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## CONSUMER PROTECTION IN AVIATION RATE REGULATION

K. G. J. PILLAI\*

AMONG the regulatory agencies of the Federal Government, the Civil Aeronautics Board is conspicuous by its reputation of being the servant of the industry it is designed to regulate. Recently, the CAB was described as a "trade association operated by certain oligopolistic carriers"<sup>1</sup> and as an "imperfect cartel."<sup>2</sup> In July 1970 the United States Court of Appeals for the District of Columbia stated that the CAB is "unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect."<sup>3</sup> If these observations are accurate, consumers and the traveling public have little chance of getting regulatory protection from the CAB.

Without jumping to sweeping conclusions certain facts must be presented to evaluate the performance of the CAB in the area of consumer protection.

On June 3, 1970, the CAB met privately with airline executives and discussed international air fares to be negotiated by the United States carriers during an upcoming traffic conference of the International Air Transport Association. The transcript of this *ex parte* meeting shows that the Chairman of the CAB made the following statement:

I would like to remind us all of a very unpleasant reality. . . . IATA is under heavy pressure, critical pressure by the defenders of the public in the Congress and many of those who make a profession of being public defenders. Therefore, perhaps it is needless

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<sup>1</sup> A. PHILLIPS, AIR TRANSPORTATION IN THE UNITED STATES 157.

<sup>2</sup> W. JORDAN, AIRLINE REGULATION IN AMERICA 233 (1970).

<sup>3</sup> Moss v. C.A.B., 430 F.2d 891, 893 (D.C. Cir. 1970).

to remind you that any increases in standard fares which appear to be devices to cover promotional fares are going to be very hard for you and for us to defend. I think this may be a very hot summer for IATA. . . . I am sorry to lecture you, but I can see some real clouds and hear some real loud rumblings.<sup>4</sup>

This statement is indicative of the general attitude of the CAB toward consumer affairs. First, this statement was made in a meeting convened without public notice or participation. Second, the statement insinuates that the CAB and the air carriers are in the same camp and the public defenders are an external source of nuisance. Third, the chairman suggests that had there been no public defenders, the CAB would not be as concerned over fare increases.

As the Chairman of the CAB predicted, the summer of 1970 was extremely hot not only for IATA but for the Board as well. The incomparable Ralph Nader challenged, for the first time in twenty-five years, the CAB's practice of rubberstamping exorbitant international air fares hammered out by IATA's secret price-fixing conferences.<sup>5</sup> Nader's speeches and writings stressed the need for a comprehensive Congressional investigation of the CAB-IATA relationship.<sup>6</sup> In the meanwhile, Ralph Nader's public interest lawyers sued the CAB to open up some of its secret files for public inspection and copying.<sup>7</sup> Simultaneously with these unprecedented developments, thirty-two Congressmen petitioned the United States Court of Appeals for the District of Columbia, seeking to nullify a six per cent increase in domestic air fares granted by the CAB as a result of a series of *ex parte* meetings of the Board with the representatives of the airline industry.<sup>8</sup> These Congressmen unsuccessfully sought the permission of the CAB to participate in those meetings.<sup>9</sup> In reversing the CAB's order, the court of appeals observed that "if Congressmen are excluded from these *ex parte*

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<sup>4</sup> Transcript of the Conference at 31-32 (June 3, 1970).

<sup>5</sup> Since 1963, the CAB approved four IATA fare increases on the North Atlantic routes. See, e.g., CAB Order 72-3-104 (March 30, 1972), which granted across-the-board increases ranging from six per cent to forty-seven per cent in the North Atlantic routes.

<sup>6</sup> See, e.g., Nader, *Book Review*, WASHINGTON POST, Jan. 5, 1970 at D4.

<sup>7</sup> Robertson v. Kiefer, Civil Action No. 3349-69 (D.D.C. Nov. 25, 1969).

<sup>8</sup> Moss v. C.A.B., 430 F.2d 891, 892 (D.C. Cir. 1970).

