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Hope A. Comisky

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THE INTERNATIONAL AIRLINES AND THEIR TOUR OPERATORS—COMPETITION ON THE FRINGE OF REGULATION

HOPE A. COMISKY*

I. INTRODUCTION

"Qantas, Australia's International Airline, brings you these see-it-your-way tours and the idea is beautifully simple . . . and simply beautiful!

"We fly you to Australia, or to New Zealand in conjunction with a participating airline. Then we offer you a variety of ways you can comfortably enjoy the wonders of each country . . . . Take a drive-yourself car or, if you want to leave the driving to someone else, take a plane good for unlimited motorcoach travel or unlimited rail travel in each country.

". . . . No matter which package you choose, transfer on arrival to your hotel for your first night's stay in Sydney or Auckland . . . all included in the tour price."

In Foremost International Tours v. Qantas Airway, Ltd., a proceeding presently before the Civil Aeronautics Board (the CAB), Foremost Tours, a wholesaler of tour programs, is challenging the actions of Qantas, a foreign air carrier, in producing and selling an integrated tour package in competition with Foremost. Foremost alleges that Qantas violated the antitrust laws in its vertical expansion into the tour business.

* J.D., Univ. of Pennsylvania Law School, 1977; B.A., Cornell Univ., College of Arts & Sciences, 1974. The author wishes to acknowledge the assistance of George N. Tompkins, Esq., and Michael J. Holland, Esq., in providing research materials.

1 Qantas Airway, 1976/1977 Australia, New Zealand tours.


3 Final briefs were submitted to Administrative Law Judge Agerakis in August 1976.

Foremost is engaged in the business of packaging, producing, and operating tour programs to Australia and New Zealand from the U.S., Canada, and other countries. The tour includes air transportation, hotel accommodations, sightseeing, and land transportation in Australia and New Zealand. For many years Qantas was a participating airline in one of Foremost's tours.

In 1967 the International Air Transport Association (IATA) filed resolutions 810D and 810E with the CAB pursuant to section 412 of the Federal Aviation Act of 1958 (the Act). Resolution 810D outlines rules under which IATA members may operate inclusive tours for sale by IATA travel agents via IATA member airlines. Resolution 810E prescribes fees applicable to tour operators such as Foremost who promote tours for sale by individual IATA agents via the scheduled services of IATA members such as Qantas. These general resolutions were approved by the CAB in Order No. E-24598.

In 1974 Qantas extended its operations and began producing and selling integrated tour packages in competition with Foremost. As required by section 403 of the Act, Qantas filed a tariff containing its group inclusive tour fare. The tariff included an itemized list of costs of the various tour items.

After Qantas entered the tour business, Foremost's business declined dramatically. For example, in May 1973 Foremost sold 581 tours; in May 1974 it sold only 65 tours.

The District Court of Hawaii issued a preliminary injunction enjoining Qantas from engaging in certain prescribed conduct in its operation of competing integrated tours. The court recognized that section 411 of the Act granted the CAB initial jurisdiction over many of the charges of anticompetitive activity, and therefore stayed further proceedings until the CAB could consider these matters. The United States Court of Appeals for the Ninth Circuit

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8 Foremost also challenged certain of Qantas' actions as constituting anticompetitive practices in and of themselves. For the purposes of this paper, these practices will be discussed only as they pertain to Qantas' vertical expansion into the tour business.
affirmed the decision, and the parties are now awaiting a decision by the CAB. In a preliminary order, the Administrative Law Judge recognized Qantas’ right to conduct its own tour operations.

This paper will examine the consequences of that order: Should air carriers in foreign transportation be permitted to conduct in-house tour operations?

II. THE PARTIES INTERESTED IN THIS DISPUTE

A. Foreign Air Carriers

A foreign air carrier is defined under section 101(19) of the Act as, “any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation.”

The CAB authorizes foreign flag carriers to transport passengers, property, or mail to and from the United States. The President of the United States has reviewing authority over all certificates in overseas and foreign transportation. Tariffs must be filed and observed. The CAB has the power to prohibit any discrimination in rates and any unfair methods of competition in “air transportation or the sale thereof.” The CAB exercises only indirect control over the actual rates and other substantive aspects of foreign air transportation, by suspending and rejecting proposed rates and by withholding approval of agreements. Once approval of such agreements is conferred, however, actions pursuant to the agreement are exempt from the antitrust laws.

10 For the purposes of this paper, the Civil Aeronautics Board’s jurisdiction over this matter is assumed.


14 Id. § 1461.

15 Id. § 1373.

16 Id. §§ 1374, 1482(f).

17 Id. § 1381 (1970).

18 Id. § 1382. Examples of such other matters include uniform ticket and baggage checks, reservations, deposits, free baggage allowances, delays and cancellation of flights. See C. Fulda, COMPETITION IN THE REGULATED INDUSTRIES 250 (1961).

International air transportation is controlled by the International Air Transport Association (IATA), a private association of air carriers who are authorized to operate scheduled international air services. Regional traffic conferences draft agreements fixing rates, fares, and other aspects of transportation. These agreements must be approved unanimously by the general membership and are subject to review by the governments of the conference members. The United States air carriers which are authorized to engage in foreign air transportation participate in this conference and are parties to such agreements.

B. Tour Operators

Wholesale tour operators are in the business of marketing and servicing charter tours. Generally, an independent tour operator canvasses the consumer's demands and assembles a package comprised of airline seats, hotel rooms, restaurant services, motorbus transportation, and related ground services. The tour operator then offers its tour to the public.

There are two aspects to this wholesaling business. In general wholesaling, the tour operator arranges the ground components of a tour for a particular travel agent, who then promotes the tour under the agency name and arranges for the air space himself. In tour packaging, the tour operator designs and contracts for a tour program with a sponsoring air carrier. A brochure is promoted jointly by the airline and the tour operator. The inclusive tour package is marketed by a travel agent and airline ticket offices. The tour operator does not directly deal with the public.

The market for tour operators is composed of a large number of independent operators. They compete among themselves in pricing and servicing their tours. New operators can freely enter the market.

Charter tour operators are controlled by the CAB's economic
regulations. Specific regulations have been promulgated for specific types of tours. United States and foreign tour operators are subject to these provisions and must obtain a permit from the CAB. However, foreign tour operators organizing foreign-originating tours are exempted from the regulations.

The CAB first disclaimed jurisdiction over these foreign tour operators in Pan American World Airways, Inc. v. CAB. In this case, the CAB recognized that tour operators were indirect air carriers and that the CAB had jurisdiction over them. However, the CAB argued that exercising its jurisdiction would fail to advance the Act and would tend to frustrate the powers of the CAB and the President with respect to American supplemental carriers flying inclusive tour charters abroad. The reasons cited by the CAB included the facts that: 1) Compliance with licensing procedures would be an extreme burden for foreign tour operators; 2) Increased uncertainty in scheduling would discourage tour operations; 3) Effective reciprocity would be denied; and 4) Regulation would be unnecessary since it was in the interest of a licensed air carrier to deal with a financially responsible tour operation. In upholding the CAB and denying jurisdiction, the court, in effect, authorized the sale and marketing of foreign-originating charters by tour operator affiliates of foreign air lines.

C. Charter Service

Charter service, as discussed in this article, refers to the entire bulk transportation market. This market is distinguished from individually-ticketed service in terms of the character of traffic, not the type of carrier. Thus, passengers traveling at group rates on scheduled service are part of the bulk transportation market.

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27 392 F.2d 483 (D.C. Cir. 1968).
28 Indirect air carriers charter the aircraft of authorized carriers.
29 392 F.2d at 495.
30 Id. at 488.
31 See text accompanying note 91 infra.
32 This definition was adopted in the Statement of International Air Transportation Policy of the United States, approved by the President, 6 WEEKLY COMP. OF PRES. DOC. 820 (1976) [hereinafter cited as Statement], cited in Licht-
The United States grants unlimited authority to international route carriers to perform charter services on their regular certificated routes. Off-route charter authority is subject to prior CAB approval. Foreign charter airlines are also granted route authority by the CAB.\textsuperscript{33}

In the 1970 Statement of International Air Transportation Policy of the United States which was approved by the President, charter services were described as a most valuable component of the international air transportation system.\textsuperscript{34} This realization evolved quite slowly. The supplemental air carriers, which perform the major charter services for the United States, were originally authorized as a class of carriers exempt from the Act’s economic regulations.\textsuperscript{35} Economic Regulation 292.1 defined these “nonscheduled” operations as those where “the air carrier does not hold out to the public by advertisement or otherwise that it will operate one or more airplanes between any designated points regularly . . . upon which airplane or airplanes it will accept for transportation, for compensation or hire such members of the public as may apply therefore.”\textsuperscript{36} This definition was revised after World War II and registration requirements were instituted.

In the meantime, an air transport industry developed composed of these non-certificated carriers,\textsuperscript{37} and in 1948 the CAB instituted a large scale investigation of these irregular carriers and removed the blanket exemption.\textsuperscript{38} Again, in 1951, a general investigation of the services of large irregular carriers was commenced. In 1955 the CAB authorized these “supplemental” air carriers to perform unlimited charter operations on a planeload basis for passengers and property in domestic flights, and for property only in international flights.\textsuperscript{39} The CAB noted that these carriers performed a useful and

\begin{thebibliography}{9}
\bibitem{33}J. H. Frederick, Commercial Air Transportation 182-84 (1961).
\bibitem{34}Lichtman, supra note 32, at 452.
\bibitem{35}Id.
\bibitem{36}Lichtman, supra note 32, at 452.
\bibitem{37}Large Irregular Carriers, Exemptions, 11 C.A.B. 609 (1950). Irregular air carriers were conducting services beyond those authorized and were advertising to the public through travel agents. See Fulda, supra note 18, at 197.
\bibitem{38}Large Irregular Carrier Investigation, 22 C.A.B. 853, aff'd on reconsideration, 22 C.A.B. 838 (1955).
\end{thebibliography}
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necessary service in meeting demands for flights, services, and charter operations which were not met by the scheduled carriers. These air carriers were recognized as innovators in developing low-cost air transportation. In 1962 Congress approved an amendment to the Act recognizing "supplemental air carriers" and providing for their certification.40

The Statement of International Air Transportation Policy suggests that scheduled and supplemental carriers should be permitted a "fair opportunity to compete" in the bulk transportation market. The government should not allow "enjoyment of the right-to-perform both scheduled and charter service to result in decisive competitive advantage for scheduled carriers."41 The present definition of "supplemental air transportation," including charter trips and inclusive tour charter trips, however, contains the following provision:

Nothing in this paragraph shall permit a supplemental air carrier to sell or offer for sale an inclusive tour in air transportation by selling or offering for sale individual tickets directly to members of the general public, or to do so indirectly by controlling, being controlled by, or under common control with, a person authorized by the Board to make such sales.42

Thus, supplemental airlines cannot compete directly for the business of individual passengers. This requirement was originally imposed to maintain the distinction between the group charter service performed by supplemental carriers from the individually ticketed service performed by the scheduled carriers.43 The supplemental carriers must depend on intermediaries such as tour operators, whereas scheduled carriers may sell their services directly to the public through their own reservation agents.44 Several of the United

41 Statement, supra note 32, at 7.
44 Note that problems in distinguishing between charter and scheduled services still remain. The CAB has never clearly articulated the limits of charter service and the Act contains no definition of a charter trip. See Trans World Airlines, Inc. v. CAB, 545 F.2d 771, 774 (2d Cir. 1976): "Congress intended 'charter' to be a flexible term which the CAB is free to define in accordance with experience
States' scheduled carriers have established in-house charter tour operations in direct competition with the supplemental carriers. 46

III. A POSSIBLE DECISION ON THE MERITS

A. Air Carrier Control of United States-Originating Tour Operations Constitutes an Unfair Method of Competition Requiring Regulation by the CAB.

