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Transatlantic Charter Policy - A Study in Airline Regulation

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ANYONE with enough money can charter a bus, a train, or an ocean liner with few questions asked. Chartering an airplane stands in a class by itself. It can involve compliance with a very complex collection of government and private restrictions.

In recent years the charter aviation field has grown tremendously. Since 1957 charter traffic over the Atlantic has increased at the rate of fifty percent each year so that at the height of the 1960 season eleven percent of all transatlantic air traffic was carried on charter flights.\(^1\) The reason for this increase is not difficult to understand. A round trip charter to Paris may save the chartering party fifty percent of the regular fare.\(^2\) Not everyone is eligible for this great savings, however. As a result, part of the traveling public is able to obtain a transportation bargain while the majority must cope with expensive single-ticket fares.

How this situation evolved is not a simple story. It provides an interesting example of the meeting between private industry and government regulation. This article will attempt to tell that story, explain the charter rules today, and explore the future for this field. It will focus on the development of the transatlantic civilian passenger charter market, dealing with the ordinary case where a group hires a plane on a pro-rata share basis.\(^3\) The first part of the article concentrates on placing charter development in an industry-wide setting. Many of the legal and administrative problems alluded to in this section are discussed in greater detail in the second part. It is hoped that this organization will make the history more readable and the law more comprehensible.

II. History of Charter Regulation

A. Early Developments; 1945-1954

The history of the Civil Aeronautics Board's policy in the transatlantic charter field is very complex. This complexity stems from the dynamic changes which have shaped the course of aviation history since the Second World War.

At the end of World War II a large number of surplus airplanes became available at low prices. The scheduled airlines were faced with growing


pains and it became relatively easy for non-scheduled airlines with small amounts of capital to enter the arena. These “non-skeds” were authorized to provide only “irregular, limited, and sporadic service.” This included the right to carry passengers in foreign air transportation. In theory these new carriers were not supposed to be in direct competition with certificated service. Nevertheless, the Board’s rules were not strictly followed and competition with the scheduled lines did exist. After September 10, 1947 the irregular carriers were no longer permitted to engage in foreign air transportation. The Board announced that, in view of the expansion of the American certificated airlines and the award of permits to foreign air carriers, continued activity by the irregular carriers in the foreign field was no longer justified. The scheduled American carriers and foreign flag lines had authority to carry charter trips as well as individually ticketed passengers. However, they were chiefly occupied at this time with developing scheduled service on their regular routes.

The Board’s action did not successfully halt all of the activity of the irregular carriers in the foreign field. There was resistance to the new restrictions. For example, on January 6, 1948 the CAB charged Transocean Airlines, an irregular carrier, with violation of the ban on foreign transportation of passengers. Transocean and other carriers in a similar position argued that since they were operating charter flights they were not engaged in common carriage and therefore were not subject to the Board’s jurisdiction. Despite the order, in the summer of 1948 Transocean carried eight round trip student charters to Europe. The CAB staff was forced to spend a lot of time establishing the necessary jurisdictional facts in the cases of Transocean and other irregular carriers. On June 5, 1950 the Board held that Transocean had been violating the Aviation Act by engaging in its transatlantic charter activities. It said that even if all of Transocean’s flights were limited to planeload lots, carrying bona fide charter groups, it would still be engaged in common carriage. Because the airline indiscriminately carried all charter groups it could not be a private carrier for hire.

In the meantime other developments had made it possible for the non-certificated carriers to engage in foreign transportation on a limited basis without defying the Board’s orders. In May 1949 the Board indicated that it would grant a limited number of exemptions to irregular carriers to

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4 Large Irregular Air Carrier Investigation, 22 C.A.B. 838, Initial decision of the Trial Examiner at 891 (1955).
7 The Civil Aeronautics Act § 401, 52 Star. 987, 49 U.S.C. 481, provided that U.S. certificated carriers “may conduct charter trips without regard to the points named in its certificate, under regulations prescribed by the Board.”
8 Foreign carriers were given authority in their permits to engage in air transportation, which included charters, between points named in their certificates. Foreign Off-Route Charter Service Investigation, Order No. E-12945, Sept. 8, 1958, p. 2.
9 Order No. E-1105.
10 Section 401 of the present Act prohibits a carrier from engaging in “air transportation” without a certificate. Sections 101 (10) and 101 (21) limit the certification requirement to situations where the airline acts as a common carrier; Investigation of Seaboard & Western Airlines, Inc., 11 C.A.B. 372, 378 (1950).
conduct transatlantic charter flights. Special exemptions were given to two irregular carriers permitting them to operate five round trips carrying students to Rome and Tel Aviv. In support of the exemptions the Board mentioned that there would be little effect on the certificated carriers since their facilities were inadequate to handle the transatlantic traffic available at the height of the tourist season. The Board indicated that it would consider requests for exemptions as long as they were for charter trips by "recognized educational, religious and charitable groups." It turned down a request by Flying Tiger Line for a blanket exemption to fly charters and pointed out that it did not plan to make any general change in the restrictions it had placed on the non-certificated carriers.

Other irregular and cargo carriers took advantage of the Board's announcement and a number of additional exemptions were issued for the summer of 1949. One of the carriers was Transocean which got permission to conduct 44 transatlantic flights. The carrier was very careful to stipulate that by accepting the exemptions it was not conceding its dispute then pending with the Board over the latter's jurisdiction. Another carrier got permission for seventy one-way charter flights under similar circumstances.

In all, it has been estimated that 2,500 students flew to Europe at bargain charter rates during the summer of 1949 at an average of $350 per round trip. At that time the only available service on scheduled air lines was first class. The cost of a round trip from New York to London was $630.

The Board advised the scheduled American carriers that it not only opposed introducing a less expensive form of scheduled transportation than the prevailing first class service but that it would favor an increase of seven per cent, raising the New York to London one-way fare, for example, from $350 to $375. This advice was based on the theory that it was not possible to have enough difference in service to distinguish between first class and other service. It was thought that the resulting diversion from first class would ultimately come out of the taxpayer's pocket in the form of additional subsidy for the scheduled carriers.

Despite these developments the Board decided to continue its charter exemption experiment. In December 1949 it undertook to describe in more detail just what its policy would be. At this point basic differences among Board members on the problems of low cost travel came into the open.

The announcement of December 1949 invited carriers without trans-
atlantic routes to seek permission to carry charter groups during the 1950 tourist season. The Board expressed confidence that the scheduled carriers could handle off-season traffic without help. Since the certificated lines were being subsidized, the Board made it clear that if they were to conduct charter flights on their own routes the Board would not allow diversions from more expensive service to increase subsidies.

The Board's policy had the marks of improvisation. Some members felt that exceptional circumstances existed and that it was therefore best not to commit any solution to a permanent set of regulations. The CAB noted that abnormal travel pressures had built up because of war time restrictions, the coming of Catholic Holy Year and devaluations of foreign currency. The public interest aspects of granting the exemptions were stressed. It was said that foreign policy would be aided by contacts between American tourists and Europeans and by the dollar flow that tourism would generate. Furthermore, the Department of State, the Department of Commerce and the Economic Cooperation Administration stressed the importance of travel in helping international understanding.

The standard for exemptions, as announced, was both vague and restrictive. Chartering groups were limited, as in the previous year, to bona fide religious, educational and charitable groups. The trip had to be "in furtherance of a common objective" and this objective had to be clear cut. Applications had to be submitted well before the summer season and firm contracts must have been made with the carriers at the time of application.

In a strong minority comment Member Harold A. Jones challenged the economy, legality and public interest of the new policy. If the Board had thought that a special low fare was in the public interest in 1950, he argued, it should have faced the issue directly and supported a low fare by the scheduled airlines. If the diversion argument was correct, then the charter policy must be uneconomical. Off-season excursion rates which had been encouraged were not going to be used when people might travel even more cheaply during the height of the season. The vague standards which were adopted risked opening the floodgates. At the same time those carriers not eligible would not be getting equal treatment from the government. Exemptions, he said, should not be used to get around the principle of route security intended by Congress.

Administrative difficulties soon materialized. The exemptions which had been issued during 1949 led people to think that an easier situation would exist in 1950. Travel agents and organizations advertised charter flights before seeking permission for such flights. Business was solicited from individuals, especially in the student and teacher market, even though the policy statement indicated that the Board planned to grant exemptions only to bona fide groups.

In May 1950 special exemptions were given to three carriers, making it possible for them to carry a total of eighty flights. The orders emphasized

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23 Ibid.
24 CAB Statement of action on applications for permission to carry groups on special transatlantic charter trips, May 20, 1950; issued with CAB Press Release 50-28.
25 CAB Press Release, supra note 22.
26 CAB Statement, supra note 24.
27 CAB Press Release, supra note 22.
28 CAB Policy Statement, supra note 22.
safety records and previous experience with four engine aircraft in transatlantic operations as the important factors in selection. The carriers receiving exemptions were Flying Tiger, Seaboard & Western and Transocean Airlines. There were seven orders denying exemptions. Most of them mentioned the fact that the burden of proof had not been met as to the bona fides of the group applying for charter, but it appeared at the same time that safety was the Board's primary concern.

The Board announced that groups contracting with airlines which had been denied exemptions would now be able to make arrangements with those which had received approval. A representative of one of the carriers which was denied an exemption said that his company paid the fares of eight hundred students at a loss so that they could travel to Montreal and then cross the Atlantic on a Canadian airline.

Member Jones who had originally objected to the Board's policy did not participate in the May decisions. On this occasion a strong minority statement was issued by Member Josh Lee. He objected to granting exemptions to carriers which had long violation records and which even then were the subjects of enforcement proceedings. In the case of Transocean, for example, the very experience which was made the basis of the exemptions had been gained in defiance of the Board's orders. The Board, caught between policies of wanting maximum experience and not wanting to reward those who had flaunted its jurisdiction, decided in favor of experience.

Lee recognized the difficult problem which confronted the Board in determining what constituted a bona fide charter group. He was in favor of doing away with this standard altogether and limiting charter flights to those groups which had purchased package tours including all the necessary arrangements. This, he argued, would simplify administration and still protect the certificated carriers by allowing them to carry these groups.

Another important problem confronting the Board was the regulation of indirect carriers in the charter field. These organizations contracted with the carriers for the operation of flights, issued their own tickets and assigned people to flights without any responsibility on the carrier's part. Because the certification requirement refers to anyone who engages either "directly or indirectly" in air transportation it was necessary for these groups to receive exemptions of their own. The bona fide group concept was supposed to apply to groups that reserved seats through the indirect carriers; but it appears that the standard broke down completely in cases in which these carriers were involved. An indirect carrier called Youth Argosy, which had been active in previous summers, asked for permission to operate eighty flights. After hearing the details the Board decided that forty flights would be enough to carry the groups which met the Board's standards. Special permission was given, however, to fill these planes with individuals if there were any space remaining.