<sup>9</sup> *Id.* at 894.

meetings between the Board and the airlines, ordinary rate-paying members of the public, or their representatives, would have little chance indeed to be admitted.”<sup>10</sup>

With the emergence of this new consumerism, the aviation industry, including the Board, became increasingly consumer-conscious. The Chairman of the CAB declared the formation of a Consumer Advisory Committee.<sup>11</sup> A new division was created at the CAB to deal with consumer complaints.<sup>12</sup> Several airlines redesignated some of their executives as “vice-president—consumer affairs.”<sup>13</sup> The Air Transport Association of America, the chief lobbyist for the scheduled airlines, amassed one million dollars “to combat consumerism.”<sup>14</sup> These cosmetic measures of protective reaction were designed more to silence consumer advocates, however, than to bring about substantive benefits to the traveling public.

The Chairman of the CAB recently stated that the CAB’s Consumer Advisory Committee has been most “productive and provocative.”<sup>15</sup> Even though the Board has taken certain minor steps for the benefit of consumers in response to the recommendations of the Advisory Committee,<sup>16</sup> it has become clear that the Committee is absolutely powerless to initiate changes in the basic regulatory framework of the CAB. For example, the Committee is not permitted to discuss issues or cases pending before the Board.<sup>17</sup> Accordingly important items such as rates and fares, airline mergers,

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<sup>10</sup> *Id.* at 894 n.12.

<sup>11</sup> The Consumer Advisory Committee was created in October 1970 pursuant to Exec. Order No. 11,007, 3 C.F.R. § 573 (1962). Reuben B. Robertson III (Chairman) and K.G.J. Pillai (Member) are associates of Ralph Nader.

<sup>12</sup> The C.A.B. Office of Consumer Affairs was created shortly after the creation of the Consumer Advisory Committee. The Office is headed by the former director of the C.A.B.’s Bureau of Public Information.

<sup>13</sup> The most prominent among these are Pan American World Airways and Eastern Air Lines.

<sup>14</sup> McLeod, *Washington Window*, WASHINGTON DAILY NEWS, July 1971, at 13.

<sup>15</sup> *Hearings on S. 1637, S. 1964, and S. 2064 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations*, 92nd Cong., 1st Sess., pt. 1, at 18 (1971).

<sup>16</sup> CAB Docket No. 23310 (SPDR-30, April 23, 1971), in which the Board initiated rule-making proceedings designed to discourage airlines’ practice of dishonoring reservations confirmed by telephone.

<sup>17</sup> See CAB Press Release (Oct. 21, 1970), announcing the creation of the Consumer Advisory Committee; Minutes of the Meeting of Consumer Advisory Committee (Dec. 9, 1970).

intercarrier agreements and route cases are completely excluded from the Committee's purview. Because of these numerous constraints on the scope and jurisdiction of the Committee, some of its members have long felt the need for establishing an independent consumer group to represent consumer interests in formal proceedings of the Board.<sup>18</sup>

The newly-created CAB Consumer Affairs Office<sup>19</sup> has also proved relatively impotent. The CAB has not prescribed any new regulations to enable the Consumer Office to deal with consumer grievances effectively. In 1971 the office received complaints from more than 8,000 consumers,<sup>20</sup> but the vast majority of them received nothing more than letters of regret from that office<sup>21</sup> that usually must plead lack of authority to settle consumer problems.<sup>22</sup>

In the spring of 1971, Ralph Nader and his associates organized a new consumer organization called Aviation Consumer Action Project.<sup>23</sup> Thus, for the first time since the Board was created, there is an action-oriented consumer group capable of transforming the Board's traditionally *ex parte* proceedings into an adversary process. Until this development, the Board's proceedings were exclusively dominated by the airlines.<sup>24</sup> Initially, the ACAP's efforts to intervene in formal proceedings as a full party<sup>25</sup> were vehemently

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<sup>18</sup> Both Reuben B. Robertson and Dr. K.G.J. Pillai have expressed this view.

<sup>19</sup> Unlike the other departments of the CAB, the Consumer Affairs Office has not been granted "delegated authority" under the Board's Regulations.

