. The language is clear that it is not a question of what evidence may be presented, but the weight to be given such evidence. The importance of this distinction is that all evidence, of any nature, that might go to sustaining a rate can be offered by the carrier. It will then be upon the Board to determine in each particular case how much weight should be given to each item of evidence. This, of course, is very different from limiting in advance the items which the carrier may use in justification of its tariff. The main reason is that any individual item may or may not be conclusive by itself. In one case one or more items, when taken together under the circumstances of that particular case, may be sufficient, while in another specific fact situation the same individual items may not be important and, therefore, would add little weight to the carrier argument.

A look at some of the specific considerations presented to the Board in the past, and the weight the Board has given to specific items can be of help in determining the direction the Board can be expected to take in the future.

In *Air Passenger Tariff Discount Investigation*,⁸² the Board found that promotion of the air industry and the significant contribution to aviation was a sufficient justification in itself, and in the *Free and Reduced Rate Transportation Case*,⁸³ the Board said that a factor important to the welfare of air transportation generally may offer an adequate reason in the public interest for a departure from the rule of equality.⁸⁴ A difference in cost of rendering the service is ample justification in itself for corresponding differences in rates.⁸⁵ Direct competition from another transportation

⁸⁰ *Id.* at 482-83.

⁸¹ *Id.*

⁸² 3 C.A.B. 242 (1942).

⁸³ *Free and Reduced Rate Transportation Case*, 14 C.A.B. 481 (1951).

⁸⁴ See also, *American Airlines, Inc., Fares for Former Employees*, 38 C.A.B. 670 (1963).

⁸⁵ *American Airlines, Inc., Proposed Standby Youth Fares*, C.A.B. Order No. E-23137 (Jan. 20, 1966), accord, *American Airlines, Inc., Fares for Former Employees*, 38 C.A.B. 670 (1963);

medium is a sufficient justification.⁸⁶ Where surface transportation had a tradition of providing free transportation to travel agents, it was allowed to the overseas air carriers. It was not, however, allowed to the domestic carriers because there was no showing of such tradition in domestic surface transportation.⁸⁷ Also, the justification for military fares was the rates that were provided by surface transportation.⁸⁸

While it did not specify what the factors might be, the Board in one case said that there may be ascertainable factors important to the welfare of the air carrier, and this would justify a difference in rates.⁸⁹

In *IATA Agreement Providing for North Atlantic Passenger Fares*, the Board justified competition with other airline carriers, in this instance international carriers *vis-a-vis* local service carriers. The Board found that unless the international carriers could lower their rates on one segment of an international route to match the rate of local service carriers, they would be unable to compete on that segment of the routes.⁹⁰

While the Board refused to allow a special fare for a group of students, it indicated it would accept a special fare for a group where it was shown that the cost of the group was less, and where the rate was open to any group of the necessary size.⁹¹ Finally, the Board has said that the national interest is sufficient to sustain a difference in rates, and this is based on the standby fares for military personnel.⁹²

The Board has considered other factors and of the following factors it has said that each, *in itself*, is not sufficient to prevent a fare from being unjustly discriminatory, although a combination may be sufficient. Mere expectation of carrier profit,⁹³ probable increase in net revenue,⁹⁴ probable reduction in airline subsidy,⁹⁵ good will⁹⁶ and social policy were not considered a sufficient basis to require the lowering of fares.⁹⁷

Probably the most troublesome factor is the promotion of traffic. During the 1950's the Board took the position that the mere promotion of additional traffic and the expectation of profit or a probable increase in net revenue could not be the basis of an otherwise discriminatory fare differential.⁹⁸ However, these decisions were made when the expansion of

IATA Agreement, Rate and Traffic Matters, 26 C.A.B. 716 (1957); Investigation of Full Adult Fares for Unaccompanied Children, 24 C.A.B. 408 (1956); Certificated Air Carrier Military-Tender Investigation, 28 C.A.B. 902 (1959).

⁸⁶ Tour Basing Fares, 14 C.A.B. 257 (1951).

⁸⁷ Free and Reduced Rate Transportation Case, 14 C.A.B. 481 (1951).

⁸⁸ American Airlines, Military Fares, 38 C.A.B. 1038 (1963).

⁸⁹ Tour Basing Fares, 14 C.A.B. 257 (1951).

⁹⁰ IATA Agreement Providing for North Atlantic Passenger Fares, 10 C.A.B. 330 (1949).

⁹¹ Capital Group Student Fares, 25 C.A.B. 280 (1957).

⁹² American Airlines, Military Fares, 38 C.A.B. 1038 (1963).

⁹³ American Airlines, Inc., Fares for Former Employees, 38 C.A.B. 670 (1963).

⁹⁴ *Id.* Group Excursion Fares Investigation, 25 C.A.B. 41 (1957); Tour Basing Fares, 14 C.A.B. 257 (1951).

⁹⁵ Group Excursion Fares Investigation, 25 C.A.B. 257 (1951).

⁹⁶ Free and Reduced Rate Transportation Case, 14 C.A.B. 481 (1951).

⁹⁷ Investigation of Full Adult Fares for Unaccompanied Children, 24 C.A.B. 408 (1956).

⁹⁸ American Airlines, Inc., Fares for Former Employees, 38 C.A.B. 670 (1963); Excursion Fares Investigation, 25 C.A.B. 41 (1957); A.T.C. Fare Discounts, 29 C.A.B. 1344 (1959); IATA Agreement, Rate and Traffic Matters, 26 C.A.B. 716 (1957); Free and Reduced Rate Transportation Case, 14 C.A.B. 481 (1951); Capital Group Student Fares, 25 C.A.B. 280 (1957).

air traffic was not a problem because the airlines were in a profitable, high traffic period.⁹⁹ With the advent of larger capacity planes and increased competition both in and out of the air transportation industry, the Board became more concerned with the financial stability and profitability of the air carriers. As early as 1957, the Board said that in the absence of a showing that the Capital Family Fare Plan traffic would be carried below cost, it is more desirable to leave the solution of financial and competitive problems to managerial discretion than to substitute the Board's judgment.¹⁰⁰ In *Mohawk Airlines, Inc., Golden Age Excursion Tariff*, the Board allowed a reduced fare to go into effect although it ordered an investigation on the basis of Mohawk's alleged need to improve its revenue position and to improve its load factor.¹⁰¹ In the last few years, when the load factors of all airlines have been dropping, and the prospect in the next few years is for new planes with increased capacity, the Board has been encouraging experimentation with promotional fares designed to utilize available load capacity. It seems to be the current philosophy of the Board to permit a promotional fare to go into effect unless it is shown that the fare is unreasonable on an experimental basis, and to allow the fare to be continued if it proves profitable to the airlines.¹⁰²

At one extreme is the argument that an airline must be judged solely in the light of its function as a public utility and its obligation to treat all members of the public equally. At the other extreme is the desire to leave the carrier as free as possible to meet business problems with such promotional devices as may appeal to its business judgment, recognizing that a business enterprise being operated for a profit will not long maintain rates that are uneconomic. The Board has taken the position that there is merit in both extremes and it will permit departure from the rule of equality to invalidate a discriminatory fare ". . . only when an extraordinarily important and serious business interest of the carrier is involved."¹⁰³

The more recent cases do indicate, however, that an important factor in the Board's final decision is the current, general financial health of the industry.

Finally, in one of the latest cases, and one decided by the Board since the *Transcontinental Bus* case, the Board held that a reduced rate was justified by the factors of long standing tradition, intermodel competition, improvement of efficiency of air transport, promotion by generating new traffic and revenue and encouragement of price competition within the industry.¹⁰⁴

⁹⁹ Keyes, *Passenger Fare Policies of the Civil Aeronautics Board*, 18 J. AIR L. & COM. 46 (1951).

¹⁰⁰ Capital Family Plan, 26 C.A.B. 8 (1957).

¹⁰¹ Mohawk Airlines, Inc., *Golden Age Excursion Tariff*, C.A.B. Order No. E-17111 (July 6, 1961).

