Deregulation - Has it Finally Arrived - The Airline Deregulation Act of 1978

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Recommended Citation
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THE YEAR 1978 was an exciting one for the airline industry. It celebrated the seventy-fifth anniversary of the first powered flight by the Wright brothers and saw the beginning of a period of feverish competition which has drastically changed the industry's way of doing business. The Civil Aeronautics Board (hereinafter referred to as "CAB" or "the Board") encouraged low fares to increase competition. Congress finally passed a deregulation bill which was signed in October of 1978.1 These developments have helped the consumer in the form of bargain fares. What they will mean to the airline industry in the long run remains to be seen.

In the next few years the eyes of many analysts and observers will be on the airline industry to see how it reacts to deregulation. As airline deregulation is the first effort to relax governmental control in a highly regulated industry, its success or failure could alternatively encourage or discourage future efforts to lessen federal regulation in other areas. The purpose of this comment is to survey the previous regulatory scheme and the way in which the new deregulation bill proposes to make reforms of that system, the possible impact of this reform on administrative law in general and on the aviation industry in particular.

I. STATUTORY BACKGROUND

Prior to 1938, just as in the past few years, the economic regulation of domestic air transportation was a matter of continuous discussion and consideration in Congress.2 When the Army was

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2 CAVERNS, AIR TRANSPORT AND ITS REGULATORS 123 (1962) [hereinafter cited as CAVERNS]. One source of discussion was the Postmaster General’s cancellation in 1934 of all existing contracts with airlines to carry mail. He took this action because of charges that the contracts had been awarded in 1930 as the result of collusion between the Post Office and the major air carriers. These charges were
carrying the mail for a short time and met with unsatisfactory results, the Air Mail Act of 1934 was developed and passed.

The Air Mail Act of 1934 delegated the power to control the air transport industry to three governmental agencies. The Post Office was to award contracts for carrying air mail and to determine the routes and schedules. This resulted, as a practical matter, in complete entry control, since a subsidized air mail contract was essential to a successful airline operation. The Interstate Commerce Commission fixed rates of mail pay. Finally, the Bureau of Air Commerce was placed in charge of safety and technical regulation.

Difficulties with the organizational structure described above soon became apparent. Jurisdiction of the three agencies overlapped. By 1935, the Federal Aviation Commission, created by the Air Mail Act of 1934 to make policy recommendations, advocated a complete revision that would centralize authority in one new commission. Competition among governmental departments concerning who would get the revised regulatory powers delayed matters for several years. Finally, a comprehensive statute governing regulation of civil aviation was passed—the Civil Aeronautics Act of 1938. That statute was revised and the controlling law is now the Federal Aviation Act of 1958 (the Act).

investigated by a special Senate committee and during this period the Army was assigned to carry the mail. Id. at 123-124.

A statutory minimum was set and the Commission was to review rates annually to eliminate unreasonable profits.

Twelve Army pilots were killed due to poor equipment and a lack of planning. Comment, An Examination of Traditional Arguments on Regulation of Domestic Air Transport, 42 J. AIR L. & COM. 187, 189 (1976).

Ch. 100, 48 Stat. 508 (1934).

CAVES, supra note 2, at 123-124.

Id. at 124.

See id.

Id. A statutory minimum was set and the Commission was to review rates annually to eliminate unreasonable profits.

Id.

Id.

Id.

Id. at 125.

Id.

Ch. 601, 52 Stat. 973 (1938) (current version at U.S.C. §§ 1301-1542 (1976)).

For thirty years the provisions for economic regulation were not changed, although the administrative structure was altered over the years. Since the 1940 administrative reorganization, the five-person Civil Aeronautics Board has had the responsibility of administering the economic regulation of the airlines. The Board is guided by a declaration of policy in the exercise of its powers and duties. The following policies, among others, are to be considered in the public interest and in accordance with public convenience and necessity:

[1] 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 United States Postal Service, and of the national defense;

[2] 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;

[3] 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;

[4] 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 United States Postal Service, and of the national defense;

[5] The promotion of safety in air commerce; and


These guidelines have been criticized as being both vague and inconsistent. Criticism stems from the fact that the Board is expected to both promote and regulate air transportation. It has been pointed out that achievement of some of the expressed goals, such as that of sound economic conditions, may directly conflict

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19  CAVES, supra note 2, at 125.
20  See CAVES, supra note 2, at 126-27.
21  See id.
with other goals, such as the prevention of unjust price discrimination.\textsuperscript{23} The objectives have been characterized as virtually impossible to achieve due to their internal inconsistencies and at the same time as so vague that the Board can find justification for almost any action they take in the declaration of policy.\textsuperscript{24}

Other sections of the Act deal with controls over exit and entry, fares, and routes.\textsuperscript{25} The Board's authority over entry into the airline industry is rooted in its power to issue a certificate of public convenience and necessity which is required before an air carrier may engage in any air transportation.\textsuperscript{26} The policy standards discussed above are used in deciding whether or not the certificate is required by public convenience and necessity.\textsuperscript{27} In addition, the applicant must be fit, willing and able to perform the transportation.\textsuperscript{28} Any abandonment or suspension of service also requires prior Board approval.\textsuperscript{29}

The Act requires every air carrier subject to Board regulation to file its tariff schedule with the CAB, to keep it open for public inspection and to observe it so long as it is in effect.\textsuperscript{30} Tariffs can only be changed on thirty days' notice unless the Board permits a more rapid change.\textsuperscript{31}

Route control is exercised by placing restrictive conditions on the certificates issued by the Board.\textsuperscript{32} Certificates specify the points between which the transportation is authorized and the type of service to be rendered.\textsuperscript{33}

This brief description of the statutory background reveals extensive government intervention into the airline industry. Virtually every aspect of the business, including prices, entry and exit from the market, and routes to be served, are government-controlled.

