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Summary Power of the Civil Aeronautics Board to Suspend Proposed Airlines Rates

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SUMMARY POWER OF THE CIVIL AERONAUTICS BOARD TO SUSPEND PROPOSED AIRLINE RATES

The power of a federal regulatory agency to suspend a proposed tariff change is an important power that regulated carriers and utilities must always consider. The power to summarily suspend a rate request serves as an indirect control on the conduct of businesses in regulated areas and as a direct control over all rate changes before they can be effected. Section 1002(g) of the Federal Aviation Act[1] empowers the Civil Aeronautics Board to suspend proposed tariffs filed by air carriers. The Board can exercise this power either on the procedural or substantive grounds specified in the Act. To effect any economic changes, a carrier must file its tariff alterations with the Board and receive the Board's approval; to avoid encountering difficulties leading to a suspension or total rejection of a proposed tariff, it is essential for an airline to comply with all procedural and substantive requirements.

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[1] Federal Aviation Act of 1958 § 1002(g), 49 U.S.C. § 1482(g) (1970) (in part):

> Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare or charge 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, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period of ninety days, and, if the proceeding has not been concluded and a final order made within such period, the Board may, from time to time, extend the period of suspension, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when such tariff would otherwise go into effect; and, after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective. . . .

I. PROCEDURAL REQUIREMENTS

Section 403 of the Act spells out the procedures that each air carrier must follow when submitting a proposed tariff.[2] All tariffs must be filed with the CAB and kept open to public inspection.[3] Each tariff must be filed at least thirty days in advance of its effective date.[4] The Board is empowered to reject any tariff filed that does not conform with these procedural requirements or with any regulations enacted thereunder by the Board.[5] If a tariff is rejected, it is void and of no effect.[6] Once, however, a tariff is properly filed with the Board and no substantive objections are pending, it becomes both conclusive and exclusive regarding a carrier's economic rights and may not be altered through reference to outside contracts or agreements.[7]

The procedures to be followed are not complicated and are plainly set out in the Act. Thus, any airline need only satisfy the criteria set out in section 403 to avoid suspension by the Board on procedural grounds.

II. SUBSTANTIVE REQUIREMENTS

In contrast to the simple procedural steps set out in the Federal

[2] Federal Aviation Act of 1958 § 403(a), 49 U.S.C. § 1373(a) (1970) (in part):

> 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. . . .

[3] *Id.*

[4] 14 C.F.R. § 221.160 (1972), *see also* Federal Aviation Act of 1958 § 403(c), 49 U.S.C. 1373(c) (1970). 14 C.F.R. § 221.190 provides for less than 30 days notice in case of actual emergency. *See also* Federal Aviation Act of 1958 § 403(c), 49 U.S.C. § 1373(c) (1970).

[5] 14 C.F.R. § 221.3 (1972), *see also* Federal Aviation Act of 1958 § 403(a), 49 U.S.C. § 1373(a) (1970).

[6] 14 C.F.R. § 221.182 (1972), *see also* Federal Aviation Act of 1958 § 403(a), 49 U.S.C. § 1373(a) (1970).

[7] Slick Airways, Inc. v. U.S., 292 F.2d 515 (Ct. Cl. 1961).

Aviation Act are the substantive requirements that proposed tariffs must meet to be acceptable to the CAB. According to the provisions of section 404 of the Act a proposed tariff can not be:

A. Unjust or unreasonable[8]

B. Unjustly discriminatory[9]

C. Unduly preferential or prejudicial[10]

Section 1002(d) of the Act also vests authority in the CAB to prohibit the adoption of fares falling into these three closely related classifications.[11]

An objection may be filed opposing a proposed tariff if it is

[8] Federal Aviation Act of 1958 § 404(a), 49 U.S.C. § 1374(a) (1970):

> 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 therefore and to provide reasonable through service in such air transportation in connection with other air carriers; 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 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.

[9] Federal Aviation Act of 1958 § 404(b), 49 U.S.C. § 1374(b) (1970):

> 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.

[10] *Id.*

[11] Federal Aviation Act of 1958 § 1002(d), 49 U.S.C. § 1482(d) (1970) (in part):

> 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. . . .