¹⁰² Mohawk Airlines, Inc., *Unlimited Travel Fares*, C.A.B. Order No. E-26359 (Feb. 14, 1968); *Senior Citizen Standby Fare Proposed by Trans-Caribbean Airways, Inc.*, C.A.B. Order No. E-23889 (July 1, 1966); *Frontier Standby Fares*, C.A.B. Order No. E-23128 (Jan. 18, 1966); *Delta Airlines, Inc., Reduced Fares for Youths on a Reserved Seat Basis*, C.A.B. Order No. E-23656 (May 9, 1966).

¹⁰³ Free and Reduced Rate Transportation Case, 14 C.A.B. 481, 483 (1951).

¹⁰⁴ Family Fare Tariffs C.A.B. Order No. E-26431 (Feb. 29, 1968), 2 AV. L. REP. ¶ 21,782 (1968).

III. "STANDING" OF BUS COMPANIES IN AIRLINE RATE DETERMINATION

The first question before the court of appeals was the standing of the bus companies to challenge airline tariffs. The Board argued that petitioners must show that those persons, whose interests the relevant portions of the Federal Aviation Act were designed to protect, are subject to substantial harm. The court rejected this argument on the ground that the CAB is charged with protecting the public interest. Preference of one group to the prejudice of another group because of failure of the CAB to enforce the provisions of the Act results in a harm to the traveling public. The court held that the petitioners, by seeking review of the Board action, were acting in the interest of the public and for the protection of the public right.¹⁰⁵

The court further held, that to the extent the petitioner's allegations of uneconomic and unjustly discriminatory tariffs are proved, a harm to the traveling public is estimated. Unjustly discriminatory rates afford favored service to those eligible under the tariff, and deprive those not eligible of equal treatment. Also, uneconomic and unreasonable rates injure the traveling public by jeopardizing the financial stability of the air carriers or by forcing those persons not eligible to travel at reduced rates to bear a greater and undue portion of the costs of operation. This shift of operating costs results in an oppressive burden on the portion of the public not afforded reduced rates.¹⁰⁶

Although Congress made provision in the Act for the protection of an aggrieved party,¹⁰⁷ and even conceding the court the right to find a substantial interest on the part of the bus company,¹⁰⁸ under the facts of the present case the bus company cannot represent both the interest of the public and its own interest, because such interests are not compatible.

The public is interested in the lowest possible fare for its transportation, consistent only with the limitation that it should not be so low that the transportation company cannot afford to stay in business. This is the precise purpose of requiring that a fare be reasonable—that it be economic. However, in the present case the interest of the bus company is to keep the airline rates up—to keep as large a margin as possible between airline and bus fares. This is brought out by the allegations of the bus company in *Family Fare Tariffs*,¹⁰⁹ where it charges that the family fares “. . . constitute an unfair competitive practice because they are specifically designed to divert its bus traffic to air carriers.”¹¹⁰

The bus company is interested in keeping airline rates at the highest possible level in order to prevent loss of bus traffic. The public interest,

¹⁰⁵ *Transcontinental Bus System, Inc. v. C.A.B.*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

¹⁰⁶ *Id.* at 476.

¹⁰⁷ 49 U.S.C. § 1436 (1958).

¹⁰⁸ The court admits this is not correct. On page 484 it concedes that the Board need not consider the effect of its actions upon surface transportation.

¹⁰⁹ *Family Fare Tariffs*, C.A.B. Order No. E-26431 (Feb. 29, 1968), 2 AV. L. REP. § 21,782 (1968).

¹¹⁰ *Id.*

however, is in the lowest possible level of fares, and is in direct conflict with the interest of the bus company. Where the public interest is compatible with the interest of a party, there is no reason why the party cannot represent both the public interest and its own. This is the situation present in *F.C.C. v. Sanders Bros. Radio Station*,¹¹¹ on which the court relied. However, the situation is not the same in the *Transcontinental Bus System* case. The bus system cannot do justice to the public interest while still properly representing its own interests.

The *Sanders* case involved an application for a competing radio station. The existing station asked leave to intervene in the petition of the new applicant, and appealed from the order of the Federal Communications Commission granting a license for the competing station. The new licensee contended that economic injury to a competitor is not a ground for refusing a broadcasting license and, since the intervenor was not an aggrieved party under the Federal Communications Act, they had no standing to appeal. The Supreme Court held that economic loss to a competitor was not grounds for refusing the license, but nevertheless gave the competitor standing to prosecute this appeal. The basis for granting the appeal was the extent to which such economic loss would be to the detriment of the public, and would, therefore, be a ground for denying the license. Too much competition would drive both stations out of business and would be detrimental to the public, which would end up with no stations. However, this is distinct and different from the consideration that competition between the two stations may cause economic loss to the original station.¹¹²

In *Sanders* the court said that to the extent the interest of the broadcasting station was the same as that of the public, it could appeal and represent the public. There is no suggestion of representation of the public interest where such interest is completely contrary to the private interest, the situation in which the bus system finds itself. In addition, it should be noted that the court in *Sanders* begins by distinguishing broadcasting stations from telegraph and telephone companies. Although all are regulated by the Federal Communications Commission, the latter are utilities. The court specifically held that broadcasting stations are not common carriers, and are not to be dealt with by analogy to railroads and other carriers. They are to be treated as being in a field of free competition.¹¹³ The Commission has power to grant or deny a license, according to the Act, but has no control over the operation of the station, and as such is distinguished from a utility that is subject to public regulation, not only on entry into the field, but also in all its actions in the field.

Finally, while the *Sanders* case involves two radio broadcasting stations, both subject to jurisdiction of the same agency under the same terms, the case under consideration involves two different modes of transportation, each subject to regulation by a different agency, neither of which has any control over the other.

¹¹¹ 309 U.S. 470 (1940).

¹¹² *Id.* at 476.

¹¹³ *Id.* at 474.

The general rule of administrative law is that one who is, in fact, adversely affected by governmental action should have standing to challenge the action,¹¹⁴ and this is in accordance with Section 10(c) of the Administrative Procedure Act. However, this provision is not applicable, because the Board has no duty to take into consideration the effect its actions may have on any other form of transportation. This distinction is taken from Section 102(b) of the Act, which provides that it shall be in the public interest to regulate air transportation in such a manner that will recognize and preserve "the inherent advantages of air transportation." This declaration of policy is taken directly from the Motor Carrier Act, which is part of the Interstate Commerce Act.¹¹⁵ Sections (a), (b) and (c) are exactly the same in the two statutes except for the portion set out above. In place of the above language of the Air Act, the Motor Carrier Act speaks of intent to "improve the relations between and coordinate transportation by and regulations of motor carrier *and other carriers*" [Emphasis added.]. It is established that the Board need concern itself only with the air industry. The court in *Transcontinental Bus* recognizes this, when it says:

. . . [t]he Board, on the other hand, is solely concerned with the needs of air transportation and it need not specially consider the impact of tariffs on competing surface or water carriers.¹¹⁶

This decision, that the Board need not consider the effect of its actions on surface transportation, has never been contested. There is no reason to allow a surface carrier to contest such action. It would be immaterial whether the action of the Board is injurious to the surface transportation because under the terms of the Act, such would not be a factor the Board need consider.

As TCO cannot represent the general public because of the incompatibility of their interests, and because TCO cannot represent its own interests because the CAB has no duty to consider other methods of transportation in determining air fares, it is submitted that the court of appeals erred in finding TCO had sufficient standing to maintain its action. The action of TCO should have been dismissed by the court.

IV. LEGALITY OF YOUTH STANDBY AND YOUNG ADULT FARES—THE CIRCUMSTANCES AND CONDITIONS ARE SUBSTANTIALLY DISSIMILAR FROM THOSE INHERING IN REGULAR ADULT FARES

The court of appeals specifically did not rule on the question of reasonableness of the rates, leaving that question to be determined on remand, and based its order for remand solely on the question of unjust discrimination. The Board and the court both defined unjust discrimination in the classic manner as "different treatment of like traffic for like and contemporaneous service under substantially similar circumstances and con-

¹¹⁴ DAVIS, ADMINISTRATIVE LAW 291 (1958).

¹¹⁵ 49 U.S.C. 302(a), as amended (Supp. II, 1965).