\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.} at 127.
\textsuperscript{26} \textit{See} 49 U.S.C. § 1371 (1976).
\textsuperscript{27} \textit{Id.}, § 1371(d).
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.}, § 1371(e).
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}, § 1371(e)(1) (1976).
\textsuperscript{33} \textit{Id.}
The wisdom of such a scheme is the subject of the following section.

II. REGULATION UNDER THE CAB

The enabling statute gave the CAB considerable flexibility in regulating the air transportation industry. Accordingly, it has been free to develop its own policies over the years which have been the source of many debates and controversies.

By virtue of a "grandfather clause" in the 1938 Act, all of the then existing trunk carriers received certificates of public convenience and necessity automatically. The CAB has not issued another such certificate in the past forty years. This inaction has been supported by the Board's reasoning that its duty is to protect existing carriers. This does not mean, however, that no new carriers have been allowed to enter the marketplace. Local service carriers, which provide service connecting smaller communities to larger cities have increased in number. The original trunk carriers, however, account for a great majority of the air travel in this country. The policy of protecting the "grandfather" carriers from new entries onto the trunkline routes has been severely criticized in recent years as evidencing a pro-industry bias incompatible with the duty of regulation.

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23 See note 23 supra and accompanying text.
25 CAVES, supra note 2, at 169.
27 CAVES, supra note 2, at 170.
28 W. JORDAN, AIRLINE REGULATION IN AMERICA 16 (1970) [hereinafter cited as JORDAN].
29 In 1970 the trunklines had 12,288.7 million revenue ton-miles as compared with 1,591 million revenue ton-miles cumulative for other classes of carriers. G. DOUGLAS & J. MILLER, ECONOMIC REGULATION OF DOMESTIC AIR TRANSPORT: THEORY & PRACTICE 111 (1974).
30 See Kennedy, Airline Regulation by the Civil Aeronautics Board, 41 J. AIR L. & COM. 607, 608 (1975); and Pillai, Government Regulation in the Private Interest, 40 J. AIR L. & COM. 29, 30 (1974).
The CAB's regulation of air fares also has met with criticism. It has been argued that without regulation fares would be lower. Others have pointed out that fares in the United States are only twenty per cent higher than in 1948.

The proponents of price regulation have argued that, like the public utilities, the air transportation industry is a natural monopoly. That is, due to the high costs of entering the market and the uniformity of the product, without regulation one company will inevitably take over the market. The argument is that a single company can provide the product or service at a cheaper rate due to the high fixed costs of investment, which the company would eventually absorb. As the company grows larger, the cost of growth gets lower. Opponents of regulation argue that the natural monopoly scenario simply does not fit the airlines. The product is not uniform in view of competing schedules and services, and marginal costs do not decrease as the airlines grow larger.

Another of the major concerns about allowing price competition is a reduction in airline safety. The theory is that airlines will cut corners to compete by taking short cuts on safety. "Cutthroat" competition also has been predicted to lead to widespread bankruptcy of smaller airlines and even greater concentration by large carriers. This idea has been discounted, however, by pointing to the successful experiences of intrastate operations which have liberal pricing policies.

Route control by the CAB, like other forms of regulation, has its friends and its foes. Some airline officials predict that excess capacity and higher fares will result from relaxed regulations on

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42 Miller, supra note 41, at 689; JORDAN, supra note 38, ch. 11.


44 Comment, supra note 3, at 194.

45 Id. at 195.

46 Id.

47 JORDAN, supra note 38, at 194; Dupre, supra note 19, at 294-95; Koontz, Economic and Managerial Factors Underlying Subsidy Needs of Domestic Trunk Line Air Carriers, 18 J. Air L. & Com. 127, 134 (1951).

48 Miller, supra note 41, at 693.

49 Kelleher, supra note 34, at 284-85.
what routes the airlines can travel.56 The argument is that there will be a rush to enter the profitable markets, resulting in excess capacity. Then, to compensate for the loss of money on these routes, airlines will have to charge higher fares on the less competitive routes.57 This argument ties in with another concern of the proponents of regulation. Their contention is that regulation by the CAB has resulted in a complex network of routes in which there is a considerable amount of cross-subsidization.58 This refers to the fact that less profitable routes to smaller cities are subsidized by profitable routes to larger, more densely populated areas. Due to this practice, passengers traveling to the small cities and towns need not pay extremely high fares.59 Opponents of regulation point to what they see as the inequities of forcing travelers on popular routes to help pay for the tickets of those on less profitable runs.60 Even those who oppose deregulation of routes admit that the CAB's performance in the area of route regulation has been extremely poor. This evaluation primarily refers to the incredibly long periods of time taken by the agency in making route decisions.61

This brief presentation of the differing views on regulation under the CAB provides the background for an evaluation of recent moves toward deregulation by both the CAB and the Congress.