See also National Airlines, Inc., DC-6 Daylight Coach Case, 14 C.A.B. 331, 336, 342-43 (1951); The Hawaiian Common Fares Case, 10 C.A.B. 921, 923-24 (1949).

alleged that it will fall into one of these prohibited classes. As opposed to a procedural objection that can only be raised by the Board, a substantive objection may be filed by either the Board, on its own motion, or by a third party having a sufficient interest.[12] The Board may dismiss a complaint without a hearing when, in its opinion, the complaint does not state facts that warrant an investigation.[13] This option not to act, however, is not unlimited because once a complaining party has made a prima facie showing that a fare is discriminatory, it is incumbent upon the Board to show affirmatively the public policy reasons for not investigating the tariff, or that its inaction is justified in terms of established CAB precedent or policy.[14] On the other hand, if the Board determines that it will investigate the proposed fare, it has discretionary power to either summarily suspend the rate[15] or to allow it to be enacted pending determination of its validity.[16]

Difficulty arises in implementing this summary power because the statutory meanings of the three prohibited discriminatory categories of air fares[17] are vague in themselves and not clearly defined in the Act. What factors may a Board consider in determining whether a rate is "unjustly discriminatory?" What characterizes an "unjust or unreasonable" rate? And finally, what does the term "unduly preferential and prejudicial" mean?

Although these classifications are not explained in the Act, it has been determined that in interpreting and applying these terms

[12] Federal Aviation Act of 1958 §§ 1002(a), (d), 49 U.S.C. §§ 1482(a), (d) (1970). Subsection (d) is quoted note 11 *supra*. Although third party objections are ordinarily filed by another airline that deems itself adversely affected, the range of third parties having "sufficient interest" has been broadened considerably by two federal court decisions in which bus companies were held to have standing to question airline fares. Although mere competition with ground transportation was rejected as a basis for standing, the court concluded that insofar as an abuse would result in harm to the traveling public the bus companies would be allowed to represent and vindicate the public right and public interest. Trailways of New England, Inc. v. CAB, 412 F.2d 926 (1st Cir. 1969); Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[13] Federal Aviation Act of 1958 § 1002(d), 49 U.S.C. § 1482(d) (1970), quoted note 11 *supra*.

[14] Trailways of New England, Inc. v. CAB, 412 F.2d 926, 932 (1st Cir. 1969).

[15] Federal Aviation Act of 1958 § 1002(g), 49 U.S.C. § 1482(g) (1970), quoted note 1 *supra*.

[16] This was done in Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[17] *See* note 11 *supra*.

the public interest policy set out in section 102 and the rules of ratemaking established in section 1002 must be considered.[18] Section 102 of the Federal Aviation Act delineates the following public interest considerations:

(i) encourage and develop air transportation,
(ii) recognize and preserve the inherent advantages of air transportation,
(iii) promote adequate, economical, and efficient service at reasonable rates and without unjust discrimination or undue preference,
(iv) encourage competition necessary to assure sound development of air transportation,
(v) promote air safety in commerce, and
(vi) promote, encourage, and develop civil aeronautics.[19]

The Board, however, is only required to consider these six enumerated standards "among other things" in the performance of its powers and duties.[20] The phrase "among other things" recorded in the opening statement of section 102 has been interpreted by the CAB to be a clear indication that Congress intended the enumerated criteria only to specify "some" of the elements that are to be considered.[21] Therefore, since these enumerated considerations merely give the Board direction and do little to limit its determinative power in respect to proposed tariffs, their value as an aid in interpreting the three prohibitory categories is diminished.

There is yet another section of the Act that the Board is required to consider in determining whether to accept or suspend proposed rates. Section 1002(e) entitled "Rule of Ratemaking" provides the Board with five additional factors to consider in determining the validity of air fares:

(i) the effect of the rate upon the movement of traffic,
(ii) the need for adequate and efficient transportation by air at the lowest cost consistent with such service,
(iii) the standards of service to be rendered,

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[18] 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).

[19] Federal Aviation Act of 1958 § 102, 49 U.S.C. § 1302 (1970).

[20] Acting in the public interest and in accordance with the public convenience and necessity, *Id.*

[21] Air Passenger Tariff Discount Investigation, 3 C.A.B. 242 (1942).

(iv) the inherent advantages of air transportation, and
(v) the need of each carrier for revenue sufficient to provide adequate and efficient air service.[22]

The Board has also determined that the elements enumerated in section 1002(e) are to be considered *among other factors* in deciding whether a rate is substantively acceptable.[23] Accordingly, the potential elements that the Board may consider in assessing the substantive propriety of a proposed tariff appears to be expanded rather than limited by the provisions of the Act.

