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Aviation

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AVIATION

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INTERNATIONAL AIR TRANSPORTATION FAIR COMPETITIVE PRACTICES ACT OF 1974

On January 3, 1975 the International Air Transportation Fair Competitive Practices Act of 1974 was signed into law (P.L. 93-623). The enactment recognized the fact that United States air carriers operating in foreign air transportation perform services of vital importance to the foreign commerce of the United States (including its balance of payments), to the Postal Service, and to the national defense, and that such carriers have in some instances become subject to a variety of discriminatory and unfair competitive practices in their competition with certain foreign air carriers. Therefore, the new legislation provides, among other things, additional measures that may be utilized to eliminate discriminatory practices and excessive user charges in international air transportation and places additional responsibilities upon the Civil Aeronautics Board and other departments of the Government. Set forth below is a brief summary of the provisions of the Act.

Discriminatory and Unfair Competitive Practices

This section directs the Departments of State, Treasury, and Transportation, and the Civil Aeronautics Board, and other departments and agencies, to monitor all forms of discrimination or unfair competitive

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practices in foreign air transportation and to take appropriate action to eliminate such discriminatory practices. These departments and agencies are to request additional legislation as may be necessary to provide legal authority adequate to deal with such discriminatory or unfair practices. In addition, the Board is directed to report annually to the Congress concerning the specific actions taken to eliminate discrimination and unfair practices, and its continuing program for such elimination. The Secretaries of State, Transportation, and Treasury are directed to transmit to the Board data to facilitate the preparation of such a report.

International User Charges

This section directs the Secretary of Transportation to survey the airport and airway charges imposed upon U.S. air carriers and foreign entities in foreign air transportation and to determine whether these charges unreasonably exceed comparable charges for furnishing such service in the U.S. or are otherwise discriminatory. If found discriminatory, the Secretary is directed to promptly report such cases to the Secretary of State and the Civil Aeronautics Board who are directed to promptly initiate negotiations with the foreign country involved for the purpose of reducing or eliminating excessive charges or discrimination. If negotiations should prove unfruitful, the Secretary of the Treasury is directed to exact compensating charges equal to such excessive or discriminatory charges from the flag carriers of the country involved. The amounts so collected are to be deposited in a fund for the purpose of compensating U.S. carriers for excessive or discriminatory charges paid by them to the foreign country involved.

Mail Rates

This section directs the Secretary of State and the Postmaster General to oppose any mail rates higher than "fair and reasonable" for the carriage of mail in foreign air transportation. The Board is directed to act expeditiously on proposed changes in international mail rates, and in establishing such rates the Board is directed to employ these criteria: (a) current Universal Postal Union (U.P.U.) rates; (b) ratemaking elements considered by the U.P.U.; and (c) any competitive disadvantages to U.S. carriers resulting from foreign air carriers receipt of U.P.U. rates for the carriage of U.S. mail and their own national origin mail.

Government-Financed Passengers and Property

This section requires that the air transportation of persons and property paid for by U.S. funds shall be on U.S. flag carriers to the extent that service by such carriers is available, and that air transportation on a foreign flag carrier will not be paid for by U.S. funds in the absence of satisfactory proof of the necessity therefor.

Promotion of Travel on U.S. Carriers

This section requires encouragement to the maximum extent feasible of travel to and from the United States on U.S. flag carriers.

Observance of Tariffs by Ticket Agents

This section requires adherence to published tariffs and forbids domestic or foreign air carriers and ticket agents from refunding or remitting any part of the rates, fares, and charges so specified. It further provides that the Board shall have access to all lands, buildings, equipment, accounts, records, and memoranda of domestic and foreign air carriers and ticket agents, including all documents, papers, and correspondence of such entities.

Prohibition Against Rebates

This section requires adherence to published tariffs for air transportation of property by shippers and forbids them to solicit or accept a refund, remittance, or special favor not specified in the tariffs. It further fixes a fine of not less than \$100 nor more than \$500 for each offense constituting a solicitation or acceptance of a refund or remittance from the published tariffs for the air transportation of property.

INSTITUTIONAL CONTROL INVESTIGATION

The Civil Aeronautics Board has divided its *Institutional Control of Air Carriers Investigation* into two phases, has added 116 new parties, and dismissed four of the original parties. The Board has also denied petitions for reconsideration of the order instituting the case. The general purpose of the inquiry is to determine: (1) whether, and in what manner, equity holding financial institutions, aircraft lessors, and substantial credi-

tors may influence the managements of airlines, and in light thereof, whether any such persons, individually or jointly, control any airline within the meaning of Sec. 408(a)(5) of the Federal Aviation Act of 1958; (2) whether further adjudicatory action should be taken with regard to any control or interlocking relationships found to exist within the scope of 49 U.S.C. 1378 and 1379; (3) whether amendments to the Board's regulations are warranted by reason of the above matter; and (4) whether the Board should propose changes in the Federal Aviation Act or other statutory provisions of law.

In taking this action, the Board stated that it recognized that the case would be lengthy and complex, but that such fact was not a valid reason to avoid the investigation of matters of such potential importance to the regulation of the air transportation system as those which the case encompasses. The Board noted that allegations of control of air carriers by financial institutions raise issues that warrant a full and thorough investigation of the situation.

