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Aviation

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AVIATION

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OFFICE OF CONSUMER ADVOCATE

The Civil Aeronautics Board has established an Office of the Consumer Advocate which is the first such office in the Federal Government. The new office will be charged with the responsibility for presenting the consumers' needs in formal and informal proceedings before the Board. The President's Special Assistant for Consumer Affairs, Mrs. Virginia Knauer, congratulated the Board on its decision to establish such an office and urged that the new office be provided with the staff and independence essential to the accomplishment of a task which is of such significance to consumers.

The predecessor office, the Office of Consumer Affairs, was established in December 1970 to serve as the Board's point of contact with users of air transportation and to achieve the Board's policy goal of keeping the public informed. That office has been primarily concerned with consumer complaints and advice to the Board with respect to consumer matters. Consistent with its established purpose, the office has been highly effective in focusing attention on the problems and requirements of users of air transportation. In this regard, the Office has advocated a number of major Board actions, the most recent being a decision to amend the Board's economic regulations so as to extend the denied boarding compensation regulations to the operations of scheduled foreign air carriers serving the United States (see discussion in following section).

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However, it is the Board's view that the Office's effectiveness would be enhanced by enabling it to participate directly as a party in appropriate Board proceedings.

While the public interest is of course represented by counsel for the Bureau of Economics, the Bureau of Operating Rights, and the Bureau of Enforcement, who participate and take positions based on a broad range of concerns and reflecting all aspects of the public interest and whose evaluation of policy factors encompasses consumer concerns, the Board believes that participation by the Consumer Advocate's Office as the office directly and exclusively concerned with these matters would permit a more thorough exploration of consumer issues. In addition, such participation would provide both the administrative law judges and the Board the benefit of the specialized information and expertise which the Office is in a unique position to acquire.

DENIED BOARDING COMPENSATION

In a major action aimed at dealing with the problem of "oversales" by foreign air carriers, the Civil Aeronautics Board has amended its denied boarding regulations (14 CFR 250) so as to encompass each foreign air carrier holding a permit issued by the Board pursuant to section 402 of the Federal Aviation Act authorizing such carriers to engage in foreign air transportation on an individually ticketed basis. The regulation is designed to prevent unfair and deceptive practices and unjust discrimination by requiring nondiscriminatory priority boarding rules for oversold passengers, liquidated damages for those passengers denied boarding, and a brake on oversales arising from overbooking.

The Board has long been concerned about the inconvenience and financial losses borne by members of the traveling public due to the overbooking practices of airlines and in 1967 sought to minimize the impact on consumers utilizing domestic certificated carriers through a penalty payable to affected passengers. The Board refrained from an outright prohibition of the overbooking practice because of its concern for the adverse effect on carrier economics. While that system dramatically reduced the number of oversold passengers on U.S. carriers, the Board's Office of Consumer Affairs constantly pointed to abuses of the exemption to the oversale regulations previously enjoyed by foreign air carriers serving the United States. The new regulation will provide the same penalty provisions to passengers oversold on foreign scheduled air carriers as are

presently applicable to U.S. air carriers, except that passengers will be eligible to receive the prescribed compensation only if their reservation for the flight in question was confirmed in the United States. Thus, passengers originating their transportation on reservations made abroad will not be covered. In addition, the new amendment applies not only to confirmed reservations noted on a passenger's ticket, but also to reservations confirmed by other means provided for in an air carrier's tariff. In adopting the new administrative regulation, the Board clearly stated that its action constitutes neither an amendment of various foreign air carrier permits nor unilateral authorization of various bilateral air transport agreements in contravention of section 1102 of the Act.

To complement the adoption of the new amendment to the denied boarding regulations, the Board has also amended its Policy Statement on Oral Confirmed Reservations (14 CFR 399) so as to extend its applicability to foreign air carriers. The policy statement provides that the Board considers it an unfair or deceptive practice for a carrier or ticket agent to confirm reserved space by any means not provided for by the carrier's tariff. This change is designed to protect the public against any carrier or its agent representing that telephone reservations for scheduled flights are confirmed when, in fact, under the terms of the carrier's tariff, they are not. The modifications will become effective on March 1, 1975.

