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## Air Tariffs — Abuse of Discretion — Rate Discrimination

Discriminatory rate making has long been the concern of administrative agencies. Most cases dealing with rate discrimination have involved violations of the Interstate Commerce Act by those carriers regulated by the Interstate Commerce Commission. The airline industry, however, has not been immune to charges of discriminatory rate making. The federal regulatory agency of the airline industry, the Civil Aeronautics Board (Board), has heard many complaints alleging violations of the policy toward rate making as set forth by both the Federal Aviation Act of 1958 and the Board itself. Recently, the youth, military, and family fares, offered by most domestic airlines, were attacked by two major bus lines on the grounds that they were unjustly discriminatory and unreasonable.<sup>1</sup>

The youth fares offer two plans, the standby plan, and the young adult plan which allows those who qualify to make reservations. Under both plans, persons between the ages of 12 and 22 are allowed a substantial discount.<sup>2</sup> The family fares provide various discounts for certain members of a family who fly together to a common destination on certain days of the week.<sup>3</sup>

The bus systems had voluntarily given up similar fares in 1967. Apparently the bus companies now feel the economic pressure which comes from the airlines competing with discount fares. The airlines are now able to offer not only faster, more comfortable, and convenient service than surface carriers, but they are fast becoming economical transportation as well. The fact that the bus companies were moved to attack the discount fares because of the economic pinch does not take anything away from the merits of their argument or affect their standing to complain.<sup>4</sup>

The Board dismissed all the complaints filed by the bus companies, refusing their requests for suspension and investigation of the family, youth and military fares, holding them to be just and reasonable.<sup>5</sup> The complainants appealed in two separate actions. In *Transcontinental Bus System*,

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<sup>1</sup> *Transcontinental Bus System, Inc. v. Civil Aeronautics Board*, 383 F.2d 466 (5th Cir. 1967), cert. denied, 390 U.S. 920 (1968); *Trailways of New England, Inc. v. Civil Aeronautics Bd.*, *Transcontinental Bus System, Inc. v. Civil Aeronautics Bd.*, 10 Av. Cas. 18,417 (1st Cir. 1969).

<sup>2</sup> The youth standby fare was 50% of the regular jet coach fare. Those airlines offering the Young Adult fare allowed a 33½% discount. See note 60, *infra* for current fares.

<sup>3</sup> The family fare discount is 25% off the regular coach or first class fares for the spouse or first accompanying minor child, with a 33½% discount offered for each accompanying minor child twelve through twenty-one, and a 50% discount for each child under twelve. Children under two fly free. These are the rates as of 1 October 1969. When the instant case was decided the discount was as much as 50% for children twelve through twenty-one, and 66⅔% discount for children two through eleven.

<sup>4</sup> Federal Aviation Act of 1958 § 1002, 72 Stat. 788, 49 U.S.C. § 1482 (1964). This section provides that "any person" may complain about "anything" done in violation of the Act.

<sup>5</sup> Family Fare Tariff Case, CAB Order E-26431 (1969); American Airlines Youth Fares, CAB Order E-23137 (1966), CAB Order E-23138 (1966) (Young Adult fares).

*Inc. v. Civil Aeronautics Board*<sup>6</sup> the court remanded the youth fares to the Board for investigation but held the military discount fares to be legal.<sup>7</sup> In *Trailways of New England, Inc., Transcontinental Bus System, Inc. v. Civil Aeronautics Board*<sup>8</sup> the court remanded the family fare for investigation. In both cases the courts held that the Board had abused its discretion by refusing to investigate those tariffs which appeared discriminatory on their face and where it could reasonably be believed that they were in violation of the Federal Aviation Act of 1958.

The *Family Fare Tariff Case*<sup>9</sup> was the most recent to be remanded. Since Board disposition of the family fare complaint was very similar to its holding as to youth fares, and the First Circuit decision in the *Trailways*<sup>10</sup> (family fare) case was based on the Fifth Circuit decision in *Transcontinental*<sup>11</sup> (youth fares), a pattern of judicial interpretation of the Board's discretionary power to refuse to investigate *prima facie* discriminatory fares seems to be developing. With primary emphasis on the family fare, this note will analyze some of the issues involved in Board policy toward discriminatory rate making.