¹¹⁶ *Transcontinental Bus System, Inc. v. C.A.B.*, 383 F.2d 466 (5th Cir. 1967), cert. denied, 390 U.S. 920 (1968).

ditions."¹¹⁷ Both the Board and the court ignored the question of "like traffic," apparently assuming that youth are "like" traffic to full fare adult passengers.¹¹⁸

The court then found the Board ruling, that the inconvenience of the standby provisions rendered the service "unlike" full fare reservation service, was adequately supported by the evidence.¹¹⁹ This left only the question of whether the circumstances and conditions were substantially similar, and it is on this point that the Board and court appear to differ. The question is what individual items may be considered in determining whether the circumstances and conditions are so similar as to be unjustly discriminatory. This can best be considered on an individual basis. First, however, it is necessary to delineate the province of the Board and the province of the court.

The court stated that the weight to be given the various factors in a particular case is a matter for the Board, but what factors may be considered in a question of statutory interpretation, and consequently is for the courts as well as the Board.¹²⁰ The court ruled that on review, the scope of the reviewing court's power is limited to a determination of whether the Board abuses its discretion,¹²¹ but the court went further when it declared that it is for the court to determine the proper factors to take into consideration.

The Supreme Court has recognized that by the use of such terms as "unjust," "undue," and "unreasonable," strict uniformity cannot be enforced, and was not intended by Congress. Rather, it was the intention of Congress that such terms should be interpreted by the tribunal appointed to carry into effect and enforce the provisions of the Act, taking into consideration all circumstances and conditions which responsible men would consider.¹²² The courts have always recognized that Congress intended to commit to the Commission the determination by an application of an informed judgment to the existing facts.¹²³ It is basic to an administrative agency that it is the interpreter of the will of Congress with its specialized expertise. In regard to the ICC, on which the CAB is based, it is said that:

[I]n effect, it is constantly performing legislative functions. It is true, of course, that the Commission must be guided by the standards of action prescribed by Congress. But these standards are usually couched in such generality of terms as to leave open an almost uncharted discretion in the disposal of specific proceedings. There are no objective and definitive tests of "justness" or "reasonableness" or "public interest;" and yet these undefined statutory qualifications or their equivalents, frequently constitute the only guides upon which the Commission must rely . . . [A]nd the power of review, when actually asserted, have been largely confined to the censorship of the Com-

¹¹⁷ 383 F.2d at 481.

¹¹⁸ For a full discussion of "like traffic" see V *infra*.

¹¹⁹ 383 F.2d at 485.

¹²⁰ 383 F.2d at 484.

¹²¹ *Id.* at 478.

¹²² *Texas & Pacific R.R. Co. v. I.C.C.*, 162 U.S. 197, 219 (1896).

¹²³ *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344 (1940).

mission's orders on constitutional grounds for want of statutory authority or for absence of essential procedural safeguards.¹²⁴

In speaking of the term "public interest," the Supreme Court said that it is up to the Commission, not the courts, to determine whether a proposal is consistent therewith.¹²⁵

The specific statutory language of the Act provides in both the Declaration of Policy, Section 102, and the Rule of Ratemaking, Section 1002 (e), that the Board shall take into consideration in its determinations certain specified factors set out in these sections, but it further states in both sections that the specified factors are only among those which the Board may consider. The Board is not limited to these enumerated, and in view of the expertise attributed to the Board, it would be unreasonable to assume that Congress intended that the determination of the other factors to be considered should be left to the courts rather than to the agency having an expertise in the area.

The court further held that the Board does not have license to resort to "the full spectrum of social policy considerations which might rationally bear on the issue,"¹²⁶ but must limit its consideration to those factors which Congress has by statute deemed material, and those factors which regulatory practice in the transportation industry has through experience found relevant. In support of this proposition, the court cited two cases, both of which concerned air mail subsidy and an attempt by the Board to avoid following a specific section of the statute. Neither case involved consideration of the statutory policy. Both are cases where the CAB chose to ignore specific language of the statute,¹²⁷ rather than cases of interpretation of the scope of the statute. Thus, there is, in fact, no authority for the statement of the Court.

The court spoke of "social policy" but did not define it. However, in taking this consideration out of the statutory authority, the court limited language so broad as to encompass almost any consideration the Board could find relevant. The statutory language indicates Congress intended to give the Board the broadest possible authority. If the provisions of Section 102 are not sufficiently broad, remember these are only some of the factors, *among others*, (unspecified) which the Board is entitled to consider. It would be very difficult to find anything that could not come within the specifically enumerated provisions, particularly when accompanied by a Board finding that it was to the benefit of air transportation. These provisions were first set out in the original Act in 1938, and in spite of several amendments to the Act since then, there has been no attempt to change or limit the broad instructions given to the CAB in the original Act.

It is now appropriate to consider the individual items considered relevant to a determination of the legality of youth fares.

¹²⁴ SHARFMAN, THE INTERSTATE COMMERCE COMMISSION, 7-8 (1931).

¹²⁵ *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173 (1959).

¹²⁶ *Transcontinental Bus System, Inc. v. C.A.B.*, 383 F.2d 466, 484 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

¹²⁷ *American Overseas Airlines v. C.A.B.*, 254 F.2d 744 (D.C. Cir. 1958); *Western Airlines v. C.A.B.*, 347 U.S. 67 (1954).

A. Promotion of Traffic

The Board in its original opinion emphasized its policy of allowing airline management to exercise its discretion in attempts to increase passenger traffic, improve the utilization of equipment and ground facilities and the financial position of the airline industry, and to make available the benefits of air transportation to a larger segment of the public. But the court held that promotion could not be used as a justification for an otherwise discriminatory rate without any evidentiary basis or rational justification.

In support of this proposition, the court relied mainly upon *Hawaiian Common Fares*,¹²⁸ *Tour Basing Fares*¹²⁹ and *Free and Reduced Rate Transportation Case*.¹³⁰ These cases do stand for the proposition that promotion is not a valid justification for an otherwise unjustly discriminatory rate. However, the *Hawaiian* case was decided in 1949 and the other two cases were decided in 1951. Other cases, both prior to and subsequent to these cases, have held that promotion of traffic is a valid consideration. The first of these was the decision upholding the validity of the air travel card in which the Board relied heavily on the fact that in 1939 50 per cent of the total passenger revenue came from cardholders.¹³¹ In the present decade, the Board has several times based its decision on the promotion of traffic, if it improves the financial position of the carrier.¹³²

The court said that in the past the Board has consistently held the promotional aspects of a tariff alone did not render the circumstances and conditions of service dissimilar,¹³³ and the court simply ignored the cases holding to the contrary. In addition, it should be noted that one of the cases cited in support is *Ozark Air Lines Senior Citizen Excursion Tariff*,¹³⁴ which is an order for an investigation on the basis that there might be discrimination, based not on the age but on the fact that there is a difference in age within the tariff, 65 for men and 62 for women. This case was combined for investigation with *Mohawk Airlines, Inc., Golden Age Excursion Tariff*,¹³⁵ a tariff which had been in force since 1951 pending an investigation, and which had been allowed to go into effect in line with the general policy of encouraging experimentation with promotional fares.¹³⁶ Analysis of the cases indicates that the opinion of the Board depends on the current financial status of the carriers. Therefore, in the present period, where the average load factors are approximately 53 per cent for the trunk carriers and 45.2 per cent for the local carriers,¹³⁷ the Board will favor any fare that may hold increase traffic if it is economic.

¹²⁸ The Hawaiian Common Fares Case, 10 C.A.B. 921 (1949).

¹²⁹ Tour Basing Fares, 14 C.A.B. 257 (1951).

¹³⁰ Free and Reduced Rate Transportation Case, 14 C.A.B. 481 (1951).

¹³¹ Air Passenger Tariff Discount Investigation, 3 C.A.B. 242 (1942).

¹³² See II at n.27 *et cet.*

¹³³ Transcontinental Bus System v. C.A.B., 383 F.2d 466, 490 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

¹³⁴ Senior Citizen Excursion Tariff Proposed by Ozark Air Lines, Inc., C.A.B. Order No. E-21973 (March 31, 1965).

¹³⁵ Mohawk Airlines, Inc., Golden Age Excursion Tariff, C.A.B. Order No. 17111 (July 6, 1961).

¹³⁶ Both of these tariffs were withdrawn by the respective airlines prior to hearing.