The decision of a company to expand internally in order to establish selling outlets or to enter other lines of business is purely a business matter. Entry through internal expansion increases the number of competitors in the market by one. Usually a company enters a new market with a belief that it can perform the new function at least as well as, if not better than, the firms already in the market. It provides incentives to those in the market to continue efforts at cost-reduction and innovation. 47 In addition, the integrated firm has special incentives and abilities to utilize resources for these purposes:

A company will have unusual incentives to develop . . . better outlets or new uses for its product; it may have unusual opportunities, arising from its operating experience, to perceive the need and possibilities for such an effort; and it might, by being able to assure successful innovations a market, be best able to justify the application of resources to their development. 48

These types of incentives influenced Qantas' decision to enter the tour business. Qantas wanted to eliminate from the price of such tours the mark-up for expense and profit of the independent tour wholesaler. This ultimate saving to the consumer was one of the "principal factors" which caused Qantas to market its own tours. 49 These advantages, however, present offsetting dangers: if the strength of one division is used to give another division an unfair

and changing circumstances as long as the integrity of scheduled service traffic is not vitiated. 50

46 Several airlines do operate such tour operations—TWA's Getaway Plan; Eastern's Fly/Cruise tours with Cunard.

47 Id. at 261.

competitive advantage, a case of unfair competition is presented."

Unfair methods of competition are prohibited by section 411: "The board may . . . investigate and determine whether any . . . foreign air carrier . . . has been or is engaged in any unfair or deceptive practices or any unfair methods of competition in air transportation or the sale thereof . . ." This section is concerned with protection of the public interest. Jurisdiction can be assumed in this case because the definition of public interest in the Act includes, "competition to the extent necessary to assure the sound development of an air-transportation system . . ." Many unfair methods of competition do not assume the proportions of antitrust violations. One need not show that the practice has totally eliminated competition in a particular market. A finding that the practice unfairly burdens competition to a significant degree is enough to condemn the practice. A violation can be found if conduct runs counter to the public policy declared by the Act. Proof of actual injury is not necessary.

When the practice in issue does resemble recognized antitrust violations, the CAB may look to cases applying those laws for guidance. The leading cases on vertical integration hold that the legality of an integration depends on the power it creates. Use of monopoly power, no matter how lawfully acquired, to foreclose or destroy competition or to gain a competitive advantage is illegal under the antitrust laws, yet price-cutting, without more, is a com-

petitive practice, not an antitrust violation.\textsuperscript{59}

We will first consider economic effects and then discuss the public policy concerns in order to determine whether the airline's vertical integration into the tour business constitutes an unfair method of competition.

1. The Economic Impact of Vertical Integration Is Anticompetitive.

Qantas is the Australian national airline. It competes with four other airlines in the United States-South Pacific market. Yet, Qantas controls thirty percent of the weekly seat capacity allocated to these carriers.\textsuperscript{0}

The problems of vertical integration will be illustrated by the testimony of various witnesses in the Qantas-Foremost dispute.

a. The "Deep Pocket"

Tour operations affiliated with airlines will have the benefit of airline financial resources for the production and marketing of their tours. Therefore, the number of tours which can be produced and marketed will be increased, and the tour operations will have an immediate market identity: "The 'affiliate' will, of course, trade on its airlines' name. The consumers will then have the option of purchasing a TWA Jet-A-Way Charter Tour or a '--- --- --- --- ---' charter tour. Which will he choose?"

In addition, the airline can include advertising for the tour within its already established advertising program. Thus, the tour can get exposure far beyond that which an independent tour operator could afford. For the Qantas Holiday Tours, Qantas printed and distributed its own brochures, and its reservation offices were used to provide tour information.\textsuperscript{62} In fact, Qantas provided the tour operations without hiring any additional personnel.\textsuperscript{63} In contrast, in-

\textsuperscript{59} Schine Chain Theatres v. United States, 334 U.S. 110 (1948).

\textsuperscript{0} Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction and in Support of Defendant's Motion for Summary Judgment, affidavit of George Howling at 6, Foremost v. Qantas, 379 F. Supp. 88 (D. Hawaii 1974) [hereinafter cited as Memorandum of Law].

\textsuperscript{61} 1976 Hearings, supra note 21, at 1090.

\textsuperscript{62} Bureau of Enforcement Brief at 16, Foremost v. Qantas, CAB Docket No. 27,631 (1976) [hereinafter cited as B.O.E. Brief]. There was testimony before the CAB that Qantas' reservation staff diverted to itself business meant for Foremost.

\textsuperscript{63} Initial Brief for Respondent, supra note 48, at 28.
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dependent tour operators usually pay a portion of the cost of promotional brochures and are responsible for trade advertising. The sponsoring carrier may provide some national advertising.  

b. Boycotting

The vertically integrated company often prefers to deal with its own affiliate to the detriment of the independents. Likewise, buyers of airspace often find it advantageous to deal with the integrated carrier for purchase of inclusive tour packages as well.

Qantas established its own Qantas Holiday Tour operations in the South Pacific in competition with Foremost. Qantas also jointly marketed its tours with Canadian Pacific where their routes coincided. Foremost was eliminated as a competitor for this tour business. Although Qantas continued to do business with other tour operators, it did not do any significant amount of business with Foremost. In addition, certain travel agents no longer did business with Foremost after the Qantas take-over. It is possible that these agents were afraid of losing Qantas services and commissions if they did deal with Foremost. It should be noted that Foremost continues to operate its tours. British Airways and Air New Zealand are its principal carriers; occasionally Foremost books space on other carriers in the market, including Qantas.

c. Foreclosure

Scheduling imposes a great limit on charter operations due to seasonal traffic. Vertical integration allows airlines to favor their own tour operations to the exclusion of independents in allocating the scarce peak-season capacity. There was evidence that this was precisely what Qantas did. Qantas and other airlines allocate space to proven producers on the basis of good business practice. When marketing its tours with Qantas, Foremost was considered a “proven product”; it routinely received the space it requested for the peak season. Upon termination of its relationship with Qantas,

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65 Motion and Memorandum in Support of Motion for Preliminary Injunction at 17, Foremost v. Qantas, 379 F. Supp. 88 (D. Hawaii 1974) [hereinafter cited as Motion and Memorandum].

66 Id. at 5.


68 Memorandum of Law, supra note 60, at 6.
Foremost's request for space was put on a waiting list for the first time in four years. Foremost was precluded, in part, because Qantas reserved extra space for its in-house tour operations on at least one of its own flights. This allotment was twenty percent more than the total amount which Qantas reserved for all independent tour operators on a single flight. Without confirmed bookings, tours become much harder to market. Travellers prefer direct, round-trip flight arrangements on one carrier to a "hodge-podge" of flight arrangements. As further illustration, the space reserved by Qantas went unused by its tour department.

Affiliates can also be preferred in terms of scheduling, rates, and cancellation policies. The affiliate can be offered the most desirable flight times. Special low tariffs can be negotiated for charter tours by affiliates, while higher aircraft rentals result from negotiations with independents. Affiliates may be relieved from cancellation charges, while independents have to pay the full penalty.

In addition, where airlines own hotels, similar preferences can be given for hotel accommodation space, rates, and cancellations. The airline also will gain a competitive advantage vis-a-vis its own competitors which operate through independent tour producers. The airline affiliated with a tour operation will have a captive market for its excess capacity and enjoy increased traffic over its routes.

d. Unfair Pricing Practices

Because the favored tour operator receives these concessions, it will be able to market tours at lower prices. Further price reductions may be the result of pricing below costs or rebating. Vertical integration increases the opportunity for such price concessions and increases the possibility that they will go undetected. If the price reductions are severe enough, competitors will be driven out of business. Many fear the high prices will return without the competitive spur of the independents. Specific pricing practices will be discussed in the next section.

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69 B.O.E. Brief, supra note 62, at 17; Initial Brief for Complainant, supra note 22, at 39.
71 B.O.E. Brief, supra note 62, at 18.
72 1976 Hearings, supra note 21, at 1093.
e. Possible Inefficiency

Usually an integrated firm "meets the test of the market" when it finally sells its product to a consumer. Therefore, there is an incentive to integrate only when it is efficient to do so. However, this is not the case with regulated monopolies:

The higher costs incurred through a subsidiary's inefficiency, or through outright padding of its records, may simply be passed on to the consumer by the regulating authority. Therefore, unless the operations of the subsidiary are fully subject to public inspection and control, a strong prima facie case exists for separation, unless there is satisfactory evidence of definite economies of integration.\(^7^3\)

In the Qantas case there is evidence that the integration permitted Qantas to save money and to continue to participate in a tour package. By working alone, Qantas saved $750,000 a year which it had previously been paying to Foremost for the tour services\(^7^4\) and avoided the commission paid to tour operators under IATA regulations. Even so, there was much evidence presented which challenged the conclusion that integration enabled Qantas to produce tours at less than the full cost to a nonintegrated firm.\(^7^5\)

Generally, the problems of integration are even more severe in a regulated area:

Even more drastic are the entry-limiting effects of integration backward or forward over a regulatory boundary which separates a sphere of legal monopoly from the competitive area . . . where the relative power of the firm in the primary market is greater than that of firms in the . . . buying market, integration leads to the spread of market dominance into [it] . . . .\(^7^6\)

In such circumstances, integration is not related to economics, but to the achievement, maintenance, spread, or exploitation of market power. In short, diversification is the basis of a scheme to avoid government control.