Section 404(b) of the Federal Aviation Act of 1958 provides that there shall be no "unjust discrimination" nor undue and unreasonable prejudice or disadvantage "shown by an air carrier when making rates and providing services to the general public."<sup>12</sup> Like section 202(a) of the Interstate Commerce Act,<sup>13</sup> the model for section 404(b),<sup>14</sup> Congress has provided the airline industry with exceptions to the anti-discrimination policy.<sup>15</sup> It would appear then, that it was the intent of Congress to prohibit the airline industry from implementing any tariff which discriminated in favor of, or against, any class of persons other than those exceptions specifically provided by law. Unfortunately, however, congressional intent is not so clear. The Board has seen fit to allow certain discriminatory rates which could be justified when considered in the light of the public policy considerations outlined in the Declaration of Policy of the Act;<sup>16</sup> however, it has not been consistent when dealing with rate discrimination. The

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<sup>6</sup> *Transcontinental Bus System, Inc. v. Civil Aeronautics Bd.*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

<sup>7</sup> The military fares provided for a 50% discount on regular jet coach fares and are on a standby basis at the time this case was decided.

<sup>8</sup> *Trailways of New England, Inc. v. Civil Aeronautics Bd.*, 10 Av. Cas. 18, 417 (1st Cir. 1969).

<sup>9</sup> *The Family Fare Tariff Case*, CAB Order E-26431 (1969).

<sup>10</sup> *Trailways of New England, Inc. v. Civil Aeronautics Bd., Transcontinental Bus System, Inc. v. Same*, 10 Av. Cas. 18,417 (1st Cir. 1969).

<sup>11</sup> *Transcontinental Bus System, Inc. v. Civil Aeronautics Bd.*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

<sup>12</sup> Federal Aviation Act of 1958 § 404(b), 72 Stat. 760, 49 U.S.C. 1374(b) (1964).

<sup>13</sup> Interstate Commerce Act § 202(a), 58 Stat. 751, *as amended*, 70 Stat. 702 (1956), 49 U.S.C. § 22 (1964).

<sup>14</sup> The Federal Aviation Act was patterned after the Interstate Commerce Act. *Hearings on H.R. 5234 and H.R. 4652 Before the Committee on Interstate and Foreign Commerce*, 75th Cong., 1st Sess., at 21-23, 45 (1937).

<sup>15</sup> Federal Aviation Act of 1958 § 403(b), 72 Stat. 758, *as amended*, 74 Stat. 445, 49 U.S.C. § 1373 (1964). For an excellent discussion of the statutes involved in rate discrimination cases, see, *Federal Aviation Act—Interworkings of Sections 403 and 404—Military Standby Fares*, 32 J. AIR L. & COM. 571 (1966).

<sup>16</sup> Federal Aviation Act of 1958 § 102, 72 Stat. 740, 49 U.S.C. § 1302 (1964).

Board approved military standby fares,<sup>17</sup> and these were upheld by the courts on the theory that they were necessary to meet the needs of national defense.<sup>18</sup> Moreover, youth fares were approved by the Board,<sup>19</sup> while group student fares were not approved because the special group fares were limited to students only.<sup>20</sup> Likewise, teachers tariffs were held violative of section 404(b) because the Board could find no congressional approval or public policy reason sufficient to allow teachers a discount rate.<sup>21</sup> In reasoning that group excursion fares (in which groups, as small as two, were given a special rate) were "unjustly discriminatory," the Board remarked that:

We are not unmindful of the fact that the family-fare plan approaches the outer limits for which reduced fares may properly be approved under the "rule of equality;" but the social interest in the family will justify special fares which would otherwise contravene the rule.<sup>22</sup>

The courts are now requiring greater justification for discriminatory rates than social interest in the family;<sup>23</sup> no doubt the courts will also require Board adherence to an established criterion which, hopefully, will result in a more consistent policy toward discriminatory rate making. It is this judicial review of Board discretion, and those legal and economic transportation-related policies which the Board must consider when determining the justification for a discriminatory rate that will be the subject of the remainder of this note.