¹³⁷ 1969 Air Transport Facts and Figures 26.

Even assuming there is a question whether promotion of traffic is a valid factor, it is still difficult to find a rational basis for the language of the court: "... [W]e do not believe that such a radical change in policy can be justified. . . ."¹³⁸ Not only is there no radical departure from previous decisions (the first dating all the way back to 1941), but it is consistent with the most recent decisions in which the Board has used promotion of traffic as a justification for the validity of discount fares. Any radical departure from precedent appears to be in the opinion of the court.

When the Board reconsidered this question, based upon the evidence developed by the examiner, it stated that promotion of traffic, merely to generate additional revenue for the individual carriers, might not justify an otherwise discriminatory rate, but the Board must consider such in light of its duty to encourage and develop an air transportation system,¹³⁹ and that in this light, promotion of traffic is a valid justification because of its contribution to the quality of service available and because "a sound promotional fare structure is vital to the continued progress of air transportation."¹⁴⁰ The Board has been careful to justify promotion of traffic as a basis for discrimination even under the narrowest interpretation of the court decision.

B. Age

Airlines favoring these fares argued that rates for specific age groups have been traditionally permitted by regulatory agencies without being considered in conflict with the anti-discrimination provision of the law.¹⁴¹ Both airlines and surface carriers have long offered special rates for children under 12 and such rates have never been questioned. Why should not another age group be also justified? Particularly in view of the fact that special rates have been offered to this age group by the family fares.¹⁴² In addition, both railroads and bus companies have previously offered discounts to young people in the 12-21 age bracket without objection from the ICC.¹⁴³

The court of appeals held that age alone is not a relevant consideration because it is a factor based on status of traffic and is not related to transportation.¹⁴⁴ Further, that reduced fares for children under 12 were a "time-honored exception."¹⁴⁵ While the court was not suggesting that these fares were unjustly discriminatory, it did not appear to the court, or to the examiner after taking evidence, that any justification existed for extending this exception to another age group.¹⁴⁶

¹³⁸ *Transcontinental Bus System, Inc. v. C.A.B.*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

¹³⁹ Sec. 102(a), (b), (d).

¹⁴⁰ C.A.B. Order No. 69-8-140 at 11 (Aug. 25, 1969).

¹⁴¹ Delta Reserved Seat Youth Fares, Order No. E-23656 (May 9, 1966).

¹⁴² Brief of American Airlines, Inc. at 10, Civil Aeronautics Board, Doc. No. 18936 (Nov. 12, 1968).

¹⁴³ *Id.*

¹⁴⁴ *Transcontinental Bus System, Inc. v. C.A.B.*, 383 F.2d 466, 489 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

¹⁴⁵ *Id.*

¹⁴⁶ Initial Decision of Hearing Examiner, C.A.B. Doc. No. 18936 (Jan. 21, 1969).

The Board, however, after reviewing the evidence taken by the examiner, held the age limitation to be very pertinent. It found that because this age group does little business travel, there is substantial elasticity and this age group is more responsive to price than the market as a whole,¹⁴⁷ that the reduced fare increased air travel in this group, as shown by the increase in traffic of this age group from 2.5% of the revenue passenger miles in 1966 to 5.3% of the revenue passenger miles in 1968,¹⁴⁸ that while some of this traffic would have traveled by air in any event, the new traffic more than offset any diversion of existing traffic, and that the growth rate in this group is greater than in other classes of traffic.

C. Competition

Another argument in justification of the youth fares is the competition from all forms of surface transportation, automobiles,¹⁴⁹ bus companies¹⁵⁰ and railroads.¹⁵¹ The examiner held that the mere fact that competition exists for youth traffic does not compel a finding that the circumstances and conditions surrounding youth fare passengers are different. The question is whether the competitive considerations are sufficiently compelling to validate the discrimination. The examiner did not find this to be so.¹⁵² However, the Board found this an important consideration and noted that surface transportation is familiar to persons of all ages, regardless of economic status, but in the case of air carriers, it is necessary to develop the air travel habit in its customers.¹⁵³ This is indicated by surveys done by Trans World Airlines which indicated that 55% of the youth passengers would not have flown without youth fares, and a Continental Airlines survey indicated that 39.1% of youth fare passengers would have otherwise used surface transportation.¹⁵⁴

D. Other Factors

Economic utilization of unused capacity is a consideration important to the welfare of the airline industry. While the court noted that this was considered by the Board,¹⁵⁵ the court did not independently consider it, but apparently combined it with all other considerations as "promotional aspects." The Board, however, found that utilization of off-peak service was an important incentive to the traveling public and that such would enable carriers to increase daily utilization of aircraft and load factors¹⁵⁶ and that "... standby fares tend to be a self-executing traffic leveler which induces eligible traffic to avoid peak travel times and to take advantage of

¹⁴⁷ C.A.B. Order No. 69-8-140 at 13 (Aug. 25, 1969).

¹⁴⁸ *Id.* at 12.

¹⁴⁹ Brief of the Bureau of Economics at 24, C.A.B. Doc. No. 18936 (Nov. 13, 1968).

¹⁵⁰ *Id.* at 22; Brief of Delta Airlines at 9, C.A.B. Doc. No. 18396 (Nov. 12, 1968); Brief of Air West, Inc. at 8, C.A.B. Doc. No. 18396 (Nov. 12, 1968).

¹⁵¹ Brief of Bureau of Economics, C.A.B. Doc. No. 18936 at 22 (Nov. 13, 1968); Brief of Delta Airlines, C.A.B. Doc. No. 18396 (Nov. 12, 1968).

¹⁵² Initial Decision of Hearing Examiner, C.A.B. Doc. No. 18936 at 67 (Jan. 21, 1969).

¹⁵³ C.A.B. Order No. 69-8-140 at 15 (Aug. 25, 1969).

¹⁵⁴ Brief of Bureau of Economics, C.A.B. Doc. No. 18936 at 23 (Nov. 13, 1968).

¹⁵⁵ *Transcontinental Bus System, Inc. v. C.A.B.*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

¹⁵⁶ C.A.B. Order No. 69-8-140 at 15 (Aug. 25, 1969).

space on less desirable flights."¹⁵⁷ The court noted that even in the case of the young adult fares, where the youth is traveling with a reservation, the same effect is created because these fares are subject to blackout periods.

Greater management discretion is a consideration emphasized by the Board as being within Section 102 of the Act, particularly (a) encouragement and development of air transportation system and (f) promotion, encouragement and development of civil aeronautics.¹⁵⁸

In addition, the Bureau of Economics of the CAB argued that because this is an accident-prone age on the highway, and the largest share of this group would drive without youth fares, that these fares should be sustained in the interest of highway safety.¹⁵⁹ Finally, local carriers argued that these fares, because they are economically sound, contribute to lessening of subsidies.¹⁶⁰

The question is then presented, even assuming none of the above factors is individually sufficient to create circumstances and conditions sufficiently dissimilar to regular fare traffic, (and this writer would not concede such) whether the combination of several or all is sufficient justification to prevent these youth discount fares from being unjustly discriminatory? In other words, do these factors justify the discrimination when weighed in the light of the pervasive requirement that "equality of treatment is paramount."¹⁶¹

The Board found that any discrimination was not unjust because the circumstances and conditions inherent in the youth fares are substantially dissimilar from those inherent in traffic generally.¹⁶² In view of the court opinion, the Board was careful to note that this decision was not based on any one consideration, but, in reaching this decision, account was taken of: ratemaking standards of Section 1002 (e); effect of these fares upon traffic; need for adequate and efficient air transportation at lowest cost; relation of these fares to development of an air transportation system adopted to needs of U.S.; fostering of sound economic conditions in air transportation; promotion of adequate, economical and efficient service; and maintenance and support of competition.¹⁶³

Having held an evidentiary hearing as required by the court, and having fully detailed the basis for its determination from the evidence presented, it is submitted that there is ample basis to sustain its findings in the face of any future appeal to the court.

V. LEGALITY OF YOUTH STANDBY AND YOUNG ADULT FARES—TRAFFIC BASED ON AGE IS NOT "LIKE TRAFFIC" TO REGULAR FARE TRAFFIC

In *Transcontinental Bus*, the court assumed without consideration of the matter that youth and young adult traffic was "like" traffic to full

¹⁵⁷ *Id.* at 16.