<sup>20</sup> CAB Press Release (Dec. 31, 1971).

<sup>21</sup> A sample survey of 200 complaints received by the CAB Consumers Affairs Office showed that 180 complaints received regret letters from the CAB. The survey was conducted by Aviation Consumer Action Project.

<sup>22</sup> The ACAP survey, which was based on random selection from the 8,000 complaints received by the CAB in 1971, shows that eighty complainants were advised of the Board's lack of legal authority to deal with their complaints. *Id.*

<sup>23</sup> Ralph Nader personally contributed 10,000 dollars initially to ACAP. ACAP has three full-time staff members, two of them are lawyers. Further, more than a dozen volunteers work for ACAP without remuneration or with nominal stipends. ACAP is fully sustained by public contributions which in 1972 amounts to more than 30,000 dollars.

<sup>24</sup> There has never been consumer participation in the Board's proceedings. Normally the adversaries in the Board's proceedings are airline parties.

<sup>25</sup> 14 C.F.R. §§ 302.14, 302.15 (1970). Section 302.14 provides for limited participation and section 302.15 provides for full participation. Section 302.14 parties do not have the right to cross-examine witnesses or to participate in oral arguments without ad hoc permission from the Hearing Examiner.

opposed by the airlines and their trade associations.<sup>26</sup> The Board's regulations require a showing of "substantial economic interest" before a party is allowed to intervene as a full party in the Board's proceedings.<sup>27</sup> Of course, it is difficult for any consumer group to establish that it represents the economic interests of an inchoate mass of air travelers and shippers. In the *American-Western Merger Case*,<sup>28</sup> the hearing examiner denied ACAP's petition for intervention.<sup>29</sup> On review of that order, the Board permitted ACAP to participate in the case "as a matter of grace."<sup>30</sup> ACAP's persistent involvement in numerous issues affecting aviation, however, finally convinced the Board that the new group is too effective to be ignored by procedural niceties. During the past three months ACAP has been granted full party status in five major proceedings of the Board.<sup>31</sup>

### I. DOMESTIC RATE REGULATION AND CONSUMER INTERESTS

The ACAP has as a primary objective the reduction of air fares for all passengers to bring air travel within the reach of those millions of our citizens who have never traveled by air.<sup>32</sup> In addition, this is one of the purposes of the regulatory scheme embodied in the Federal Aviation Act of 1958.<sup>33</sup> To achieve this purpose

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<sup>26</sup> See the Answer filed jointly by Air Transport Association, Air Traffic Conference of America and scheduled air carriers in opposition to ACAP's petition for leave to intervene in ATC Bylaws Investigation, CAB Docket No. 23542 (July 21, 1971). Specifically, the ATA answer asked, "For whom does ACAP speak, and under what authority?"

<sup>27</sup> 14 C.F.R. § 302.15(b), (d) (1970).

<sup>28</sup> CAB Docket No. 22916 (June 25, 1971).

<sup>29</sup> CAB Order No. 71-6-132 (June 25, 1971).

<sup>30</sup> CAB Order No. 71-11-43 (Nov. 11, 1971).

<sup>31</sup> Airline Industrial Relations Conference Investigation, CAB Docket No. 23267 (April 19, 1972); Student, Youth and Senior-Citizen Fares Investigation, CAB Docket No. 23780 (Jan. 19, 1972); Liability and Claims Rules Investigation, CAB Docket No. 19923 (Dec. 27, 1971); ATC Bylaws Investigation, CAB Docket No. 23542 (Feb. 22, 1972); National-Northwest Merger Case, CAB Docket No. 23852 (Nov. 22, 1971).

<sup>32</sup> The CAB has no statistics to show the percentage of population which ever utilized the air services. A survey conducted by ACAP volunteers in the summer of 1971, however, indicates that at least forty per cent of the United States population has never travelled by air. In this survey ACAP interviewed 500 persons from twenty states.

<sup>33</sup> 49 U.S.C. § 1301 *et seq.* (1970).