The Board added that it need not establish that a control relationship in fact exists before instituting an investigation to determine whether such control does or does not exist under the Board's discretionary right to investigate. Nor would it be necessary to establish the existence of "control" under the law to conclude that a financial institution has actually exercised control of an airline. Control, the Board said, "implies the existence of a right or power in the controlling party to direct or dominate the affairs of a company whether actually exercised or existing only in potential use." The Board observed that control "involves the act or the power of direction or domination under many and varied circumstances, and the controlling person need not direct or dominate all of the affairs of the controlled corporation."

The Board concluded that dividing the case into two phases, each with a separate decision, could best facilitate its progress without compromising on the development of a full and complete record "which would be essential to a careful consideration and definitive resolution of the issues presented." The Board stated that the two phases would be tried serially.

PHASE I

This phase of the proceeding will develop the facts needed to identify on a current, prospective, and historical basis, each of the relationships,

direct and indirect, existing among the certificate carriers and financial institutions (including the parents and affiliates of either.) It will also develop information necessary to understand the nature and extent of the relationships identified; the underlying carrier and industry conditions giving rise to such relationships, and other information which the administrative law judge shall deem necessary to selection of the relationships which Phase II will examine definitively. Phase I will also consider whether amendments or additions to current Board reporting requirements should be adopted and whether additional legislation is needed to authorize the Board to obtain any further reports which should be required.

PHASE II

This phase of the proceeding will decide the remaining issues specified in the original order instituting the case, including whether and in what manner financial institutions may influence the managements of airlines; whether any such persons (individually or jointly) may or do control any carrier within the meaning of the Federal Aviation Act of 1958; whether and what further adjudicatory action should be taken with regard to any control or interlocking relationships found to exist, or which the evidence indicates are likely to exist under the Act; and what further amendments or changes, if any, to Board regulations, the Federal Aviation Act, or other statutory provisions are warranted by reason of such findings.

SAFETY

The National Transportation Safety Board (NTSB) has released a preliminary report on U.S. civil aviation safety statistics indicating that 1974 was the worst year for fatalities in commercial aviation since 1960. Comparing 1974 air carrier operations with the previous year, the NTSB stated that the total number of accidents increased, the number of fatal accidents remained the same, but the number of fatalities more than doubled. With respect to general aviation, such comparison indicates that while the total number of accidents increased, the number of fatal accidents and the number of fatalities both decreased.

Air Carrier Operations

U.S. air carriers in 1974 had forty-seven total accidents compared to forty-three in 1973 with fatal accidents remaining constant at nine in both

years. However, fatalities increased from 227 in 1973 to 467 in 1974, representing the largest number of fatal injuries in a single year since 1960 when 499 fatalities occurred. Ratewise, in air carrier operations, with flight hours down in 1974 compared to 1973, the "total accident rate" per 100,000 aircraft-hours flown increased from 0.661 in 1973 to 0.779 in 1974 and the "fatal accident rate" increased from 0.138 during 1973 to 0.149 in 1974.

Three of the nine air carrier accidents occurred outside the United States: in Pago Pago, American Samoa; Island of Bali, Republic of Indonesia; and in the Ionian Sea near Athens, Greece. Five of the nine fatal accidents accounted for 454 of the 467 fatalities. These five accidents were the three mentioned above plus two in domestic operations: one at Charlotte, North Carolina and the other at Berryville, Virginia. The NTSB pointed out, however, that one of the nine fatal accidents recorded in 1974, while necessary to report, did not involve any aeronautic failure but occurred when an infant passenger was strangled by a seat belt.

During the eleven-year period 1964-74, the total number of accidents in all operations in U.S. air carrier aviation had a generally decreasing trend with a high of eighty-three accidents in 1965 to a low of forty-three accidents in 1973. The report shows that the same is true in terms of accident rates—starting with a high of 1.809 accidents per 100,000 aircraft-hours flown in 1964 decreasing to a low of 0.661 per aircraft-hours flown in 1973. The NTSB observed that the number of fatal accidents from year to year has shown relatively slight deviation with a high of fifteen in 1968 and a low of eight in 1966, 1970, 1971, and 1972 and nine each for the past two years. The fatal accident rate generally had a decreasing trend from 1964 to 1971, with a high of 0.278 per 100,000 aircraft-hours flown during 1964 to a low of 0.094 in 1971. However, the report indicates that the fatal accident rate had increased each year for the past three years to 0.127, 0.138, and 0.149 in 1972, 1973, and 1974, respectively.

In scheduled passenger service only, the certificated airlines carried 202.2 million passengers in 1973 and 204.6 million in 1974. However, the estimated passenger miles flown decreased from 171.4 billion in 1973 to 163.9 billion in 1974. Total accidents increased from thirty-two in 1973 to forty-one in 1974; at the same time, fatal accidents increased from six to seven, and passenger fatalities more than doubled: 197 in 1973 to 420 in 1974. With the increase in passenger fatalities and decrease

in passenger miles flown, the corresponding passenger fatality rate per 100 million passenger miles flown increased from 0.115 in 1973 to 0.256 in 1974, which is the highest rate since 1965.

General Aviation Operations

The report states that in U.S. general aviation in 1974, there were 4,362 total accidents compared to 4,251 in 1973, the first such increase since 1967. At the same time, however, fatal accidents decreased from 722 in 1973 to 653 in 1974, the lowest number since 1970. Fatalities decreased from 1,411 in 1973 to 1,290 in 1974, the lowest since 1966. Ratewise, with a slight increase over 1973 hours flown, general aviation figures for 1974 show the "total accident rate" per 100,000 aircraft-hours flown decreased from 14.1 in 1973 to 14.0 in 1974. At the same time, however, the "fatal accident rate" per 100,000 aircraft-hours flown in general aviation dropped from 2.40 in 1973 to 2.09 in 1974. It was noted that both the total and fatal accident rates in general aviation are the lowest recorded as far back as 1946.