¹⁵⁸ CAVES, AIR TRANSPORT AND ITS REGULATORS, 140-68 (1962).

¹⁵⁹ Brief of Bureau of Economics, C.A.B. Doc. No. 18936 at 21 (Nov. 13, 1968).

¹⁶⁰ Initial Decision of Hearing Examiner, C.A.B. Doc. No. 18936 at 75 (Jan. 21, 1969).

¹⁶¹ *Transcontinental Bus System, Inc. v. C.A.B.*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

¹⁶² C.A.B. Order No. 69-8-140 at 19 (Aug. 25, 1969).

¹⁶³ *Id.*

fare adult traffic. It then proceeded to dispose of the age factor as not a relevant consideration in determining whether there are conditions and circumstances justifying discrimination.¹⁶⁴ The court went on to say that such statement applies only to the ages of 12-21, and that "We are not intimating that the time-honored exception for children under 12 is unjustly discriminatory."¹⁶⁵

Unquestionably, reduced rates for children are a time-honored tradition. Not only in all forms of transportation, but in many other areas as well. One need only look at the closest movie theater, sporting event, concert, or other events to which tickets are sold. On the basis of cost, probably the baby under two does not take up a seat and his free transportation may be, therefore, justified. In the case of the children's menu in a restaurant, the cost of a smaller portion will be less. However, in most other areas such as movies, sporting events, etc., there is not a cost basis justification for a child's ticket.

Assuming that a time-honored tradition is entitled to some standing, the next question is when does a practice become sufficiently "time-honored" to be recognized? The youth fares have been in force for nine years,¹⁶⁶ a relatively short period of time. In relation to the life of the act itself, which is barely 30 years old, and in relation to promotional fares, which were not really relied upon in a substantial way until 1951, less than 20 years ago, nine years becomes relatively substantial.

Recognition over a long period of time is not, apparently, a justification in itself. Family fares have been in force over 20 years, a substantial period of time in airline regulation. Yet, the court in the *Family Fare Tariffs* case rejected the "time-honored tradition" argument. Its rejection was based on the fact that these fares had previously been in question, even though all previous attacks on these fares had been rejected by the Board. What is necessary in addition to time? Why is a rate justified if the age is 2-12, and unjustified if the age is 13-21? What is the distinction between 12 and 13? It does not seem that this question has ever been answered.

It is submitted, however, that the proper question is not whether a fare for a specific age group is unjustly discriminatory but rather whether a fare limited to a particular age group is discrimination at all; whether age 12-21 is "like traffic" to regular adult traffic. If age 12-21 traffic is not "like traffic" to regular adult traffic, then a difference in fare cannot be discriminatory. There is no question of discrimination. The two fares cannot be compared to each other, and the only question to be decided in

¹⁶⁴ *Transcontinental Bus System, Inc. v. C.A.B.*, 383 F.2d 466, 489 (5th Cir. 1967), cert. denied, 390 U.S. 920 (1968).

¹⁶⁵ *Id.*

¹⁶⁶ Youth Fares Proposed by Domestic Carriers, C.A.B. Order No. E-17367 (Aug. 25, 1961). These fares were first introduced Aug. 1, 1961, providing for reservations within three hours of flight time, with the privilege of standing by if reservations were not available. They were abandoned by the trunk lines in Dec., 1961, but were retained by Bonanza Airlines, Inc., Central Airlines, Inc., Frontier Airlines, Inc., Ozark Air Lines, Inc., Pacific Airlines, Inc., Southern Airlines, Inc., Trans-Texas Airways, Inc., and West Coast Airlines, Inc. This fare was still in effect for these local carriers at the time American and Allegheny filed their new youth fare plans which are presently under consideration.

determining the legality of the youth fares is whether the fare is just and reasonable.

The question of "like traffic" was not submitted to the court or the Board in the *Transcontinental Bus* case. In fact, it does not appear that this question has ever been directly presented or decided, although an analysis of the cases concerning specific age groups indicate that indirectly the decisions are based on the fact that traffic in a specific age group is not "like traffic" to other age groups.

That children fares are valid in transportation is so well accepted that few cases can be found involving such. Even the court in *Transcontinental Bus*, while rejecting reduced rates for the age 12-21 group, was careful to add that it was not suggesting that children's rates were in any manner discriminatory.

The only CAB case directly covering rates for children (as distinguished from students) is *Full Fares for Unaccompanied Children*,¹⁶⁷ in which the court held that it was not unlawful to charge full fare for a child without an adult because the cost to the airline was higher than the cost of transporting a child with an adult. It further held that a difference between domestic and international rates was unjust discrimination because two children on the same plane could be charged different rates, one in domestic flight and the other in international flight. The reasons for the difference was that it was customary in international flight to charge half fare, whether or not the child was accompanied by an adult. On this point, the Board held that the airline could either raise both rates to full fare or reduce both rates to half fare. Either fare would be legal. The only illegality would be in making a distinction between domestic and international flights. The court refused to rely on the *Full Fares* case because the court found that it lacked "cogency."

While the court said that it examined this opinion with great care,¹⁶⁸ it apparently overlooked the following clear quotation:

... [w]e think it is clear that the lawfulness of both the half fare and the full fare were in issue insofar as discrimination and prejudice are concerned, and the Board has full authority to direct that any unlawfulness in this regard be removed.¹⁶⁹

In holding the reduced rates valid, the court has accepted a fare based on a specific age group.

In the *Full Fares* case, the dissent of Vice-Chairman Adams helps clarify the decision, by pointing out that he does not dissent from the decision, but rather from the approach of the majority. The majority found it lawful to charge full fare because of the extra service required in case of travel by a child unaccompanied by an adult. The dissent held that the cost of the unaccompanied child should be compared to the accompanied child, not to the adult. In other words, the dissent considered the children's

¹⁶⁷ 24 C.A.B. 408 (1956).

¹⁶⁸ *Transcontinental Bus System, Inc. v. C.A.B.*, 383 F.2d 466, 491 (5th Cir. 1967); cert. denied, 390 U.S. 920 (1968).

¹⁶⁹ *Full Fares for Unaccompanied Children*, 24 C.A.B. 408, 411 (1956).

half fare legal, and as such it should be the starting point for considering extra fare for extra service.

This decision makes clear that children's half fares are legal, although no basis is given for the legality of such fares. There is no allegation that special circumstances remove it from the category of full fares, and the Board does not justify it as such. The actual holding of the majority¹⁷⁰ clearly indicates that children constitute a special class, apart from adults. The dissent spells it out even more clearly; the rate set for children need not be the same as for adults. In reference to the children's rates, the children's "base" rate should be the criterion, rather than adult rates which are not applicable. Furthermore, the majority opinion stated that the actual rate set for children's fares was within the discretion of the management.

This proposition is even more clearly shown by two ICC cases which directly ruled that age was a valid basis on which to base special rates. These cases, *In the Matter of Regulations Governing Sale of Commutation Tickets to School Children*¹⁷¹ and *Bitzer v. Wash.-Va. Ry. Co.*,¹⁷² established the proposition that a rate can be established for an age group, provided that such rate is not limited to a particular kind or class and does not exclude other persons of the specified age group.

In the *Commutation Tickets to School Children* case, a rate was set that was open only to students of a certain class, specifically providing for the exclusion of pupils attending various other kinds of schools. The Commission held this fare unjustly discriminatory under Section 2 of the Interstate Commerce Act. The Commission added, "... [B]ut ... carriers may lawfully offer and use a commutation ticket limited in its sale and use to children or young persons between certain stated ages (as, for instance, from 12 to 21 years of age)."¹⁷³

The second case is similar to the *Commutation Ticket* case, and the Commission again states that a special fare cannot be provided for students, but that special rates can be provided for young persons based on age.

No sufficient reason is shown, however, why special commutation rates for young persons between certain ages should not be established provided the rates are not limited to pupils of schools of any particular kind or class and do not exclude other persons between the same ages who travel under substantially similar transportation circumstances and conditions.¹⁷⁴

All three of these cases were presented to the court in *Transcontinental Bus*. The court rejected the *Full Fares* case on the basis it lacked cogency, but it is submitted that this case was not properly presented and analyzed for the court.