\(^7^4\) There is some question as to the legality of this payment.


2. Acquisitions of Control of Tour Operators by Domestic Airlines Will Not Be Approved by the Board.

Section 408 of the Act prohibits U.S. air carriers and foreign air carriers from acquiring control of any citizen of the United States engaged in any phase of aeronautics without Board approval." It also details the requirements for such approval."

In Foreign Study League v. CAB," the court ruled that airline control of a tour operator will not be approved under section 408. In that case, a conglomerate corporation, Transamerica Corp., acquired Foreign Study League (FSL), a corporation organizing foreign study-travel courses, after having acquired Trans International Airlines (TIA), one of the largest certificated supplemental air carriers. By doing so, Transamerica "brought under the roof of a single corporation one of the nation's largest supplemental air carriers and the nation's largest buyer of air transportation in the foreign study-travel business. Such a potential tie-in definitely merited possible anticompetitive consequences . . . ." The court adopted the "conflict of interest" test advocated by the CAB and determined that the acquisition created anticompetitive conditions not in the public interest.

The conflict of interest was discussed by the court. To maximize TIA's benefit, FSL would provide a guaranteed base for its transatlantic flights and might charge a higher price than that charged by other carriers. If FSL was to benefit, lower rates and preferred charter scheduling would be available to it. In either case, competition would be harmed.

These same dangers exist where the control of tour operations has been established by a carrier's internal expansion. The public interest seems to be promoted by the existence of independent tour operators whose sole interest is to create the best package for the lowest price for his customers—the consumers of charter tours.

78 Id. § 1378(b) (1970).
79 475 F.2d 865 (10th Cir. 1973), aff'd Reopened Transamerica Corp. and Trans-International Airlines, Inc., CAB Order No. 71-7-119 (July 21, 1971).
80 Id. at 869.
81 Id. at 871.
3. *Indirect Air Carrier Permits Will Not Be Unconditionally Approved Where Some Control Relationship Exists Between the Air Carrier and the Tour Operator.*

In *Kuoni Travel Limited* and *Laker Air Travel Limited*, the CAB denied blanket authorization for foreign tour operators to organize charters originating in the United States which used the services of an affiliated foreign air carrier. The CAB reaffirmed the *Foreign Study League (Transamerica)* decision and restated the policy considerations previously discussed:

The direct air carrier parties to the Laker proceeding urge that there are significant economic advantages inherent in providing charter operations through an "in house" or affiliated subsidiary tour operator. Thus they urge that there exists an increased efficiency of charter operations because of greater control over charter booking, the avoidance of ferrying and positioning flying, crew utilization, maintenance planning and other details, and the monitoring capability for early detection of potential cancellations. However, it is precisely these economic advantages, which, when coupled with the preferential and "synergistic" practices referred to by the Board in the *Transamerica* case, would create a significant competitive advantage for any direct air carrier that was affiliated with a tour operator.\(^3\)

In addition, the CAB addressed the statutory and regulatory limitations upon the organization of charters through affiliated tour operators.

[T]he definition of "Supplemental Air Transportation" in section 101(36) (49 U.S.C. 1301(36)) includes a proscription against supplemental air carriers selling tours through an affiliated tour operator. A similar policy is reflected in the Board's charter regulations, where a tour operator and foreign tour operator are defined as "... (other than a direct air carrier) ...," and the exemptions from section 408(a) and 409 applicable to control or interlocking relationships (and the approval of interlocking relationships with respect to foreign tour operators) are specifically made inapplicable to such relationships "with direct air carriers."\(^4\)

The CAB recognized that any such authorization would place United States carriers at a serious disadvantage. Such a result would

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83 Id.
84 Id.
be contrary to the International Air Transportation Fair Competitive Practices Act.\textsuperscript{85} This Act directs the CAB to "take all appropriate actions within its jurisdiction" to eliminate all "forms of discrimination or unfair competitive practices to which United States air carriers are subject in providing foreign air transportation services . . . ."\textsuperscript{86} Recently, the courts have recognized the obligation of the CAB to "re-examine [its] policies regularly to guarantee that relevant changes in the international air transportation market are taken into account and that the position of U.S. scheduled and supplemental carriers in the international charter market is protected."\textsuperscript{87} The courts have concluded that it would not be in the public interest to allow foreign tour operators to organize charters on behalf of their affiliated carriers while United States direct air carriers are precluded from doing so:

The fact that U.S. tour operators affiliated with U.S. direct air carriers might be permitted to engage in organization of charters originating in Switzerland or the United Kingdom, does not require, under principles of reciprocity, the grant of authority to Swiss or United Kingdom tour operators affiliated with direct air carriers to organize charters originating in the United States, where U.S. laws and policies would preclude such operations by U.S. citizen tour operators.\textsuperscript{88}

The CAB recently limited the \textit{Kuoni} decision. The American Society of Travel Agents (ASTA) and the United States Tour Operators Association requested a rulemaking proceeding to prohibit the direct marketing of tours carried on scheduled service by scheduled airlines.\textsuperscript{89} The CAB denied the petition stating that the public interest would not be served by such a prohibition.

The CAB noted that vigorous competition exists with independent tour operators for these fares. The use of buying power to arrange and offer the lowest possible price is the main advantage to group travel and provides the competitive tool used by tour operators and airlines alike.

\textsuperscript{86} Id.
\textsuperscript{87} Pan Am. World Airways, Inc. v. CAB, 517 F.2d 734, 746 (2d Cir. 1975).
\textsuperscript{89} CAB Order No. 76-12-101 (Dec. 16, 1976).
This decision ignored the problems posed by airline integration. Conflict of interest problems abound. And, as we have seen, the advantages to the scheduled carriers of joint advertising and direct marketing represent associated disadvantages to the independent tour operators. If only independent tour operators were competing for this tour business, competition might be even more rigorous; more operators would enter and bargain for these fares knowing that none of their competitors had an unfair size or "name" advantage. The use of buying power would still lead to low prices for the consumer.

The rationale behind the decision was that the CAB does not consider group travel on scheduled flights to be charter transportation. In fact, the ASTA decision specifically limited Kuoni to affiliations in the charter field, thereby insuring that it was not pertinent to the ASTA petition. Under the definition of charter transportation used in this article, which includes all group services, Kuoni would apply to tour operators booking tours on scheduled flights, and the ASTA decision would have little impact.

In ASTA, the CAB based its decision on a distinction between scheduled and charter service. Ironically, by continuing to allow the direct marketing of tour programs by scheduled carriers, the CAB effectively blurred the distinction upon which it relied.


In Pan American World Airways, Inc. v. CAB, the court approved the decision by the CAB not to exercise its jurisdiction over foreign tour operators, effectively permitting them to charter foreign air carriers for tours originating abroad. Moreover, this abdication allowed foreign tour operators to be controlled by foreign airlines without prior CAB approval.

In response, United States carriers argued that they should be permitted such affiliations in foreign countries so they could compete more effectively.

Even such control arrangements may not be sufficient to close the competitive gap. Foreign tour operators have a competitive ad-

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90 See text accompanying notes 61-64 supra.
91 392 F.2d 483 (D.C. Cir. 1968); see text accompanying notes 27-31 supra.
92 1976 Hearings, supra note 21, at 1095; see note 9 supra.
vantage for various reasons: 1) Local airline affiliates of foreign tour operators subsidize the ground packages; 2) Aircraft space can be purchased on a year-round basis, lowering their costs for flight space; and 3) Tour operators are favored by governmental regulations and may be part of a governmentally-owned monopoly. 83

Once air carrier affiliations with tour operators are permitted in foreign markets, it can be argued that the policies of the CAB which prohibit such affiliations at home will be effectively frustrated:

[United States airlines] will gain all the ingredients for market control inside this country. It is a fairly simple matter for the airlines' foreign tour operator subsidiary to enter into arrangements with a so-called independent tour operator in the United States and for the two to combine their mutual interests in traffic, preferential tariffs, and subsidized promotional and sales assistance. The net result is the same as if the airlines are allowed to own or control U.S. tour operators. 84

Based on the preceding analysis, the CAB should conclude that integration in *Foremost v. Qantas* is an unfair method of competition. It frustrates the public interest in promoting competition to the extent possible in both domestic and international aviation without any off-setting public advantage: lower fares are not assured; stronger United States carriers cannot be assumed; and more efficient tour operations have not been evidenced.

The following discussion of pricing practices supports this conclusion.


1. **Low Fares for Inclusive Tours May Constitute Illegal Rebates.**

Section 403(b) of the Act provides:

No . . . foreign air carrier . . . shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the . . . fares . . . specified in then currently effective tariffs . . . ; and no . . . foreign air carrier . . . shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, re-

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83 1976 Hearings, supra note 21, at 1108.
84 Id.
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fund or remit any portion of the ... fares ... so specified, or ex-
tend to any person any privileges or facilities, with respect to
matters required by the Board to be specified in such tariffs, except
those specified therein."

The Act also provides criminal penalties for granting or receiving
rebates.6

Where an air carrier is operating its own inclusive tours, this
problem in computing the cost of the air fare component of the in-
clusive tour package is presented. Should the fare include a factor
for overhead and administrative costs of the tour operation? If not,
are the tour passengers receiving, in effect, a rebate on the price of
their air fare? The problem is especially acute in the Qantas case
where Qantas claims it has experienced no additional costs in as-
suming the tour programming operations.