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21 Orders E-4193 through E-4200, May 19, 1950.
22 CAB Statement, supra note 24.
23 ASTA Comments, supra note 18, at 30.
24 CAB Statement, supra note 24.
25 CAB Statement, supra note 24.
26 Federal Aviation Act of 1958, § 101(3).
Under the exemptions granted in 1950 more than half of the 2,633 passengers which Youth Argosy carried were individuals. Furthermore a list of the "groups" which were carried shows that the announced standards were all but ignored. Ten of the groups listed had only one member. Most of them had less than ten members and many of these did not travel as a group on the same flight. Some of the "group" names were merely names of travel agencies. The organization's solicitation material made no reference to the group requirement although it did state that those participating in the flights should have "educational, religious, or charitable motivation." The difficulties involved in this sort of test are self-evident.

Five years later a member of the Board was to refer to the summer of 1950 as "a period of unfortunate experience." A description of events as they occurred certainly bears this out.

The activities by indirect carriers created situations in which passengers were left stranded, sometimes in cases of real hardship. One agency left one hundred eighty tourists in Paris saying that there simply was not enough money left to pay for return flights. Eventually these passengers had to sign a note for 165 dollars payable to the airline, but collectable only if the travel service defaulted completely. A student group ran out of money and slept on the floor of the student travel agency in Paris until informed that the agency had gone broke. In Luxembourg, when planes were delayed, an appeal was sent out through the newspapers asking people to take members of Youth Argosy into their homes. Perle Mesta, the United States Minister in Luxembourg opened a free lunch counter for 300 stranded students at the U.S. legation. Responsibility seemed to lie with the defaulting travel services rather than with the airlines. Incidents like these gave rise to the later adoption of provisions requiring the chartering group to post bonds or advance payment and eliminating indirect carriers from the charter field.

Under the 1950 program exemptions had been allowed for a total of 105 round trip flights between the United States and Europe. Three irregular carriers and one domestic certified carrier were ultimately involved in these operations. About 5,000 students were carried on these flights at prices well below first class fares.

As a result of its 1950 experience the Board instituted a Re-examination of Exemption Policy consisting of informal conferences and presentation of evidence beginning late in September 1950. The facts developed above were brought out at these conferences. It was suggested that the Board must either "open the door" or be prepared to deal with all manner of subterfuge and special "deals." It was also argued that circumstances...
in transatlantic air travel had changed sufficiently so that it would then be practical to have two distinct classes of service. The scheduled airlines had begun to advertise luxurious meals, free wines and liquors, and more comfortable seating arrangements. Domestic coach service had been in existence since September 1949. It seemed that there might now be room for two distinct classes of international service, eliminating the charter problem. Slower planes such as the DC-4 with closer seating arrangements might be used for a tourist class as newer aircraft were coming into use.  

Part of the Board’s plan was to regulate charter conditions for certificated carriers. Pan American Airlines requested that the Board permit relative freedom with regard to charters by the certificated airlines, saying that the protection given by certificate was not meant to apply to charter competition by other certificated carriers. It was suggested that travel bureaus be permitted to organize groups for charters.

The Board still had relatively limited knowledge of the problems involved in charter activity. Many ideas were suggested by the rules which the airlines had adopted privately through resolutions of the International Air Transport Association (IATA).  

IATA, representing the scheduled airlines had been wrestling with the charter problem for a number of years. In June 1947 there was a proposal to admit charter operators to IATA if they were of sound financial standing. Charter competition had made IATA consider introducing a more austere type of service as early as 1948. However, the members of the organization decided not to admit charter operators and to guard against chartering as a medium of price cutting within their own organization. IATA recommended that members stop servicing and other operational agreements with non-scheduled airlines. A campaign was started, asking governments to crack down on the international operations of the non-skeds. IATA also moved to curb the practice of chartering planes to travel agents who proceeded to retail seats on a basis which under cut the fare schedule that IATA works to maintain.  

An IATA proposal of December 1948 recommended that charter contracts stipulate that space would not be resold at less than IATA fares. Exceptions were made only for government organizations that were aiding immigrants and displaced persons. This original charter resolution soon proved inadequate. IATA carriers were prevented from meeting outside competition. Before the CAB issued its new regulation in May 1951 the IATA legal committee had been working with a “common interest” test for charter groups. It was very difficult to draft a resolution without loopholes that would cover all the cases of “common inter-
est" which might justify a group charter. There was the danger that a narrowly drafted resolution might require members to determine the state of mind of the chartering group and become more of a hindrance than a help in future business.  

On March 22, 1951 the CAB severely limited the authority of the non-skeds in the domestic airline industry.  

Two weeks later a new Board policy statement spelled their end in the international field. At the same time a regulation was issued defining charter rules for certified American carriers.

The Board examined the results of the 1950 season and concluded that all of the passengers handled by the supplemental carriers could have been carried by the certificated lines with only a slight revision in schedules. Therefore no further charter exemptions were to be granted unless there was an affirmative showing that the authorized carriers were unable to provide "reasonably adequate service."

The standard of "reasonably adequate service" was to be judged by charter rates established by the scheduled airlines. The Board requested that IATA adopt a resolution fixing minimum rates for charter flights above what had been the free market rate. This was not done and charter prices remained uncontrolled.

The scheduled airlines were told to make arrangements to rent extra airplanes for the peak season so that it would not be necessary for others to share in the transatlantic market. In accordance with this policy, Pan American, for example, rented planes from National Airlines which had a seasonal decline during the summer. The Board said that it would not grant further exemptions to indirect carriers. However, it would encourage low fares for individuals on regular transatlantic flights. In the spring of 1951 the Board asked that a tourist service be started on the North Atlantic routes in time for the 1952 season. An agreement was reached which set fares at substantially those recommended by the Board. Meanwhile the IATA-regulated round trip fare from New York to London reached $675 in 1951. It had been $630 in 1949.

The new policy effectively cut the irregular carriers out of the commercial charter market. As a rule exemptions were given only to carry military personnel and refugee groups across the Atlantic. The new domestic and international restrictions left only the military situation to keep the irregular carriers alive. An investigation was launched which

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64 Ibid.
67 14 C.F.R. § 207 (1951).
68 CAB Policy Statement, supra note 66.
69 Ibid.
70 American Aviation, March 19, 1951, p. 2.
71 CAB Policy Statement, supra note 66.
73 CAB Policy Statement, supra note 66.
75 Hearings before the Antitrust Subcommittee, supra note 19, at 1032.
76 See, e.g., CAB Weekly Summary of Orders and Regulations Nos. 272-300 (1951).
77 Henley, Defense Role for Non-skeds under New CAB Policy, American Aviation, March 19, 1951, p. 41.
was ultimately to determine the place of the irregular carriers in the aviation industry.\footnote{Large Irregular Air Carrier Investigation, Docket No. 5132.}

During the first summer of the new policy the Board retreated slightly. Youth Argosy received permission to arrange thirteen flights for those who had relied on the old policy. It was permitted to fill these flights with later applicants, if necessary. The Board stressed the fact that this was done out of consideration for the passengers and not for Youth Argosy.\footnote{Order No. E-5359, March 23, 1951; Order No. E-5390.} The Flying Tiger Line was given an exemption to conduct operations for Argosy\footnote{Order No. E-5420.} and also received exemptions for several other student trips.\footnote{University of Cal., Order No. E-5435; World Assembly of Youth, Order No. E-5627.} This, however, was all the transatlantic charter activity permitted the non-skeds during the summer of 1951.

Meanwhile the total number of charter passengers carried across the Atlantic by scheduled IATA carriers doubled. Nearly 12,000 charter passengers were carried in 1951 compared to 5,600 in 1950.\footnote{IATA World Air Transport Statistics 40 (1960).}

An attempt was made to break the barrier of the 1951 Policy Statement by finding a loophole in the Civil Aviation Act. Flying Tiger, a certificated cargo carrier, argued that the provision that charter trips might be made "without regard to the points named in its certificate" gave it the right to conduct passenger charters if it wanted to do so. The Board held that the words "charter trips" refer to the conditions under which the carriage is performed and not to the type of traffic which is carried. Since Flying Tiger was a cargo carrier, it was limited to carrying cargo charters under its certificate. It could not use this argument to re-enter the market closed by the Board's policy statement.\footnote{Federal Aviation Act of 1958, § 401 (e); Charter Flight Tariff Investigation, 15 C.A.B. 921 (1952).}

From 1951 to 1955, the new Part 207 of the CAB Economic Regulations provided the framework for charter activities. It was meant to limit charter flights so that they could not be used as a device to undermine regular fares and eventually cost the American public more money in subsidy.\footnote{14 C.F.R. § 207 (1951).} In taking steps to regulate U.S. carriers the CAB suggested that if foreign carriers were not similarly limited the CAB would re-examine its own policy.\footnote{CAB Press Release 21-58, March 22, 1951.} After all, the CAB had ended "wasteful competitive practices."\footnote{Preface, 14 C.F.R. § 207 (1951).} Now it was expected that foreign carriers would tighten up their own regulations. The CAB had the potential power to regulate directly the foreign charters entering the United States; however, it was not until 1958 that the Board was to issue a regulation in this field.\footnote{See text, infra p. ——.}

The provisions of Part 207 were comparatively simple. The new regulation focused on limiting methods by which charter groups could be solicited. The activities of travel agents were severely curtailed. No charter flight could be organized by a person whose business was the sale of transportation services.\footnote{14 C.F.R. § 207.1 (a) (2) (1951).} The profit was thereby taken out of organizing charters. No arrangement was valid where the total amount paid by the
passengers was more than the carrier’s published rate. There was to be no soliciting of individuals from the general public. The point at which a solicited group was deemed to be equal to the general public was a difficult decision to make under the regulation.

By regulating the solicitation process rather than describing the nature of eligible charter groups the Board evidently hoped to avoid the possibility of unjust discrimination in the rules.

After the 1949-50 period, when it had used the “religious, educational, and charitable” test, the Board decided the Free and Reduced Rate Transportation Case. It held that a reduced rate must be available to all who apply and must not be related to the “mission, business, or status” of the passenger. A tariff based on “community of interest and purpose” of the traveling group was held to be unjustly discriminatory.

This decision has not prevented the Board from looking at the “purpose and objectives” of the group as evidence of whether there has been actual solicitation of the public. It has meant that a previously unaffiliated group, able to meet the Board’s standards, has occasionally been permitted to charter an airplane. However, the importance of the rule allowing “spontaneous” charters has been largely academic. In one case, a scheduled TWA flight had mechanical trouble just before take-off and the passengers were able to charter an airplane from a competitor at a lower rate. By barring the activities of agents and promoters the Board has left very little opportunity for forming charter groups unless the group has had a “prior affinity.”

There was no limit to the number of charters that a scheduled carrier might conduct as long as they were flown on its certificated route. Except for filing a tariff no prior authorization was necessary.

Off-route charters were limited by a formula based on the previous year’s scheduled mileage. In practice the scheduled carriers fly such a large number of scheduled miles that this limit has never restricted their activities in this area. Before conducting an off-route charter flight it was necessary to get permission from the other carriers serving that route or to go to the Board for a finding of public interest. The other carriers might contest this finding, showing that they were equipped to handle the traffic themselves.