¹⁷⁰ The actual question put to the Board was whether, in view of half fares for accompanied children, it was unjustly discriminatory to charge full fare for children not accompanied by an adult. The Board ruled that it could not require the airlines to set half fares for unaccompanied children where it is shown that the costs of carriage are higher than for accompanied children, because there is no regulatory rule requiring that accompanied children be charged half fare. This fare is set at the discretion of management.

¹⁷¹ 17 I.C.C. 144 (1909).

¹⁷² 24 I.C.C. 255 (1912).

¹⁷³ 17 I.C.C. 144 at 144 (1909).

¹⁷⁴ *Bitzer v. Wash.-Va. Ry. Co.*, 24 I.C.C. 255, 257 (1912).

The court rejected the ICC cases on the basis that the pertinent language was dicta. The court erred in this holding. If the Commission's only duty were to rule on the legality or illegality of the proposed tariff, the court would be correct. However, the Commission had the same duty the Board has under the CAA. Specifically, under Section 1002(d), it is provided that if the Board finds a rate illegal, the Board shall determine the lawful rate.¹⁷⁵ In view of this Board duty, it can hardly be said that the exercise of a duty under its regulatory powers is dicta. It is, in fact, to the point of the matter that the Commission has found a rate illegal and announced that it would accept as being legal. It is directly in point here as it specifically used as an example the age group with which we are concerned.

The court also said that, in addition to being dicta, the actual decision of the *Commutation Rate* case was based on *In Re Party Rate Tickets*, in which the Commission had held that party rate tickets could not be limited to a particular class but must be open to the whole public alike, and such rate cannot be limited based on vocation.¹⁷⁶ The court is correct so far as it went, but the Commission went further and said, in regard to the application of the party rate doctrine:

The rule that if carriers desire to establish party rates, such must be open to the general public and cannot be limited to the use of school children.

In this connection it should be remembered that the Commission's ruling does not prohibit the publication of commutation rates for children of specified ages, but merely holds that such rates must be open to all children within the ages stated in the tariff.¹⁷⁷

In other words, the Board in *Commutation Tickets* recognized fully the impact of *Party Rates*, but simply did not consider that an age group was a closer class.¹⁷⁸ Instead, the court considered age a valid distinction. Neither of these cases, each decided over 60 years ago, has been overruled by the Commission, the Board or a court.

The cases speak clearly on a subject seldom debated, simply because it is usually accepted without argument. The bus company, while it continues to recognize rates based on age in its own industry, attacks such rates of its competition.¹⁷⁹ It is submitted that the clear language of the court and the long standing practice in transportation should be recognized.

¹⁷⁵ The Hepburn Act of 1906, 34 Stat. 584, was an amendment to the Interstate Commerce Act. This amendment became effective Aug. 29, 1906, and provided, inter alia, the Commission with power to prescribe maximum future dates. See also SHARFMAN, *supra* note 124, at 45.

¹⁷⁶ In the Matter of Party Rate Tickets, 12 I.C.C. 96 (1907).

¹⁷⁷ In the Matter of Commutation Tickets to School Children, 17 I.C.C. 144, 242 (1909).

¹⁷⁸ The court further said that this case could not be considered, in addition, because Sec. 22 of the Interstate Commerce Act excises commutation tickets from the unjust discrimination provisions of Sec. 2. This is incorrect because the Supreme Court has held that nothing in Sec. 22 in any way restricts the Commission from declaring a rate unjustly discriminatory, unduly preferential or unreasonable. *Nashville, C. & St. L. Ry. v. Tennessee*, 262 U.S. 318 (1923); *United States v. Pennsylvania R.R.*, 266 U.S. 191 (1924).

¹⁷⁹ The bus companies, as well as other ground transportation, have long recognized children's fares. In addition, discount fares were offered to youths in the 12-21 age bracket without objection from the ICC. The youth fares were voluntarily withdrawn by the bus companies prior to commencement of action against the airlines.

To select a specific group from an age group, such as students,¹⁸⁰ to limit a group in racial or religious ground,¹⁸¹ to favor a particular shipper,¹⁸² are all examples of discrimination. However, when the group is based on age, without any limitation within that age group, then the fare is valid because there is no discrimination. There is no question of justification for unjust discrimination; it is simply that there is no discrimination. Neither the ICC nor the CAB has made any attempt to consciously distinguish the reason children are in a privileged class. It may be that no explanation was thought necessary, or it may be that the true significance was not realized. The conclusion is, however, that like traffic that is not "like" adult traffic, there is not need to justify the rates, *vis-a-vis* adult rates. As a separate class of traffic, a rate may be set in regard to itself only. No special conditions or circumstances are necessary to justify rates that are different from rates offered to different traffic. It is submitted that based upon reason and the decided cases, an age classification open to all members of the age group is not discriminatory, *vis-a-vis* any other class of traffic because it is not "like traffic." Such a rule would not be a license for arbitrary tariffs because a fare would still be subject to the rule of reasonableness and would remain valid only so long as it could be demonstrated that such fare was economically sound.

VI. LEGALITY OF YOUTH STANDBY AND YOUNG ADULT FARES— AN HISTORICAL BASIS

The beginning of commercial air service was the inauguration of air mail service on May 15, 1918, to New York City, Philadelphia and Washington, D.C.¹⁸³ However, the first economic control over airlines did not come until the McNary-Watres Act of 1930, an amendment of the Air Mail Act of 1925.¹⁸⁴ This legislation gave the Postmaster-General broad power of economic control over air carriers for the purpose of increasing passenger revenue and reducing the cost to the Government of carrying mail.¹⁸⁵

Until 1938, all federal regulation of air carriers was premised on the carriage of air mail, upon which all airlines relied to stay in business. No airline operating substantial routes could survive without air mail pay. The cost of passenger operations was such that originally air mail contractors had been unwilling or at least reluctant to enter the passenger field.¹⁸⁶

Between 1934 and 1938, there was considerable agitation for comprehensive legislation covering air transportation. This was due in part to the increasing importance of passenger traffic, which by 1937 accounted for

¹⁸⁰ Capital Group Student Fares, 26 C.A.B. 451 (1958).

¹⁸¹ Mitchell v. U.S., 313 U.S. 80 (1941).

¹⁸² Wight v. U.S., 167 U.S. 512 (1897); I.C.C. v. B. & O. R.R. Co., 225 U.S. 326 (1912); Louisville & N.R. Co. v. U.S., 282 U.S. 740 (1931).

¹⁸³ New York Times, May 16, 1918, at 1, col. 1.

¹⁸⁴ Act of April 20, 1930, ch. 924, § 2, 46 Stat. 259.

¹⁸⁵ RHYNE, THE CIVIL AERONAUTICS ACT ANNOTATED, 22-3 (1939).

¹⁸⁶ Westwood & Bennett, A Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterward, 42 NOTRE DAME LAW. R. 309, at 313 (1967).

68% of the carrier income while air mail accounted for only 30%,¹⁸⁷ and in part to the fierce competition for air mail routes.¹⁸⁸

In addition, the cost of initiating operations was high. Competition was limited by a provision forbidding an air mail carrier to engage in non-mail operations "off-line" where it competed with the air mail route of another carrier.¹⁸⁹ There was, however, no control over carriers without air mail subsidy, and the established carrier was never certain from what source its competition would come the next day. For these reasons the main push for regulatory legislation came from inside the industry itself, from the air carriers. In addition, the general economic conditions caused a financial crisis in the airline industry. This crisis was heightened by seven major air crashes with the loss of 50 lives in 1936 and 1937.¹⁹⁰ Further financing of the airline industry was dependent on a showing of stability, which the industry felt could best be shown by federal regulation.¹⁹¹

The Civil Aeronautics Act of 1938 became law on June 23, 1938.¹⁹² It was an effort to avoid rate war, cut-throat devices, destructive and wasteful practices, and to insure that economic power and recklessness management should not be permitted to injure the smaller lines, the employees of the companies and the public. Its further purpose was to make possible long range economic planning on the part of both government and management.¹⁹³

There was little discussion of the ratemaking provisions of the Act because the sections were taken from the ICA, and it was felt that their wording, in the light of the ICC experience with similar provisions, was sufficient and clear and unobjectionable.¹⁹⁴ It was taken from the Motor Carrier Section of this Act.¹⁹⁵ While many of the legal principles which have proved to be in the public interest under the ICA can be used also in the regulation of transportation, nevertheless those principles must be applied with a clear understanding of their limitations and necessary qualifications which must be made because of the differences between the modes of transportation.¹⁹⁶

The principal provisions of the ICA were, (1) Section 1, providing that all charges be just and reasonable and declaring that every unjust and unreasonable charge was prohibited and declared unlawful; (2) Section 2, prohibiting of direct or indirect charging for any services a greater or less compensation from one than from another for a like and contemporaneous service rendered to a like kind of traffic; (3) Section 3, prohibiting the giving of any undue or unreasonable preference as between per-

¹⁸⁷ RHYNE, *supra* note 185, at 35. The remaining 2% was express.