Congress has granted the CAB plenary powers to regulate the rates and fares of air carriers.<sup>34</sup>

Rates and fares for domestic air transportation can be decided by the carrier or by the Board.<sup>35</sup> Whatever the source, these fares must be included in a "tariff" filed by the air carrier with the Board.<sup>36</sup> Consequently, the charging of rates and fares not properly included in the tariff is illegal *per se*.<sup>37</sup> The CAB, upon complaint or upon its own initiative, may change existing fares after notice and hearing if the fares are found to be unjust, unreasonable or discriminatory.<sup>38</sup> Moreover, the Board is empowered to prescribe maximum and minimum rates to be charged by air carriers.<sup>39</sup> In determining the just and reasonable rate, the Board is required to conform to certain statutory criteria enumerated in the Act.<sup>40</sup> These criteria include, *inter alia*, the need for adequate and efficient transportation at "the lowest cost consistent with the furnishing of such service."<sup>41</sup>

The rate regulation of the CAB is often characterized as an empty legal formality.<sup>42</sup> In the vast majority of cases, the CAB simply adopts carrier-made rates without evaluating their reasonableness.<sup>43</sup> The carriers informally agree on the same fare levels and the CAB invariably approves them.<sup>44</sup> In those instances where the carrier-made rates involve substantial increases, the CAB meets with representatives of the airline industry in private to decide on an acceptable amount of fare increase. This practice of granting fare increases in *ex parte* meetings has been the subject of public criticism in recent years.<sup>45</sup> In the *Moss* case,<sup>46</sup> the court of appeals

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<sup>34</sup> Federal Aviation Act of 1958, § 1002(d), 49 U.S.C. § 1482(d) (1970).

<sup>35</sup> *Id.*

<sup>36</sup> Federal Aviation Act of 1958 § 403(a), 49 U.S.C. § 1373(a) (1970).

<sup>37</sup> *Moss v. C.A.B.*, 430 F.2d 891 (D.C. Cir. 1970).

<sup>38</sup> Federal Aviation Act of 1958 § 1002(d), 49 U.S.C. § 1482(d) (1970).

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

<sup>40</sup> Federal Aviation Act of 1958 § 1002(e), 49 U.S.C. § 1482(e) (1970).

<sup>41</sup> *Id.*

<sup>42</sup> See generally W. JORDAN, AIRLINE REGULATION IN AMERICA 57-73 (1970).

<sup>43</sup> See, e.g., *Moss v. C.A.B.*, 430 F.2d 891 (D.C. Cir. 1970), in which the CAB granted fare increases without evaluating their reasonableness.

<sup>44</sup> See generally P. CHERINGTON, AIRLINE PRICE POLICY: A STUDY OF DOMESTIC AIRLINE PASSENGER FARES 84-110 (1958).

<sup>45</sup> E.g., Letter from Congressman Moss of California to CAB Chairman, March 1972 objecting to this continuing practice.

<sup>46</sup> 430 F.2d 891 (D.C. Cir. 1970).

condemned this practice as contrary to the statutory rate-making plan "in that it fences the public out of the rate-making process and tends to frustrate judicial review."<sup>47</sup> The Board's procedural irregularities are largely instrumental in maintaining domestic airline fares at artificially high levels.<sup>48</sup>

This collusive rate regulation offers the prospect of perpetuating the existing high fares indefinitely. This is the area of greatest public concern. As a result of the challenge to the six per cent general fare increase granted in 1969, the Board reluctantly instituted a domestic passenger fare investigation.<sup>49</sup> Before completing the over-all investigation, however, the Board issued a tentative decision which granted "interim fare relief" on the ground that "the carriers require an increase in yield of [twelve per cent] over the fare levels which existed on October 15, 1970."<sup>50</sup> The investigation was used as a springboard to justify existing fare levels and future increases. The Board simply rearranged the cost and revenue figures supplied by the airlines in various convenient bureaucratic molds.<sup>51</sup> Crucial questions such as reduction of airline costs by elimination of unnecessary promotional expenses and other elements of mismanagement, reduction of the price of air travel to attract traffic adequate to fill seats that are presently empty and examination of the effect of misuse of airline resources for nontransportation purposes were outside the purview of the investigation.