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<sup>17</sup> American Airlines, Military Fares, 38 C.A.B. 1038, authorized military standby fares on a temporary basis, they were extended in 1965; Proposed Military Standby Fares, CAB Docket Nos. 15925 *et. al.*, CAB Order No. E-22068 (1965).

<sup>18</sup> Transcontinental Bus System, Inc. v. Civil Aeronautics Bd., 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

<sup>19</sup> Youth Fares Proposed by Domestic Carriers, CAB Order No. E-17367 (25 Aug. 1961).

<sup>20</sup> Capital Group Students Fares, 25 C.A.B. 280 (1957). The tariff in this case provided reduced rates for student groups of 25 or more traveling between specific points on certain days. This proposed tariff was more restrictive, therefore, more "unlike" regular fares than is the youth fare, yet it was held discriminatory by the board because it was offered to students only.

<sup>21</sup> Frontier Teachers Tariff, 39 C.A.B. 615 (1964).

<sup>22</sup> Group Excursion Fares Investigation, 25 C.A.B. 44 at 47 (1957). The "rule of equality" has been applied in many cases and has been used to strike down fares which would give discounts to a certain class of passengers, or which would offer a discount and at the same time provide services not "unlike" those offered regular fare passengers. Airline Pass Agreement Case, 1 C.A.B. 675 (1940); Delta Airlines, Inc. Passenger Tariffs Suspension, 9 C.A.B. 368 (1948); Hawaiian Common Fares Case, 10 C.A.B. 921 (1960).

<sup>23</sup> The court in reviewing Board refusal to investigate youth fares, partly on the grounds that they were of social value, stated:

While Congress may delegate to an administrative body, under appropriate guidelines, the outward implementation and execution of a general social objective incorporated in a statute, an intent to commit such matters to the agency must appear either explicitly or by necessary implication in the enabling statute. We are unable to find such delegated authority which would enable the Board to consider social policy factors which are not incorporated in the Federal Aviation Act or which have not been deemed relevant in the course of the history of rate regulation in the transportation industry.

Transcontinental Bus System, Inc. v. Civil Aeronautics Bd., Transcontinental Bus System v. Civil Aeronautics Bd. (two cases), 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968). See note 15 *supra*, for the statutes which show Congress' regulation of social policy by providing for exceptions to the rule of equality.

## I. ADMINISTRATIVE DISCRETION

Section 1002 of the Federal Aviation Act provides that "any person" may file a complaint with the Board concerning anything in contravention of the Act, and that if there "shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or Board to investigate the matter complained of."<sup>24</sup> The statute goes on to say, however, "whenever the Administrator or Board is of the opinion that any complaint does not state facts which warrant an investigation, such complaint may be dismissed without hearing."<sup>25</sup> Because it is generally held that section 1002 (a) does not vest a compulsory duty to investigate (as required by a similar section in the Interstate Commerce Act)<sup>26</sup> the Board's discretion is clear; but that the courts will fully review the reasoning used in any Board action, to determine possible abuse of discretion, seems beyond doubt.

Section 1006 of the Federal Aviation Act provides statutory authorization for judicial review of Board decisions upon the petition by "any person disclosing a substantial interest in such order," with the broad power for the courts to affirm, deny, modify, or order further proceedings.<sup>27</sup> If the Board dismisses a complaint and that order is brought before a court, the courts feel compelled to examine the Board's findings to determine if they were based on sufficient evidence. The court will not "examine the subsequent rationalization of [the Board's] counsel,"<sup>28</sup> but will "judge the propriety of such action solely on the grounds invoked by the Agency. If . . . [the] grounds are inadequate, the court is powerless to affirm the administrative action. . . ."<sup>29</sup>