58 Id.
59 Id.
60 Notes and Comments, Is Regulation Necessary? California Air Transportation and National Regulatory Policy, 74 Yale L.J. 1416, 1428 (1965). It has been postulated by opponents of regulation that commuter airlines will probably step in if major carriers were allowed to drop some of these routes. U.S. News & World Report, May 9, 1977, at 75-76, quoting Senator Howard W. Cannon.
61 Kennedy, supra note 40, at 615. At the beginning of 1975, two-thirds of the applications on file with the CAB had been pending over two years. One-fourth had been pending over five years. There was even a moratorium on route applications in the early seventies in which no new routes were granted for about five years. Id. Eastern Air Lines President Frank Borman has stated: "Now, CAB has a grave tendency to simply not consider things. . . . For over eight years, we've been trying to fly from Atlanta to Cincinnati, Cleveland and Detroit, CAB has not yet given us a decision." U.S. News & World Report, supra note 54, at 76.
III. CAB's Efforts to Deregulate

The CAB took the first step in liberalizing its regulatory policies in late 1975 when it authorized "OTC's" (One Stop Inclusive Charter Tours). This ended the requirement that travelers on charter flights be members of a club or group in order to get cheaper rates. The package price still had to include the hotel bill, however. In late 1976 the Board authorized "ABC's" (Advance Booking Charters). This eliminated the requirement that the price include the hotel bill. The only prerequisite was that the traveler make a confirmed reservation thirty to forty-five days before the flight. These initial steps toward deregulation by the CAB coincided with the introduction into Congress of various deregulation bills. Certainly the existence of pending legislation provided an impetus for the CAB to begin preparing the industry for the inevitable prospect of statutory revision.

In early 1977 the major airlines began to respond to the increased competition which resulted from the Board's rule changes concerning charters. A price war officially began in February 1977 when American Air Lines advertised for the first time its "Super Saver" fares. At that time these fares represented from thirty-five to forty-five percent savings on the New York to California route. Other airlines soon entered the battle. As of August 1978, some airlines offered as many as ninety fares and discount packages. The Big Four—United, American, T.W.A. and Eastern—all offered "Super Saver" fares which cut thirty to fifty percent off regular economy fares. Other such offers were Braniff's "Small Potatoes," Texas International's "Peanuts" and Continental's "Chicken-feed" fares.

In June of 1977, Alfred E. Kahn became Chairman of the CAB. Although his immediate predecessor, John Robson, had initiated the relaxation of route restrictions, his efforts were
minimal in comparison to the vigorous actions taken by Chairman Kahn in his first months in office. Although Mr. Kahn left the CAB in late 1978 to become Chairman of President Carter's anti-inflation program, his efforts at the CAB will not soon be forgotten. The Chairman was never slow to tell the public and the airlines what he hoped to do: "So what I am trying to do, to put it in the broadest possible terms, is to remove the meddling, protective and obstructionist hand of government, and to restore this industry, insofar as the law permits, to the rule of the market."**

Kahn outlined his program for liberalizing CAB regulation. The program involved: greater receptivity to applications for new operating authority, particularly to those accompanied by low-fare options; willingness to make route awards temporary, with renewal dependent on performance; permission to existing carriers to realign routes and eliminate restrictions that limit their operating flexibility; grants of authority to enter markets that may not be able to support more carriers, then grants to others to enter if the first carrier does not; a more permissive attitude toward market exit where entry has been liberalized.** The program also included a relaxation of the functional and operational restrictions on the various categories of carriers and on the services they offer. An example of this was the liberalization of charter rules mentioned above.** The Board also has relaxed limitations on the right of scheduled carriers to run charters apart from their certificated routes. In addition, it has declared a willingness to allow carriers to transfer customers from charters onto empty seats of scheduled flights.**

The Board also contemplated a full-scale revision of the standards set forth in the Domestic Passenger Fare Investigation** (hereinafter cited as DPFI). The revision includes abandonment of the following aspects of the DPFI: its criticism or disapproval of discount fares except on a temporary basis; its required cross-}

Order No. 77-2-58 (Feb. 11, 1977); Delta, Braniff, and Continental were given route authority from Denver to various points in Florida, CAB Order No. 77-4-146 (Apr. 28, 1977).

**AV. WEEK & SPACE TECH., Mar. 6, 1978, at 37.

**Id.

**Id. See text accompanying notes 56-59 supra.

**Id.

**CAB Order No. 70-1-147 (Jan. 29, 1970).
subsidization of short-haul by long-haul traffic; its imposition of uniform rates per mile in all markets; its prescription of minimum mark-up of first class over coach fares and a maximum discount of economy from coach; its requirement of uniform rates based on industry cost, regardless of individual carriers, methods of operations and cost; its insistence that rates be judged by coverage of cost, without regard to direction of travel or popularity of route. 69

The Board did not hesitate in putting these plans into action. In August 1978 airlines were permitted to cut fares during peak periods by as much as fifty percent without Board approval. 70 In off-peak periods they were allowed to reduce fares by seventy percent and sell first class tickets at a price they thought traffic would bear. 71

Many of these proposals have been criticized by airline officials. 72 They claimed that the Board was backing away from the current law and may have been acting illegally. 73 In the area of fares, for example, the Board has been criticized for dismissing illegal rebating charges against China Airlines in June 1978. 74 The dismissal is said to evidence CAB's encouragement of a break from published tariffs, which are specifically required by the Federal Aviation Act of 1958. 75 Kahn said: "The law prohibits departure from tariffs, but departures from tariffs are good for competition. Rebating as we see it is a consequence of non-competitive rate levels, and the best theoretical remedy is to reduce fares." 76