The NTSB report indicates that in general aviation since 1968, the total number of accidents had a decreasing trend, with a high of 4,968 accidents in 1968 and a low of 4,251 in 1973. Likewise, the accident rate per 100,000 aircraft-hours flown had a decreasing trend, starting at 20.6 in 1968 and decreasing to a low of 14.0 in 1974. The number of fatal accidents since 1968 has fluctuated up and down starting with 692 in 1968, decreasing to a low of 641 in 1970, increasing to a high of 722 in 1973, and decreasing again to 653 in 1974. Similarly, the fatal accident rates have fluctuated starting with 2.86 per 100,000 aircraft-hours flown in 1968 and dropping to 2.09 per 100,000 aircraft-hours flown in 1974. The report indicates that the ratio of fatal accidents to total accidents increased during the period 1970 through 1973, but that the trend was reversed in 1974 when total accidents increased and fatal accidents decreased.

EMERGENCY EVACUATION

The National Transportation Safety Board (NTSB) has completed a special study of air carrier accidents involving emergency evacuation and has determined that serious problems exist which merit further safety studies and corrective actions. The study included case histories of ten accidents and has resulted in the NTSB's recommending a number of

measures to the Federal Aviation Administration (FAA) intended to alleviate the problems that were detected in the study. Although the study did not include means of preventing or retarding post-crash fire, it recognized the necessity of rapid evacuation in such accidents. In this connection, the NTSB reiterated its 1973 recommendation that would require brighter emergency cabin lighting to facilitate passenger guidance to emergency exits.

The special emergency evacuation study made findings in five categories as set forth below:

Evacuation Slides — It was found that slide failures are not reported, thus their reliability cannot be exactly determined. Past accident experience indicates, however, that failures occur frequently limiting exit usability. Many older airliners have slides which deploy automatically but must be inflated manually (a time-consuming process), while fully automatic slides provide a usable exit almost immediately. Slides on wide-body airliners can become near vertical when the aircraft is nose or tail-high; use of such slides caused eight serious and nineteen minor injuries in one case.

Exterior Emergency Lighting — The study was found that existing systems activate only when main aircraft power is interrupted. Therefore, because normal power may continue, leaving emergency lights out or requiring a switch to emergency power, a more reliable system should be employed that would be activated by door opening in the emergency mode.

Emergency Communications — It was determined that currently required portable megaphones are stowed in rather inconspicuous and inaccessible locations in the passenger cabins and were not used in any of the ten accident cases studied. Many are large, heavy, and cumbersome to handle in a crowded cabin. Public address systems often are used when they remain operable. Whatever is used, a concise evacuation order is essential, and reliable communication during the evacuation is important.

Passenger Safety Information — It was found that evacuated passengers often say they needed more advance information, yet cannot recall the pre-takeoff briefing and had not read the safety information card. Study of one of the ten cases suggests that passengers who were not attentive to safety information were much more susceptible to being injured during an evacuation. Although the NTSB in 1972 urged both government and industry to improve passenger safety information, there still exists a need for upgraded and standardized requirements.

Crewmember Emergency Training—It was found that crew performance has a great potential for causing problems during evacuations, and several of the ten cases suggest that current crewmember emergency training may be inadequate. Some airlines rely more on audio-visual demonstrations than on actual hands-on training. More realistic initial and continuous training would significantly increase survival and reduce injuries.

As a result of the NTSB's study of emergency evacuation of commercial airliners, the agency recommended that FAA take the following actions:

(1) Require air carriers to report to it all emergency evacuation slide deployments, failures, and malfunctions;

(2) Develop a maintenance surveillance program to insure greater reliability of emergency evacuation slide systems;

(3) Require that slides be long enough to reach the ground at a safe angle in a landing gear collapse, and set a reasonable deadline for installation of such new slides;

(4) Require, after a reasonable date, that slides on all floor-level exits inflate automatically on deployment;

(5) Require, after a reasonable date, that exterior emergency lighting activate automatically on emergency opening of exits;

(6) Require air carriers to assign flight attendant responsibility for megaphone use during evacuation, and relocate such equipment within easy reach of the assigned attendant's seat. Consideration should be given to installation of new, compact, lightweight megaphones;

(7) Require, after a reasonable date, that public address systems be capable of operating on a power source independent of the main aircraft power supply;

(8) Require that passengers be warned during pre-takeoff briefing how important it is that they understand how to use emergency exits;

(9) Issue an advisory circular giving the airline industry standardized guidance on effective presentation of safety information to passengers; and

(10) Eliminate an existing regulatory provision permitting air carriers to use only demonstrations to train crewmembers for certain emergencies, thus requiring drills in operation and use of emergency exits.

PAN AM-TWA AGREEMENT

The Civil Aeronautics Board has unanimously approved an agreement between Pan American World Airways and Trans World Airlines thereby authorizing various mutual suspensions on their Pacific and transatlantic route systems. In addition, each carrier will receive certain new authority by temporary exemptions from certain provisions of the Federal Aviation Act that would otherwise prohibit proposed operations. The approval is effective for a period of two years or until ninety days after the final Board decision in the *Transatlantic Route Proceeding*, whichever occurs first.