¹⁸⁸ 83 Cong. Rec. 6405-6 (1938).

¹⁸⁹ Jones, *Anti-Trust and Specific Economic Regulation: An Introduction to Comparative Analysis*, 19 ABA ANTI-TRUST § 261 (1961).

¹⁹⁰ S. Rep. No. 687, 75th Cong., 1st Sess. (1937); Westwood & Bennett, *supra* note 186, at 322-23.

¹⁹¹ Jones, *supra* note 189, at 305.

¹⁹² The Civil Aeronautics Act, 49 U.S.C. § 1301 (1958), formerly 52 Stat. 973 (1938).

¹⁹³ 83 Cong. Rec. 6507 (1938).

¹⁹⁴ RHYNE, *supra* note 185, at 124.

¹⁹⁵ 49 U.S.C. § 301 (1935).

¹⁹⁶ RHYNE, *supra* note 185, at XVI.

sons or localities or kinds of traffic; and (4) Section 6, requiring the publication of rate schedules and the requirement that such rate schedules be followed. In regard to Section 6, it was said that no section was more thoroughly responsive to a popular demand. "Midnight tariffs" and rebating had brought about utmost confusion, gross favoritism and dishonesty.¹⁹⁷

All of these sections have been incorporated in the Civil Aeronautics Act. Section 1, requiring reasonable rates is in 404(a). The prohibitions against undue preference or unjust discrimination are in 404(b), and Section 6 has its counterpart in Section 403(a)(b).

It has been said that legislation was necessary in the airline industry to prevent the disastrous rate wars and discriminatory practices of the early railroad days,¹⁹⁸ and to avoid cutthroat devices and destructive and wasteful practices.¹⁹⁹ The fact is that the background and history of the railroad industry was entirely different from that of the air industry.

The railroads became a strong influence in the economy of the United States in the 1830's. From this period up to the 1970's the railroads were given very liberal charters which were mainly free of state and federal supervision. In addition, they were usually given extensive public aid in the form of land grants and money subsidies. The early attitude of both government and the general public was favorable because of the interest in this new means of "high speed" transportation, in opening of the West to settlement, in settling public land, in pushing of the frontier West and in the strengthening of the unity of national life.²⁰⁰

The public attitude changed, however, because of the evils that appeared, such as highly speculative railroad holdings, financial manipulation, destructive competitive warfare, fluctuating and discriminatory rate adjustments, and the overreaching exercise of monopoly power. The collapse of the railroad boom, together with general economic decline in the middle of the 18th Century started the troubles. The railroads, in order to maintain the traffic they already had, and to protect it from the competition, entered into special contracts and secret rebates.

So widespread was the practice and so demoralizing its results, that even those who directly profited were forced to the conclusion that a system of fair and open rates was far preferable to a basis resting on competitive warfare and personal favoritism.²⁰¹

Local discrimination prevented normal development of the country in accordance with economic advantage by creating trade centers given special favors in rates, while the business of competitors or of intermediate territory was depressed so that effective rivalry became impossible. Personal discrimination in the form of free passes was a source of both political and

¹⁹⁷ Atchison, *The Evolution of the Interstate Commerce Act, 1887-1937*, 5 GEO. WASH. L. REV. 289, 314 (1937).

¹⁹⁸ THOMAS, *ECONOMIC REGULATION OF SCHEDULED AIR TRANSPORT* (1951).

¹⁹⁹ 83 Cong. Rec. 6507 (1938).

²⁰⁰ SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION*, 14 (1931).

²⁰¹ Atchinson, *supra* note 197, at 292.

commercial scandal, and used as a cheap means of corrupting public officials and making the powerful shipper even more powerful. Rate changes were made effective overnight, or found expression only in a pocket-memorandum. Tariffs when published were not observed, and reviations were secret.²⁰² The growth of interstate commerce made it clear that the problem could be controlled only by the federal government.

Demand for federal legislation was based on the discriminatory practices of the railroads, the most glaring of which was the grant of personal preferences to favored shippers. Sharp resentment at the manifest injustice and baleful consequences of the rebating evil and at the subversive industrial tendencies inherent in rate maladjustments was the most potent factor leading to federal legislation.²⁰³

The Interstate Commerce Act became law February 4, 1887.²⁰⁴ In presenting the bill to the Senate, the Committee said in part:

The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States are now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations, both by declaring them unlawful, and adding to the remedies now available for securing redress and enforcing punishment, and also by requiring the greatest practicable degree of publicity as to rates, financial operations and methods of management of the carriers.²⁰⁵

Simple passage of legislation did not cure the evils. It took considerable time and many amendments to the original Act to bring the practices of the railroads under control. One of the most important amendments was the Elkins Act of 1903,²⁰⁶ which provided criminal penalties for rebating and other forms of discrimination, both on the part of the giver and the receiver of the favor. The amendment immediately became a powerful deterrent to the practice of rebating.²⁰⁷

A second amendment of particular importance is the Hepburn Amendment of 1906.²⁰⁸ This amendment gave the Commission the power to condemn unjust and unreasonable rates, and also the power to determine and prescribe future maximum just and reasonable rates. Later the Commission was given the power to set the minimum as well as the maximum rate.

The case of *Wight v. United States*,²⁰⁹ decided by the Supreme Court over 70 years ago, is still cited as the leading authority for the basic proposition that unlike treatment for like traffic under substantially similar circumstances and conditions is unjust discrimination. The facts of this

²⁰² *Id.*

²⁰³ SHARFMAN, *supra* note 200, at 18.

²⁰⁴ 24 Stat. 379 (1887).

²⁰⁵ SHARFMAN, *supra* note 200, at 18 n.14.

²⁰⁶ 49 U.S.C. §§ 1, 6, 11, 14, 15, 16, 18, 20, 41 (1964).

²⁰⁷ Atchison, *supra* note 197, at 325.

²⁰⁸ *Supra* note 206.

²⁰⁹ *Wright v. United States*, 167 U.S. 512 (1897); *Transcontinental Bus Systems, Inc., C.A.B. Order No. E-26431* (Feb. 24, 1968), 2 Av. L. REP. ¶ 21,782 (1968).

leading case graphically illustrate the type of problem with which the Commission was faced. Bruening was a wholesale beer dealer in Pittsburgh who bought beer in Cincinnati. His place of business was on the tracks of, and he had a siding connection with, the "Penhandle" railroad. Beer at the published price of 15¢ per 100 lbs was delivered to his door. The "B & O" railroad had neither track nor siding to the door of Bruening, and at the rate of 15¢ per 100 lbs., Bruening had to pick up the beer at the station of B & O, who, therefore, offered to deliver it to Bruening at the same price. The cost of this service was determined to be 3½¢ per 100 lbs., and Bruening thereafter offered to pick up his beer if he were given a price cut of 3½¢ which was done. He paid his bill at the rate of 15¢ per 100 lbs., and each month he presented his bill for delivery at 3½¢ per 100 lbs. There was no question in this case of the reasonableness of the 3½¢ charge. The question arose because of Mr. Wolf, who had no railroad siding with any railroad, was required to pay 15¢ and pick up the beer at the depot of the railroad. It was not simply a case of giving a customer a hidden rebate, but, in addition, the railroad also discriminated between individual customers.