The Board was content to let regulation of foreign carriers remain the primary responsibility of IATA whose members were bound by Charter

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89 14 C.F.R. § 207.1(a)(4) (1951).
90 Ibid.
95 Examiner’s Recommended Decision, supra note 91, at 15 n. 26.
96 Id. at 15; No Boston airline office could remember ever dealing with a “spontaneous group” charter.
97 14 C.F.R. § 207.3 (1951).
98 14 C.F.R. § 207.4 (1951).
99 14 C.F.R. § 207.5 (1951).
100 Foreign Off-Route Charter Service Investigation, Order No. E-12945, Sept. 8, 1958, p. 18.
14 C.F.R. sec. 207.8 (1956).
Proposals for change have not been implemented, 1959 CAB Ann. Rep. 30.
Resolution 045. It held, however, that the two U.S. transatlantic carriers, TWA and Pan American, remained bound by the terms of Part 207, conditioning its approval of Resolution 045 to that effect. Basically the IATA resolution then in effect resembled Part 207. However, the Board wanted IATA to abandon its strict "prior affinity" test because of the discrimination issue mentioned before. For a number of years IATA did not comply with this request.

In 1952 the Board issued a policy statement reaffirming the previous year's stand and mentioning the fact that the new transatlantic tourist fares would minimize any need for special charter relief. The new fares went into effect in May 1952 and soon proved popular. The tourist fare for a round trip from New York to London was $486; first class service had risen to $711. The number of charter passengers carried by the scheduled lines continued to grow. In 1952 IATA members carried 15,684 charter passengers across the North Atlantic. The following year, when tourist fares were fully implemented, scheduled totals in tourist class rose from 188,701 in 1952 to 320,529; however, the number of charter passengers remained about the same as in 1952. In 1954 charter totals had risen to 30,858 while all scheduled North Atlantic passengers totaled 550,000. There was an indication that at the peak of the summer season none of the Atlantic carriers were able to satisfy the demand for any type of accommodation including charters. The non-skeds had ceased, of course, to be important in the transatlantic commercial charter field. No decision had yet been announced in the Large Irregular Air Carrier Investigation which had started in 1951.


In May 1955 the Board made an important change in charter policy. After hearing oral argument, it announced a plan to grant exemptions to supplemental and cargo carriers. It carefully limited the announcement to the summer of 1955, saying that continuation of the policy depended on the disposition of the Large Irregular Air Carrier Investigation. The new policy made it possible for the non-skeds to compete once again in the transatlantic market. Where the passengers shared costs on a pro-rata basis, the scheduled carriers still had a right of first refusal on their own routes. However, the Board was now willing to consider rate differences in deciding whether to grant an exemption to an irregular carrier. The general definitions adopted in Part 207 were applied to the irregular carriers. The "essential to the success of the movement" test was abandoned. A number of points not explained in Part 207 were made more explicit. Agents were permitted to represent the airlines as long as their commission did not exceed five percent. It was thought that by keeping commissions low there would be little incentive for agents to form bogus charter groups. It was still not clear, however, whether an agent could represent a bona

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4 Pan American, supra note 93, at 650; See text, infra page ——.
7 Hearings before the Antitrust Subcommittee, supra note 19, at 1032.
9 Id. at 41.
12 Docket No. 7132.
fide group if no individual solicitation had taken place. Advertising by the carriers was severely limited. Any advertising of individual pro-rated charter shares was to be considered solicitation of individuals and would be grounds for denying an exemption. To preserve the distinction between individual fares and charter service, a group that chartered more than one round-trip flight was not allowed to mingle passengers from different flights on return trips.

A number of procedural innovations were made in 1955. To avoid stranding incidents, carriers were instructed to require full payment or bond ahead of time. An informal method of conference with the director of the Bureau of Air Operations was devised so that groups would not go through the exemption procedure and learn at the last minute that they were ineligible from the start. A list of expenses incurred in organizing the charter had to be given to the passengers so that there would be no hidden profit. The total amount of expenses incurred in organizing the charter was considered in granting the exemption.

A dissent from the Policy was issued by Member Chan Guerney. He cited the unfortunate experiences that had resulted from the pre-1951 approach and expressed the opinion that legitimate charters could still be handled by the scheduled carriers.

However, the scheduled carriers’ own testimony showed that there was not a carrier on the Atlantic that could satisfy the demand at the peak of the season, including the demand for charter service. Nonetheless, they fought the further entry of the irregular carriers in the foreign field. Pan American warned that more American competition would hurt foreign relations. Pan American was still heavily subsidized and TWA only recently had stopped receiving help. In the year ending March 31, 1955 federal subsidy to all the international carriers amounted to $25,210,000. The financial success of the scheduled airlines in the charter business was still uncertain. After several years of active participation in the field, Pan American had made no study to see if its charter operations were profitable on an allocated cost basis or otherwise. It is doubtful, therefore, whether the Board could have made good its threat of December 1949 to disallow diversion losses incurred by the scheduled carriers own charter operations in computing subsidy.

With the institution of a more liberal policy for irregular carriers, the Board ordered an investigation into problems connected with activities of foreign carriers in the charter field. There was to be no decision resulting from this new inquiry for three years.

The decision in the Large Irregular Air Carrier Investigation was announced later in the year. It was directed toward a policy of survival

15 1955 Policy, supra note 13.
16 Ibid.
18 Ibid.
20 Large Irregular Air Carrier Investigation, 22 C.A.B. 838, 868 (1955).
and growth for the non-skeds. The Board praised the role of the irregular carriers as innovators, especially as to coach service and charters. Dr. Charles Cherington, Dean of the Graduate School of Public Administration at Harvard, had testified that the irregular carriers would be good for testing and developing new markets, one of which was the foreign charter field. It was recognized that in the domestic field the scheduled carriers had done little to develop the charter market. Therefore the irregular carriers were given an exemption to fly an unlimited number of domestic charter flights. However, the Board refused to go beyond the Transatlantic Charter Policy of 1955 so far as international charters were concerned.

Since the scheduled carriers had already absorbed a great deal of subsidy the Board concluded that individually ticketed operations across the Atlantic by the non-skeds should not be permitted. Having reached this conclusion, the Board was afraid that a grant of blanket authority to fly charters would encourage spurious charter flights as a way of getting around the single ticket restriction. The same problem did not exist in the domestic field since the irregulars were permitted to conduct a certain amount of individually ticketed service anyway. The Board also reasoned that transatlantic passengers tend to stay at their destinations for longer periods of time than domestic passengers. They thought that this would build up pressure for the carriers to find back-hauls which would lead them to circumvent the rules.

In 1955 the Board also had occasion to pass on a proposal made by a number of non-scheduled airlines to allow their Air Charter Exchange to solicit commercial charter business. Since 1951 the exchange had been aiding military operations with a central communications and control board in Washington. This enabled the combined fleet to provide quicker service and cut down on ferry mileage. The Board permitted the exchange to extend its activity to the domestic commercial market but cited the need for a backlog of experience before extending this authority abroad. Approval of the plan would not have eliminated the need for individual exemptions. The limitation to domestic commercial charters was something of a handicap. Since the same planes might be flying military and commercial missions on consecutive flights it was more difficult to coordinate the two kinds of traffic.

Developments in 1955 and 1956 showed the difficulty which the CAB faced in achieving a lower transatlantic fare structure. In 1955 the Board approved the IATA fare proposals but warned that the general level over the North Atlantic was too high and urged a reduction. IATA proceeded to raise first class fares ten percent although it made no change

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25 Id. at 911.
26 Id. at 866.
28 Large Irregular Air Carrier Investigation, 22 C.A.B. 838, 940 (1955).
29 Id. at 865.
30 Ibid.
33 Id. at 16.
35 Burwell, supra note 32, at 15.
in tourist rates. In February 1956 the Board refused to approve the IATA fares, saying that it thought that the relatively high load factor on the North Atlantic did not justify an increase. It approved the tourist rates although it thought them high. Pressure from IATA lead the Board to reverse itself. It approved the IATA fares before the start of the 1956 season. Later that year a compromise was reached which was suitable to the CAB. IATA agreed to put new low fares into effect beginning April 1958, not as soon as the CAB had wanted but closer to what it had asked for.

The 1955 Transatlantic Charter Policy marked the start of a period of continuous growth in charter operations. Much of this business went to the supplemental carriers although the scheduled carriers also showed a steady annual increase. By 1957 the Flying Tiger Line had become the largest charter operator in any class. In that year it carried 15,000 commercial charter passengers and had revenues from this source alone of $5.2 million dollars. Most of this business was from clubs and college groups. Pan American and KLM ranked first and second among the scheduled operators. TWA, further down the North Atlantic charter list had charter revenues of 1,326,000 dollars in 1957. The total IATA North Atlantic charter figure went above 50,000 in 1957 from 39,500 in 1955. However, scheduled traffic had grown faster than charter traffic among the IATA carriers. During the peak season from April 1 to September 30, charters accounted for 6.2 percent of all North Atlantic traffic. This percentage was to grow in future years.

The CAB continued to refine the standards by which it would allow forming of charter groups. It issued no new regulation in 1956 but decided one case which limited the size of eligible organizations. The National Education Association advertised charter flights among its members through its own academic and professional journals and faculty notice boards. This ordinarily would not have been considered "public solicitation." However, the group was denied a charter because it had a total membership of 600,000 members which was held to be so large as not to be sufficiently distinguishable from the general public.

In 1957 the Board issued a new policy statement making many of the criteria more specific, based upon experience in administering the 1955 Policy. The new statement showed the influence of IATA Charter Resolution 045. The Board stated that there had been numerous occasions where airlines had not complied with the Board's policy. The Board warned that it was going to require stricter compliance and that it had decided to incorporate the various parts of the policy as express conditions of the exemption order. Violations were to be turned over to the Office of Com-

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32 Garrison, Transatlantic Charter Growth Foreseen, Aviation Week, June 2, 1958, p.28.
33 Ibid.
34 Ibid.
35 IATA, supra note 41, at 39.
37 Order No. E-10057, March 1, 1956.
pliance for appropriate action. In order to provide more time to examine "complex and novel questions of policy or law," the Board extended the filing time from 30 to 60 days before the flight date. The Board was not alone in passing on these questions. Under the exemption procedure, applications could be and often were opposed by other airlines.

The scheduled carriers still enjoyed a right of first refusal. However, the route carrier could not pre-empt the non-sked's application if it charged in excess of 5% more for the same equipment. If the regular carrier provided a better plane, it was allowed to bid ten percent more and still keep the job. The Board also reserved the right to decide that the non-sked's offer was unreasonably low or that seating density was too high, thus further protecting the route carriers. As matters developed this right of first refusal was not often used by the scheduled carriers during 1957.

Methods of solicitation were more closely limited. The policy did not permit the carriers to employ anyone for the purpose of assembling members of a charter party into a group. Travel agents were allowed to act only after the members had formed the charter group.