The effects of fare and route competition upon airline earnings have been phenomenal. Certificated carriers had an overall deficit in 1975 of $84 million, had a net income of $564 million in 1976, and profits climbed to $708 million in 1977. 77 These profits are of course welcomed by the airlines, but airline officials also point to

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71 Id.
73 Id. In response to critics who say he is tearing down the present system before another is ready, Kahn said: "That's our dilemma." Id.
74 Id.
77 Civil Aeronautics Board, Air Carrier Financial Statistics, Vols. XXIV-4 and XXV-4.
the uncertainty of the future caused by the CAB's actions and Congressional deregulation. The airlines are concerned about the need to replace their old jets and fear that the uncertainty caused by deregulation will scare away investors.87 Airlines also feel that these price cuts simply cannot go on forever without impairing profits,78 and perhaps even safety standards.80

The opponents of deregulation theorize that in the long run prices will have to rise due to higher costs. No regulatory change will lower certain costs, such as fuel bills. Furthermore, the proposed freedom of entry to be granted by the CAB will cause fuel costs to increase because airlines will offer more frequent flights on popular routes in order to meet the increased competition.81 The pro-regulation forces also contend that the airlines are already highly competitive in service and pricing. More competition will reduce the number of passengers per flight and services will be wastefully duplicated.82 Small-city service will suffer if airlines can freely drop unprofitable routes.83 Thousands of airline employees will lose their job security because new airlines will come on the scene free from the constraints of present collective bargaining agreements.84 Finally, there is a fear that due to the uncertain financial situation of the airlines caused by less regulation, they will be unable to make commitments for support of airport revenue bonds.85

These fears were acknowledged by former Chairman Kahn, but he openly challenged their validity. As to the fear that deregulation will lead to destructive competition, wasteful entry and cutthroat

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87 Brenner, supra note 51, at 812.
88 TIME, Aug. 14, 1978, at 53; WALL ST. J., Sept. 30, 1977, at 7, col. 1, a Continental official was quoted as saying: "Pretty soon we won't be charging for airline tickets—we'll just take up a collection and people can contribute what they want."
89 U.S. News & WORLD REPORT, May 9, 1977, at 76, quoting Frank Borman: "But in the final analysis, the safety of the air-transportation system is dependent upon the integrity of the airlines' management. If you had a proliferation of one-lung, gypsy operations, together with only two or three major airlines, you would degrade safety."
87 Id.
89 Id.
89 Id.
87 Id. at 181.
pricing, the former Chairman said gradual relaxation of regulations will avoid these results. He advocated giving the airlines time to adjust. He emphasized, however, that airlines must understand that these changes are going to take place and that they must re-orient themselves in order to survive.66

Kahn also rejects the idea that airlines will crazily rush into markets without regard to how many carriers they can sustain and to how many others may be entering at the same time. He predicts that entry will be cautious and that carriers will be careful in selecting what markets to enter.67

As to the fear of cutthroat pricing, Kahn sees no real threat. He predicts that carriers with a small share of one market, who have most to gain from cutting their prices, will be deterred from all-out price wars because they realize that in other markets they will be up against the same competitors under circumstances where the situation may be reversed.68

In reference to the fuel waste argument, Kahn argues that price competition will in fact lead to more efficient use of fuel. His rationale for this is as follows: CAB receptivity to applications for route authority accompanied by low-price options will provide a wide range of choice for passengers, which will naturally tend to put limits on cost-inflating competition in services (frills such as stereo, movies, gourmet meals, etc.). People will get only those services they are willing to pay for. Once price competition is possible, lower fares will reduce the average net revenue yields per passenger. Therefore, airlines will have to attract more passengers on each flight (raise the break-even load factor) in order to be profitable. If airlines act rationally, they will acquire equipment and make scheduling decisions with a view toward maintaining higher load factors. These load factors in turn will lead to more efficient use of fuel as fewer and fuller airplanes will be flown.69

IV. CONGRESSIONAL EFFORTS TO DEREGULATE

The significant changes which have taken place in the past year, principally in the form of heavy price competition, testify to the

67 Id.
68 Id. at 41.
69 Id. at 41-42.
CAB's enormous power to effect change. Much of that power stems from the vagueness and broadness of its enabling statute. Those who favor continued regulation point to the recent discount fares and rule changes as support for the idea that there is no need for a change in the law. Proponents of congressional deregulation point out that without a statutory change, a later Board with a more conservative membership and chairman could very easily reverse the trend set by the current CAB.

Although Chairman Kahn's efforts in the last year have served to focus a great deal of public attention on the activities of the Board and on the entire issue of deregulation, Congress has been working on legislation in this area for the past four years. The Senate Judiciary Subcommittee on Administrative Practice and Procedure, headed by Senator Edward Kennedy, began an investigation of CAB practices in late 1974. The resulting report came to the conclusion that regulation of the airline industry should be ended. The findings of the committee were that the airlines are naturally competitive and that regulation has served only to raise fares, promote inefficiency and discourage innovative new people from entering the market.