In reviewing the Board decision in the *Family Fare Tariff Case*,<sup>30</sup> the court stated: "If the reviewing court is to be more than a rubber stamp, standards for the Board's exercise of discretion must exist."<sup>31</sup> The court then proceeded to establish some standards. It explained that, although the Board had broad discretion when deciding what cases to investigate and the factors to be considered while judging the validity of rate discrimination, when a *prima facie* case of rate discrimination is presented, the Board must investigate it;<sup>32</sup> or in the alternative, the Board must take the affirmative burden of showing that the complaint should not be investigated, either for public policy reasons or because the discrimination was justified "in terms of established Board precedent or policy and the

<sup>24</sup> Federal Aviation Act of 1958 § 1002 (a), 72 Stat. 788, 49 U.S.C. § 1482 (1964).

<sup>25</sup> Federal Aviation Act of 1958 § 1002 (a), 72 Stat. 788, 49 U.S.C. § 1482 (1964).

<sup>26</sup> Interstate Commerce Act § 13 (1), 49 Stat. 543, 49 U.S.C. § 13 (1) (1935). It was held in *Nebraska Department of Aeronautics v. Civil Aeronautics Bd.*, 298 F.2d 286 (8th Cir. 1962), that the CAB has no compulsory duty to investigate, but may exercise its discretion under § 1002 (a).

<sup>27</sup> Federal Aviation Act of 1958 § 1006 (a), 72 Stat. 795, as amended, 75 Stat. 497, 49 U.S.C. § 1486 (1964).

<sup>28</sup> *Trailways of New England, Inc. v. Civil Aeronautics Bd.*, 10 Av. Cas. 18, 417 (1st Cir. 1969).

<sup>29</sup> *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 196 (1947).

<sup>30</sup> CAB Order E-26431 (1969).

<sup>31</sup> *Trailways of New England, Inc. v. Civil Aeronautics Bd.*, 10 Av. Cas. 18, 417 (1st Cir. 1969).

<sup>32</sup> *Flying Tiger Lines, Inc. v. Civil Aeronautics Bd.*, 350 F.2d 462 (D.C. Cir. 1965).

relevant facts."<sup>33</sup> This becomes even more important when the Board dismisses a complaint for lack of substantive merit. The court, in the family fare case, did not intend to replace administrative agency expertise but only demand that the Board explain why it dismissed the complaint and on what evidence the decision was based.

In the instant case, the court did not believe that the Board ever explained why rates founded on age and status were not unjustly discriminatory. The Board justified the "group fare" aspect of the family fare by declaring that the services offered the discount fare passenger were substantially "unlike" those offered regular fare passengers. This was a difficult position to defend, observed the court, especially in light of the Board's prior reasoning in the *Group Excursion Fares Case*.<sup>34</sup> Even if it could be found that the group rate was justified, the principal issue of limiting the group to families only was not answered to the satisfaction of the court. The Board presented five reasons for justifying the discriminatory rates in favor of the family: (1) Granting discrimination in favor of the family is a "time-honored" tradition. The court, however, cited two occasions when the Board recognized the questionability of family fares and started investigations, which were later dismissed.<sup>35</sup> It was believed that family fares were of doubtful tradition. (2) The airlines need the rate to meet intermodel competition. While this was recognized as a legitimate justification, there was no evidence offered to show any actual competitive need. (3) Efficiency is promoted by shifting the passenger load from peak to non-peak hours. Again, the court believed the reason was valid, but not supported with proof. It was also observed that the same argument could be made for allowing lower rates to anyone who would fly at the non-peak hours. (4) The fares would promote new traffic. (5) The family tariffs would stimulate competition among the air carriers resulting in better service at a lower fare. The court could find no reason why both of these objectives could not be realized if fare reductions were offered indiscriminately. In sum, the court objected to the Board's reasons on the ground that they were little more than "generalizations of principles unsupported by underlying facts."<sup>36</sup> Although the court was only reviewing a case where the Board refused to investigate a complaint containing *prima facie* evidence of rate discrimination, it must be remembered that the court may review *any* decision of the Board under section 1006, and will likely demand that *all* decisions be supported by substantial evidence based on specific criteria.