According to the estimates developed by the CAB's Bureau of Economics, the reasonable coach fare for the major domestic routes should not exceed 3.7 cents per revenue passenger mile for wide-bodied jets.<sup>52</sup> To illustrate this conclusion, the Pacific Southwest Airlines, an intra-state California carrier, which is not regulated by the CAB, actually does offer a fare of 3.7 cents per mile

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<sup>47</sup> *Id.* at 893.

<sup>48</sup> The Board's procedural irregularities, such as *ex parte* determination of rates, prevents the public or other interested parties from making critical analysis or evaluation of the reasonableness of rates.

<sup>49</sup> CAB Order No. 70-1-147 (Jan. 29, 1970).

<sup>50</sup> CAB Order No. 71-4-59 (April 19, 1971).

<sup>51</sup> The CAB never examined the reasonableness of airlines' spending for advertising, leases and purchases of equipment, source and nature of financial loans and heavy insurance payments to companies interlocked with airlines.

<sup>52</sup> Exhibit No. 4001, Bureau of Economics, CAB Docket No. 21866-9 (Nov. 20, 1970).



in its Los Angeles-San Francisco short-haul route.<sup>53</sup> In contrast to this reasonable fare level, the CAB regulated carriers charge 7.5 cents per coach-passenger-mile on the Dallas-Washington, D.C. route, and 6.6 cents per coach-passenger-mile on the New York-Los Angeles route.<sup>54</sup> There are several economists who agree that these fares are grossly unreasonable and that they should be reduced by at least one-half.<sup>55</sup> A substantial reduction in existing fares is economically possible since World Airways, a charter airline, unsuccessfully sought CAB permission to operate scheduled services between the East Coast and California at a fare of 79.50 dollars or 3.2 cents per mile.<sup>56</sup>

## II. INTERNATIONAL FARES

The rates and fares in international air transportation are fixed by the airlines themselves through the instrumentality of IATA without CAB regulation.<sup>57</sup> The IATA rate-making conferences are not open to governments, not to mention consumers or the press. In 1971, IATA's secret ratemaking conference in Montreal was picketed when the airlines denied a request of consumer representatives to be present at that conference as observers.<sup>58</sup> The public's knowledge about IATA conferences is limited to certain selected documents filed by the carriers with the CAB. These documents are carefully contrived to transmit distorted and precensored accounts of arguments and discussions of anonymous carriers, and do not include important studies, analyses and reports that are allegedly used as the basis of IATA rate agreements.<sup>59</sup> Moreover,

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<sup>53</sup> W. JORDAN, *AIRLINE REGULATION IN AMERICA* 122 (1970).

<sup>54</sup> Calculated on the basis of published tariffs.

<sup>55</sup> See generally W. JORDAN, *AIRLINE REGULATION IN AMERICA* (1970); R. CAVES, *AIR TRANSPORT AND ITS REGULATORS* (1962); S. RICHMOND, *REGULATION AND COMPETITION IN AIR TRANSPORTATION* (1961).

<sup>56</sup> *AVIATION WEEK & SPACE TECHNOLOGY*, May 1, 1967, at 27.

<sup>57</sup> See K. PILLAI, *THE AIR NET* (1970), for an analysis of the IATA rate-making system.

<sup>58</sup> In May 1971, ACAP as well as certain other consumer groups from Europe made the request. Upon denial, one dozen ACAP volunteers picketed the Montreal Conference.