The Board established the "six months" rule for members of the charter group. If members of less than six months standing participated in the charter, the club assumed the burden of proving affirmatively that it had not solicited the public. National and state-wide organizations of "substantial size" were barred because they constituted too large a part of the public, thereby codifying the National Education Association Case.

A list of thirty-two detailed questions about the chartering organization had to be answered. Any one of a number of detailed rules could be grounds for denial of exemption.

The Board stated that in deciding whether a particular exemption should be granted it would employ a "case-to-case basis" in the light of the statutory standards of Section 416(b) of the Act. The American Airlines case of 1956 required the CAB to make specific findings in exemption cases, not to mouth statutory standards in conclusory fashion. The case had upset the Board's regulation of irregular carriers and undoubtedly influenced its thinking as to the use of Section 416(b). However, ruling on exemptions became a matter of routine.

At the end of the 1957 tourist season the Board invited comments and, after hearing oral argument, issued a new policy for 1958. The Board was concerned with the fact that many groups had discovered that they were
ineligible at the last minute. For this reason the Board undertook to spell out for the first time just what sort of groups would be eligible. In practice the Board had been forming administrative rules in the course of rendering exemption decisions. Until now these were not easily available to the average group interested in chartering.

Specific numerical standards for the chartering organization were articulated. A local group could have 20,000 members whereas state-wide and nation-wide groups were limited to 10,000 and 5,000 members respectively. However, if there were some basis for selecting individuals from among a large group, so that the chartering class was limited, its absolute size might not be a bar. The “six months” rule was continued, but this requirement was read in light of the “real interest” which the member had in joining the group based on difficulty in obtaining membership and the amount of time spent in the club’s activities. Groups were cautioned against allowing items to appear in the general press if likely to induce travel on the chartered plane.

In the name of administrative convenience, the allowable activities of travel agents were very narrowly defined. An agent was not permitted to lay out money in order to aid a chartering organization in making up a brochure to aid the group in solicitation among its own members. The agents complained that the Aviation Act makes no mention of their industry; nonetheless, so long as the Board decided when the public interest justified granting an exemption there was little that they could do.

It had been suggested by some of the carriers that two groups be allowed to share an airplane. The advent of larger planes was making it more difficult for legitimate groups to charter a transatlantic craft, especially when the definition of eligible groups was gradually becoming more circumscribed. The Board rejected a “split-charter” rule saying that this would lead to a breakdown between charter and individually ticketed services. There might be hardship cases if it developed that one group was not eligible. The Board could also foresee the temptation to form an artificial fill-up group if a charterer could only fill half the airplane. The rule against mingling passengers where more than one round trip was chartered was tightened so that one-way passengers were prohibited if the group had chartered a round trip.

Forms were provided for the charterer, the agent, and the carrier to fill out. Chartering groups were asked to provide lists of their complete membership with addresses as well as passenger lists. Objectives, membership qualifications, and other details had to be provided. These requests undoubtedly stemmed from a sincere desire to obtain sufficient information to advise a group of its status; but this requirement placed a considerable burden upon the organization and the carrier. However, at least one writer at the time said that the Board’s fuller articulation of requirements in 1958 made things a little easier for all parties concerned.

As an aid to non-scheduled carriers the Board ended the right of first
refusal that existed until 1958. First refusal was only to apply during the off-season. The Board concluded that since the right had been used infrequently in 1957 there was no reason for extending this "artificial priority" in view of the other competitive advantages which the scheduled carriers enjoyed.70

The scheduled lines did not need prior permission to fly charters. The CAB changes, narrowing the eligible group standard, had not been applied to the route carriers. However, IATA Charter Resolution 045 set its own fairly strict "prior affinity" standard for eligible groups.

Until 1958 the activities of the foreign carriers in the charter field had been regulated principally by IATA. In August 1958 the Board issued a regulation governing part of the charter operations of foreign air carriers.71

This was the culmination of a proceeding which had been launched the day before the 1955 Transatlantic Policy had been handed down.

The purpose of the Foreign Off-route Charter Service Investigation72 was to provide a legitimate legal basis under which holders of foreign air carrier permits could conduct off-route charter operations. The foreign carriers already had authority to conduct charters on their regular routes.73 However, off-route charter operations had been conducted under a Section of the Air Commerce Act of 192874 which was not even designed to apply to aircraft engaged in common carriage.75 No statute allowed off-route flights in common carriage by foreign air-carriers. The Aviation Act is quite specific about the need for a permit for these activities.76 The Board is permitted to grant exemptions only to American carriers under Section 416(b).77

Since foreign countries liberally permitted American planes to fly off-route charters,78 the CAB had stretched a point and allowed foreign carriers to conduct charter operations under the existing statute. The CAB had administered the Air Commerce Act since 1953.79 In the interim approximately 4060 foreign off-route charter flights were authorized.80 A small number of applications had been denied because of their common carriage aspects but the rest of the operation were permitted to continue in what was called a "legal no-man's land."81 Although the Board evidently was willing to stretch a point to allow foreign charter operations, it had taken a very different view when a decision on the same common carriage issue involved the non-certificated lines eight years before.82 As a result of the investigation the permits of all foreign carriers were

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70 Regulation Policy Statement No. 3, 14 C.F.R. § 399.29(D).
74 This is now § 1108(b) of the Federal Aviation Act of 1958.
75 Foreign Off-route Charter Service Investigation, supra note 73, Examiner's Recommended Decision 2.
78 Foreign Off-route Charter Service Investigation, supra note 73, Examiner's Recommended Decision 3. nn. 78, 9.
79 Prior to this time it was under the jurisdiction of the Civil Aeronautics Administration.
80 Foreign Off-route Charter Service Investigation, supra note 63, Examiner's Recommended Decision 3.
81 Id. at 2.
amended to allow them to conduct off-route charter operations. The Board also issued a regulation by which it reserved the right to decide whether individual flights should be authorized on a case-by-case basis. Both the Bureau Counsel and TWA urged that all charter activities of foreign carriers be governed by the new regulation. This proposal was rejected, however, and no CAB regulation has yet been issued governing foreign on-route charters.

The 1958 regulation provided for issuance of Certificates of Authorization on a “public interest” standard. There was no numerical limit on frequency of operations but frequency was declared to be one criterion. In order to specify the standards which would be applied under the regulation, a Statement of General Policy was issued interpreting Part 212 of the CAB Economic Regulations. This document set forth many of the same standards applicable to the irregular carriers. There were some differences, however. Numerical limitations on the size of groups were not imposed, but size and area of residence were to be considered. “Reasonable” organization expenses were allowed but no dollar amount was specified.

One of the issues debated in the investigation was the eligibility of “spontaneous groups.” As mentioned before the Board felt strongly that these groups should be legally eligible. It had conditioned approval of the IATA Resolution 045 stating that approval would not be given unless IATA’s “prior affinity” rule were modified to allow spontaneous groups organized without public solicitation. The trial examiner’s report emphasized the point that the Board had always considered this important. Subsequently IATA amended Resolution 045 by adding a provision specifically called Charters for Spontaneous Groups. However, only by the closest reading of the Board’s own rules, is one able to see how a spontaneous group might be eligible. The regulation of 1959 makes the possibility seem even more remote.

The procedure which the foreign carriers had to follow was simpler than that required of the non-skeds. Instead of the 60 days notice required of the non-skeds, applications were required only five days in advance. The foreign carriers were required to submit a simple one sheet application. It was not necessary to serve carriers certificated to fly the proposed

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83 Order No. E-12945, Aug. 12, 1958 (date of amending).
85 Id. at 20, Examiners Recommended Decision 6.
86 14 C.F.R. § 212.6 (1958).
87 Id. at § 212.6(b)(1).
89 Id. at § 399.30 (IV (1).
90 14 C.F.R. § 212.1(b) (1958).
91 Foreign Off-Route Charter Service Investigation, supra note 84, at 13; Examiner’s Recommended Decision 14-17.
92 IATA Charter Resolution 045 (4) (c).
95 IATA Charter Resolution 045 (4) (b).
97 14 C.F.R. § 212.5(b) (1958).
98 CAB form 433 (Sept. 1958).
route. The Board ruled that any further requirements imposed on the foreign carriers would be unduly burdensome.

Economy fares were introduced in 1958 making it possible to fly round trip to London for $450. There was still a great deal of incentive to form charter groups. Traveling by charter saved a minimum of $150 and possibly $200 on a New York-London round-trip. On longer trips the savings were even greater.

The 1958 fares were not as low as the CAB had wanted, and when the jet supercharge became prevalent in 1959 the charter market boomed. Foreign off-route operations increased ten percent. IATA charters rose from 90,000 in 1958 to 172,000 in 1959. As an aid to enforcement, the Transatlantic Charter Policy was issued in regulation form just before the 1959 summer session. The new regulation brought no important changes, but it was intended that the regulation form would provide greater "stability and legal effect." Evidently this was greatly needed. Problems of enforcement had substantially increased. The N.Y. Times reported that the system was "growing out of hand . . . the way discount houses had grown around retail stores." The situation was described as "reminiscent of the last days of the Volstead Act." Reports indicated that in New York City it was possible to join an organization retroactively for a fee of six dollars and thus become "eligible" for a charter trip. Some agents were ready to enroll the traveler in any one of a number of groups in order to fit their plans.

The situation presented a dilemma for the honest traveler who did not wish to violate the Board's rules but, wanting to save money, saw the rules being violated all about him. In reply the CAB said that the number of violations had been decreasing. It was aware of the economic incentives present and the temptation to break the rules. However, it had faith in the fact that most Americans were law abiding people and that with greater knowledge of the charter requirements it was thought that they would comply with the rules rather than try to evade them. No one denied that there was a problem, but there was disagreement as to whether it was a mere question of enforcement or an issue of basic policy. There was no indication that any policy change was in the offing.

The Board's decisions under the regulations did not always clarify the situation, which had at times confused travel agents, clubs and airlines. The United Nations Flying Club, with a membership of less than one

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14 IATA, supra note 1, at 39.
16 The right of first refusal which the route carriers had retained during the off season was eliminated completely. The draft release had included the refusal right. Draft release No. 102, 23 Fed. Reg. 9784 (1958), but the final version excluded it. Part 295, ER-273, 24 Fed. Reg. 4907 (1959).
20 Ibid.
hundred people, was given permission to include employees of the U.N. and its special agencies and members of missions to the U.N. in its charter group. When this did not prove sufficient to provide a plane-load the group was extended to include newsmen who covered the U.N. and various service employees. This seemed like a loose application of the CAB's "bona fide group" concept, especially after the second solicitation was made. On July 17, 1959 the CAB decided that this flight qualified under the rules. A CAB official said that if all the people who worked in the Empire State Building wanted to set up a charter this would constitute a legitimate group so long as no more than 20,000 people worked there. In light of the Board's generally strict insistence on bona fide membership, these interpretations were somewhat puzzling.