The general policy of the CAB includes "the promotion of ade-
quate, economical and efficient service by air carriers at reasonable
charges, without unjust discrimination, undue preference or ad-
vantages, or unfair or destructive competitive practices."7 The
CAB has established a basic fare structure which includes both di-
rect and indirect operating costs allocated to various classes of ser-
vice.8 Inclusive tour fares, however, being promotional, or discount,
are not included in this structure. The CAB discussed the pricing of
these fares in its Domestic Passenger-Fare Investigation (DPFI)
Phase 5—Discount Fares.9 The CAB recognized the value in elimi-
nating short term conditions of excess capacity by using promotion-
al fares to fill empty seats, but it also noted the potential danger in
generating traffic requiring additional capacity, which would be
detrimental to full-fare passengers in the long run.10 The CAB held

6 Id. §§ 1373(b)(1), 1472(d).
7 Id. § 1302(c) (1970).
8 Domestic Passenger Fare Investigation (DPFI), Phase 9 (Fare Structure),
1974] 2 Av. L. REP. (CCH) 22,137. Direct operating costs include flight crew
salaries, fuel and oil, insurance, maintenance and overhead, and depreciation.
9 [1972] 2 Av. L. REP. (CCH) 22,096.
10 One court explained the problem in this way: A high volume of discount
fare passengers may cause the airlines to increase capacity. (Discount passengers
are not just using up extra seats.) The over-capacity will be paid for by the full-
fare passengers whose rates are based on a certain percentage load factor. The
burden of over-capacity is increased on full-fare passengers, because although the
CAB allows only 45% empty seats, it allows another 20% to be half-empty
that discount fares are economically justified only where they fill seats which are empty due to present excess capacity. The CAB used a "profit impact" test for costing these fares:

[A] discount fare may thus be profitable if it generates sufficient additional traffic to more than offset (1) the diversion of the full-fare traffic and (2) the added non-capacity costs associated with the generated traffic, less any savings in cost attributable to the nature of the services provided to the discount traffic.\(^{101}\)

In the South Pacific inclusive tours market, there is no evidence of diversion from full-fare passengers. "Qantas' principal full-fare passenger is the business traveller, who is not interested in the hotel limitations, time restrictions or other features of the inclusive tour."\(^{102}\) However, promotional fares generate more traffic and fill more seats than would be diverted from full-fare revenues.\(^{103}\) Generally, it is recognized that the various features of the inclusive tours sufficiently distinguish it from individually-ticketed service\(^{104}\) to attract passengers who otherwise would not travel.

The tour package is recognized as a transport-related service. In pricing such services, those expenses which would remain as an essential part of the air transport service if the transport-related services were terminated should not be included.\(^{105}\) This pricing scheme is consistent with the policy discussed above for pricing the air fare, using the "added non-capacity costs."

Following these principles, Qantas considered only the additional costs of the land components in pricing its tours.\(^{106}\) The tariffs Qantas filed included these costs, met the minimum price requirements of IATA and the CAB,\(^{107}\) and were followed by Qantas.

by being filled by those who do not pay full fare. See Moss v. CAB, 521 F.2d 298 (D.C. Cir. 1975).

\(^{101}\) [1972] 2 Av. L. REP. (CCH) ¶ 22,096 at 14,249 (emphasis added).

\(^{102}\) Initial Brief for Respondent, supra note 48, at 26.

\(^{103}\) Id.

\(^{104}\) Trans World Airlines, Inc. v. CAB, 545 F.2d 771 (2d Cir. 1976); Saturn Airways, Inc. v. CAB, 483 F.2d 1284 (D.C. Cir. 1973); American Airlines, Inc. v. CAB, 365 F.2d 939 (D.C. Cir. 1966).


\(^{106}\) Initial Brief for Respondent, supra note 48, at 28.

\(^{107}\) Ironically, the CAB set the minimum price of inclusive tours for planeload charters at 110% of the air fare price, so that scheduled airlines could not price the tour operators out of business. Supplemental Air Service Proceeding, 45 C.A.B 231, 264 (1966).
However, Qantas alleged that no additional staff or administrative expenses were incurred in producing its tours.\textsuperscript{108} Since these expenses were already recovered in its basic far structure, Qantas did not include any factor for administrative and overhead costs of tour operation.\textsuperscript{109}

These practices lead to the charge that the Qantas price structure included an unlawful subsidy of the land costs, constituting an illegal rebate under section 403(b). Since the air fare price was set by a tariff which did not include all of the costs of the tour operations, certain tour passengers received an indirect rebate in the form of a lower-priced tour package. Part of the air fare collected from participants in the higher-priced tours and non-tour passengers was applied to cover the overhead of the tour operation.\textsuperscript{110}

Air fare does cover certain tour-related operating costs such as traffic servicing expenses, advertising, reservations, and ticket sales, but expenses for negotiating land supplier contracts, printing passenger baggage tags, and voucher checks are not included.\textsuperscript{111} In addition, Qantas probably incurred at least minimal costs in starting up the Qantas Holidays Tours and setting up a new department.

Foremost contends that Qantas' pricing practice conflicts with the \textit{Air Carrier Reorganization Investigation}.\textsuperscript{112} In considering whether air carriers should be able to diversify through the creation of holding companies, the CAB alluded to the problems of reciprocal dealing between affiliated companies. In the rules promulgated to guide air carriers in such diversifications, the CAB provided that an air carrier should be reimbursed at least for the full cost of serv-

\textsuperscript{108}Initial Brief for Respondent, \textit{supra} note 48, at 28.

\textsuperscript{109}Another major problem presented in this case involved the appropriateness of the exchange rate Qantas used in determining the cost of its tours. It was agreed that Qantas was actually pricing below the total direct cost of the tour portion by using an exchange rate which was lower than appropriate. The parties were agreed on the crucial issue—that the price covered the cost of the land components of the tour.

\textsuperscript{110}There are an enormous variety of possible rebate payments. See \textit{Hearings on Oversight of CAB Practices and Procedures Before the Subcomm. on Administrative Practices and Procedures of the Senate Judiciary Comm., 94th Cong., 1st Sess. (1975)}. The most common are rebates to high-volume travel agents in exchange for their sending customers to the tour operator.

\textsuperscript{111}Brief for Complainant, \textit{supra} note 22, at 22.

ices performed by that carrier for its affiliate and vice versa. There was no reimbursement between Qantas and Qantas Holidays for the use of employees in performing each other's services.

From an economic point of view, the CAB's pricing policies for tours and discount fares are sound:

The costs of carrying 50 passengers on a scheduled plane flight constitute a single lump of common costs. They are not incurred on a passenger-by-passenger basis but all together or not at all. . . . The fact that most services are typically provided in combinations, using the same facilities, does not mean that definable shares of the common costs cannot in principle be causally attributed to each. . . .

. . . [A particular] service [such as tour fares or tour services] bears a causal responsibility for a share of common costs only if there is an economically realistic alternative use of the capacity now used to provide it, or if production of [the service] requires the building of additional capacity [use of another aircraft or a new operating division].

The most recent enforcement proceeding in this area, *Hawaiian Airlines, Inc. v. Aloha Airlines, Inc.*, held that a fly-drive arrangement between an air carrier and a car rental company constituted an illegal rebating scheme. The administrative law judge found that Budget Rent-A-Car was leasing cars to Aloha passengers at rates less than their out-of-pocket costs; Aloha was reimbursing Budget for the difference. The CAB sustained the finding of a violation of the Act, but did not seem to rely on the fact that Budget's rates were found to be below cost by the hearing judge:

Essentially, Aloha used a portion of the passenger fares it received to make a large contribution to Budget's costs; that contribution enabled Budget to offer *low-cost* rental cars to Aloha's passengers; and those *low-cost* rentals were the means of rebating to the passengers a portion of the fares they had initially paid.

Using this reasoning, Qantas' practices would be considered to be illegal rebates. Several earlier cases are more favorable to Qantas.

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115 *Kahn*, *supra* note 46, at 77, 78.
117 *Id.* at 14,860 (emphasis added).
In *Complaints v. American Shippers,*\(^{118}\) the CAB dismissed a complaint challenging Shippers' practice of averaging the cost for ground transportation of parcels as part of an air-ground service. The CAB said that charges for incidental services such as a ground transportation service do not have to be at cost if the rate charged is reasonable, tested by some other standard, such as the value of the services performed.\(^{119}\) However, *American Shippers* can be distinguished: since Qantas never estimated the overhead or administrative cost or the number of tour passengers before pricing the tour, the rate may not be considered reasonable. In *American Shippers,* the CAB spoke of covering total ground transportation costs, in contrast to the more recent pricing policies which emphasize added costs. Moreover, the recent interest of the CAB in preventing rebating practices may limit the usefulness of *American Shippers.*

Even when the CAB refused to challenge the practice of paying the passenger's ground transportation between airports, it gave a warning which anticipated its more recent policy. "Compliance with a tariff will not excuse a rebate in the form of a service which is not connected with transportation nor given immunity to acts violating the law against favoritism or discrimination."\(^{120}\)

Qantas should be permitted to price at the additional costs to it of producing the tour package—and not the full cost of service; however, such prices must include the costs attributable to the tour operations. Such costs can be measured. Although Qantas hired no new personnel, some of its former airlines staff are now working for the tour division. Similarly, office space, telephone service, and secretarial staff have switched responsibilities. Why should the scheduled passengers continue to bear these expenses for which the full-fare passengers are no longer responsible? Why should passengers on higher-priced tours pay a larger percentage of these expenses when passengers on lower-priced tours are equally responsible for these expenses? Such costs were never estimated by Qantas in pricing its tours, but when the district court ordered Qantas to submit such a cost figure, the costs were found to exceed $200,000.

\(^{118}\) 30 C.A.B. 1478 (1960).

\(^{119}\) Id. at 1486.

\(^{120}\) Ground Transportation Between Airports, 31 C.A.B. 5 (1960). *See also* Seaboard World Airways, Inc. v. Pan Am. World Airways, Inc., 43 C.A.B. 751 (1965), which implied that if free or low-cost services were offered only as part of a tie-in with the carrier's services, a violation of § 403(b) would be found.
Passengers on low-cost tours should not be permitted this benefit. Costs should be reallocated, and perhaps the full-fare passengers will be able to enjoy a lower airplane fare.

2. **Passengers on Airline Inclusive Tours May Receive the Benefits of Unjust Discrimination.**

Section 404(b) of the Act provides:

No . . . foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . or description of traffic in air transportation in any respect whatsoever or subject any particular person . . . or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'

When Congress established this provision, it intended to underscore the duty of an air carrier to provide service to all who request it on equally favorable terms. In deciding this matter, the CAB considers cost factors and the public policies set forth in section 102, including the encouragement and development of air transportation and the promotion of adequate, economical service at reasonable rates.

Foremost argues that Qantas' pricing policies result in unequal treatment of air passengers who fly the same route under the same conditions; only those who fly on Qantas Holidays receive the benefit of the rebate in the air fare. As seen in the previous discussion, however, this rebate is much smaller than Foremost contends. The controversy also is limited to the pricing of only a few of Qantas' tour packages at the economy end of the total range of tour packages Qantas had available.

Discrimination can be established by charging different rates to different passengers afforded the same service or by offering special services only to a select group. The passengers on all of Qantas'
tours were travelling under the same conditions and should have been charged the same price. A variety of factors must be evaluated when deciding whether the price for Qantas' inclusive tours was unduly discriminatory. Such factors include custom, price competition, promotional aspects, and promotion of efficiency. 128 Qantas tried to establish an IATA minimum tour price as a price leader to be competitive. This practice had been followed in the past when the tours were jointly produced and marketed with Foremost. 127 Qantas was an additional competitor in an already competitive market and was trying to establish customers for its new product. The benefits to full-fare passengers of selling discount tickets have already been discussed. 128 The benefits to the public of having an additional competitor in the tour market are obvious. Furthermore, the tours in issue were equally available to anyone interested in the package tour idea. Under such circumstances, even though the differences in cost were not fully reflected in the tour prices of Qantas' early tours, the CAB could reasonably conclude that these differences were not unjust.