<sup>59</sup> E.g., the minutes of IATA conferences only disclose that certain unidentified carriers supported a fare proposal and that certain others were opposed.

the CAB classified these truncated IATA documents as confidential.<sup>60</sup>

Section 412 of the Federal Aviation Act of 1958<sup>61</sup> requires air carriers to file all intercarrier agreements for approval of the CAB. This section states that the Board shall disapprove intercarrier agreements that are found to be adverse to the public interest or in violation of the Act.<sup>62</sup> By virtue of this provision, it is possible for the Board to disapprove any IATA rate agreement including the agreement that created the IATA rate-making conferences. Needless to say, the CAB has always utilized its powers under section 412 to approve IATA rate agreements and thereby to protect them from the operation of United States antitrust laws.<sup>63</sup>

The CAB has never made an investigation into the reasonableness of the IATA fares. Even the Board members admit that IATA fares on all major international routes are prohibitively high.<sup>64</sup> According to the recent statistics of the International Civil Aviation Organization the spectacular improvement in the performance of jet aircraft during the past decade has reduced the costs of operation of world airlines by one-half.<sup>65</sup> The costs per ton-kilometer flown, adjusted to the United States consumer price index, have dropped from 28.3 cents in 1960 to 15.8 cents in 1970.<sup>66</sup> Of course, the ICAO figures include the costs of the notoriously inefficient airlines of the free world.<sup>67</sup> Despite the sharp reduction in cost, the IATA normal prices were increased several times dur-

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<sup>60</sup> CAB Order No. E-23120 (Jan. 13, 1966); CAB Letter to Carriers (July 16, 1968).

<sup>61</sup> 49 U.S.C. § 1382 (1970).

<sup>62</sup> Federal Aviation Act of 1958 § 412(b), 49 U.S.C. § 1382(b) (1970) provides: "The Board shall by order disapprove any such contract or agreement . . . that it finds to be adverse to the public interest, or in violation of this chapter . . . ."

<sup>63</sup> Federal Aviation Act of 1958 § 414, 49 U.S.C. § 1384 (1970), provides that agreement approved pursuant to section 1382 are "relieved from the operations of 'antitrust law.'"

<sup>64</sup> All agreements approved by the Board are immune from antitrust laws. *See, e.g.*, CAB Order No. 72-3-105 (March 30, 1972) (Murphy and Minetti, dissenting); CAB Order No. 71-3-87 (March 16, 1971) (Murphy and Minetti, dissenting).

<sup>65</sup> A review of the Economic Situation of Air Transport, 1960-1970 at 42 (ICAO Circular 105-AT/26, April 1971).

<sup>66</sup> *Id.* at 41-42; *see also* The Montreal Star, June 29, 1971, at 21, for an analysis of the ICAO study.

<sup>67</sup> *E.g.*, Aer Lingus and Pakistan International.

ing the last decade. For instance, the new peak season economy roundtrip fare for New York-London is 21.4 per cent higher than the 1962 level.<sup>68</sup> Similarly, the economy fare for San Francisco-Saigon is 15.4 per cent higher, and the Los Angeles-Hong Kong fare is 13.3 per cent higher than their corresponding 1962 levels.<sup>69</sup>

The actual operating costs of the United States carriers are considerably less than their IATA counterparts. If the international fares are brought into reasonable relationship with the costs of United States carriers, the public would be able to travel at one-half the price than they are now paying. For example, TWA's total operating costs on the transatlantic division were less than 4.2 cents per revenue-passenger-mile for wide-bodied jets<sup>70</sup> in 1971. The new IATA prices for New York-London are set at 12.1 cents per mile for first class, 8.5 cents per mile for peak season economy class, and 5.9 cents for peak 14/21 day excursion fare.<sup>71</sup> Likewise, the new IATA fares for Los Angeles-Tokyo are 13.2 cents per mile for first class, 8.1 cents per mile for economy, and 6.8 cents for 14/21 day excursion, while it is possible for United States carriers to offer a fare of less than 4.5 cents per mile in the average.<sup>72</sup> It is clear that the existing IATA fares should be cut by one-half in order to bring them within reasonable levels which approximate the costs of operation. Strangely, the CAB position is that the IATA fares are not adverse to the public interest within the meaning of section 412 of the Act.