Early in 1959 the CAB had issued a new opinion in the Large Irregular Air Carrier Investigation. Certificates were issued in place of the exemptions under which the irregular carriers had previously operated since the courts had placed limitations on the use of exemptions. The services permitted the supplemental carriers were basically those which had been permitted under the exemptions. No change was made in the transatlantic situation. The Board stated, however, that the fate of the supplemental carriers in the foreign field would be made the subject of a future decision.

The Board was also studying the matter of amending Part 207 so that certificated United States carriers would come under the same rules which governed other carriers. In December 1959 it had tentatively imposed certain conditions on IATA Resolution 045 in an attempt to make the rules for all carriers uniform. The following March, after comment had been filed, the Board compromised on certain IATA rules but insisted that IATA follow the CAB in imposing very strict rules on travel agents so that there would be no opportunity for them to "succumb to economic temptation." A new edition of Part 295 incorporating a more liberal IATTO standard for group size was issued in time for the 1960 season. The Board also revealed that it was studying the possibility of issuing regulations specifically applying to foreign on-route charters.

A pair of decisions made in 1959 and 1960 showed an increasing attitude toward encouragement of the supplemental carriers. In the Independent Airlines Association Commercial Charter Exchange case, the Board removed the restrictions imposed in 1955 which barred the exchange from commercial operations in the foreign field. It accepted the position of the Independent Airlines Association that any new business would come from

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14 Ibid.
15 American Airlines v. CAB, 235 F.2d 845 (D.C. Cir. 1956); in connection with issuance of certificates, the Board promulgated ER-263, Amendment No. 1 to Part 207, effective March 30, 1959, which made it clear that Part 207 did not apply to the new certificated supplemental carriers.
17 Id. at 30.
“untapped potential” or from increased competition with foreign carriers agreeing there was no showing that certificated carriers would be affected. The decision made it easier for supplementals to coordinate civilian and military passenger and cargo flights so that idle ferry mileage would be reduced and the carriers would be in a better bidding position. Five months later the Board denied the scheduled airlines permission to combine efforts to help charter business holding that it would violate the antitrust laws and hurt the supplemental airlines. The position of the supplementals had shifted.

As mentioned previously the 1960 charter season turned out to be a record one in many respects. Charter flights accounted for eleven per cent of transatlantic air traffic. The CAB admitted in November that there had been a defect in its policy of using the supplemental carriers as a stop gap measure. Without a certain amount of security, their availability was being endangered. Even with the advent of jets, it was not always possible to find aircraft available for charter service. It was noted that the identity of the carriers participating in the charter trade had not been consistent from year to year. In the early years the certificated cargo carriers had occupied an important share of the market. Seaboard & Western, for example, relied heavily on charter flights as an aid to its scheduled cargo service. Participation by the certified cargo lines has diminished in recent years while the proportion of charters carried by the supplementals has increased. The supplementals objected to the lack of stability of the market, saying that competition from the scheduled lines in the charter field was not predictable. It was their view that protection was needed because the scheduled airlines were “sporadically throwing large amounts of surplus equipment into the charter field with little continuity or permanence of purpose.” Therefore it was suggested that the scheduled airlines be limited in their rights to conduct charter flights.

The Board took note of the fact that the complicated procedures necessary to conduct charter flights had a definite influence of the attractiveness of the market to the smaller operators and that the route carriers might not maintain a piston aircraft fleet to serve a seasonal market. Jet capacity and costs made them less practical for charters. Therefore the Board decided to review the field and instituted the Transatlantic Charter Investigation to determine whether it would be advisable to grant certificates to non-route carriers so that they might be prepared to supplement the scheduled carriers by providing charter service on a sustained basis.

While the Investigation is pending, the Board has granted seasonal exemptions to carriers applying for certificates. The exemptions run from April to September and are renewable each year. The basic requirements

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27 See text, supra page 282.
31 Burwell, supra note 25, at 28.
for a charter group are unchanged but it is no longer necessary for carriers
to receive individual exemptions for each flight. If the charter does not
completely conform to Part 295, a request for waiver will have to be
presented at least thirty days before the proposed flight. The Board has
said that it eliminated the requirement of individual approval because it
now believes that the standards for charter eligibility are sufficiently precise
and understandable so as to preclude violations on a large scale.

The Board expects this result because of the great administrative and
economic burden involved, and because of the competitive disadvantage
stemming from the charterer's knowing that specific authorization had
to be obtained from the Board.

Following a season of poor business on the Atlantic in 1961, IATA
came forward with a proposal to carry groups of twenty-five or more
persons traveling in economy class service at a reduction of thirty-eight
per cent from normal fares. This plan makes possible a New York-London
trip for $300 and is available to both "prior affinity" and "spontaneous"
groups. Its impact on charter business has been immediate. Flying Tiger
reported that twenty of its charter contracts were canceled with the an-
nouncement of group fares. The CAB held a hearing on the group rates
on March 27, 1962. At this hearing many of the supplemental carriers
opposed the rates on the grounds that the lower fares would ruin their
charter business. Nonetheless, on April 16, 1962, the Board approved the
group fares through next year, saying that the new rates would help the
scheduled carriers fill empty seats. Two Board Members suggested that the
Part 295 carriers be allowed to sell split charters to groups of fewer
than seventy.

In announcing the Transatlantic Charter Investigation the Board
evinced an interest in creating a new class of international airline with
permanent authority to fly charters. Its decision on group fares will no
doubt be crucial to any decision it may make in the Investigation.

III. LEGAL BASIS; INTERPRETATION AND ADMINISTRATION

In recent years the CAB has been working toward uniform charter
standards for all classes of carriers under its jurisdiction. Due to a
difference of position in the regulatory scheme, a variety of techniques
has been used in an attempt to achieve this end. An understanding of the
way charter flights are regulated requires an exploration of the different
ways in which the problem has been attacked.

Three main classes of air carriers are concerned with providing trans-
atlantic charter service. They are (1) United States route carriers, certi-
fied to fly passengers across the Atlantic, (2) foreign air carriers, and
(3) United States supplemental and cargo carriers. Each is regulated in a
different way.

A. Foreign Air Carriers

There were no CAB regulations concerning charters by foreign air

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37 Order No. E-18075, March 5, 1962, approving the plan until May 31, 1962.
carriers until the Foreign Off-route Charter Investigation of 1958. As a result of the Investigation a regulation was issued governing flights conducted off the routes for which the carriers held permits. There are no CAB regulations for on-route charters. Therefore charters by foreign carriers are regulated in two different ways.

1. On-route charters.

a. The Role of IATA.—Control of on-route charters has been maintained by resolutions of the International Air Transport Association. Agreements must be unanimous. Since each member has a veto on all resolutions, many are products of extensive compromise. In keeping with the terms of the Chicago Convention of 1944, Section 402 of the Federal Aviation Act provides for granting permits to foreign air carriers, specifying the points between which the carrier may engage in air transportation. Clearly charter flights are "air transportation." Therefore these carriers may fly charters on their permitted routes.

For many years IATA has had a resolution governing charter flights. Under the Federal Aviation Act, United States carriers must file copies of inter-airline contracts with the CAB. Section 412(b) of the Act gives the Board the power to disapprove contracts which it finds are not in the public interest. Approval by the Board provides immunity from antitrust laws. Without immunity many IATA agreements would be illegal.

IATA Resolution 045, concerning charters, has been approved and amended by IATA members on a year to year basis. Each time the resolution is renewed the Board has the opportunity to pass on its terms.

In reviewing IATA Charter Resolution 045 the CAB has used the technique of conditional approval. The Board lists the conditions under which it will find that the agreement is not adverse to the public interest. A literal reading of the conditioning orders makes it seem that failure of IATA to include the condition in its resolution will automatically result in disapproval by the CAB. However, the Board has been more flexible in this respect. At least one writer has suggested that these conditions are merely indications by the CAB as to what it wants the next IATA conference to adopt. Even if IATA does not adopt the Board's conditions, its members are still bound by the terms of the old resolution. Flat disapproval would leave IATA members with no rule, something the CAB has never done.

45 Federal Aviation Act of 1958, § 712(a).
46 Id., § 414.
47 Price fixing, for example, is illegal per se under the Sherman Act. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
49 E.g., In the Matter of an agreement adopted by the Traffic Conference of the IATA relating to charters, Order No. E-15047, March 28, 1960, p. 5.
50 Bebchick, supra note 48.
51 Ibid.
In one case the Board attempted to get IATA to modify its "prior affinity" rule on charter group eligibility. It first conditioned the resolution in February 1954. It was not until 1958 that IATA amended its resolution to include the "spontaneous group" provision, although the Board had repeatedly conditioned the resolution in the interim. The change came when it became certain that the Board was going to step in and issue its own regulation on the subject.

In a recent incident the CAB took a more restrictive attitude. On March 28, 1960 the Board approved Resolution 045 subject to the condition that IATA follow a "no mingling rule" in cases where a group contracts for more than one round trip. The Board's theory was that if passengers do not move in plane-load groups the charter concept breaks down and approaches the single ticket idea.

The IATA resolution was to go into effect on April 1, 1960 so that the members did not have a chance to approve the CAB conditions and make them part of their agreement. Five IATA members had filed comments contesting parts of the conditioning order as a result of a tentative announcement in December 1959 but IATA had not changed its position. The IATA rules say that the organization will only enforce a "commitment assumed through individual ratification by the members." The Board's order indicated, however, that it assumed that its condition bound IATA members ex proprio vigore. When IATA members continued to conduct charters without obeying the "no mingling" rule, the Board said that it was "considerably disturbed" that this should occur after the effective date of the Board's condition. It spoke of the condition as having been "finalized, effective April 1" and said that it would communicate with the carriers because of the "apparent violation" of the condition. There was evidence that IATA carriers had advised customers that mingling was permissible after the date of the Board's condition. The precise enforcement status of these conditions is not clear. Under the provisions of the Chicago Convention the Board does have the power to regulate non-scheduled traffic, and has done so in the case of off-route charters. It is doubtful that conditioning the IATA resolution has the same result as the formal issuance of a Board regulation, which may be one reason...
why the Board is studying the idea of amending its regulations to apply to on-route charters. As a practical matter there is a strong incentive for IATA to observe the Board’s conditions. If at any time Resolution 045 should get too far from what the Board wants, the Board could always issue its own regulation instead of delegating the task to IATA.

b. IATA Enforcement and Procedure.—The CAB relies upon IATA to police its own resolutions. Under IATA rules members can be fined up to $25,000 for violations. The organization has its own staff of enforcement officers which conduct field investigations and act on complaints from competing member airlines. IATA agents visit airline offices periodically to inspect charter contracts. Violations are referred to the Director General of IATA who appoints a three man commission to review cases.

The enforcement proceedings of IATA have generally been kept secret. As a rule the results of decisions are only circulated among the member airlines. Several years ago, in response to the demands of the House Antitrust subcommittee, IATA released a partial list of its enforcement proceedings. Out of twenty-four cases mentioned, two involved charters. The exact nature of the violations was not specified and neither case resulted in fining although it was not clear that there was “no violation.”