The Aviation Act of 1975 was introduced to the Senate in October 1975. The main provisions of the bill called for time limits on consideration of route cases, liberalized entry requirements and price flexibility. The CAB was required to eliminate all route restrictions by 1981. The bill also allowed trunk carriers to expand into new markets without CAB restraint. Approval of

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90 See notes 19-23 and accompanying text supra.
92 See note 93 and accompanying text, infra.
94 Kennedy, supra note 36, at 631.
95 Id.
97 Miller, Effects of the Administration's Proposed Aviation Act of 1975 on Air Carrier Finances, Transp. J., Spring 1976, at 14. The time limit provision was in response to the long delays which were noted earlier. See note 55 and accompanying text supra.
98 Miller, supra note 97. In reference to entry requirements, the Board was instructed to consider the benefits of competition in deciding on entry cases. Id. at 21.
99 Id.
fare decreases would depend on degree of competition on the route, average length of the haul and carrier aggressiveness.100

In April of 1976, Senator Howard Cannon of the Commerce, Science and Transportation Committee launched his own hearings on deregulation, and in 1976 Senators Kennedy and Cannon introduced their own reform measures.101 They introduced a new bill in February of 1977 which developed into the Cannon-Kennedy-Pearson Air Transportation Reform Act of 1978,102 which was passed by the Senate on April 19, 1978. The House bill was entitled the Air Service Improvement Act of 1978.103 After considerable discussion between House and Senate conferees the final legislation, called the Airline Deregulation Act of 1978 (hereinafter referred to as the Deregulation Act),104 was signed by the President on October 24, 1978.105 This Act makes significant changes in the areas of fare, route and exit/entry regulation.

Section three of the new Deregulation Act makes profound changes in the declaration of policy as set forth in section 1302 of the Federal Aviation Act of 1958.106 While the original statute directed the Board to consider competition only "to the extent necessary" to develop an air transportation system,107 the new law encourages competition rather than merely tolerating it when "necessary." The new declaration of policy directs the Board to consider as being in the public interest, and in accordance with the public convenience and necessity:

(4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital. . . .

100 Id.
105 92 Stat. 1754.
106 See notes 18-23 and accompanying text, supra.
(7) The prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation, and the avoidance of—(A) unreasonable industry concentration, excessive market domination, and monopoly power; and (B) other conditions; that would tend to allow one or more air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation. . . .

(9) The encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services.108

The new declaration of policy is a combination of the Senate and House bills, with a few omissions.109 Other provisions direct the CAB to maintain safety as its highest priority and to prevent any deterioration in safety procedures.110 The Board is to encourage fair wages and equitable working conditions in the air transport industry111 and to develop a regulatory environment where decisions are reached promptly.112 The declaration of policy states that the encouragement of air service at major urban areas through secondary or satellite airports is in the public interest.113 It directs the

109 H.R. Rep. No. 1779, 95th Cong., 2d Sess. 56 (1978). Two omissions were made from the Senate and House versions. These were paragraph 2 from the Senate bill and paragraph 3 from the House bill. Paragraph 2 read as follows:
(2) The development and maintenance of an efficient and reliable air transportation system which provides an opportunity for efficient and well-managed air carriers to earn a fair and reasonable return on investment in a competitive environment in order to meet the present and future needs of the public, the foreign and domestic commerce of the United States, the Postal Service, and the national defense. S. Rep. No. 631, 95th Cong., 2d Sess. 6 (1978).
Paragraph 3 from the House bill read as follows:
(3) The encouragement and development of an air transportation system which is responsive to the needs of the public and is adapted to the present and future needs of (A) the foreign and domestic commerce of the United States, (B) the Postal Service, and (C) the national defense, and which includes, where feasible, the authority for air carriers to serve unused routes authorized to be served by other air carriers. H.R. Rep. No. 1211, 95th Cong., 2d Sess. 38 (1978).
111 Id. at 92 Stat. 1706 (to be codified as 49 U.S.C. § 1302(a)(3)).
112 Id. at 92 Stat. 1706 (to be codified as 49 U.S.C. § 1302(a)(5)).
113 Id. at 92 Stat. 1706 (to be codified as 49 U.S.C. § 1302(a)(6)).
CAB to encourage the maintenance of "a comprehensive and convenient system of continuous scheduled airline service for small communities and for isolated areas, with direct Federal assistance where appropriate."\(^{114}\)

A radical change in orientation is prescribed for the CAB by virtue of the new declaration of policy.\(^{115}\) The comprehensive amendments to the 1958 Act reflect a change in the attitude of the legislature toward the industry as a whole. One member of Congress expressed the reason for the attitude change in this way: "Historically, aviation was a fledgling industry which needed help and financial guarantees, and the public needed controls for safety. But we're 40 years from that point and there is no need for the CAB to be overly protective of a $100 billion industry."\(^{116}\) This statement condenses a major argument of the proponents of deregulation. The new Deregulation Act recognizes the goal of promoting competition throughout its amendments of the 1958 Act but nowhere is it more explicit than in the new declaration of policy.

The subsection in the declaration of policy concerning service to small communities represents an appeasement of many Senators and Representatives from sparsely populated states who expressed the fear that many of the towns in their home states would lose air service completely when exit restrictions are relaxed allowing carriers to drop unprofitable routes.\(^{117}\) In addition to the provision in the policy declaration, the Deregulation Act adds a new section to the Act entitled "Small Community Air Service."\(^{118}\) It guarantees continued air transportation for ten years to all cities listed on air carrier certificates on the date of enactment, including cities to which service has been suspended. The Board is directed to estab-

\(^{114}\) Id. at 92 Stat. 1706 (to be codified as 49 U.S.C. § 1302(a)(8)).