It should not be difficult for the CAB to realize that higher fares inhibit the growth of air travel in general and the tourist industry in particular. Only three per cent of the American public gets an opportunity to travel abroad by air annually.<sup>73</sup> This small percentage of the population pays at least three billion dollars in excess air fares, while at the same time, the rest of the population is denied their constitutional right to travel at reasonable cost. The present financial condition of the United States carriers should be

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<sup>68</sup> Calculated from published tariffs.

<sup>69</sup> *Id.*

<sup>70</sup> 6 Wide-Bodied Jets: Aircraft Operating Cost and Performance Report (Bureau of Accounts and Statistics, CAB, 1972).

<sup>71</sup> CAB Order No. 72-3-104 (March 30, 1972).

<sup>72</sup> CAB Order No. 72-3-105 (March 30, 1972).

<sup>73</sup> Miller, *International Travel, Passenger Fares, and Other Transportation in the U.S. Balance of Payments*, 51 SURVEY OF CURRENT BUSINESS 20 (1971).

sufficient evidence to convince the CAB that higher fares are not necessarily in the interest of even the carriers. For instance, the transatlantic load factor of Pan American has fallen from 57.3 per cent in 1966 to less than fifty-one per cent in 1971,<sup>74</sup> mostly due to the recurrent IATA fare increases.<sup>75</sup> In 1971, the transatlantic airlines had sufficient vacancies to fill in excess of one hundred Boeing-707s per day. Of this amount Pan American accounted for more than thirty per cent. If the fares were reduced, the traffic volume, and consequently the load factors of Pan American would be increased to a profitable level. When Lufthansa recently tried to introduce lower air fares, however, Pan American objected on the ground that the carrier may not be able to carry the estimated thirty per cent additional traffic that would be generated by Lufthansa fare.<sup>76</sup> The CAB did nothing to dissuade Pan American from its opposition to lower fares. Instead, both the CAB and the airlines asked the Congress for more statutory powers to enable the CAB to cancel the so-called "uneconomically low fares" that it believes inimical to the interests of United States carriers.<sup>77</sup>

IATA's pervasive influence on the economic life of air carriers has not only spelled disaster on the relatively efficient United States air carriers but has also imposed a continuing economic burden on overseas travelers. Apart from price-fixing for international travel, IATA controls travel agents, sets private currency exchange rates, opposes non-IATA competitors and determines the pitch and width of seats in airplanes.<sup>78</sup> Moreover, IATA engages in price-fixing for domestic air travel by prescribing the so-called proportional fares that apply to domestic route segments connected to international routes.<sup>79</sup> The new IATA agreement on proportional

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<sup>74</sup> Air Carrier Traffic Statistics (CAB, Dec. 1966 and Dec. 1971).

<sup>75</sup> The carrier may disagree with this statement. There appears to be a definite correlation, however, between the decline in load factor and fare increases.

<sup>76</sup> Transcript of the CAB meeting with officials of Pan American and Trans World Airlines at 18 (Sept. 23, 1971).

<sup>77</sup> *Hearings on S. 2423 Before the Subcomm. on the Regulation of Rates and Practices of Air Carriers and Foreign Air Carriers of the Senate Comm. on Commerce*, 92nd Cong., 1st Sess., at 13-32, 195-225 (1972).

<sup>78</sup> See MANUAL OF IATA RESOLUTIONS (1972).

<sup>79</sup> For instance, a passenger traveling Chicago-New York-London, pays the New York-London fare plus the proportional fare for Chicago-New York (forty-

fares for North America prescribes fares for 1,094 domestic city-pairs.<sup>80</sup> This intrusion of IATA's monopoly price-fixing practices into domestic air transportation, as well as its other multifarious activities, directly violate the provisions of the Federal Aviation Act.<sup>81</sup> ACAP repeatedly requested the CAB to restrain IATA from many of its existing activities and practices.<sup>82</sup> When the CAB refused to respond to these requests, an action was brought against the CAB challenging the statutory authority and the constitutional propriety of the Board's unholy alliance with the international cartel.<sup>83</sup>

The CAB regulation of rates and fares of scheduled airlines is *pro forma* and perfunctory. It appears that consumers would be better off if the airlines are deprived of the protection granted by the CAB's rate regulation. The history and development of the charter airlines adequately demonstrate that there is nothing more beneficial to consumers than price competition controlled by normal market forces.<sup>84</sup> Price competition of the charter airlines over the years has not produced any corporate casualties, and at the same time the public and consumers were afforded the benefit of low-cost charter travel.