Prior clearance is not required for IATA members conducting charter flights. As an initial step, the chartering organization is presented with a charter application. This blank requires information about the purpose of the organization, its articles and by-laws, its size, the type of soliciting material used and many other details. The charterer is asked to warrant that all answers as to the bona fides of the group are correct. The carrier has a cancellation privilege if it “becomes aware of any conditions which are inconsistent with the rules and regulations of proper aeronautical authorities.” This application is retained by the carrier. It is not a contract. The carrier is not bound at this point.

The charterer is next confronted with the standard airline charter contract. The terms stated appear to be fairly simple and to the point. One clause stipulates that the terms of IATA 045 are incorporated as part of the contract and that the charterer warrants that IATA 045 has been complied with as if it were set out in full. Resolution 045 is a ten page, intricate document written in a very confusing style. To make things more complex, Resolution 045 ends with the caveat that it is subject to “applicable government reservations.” It is not easy for the charterer to

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66 How IATA Curbs the Maverick Lines, American Aviation, Sept. 8, 1958, p. 57; IATA, World Air Transport Background, No. 4 (1957) (mime.)
67 21 IATA Bull. 115.
68 American Aviation, supra note 66.
69 21 IATA Bull. 115.
71 List of Cases decided by IATA enforcement commissions concerning charters in which U.S. carriers were involved:
PAA & TWA v. KLM; no fine, notification. PAA v. Swissair; no penalty.
72 IATA, Charter Application, Sept. 17, 1960 (mime.).
73 Id. at 3.
74 See, e.g., British Overseas Airways Corporation, Charter Contract.
know what reservations are currently outstanding and to be sure of their current status. A charter transaction is not a simple one.

c. Foreign Carriers Outside IATA.—All of the scheduled transatlantic airlines are members of IATA except for Icelandic Airlines. Because of its unique situation Icelandic does not come under either the CAB charter regulations or IATA 045. It is a small line and does not usually seek charter business. This is partly because it is free to set its own prices on individually ticketed fares and charges less than any other scheduled transatlantic airline. Icelandic evidently feels the effect of competition from the charter trade which undercuts even its low fares. Its president thinks that there has been abuse in the charter field. He has said, “It has gotten to the point where people with brown eyes organize a club to arrange a charter flight to Europe.”

2. Off-route Charters.

a. Background.—Holders of foreign air carrier permits conducting charter operations in other than their scheduled routes fall under both IATA Charter Resolution 045, which makes no distinction based on routes, and under regulations promulgated by the CAB.

At the conclusion of the Foreign Off-route Charter Service Investigation the Board amended the permits of foreign carriers, allowing them “to engage in charter trips in foreign air transportation without regard to points named in the foreign air carrier permit. . . .” The Chicago Convention provides that each participating state may regulate international non-scheduled operations conducted for hire. The Board's rule, Part 212, provides that for each off-route charter flight conducted there must be a finding by the Board that the trip is in the public interest. The regulation offers several criteria defining public interest. These include (1) whether the carrier has frequently conducted similar flights, (2) whether the public was solicited in forming the charter group, and (3) whether the carrier has previously violated the regulation. At the time that Part 212 was promulgated a document called “Regulation Policy Statement No. 5” was issued. It described in detailed language what the Board meant by “public interest.” It is not referred to in Part 212. The Policy Statement said that it could not cover all of the Board's standards since “determination of the public interest requires consideration of all the standards set forth in the Civil Aeronautics Act.” At one point in 1960 it was necessary to have not only Part 212 and Regulation Policy Statement No. 5 but also a copy of an order modifying the Policy Statement. The policy statement does not say that it is subject to individual Board orders. As a result, a request to the CAB asking for the latest regulation on the subject or even for the latest policy statement will not always produce all the necessary documents needed to find out the true state of

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79 Time, Sept. 5, 1960, pp. 67, 68.
77 Order No. E-12945, Aug. 12, 1958; Permit to Foreign Air Carrier, as amended, pursuant to Order No. E-12941, approved Dwight D. Eisenhower, Sept. 6, 1958.
79 14 C.F.R. § 212.6(a) (1958).
80 14 C.F.R. § 212.6(b).
81 14 C.F.R. § 399.30 (1958).
82 Id., General Provisions.
the law on this subject. This can be confusing for a potential charterer.
The Board has issued a new policy statement replacing Statement No. 5.
This new document incorporates by reference many of the provisions of
Part 295, applying to supplemental and cargo carriers. Standards for
these two groups are now almost the same.

b. Procedure.—In order to secure permission for an off-route charter
flight it is necessary to submit a form to the Board at least five days in
advance of the proposed flight. If good cause is shown this period can be
shortened. The application is published in the “Weekly List of Applications Filed.”
The purpose of publication is to give competing carriers an
opportunity to contest the grant of a Statement of Authorization.
The application and supporting documents, if any, are open for public inspection
at CAB offices. However, because the application form does not
provide very much information, it is difficult to see if the carrier has
complied with the rules on the basis of the application alone. Since copies
do not have to be served on interested parties and since the Board may act
before the five day period has expired, there is little opportunity to con-
test these applications. The Board has decided that the possible burden on
the applying carriers outweighs the harm to other airlines in these
situations.

After the Board has processed an application the result of its action
is published in the “Status of Charter Applications” attached to the
“Weekly List of Applications Filed.” A letter is sent to the applicant
giving notice of the decision. Copies of the letters are made available to
interested persons on request, but are not given the same general dis-
tribution as exemption orders under Part 295.

c. Effect of Dual Regulation.—IATA members continue to be bound
by IATA Charter Resolution 045 even though they are also subject to
the Board’s regulations. IATA rules do not provide for waiver of resolu-
tions. Therefore approval of a charter application by the CAB does not
excuse the carrier from any of the self-imposed IATA standards.

Sometimes IATA 045 has been stricter than CAB standards. The period
when IATA rules did not provide for “spontaneous groups” is an example
of this. Even though the CAB conditioned IATA 045 so that Part 207
remained in force in its entirety, the Board’s position on the “prior affinity”
rule was not readily followed. As a practical matter it is difficult for the
Board to make IATA carriers follow a more liberal standard for charter
groups than they choose to follow.

In other situations the Board’s rules have been more restrictive than
IATA 045. Since prior permission is needed from the CAB in all off-route
charter cases it is the narrower standard which will prevail.

While enforcement of IATA 045 is not within the province of the
CAB, the Board will sometimes use IATA violations as an arguing point

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65 14 C.F.R. § 212.5(b) (1958).
66 Id. at § 212.5(d).
68 14 C.F.R. § 212.6(c).
69 Provisions for the Regulation and Conduct of the Traffic Conferences of IATA, 5 IATA
Bull. 19 (June 1947).
72 If discrimination is involved then § 404(b) of the Federal Aviation Act gives the Board a
legal weapon. Free and Reduced Rate Transportation Case, 14 C.A.B. 481 (1951).
in its own decisions. One example will show how the Board considers both sets of rules. In May 1960 the Board denied BOAC the right to fly eight round trip charter flights for the British legal profession whose purpose was to attend conventions in the United States and Canada. The Board wrote a full opinion and handed down a formal order instead of its usual letter denying authorization. The principal problem was the size of the group solicited. At this time the Board had no written numerical rule as to the size of chartering organizations. The Policy Statement merely stated that the Board would consider the size of the group and the area of residence of the members. Two months before this case, the Board had approved IATA 045 which allowed nation-wide groups of 15,000 to charter aircraft. The Board said, however, that "in practice" it had construed a nation-wide group in excess of 5,000 members to be one drawn from the general public and therefore could not consider the group as eligible. In the course of its argument the Board noted that the IATA limit of 15,000 had been exceeded in this case and that it had no power to grant relief from the IATA resolution. BOAC was satisfied that it came close enough to the IATA limit so that it could carry the eight round trip charters. If the flight had been on a regular route, BOAC could have proceeded with the contract. If the group had been solicited from a smaller area CAB practice would have allowed it to run as large as 20,000. Evidently the Board thought that it was appropriate to use the same standard for "nation-wide" groups even though the United States and Britain are quite different in size. Although the Board's Policy Statement is written in flexible terms this case shows that it can be rigidly applied.

One can conclude that the charterer must look for regulations, policy statements, amending orders and rules developed "in practice" in order to judge an organization's eligibility. These must be interpreted in the light of the IATA resolutions with their various problems. Without criticizing the substance of the rules themselves at this point, it seems that a better integration of these documents might be achieved for the benefit of chartering organizations.

B. United States Route Carriers


The right of certificated American carriers to engage in charter operations is derived directly from the words of the Federal Aviation Act Section 401(e). The Act provides that "any air carrier may make charter trips . . . without regard to the points named in its certificate, under regulations prescribed by the Board." Part 207 of the Economic Regulations has been promulgated by the CAB. This Regulation has remained unchanged since its first appearance. Different procedures must be followed depending on whether or not the charter flight is being conducted on the airlines' regular route. In addition to Part 207, the

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96 14 C.F.R. § 207 (1951).
97 There has been one technical amendment. See text and note 105 supra, p. ——. The Board has studied the matter of amending Part 207 to include language comparable to that in other sections but it has not yet acted.
scheduled transatlantic airlines are also members of IATA and come under its sanctions, as foreign carriers do.

Restrictions for U.S. carriers are not very detailed. Charter definitions are quite similar to those in Part 212 of the Economic Regulations, but part 207 has not been limited by policy statements. Consequently the standards for scheduled United States airlines appear to be more liberal than for other classes of carriers. However, IATA 045 binds the U.S. transatlantic lines and makes the rules substantially equal.

2. On-Route Charters.

Under the present rules no prior permission is needed for the airlines to conduct on-route charter flights, nor is there any limit to the number that may be flown. Charterers must, however, file the IATA application.

3. Off-Route Charters.

When a scheduled U.S. carrier wants to conduct a charter flight on other than its regular route prior permission must be obtained. If the other airlines which fly the proposed route consent to the trip, giving notice of this fact to the Board is the only action needed. If permission is not obtained from the other route carriers then there must be a finding of public interest by the Board before the flight is allowed. The standards which the Board uses to find if the grant is in the public interest do not appear in the regulation nor have they been articulated elsewhere. A procedural rule has been promulgated by the Board for these situations. The carrier must set forth the pertinent details concerning the flight and serve other route-carriers. Objecting carriers have five days to file objections and ten days more to give supporting reasons as to why the proposed flight would not be in the public interest, demonstrating, for example, that they are willing and able to conduct the flight themselves. It is paradoxical that even though supplemental and cargo carriers are no longer subject to route carriers' first refusal rights, off-route scheduled carriers must still follow the above procedure. As a practical matter, however, there are few occasions when it is used.