In light of the broad authority vested in the Board to summarily suspend rates on substantive grounds, it is essential for representatives of air carriers to understand the method that the Board employs to determine whether a rate will fall in a prohibited classification, and therefore be subject to suspension. Since there is little clarification within the Aviation Act itself, it is necessary to look outside the Act to understand the interpretations applied to these vague categories.[24]

A. *Unjust or Unreasonable*

The power to determine the reasonableness of a rate found in any carrier tariff on file with the Board is delegated to that agency rather than the courts.[25] Therefore, past Board decisions provide the basis for discerning what is an unjust or unreasonable tariff.

Any carrier has two types of fares: (i) the basic fares, *e.g.*, for regular first class or coach service and (ii) promotional fares, *i.e.* those geared at filling available seats that would otherwise remain empty.

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[22] Federal Aviation Act of 1958 § 1002(e), 49 U.S.C. § 1482(e) (1970).

[23] 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). Both sections 102 and 1002 were first enacted in the original Civil Aviation Act of 1938, 52 Stat. 980 (1938).

[24] Sections 403 and 404 were also preserved from the original 1938 Act with only minor changes in phrasing. Although there were major revisions to the 1938 Act in 1958, no material changes were made to either of these sections. *See* H. R. Rep. No. 2360, 85th Cong., 2d Sess. (1968). Therefore, historical interpretations of the Act's application specifically relating to these enumerated provisions are valid to interpret them as they are recorded in the present Federal Aviation Act of 1958.

[25] Hycel Inc. v. American Airlines, Inc., 328 F. Supp. 190, 192 (D.C. Tex. 1971); Tishman & Lipp, Inc. v. Delta Airlines, 275 F. Supp. 471, 475-76 (S.D.N.Y. 1967), *aff'd*, 413 F.2d 1401 (1969).

Proposed fares for the former class—those available for the basic types of services—must be capable of meeting the "fully allocated" cost of service to be considered as reasonable. In other words, the fares should meet the costs of operations, whether direct or indirect, and allow for a return of profit.[26] Although rates for all classes of traffic and service need not cover the entire cost of carrying the traffic or providing the service, they must always be reasonably related to cost.[27] This reasonableness involves the consideration of the: (i) recognition of variations in the ability of traffic to carry a full share of costs of different stages in the development of that specific traffic, (ii) effect of low rates in generating new traffic and (iii) resulting effect of increased volume on reduction in unit costs.[28] A proposed rate must cover the present costs of a service and promote a sound economic growth to be reasonable. To sustain this financial growth, the rates will vary corresponding to the stage of development of a particular service because they must be adjusted to relate reasonably to an expected future level of expenses for further development.[29] A different rate pattern would be disruptive to both the industry and commerce by producing wide variations in traffic volume thereby hampering the orderly development of the industry. Also, if a particular rate were uneconomically low, it would place an undue burden on other types of transportation without compensatory benefit.[30]

Proposed fares for the latter class, promotional fares, must also have some relationship to costs. The CAB determines the acceptability of these fares by applying the profit-impact test.[31] Under the profit-impact test, a fare not reasonably related to fully allocated costs can still be found to be reasonable if it improves the net profits of the carrier. To satisfy this test, a promotional fare must generate sufficient traffic to offset the loss from self-diversion, *i.e.* passengers traveling at the lower fare who would have traveled at the normal fare, plus the increased cost of carrying the additional

[26] Summer Excursion Fares Case, 11 C.A.B. 218 (1950).

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

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Family Fare Tariffs—Complaint of Transcontinental Bus Service, Inc., CAB Order No. E-26431 (Feb. 29, 1968).

traffic. This test is predicated upon the assumption that additional traffic attracted by the discounted fare will not require increased capacity costs to handle the extra passengers; therefore, no capacity costs are allocated to the particular discount fare under investigation. Conversely, the profit-impact test is not appropriate for discount fare services that require the operation of additional capacity.[32]

> Once the stimulation of the discounted or promotional fares 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.[33]

Applying the profit-impact test, the Board's determination of reasonableness of a proposed promotional fare depends on their 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 finding will require an actual assessment of the specific circumstances surrounding the proposed fares. Regardless of the circumstances, however, the CAB demands that the airline profit from its proposed tariff. A tariff that will not effect a profit will ordinarily be held unreasonable.[34]

It is apparent that generally the Board's interpretation of "unjust or unreasonable" fares is in terms of rate structure alone; that is, a rate structure must be economically sound. If the Board determines that a rate is unsound it will be deemed unjust or unreasonable and therefore not acceptable.