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<sup>33</sup> *Trailways of New England, Inc. v. Civil Aeronautics Bd., Transcontinental Bus System, Inc. v. Same*, 10 Av. Cas. 18, 417 (1st Cir. 1969).

<sup>34</sup> *Group Excursion Fares Investigation*, 25 C.A.B. 41 (1957); see note 22 *supra*, and accompanying text.

<sup>35</sup> CAB Order E-11867 (11 Oct. 1967), dismissed by CAB Order E-19121 (20 Dec. 1962). CAB Order E-20099 (16 Oct. 1963), dismissed by CAB Order E-21617 (28 Dec. 1964).

<sup>36</sup> *Trailways of New England, Inc. v. Civil Aeronautics Bd.*, 10 Av. Cas. 18, 417 (1st Cir. 1969).

## II. ISSUES NOW BEFORE THE BOARD

### A. Legal Issues—Discrimination

Even though a fare may be discriminatory it is not impossible to demonstrate that the fare is something other than "unjustly discriminatory." Several tests have proven successful in the past but the test most often used by the Board to determine the legality of an alleged discriminatory practice in whether the services offered special fare passengers were "like" or "unlike" that offered regular fare passengers under the same or similar circumstances. Such features as the standby requirement and "bumping" provision of military fares and some youth fares, and the fact that the fares are available only on certain days of the week and are not allowed at certain times of the year, have been cited as making the services "unlike."<sup>37</sup> The court in the family fare case analyzed the Board's application of the "like-unlike" test and was unimpressed with the Board's finding of "unlikeness."<sup>38</sup> The court held that even if the services were found to be unlike those offered regular fare passengers, it is because the fares are offered only to families, and not to any group in the traveling public, that they could not be justified by a finding of "unlikeness."<sup>38</sup> Most important, then, is the court's finding that unlikeness is irrelevant. The real concern of the courts is that the services offered under either the family fare plan or the youth fare plan are confined to an artificial class, based on age or status.

The Board has placed heavy emphasis on another aspect of some discriminatory fares—and the family fare in particular—its historical acceptability. The Board relied on the fact that the family fare had been offered by most air carriers for over twenty years, and stated:

The custom of granting fare concessions to families is so clearly embossed in tradition that it must be concluded that such fares are not in conflict with the anti-discrimination provisions of the Act.<sup>40</sup>

The court in both the family fare and youth fare cases, however, has held that whether or not it has been customary for the airline industry to offer special rates to youth, military personnel, or families, adds little to the argument favoring class discrimination. Although discrimination against the Negro was practiced by carriers for years, the age of this custom was of little concern to the courts who struck it down.

If the family fares are discriminatory, by whose authority could they

<sup>37</sup> American Airlines, Military Fares, 38 C.A.B. 1038 (1963); Summer Excursion Fares, 11 C.A.B. 218 (1950); Braniff Airways Excursion Fare Case, 12 C.A.B. 227 (1950).

<sup>38</sup> Trailways of New England, Inc. v. Civil Aeronautics Bd., 10 Av. Cas. 18,417 (1st Cir. 1969). The court observed: "Even assuming relevancy, the period of availability was 80% of the week for most local carriers, and it may be wondered how much of an inconvenience it is for a family to travel together to the same destination. In all other respects the service was exactly similar to normal service . . . Such inconveniences seem small compared with the substantial fare reduction."

<sup>39</sup> The Board held that a finding of unlikeness was enough to justify the lower fare but that more was needed to justify the fact that this service was offered only to the military and not civilian traffic. The fact that a reduced rate offered to military personnel was in the national interest, because of the moral factor, and that this tariff was needed to meet the competition of a similar tariff offered by surface carriers was cited as justification for discrimination in favor of the military. American Air Lines, Military Fares, 38 C.A.B. 1038 (1963).