Part 207 of the Economic Regulations prevents a carrier from performing off-route charters during "any calendar quarter . . . which in the aggregate, on a revenue plane-mile basis, exceeds 2½ per cent of the revenue plane miles flown by it in scheduled air transportation during the preceding twelve month period." Since the scheduled lines fly extensive scheduled operations this provision has never had any effect on the airlines' capacity to conduct off-route charter flights.

C. United States Supplemental And Cargo Carriers

1. Statutory Problems.

Regulation of supplemental and cargo carriers, i.e., "Part 295 Carriers," has been left almost exclusively in the hands of the CAB. Since IATA is an organization of scheduled airlines very few of the carriers in this category are members. Seaboard & Western, a scheduled cargo carrier, is

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99 CAB Econ. Regs. § 207.8. An outline of Part 207 is presented in the text at pp. supra.  
100 14 C.F.R. § 207.5 (1951).  
1 14 C.F.R. § 207.8 (b).  
2 14 C.F.R. § 302.600.  
3 14 C.F.R. § 302.601(a).  
a member of IATA but no longer has voting privileges when it comes
to passenger matters. The Flying Tiger Line has the status of associate
member and does not have voting privileges. The only relevant regula-
tion for this class of carriers is the Board's Part 295.

Until April 28, 1961 Part 295 provided for granting single flight
exemptions under section 416(b) of the Federal Aviation Act. Although
compliance with the provisions of Part 295 virtually assured an exemption,
the regulation stated that "each application will be considered and passed
upon by the Board in accordance with the statutory standards of . . . the
Act." In *American Airlines v. CAB* the court decided that for the
Board to grant an exemption under the statute, it must make factual
findings so that the court might judge their validity, not findings made
in terms of statutory conclusions. In theory each set of facts was to be
passed on separately.

The basic premise of the Act comes from section 401(a) which states
that a carrier cannot engage in air transportation unless it has received
a certificate from the Board authorizing that transportation. In order to
provide an exemption from this section the Board must show that there
is an undue burden placed on the carrier either because of the limited ex-
tent or the unusual circumstances of the proposed operations. It must also
show that it is in the public interest that exemption rather than certifi-
cation be used in that particular case. The court in *American Airlines*
read in the further qualification that the exemption process could not be used
to impinge upon the system of certificated airlines.

When individual exemptions were granted for charter flights it was
easy to bring the facts under the requirements of the statute. Since most
charter arrangements involve contracts for one round trip flight, it would
have been too time consuming and too expensive to conduct a certifica-
tion proceedings each time a contract was made. The Board stated that
the fact that these contracts were made during a short period each year
before the summer season was an unusual circumstance, not typical of air
transportation in general. On this basis it concluded that use of the
exemption procedure was valid, citing the "the undue burden" on the
carrier because of both the "limited extent" and the "unusual circum-
stances" concerning the charter operation. Some exemption orders refer
to the public interest aspects of the particular chartering group. This
happened most when the order involved waiver of one of the provisions of
Part 295. However, most decisions did not make a special public interest
finding for the group concerned but relied on the fact that it had been
the Board's experience over the years that supplementing the charter
capacity of the scheduled airlines with other carriers was "necessary and
desirable in the public interest." In April 1961 the Board began to grant blanket 180 day exemptions

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9 Section 295.1.
10 235 F.2d 845 (D.C. Cir. 1956).
12 See, e.g., Capitol Airways, Order No. E-15456, June 28, 1960. (Experiment in International
Council of Churches).
under section 416(b) of the Act. The court limitations on section 416(b) would appear to be more serious when exemptions are not considered on a flight by flight basis, but are granted for 180 day periods. It is not so clear that certification is an undue burden in these situations.

Another case, however, indicates that the Board can conduct experiments, using the exemption process, as long as certification proceedings are also under way. It has been held that as long as the exempted carriers were parties to pending certification proceedings this would be enough of an unusual circumstance to justify use of exemptions. The Board, in the Transatlantic Charter Investigation, has stated that exemptions will only be granted to parties actively seeking certification. It was argued that pending certification proceedings are not an unusual circumstance. However, the authority of this case would seem to protect these exemptions.

If certificates are eventually issued as a result of the Transatlantic Charter Investigation it will not be possible to give the carrier blanket permission to fly between any points which their business may demand. It has been held that the Act requires that certificates name specific terminal points. Unless the certificates have detailed lists of authorized points, a certain amount of flexibility in the charter trade may be sacrificed through certification. It might be possible to continue the exemption procedure in unusual cases where terminal points are not covered by charter certificates. Whether one flight charter exemptions will still be granted if certificates are issued is not entirely clear.

2. Administration.

There have been problems in administering the Board’s Charter regulations. Starting with the problems precipitated by the vague standards announced in 1949 the Board has been plagued by the problem of enforcing the rules concerning charter eligibility. In the early days of the policy the rules were of a general nature, leaving the Board to make individual judgments. After 1955 the Board made standards more precise. This has aided administration as the volume of charter traffic has increased. Most of the exemption decisions have been delegated to the Board’s staff. There are many devices that the Board has used to solve its administrative problems.

a. Advisory Procedures.—Chartering groups may seek advisory opinions from the Bureau of Economic Regulation so that eligibility can be determined at an early stage. Detailed representations can help to establish the group’s status in reliable fashion before travel plans have proceeded very far. Carriers must inform groups making reservations that the advisory procedure is available. Advisory opinions helped to cut down the number of formal denial orders under the individual exemption procedure. Because carriers have submitted applications which the Board
rejected under the individual system, the Board does not believe that the carriers would necessarily have performed such charters on their own responsibility. Since there is no present pre-flight filing requirement, the Board expects that carriers, for their own protection, will ask for advisory opinions in doubtful cases.  

b. Adversary Proceedings.—During peak seasons prior to April 1961 as many as seven CAB staff members were employed in processing charter applications. Their task was aided by the fact that the scheduled route carriers sometimes submitted briefs pointing out Part 295 violations. Detailed application forms had to be served on these competing carriers.

With seasonal exemptions the Board no longer has formal surveillance by the route carriers as an aid to enforcement. When it adopted the present system it rejected a proposal that charter data be filed prior to each flight and that it be open to public scrutiny. The Board stated that substantial violations would be readily known to competing carriers and appropriate complaints could be made.

c. The Board’s Decisions.—Under the single exemption rules the Board was not always rigid in interpretation of Part 295. The principles articulated in exemption cases continue to be applied as standards for advisory opinions and granting of waivers. An examination of the exemption orders issued over a period of several years indicates a strict but not inflexible application of the regulations. The most common provision waived was the sixty-day filing requirement, now abolished. Even if no real excuse were given, late filing did not stand as a bar if there were no other defects in the application. The Board tends to excuse charters which go beyond the normally allowable scope of solicitation if there is some intermediate screening process which limits the potential size of the group and if the Board feels that the group has public interest aspects. An exemption was granted for American Youth Hostels, although easy to join and drawing from a nationwide membership, because the trip included “a degree of rigorous travel on foot or bicycle with low cost hostel accommodations which severely limits appeal to the traveling public.” Another group, solicited generally from students of several states was approved because “the program was purposeful, educational . . . not designed to promote cheap air transportation or attract the itinerant traveler.” A group of foreign students coming to live with American families was approved because “the number of participants is severely limited by finding host families,” there was a screening process, and outsiders had donated funds. Another group consisting of Boy Scouts drawn from a number of different European countries, was potentially very large. However, the Board reasoned that there

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40 Letter from CAB to author, March 7, 1961.
41 “Flying Tiger Line, Docket No. 11460, Order No. E-15456, June 28, 1960 (Experiment in Int’l Living).”
43 Order No. E-15240, May 17, 1960 (Int’l Center, Univ. of Louisville).
was some selection process involved so that this group might be described as set off from the general public. There was also the very practical reason of not wanting to strand the group in the United States.  

Judging the appropriate unit which may form an entity for charter purposes leads to fine questions of fact. The *United Nations Flying Club* case mentioned earlier represents a liberal approach.  

One decision allowed Brown University and the Rhode Island School of Design to charter one airplane, citing the common ties that the schools had such as joint library privileges, common extra-curricular activities, and exchange of students for some courses. A less liberal decision allowed members of the N.Y. State Medical School to charter an airplane but excluded members of its affiliated hospitals.  

Where a provision affects the status of only one or two members of the charter group the Board tends to be quite strict about waiving provisions. In a rare case the daughter of a professor was allowed to travel on a university charter even though her father did not participate in the group. The Board explained that it was planning to change the rule governing these situations anyway. In most cases, however, members must come precisely within the definitions found in the regulations or permission will not be granted.  

Since there is always an incentive for private parties to organize charters for profit, the Board has strictly limited organization expenses. If the listed expenses exceed the permitted dollar amounts, the Board will usually grant the exemption subject to the condition that the expenses charged be lowered. If expenses are much higher than those permitted this can be grounds for flat denial, especially if the organization has consistently high expenses on repeated trips.  

Under the regulations persons are presumed not to be bona fide members of the chartering organization if they have not been members for six months before the flight date. This presumption can be rebutted. At the same time the decisions show that the six-month rule does not provide a shield of safety if reasons for joining the organization are suspect. The Board has said that technical compliance with the six months rule will not remove a "presumption of public solicitation." If there is an abnormal increase in the club's membership during the years in which it begins to sponsor charter flights and if the organization has nominal entrance requirements, the Board may conclude that there has been public solicitation even if all the members come with the six months rule.  

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38 *Order No. E-15630, Aug. 8, 1960 (Belgian Inter-Federal Boy Scouts).*  
39 *See text *infra* p. —.*  
30 *Order No. E-15348, June 8, 1960.*  
36 *Order No. E-15305.*  
37 *Order No. E-15348, June 8, 1960. The present rules permit participation of the immediate families of bona fide members even if the members do not travel with the group. *CAB Econ. Regs.* § 295.32.*  
38 *Order No. E-15348, June 8, 1960 (brother of member not allowed); Order No. E-15255 (Univ. of Chicago, close relatives banned).*  
39 *Permitted expenses are $300-500 per round trip, depending on group size. *CAB Econ. Regs.* § 295.33.*  
40 *See, e.g., Order No. E-15207 (Polish Friendly Society).*  
42 *Order No. E-15309, June 1, 1960 (Yorkville Gesellsits Klub).*  
43 *CAB Econ. Regs. § 295.2 (j).*  
44 *Order No. E-15309, June 1, 1960; Order No. E-15354, June 9, 1960 (dictum) (Catholic Kolping Society).*  
45 *Order No. E-15309, June 1, 1960.*
get the Board into highly subjective questions of individual sincerity but not if used only in more extreme cases where other violations are also found.