The carriers originally filed their route transfer and suspension agreement late last year requesting expeditious processing by the Board. However, the Board ruled that the filing did not permit positive Board action of any kind and urged the parties to file for suspension and route modification authority that could be considered through the use of the Board's nonhearing procedures. The parties' second agreement received the Board's expeditious approval.

In approving the agreement, the Board observed that the financial deterioration of the two carriers, brought on at least in part by traffic and cost conditions beyond their control, demanded immediate regulatory action, and, that under the circumstances presented, the Board's extraordinary exemption powers should be employed. In this regard, the Board estimated that the agreement would produce net operating gains of between \$17 million and \$24.2 million for Pan Am and between \$16 million and \$25.4 million for TWA in the first year of its effectiveness. These forecasts are in stark contrast to the combined system losses of over \$111 million for the year ended September 30, 1974.

Although Pan Am's primary benefits will come in the Pacific where TWA's duplicative service will be eliminated, Pan Am will also benefit greatly from the additional revenues resulting from the Board's grant of exemption authority to serve Taipei and Okinawa. The Board recognized that while implementation of the agreement would have a net adverse impact upon Pan Am's Atlantic Division, the European suspensions were an important part of the entire agreement. TWA's greatest improvements will be in Europe where Pan Am's service at Paris and between Los Angeles and London will be eliminated. Also expected to benefit TWA is the Board's grant of exemption authority allowing TWA service in the U.S. Iberian markets where Pan Am's service was suspended. The Board noted that while TWA's temporary suspension at Frankfurt, Germany and in the

Pacific will, by that carrier's estimate, result in a net decrease in revenues for TWA in 1975, the adverse impact would be more than outweighed by improvements made possible by other provisions of the agreement.

Stressing the view that it considered the agreement as only the first of many self-help programs that it expects the two carriers to devise to improve their financial positions, the Board indicated that the two airlines should immediately consider other cost-saving programs such as unilateral suspension of unprofitable routes, reduction of overall levels of operations, reductions in operating expenses through austerity measures, reduction of capital expenditures, the sale of aircraft and other assets, and other route restructuring proposals. The Board also cautioned the carriers against trying to redistribute aircraft capacity, which the agreement will release, into other areas which already receive substantial U.S.-flag capacity such as the charter market.

Answering Department of Justice arguments in opposition to the agreement, the Board stated that the gravity of the financial situation confronting Pan American and TWA (the two largest U.S. international competitors) required that immediate emergency route-related action be taken to provide short-term economic relief to avoid substantial disruption of their international services. In this connection, the Board noted that such a disruption could foreshadow the virtual termination of all U.S.-flag competition in the affected international markets, but that the benefits which Pan Am and TWA would reap from the Board's action should, in the long run, preserve U.S.-flag competition.

Although the Board imposed no labor protective provisions on the agreement, it directed the applicants and interested labor parties to file further pleadings giving detailed estimates of the impact of the agreement, by station, on each class of employees of each carrier, and the financial impact on the applicants which might result from the imposition of standard labor protective provisions. The Board also instructed the parties to address the possibility of tailoring the standard labor protective provisions normally imposed in merger cases to fit the scope of the subject agreement, including the possible use of labor protective guidelines.

FUEL MATTERS

Fuel Related Fare Increases

The Civil Aeronautics Board has approved International Air Transport Association (IATA) agreements providing for fuel-related fare in-

creases of four to eight percent in U.S.-Caribbean and U.S.-Central/South America markets and has disapproved proposed increases in U.S. west coast-Mexico fares, noting that Western Air Lines, the only U.S. carrier offering direct service in those markets, was experiencing profitable results in its operations. The Board had deferred action on the agreements late last year pending receipt of additional justification from the carriers.

The Board's approval was based upon additional information provided by the carriers which set forth legitimate cost increases and overall rate of return forecasts for 1975. The Board stated that the information, as adjusted to comport with other data periodically reported, indicated that in none of the ratemaking areas (other than the U.S. west coast-Mexico markets) will the U.S. carriers experience a return on investment of more than twelve percent on a composite basis. In addition, the Board concluded that further increases would not be warranted in the Mexico and Central/South America markets for the remainder of the year.

Carrier Discussions Authorized

In response to a joint application of eleven domestic airlines, the Civil Aeronautics Board has authorized discussions among U.S. and foreign airlines that may lead to a possible re-examination of the traditional methods of doing business between airlines and their fuel suppliers.

The carriers requesting the Board's authorization to hold discussions expressed great concern over the long-term impact of fuel prices on their cost of doing business and stated that the recent fuel shortage seemed to have triggered fundamental and possibly permanent changes in the relationships between airlines and their fuel suppliers. The applicants also claimed that some suppliers had sought to modify existing fuel contracts unilaterally or to negotiate changes that heavily favor the suppliers. It was also noted by the carriers that there were indications that in new contract negotiations fuel suppliers were not only demanding substantially higher prices, but also terms and conditions that appear onerous if not totally unreasonable. The carriers also stated their belief that the fuel situation was serious enough to explore possible methods of collective action looking toward the preservation of a reasonable balance of bargaining rights with respect to future contracts. Contemplated by the carriers is the possible retention of a joint staff of experts to assist in the purchasing of fuel or a system of joint bargaining.

In granting its approval of the carrier discussions, the Board noted the potential threat of further disruption of fuel supplies resulting from increased instability in the fuel-producing areas of the world. In this connection, the Board observed that the recent controversy among the major petroleum exporting countries regarding price and supply policies was being compounded by the pricing policies of major fuel suppliers. The Board also recognized the fact that precipitous price increases, as well as a shortfall in fuel supplies, had presented serious problems not only to the carriers but also to the traveling public both through fuel-related fare increases as noted above and through reductions in frequencies.