### III. CONCLUSION

Instead of spending its time and resources on the ritualistic regulation of rates and fares of certificated air carriers it is suggested that the Board should certificate and regulate the indirect air carriers, such as tour operators and charter consolidators. The total failure of the Board to regulate indirect air carriers has

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two dollars) instead of the regular domestic fares for Chicago-New York (58.90 dollars).

<sup>80</sup> IATA Resolution 015 (Feb. 2, 1972).

<sup>81</sup> *E.g.*, under 49 U.S.C. § 1482(d) (1970), the CAB and domestic carriers have exclusive authority to fix domestic fares. However, IATA proportional fares are fixed by United States and foreign air carriers.

<sup>82</sup> In CAB Order No. 72-3-104 (March 30, 1972), ACAP's request that the CAB disapprove IATA proportional fares was denied. ACAP subsequently filed a petition for review of this order. Civil Action No. 72-1491 (D.D.C. filed May 30, 1972).

<sup>83</sup> See *ACAP v. C.A.B.*, Civil Action No. 2188-71 (D.D.C. filed Nov. 1, 1971).

<sup>84</sup> *Statement of International Air Transportation Policy of the United States*, 6 Weekly Compilation of Presidential Documents 804 (June 22, 1970); 63 Dep't State Bull. 86 (July-Dec. 1970).

created a state of lawlessness and chaos in the air tour business, causing considerable hardship and agony to the tourists at large.<sup>85</sup> This situation became manifest during recent years when thousands of passengers were stranded in foreign countries because of the failure of tour operators to furnish the promised transportation and related services.<sup>86</sup> Even though the Board classified the tour operators as indirect air carriers, they are relieved from the various provisions of the Federal Aviation Act by means of a blanket exemption granted by the Board.<sup>87</sup> As a result, the tour operators are free to engage in the furnishing of air transportation without specific authorization from the Board, to charge their customers arbitrary prices, to make unreasonable profits, or even to abscond with monies collected from passengers.<sup>88</sup> The Board has no information concerning the number of tour operators engaged in indirect air transportation, their assets and liabilities, or the identity of persons who own or control them. Recently ACAP has petitioned the CAB to certificate and regulate indirect air carriers engaged in transportation of passengers.<sup>89</sup>

An assessment of the CAB's delinquencies in rate regulation makes a strong case against the continuance of the CAB's jurisdiction over the rates and fares of scheduled airlines. However, at this time, this author does not subscribe to the views of those who advocate the abolition of the CAB itself.<sup>90</sup> There is no question that the Board's view of regulation are fundamentally defective and that they are inconsistent with the present day realities. Nevertheless, experience indicates that persistent public pressure could catalyze the Board to make introspective changes in many of its established procedures and practices, and to update its regulatory process. If the changes occur, the Board would then be able to justify its own existence.

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<sup>85</sup> See, e.g., testimony of William Dale, *Hearings on S. 2577 Before the Subcomm. to Provide for Regulation of the Travel Agency Industry of the Senate Comm. on Commerce*, 92nd Cong., 1st Sess., at 21-29 (1972) [hereinafter cited as *Hearings on S. 2577*].

<sup>86</sup> See testimony of the Chairman of the Civil Aeronautics Board, *Hearings on S. 2577* at 49-78.

<sup>87</sup> CAB Eco. Reg. § 296.12(b), 1A CCH Fed. Av. L. Rep. § 11,570 (1971).

<sup>88</sup> For details, see ACAP petition, CAB Docket No. 24204 (Feb. 4, 1972).

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

<sup>90</sup> The Report of the President's Advisory Council on Executive Organization (1970), strongly urges the abolition of the CAB.



# Aviation Labor Problems