Foremost suggested that discrimination also existed between the tour participants in these low-cost tours and the full-fare passengers. It has been firmly decided, however, that tour participants and full-fare passengers do not travel under the same conditions and do not receive the same service. 129 In 1967, the CAB ruled that the tie-in features of the group-inclusive tour fares with the purchase of ground accommodations does not seem to be an unreasonable one in view of the considerable discount these tours provide from normal and other fares. 130 Thus, the CAB no longer concerns itself with the alleged discriminatory aspects of the tour-based features. Especially in light of the market factors outlined above, 131 the CAB would not consider this case to be one involving discrimination.

The problem of discrimination, however, is a real one. Several

126 Id.
127 Initial Brief for Respondent, supra note 48, at 20.
128 See text accompanying notes 100-04 supra.
131 National Air Carrier Ass'n v. CAB, 442 F.2d 862 (D.C. Cir. 1971).
explanations have been offered why a company would charge prices below its total costs. These include: 1) a preference for greater growth of the company; 2) an excess of competitive zeal—predatory or otherwise; and 3) an opportunity for them to more fully exploit their monopoly power. The impact on competition, regardless of the company's motives, must be considered. Several suggestions have been made for tempering such pricing policies in the presence of competition.

First, a lower limit could be placed on the tour package price to prohibit the possibility that price reductions are predatory or destructive. The existing dollar limit on IATA minimum tour agreements is too low. The CAB tour regulations effectively deal with the problem by stating this limit as a percentage of the scheduled air fare.

Second, selective price-cutting may be controlled by permitting regulated companies to reduce prices, subject to the condition that they may not raise them unless they can show a cost change in the interim. Thus, companies like Qantas could include a "price leader" when entering a new market, but must be prepared to continue to make the tour available to the public once it establishes its place in the market.

Third, although it may be efficient in the static sense to permit a regulated company to take business away from its rivals by reducing rates on competitive services, there may be a dynamic loss if the result is elimination of competitors. A company like Foremost may sufficiently contribute to innovation and improvement in service to outweigh the static welfare loss in keeping it alive.

These pricing practices, abuses in themselves, further reinforce the conclusion that vertical integration over a regulatory boundary should be considered an unfair competitive practice. By narrowing the margin between the price of the air fare it supplies to its one-stage rivals and the price at which it sells its competing tour package, an integrated airline can limit the profit and growth of its tour operator-rivals, or even drive them out of business entirely.

132 Kahn, supra note 46, at 146.
133 Id. at 176-77.
135 Kayser & Turner, supra note 76, at 122.
IV. ALTERNATIVE AVENUES FOR REMEDIAL RELIEF

There are four figures in the scheme of airline regulations which may limit, to varying degrees, practices such as vertical integration which are contrary to the public interest. Which instrumentality will best be able to control the abuses of vertical integration: the CAB, the courts, the President, or the Congress?

A. The CAB

Following the analyses in the preceding section, the CAB should conclude that integration in this case is an unfair method of competition. The CAB should issue an order compelling Qantas to cease and desist from using its in-house tour operator in packaging and promoting tours originating in the United States. Moreover, the CAB should re-open the ASTA petition and grant its request for rule-making to prohibit the direct marketing by scheduled carriers of tours originating in the United States which are carried on scheduled service, thereby furthering the established policy in the air carrier permit cases. It should also re-open its consideration of IATA Resolutions 810D and 810E and disapprove the parts thereof which authorize air carrier-tour operator affiliations on flights originating in the United States. Through rule-making, the CAB could prohibit all such affiliations and, in effect, attach this limitation to all new and outstanding air carrier certificates.

This course of events is unlikely. The Bureau of Enforcement has already dismissed the integration issue from the case, saying that Qantas had a right to enter the tour operating business. This right is based, in part, on IATA Resolutions 810D and 810E, which authorize such affiliations and which were approved by the CAB.

Under section 412 of the Act, the CAB must issue an order either approving or disapproving every intercarrier agreement filed with the CAB upon a finding that the agreement is either in or ad-

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verse to the public interest or in violation of the Act.\textsuperscript{140} Section 414 of the Act grants antitrust immunity for actions "authorized, approved or required by such [Board] order."\textsuperscript{144}

In considering whether an agreement is in the public interest, the CAB must consider the agreement's effect on competition. Competition, however, is merely one of six factors to be considered in making this determination\textsuperscript{142} and could be outweighed by one or more of the other factors.\textsuperscript{148} In reviewing IATA agreements, the CAB often, if not always, subordinates the competitive factor to other interests.

One recent example is the re-approval by the CAB of an IATA rate agreement relating to North Atlantic passenger fares.\textsuperscript{144} In 1972 these rates were approved, with reluctance, by the CAB, on a one-year basis as a compromise solution to a rate disagreement. In 1973 these uneconomical rates were approved again. The CAB said approval was in the public interest—it promoted the convenience of the traveling public. Yet this time extension would not necessarily

\textsuperscript{140} 49 U.S.C. §§ 1382(a), 1382(b) (1970).
\textsuperscript{141} Id. § 1384.
\textsuperscript{142} Id. § 1302:
In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;
(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;
(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
(e) The promotion of safety in air commerce; and
(f) The promotion, encouragement, and development of civil aeronautics.
\textsuperscript{144} United States v. CAB, 511 F.2d 1315 (D.C. Cir. 1975).
lead to an acceptable fare structure. The CAB ignored other viable options, such as suspension of rates and bilateral rate agreements, which would have promoted public convenience.

In 1967 a group of travel agents challenged the staff action approving IATA Resolutions 810D and 810E, which permitted IATA carriers to initiate inclusive tours. The travel agents argued that approval would result in "unfair competition for the travel agency industry, the unnecessary expenditure of funds by carriers, which could better be passed on to the public in the form of lower fares, and an assumption by airlines of responsibilities [for ground services] beyond the purpose for which they were certified." The CAB nevertheless approved the resolutions, referring only to its responsibility to promote air transportation.145

A host of similar examples can be found.146 This situation led one commentator to conclude:

All told, the decisions [of the Board] . . . attempt to prod IATA to modify its procedures here and there, to admonish it occasionally, but on the whole to accept, albeit reluctantly, the results of its activities which the Board correctly described as "an all-embracing international cartel."147

Rationalizations for this policy include fear of rate wars, political repercussions in the countries where American carriers are operating, and protection of IATA sales agency business, which represents a major source of international air travel.148

B. The Courts

Any order of the CAB, except those orders which require Presidential approval, is subject to court review.149 In this review, find-


146 Among them are: North Atlantic Tourist Commission Case, 16 C.A.B. 225 (1952), (approving an IATA resolution establishing a 6% commission on sales of tourist class service in contrast to a 7.5% commission on sales of first class service); Agreement Adopted by IATA Relating to Group Fares, 36 C.A.B. 33 (1962), (approving a 38% discount on transatlantic scheduled flights, arguably calculated to eliminate supplemental airlines from the market); National Air Carrier Ass'n v. CAB, 436 F.2d 185 (D.C. Cir. 1970) and 442 F.2d 862 (D.C. Cir. 1971), (approving an IATA fare package without substantial evidence).

147 FULDA, supra note 18, at 251.

148 Id. at 250-51.

ings of fact made by the CAB and supported by substantial evidence are conclusive.\textsuperscript{150} Court review is not to support the balancing of interests by the CAB, but to insure that the CAB gives reasons for its conclusions.\textsuperscript{151}

If the CAB had condemned the practice of vertical integration and issued a cease and desist order under section 411, the court would have affirmed the order, so long as the order included a reasonable justification for the action by the CAB. However, in the Qantas case, the Bureau of Enforcement found that Qantas had a right to enter the tour operating business, based in part on IATA Resolutions 810D and 810E, which had been approved by a CAB order pursuant to section 412 of the Act. What power do the courts have in reviewing such CAB orders, which have anticompetitive consequences?

The CAB, in the \textit{Local Cartage Agreement Case},\textsuperscript{152} adopted a standard for determining whether approval under section 412 of an agreement having anticompetitive aspects is consonant with the public interest: "Where an agreement has among its significant aspects elements which are plainly repugnant to established antitrust principles, approval should not be granted unless there is a clear showing that the agreement is required by a serious transportation need, or in order to secure important public benefits."\textsuperscript{153}

In \textit{National Air Carrier Association v. CAB}, the court used a different standard, stating that the test of whether fares adopted by the conference of scheduled carriers conform to antitrust principles is not whether there is an "intent to aggrandize the share of the scheduled carriers in a market also served by the supplementals," but whether the "particular means devised for effectuation [of such intent] unduly jeopardize [the] market structure conducive to maximum feasible competition."\textsuperscript{154} Under this standard, the court affirmed CAB approval of an IATA fare package which subjected the supplemental carriers to intensive competition, because the

\textsuperscript{150} Nebraska Dep't of Aeronautics v. CAB, 298 F.2d 286 (8th Cir. 1962); Specht v. CAB, 254 F.2d 905 (8th Cir. 1958).
\textsuperscript{151} Continental Air Lines, Inc. v. CAB, 519 F.2d 944 (D.C. Cir. 1975).
\textsuperscript{152} Local Cartage Agreement Case, 15 C.A.B. 850 (1952).
\textsuperscript{153} \textit{Id.} at 863.
\textsuperscript{154} 442 F.2d 862, 865 (D.C. Cir. 1971).
CAB found that the competition was not destructive. Unfortunately, the court's suspicions that these lower fares were merely a step toward an ultimate increase in concentration were never relieved.

This standard is inadequate to test whether carrier agreements conform to antitrust principles. Although such agreements may not "unduly" affect the structure of the market, they may result in anticompetitive conduct by the carriers in the industry; they may also solidify the positions of existing carriers in the market and result in a lower level of performance by the industry as a whole.

Capacity-restricting agreements do not affect industry structure, but have severe anticompetitive effects. The CAB recently allowed just such an agreement between three major air carriers as to the number and scheduling of flights in twenty major markets because of a critical fuel shortage in 1973, and the CAB permitted its extension into 1974. Such agreements reduce the principal form of competition in the industry and result in a lower level of service. Unused capacity is artificially reduced by such arrangements, while the high prices and over-investment continue. Carriers may use idled equipment in other markets and distort allocation there, too.