Concluding that the carriers should have an opportunity to conduct discussions concerning the fuel problems mentioned above, the Board stated that it was not yet prepared to reach any determination as to whether any agreements arising from the discussions would be consistent with the public interest.

STRATOSPHERIC POLLUTION BY SST AIRCRAFT

The United States Department of Transportation (DOT) has completed a three-year study concerning the effects of stratospheric pollution by aircraft upon the earth's atmosphere. The study was conducted by DOT's Climatic Impact Assessment Program (CIAP). In conducting the investigation, CIAP drew upon the resources of many federal departments and agencies with numerous investigators from many universities and other organizations in the U.S. and abroad assisting the effort.

The study resulted in the formulation of two major conclusions: (1) operations of present-day supersonic transport aircraft, together with those currently scheduled to enter service (approximately sixteen Anglo-French Concorde's and fourteen Soviet TU-144's), will cause climatic effects far less than those minimally detectable; and (2) any future harmful effects can be avoided if proper measures are taken to develop new engine technology leading to lower levels of nitrogen oxide emissions and the use of fuels having a lower sulphur content.

The report defined the minimal detectable change as the smallest changes, due to all causes, in annual average total ozone that could be discerned from ten years of daily global monitoring by satellites, aircraft, balloons, and ground stations. The minimally detectable change in global mean ozone is estimated to be 0.5%. In this connection, the report noted

that it would require some 125 Concordes flying four and one-half hours or more daily to reach the minimally detectable level change in the quantity of ozone in the earth's atmosphere.

The study indicated that the concentration of nitrogen oxide in the atmosphere affects the quantity of ultraviolet rays reaching the earth's surface. Likewise, it was noted that heavy concentrations of sulphur dioxide could increase the aerosol layer of the stratosphere thereby affecting the quantity of visible radiation reaching the earth. While a decrease in ultraviolet radiation could result in a salutary effect upon the environment (decrease in incidence of skin cancer), a decrease in the quantity of visible radiation could lower the earth's surface temperature resulting in harmful effects upon agriculture and forestry. In this connection, it was concluded that such concentrations could be controlled by limiting their injection into the atmosphere by the use of improved technology, by restricting the numbers and frequency of high-altitude aircraft, or by a combination of both methods.

The report also concluded that a continuous atmospheric monitoring and research program should be initiated to determine whether the atmospheric quality of the earth is being maintained. In response to this recommendation, the Federal Aviation Administration has announced that it will conduct a continuing program to determine the effects on the earth's environment of high-altitude aircraft as a part of its total environmental program. It is believed that such a study could further reduce uncertainties in current scientific knowledge, ascertain whether atmospheric quality is being maintained, provide guidance for decisions concerning regulatory actions, and minimize the cost of providing any required environmental safeguards.

The FAA has indicated that it believes that any regulatory action to prohibit stratospheric pollution would be ineffective unless accomplished by all nations operating high-altitude aircraft. In this regard, the agency intends that the program now being undertaken will facilitate the development of a program leading to international policy.

AIR TRAVEL CLUBS

Since the Civil Aeronautics Board continues to receive a large number of inquiries concerning the operations of air travel clubs and the regulatory policies of the federal government as applied to such entities, the

Board has made available information regarding air travel clubs that may be helpful to the public. The specifics of the Board's statement is set forth below:

The Federal Aviation Act requires a license from the Board before one may engage lawfully in "common carriage" by air. Essentially, common carriage means a holding out of transportation services to the general public in return for the payment of compensation. Since none of the air travel clubs (there are approximately 30 such clubs) has such a license, the legality of a given club's operations depends upon whether that club is engaging in common carriage. This, in turn, depends upon all of the details of the club's method of operating.

There have been three proceedings before the Board involving the legality of air travel club operations, two of which have been finally decided by the Board. The first was a proceeding against Voyager 1000. After full evidentiary hearings, the Board determined that Voyager was engaged in common carriage and hence was operating in violation of the Act. In reaching that conclusion, the Board began with the stipulated fact that Voyager's services were advertised extensively to the public. The Board observed that a person responding to the public solicitation had to become a Voyager member before he could take a flight, and that this required a financial outlay in the form of an initiation fee and dues, over and above the fare charged by Voyager for a particular trip. The Board's view, however, was that acceptance of those labels would ignore reality because: (1) membership and the immediate right to take any trip of one's choice was offered to the public at large; (2) admission to membership was automatic upon payment of the fees (there being no screening of applicants for membership); and (3) fees were relatively insignificant, particularly when compared to the fare bargains they made possible.

Voyager appealed the Board's decision to the United States Court of Appeals for the Seventh Circuit. In November 1973, the Court sustained the Board's order, finding the Board's determination that the club was engaged in common carriage to be supported by "substantial evidence and a reasonable basis in law." *Voyager 1000 v. Civil Aeronautics Board*, 489 F.2d 792 (C.A. 7, 1973). The Supreme Court, on May 13, 1974, denied Voyager's petition for certiorari.

The second Board proceeding was against Aeronauts International Travel Club. After a full evidentiary hearing, an administrative law judge determined that the club was engaged in common carriage and hence was operating in violation of the Act. In that case, the club did not seek Board

review of the administrative law judge's decision, and the Board's order running against it automatically went into effect. However, three individual officers of the club requested Board review. The case is now pending before the Board.