The Board has steadfastly maintained that allowing mingling of plane-load groups would break down the charter concept which requires "the participant to subordinate his own personal wishes to the wishes of the charter group as a whole." Consequently the Board has been quite strict in its prohibitions against permitting return trip mingling. The rule also states that only five per cent of the passengers may travel one-way if a round trip flight is chartered. A Yale University exemption was granted only on the condition that this five per cent limit be maintained, especially when it was shown that one-way passengers had been solicited. On the other hand a group from Harvard managed to get the mingling provision waived although it appeared at first that exemption would be denied. In the Harvard case students were offered a choice of any one of eleven flights in both westbound and eastbound directions. At the time that the trips were planned, IATA carriers on their own routes were not bound by the "no mingling" rule. The flights were planned with IATA carriers. Later it became necessary to employ an American carrier and seek exemption under Part 295. The Board first issued an opinion flatly denying exemption, because of the mingling involved, and said that the group proceeded at its own risk in assuming none of its flights would have to be carried under Part 295. The IATA carriers proceeded with their contracts despite the fact that the Board had conditioned IATA 045 to prevent mingling. Twelve days later, the group again attempted to obtain the exemption, this time using a different carrier, albeit one also subject to Part 295. The Board considered this as an appeal of the same case even though it was being brought by a different carrier. The new carrier was granted the exemption. The Board stated that it did not find that the violations as to mingling had been corrected. However, four flights had already departed for Europe where the addresses of the passengers were unknown. Denial of the exemption would result in stranding the passengers in Europe and cause "substantial hardship" to those involved. Therefore, three days before the flight date the Board reversed itself and allowed the second carrier to conduct the flights as requested.

The case shows that where hardship may result the Board will not necessarily be inflexible in its administration. At the same time the Board was put in a position where it had to issue two contrasting opinions on the same facts within a very short period of time.

d. Post-flight Sanctions.—The season exemptions have largely eliminated the pre-flight screening devices described above. One Board member has viewed this development as a failure to provide a "prompt and adequate remedy." However, there are a number of sanctions left to the Board which can be used after the flight has taken place both to prevent recurrence of violations and to punish violators.

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45 BOAC, Order No. E-15301, May 31, 1960. (British Legal Professions.) This case was decided under Part 212, but the principle is the same.
47 Order No. E-15238.
48 Seaboard & Western Airlines, Order No. E-15364, June 10, 1960.
As an aid to enforcement the carrier must file monthly statements giving basic information on every charter flight. In addition very detailed data certified by the charterer, travel agent and carrier as to each charter operation must be retained by the carrier for two years, available for Board inspection.

The Bureau of Enforcement conducts investigations of charter cases. The Bureau has no members whose only duty is to patrol the charter field, but it will act on complaints made by private parties. Cases are sometimes referred to the Bureau from the Bureau of Economic Regulation which processes applications under the various charter provisions. Investigation is usually done by correspondence with the charterer and the air carrier involved since the Bureau's staff is not large enough to conduct field investigations in each case. However, under some circumstances a Special Agent will be sent to the scene.

The carriers have an important stake in maintaining clean records. When it inaugurated seasonal exemptions the Board stated that the self-interest of the Part 295 carriers in remaining eligible for exemptions and eventual certification constitutes a strong incentive for them to conform to the regulations. The seasonal exemptions could be revoked at any time. A new exemption is necessary for each season. In recent years the compliance records of the carriers themselves have ceased to be the issue that they once were.

Violations by chartering groups constitute another problem. Under the single exemption policy the Board considered records as part of the public interest test. Since many organizations make charter flights an annual event this gave the groups reason for care. However, the Board no longer rules on individual groups and has lost this sanction.

Although the Board has the power to bring formal enforcement proceedings, there has been only one such proceeding under the charter regulations. This case reached the formal order stage because the complainant, a travel agent, had filed a motion before the Board asking for institution of proceedings. No adverse finding was made.

Various perjury and false statement statutes provide an additional enforcement weapon. Charter statements must be sworn to by officials of the charterer, the travel agent and the carrier. The texts of the various penal statutes are printed conspicuously on the forms provided. Criminal reference is awkward in practice. However, the presence of the statutes on charter forms probably has a helpful in terrorem effect.

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81 CAB Econ. Regs. § 295.6.
82 CAB Econ Regs. pt. 249.
83 Letter from CAB to the author, March 7, 1961; Some travel agents have been described as "vigilante groups" who have acted to inform the CAB of violations. Friedlander, Hope for the traveler, N.Y. Times, Jan. 15, 1961, § 2, p. 1, 20, col. 3.
89 University Travel Co. v. Flying Tiger Line, Order No. E-12990, Sept. 18, 1958.
91 Until April 1961, 18 U.S.C. § 1001 was used on forms. The Bureau of Enforcement referred three cases to the Justice Department under this section. Two were not prosecuted because of
IV. CHARTER FLIGHTS; THE PUBLIC INTEREST

Much criticism has been directed against the charter rules. Representative Celler, Chairman of the House Anti-trust Subcommittee has called them "arbitrary and illogical." The president of the supplemental carrier trade group has pleaded for "a more sensible definition" of what constitutes a charter, saying that the "magical and metaphysical affinity" of the group must be examined with a mental microscope. A New York Times writer has described the standards as "senseless, outside the realm of bureaucratic thinking." In order to evaluate these comments it is necessary to examine briefly the "realm of thinking" inside which these rules have been made.

Since the Second World War the CAB has been committed to a policy of letting the initiative for setting transatlantic fares lie with IATA. IATA members fix uniform fares. The requirement of a unanimous vote makes it possible for the least efficient of the airlines to influence the IATA rate. It has been admitted that at IATA conferences American carriers generally have taken the initiative in proposing reductions while foreign lines have resisted these changes.

In this context the present dual system of pricing has evolved. Charter passengers pay about $260 for a round trip from New York to London while others pay $486 and up. The CAB has called attention to the seasonal nature of the charter business. It has said that if the public had access to charters on a less restricted basis the scheduled carriers would not have the opportunity to accumulate profits during the summer in order to provide for the off-season. It has defended the rules by saying that the restrictive charter concept began with IATA and was later adopted and approved by the United States and other governments. This seems like another way of saying that the CAB has been committed to supporting the IATA rate structure.

If the charter regulations seem to discriminate against part of the public it is because they are meant to. If the rules are dedicated to limiting charter traffic to a "safe amount," then it does not matter exactly what rules are used. Someone will always be ineligible for the lower fares. It is worth noting, however, that in Europe IATA regulations permit solicitation of individuals for charter flights if the flight is part of an inclusive tour at least as expensive as what normal airplane fare would be. This has produced a competitive, but workable result.

Of course the Board deserves credit for the 1955 Transatlantic Charter Policy and its successors which have made it possible for supplemental carriers to compete on the North Atlantic route. Along with Icelandic Air-

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References:

64 Clayson Burwell, Lecture on Supplemental Air Carrier Service, American Univ. School of Bus. Administration, Nov. 11, 1960, p. 29 (mime).
67 Id. at 1054.
68 Id. at 1038.
69 The current IATA round trip fare from New York to London is $900 first class.
70 Letter from CAB to N.Y. Times, Aug. 9, 1959, § 2, p. 21, col. 2.
TRANSATLANTIC CHARTER POLICY

lines, a scheduled airline which does not belong to IATA, they have provided a yardstick for transatlantic fares. If it were not for their presence IATA probably would have set uniform charter rates above what are now being charged. The Board has refused to include a rate floor in Part 295. The IATA carriers justify their own dual pricing system by maintaining that great savings are made when the airlines deal on a charter basis. The airline is guaranteed a flat rate for the plane and does not have to risk taking off with empty seats. It also claims to save money in sales effort and bookkeeping by dealing only with the chartering organization and not with individual passengers. It is doubtful, however, that the bookkeeping and sales savings are so great as to justify such a large price differential. The airlines maintain large permanent organizations for this purpose anyhow. During the peak season, when most charters are carried, the load factor on transatlantic flights runs above ninety per cent in economy class so that the full plane argument is not too compelling. With the new group rates it seems even less persuasive. It is significant that transatlantic fares have always been disproportionately higher than transcontinental fares even though distances are approximately equal and the same equipment is used on both routes. The recently approved proposal to give a 38 per cent discount to groups of twenty-five only points up the issue of whether the basic fare structure serves the public interest.

Would it be in the public interest simply to allow the charter business to continue to grow along the lines that it is following now? Under the present rules there are a number of reasons why more charter flights will not necessarily lead to the sound development of transatlantic air transportation. Lack of flexibility is the main disadvantage in charter travel. The passenger must travel on the dates that his group selects. If the group has chartered a round trip then he must travel on both legs of the flight. He cannot pick his traveling companions if they do not belong to the chartering organization. If he must change his plans and return home at a different date his seat cannot be resold. Arrangements for the flight must often be made many months in advance. The traveler can never be sure just how much the flight ultimately will cost. Most charters are run as cooperative ventures with the charterer's responsibility limited to making business arrangements for the flight. Therefore, even after the flight is over, extra charges may be made if unsuspected expenses have occurred. Instead of dealing with an airline or professional travel agent the charter is often organized by inexperienced amateurs. There is always the chance that at the last minute the flight may be found not to conform to the appropriate regulations and may never take off at all. Equipment used is usually not the most modern available but has been taken off

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Footnotes:

63. Hearings Before the Antitrust Subcommittee, supra note 65, at 1080, para. 65.
67. Present jet fare from New York to Los Angeles is $138.60 plus 10% tax; from New York to London, $270. In 1959 the transatlantic rate was 150% more than transcontinental rate. For an interesting comment on this subject see Hearings Before the Antitrust Subcommittee, supra note 65, at 1054. A defense is found in IATA, World Air Transport Background; “The Cost of Flying” (mime.) (1919).
69. CAB Econ. Regs. § 295.14(c).
70. See, e.g., Harvard Student Agencies, “Cooperative Air Charter for Members,” (mime. form) (1961); Letter from Harvard Student Agencies to flight members (Sept. 1960).
regular runs. Jet aircraft are usually too large for most organizations to fill.

Under the Federal Aviation Act the CAB does not have the power to fix international rates. It can only alter them if they are "unjustly discriminatory or unduly preferential." However, because of its privilege of disapproving agreements and removing anti-trust immunity from the carriers concerned, the CAB holds a powerful weapon over IATA. By passing on individual rate resolutions it has the power to influence the level of international fares. It could even remove its support from the present price structure altogether by not approving IATA's price fixing machinery. This may involve the United States carriers in problems of negotiating satisfactory agreements with other countries. However, there are ways to deal with the fare issue.

V. CONCLUSION

By examining the growth of the Transatlantic charter market it is possible to see that the present situation has stemmed from a desire to provide sufficient air transportation without directly facing the problem of the prevailing IATA fare structure. If the charter business continues to grow in its present form it will not provide the convenient form of inexpensive air travel needed by the public at large. Although there may always be some legitimate demand for charter group travel, the present market is an artificial one created by technical restrictions. The current Transatlantic Charter Investigation may develop ideas that will help the present process work more smoothly. However, until the rate structure is dealt with as a whole there will always be a problem of discrimination if the majority of the public is unable to take advantage of cheaper fares, and the problem of administration will follow as these people attempt to become part of the favored minority.

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80 Federal Aviation Act of 1958, § 1002(f).
81 Federal Aviation Act of 1958, § 412, 414.
84 Docket No. 11908.