The court properly adopted the *Local Cartage* standard in setting aside the CAB's action in *United States v. CAB*. The court, however, suggested that had there been a subsequent procedure for hearing or experimentation in certain markets to support the CAB's decision that the competitive market response was wasteful of energy, the court possibly would have affirmed the Board's order.

Thus, even under the *Local Cartage* standard, the scope of court review is quite narrow. Even the most anticompetitive order might receive affirmance on court "review."

Once an order is approved, it confers antitrust immunity sufficient to enable a person to do anything authorized, approved, or required by the order. In the leading case of *Hughes Tool Co. v. Trans World Airlines, Inc.*, the Supreme Court suggested that the CAB is required to carefully scrutinize the particular acts before

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155 442 F.2d at 874.

156 National Air Carrier Ass'n v. CAB, 436 F.2d 185, 194 (D.C. Cir. 1970).


158 511 F.2d 1315 (D.C. Cir. 1975).

they can be authorized by a CAB order. The Court emphasized that, "every acquisition or lease of aircraft by TWA from Toolco required Board approval. Each transaction was approved by the Board and each approval was an order...." This reasoning was followed by both the district court and the court of appeals in the Qantas case. The court of appeals added:

The scope of the antitrust immunity which an agency's approval can confer under statutes such as 49 U.S.C. §1384 was intended to be, and is, no broader than the industry regulated. Butler Aviation Co. v. CAB, 389 F.2d 517, 521 (2d Cir. 1968). A regulatory agency's approval of certain actions cannot confer antitrust immunity to those actions unless the primary anticompetitive effect those actions may have is limited to the industry in question.181

Yet, recent decisions by various courts have limited the Hughes Tool decision.

In Grueninger International Travel, Inc. v. Air Transport Association of America,182 the court granted immunity for actions pursuant to a plan approved by the CAB when the CAB had merely reviewed some annual reports and required some modifications of the working resolution. In Scroggins v. Air Cargo, Inc.,183 the court held that CAB approval of the formation of a subsidiary to contract with truckers included approval of the subsidiary's authority to enter into such contracts and granted antitrust immunity for actions implementing its operations, including contracts for competitive service. The court said that individualized approval was not necessary so long as the alleged conduct was clearly within the contemplation of prior CAB orders. It was sufficient that the alleged conduct was "the kind of conduct the CAB . . . [has] approved and authorized for the future." Only where the parties go beyond the terms of the proposal would their actions lose the immunity conferred by CAB approval.184

This broad immunity is consistent with legislative history which

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180 409 U.S. at 379.
181 525 F.2d at 286.
183 534 F.2d 1124 (5th Cir. 1976).
184 Id. at 1131 (quoting Hughes Tool, 409 U.S. at 388-89).
suggests that the CAB was to have broad jurisdiction over air carriers insofar as most facets of federal control are concerned. However, this broad reign is not consistent with the Supreme Court’s recent decision in *Cantor v. Detroit Edison Co.* Where the program being challenged was the product of a decision in which both the private utility company and the utility commission participated, the court found nothing unjust in concluding that:

[The company's] participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law.

... There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent it engages in business activity in competitive areas of the economy.

Thus, the statutory language leaves the CAB free to overrule antitrust provisions and confer immunity in “appropriate” cases, while it leaves the courts without power to effectively review such actions. The courts could not control a decision by the CAB to allow vertical integration even though it were thinly disguised as an IATA agreement perfunctorily approved by CAB order.

C. The President

The CAB may solve the problem of vertical integration by promulgating rules and regulations generally prohibiting the direct marketing of inclusive tours originating in the United States by airlines with affiliated tour operators and by prohibiting tour operators from organizing such tours using the services of an affiliated air carrier. Such a regulation would constitute a limitation on all foreign air carrier permits analogous to the conditions contained in the air carrier permit issued to *Kuoni*.

As an aspect of its power to issue air carrier permits, the CAB can attach “reasonable terms, conditions or limitations, as in its

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168 428 U.S. at 594, 596, 96 S. Ct. at 3119.
judgment, the public interest may require." However, the terms and conditions contained in any foreign air carrier permit and the provisions of any regulations pertaining to foreign air routes are subject to the approval of the President of the United States. Under the statute, the CAB acts as a presidential advisor in this area of foreign affairs, and its orders have no independent authority. Because of presidential review, there can be no judicial review.

Similar provisions have received presidential approval in the past. They are included in the CAB regulations pertaining to inclusive tour charters, as well as in several foreign air carrier permits. If President Carter is presented with such a CAB order, one limiting foreign air carriers in the marketing of tours, he should follow the lead of his predecessors and approve it.

Approval of such a hypothetical order would remedy the problems of vertical integration. Yet, in light of the recent denial of the ASTA petition, one must recognize that the possibility that the CAB will issue such an order is very remote indeed.

D. The Congress

Many of the problems discussed in the preceding sections could be viewed as unavoidable consequences of a system of airline regulation. With regulation comes protectionism to some extent, as well as conflicts among the regulators and the regulated as to what truly represents the public interest.

Recently, President Carter urged the Congress to reduce federal control over the airline industry. President Carter did not submit his own legislation; however, four bills were introduced during the Ninety-fourth Congress which deal with problems in airline regulation and propose various solutions: Senate Bill 2551, the Ford ad-

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170 Id. § 1461.
ministration bill;\textsuperscript{176} Senate Bill 3364, the Kennedy bill;\textsuperscript{178} Senate Bill 3536, the CAB proposal;\textsuperscript{177} and Senate Bill 3830, Senator Cannon’s bill.\textsuperscript{178}

Generally, the Ford administration bill and the Kennedy bill suggest sweeping changes in the scope of airline regulation, including pricing flexibility and the liberalized entry requirements. The Kennedy bill plans for total deregulation within ten years of its passage. The CAB and Cannon bills are much less radical in approach, but do respond to many of the problems facing airline regulation today.

The provisions of these bills which affect our present considerations will be summarized in the following sections and their impact will be evaluated.

1. Definitions

In the Ford administration bill\textsuperscript{178} and the Kennedy bill,\textsuperscript{180} inclusive tour charter trips are specifically defined (subject to CAB regulations) and included within the definition of “supplemental air transportation.” The CAB proposal and Senator Cannon’s bill similarly define “charter air transportation” to include inclusive tour charters. These two bills also specifically define “charter trip,”\textsuperscript{181} but the proposed definitions include only planeload charter flights. Thus, under these two proposals inclusive tours on scheduled flights would continue to be viewed as scheduled, not charter, service. Such provisions effectively eliminate the administrative and judicial uncertainty in this area, but replace uncertainty with an arbitrary—


\textsuperscript{174} Philadelphia Inquirer, March 5, 1977, at 8-A, col. 1.

\textsuperscript{175} S. 2551, 94th Cong., 1st Sess. (1975).

\textsuperscript{176} S. 3364, 94th Cong., 2d Sess. (1976).

\textsuperscript{177} S. 3536, 94th Cong., 2d Sess. (1976).

\textsuperscript{178} S. 3830, 94th Cong., 2d Sess. (1976). In addition, the Air Service Improvement Act of 1976, H.R. 14,604, was introduced by Representative Anderson during the second session of the 94th Congress, 1976. That bill encouraged greater competition through liberalized entry requirements. Since its provisions do not materially affect the problems here in issue, that bill will not be included in this analysis.

\textsuperscript{179} S. 2551, 94th Cong., 1st Sess. §§ 3(b), 3(c) (1975).

\textsuperscript{180} S. 3364, 94th Cong., 2d Sess. §§ 102(b), 102(d) (1976).

\textsuperscript{181} S. 3536, 94th Cong., 2d Sess. § 2(2) (1976); S. 3830, 94th Cong., 2d Sess. § 4(c) (1976).
not a functional—distinction between scheduled and supplemental service. In addition, the CAB bill specifically excludes charter trips from its discrimination provision; this change codifies case law in the area.

On the positive side, all of these proposals firmly establish, at long last, the propriety of charter trips in the scheme of airline transportation. These bills further amend the definition of supplemental air transportation. All but the Ford administration plan permit the direct sale of charter trips by eliminating the old provision which prohibits the supplemental carriers from selling or offering individual tickets directly to the general public. A proposal similar to these was made in 1973. It was suggested that the direct marketing of inclusive tour charters would eliminate some of the problems of independent tour operators discussed earlier. More money could be spent on advertising if the carrier, as well as the tour operator, could promote tours; this would help offset the advantage of "in house" tour operations. Increased advertising would mean increased demand for tours, further enhancing the position of independents in the market. Support from the airlines would also help spread the risk associated with tour promotion and could lead to more innovative tour operations. There would be no problem with diversion of traffic from the scheduled flights, since charter operations are recognized as a service distinct from scheduled service, even if marketed directly.

The Ford administration proposal approached this result indirectly by permitting a supplemental carrier to control or be under the control of a person authorized to sell individual tickets directly to members of the public, if such control is approved by the CAB. The Ford proposal also creates several problems; for example, in its attempt to foster indirect sales of charter trips, it jeopardizes the existence of the independent tour operator. The proposal allows the United States supplemental airlines to have the same relationship

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182 S. 3536, 94th Cong., 2d Sess. § 7(c) (1976).
183 S. 3364, 94th Cong., 2d Sess. § 102(d) (1976); S. 3536, 94th Cong., 2d Sess. § 2(2) (1976); S. 3830, 94th Cong., 2d Sess. § 4(c) (1976).
185 See text accompanying notes 61-64 supra.
186 Hearings on S. 455 and S. 1739, supra note 184, at 168.
187 Id. at 103.
188 S. 2551, 94th Cong., 1st Sess. § 3(b) (1975).
with tour operators that Qantas, a foreign carrier, now enjoys. Perhaps this provision was drafted in response to claims of competitive necessity. American flag carriers have applied for authority to control European tour operators and to market European-originating tours to the United States;\textsuperscript{190} they have also requested such authority for charters originating in the United States.\textsuperscript{190}

This same provision of the Ford bill would also put supplemental carriers in the same position as scheduled carriers, enabling them to apply for similar authority. However, it would contradict the policy of the CAB, as evidenced by Kuoni, of limiting such control relationships. Passage of the bill might be construed as a signal to the CAB to revise or even reverse its policy in this area, but United States air carriers might still not be on an “equal footing” with foreign carriers, for the reasons previously discussed.\textsuperscript{191}

At least one supplemental air carrier recommends against such vertical integration; claiming that it does not want to assume the risk on the load factor, it cited the high degree of consolidation in the United Kingdom as a significant contributing factor in some major tour operator/air carrier collapse there.\textsuperscript{192} Finally, it suggested that the resulting increase in vertical integration would severely diminish competition in the tour industry.\textsuperscript{193} As CAB Chairman Robson explained, the probable result would be that “all but the largest independent tour operators would be gradually squeezed out of the market . . . ”\textsuperscript{194}

2. \textit{Tariffs and Pricing}

All of the bills include new rate provisions\textsuperscript{195} which eliminate

\textsuperscript{190} Application of Pan Am (CAB Docket No. 28,515); Application of Overseas National Airway (CAB Docket No. 28,668); Application of TIA (CAB Docket No. 28,604); Application of World Airways (CAB Docket No. 28,668).