<sup>40</sup> Trailways of New England, Inc. v. Civil Aeronautics Bd., 10 Av. Cas. 18,417 (1st Cir. 1969).

be authorized? It is always possible that Congress will make such fares legal if it could be proved that they are economically feasible and will relieve airport congestion at peak hours. Surface carriers were offering a reduced rate for the military prior to enactment of section 22 of the Interstate Commerce Act authorizing such tariff. Congress passed that provision to clarify what was considered a technical question of the legality of reduced rates.<sup>41</sup> Besides the free and reduced rate air transportation offered a limited class of individuals under section 403 (b) of the Federal Aviation Act,<sup>42</sup> Congress also felt it was necessary to amend the Act to provide for reduced fares for ministers on a standby basis;<sup>43</sup> yet Congress has not been fit to pass legislation providing for the discount fares offered the military, youth, families, and other groups. Several possibilities may explain Congress' inaction: Perhaps Congress did not think the provision was necessary; it may be that Congress did not want airlines competing with surface carriers for reduced rate traffic; or possibly the justice of discriminatory rates was doubted.

### B. *Economic Issues—Reasonableness*

Are promotional fares profitable to the airlines? Since this is the principal economic issue when deciding the reasonableness of a challenged tariff, a brief survey of the economic problems encountered when considering the economic justification of a discriminatory fare is necessary. It should be kept in mind that the Board and courts are facing two important problems. First, there are numerous "tests"<sup>44</sup> proposed by opposing sides to demonstrate the desirability of discount fares, each using the same statistics but applying them in different ways to show different results. Second, there is only a limited amount of information available to use in any analysis. The problems are made evident by the fact that everytime an air carrier has applied for a discount fare, several more carriers argue against Board approval on the grounds that such a fare is uneconomical. Consider Delta's attack on American's proposed military fare:

. . . [U]neconomical and thus unjust and unreasonable; that the proposed fares would divert traffic now covered at full fares; . . . and that any revenue loss from military traffic, which constitutes a large percentage of business of some carriers, would be most serious.<sup>45</sup>

American, however, predicted the military fares would gross 200 million dollars annually, and that diversion would be at a minimum since many

<sup>41</sup> Nebraska Department of Aeronautics v. Civil Aeronautics Bd., 298 F.2d 286 (8th Cir. 1962).

<sup>42</sup> Federal Aviation Act of 1958 § 403 (b), 72 Stat. 758, as amended, 74 Stat. 445, 49 U.S.C. § 1373 (1964).

<sup>43</sup> Act of Aug. 1, 1956, Pub. L. No. 84-865, 70 Stat. 784.

<sup>44</sup> Two such economic tests are the "fare-cost test," and the "profit-impact test." The "fare-cost test" measures the economic justifiability of the discount fare by its ability to cover the fully allocated cost of the traffic it attracts. Under the "profit-impact test," however, cost of transportation is not considered as important as the tariff's ability to "improve the net profit position of the carrier." The tariff then must be able to more than offset the revenue lost from the traffic diverted from regular fares. The "profit impact test" ("effect on profits test") was used by the board to justify the reasonableness of the family fare in the Family Fare Tariff Case, CAB Order E-26431.

<sup>45</sup> American Airlines, Military Fares, 38 C.A.B. 1038, 1039 (1963).



would want reservations anyway, and that the fares would fill otherwise empty seats.<sup>46</sup>

One economic justification merits close attention—that the discount fares would help fill seats which would otherwise be empty. The standby-space-available feature of such fares claims contribution to fix expenses and thus lower regular fares. It is possible, however, that such fares are so low<sup>47</sup> that they do not even cover the fully allocated costs and that full fare passengers are having to subsidize the discount tariffs (the fare-cost test<sup>48</sup>). It is also argued that the airlines are purchasing equipment and scheduling in anticipation of the promotional fare passenger.<sup>49</sup> This fact takes on added significance when one considers that while load factors have been decreasing since 1966, equipment purchases have continued at the same level.<sup>50</sup>

Whether or not the airlines are losing money by encouraging full fare passengers to fly at a discount rate should also be considered (the profit-impact test).<sup>51</sup> If such fares are not diverting full fare traffic significantly, as contended by many air carriers, what would be the argument against offering the same rate, on a standby basis, to the general public as a whole and not just a limited class? Moreover, still unanswered is the question of whether the more even distribution of traffic, or the generation of new traffic, which promotional fares should provide, reduces costs and increases earnings.