B. *Unjustly Discriminatory*

The Act prohibits any tariff that is unjustly discriminatory.[35] Discrimination can exist in two forms: (i) charging different rates to different passengers who are afforded the same or like service[36]

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[32] Domestic Passenger-Fare Investigation, Phase 5—Discount Fares, Docket 21866-5 (Dec. 5, 1972).

[33] Trans World Airlines, Inc., Rates for Phonograph Records, CAB Order No. E-22935 (Nov. 26, 1965).

[34] Family Fare Tariffs—Complaint of Transcontinental Bus Service, Inc., CAB Order No. E-26431 (Feb. 29, 1963).

[35] Federal Aviation Act of 1958 § 404(b), 49 U.S.C. § 1374(b) (1970), quoted note 9 *supra.*

[36] ICC v. Alabama M. Ry., 168 U.S. 144, 166 (1897); Wight v. United States, 167 U.S. 512, 517 (1897); Certified Air Carrier Military-Tender Investigation,

or (ii) offering special services only to a select group of patrons.[37] Either type of discriminatory tariff is justified only when the regular fare and reduced-rate service are produced by dissimilar circumstances and conditions.[38] The Federal Aviation Act provides that the weight of the evidence in each particular case is a matter for the Board to decide,[39] but the determination of what factors are to be weighed is a question of statutory interpretation that can be considered by the courts as well as by the Board.[40] The Board has ruled that effects on transportation competition,[41] contributions to national defense,[42] discounted rates reducing expenses,[43] and, to some extent, considerations of public policy[44] are factors that may properly be invoked as a defense for a fare alleged to be unjustly discriminatory. Increased revenue[45] and promotional aspects[46] have

28 C.A.B. 902, 924 (1959); Summer Excursion Fares Case, 11 C.A.B. 218, 222-23 (1950).

[37] Historically, unjust discrimination arose only when carriers charged different rates for like services. The charging of different rates for unlike service fell under the undue preference prohibition of the Interstate Commerce Act § 3(1), 49 U.S.C. § 3(1) (1970), and has since been extended to the unjust discrimination prohibition of the Federal Aviation Act, § 404(b). Transcontinental Bus Service, Inc. v. CAB, 383 F.2d 466, 485 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[38] ICC v. Baltimore & O.R.R., 145 U.S. 263, 276-77 (1892); Certified Air Carrier Military-Tender Investigation, 28 C.A.B. 902, 924 (1959); Summer Excursion Fares, 11 C.A.B. 218, 222-23 (1950).

[39] Federal Aviation Act of 1958 § 1006(e), 49 U.S.C. § 1486(e) (1970).

[40] *See* ICC v. New York, N.H. & H.R.R., 372 U.S. 744 (1963); Delta Airlines, Inc. v. Summerfield, 347 U.S. 74 (1954); Administrative Procedure Act § 10(e), 5 U.S.C. § 1009(e) (1970).

[41] American Airlines, Military Fares, 38 C.A.B. 1038, 1039 (1963); Certified Air Carrier Military-Tender Investigation, 28 C.A.B. 902, 905-12 (1959).

[42] American Airlines, Military Fares, 38 C.A.B. 1038, 1039 (1963) (morale factor considered in permitting rapid transportation to be available to servicemen on leave at a discounted price within their means).

[43] Certified Air Carrier Military-Tender Investigation, 28 C.A.B. 902, 910-11 (1959); Capital Group Student Fares, 26 C.A.B. 451, 454 (1958); Group Excursion Fares Investigation, 25 C.A.B. 41, 46-47 (1957). The reduced cost justification is only applicable to that type of discrimination that allows unlike service to be extended to a special group because it would be impossible to perform the same or like service and have substantial cost differentials.

[44] Group Excursion Fares Investigation, 25 C.A.B. 41, 47 (1957) (a fare differential for group travel may be provided under certain conditions without being unjustly discriminatory).

[45] Group Excursion Fares Investigation, 25 C.A.B. 41, 46 (1957); Tour Busing Fares, 14 C.A.B. 257, 258 (1951); The Hawaiian Common Fares Case, 10 C.A.B. 921, 925-26 (1949).

[46] Frontier Airlines, Reduced Fares for Teachers, 38 C.A.B. 1148, 1149

been held not to be elements justifying a discriminatory fare.