Although Congress talked about the similarity of practices leading to the ICA and the CAA, the background leading to each was entirely different. In the first place, when the ICA was enacted the railroads were already established in all of the United States, and it was acknowledged that the railroad was the fastest and most economical mode of transportation, both for passengers and for freight. In addition, competition had already been established. It was not until 1920 that entry into the railroad field was limited,²¹⁰ and by 1887 there was competition between two or more lines to all major cities in the United States.²¹¹ The situation in the airlines was almost exactly opposite. There was no clamor by public for control; rather, the push for economic legislation for the airlines came from the airlines themselves, based upon the desire of the established lines to protect their investments and to prevent too much competition. As a practical matter, the competition of the air mail carriers was limited by the restrictions of the Post Office Department²¹² so that competition could come only from the unregulated carriers, *i.e.*, those without air mail contracts, and these carriers were not strong enough to challenge the subsidized lines at that time. In addition, the airlines were not a necessary form of transportation. Until the airlines proved their ability in World War II, they were not considered an important means of transportation. While railroads were put under regulation because of their importance in the economy, the airlines only gained importance and became an accepted common carrier after the industry was already under regulation.

While the rule against unjust discrimination was enacted to protect the public against practices of the railroads, at the time of enactment of the CAA, there was, in fact, no unjust discrimination in the airline industry.

²¹⁰ FULDA, *COMPETITION IN THE REGULATED INDUSTRIES, TRANSPORTATION*, 10 (1961).

²¹¹ *Id.*

²¹² Jones, *supra* note 189, at 302.

The most that could be said of the airline industry was that there might have been some unhealthy competitive practices. Even on this point there seems to be some question of whether this was fact or talk only, encouraged by those interested in promoting airline legislation.²¹³

What was the discrimination the OCA was designed to correct? Basically, it was under-the-table rebates and different treatment of different individuals. The Commission and the courts enunciated the rule of equality, but they did not mean that all were entitled to the same rates for all purposes. It was not concerned with the published tariff, but with the rate not in accordance with the published tariff, the rate given to some in spite of the tariff, and the rate made in order to provide benefit to certain individuals or areas that were not given to others. The Supreme Court stated in an early decision that the great purpose of the Act to regulate Commerce was to secure equality of rates and to destroy favoritism:

. . . [T]hese last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences. . . .²¹⁴

That Congress was not concerned with the published tariff, but rather with the unpublished tariff to special customers, is indicated by the necessity to amend the Act not once, but several times. Congress was not concerned with distinctions between customers and carriage, but with distinctions made on an individual basis. The Supreme Court said that not every discrimination was unjust, nor every preference or advantage undue or unreasonable. Rather all circumstances and conditions must be considered.²¹⁵

This is not to suggest that any rate is automatically non-discriminatory because it is published. It is, however, to suggest that the remedy provided was intended to correct a vicious evil and an extreme situation. To determine whether the discrimination is unjust:

. . . [A]ll circumstances and conditions which responsible men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the Act.²¹⁶

While the CAA gave the Board the power to regulate airline rates in 1938, very little attention was paid to rates until the 1950's. The carriers had mail subsidy, and as entry of additional carriers was subject to administrative control, there was no incentive for carriers to depart significantly from the already established rates.²¹⁷ While there was a great deal of informal Board activity, in the way of ironing out technical tariff imperfections and assuring compliance with tariffs format, there was only one formal proceeding prior to World War II relating to rate regulation.²¹⁸

²¹³ *Id.* at 306.

²¹⁴ *New York, New Haven & Hartford R.R. Co. v. I.C.C.*, 200 U.S. 361, 391 (1906).

²¹⁵ *Texas & Pacific R.R. Co. v. I.C.C.*, 162 U.S. 197 (1896).

²¹⁶ *Id.* at 219.

²¹⁷ Keyes, *Passenger Fare Policies of the Civil Aeronautics Board*, 18 J. AIR L. & COM. 46 (1951).

²¹⁸ CHERINGTON, *AIRLINE PRICE POLICY*, 76-77 (1958).

Board control of rate regulation has been a matter of great importance only during the last two decades. Prior to that time, rate regulation did not appear necessary, certainly not for any of the extreme practices which required regulation in the railroad industry.

The proper conclusion to be drawn is that if the statute is followed the presumption is that the rate is legal, and it should be overturned only on a showing of real evil that the statute intended to correct. Where the tariff is published, and where there is no showing of variance from the published tariff, such tariff should be valid unless there is a positive showing of unjust discrimination. This is further supported by the fact that no cases have been found in which an airline failed to follow the published tariff or was guilty of giving rebates. Whatever the reasons, the airlines simply have not been involved in these types of practices. There is no justification for judicially legislating new meaning to the statute and the intentions of Congress.

It is submitted that the situation presented by the youth standby and young adult fares is not the type of situation to which unjust discrimination was intended to apply. It is submitted that unjust discrimination was intended basically to apply to rates not in accordance with published tariffs, and in the case of published tariffs, only to those extreme cases which could not be justified on any ground, the type of case presented by *Smith v. Northern Pacific Ry. Co.*²¹⁹ It is further submitted that where there is a reasonable basis in published tariffs, there can be no unjust discrimination. The validity of such tariff would depend on the reasonableness requirement, Section 404(a) of the Act.

VII. CONCLUSIONS AND RECOMMENDATIONS

Youth standby and young adult fares affect a substantial segment of the population. However, the final decision on the question of discrimination will be even more far-reaching. Need to expand traffic during the 1950's and 1960's brought considerable experiment in promotional fares.²²⁰ The decade of the 1970's will require even more expansion if the huge capacities of the Boeing 747, already in commercial operation, the McDonnell-Douglas DC-10 and the Lockheed 1011, scheduled for introduction in 1971, are to be utilized. The health of commercial aviation requires the greatest possible flexibility.

It is submitted that under the law and the Federal Aviation Act, neither the Bus System nor any other mode of transportation has authority to question the legality of airline fares, and that the court of appeals erred in not dismissing the complaint of TCO.²²¹ It is further submitted that under the evidence produced, the Board was correct in determining that the youth standby and young adult fares are not unjustly discriminatory because there are substantially dissimilar circumstances and conditions.²²²

²¹⁹ *Smith v. Northern Pacific R.R. Co.*, 1 I.C.C. 611 (1887).

²²⁰ For example: coach fares, family fares, military fares, youth fares, golden age fares.

²²¹ *Supra* III.

²²² *Supra* IV.

It is further submitted that youths in the 12-21 age bracket are not "like traffic" to adult traffic because age is a valid basis for distinction in traffic, so there is no question of discrimination in the first instance.²²³

Finally, it is submitted that, in fact, there is no unjust discrimination, because the statutory meaning of unjust discrimination was never intended to apply to the situation present here; that, in fact, such was only intended to apply to matters arising outside the published tariff, or not in accordance with the published tariff, or to extreme situations under a tariff, but that where there are any reasonable bases for such a tariff, there can be no question of unjust discrimination.²²⁴

It is conceded that the last two grounds have never been argued either before the Board or the court. The fact that an argument has not been put forward previously should not detract from its legal basis, particularly as it has only been in the past two decades that rate proceedings have received real attention from the Board. Today all rate proceedings, including promotional rates, are of major importance, although the importance of promotional fares varies in relation to the fluctuations in airline profits.

Airlines have risen from an insignificant forces in passenger traffic to the largest carrier of passengers, apart from the automobile, in the short span of 30 years. Of primary importance in that rise is the fact that airlines can offer the fastest service between two points, and the fact that the management of the airlines has educated the public to the possibilities that airlines can offer, and has offered a package that the public has found attractive. Also important in this rise is the Civil Aeronautics Act which was written with vision and foresight and which provided for the encouragement and promotion of air transportation, neither subject to the problems of any other form of transportation nor at the expense of those other forms of transportation. The CAB is to consider only the airlines and the public paying the bills. This has proved to be the correct approach. To allow a bus company, or any other form of transportation to question airline activity, for the purpose of keeping itself competitive, can be of value to no one other than the bus company itself. Certainly, the public cannot benefit.

²²³ *Supra* V.

²²⁴ *Supra* VI.