The third case was against Club International, Inc., now known as Air Club International. Again, after full evidentiary hearings, the Board concluded that Club International was engaged in common carriage in violation of the Act. Essentially, the Board found that the club's operations were patterned on those involved in the *Voyager* case and were indistinguishable from *Voyager's* in any material respect. Thus, Club International indiscriminately solicited every member of the public (for a small fee and with no screening) to take advantage of its transportation service at savings far exceeding the membership charge. The Board rejected the club's principal defense which was, in effect, that the Board was precluded from taking action against Club International, or air travel clubs in general, because it had not taken earlier action against Club International but rather had allowed those clubs holding safety authority under Part 123 of the Federal Aviation Regulations to institute and continue their activities with knowledge of those activities. As the Board stated, and as the Federal Aviation Administration (FAA) itself has recognized, it is the Board, not the FAA, which is the responsible agency for determining issues — such as what constitutes common carriage — arising under those provisions of the Act which it administers. Club International has appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit.

The Board's statement points out that the institution of the aforementioned proceedings and their disposition in no way reflects any intent on the part of the agency to harass air travel clubs; that the law requires a license to engage in common carriage by air; and that the Board has the duty to enforce that law. That is all that has been or will be done.

It has sometimes been suggested that the Board should promulgate regulations defining the permissible limit of air travel club activities, that is, stating when a club would be considered a common carrier. Such a suggestion was considered by the Board in its *Voyager* opinion and rejected. The basic legal elements of common carriage being clear, it was the Board's view that a case-by-case application of such standards is the only proper way to test whether the activities involved constitute common carriage. This undoubtedly results in uncertainties for a club, but unfortunately the question is simply not the sort which the Board believes can be answered by application of a precise regulatory formula. The

Board's view that it should not attempt to define the permissible limits of the activity other than in terms of common carriage was challenged as legal error in Voyager's appeal from the Board's order. The Court sustained the Board.

Finally, the Board's statement notes that air travel clubs occasionally experience difficulties when seeking to land at foreign airports. The difficulties appear to stem from a belief on the part of foreign officials that at least some of the clubs are operating what some foreign officials consider to be charters and, therefore, should apply for permission to land in the same way as supplemental air carriers certified by the Board. The question of whether a particular air travel club is in fact a common carrier thus has relevance to its possible rights, as a private club, to make flights into a transit foreign territory in accordance with Art. 5 of the Chicago Convention. Art. 5 provides, in pertinent part, that each contracting state will permit all aircraft not engaged in scheduled international air services to make flights into or in transit nonstop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission. When a problem of this sort arises, the Board's position is limited to that of providing assistance to the Department of State which is responsible for dealing directly with the foreign government involved and, in so assisting, unless a final determination has been made as to the nature of a particular club's operations, the Board has cautioned against making any definite representations to the foreign government concerning a club's status.

TRANSPORTATION SAFETY ACT OF 1974

On January 3, 1975 the Transportation Safety Act of 1974 was signed into law (PL 93-633). Among other things, the enactment established the National Transportation Safety Board (NTSB) as a totally independent agency of the United States as of April 1, 1975. The Board is to consist of five members appointed by the President, by and with the advice and consent of the Senate. No more than three members of the Board are to be of the same political party, and two such members are to be appointed upon the basis of technical qualifications and professional standing in the field of accident reconstruction, safety engineering, or transportation safety.

The legislative history of the measure indicates that the Congress was concerned about the NTSB's relationship to the Department of Transportation (DOT). The Senate amendment recommending the NTSB's independ-

ence observed that, although the NTSB was established in 1966 (49 U.S.C. 1654) as an independent governmental agency, its position as a subordinate agency within DOT inhibited its ability to effectively perform the functions for which it was designed. Since the Board's investigations concern other government agencies and since some of its determinations could contain severe criticism of such agencies, the Senate amendment expressed the view that the agency would best serve the nation and fulfill its role if it were a totally separate and independent agency. The conference committee reporting on the legislation adopted the provisions of the Senate amendment.

The new legislation also amended the Hazardous Materials Transportation Control Act of 1970 so as to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials. The measure provides, among other things, that the Secretary shall issue regulations regarding the transportation of radioactive materials on any passenger-carrying aircraft. Such regulations are to prohibit any such transportation unless the radioactive materials involved are intended for use in, or incident to, research, or medical diagnosis or treatment and are packaged in such a manner that they do not pose an unreasonable hazard to health and safety. It should be noted that the Administrator of the Federal Aviation Administration has been delegated the authority vested in the Secretary by P.L. 93-633 with respect to the transportation of radioactive materials on passenger-carrying aircraft and will be expected to establish procedures for monitoring and enforcing applicable regulations.

RECENT U.S. CASE LAW

Air Line Pilots Association, Int'l. v. Civil Aeronautics Board, C.A.D.C. Nos. 73-1828, 1874 (1975)

This proceeding before the United States Court of Appeals for the District of Columbia Circuit involved a petition for review of an order of the Civil Aeronautics Board granting interim approval of a capacity reduction agreement between three trunk airlines. The agreement provided for mutual reductions in the number of flights operated by those air carriers in certain long-haul markets.

The petitioner made several arguments in opposition to the Board's interim approval. It was contended by ALPA that the Board should not

have granted interim approval of the capacity reduction agreement without holding an evidentiary hearing to determine whether the antitrust implications of the agreement were outweighed by public interest considerations; that the Board should have imposed labor protective arrangements as a condition for interim approval of the agreement; and that the cost savings to the carriers that were to flow from the decrease in capacity were not in the public interest because they increased the agreement carriers' profits.