\(^{115}\) The amendments to § 1302 also add provisions concerning foreign air transportation which are identical to the old declaration of policy in § 1302 for domestic air transportation. 92 Stat. 1707 (1978). As this comment is concerned with domestic air transport, these changes are beyond the scope of the discussion here.


lish a level of "essential air transportation," which cannot be less than two daily round trips, five days a week, or the level of service actually provided during 1977. 119

Air carriers serving cities which are guaranteed service must give notice before reducing service below the level of essential air transportation. 120 If within the ten-year period, the Board receives notice of a reduction in service, it must make every effort to arrange for another carrier to provide essential service. If unable to arrange such service within the notice period it must require the carrier to continue service for additional thirty-day periods until a replacement is found. 121 Of course, the carrier receives subsidies during its time of extended service. After January 1, 1983, any carrier may file an application seeking to replace a subsidized carrier. The Board must grant the application if the applicant shows that it can provide a substantial improvement in the air service and a decrease in the amount of compensation. 122

The guaranteed essential service to small communities ties in with changes in exit regulation. In theory, the Deregulation Act significantly changes prior law in regard to exit regulation. The old Act stated that:

No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest. Any interested person may file with the Board a protest or memorandum of opposition to or in support of any such abandonment. 123

The new Act repeals the above provision and provides that gener-

119 Id. at 92 Stat. 1739 (to be codified as 49 U.S.C. § 1371). Air transportation in Alaska is to remain at a level no lower than that which existed during 1976, or two round trips per week, whichever is greater. This is subject to contrary agreements between the Board and the state agency in Alaska, after consultation with the community affected. Id.

120 Id. at 92 Stat. 1733-34 (to be codified as 49 U.S.C. § 1371). Certified carriers and subsidized carriers must give at least 90 days notice and unsubsidized commuters must give 30 days notice. Id.

121 Id. at 92 Stat. 1734. The Board also is directed to review all cities which have been deleted from air carrier certificates since 1968, and decide whether any of these cities should be made eligible for the new subsidy program. Communities added by this procedure also are protected by the notice provisions described at note 118 supra. Id. at 92 Stat. 1736.

122 Id. at 92 Stat. 1738 (to be codified as 49 U.S.C. § 1371).

ally there are no exit restrictions. The exception to this is where essential air transportation is in jeopardy. In addition, a certificated air carrier must give sixty days notice before terminating or suspending non-stop or single-plane air transportation between two points being provided by such air carrier under its certificate. It is the routes to small communities, previously supported by cross-subsidization, from which carriers will most likely want to exit. Yet the legislative history of the Deregulation Act states that carriers will be forced to continue serving these unprofitable routes until the Board certifies that another air carrier is willing and able to step in and provide essential air transportation. Thus, in essence, meaningful exit freedom has been delayed indefinitely.

The Deregulation Act drastically changes the regulation of fares by the CAB. The Board is prohibited from determining whether the fares charged for interstate transportation are unjustly or unreasonably high unless, after July 1, 1979, the fare is over five percent higher than the standard industry fare level for the same service. This prohibition will not apply to any market where the affected carrier transports seventy percent or more of the passenger air traffic. On the other hand, the Board cannot find a fare for scheduled passenger transportation to be unjustly or unreasonably low unless it is more than fifty percent below the standard industry fare level or it is found to be predatory. Air carriers also are allowed to add new classes of services to provide more variety to consumers. The Board also can increase the permissible percentage under the standard level by which rates can be lowered. The Deregulation Act also provides that parties opposing any fare on the basis that it is too low have the burden of proving that the fare is indeed too low.

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116 See notes 116-20 and accompanying text supra.
119 Id. § 37, 92 Stat. 1741 (to be codified as 49 U.S.C. § 1371). "Standard industry fare level" is defined as the fare level in effect on July 1, 1977, but is to be adjusted no less than semi-annually on the basis of actual operating costs per available seat-mile. Id. at 92 Stat. 1741-42.
120 Id. at 92 Stat. 1741.
121 Id.
The general area of entry regulation is now covered in new provisions regarding the granting of certificates and in the new automatic entry program. The old Act directed the Board to issue a certificate if it found the applicant to be fit, willing and able to perform the air transportation properly and that the transportation was “required by the public convenience and necessity." The new Deregulation Act provides for a different standard to be applied in hearings on the issuance of certificates. It retains the requirement that the Board find the applicant to be fit, willing and able to perform, but the transportation need not be “required by,” but rather only “consistent with” the public convenience and necessity. The new Act goes on to define the burdens of proof placed on the parties. The applicant has the burden of showing that it is fit, willing and able. As to determinations of consistency with public convenience, however, “an opponent of the application shall have the burden of showing that such air transportation is not consistent with the public convenience and necessity.” In addition, the transportation applied for shall be deemed to be consistent with the public convenience and necessity “unless the Board finds based upon a preponderance of the evidence that such transportation is not [so] consistent.” These provisions shift the focus of certification procedures so that the Board is practically forced to issue the certificate in almost all situations, unless the carrier is clearly unfit or unable to provide the service.

The pressure to certify new carriers created by the new Act will result, according to some sources, in a rush by inexperienced operators to form airlines. This theory ignores the economic realities of the situation, however. Starting an airline is an expensive proposition and realistically speaking, few lenders would invest millions in a project if they were not confident in the operators’

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122 Id. at § 14, 92 Stat. 1719.

123 Id.

124 This interpretation apparently has been adopted by the CAB, which recently stated: “In summary, we have found that the new Act essentially creates a rebuttable presumption in favor of granting all applications for interstate and overseas certificate authority. This presumption is not overcome unless the record contains an affirmative showing that the public interest requires a different result.” CAB Order No. 78-12-105, at 3 (Dec. 14, 1978).
The key point is that carriers must still be fit, willing and able to perform the transportation. The Federal Aviation Administration will control safety standards as before. It is unlikely that safety will be threatened in any way by the advent of deregulation.