Another major consideration is whether the promotional fares are in the public interest. If such fares do not contribute to the financial stability of the airline industry, they are not in the public interest. Such fares, however, do cover at least some of the fixed costs, and also help to stimulate more traffic during off-peak hours so the airline can afford to provide off-peak service to the general public. It is also possible that promotional fares introduce many people to flying who will later become full fare passengers.

When considering the justification of discriminatory fares, the Board has consistently considered the airline industry as having characteristics of a public utility.<sup>52</sup> By such reference, the Board minimizes the importance of economic considerations when the fares are found to be con-

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<sup>46</sup> *Id.*

<sup>47</sup> See note 3 *supra*.

<sup>48</sup> See note 44 *supra*.

<sup>49</sup> 37 U.S.L.W. 2641 (1969); This argument was considered in an address by the Hon. John B. Crooker, Jr., Chairman of the Civil Aeronautics Board before the International Air Transportation Symposium at Stanford University, July 18, 1969, when he spoke on *Promotional Fares—Stimulus or Demon?*

<sup>50</sup> 37 U.S.L.W. 2641 (1969).

<sup>51</sup> See note 44 *supra*.

<sup>52</sup> *Tour Basing Fares*, 14 C.A.B. 257 (1951). In this case the Board said: "We cannot lose sight of the fact that the air carriers here involved are public utilities. And as a public utility, in return for the privileges of operating in a more limited competitive atmosphere as well as enjoying other benefits, an air carrier assumes certain obligations, one of which is the duty to provide service to all who request it on equally favorable terms." Limited competition due to air route franchising, government subsidies, and administrative rate controls, as well as the vital national interest in an economical and efficient air transport industry all serve to place the airlines within the definition of a public utility.

trary to the "rule of equality."<sup>53</sup> In the *Group Excursion Fares Case*,<sup>54</sup> the Board held that, even though it could be proved that the airlines would make more money by offering a discriminatory fare, thus requiring less subsidy from the government, it would not be sufficient justification for allowing discriminatory fares. In this case, the Board held that the cost savings as to groups as small as two did not justify the fare differential and departure from the rule of equality.<sup>55</sup>

In the *Tour Basing Fares Case*,<sup>56</sup> the Board spoke of economic considerations outside carriage factors. It was held that the consequence of direct competition from other modes of transportation did not in itself justify a discriminatory fare. The Board applied the public utility concept in this case but also held that, while competitive and promotional considerations are not normally justification in themselves, when the welfare of the airline industry was at stake, a departure from the rule of equality would be allowed. The Board stated this position in the *Free and Reduced-Rate Transportation Case*:<sup>57</sup>

We would permit departure from the "rule of equality," and thus validate a discriminatory fare, only when an extraordinarily important and serious business interest of the carrier or of air carriers generally was involved.<sup>58</sup>

In the future the Board may place more emphasis on freedom of management discretion. It was pointed out in the *Frontier Teacher Tariff Case*,<sup>59</sup> however, that management decisions relate only to carriage factors which are not the only factors to be considered when deciding the justifiability of discriminatory fares. Neither could such management freedom be so unrestricted as to allow the airlines to forget that they are a public utility and cause the Board to hesitate to enforce the statutory language of the Federal Aviation Act.

### III. CONCLUSION

In both the *Trailways* and *Transcontinental* cases the Board was shown that the courts will reject unsupported justifications for rates which are discriminatory on their face. The Board will very likely be more careful in the future to analyze fully and explain its conclusions regarding the justifiability of a discriminatory rate. As a more immediate step toward making the discriminatory rates less objectionable, and perhaps in an attempt to make the discriminatory rates more susceptible to economic justification, the Board has already approved the lowering of discounts for family and youth fares.<sup>60</sup> (These lower discounts for the family fare and

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<sup>53</sup> See note 22 *supra*, and accompanying text.