The Court rejected ALPA's arguments and affirmed the Board's order. The Court, reiterating its finding in a similar case, stated that there was no statutory requirement that the Board hold a hearing in such a case, and that the Board should have a degree of latitude in determining whether a full evidentiary hearing would be necessary in a given case. The Court noted, that there was however, a hearing requirement in cases involving a substantial and material issue of fact or where the absence of a hearing would deprive the Board of sufficient information upon which to render a rational decision. The Court concluded that the Board's action was justified in light of the substantial fuel and cost savings; that the Board did not abuse its discretion; and that interim approval was sufficiently supported by the evidence.

With respect to the issue of labor protective conditions, the Court found no fault with the Board's determination that no labor protective conditions should be imposed. In so holding, the Court noted the Board's prior policy of limiting the application of labor protective conditions to agreements involving substantial employee dislocations (e.g., mergers), and pointed out that the Board had given adequate consideration to the need for the imposition of labor protective conditions. The Court clearly indicated that its disposition was not intended to limit in any way the Board's discretion to reconsider and reverse its earlier position and impose labor conditions as a prerequisite to continued approval. The Court expressed its approval of the Board's practice of retaining jurisdiction over such agreements, and indicated that the Board should not hesitate to reconsider such decisions in cases where there may have been a substantial change in circumstances.

Air Europe International, S.A. v. Robert D. Timm, 13 *Avi.* 17,434 (1974)

This proceeding was before the U.S. Court of Appeals for the District of Columbia on a motion to dismiss. The plaintiff was a Luxembourg

corporation that was promoting the operation of a Luxembourg-Tijuana, Mexico, air passenger service, and the defendants were the five members of the Civil Aeronautics Board. The plaintiff had alleged that employees of the defendants had made statements to the press which were intended to and did in fact create the false impression that the plaintiff's air transportation service was illegal, that the Board had officially decided that the plaintiff's operations was in violation of some provision of United States law, and that the Board had officially decided to terminate the plaintiff's air transportation service. The plaintiff had also alleged that the complained of statements to the press were false, that plaintiff's proposed operations were not illegal, and that the "leaked" statements had damaged the plaintiff to the extent that it was necessary to discontinue its sales efforts and postpone the inauguration of its service. However, the plaintiff did not allege that the defendants or any of them made any of the statements which were complained of or that such statements were official Board action.

While expressing sympathy for the plaintiff's claim, the Court dismissed the complaint for failure to state a claim upon which relief could be granted, and for lack of a case or controversy pursuant to Article III of the United States Constitution.

The Court noted that Air Europe's proposed operation consisted primarily of transporting U.S. residents to Europe and return, and was apparently designed to circumvent the economic regulatory authority of the Board pursuant to the Federal Aviation Act of 1958 (49 U.S.C. 1301 *et seq.*). The plaintiff had complied with the safety requirements of the Federal Aviation Administration, and there was no showing that it was in violation of any U.S. law or regulation. The evidence indicated that the plaintiff had been successful in avoiding the economic jurisdiction of the Board. Nevertheless, it was the plaintiff's position that the Board, through "leaks" to newspapers and the trade press, had done indirectly what it could not do officially, that is, prevent the inauguration of Air Europe's service. The Court agreed that the statements complained of may have contributed to the plaintiff's inability to inaugurate service, since, taken as a whole, the statements in the press indicated that official proscription of the plaintiff's proposed operations was imminent and that the Luxembourg-Tijuana operation, if not illegal, was unethical and would be stopped by whatever means necessary.

While indicating its displeasure with the tactics pursued by the staff members of the Board, the Court granted the motion to dismiss. In so

holding, the court pointed out that the plaintiff had sought not only to preclude interference with its operation by statements from Board sources of the type described, but had also sought to obtain a judicial declaration that the Board had no jurisdiction over Air Europe's proposed operation. This the Court could not do. Concluding that such relief had no basis in the plaintiff's allegations, the court pointed out that in order to overcome a motion to dismiss, there must be an allegation of agency action adverse to the plaintiff (see Sec. 10(a) and (c) of the Administrative Procedure Act, 5 U.S.C. 702 and 704). In this regard, the court noted that there had been no such action by the Board with respect to the question of its jurisdiction over Air Europe's proposed operation.

Williams v. Trans World Airlines, 13 Avi. 17,482 (1974)

This proceeding arose from the refusal of an air carrier to transport a passenger who was the holder of a valid and confirmed ticket for air transportation between London and Detroit. The U.S. District Court, Southern District of New York, held that the defendant air carrier was well within its right in refusing transportation to the plaintiff pursuant to Sec. 1111 of the Federal Aviation Act, and that the defendant's refusal was not, under the circumstances presented, arbitrary or unreasonable, nor did it subject the plaintiff to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever as proscribed by Sec. 404(b) of the Federal Aviation Act.