The "Automatic Entry Program" provides for relaxed entry into scheduled non-stop transportation. Interstate air carriers and certain intrastate air carriers which meet specific qualifications can, in 1979, 1980 and 1981, select one pair of points between which it will provide scheduled non-stop service, in addition to the points it is presently authorized to serve. Selections are filed with the Board, which will only disapprove a route if it finds that the carrier is not fit, willing and able to provide the service selected. Air carriers also can designate one route each year, for which they already provide regularly scheduled non-stop service, which will not be open to automatic entry. This protection is only from entry provided for in this automatic entry section, however. Otherwise, carriers can apply freely for new routes.

The Board is required to publish lists of the segments selected for automatic entry. Duplicative selections can be changed, but more than one new entry on the same route will be certified if that is what is requested. The Board also can modify the entry program on an emergency basis if it finds the program is causing substantial public harm to the national air transportation system or a substantial reduction in air service to small and medium sized communities. Not later than December 31, 1980, the Board is to have completed a study of the entry program. It is to evaluate whether the program is consistent with the new declaration of

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135 Kelleher, supra note 34, at 286.
137 Interstate air carriers must have a certificate of public convenience and necessity which has been in force during the entire preceding calendar year and must have provided air transportation of persons during such calendar year. Intrastate air carriers must have a valid certificate or license issued by a state regulatory authority and must have operated more than one hundred million available seat-miles in intrastate air transportation in the preceding calendar year. Id. at 92 Stat. 1717.
138 Id. at 92 Stat. 1717-18.
139 Id. at 92 Stat. 1718.
140 Id.
policy in the Act and to evaluate the effectiveness of the pro-
cedure.\textsuperscript{141}

The provisions for evaluation and modification of the entry pro-
gram demonstrate the efforts by Congress to make regulatory
reform as gradual as possible. This plan, hopefully, will minimize
any dislocations. The opponents of reform predict disaster, as usual,
but even they should be heartened by these efforts at ongoing
evaluation during the institution of reforms. Those who advocated
more rapid changes may be impatient, but as deregulation is an
unknown quantity, it will probably be better in the long run to
go about it slowly and carefully.\textsuperscript{142}

Section sixteen of the Deregulation Act provides for the re-
moval of so-called "closed-door restrictions." These are the condi-
tions attached to certificates that prohibit interstate and overseas
carriers from providing local passenger service between any of the
points on its certificate.\textsuperscript{143}

Entry is also liberalized into markets where authority to fly
has not been used to its full potential. If a carrier is authorized
to provide round trip service in the continental United States and
fails to provide a minimum of five round trips per week for
thirteen out of any twenty-six-week period, the Board is to issue a
certificate to the first applicant who is qualified under the Act.\textsuperscript{144}
Where more than one carrier has been serving the route the Board
has sixty days to decide on the new application, as opposed to a
fifteen-day deadline where only one carrier has been providing serv-
ice.\textsuperscript{145} These provisions also apply to seasonal routes, with the re-
quirement that the service be provided half the weeks of the season
in order to avoid the certification of a new carrier onto the route.\textsuperscript{146}

In addition to the changes in fare and entry/exit regulation,
the Deregulation Act also adds a new title to the Act called the
"Sunset Provisions."\textsuperscript{147} These new provisions initially provide for

\textsuperscript{141}Id.
\textsuperscript{142}Wilson, \textit{Deregulation: How Far Should It Go?}, 51 \textit{Ind. L.J.} 700, 714
(1976); \textit{Av. Week \& Space Tech.}, Mar. 6, 1978, at 37, paraphrasing former
Chairman Kahn.
\textsuperscript{144}Id. at § 10, 92 Stat. 1713.
\textsuperscript{145}Id. at 92 Stat. 1714-15.
\textsuperscript{146}Id. at 92 Stat. 1714.
\textsuperscript{147}Id. at § 40, 92 Stat. 1744.
termination of Board authority with respect to specific provisions of the Act on December 31, 1981. These provisions include the Board's authority to issue certificates on the basis of consistency with public convenience or necessity for interstate, overseas and foreign air transportation. Also, carriers with the above types of certificates will then be allowed to engage in charter transportation. All exit restrictions are dropped except those with respect to essential air transportation. Virtually all the Board's rate-making authority ceases on January 1, 1983.148

Certain elements of the Board's authority is to be carried on by other Federal departments beginning January 1, 1985. The Department of Transportation will handle foreign transportation (in consultation with the Department of State) and compensation for providing essential air transportation. Jurisdiction over consolidations, mergers and co-operative working arrangements will be vested in the Department of Justice and authority to set mail rates will be transferred to the Postal Service.149

These new provisions also call for the Board to prepare and submit to Congress by January 1, 1984, a comprehensive review of its implementation of the regulatory reform measures in the Deregulation Act.150 Among the listed tasks to be included in the review are comparisons of the following factors between 1977 and 1983: the degree of competition in the industry; the extent of route authority granted which has not been utilized by the carrier involved; the extent of air transportation service provided to small communities, together with details on comparative subsidy costs. The Board is also to assess the impact of the reforms upon the national air transportation system and to opine as to whether the changes have improved or harmed the domestic air transportation system.151 These evaluations are to be accompanied by an opinion as to whether the public interest requires continuation of the Board and its functions beyond January 1, 1985. If the Board concludes that it should continue to exist, it is to provide detailed recommendations as to how provisions of the Deregulation Act are to be revised to ensure continued improvement of the national air trans-

148 Id. at 92 Stat. 1744-45.
149 Id. at 92 Stat. 1745.
150 Id.
151 Id. at 92 Stat. 1746.
portation system. Other provisions of the Deregulation Act include an employee protection program, a framework for expedited procedures, amendments to the loan guarantee program, and a section on experimental certificates.