Any consideration of fares or rates applicable to a special class of persons must commence with the proposition that:

> the rule of equality is the very core and essence of the fare structure in the transportation industry, and it should not be rendered a meaningless phrase by the use of spurious justifications for unjustly discriminatory rates.[47]

Therefore, "equality of treatment is paramount"; any factors alleged to justify departure from the rule of equality must be weighed in the light of that pervasive requirement.[48] Moreover, as stated earlier, the range of factors that the Board may consider in justification of a discriminatory fare is circumscribed. According to the 5th Circuit Court of Appeals, the justification of any discrimination is "limited 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."[49] Therefore, factors related to the status of the traffic but not to transportation and matters involving broad social policies, *e.g.*, special treatment for any particular age group, may not be considered in justification of a discriminatory fare.[50]

The rule under section 404(b) prohibiting unjust discrimination is not absolute and is not a term easily adapted to rigid application. Rather it is a rule of reason that must be applied to specific circumstances as they are raised before the Board.[51] As noted earlier, the Act itself does not define this prohibited element; therefore, the Board has utilized outside sources to interpret this provision. The CAB has looked for guidance to the Interstate Commerce Act[52] (ICA) which provides that a rate is unjustly dis-

(1963); Group Excursion Fares Investigation, 25 C.A.B. 41, 46 (1957); Investigation of Full Adult Fares for Unaccompanied Children, 24 C.A.B. 408, 413 (1956); The Hawaiian Common Fares Case, 10 C.A.B. 921, 925-26 (1949).

[47] Transcontinental Bus Service, Inc. v. CAB, 383 F.2d 466, 485 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[48] *Id.*

[49] *Id.* at 484.

[50] Domestic Passenger-Fare Investigation, Phase 5—Discount Fares, Docket 21866-5 (Dec. 5, 1972).

[51] Texas & Pacific R.R. Co. v. ICC, 162 U.S. 197 (1896); Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[52] 49 U.S.C. § 102 (1970).

criminatory if it grants different treatment to like traffic for like and contemporaneous services offered under substantially the same or similar circumstances or conditions.[53] The desired results of implementing the ICA was to create equality:

> The great purpose of the Act to regulate commerce . . . was to secure equality of rates as to all, and to destroy favoritism . . . by prohibiting . . . for hidden rebates, preferences and all other forms of undue discrimination.[54]

The CAB strives for this same equality in its application of the Federal Aviation Act.

It appears therefore that the prohibited "unjust discrimination" potential of a proposed air fare refers to a discrimination related to the type of service rather than to the rate itself.[55] This discrimination refers to a differential of treatment of certain persons paying the same fare or to a differential in rate charged to certain persons paying for the same services. If the CAB determines that a proposed fare falls under this class, it is empowered to reject it.

C. *Unduly Preferential or Prejudicial*

It is well established that when legislation has been interpreted by administrative agencies charged with the duty of administering it and by courts reviewing the action of these administrative agencies, the interpretations will be presumed to control with respect to similar and subsequent legislation on the same subject matter.[56] Section 404(b) of the Federal Aviation Act is fashioned after sections 2,3(1), and 216(d) of the ICA.[57] In administering

[53] Wight v. U.S., 167 U.S. 512 (1897); Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[54] New York, New Haven & Hartford R.R. Co. v. ICC, 200 U.S. 361, 391-92 (1906).

[55] The term "unjust or unreasonable" has been interpreted to refer to discrimination related directly to the rate itself. *See* text at notes 25 to 34, *supra*.

[56] Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

[57] 49 U.S.C. § 2 (1970): That if any common carrier subject to the provisions of this shall, directly or indirectly, * * * receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it * * * receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimnation, which is hereby prohibited and declared to be unlawful.

49 U.S.C. § 3(1) (1970): It shall be unlawful for any common carrier sub-

section 216(d), the Interstate Commerce Commission has repeatedly held that it must accord great weight to the precedents established by the courts and by itself under sections 2 and 3(1) of the ICA.[58] The question whether rates or fares for different, related services or for similar service between different points are lawful is governed by section 3(1) of the ICA relating to "undue or unreasonable preference or prejudice." This same language is used in section 404(b) of the Aviation Act. 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 that are different distances from the point of origin.[59]

In section 404(b) of the Aviation Act, the phrases "preference or advantage" and "prejudice or disadvantage" are preceded by the words "undue or unreasonable"[60] just as it appears in section 216(d) of the ICA.[61] In interpreting the limitation "undue or unreasonable" of the ICA, it has been established that "the mere circumstance that there is, in a given case, a preference or an advantage, does not of itself show that such preference or advantage is undue or unreasonable. . . ."[62] Rather, all reasonable "circum-

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ject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, * * * locality, port, * * * or any particular description of traffic, in any respect whatsoever; or to subject any particular person, * * * locality, port, * * * or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U.S.C. § 216(d) (1970): * * * It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, * * * locality, * * * or description of traffic, in any respect whatsoever; or to subject any particular person, port, * * * locality, * * * or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * * .

[58] Arrangements-Arrow Carrier Corp. and Duplan Silk Corp., 4 M.C.C. 657, 677 (1938); Chicago and Wisconsin Points Proportional Rates, 17 M.C.C. 573, 578 (1939); Consolidation Rule on Shipments at Seattle and Spokane, 22 M.C.C. 295, 299 (1940).

[59] Hilo Mainland Temporary Service Investigation, CAB 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).

[60] Federal Aviation Act of 1958 § 404(b), 49 U.S.C. § 1374(b) (1970), quoted note 9 *supra.*

[61] Interstate Commerce Act, 49 U.S.C. § 216(d) (1970) quoted note 57 *supra.*

[62] Texas & Pac. Railway v. ICC, 162 U.S. 197 (1896).

stances and conditions" are to be considered in determining whether a proposed rate is unduly prejudicial or preferential.[63]

What the term "circumstances and conditions" denotes has not been specifically determined; it is a factual matter to be decided in each instance upon the evidence of record. In 1924 the Supreme Court recognized certain factors to be considered when it stated that "the difference in rates can not be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."[64] Earlier, in the *Alabama Midland Railway*[65] case of 1897, the Supreme Court indicated that competition was another factor to consider. Therefore, it appears that costs, competition and other factors incidental to the fixing of rates are proper elements to consider in determining whether proposed fares will result in an undue or unreasonable preference or prejudice prohibited by the Act.

The greatest area of difficulty arises in distinguishing between the "discriminatory" rate and the rate that falls under the classification of "preferential or prejudicial." A specific example is the most appropriate means to clarify the difference between these two distinct classifications. It has been determined that if, under a proposed tariff, all passengers were to pay the same fare to arrive at their destinations, although some destinations were at a nearer point on the route than others, there would be no issue of "unjust discrimination" under the Act since a difference in fares paid for like and contemporaneous transportation between the same points would be essential to raise that question. The issue of preference and prejudice, however, would be present because requiring a passenger traveling along the same route to a nearer point to pay the same fare as one going to a further point prejudices the former who is required to assume a greater proportion of the applicable costs, and prefers the latter who carries a relatively smaller proportion of such costs.[66] Another point of characteristic differentiation is the procedural element unique to a complaint based on the prejudicial or preferential aspect that injury to the passenger may be inferred

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[63] *Id.* at 219.

[64] United States v. Illinois Central R.R., 263 U.S. 515 (1924).

[65] ICC v. Alabama Midland Ry., 168 U.S. 144 (1897).

[66] The Hawaiian Common Fares Case, 10 C.A.B. 921 (1949).

from the mere fact that he pays as great a fare as the next passenger, but receives less transportation services.[67]

Therefore, this category of prohibited fares can be distinguished from the other two by emphasizing that "undue preference or prejudice" does not refer to a discrimination per se, but only to a discrimination based on distance or location. This class includes those fares that fail to charge distinct amounts based upon the distance and destination of a passenger.

III. CONCLUSION

The power of the CAB to suspend rates is statutorily limited to the three instances discussed above. Regardless of how extensively one investigates the matter, however, it is difficult to predict which proposed rates will be rejected by the Board as included in one of the prohibited categories. The Board has recognized[68] that the terms used in the statute—that charges must be reasonable, that any discrimination that may be present can not be unjust, and that any advantage to a particular person or locality can not be undue—are extremely vague making it impossible for strict uniformity to be enforced. It has been determined that the CAB, given the power to enforce the economic regulations of the Federal Aviation Act, must consider the circumstances as they arise and apply the unpredictable reasonable man test to decide the fate of a proposed rate.[69] Therefore, as indicated by the Board itself, past holdings and decisions can be used as a guide for air carriers to follow in establishing their proposed tariffs, but not as an unequivocal rule.

Elliott S. Garsek

[67] Mitchell v. U.S., 313 U.S. 80 (1941); ICC v. U.S., *ex rel.* Campbell, 289 U.S. 385 (1933).

[68] Air Passenger Tariff Discount Investigation, 3 C.A.B. 242 (1942).

[69] Texas & Pac. Railway v. ICC, 162 U.S. 197, 219 (1896).