The plaintiff had fled the United States in the early 1960's to avoid prosecution on a kidnapping charge and had traveled abroad for a number of years including trips to Cuba, Communist China, and Tanzania. Upon deciding to return to the United States, the plaintiff purchased a ticket for air passage from Tanzania to London, England, and thereafter from London by direct flight to Detroit, Michigan on the defendant air carrier. The Federal Bureau of Investigation notified the defendant that the plaintiff was a fugitive, that he was planning to arrive at Detroit aboard the defendant's aircraft, and that there was a possibility of a public demonstration. The FBI requested the defendant to park the aircraft in question somewhere other than at the passenger terminal or to reroute the aircraft to a different terminal. Upon receiving such information, the defendant air carrier notified its London officials that they should deny the plaintiff passage which directive was followed. That decision was made by the defendant air carrier's president based upon the following information: (1) an FBI Wanted Bulletin including information that the plaintiff was

a fugitive from an indictment and should be considered armed and dangerous; the possibility of a demonstration upon the plaintiffs arrival at Detroit; and the danger of a possible hijacking attempt. After a brief period in the custody of British officials, the plaintiff was flown by the defendant to Detroit on a special unscheduled non-stop flight. Upon arrival at the Detroit terminal, the plaintiff was taken into custody by the FBI.

The court recognized that during the past fifteen years the problem of hijacking of commercial aircraft had been one of the greatest hazards to air transportation, and that such piratical practices had resulted in the loss of many lives not to mention the disruption of plans, the inconvenience, and the financial losses suffered by hundreds of people. It was noted that in an attempt to deal with such problems, the Congress enacted legislation authorizing air carriers to refuse transportation to any passenger when in the air carrier's opinion such transportation would or might be inimical to the safety of flight. The plaintiff, however, had contended that the authority of the air carriers in that regard were strictly limited by Sec. 404(b) as noted above. It was argued, among other things, that the defendant had no right to rely upon the written and oral representations of the FBI and that in order for the defendant carrier to refuse transportation it was required to investigate in depth the FBI's statements and to inquire into the plaintiff's personal history as well. In rejecting this argument, the Court stated that Congress did not intend that such an inquiry be made. Rather, the test of whether the air carrier properly exercised its power rests upon the facts of the case as known to the carrier at the time it formed its opinion and whether its opinion and decision were rational and reasonable and not capricious or arbitrary. The court concluded that the carrier, in deciding to refuse passage to the plaintiff, was entitled to accept at face value the oral and written representations made by the FBI regarding the plaintiff, and that the fact that the plaintiff was not actually armed and appeared amenable when he presented himself to board the defendant air carrier's aircraft in London did not call for a change of opinion.

Judgment affirmed.

Miller v. United States, 13 Avi. 17,443 (1974)

This proceeding arose from deaths that resulted from the crash of a commercial airliner on its landing approach at the Greater Cincinnati

Airport. Five of the seven crew members and sixty-five of the seventy-five passengers sustained fatal injuries in the accident. The passengers and their estates filed numerous suits against the air carrier, and the aircraft and instrument manufacturers, while the crew filed suit against the United States for negligence on the part of the Federal Aviation Administration (FAA) in controlling the landing of the ill-fated aircraft. The litigation was consolidated in the U.S. District Court, Eastern District of Kentucky, pursuant to the Multidistrict Litigation Act (28 U.S.C. 1407). The trial court granted summary judgment against the air carrier, but dismissed the claims against the respective manufacturers and the United States. The Court of Appeals reversed and remanded for trial, concluding that summary judgment was precluded by the existence of factual issues. This proceeding concerns the suit by the crew against the United States.

Liability on the part of the United States was predicated on the Federal Tort Claims Act (28 U.S.C. 1346(b)) which provides, in pertinent part, that "The district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The plaintiff's alleged that the defendant FAA was negligent in several respects: (1) failure to ascertain and transmit to the airline crew the correct meteorological data; (2) failure to direct the aircraft to a runway with milder weather conditions and superior navigational aids; and (3) failure to activate the "glide slope" (despite a .05 degree error that had been discovered several days before the accident).

The Court concluded that the plaintiff's claim against the FAA was not judicially cognizable under the Federal Tort Claims Act. In this connection, the Court pointed out that the Act does not apply to ". . . any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" (28 U.S.C. 2680(a)). Noting that this section was intended to insulate the rulemaking

functions of the administrative branches of the Government, the Court stated that the establishment of requirements for aircraft and pilots and the provision of landing systems, communications, and weather information facilities were discretionary functions of government.

After a survey of the evidence, it was also determined that the record disclosed no actionable negligence on the part of individual FAA officials. The court found that while the weather on the day in question was undoubtedly poor, there was no evidence that the visibility was improperly ascertained. Rather it was apparent that the weather observations were consistent with accepted standards governing such determinations. In this regard, the cockpit voice recorder revealed that the aircraft crew was properly informed of prevailing meteorological conditions. Nor did the court find fault with the FAA's failure to assign the aircraft to a different runway, stating that while a complete instrument landing system (ILS) was not in operation on the assigned runway, sufficient navigational aids were present for a "nonprecision instrument approach." Important, in this connection, was the fact that the pilot as the final authority over runway choice at no time requested diversion to another approach even after being informed of the prevailing conditions on the assigned runway. The Court also rejected the contention that the glide slope should have been activated, noting that FAA regulation's prohibit the operation of such a device if it is producing erroneous data of the magnitude on record.

The Court, therefore, concluded that the accident was attributable to the crew's failure to detect the aircraft's excessively low altitude, and that such conclusion necessarily severed any causation flowing from the conduct of FAA officials. It was not disputed that the aircraft, with no malfunction of aircraft or equipment, was allowed at a distance of two miles from the runway to descend 225 feet below the elevation of the point upon which it proposed to land. In the Courts view, that fact was the sole proximate cause of the accident. Accordingly, there was no justification for the imposition of liability upon the United States.