\textsuperscript{191} Application of World Airways (CAB Docket No. 28,030); Application of TIA (CAB Docket No. 29,060); Application of Overseas National Airway (CAB Docket No. 29,283).

\textsuperscript{192} See text accompanying notes 91-93 \textit{supra}.

\textsuperscript{193} 1976 \textit{Hearings}, \textit{supra} note 21, at 576.

\textsuperscript{194} \textit{Id.} at 344. \textit{Note} that the CAB requested that it be permitted to retain its authority to continue its present policies. \textit{Summary Analysis of S. 2551 by the CAB, 1976 \textit{Hearings}, supra} note 21, at 425.

\textsuperscript{195} S. 2551, 94th Cong., 1st Sess. § 14 (1975); S. 3536, 94th Cong., 2d Sess. §§ 6, 14 (1976); S. 3830, 94th Cong., 2d Sess. § 15 (1976); S. 3364, 94th Cong.,
many of the problems facing a domestic air line in defending a rebating charge under circumstances like those in Qantas. For example, the Ford bill proposes that a rate "above 'direct costs,' . . . may not be found to be unjust or unreasonable on the basis it is too low."\(^{196}\) Direct costs would not include items such as general and administrative expenses or "costs associated with the development of a new route or service."\(^{197}\) In evaluating individual rates and determining and prescribing a lawful rate under the Ford bill, the CAB must consider, among other things, the need for low cost service, the need for price competition and the desirability of a variety of price and service options, and the quality or type of service required in each particular market.\(^{198}\)

As to foreign air transportation, however, all of the bills leave the CAB with the limited power it now has to review tariffs and either accept or reject them. It has been argued that the CAB should not be given rate-setting authority since other countries do not have it. Veto power is as strong a unilateral step as can be taken, considering that there is not at present any substitute for the conference procedure.\(^{199}\) The present standard at least includes special consideration of whether rates are predatory or tend to monopolize competition among air carriers and foreign air carriers in foreign air transportation.\(^{200}\)

There are other objections to the existing tariff mechanism. A firm is required by its tariff to announce in advance the amount of any proposed price reduction. This insures that rivals will have time to respond in kind. Therefore, since it will not be able to gain more customers by doing so, a firm will not be likely to reduce its prices. In addition, the risk in raising prices is reduced, since advance notice ensures that the firm can "gauge the response of its rivals before the increases actually go into effect."\(^{201}\) Thus, the oligopolistic pricing policies in the foreign market remain unaffected by the new

\(^{196}\) S. 2551, 94th Cong., 1st Sess. § 14(a) (1975).
\(^{197}\) Id. § 14(e).
\(^{198}\) Id. § 14(b); Note that the Kennedy bill provides for prescribing maximum rates only. S. 3364, 94th Cong., 2d Sess. § 456 (1976).
\(^{201}\) Levine, Alternative to Regulation: Competition in Air Transportation and the Aviation Act of 1975, 41 J. AIR. L. & COM. 703, 716-17 (1975).
legislative proposals.

3. Standards for Approval of Control Relationships and Other Inter-Carrier Agreements

All the new proposals strengthen the standards against which a control arrangement under section 408 must be measured. The Kennedy and Ford bills propose standards similar to that in the Clayton Act to guide CAB approval. The Kennedy standard is only temporary, looking ultimately to review of these arrangements under the antitrust laws. All but the CAB plan require that notice be sent to the Attorney General and provide that an appropriate suit may be brought to challenge the control arrangement. In fact, the Cannon plan merely requires filing of the arrangement and relies on the Attorney General to challenge any agreements under the appropriate antitrust statute.

By contrast, each of the bills proposes a different standard which must be met before inter-carrier agreements can be approved under section 412. The Ford bill provides, in part, that approval shall not be given for agreements in overseas transportation which 1) control levels of capacity, 2) relate to apportioning earnings, or 3) fix fares. With respect to all other agreements in foreign air transportation, it adopts the present standard of "not adverse to the public interest." The new policy statement included in this bill emphasizes increased competition; accordingly, the anti-competitive effects of foreign air carrier agreements will be more thoroughly considered before such agreements are approved by the CAB. Provisions for notice to the Attorney General and Secretary of Transportation and hearing on merits of the agreement are included in

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203 S. 2551, 94th Cong., 1st Sess. § 11(b) (1975); S. 3364, 94th Cong., 2d Sess. § 492(c) (1976).
204 S. 3364, 94th Cong., 2d Sess. § 492(a) (1976).
205 S. 3830, 94th Cong., 2d Sess. § 12(a) (1976).
207 Id. But see S. 2551, 94th Cong., 1st Sess. § 4 (1975) for a new definition of public policy.
208 Id. § 12. For agreements involving domestic airlines only, clear and convincing evidence must exist that the agreement is necessary to meet a serious transportation need or to secure important public benefits and that no less anticompetitive alternative is available to reach the same result. Id.
the bill.

The Kennedy proposal provides merely for the filing of inter-carrier agreements between an air carrier and a foreign air carrier or other carrier, leaving antitrust enforcement to the Justice Department. In the regulations for the transition period, it provides for disapproval of all agreements on fixing rates, charges, or dividing markets, as well as agreements contrary to the public interest or contrary to, or in violation of, the Act. It also requires disapproval of all agreements that "restrain trade or may lessen competition substantially unless the anti-competitive effects of the contract or agreement are clearly out-weighed in the public interest by significant transportation needs that cannot be substantially satisfied in any less restrictive way."210

This standard adopts a liberalized Clayton Act approach. It has been criticized because it corrects past problems in the administration of the Act while it leaves the CAB with the power to "recreate an anti-competitive regime through specific decisions."211 Under the Kennedy plan, however, this section will terminate ten years after enactment of the bill and represents a workable approach for the transition to the stricter antitrust standards.

Neither the CAB plan nor the Cannon bill have proposals dealing with these problems. The CAB requested that it be permitted to retain its authority to continue its present policies,212 and the Cannon bill retains the existing standard for agreements in foreign transportation.213

These proposals unanimously call for stricter standards when dealing with agreements and control relationships among parties in the air transportation field. They heed the warnings raised earlier concerning integration in a field where competition is already tempered by the presence of regulation. Yet, two of these bills do not deal at all with the problems of inter-carrier agreements in foreign

209 S. 3364, 94th Cong., 2d Sess. § 455 (1976). This includes IATA agreements.
210 Id. § 493 (emphasis added).
211 Levine, supra note 201, at 722.
212 Summary Analysis of S. 2551 by the CAB, 1976 Hearings, supra note 21, at 425.
213 S. 3930, 94th Cong., 2d Sess. § 12(b)(2) (1976). This proposal entirely eliminates agreements affecting domestic transportation from any filing requirement, leaving the Justice Department with total responsibility in this area.
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air transportation. This failure is indicative of the power of the international airline cartel and highlights the prominence of foreign policy considerations in this area of airline regulation.

4. Immunity

All of these proposals limit the antitrust immunity conferred by CAB approval of agreements under section 412. The Cannon proposal is the weakest; it retains the present standard for agreements under section 412. The Ford plan allows antitrust relief only insofar as may be necessary to enable the party to do anything "in air transportation" authorized, approved, or required by CAB order. A similar standard proposed by the CAB allows immunity as to "transactions specifically approved by the Board—or those transactions necessarily contemplated thereby," and provides that the CAB "may specifically define and limit the scope of the relief granted."

The section conferring antitrust immunity in the Kennedy plan would be effective for only ten years; it uses the same standard as that in Ford's bill and specifically provides that no approval granted within this ten year period will provide immunity beyond that time.

The provisions of three of these bills similarly restrict the immunity for control relationships approved by the CAB and, furthermore, provide no immunity from attack under Section Two of the Sherman Act. These proposals recognize and try to strengthen the presently inadequate judicial control over anti-competitive practices in the airline industry. They provide supplemental air carriers (and others) a greater opportunity to challenge agreements sponsored by the IATA and a better chance of success.

5. Restatement of Public Policy

The disparity between the proposals concerning domestic aviation and those concerning foreign air transportation is crystallized by the various proposed restatements of the public policy which the CAB must review when considering if a particular action meets

\[214\] S. 3830, 94th Cong., 2d Sess. § 12(c) (1976).
\[216\] S. 3536, 94th Cong., 2d Sess. § 10 (1976).
the "public interest" test.

The CAB plan and the Cannon bill are substantially identical.\footnote{S. 3536, 94th Cong., 2d Sess. § 3 (1976); S. 3830, 94th Cong., 2d Sess. § 5 (1976).} These bills separate the policy statement into two parts: the first part deals with interstate and overseas air transportation, the other half concerns foreign air transportation. The policy for domestic commerce is revised to include "the phased and progressive transition to an air transportation system which relies on competitive market forces," promotion of entry of new carriers, and provision for "low-cost services,"\footnote{S. 3830, 94th Cong., 2d Sess. § 5 (1976).} or services "responsive to the diverse needs" of the public.\footnote{S. 3536, 94th Cong., 2d Sess. § 3 (1976).} In contrast, with respect to foreign air transportation, these proposals suggest no change in the present policy statement. This policy includes regulation "to recognize and preserve the inherent advantages of, . . . and foster sound economic conditions in" such air transportation.\footnote{49 U.S.C. § 1302 (1970 & Supp. V 1975) (emphasis added).}

Certainly there are a host of characteristics which distinguish domestic from international air transportation. International practices must accommodate the diverse interests of other sovereign states. Private United States companies compete with foreign government enterprises in many markets. Tariffs are set by the IATA subject to governmental approval. Some foreign states, seeking foreign exchange rate earnings from United States tourists, underwrite their national air carrier's losses in order to maintain large capacities to the United States. In short, competition is limited by government policy in most countries.\footnote{1976 Hearings, supra note 21, at 638.} In embracing a "live and let live" attitude towards the international airline cartel, these proposed bills, purporting to foster sound economic conditions are relying on a policy statement written thirty-seven years ago in the context of an infant industry in need of protection—a policy which has been used by the CAB on many occasions to limit rather than foster competition.\footnote{See Snow, supra note 157, at 649.}

The Kennedy plan proposes a workable policy goal which integrates these competing concerns. It declares one policy for all air

\footnote{1976 Hearings, supra note 21, at 638.  
221 S. 3536, 94th Cong., 2d Sess. § 3 (1976).  
224 See Snow, supra note 157, at 649.}
transportation, striving for increased competition domestically, and providing in the foreign area for: "regulation in a manner that encourages to the extent practicable maximum reliance on price and service competition in foreign air transportation, with appropriate recognition of the differences between interstate and overseas air transportation on the one hand, and foreign air transportation on the other."\textsuperscript{225}

This statement at least suggests an endorsement of the CAB's restrictions on air carrier permits in cases where the tour operator-applicant is affiliated with a foreign air carrier. One obvious weakness is that the CAB maintains discretion to revert to its old practices if it concludes that competition in this area is not "practicable." However, one must read this statement together with the other substantive provisions of the Kennedy plan; considering the limited antitrust immunity,\textsuperscript{226} the strict standard for approval of inter-carrier agreements,\textsuperscript{227} and the ultimate goal of deregulation within ten years,\textsuperscript{228} this bill would significantly enhance competition in the foreign, as well as the domestic, transportation market.