<sup>54</sup> *Group Excursion Fares Investigation*, 25 C.A.B. 41 (1957).

<sup>55</sup> See note 22 *supra*.

<sup>56</sup> *Tour Basing Fares Case*, 14 C.A.B. 257 (1951).

<sup>57</sup> *Free and Reduced-Rate Transportation Case*, 14 C.A.B. 481 (1951). See also *Frontier Teachers Tariff*, 39 C.A.B. 615 (1964); *Tour Basing Fares*, 14 C.A.B. 257 (1951); *Group Excursion Fares Investigation*, 25 C.A.B. 41 (1957).

<sup>58</sup> *Free and Reduced-Rate Transportation Case*, 14 C.A.B. 481 (1951).

<sup>59</sup> *Frontier Teachers Tariff*, 39 C.A.B. 615 (1964).

<sup>60</sup> For current family fare rates see note 3 *supra*. Most airlines offer a 20% discount off regular

youth fare took effect 1 October 1969.) Furthermore, it is possible that Congress may consider and even pass some sort of legislation regarding discount fares, possibly out of concern over the recent attacks on the tariffs and as a possible step toward the alleviation of airport congestion.<sup>61</sup> Proposals for such legislation might very well come from the Board itself; any action by Congress to clarify its position in this area would be helpful in formulating policy.<sup>62</sup>

Hopefully one of the results of an investigation into the legality and economic feasibility of the family fare will be the formulation of some clear and consistent criteria to be used to test the reasonableness of a discriminatory fare.<sup>63</sup> The criterion might well include some or all of the following:

- (1) Can the purpose of the promotional fare be accomplished just as well if offered to the general public?
- (2) Is the "time of use" aspect of promotional fares stressed?<sup>64</sup>
- (3) Does the discount fare at least meet direct costs and overhead expenses in order to maximize not only revenues but also profits?
- (4) Will such fares ultimately afford a basis for a reduction of the general fare level, or at least help to avoid an increase?
- (5) Do discount fares have a serious impact on the financial position of competitive intermodel transportation?

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coach fare for reserve youth fare, and some airlines offer a 40% for youth stand-by. A 50% discount is given military stand by, and a 33 1/3% discount for the military reserve fare.

<sup>61</sup> To provide lower rates at off-peak hours might provide a more even distribution of traffic by encouraging the public to travel at the unpopular hours.

<sup>62</sup> See notes 15, 42 and 43 *supra*, and accompanying text.

<sup>63</sup> After this note had already been printed, the latest Board decision regarding the youth and family fares was reported; Standby Youth Fares—Young Adult Fares, Docket No. 18936 (Order Serial No. 69-8-140), August 25, 1969. In this order the Board reviewed the hearing examiner's findings on youth fares and held that youth fare discrimination was justified provided they could be found to be economically reasonable. The youth fares were remanded for investigation of their reasonableness and were consolidated with the family fare investigation. The Board indicated a strong desire to keep the youth fare for "promotional" reasons; that is, they fill otherwise empty seats, encourage the young to get into the flying "habit," and enable the airlines to schedule flights at off-peak hours.

The Board held that discrimination in favor of those between 12 and 22 was not "offensive" or "invidious," and in the long run would benefit all of the traveling public. It was found that their "promotional" and "generative" value far outweighed their discriminative characteristic (especially in light of the declining load factors), and that the fares were considered necessary to meet the nation's present and future needs within the meaning of the Federal Aviation Act of 1958. § 102, 72 Stat. 740, 49 U.S.C. § 1302 (1964).

The investigation on the reasonableness of youth fares promises to resolve the issue of whether the airlines are scheduling and purchasing equipment in anticipation of all promotional fares, and whether the youth and family fares could meet the requirement of the profit-impact test.

<sup>64</sup> See note 61 *supra*.