V. CONCLUSION

The ultimate goal of the Act is obviously deregulation. Some parts of the Act, however, do little to attain that end. The worst example of this is the ten-year guarantee of essential air service, which effectively continues a policy of exit regulation. In other respects, the bill is quite strong. These include the significant

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153 Id. The adopted provisions take effect less rapidly than the original proposal in the House bill which provided for a termination of CAB authority on December 31, 1982. H.R. 12611, H.R. REP. No. 1211, 95th Cong., 2d Sess. 66 (1978).

154 Pub. L. No. 95-504, § 42, 92 Stat. 1748-50 (1978). The loan guarantee program is extended for five years. Eligibility is given to commuter carriers and intrastate carriers. Charters are eligible for the purchase of all nonconvertible cargo aircraft. The total amount of loans which may be guaranteed under the program is extended to $100,000,000. The amount of loans to be extended to charters depends on the amount of service they provide to small communities.

155 Id. at § 13, 92 Stat. 1718-19. The Board can grant route authority for only a temporary period whenever it decides a test period is desirable to determine if projected services, fares, and charges will in fact materialize. It also can use this method to assess the impact of the new authority on the national air transport system.
changes in the declaration of policy and new standards for considering a carrier for certification. The provisions for fare deregulation still leave some control with the CAB, at least until 1983.

This bill, like all highly controversial legislation, is necessarily a product of compromise. This is reflected in the continuation of some aspects of regulation even after (and if) the CAB is dismantled. The conservative and gradual approach taken by the Congress in the Deregulation Act would be a good example for future deregulation bills to follow. A step-by-step approach is the only reasonable way to go about making profound changes in the economic structure of major industries. The only question to be answered as to each industry is how gradual the changes must be to obtain optimal results. Hopefully, observance and evaluation of this effort will be helpful in drafting future legislation.

Deregulation of the airline industry is a highly complex and controversial issue. Long-awaited regulatory reform legislation has finally been enacted. The Airline Deregulation Act of 1978 calls for drastic changes in fare and exit/entry regulation. It even calls for much of the authority of the CAB to be transferred to other agencies or done away with altogether. Despite the many predictions of disaster, the reality is that the airlines are faced with a new environment in which to do business.

The frank admission by former Chairman Kahn before the passage of the Deregulation Act that the old statute would have to be violated in order to achieve his goals creates a fertile source of controversy in the whole area of administrative law. It must be asked if the favorable response to Kahn's efforts from Congress would be duplicated if other agencies decided to go beyond their enabling statutes in the interests of lessening regulation wherever they saw fit. A valid question might be whether an agency must wait until deregulation or regulatory reforms has been proposed in Congress before it can begin deregulating on its own.

On a practical level, perhaps the most forceful check on agencies' violating their own statutes as the CAB did is the fact that most agency heads do not want to eliminate their own jobs, as Kahn professed a wish to do. There remains the prospect, however, that the agencies will violate their statutes in order to achieve goals other than deregulation. For example, they might attempt to take
over matters which are not within their grant of jurisdiction. The victims of such overstepping might resort to the courts or to Congress. In any case, Kahn has assuredly opened up a vast area of controversy with great potential for drastic effects on the whole philosophy of administrative procedure.

What will be the ultimate results of these changes cannot be predicted with any certainty, though as we have seen, parties on each side of the issue have painted very dissimilar pictures of the future under deregulation. One thing is certain: this legislation is different from the great majority of the laws passed in Congress in that it seeks to reduce governmental interference in private business rather than to increase it. The success or failure of these measures in improving air transportation will certainly serve as an indicator of what happens when government backs away and lets private enterprise take its course. If the measures meet with success, Congress may be faced with demands for less government regulation in other areas. Whatever the results, an important step has been taken and at least as far as the air transportation industry is concerned, things will never be the same.

157 Opponents of the bills argued that this would result in more rather than less regulation. H.R. REP. No. 1211, 95th Cong., 2d Sess. 72 (1978), views of Bob Stump; Frank Borman in U.S. NEWS & WORLD REPORT, May 9, 1977 at 75-76. They also point to different treatment of various types of carriers under the new legislation. There is still no doubt that the intent behind the changes, however, is to reduce regulation. This intent became a bit confused in the drafting of the Senate bill. Although not adopted in the final legislation, it was proposed that the Board be given authority to issue certificates to local air transportation carriers. The Senate report did not address the issue of why the bill extended regulation here rather than contracted it. While the report states that the amendment aimed to keep these lines operating in an essentially unregulated environment, it goes on to put burdens of obtaining certificates of public convenience, as well as limiting exit options, upon commuter carriers. The only comment addressed to why the Senate did this stated: "It is clear that the commuter airline industry, small though it is, has proved in the market place that it is indeed worthy of full participation in the Nation's air transportation system." This apparently referred to the ability to challenge trunkline carriers for subsidies and eventually, through automatic entry programs, for various routes as well. S.2493, S. REP. No. 631, 95th Cong., 2d Sess. 92-94 (1978).