The Ford administration bill contains the broadest statement of policy, including "maximum reliance on competitive market forces and on actual and potential competition to provide the needed air transportation system."\textsuperscript{229} This policy statement strengthens the bill's provision on approval of inter-carrier agreements since the CAB must evaluate such agreements in terms of the public interest, using this policy statement as the standard. The policy statement also limits the impact of the related immunity provision since competitive concerns pervade the factors the CAB must weigh before granting its approval order. By expanding the public interest in competition, the CAB is also given greater authority to investigate various methods of competition and to condemn them as unfair if necessary. Thus, if the CAB fully exercises its powers in conformity with this standard, competition in foreign air transportation to and from the United States is a likely prospect—and a welcome one.

A comprehensive legislative solution to the problem of vertical

\textsuperscript{225} S. 3364, 94th Cong., 2d Sess. § 103 (1976).
\textsuperscript{226} Id. § 455.
\textsuperscript{227} Id. § 492.
\textsuperscript{228} Id. § 494.
\textsuperscript{229} S. 2551, 94th Cong., 1st Sess. § 4 (1975).
integration would include the following provisions:

1. A definition of "charter transportation" which refers to bulk or group transportation;
2. A prohibition of domestic airline/tour operator affiliations;
3. Prohibition of foreign air carrier use of tour affiliates when marketing tours which originate in the United States;
4. Permission for supplemental carriers to market tours directly;
5. Strict standards against which inter-carrier agreements must be measured before approval by the CAB; notice to and evaluation of such agreements by the Attorney General;
6. Elimination of antitrust immunity for intercarrier agreements; and
7. A public interest standard which emphasizes low fares and increased service while recognizing the distinctive features of foreign air transportation.

Although none of these proposals incorporates all of these provisions, the Kennedy Plan, in particular, includes most of them. Thus, a congressional response to at least some of the problems in this area is a distinct possibility.

Even the most comprehensive legislation would not be the ultimate solution. The United States must also work within the existing IATA framework to promote increased competition for group transportation services on scheduled flights. In addition, it must independently promote the competition offered by United States and foreign charter airlines. Success in all of these areas would result in a greater variety of low cost tours and a more competitive foreign air transportation service.

V. CONCLUSION

The South Pacific market is in its formative stages. Because Australia is a country without a large population and with no strong ethnic colonies in the United States, the tourist interest in Australia is very general without the "immediate draw" of other destinations. However, passenger traffic in this market has increased substantially over the past few years. For this year, a growth of ten per cent in passenger traffic originating in the South Pacific is anti-

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820 John Rowe, Regional Director of Tours for the Americas, Qantas Airways, Transcript, supra note 70, at 1203-04.
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In the past, foreign air carriers were disinterested in the charter field, so most charter service was provided by United States air carriers. The small number of firms in the market and their limited diversity of interests provided an opportunity for restrictions on United States operations—by restricting landing rights—in response to competitive or expansionist aviation policies of United States air carriers.\(^{221}\)

The market now supports five scheduled carriers and two supplemental airlines,\(^{222}\) and, with the growth in the market, there has been an increased demand for charter tours. Most of the scheduled airlines perform some tour operations, and eight to ten tour operators offer tours in this region.\(^{224}\) As evidenced by the actions of Qantas, competition for this increased passenger traffic is growing.

Qantas entered the tour business so that it could more economically operate—and more fully exploit—this growing demand for tour services. Once an airline institutes a system that places it at a competitive advantage *vis-a-vis* its competitors, the competitors feel compelled to diversify as well, and pressure becomes intense to permit them to do so.\(^{225}\) The result of such diversification, however, would be competition in the tour operating business, and, perhaps, in the charter field as well. The other scheduled carriers would establish "in house" tours with the same favored position which Qantas Holiday Tours enjoyed.\(^{226}\) Coupled with the degree of market power these airlines already command, diversification could serve

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\(^{222}\) *Straszheim, supra* note 199, at 219-20.

\(^{223}\) Qantas, British Airways, New Zealand Airlines, Pan American and Union de Transportation Airlines were the scheduled carriers at the time of the suit. Memorandum of Law, *supra* note 60, at 6. At the present time, Canadian Pacific has replaced British Airways in this market. *Official Airline Guide, World-Wide Ed.* (1976). World Airways and Trans International Airlines are the supplemental carriers certificated in this market. *Straszheim, supra* note 199, at 219-20.

\(^{224}\) McGhettigan's Travel Agency, Ruth Castle. These include: Tourwinds, Brendans, Percival, Maupin, Travcoa, Lisland, Australian Travel and Foremost.

\(^{225}\) *See* Hale, *Diversification: Impact of Monopoly Policy upon Multi-product Firms*, 98 U. Pa. L. Rev. 320, 362 (1950); *see also* Danna v. Air Fr., 463 F.2d 407, 413 (2d Cir. 1972), for a discussion of diversification in the context of fare discrimination.

\(^{226}\) Pan American has already done so.
as a basis for undesirable pricing practices and might permit an attempt to monopolize the tour operating business. Many independent tour operators could not withstand the resultant competitive disadvantages, and since the supplemental airlines cannot integrate vertically in this way, these smaller airlines will be faced with a hard competitive struggle with the larger scheduled carriers for the remaining charter business. Ironically, all of this would occur in response to pressure for lower rates for the general public.

Any recommendations made in this area must be tempered by consideration of their subsequent international repercussions. International aviation policies are a mix of economics and applied diplomacy. External market effects include balance of payment effects, the attraction of trade, tourism, and investment, and the political prestige of showing the flag. Any unilateral action by a government to impose its interpretation of the public interest on all airlines is "hardly likely to be successful; even if that interpretation is impeccably correct."

The IATA, however, has successfully imposed its own concept of the public interest, one which favors economic protection of the sovereign flag carriers, on the United States markets for decades. The administrative, executive, and legislative actions which are recommended in this paper would merely establish the United States' concept of the public interest for its own market air transportation services which originate in the United States. Enforcement of this concept would strengthen charter services, promote flexibility in the industry, and foster innovations in the market. Above all, these policies would promote the interests of the airline passengers—not merely the interests of the flag carriers which serve them.

**ADDENDUM**

None of the bills discussed in this article were reintroduced before the 95th Congress. Two new Senate bills, S. 292 and S. 689, are now in committee. An additional legislative proposal is currently being drafted by members of the House of Representatives. Un-

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237 Further distortion occurs where nationally owned airlines—such as Qantas—receive large operating subsidies.

238 Straszheim, *supra* note 199, at 3.

239 *Id.* at 2.

240 *Id.* at 195 (quoting Wheatcroft, *Air Transport Policy* 85 (1964)).
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fortunately these new bills are not as promising as some of their predecessors in resolving the problem of air carrier control of tour operations in foreign air transportation.

Senate bill S. 689, introduced by Senators Cannon and Kennedy, is a compromise of the positions contained in their original proposals. This bill contains definitions of "charter air transportation" and "charter trip" which permit direct sale to the general public; however, charters are again defined to include only planeload flights.\(^1\) The bill provides for increased charter flights by scheduled carriers, but then imposes a percentage limitation based on the number of miles flown by any particular carrier.\(^2\) No new powers are proposed for tariff review. No new standards for approving inter-carrier agreements in foreign air transportation are mentioned, and the antitrust immunity conferred by such approval is not limited.\(^3\) The public interest standard contained in this bill is identical to that now in the Act.\(^4\) If this bill becomes law, the present policies of the CAB will continue, without any Congressional direction. In addition, this bill eliminates Presidential review of CAB orders in foreign air transportation.\(^5\) In so doing, the "alternative avenues for relief" in this area are drastically reduced.

Senate bill S. 292,\(^6\) introduced by Senators Pearson and Baker, contains provisions which are more responsive to the problems discussed in the article. Its provisions defining charter transportation are similar to those in S. 689. It fails to propose changes in the limited power of the CAB to review tariffs in foreign air transportation, but it specifically limits the immunity granted by CAB order to the "transaction specifically approved . . . or those transactions necessarily contemplated thereby," and allows the CAB to de-

FOOTNOTES FOR ADDENDUM

\(^1\) S. 689, 95th Cong., 2d Sess. § 4(c) (1977).

\(^2\) Id. § 10. The limitation may be increased in cases where the CAB finds it is "in the public interest."

\(^3\) Id. §§ 18(c), 18(d).

\(^4\) Id. § 5.


fine and limit the scope of relief granted. In contrast to S. 689, this bill strengthens the role of the President by specifically providing that licenses for foreign as well as domestic charter flights shall contain terms and limitations “which are directed to be included by the President upon his review.”

Most significantly, the public policy definition represents a strong declaration of the public interest with respect to foreign air transportation. It stresses the need for developing a foreign air transportation system conducted by privately owned and operated air carriers. “Market realities” such as government ownership of foreign flag carriers, restrictive foreign laws, and the inability of individual carriers to determine rates and capacity are listed as “inherent differences” between domestic and foreign air transportation. Such an explicit policy statement, if incorporated into law, would direct the CAB to scrutinize inter-carrier agreements more thoroughly and would encourage the CAB to investigate and regulate unfair methods of competition more extensively. If the CAB responds to this Congressional directive, some of the problems in this area may at least be controlled, if not resolved.

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7 Id. § 12.
8 Id. § 6(f)(6).
9 Id. § 4.
Comments and Case Notes