CHARTER RATE GUIDELINES

In September 1973 the Civil Aeronautics Board stated, in a notice of proposed rule making, its intention to establish minimum charter rate guidelines for the U.S. — Europe market, and that its policy would be to regard charter rates below 2.2 cents per seat-mile for weekday charters and 2.4 cents per seat mile for weekend charters, without compelling justification, as unjust and unreasonable and subject to suspension and investigation. Since that time, the financial strength and viability of the U.S. supplemental air carrier industry has continued to deteriorate to the extent that its total operating losses more than doubled between the twelve months ended March 31, 1974, and a year earlier. Of course, rising fuel costs have been a major factor contributing to the industry's poor financial health.

In this connection, it should be noted that Pan American and Trans World Airlines have also reported losses amounting to \$15 million in

North Atlantic charter operations during the year ended March 31, 1974. Although these losses are not of the magnitude incurred in their scheduled service, they are of serious concern. Pan-American's overall financial problems are exemplified by its recent petition for subsidy in an amount approaching \$200 million annually for a fixed term.

Recognizing the need for stabilized charter rates at economically justified levels, the Board authorized all U.S. and foreign carriers providing North Atlantic charter service to hold discussions for the purpose of agreeing upon minimum rate levels but no agreement was reached. Therefore, in an attempt to provide guidance to the supplemental air carriers and assist in the development of more economic and rational pricing policies in the public interest, the Board has adopted a comprehensive Policy Statement setting forth minimum charter rate guidelines (14 CFR 399) for the U.S.-Europe market for calendar 1975. However, since the data relied upon when the Board first proposed the minimum rate guidelines have, according to the Board, been rendered obsolete by intervening economic developments, the minimum rates contained in the guidelines are significantly higher than those earlier proposed. In this regard, the Board stated that it was convinced that the minimum charter rates contemplated by the new policy statement, when compared to the fares for scheduled service agreed upon for 1975, will disadvantage neither class of service.

The Board concluded, that for aircraft with a capacity of more than 229 seats (which includes the "stretched" DC-8, the DC-10, and the B-747), 2.9 cents per seat-mile for U.S.-originating transatlantic passenger charters is cost related and would fully compensate the carriers for their service, based upon the year round cost of providing North Atlantic passenger charter service with the equipment indicated. For equipment with less than 230 seats ("conventional" jet equipment), it was determined that a rate of 3.6 cents per seat-mile is cost related, will provide the carriers with adequate compensation, and will permit them to compete for the charter market despite their lack of "wide-bodied" equipment. It was pointed out that the economic cost data utilized reflected a 12% return on investment after taxes, but net of the commission payable on certain types of charters. As for the return element built into the minimum rate guidelines, the Board reiterated its intent to follow, in evaluating individual carrier tariff filings, the determinations reached after extensive probing in the *Domestic Passenger Fare Investigation*. The Board has used the 12% return figure as a benchmark in evaluating tariff filings involving

markets not technically within the geographical limits of that proceeding and concluded that its application is no less appropriate in the context of the subject transatlantic charter service.

Since October 18, the effective date of the new guidelines, the National Student Travel Bureau and the Aviation Consumer Action Project have filed petitions for judicial review (C.A.D.C.) of the Board's action contending that promulgation of the new guidelines was tantamount to a prescription of rates and that such steps can only be taken after public hearings. The United States Department of Justice has also challenged the Board's action. However, the Board has stated that since no prescription of rates is involved, a hearing is not required and that in any event there being no statutory requirement for an "on the record" hearing, rule making procedures satisfy any hearing requirement which might be thought to be applicable.

TERRAIN WARNING SYSTEMS

In recent years there have been a number of air carrier accidents caused by the inadvertent flight of aircraft into the ground. While the FAA has long held the view that present instrumentation and procedures in airline operations were safe and adequate as long as proper cockpit disciplines were maintained and appropriate flight procedures were followed, the agency has now determined that ground proximity warning systems on all-turbine-powered aircraft may be required. The proposed equipment would automatically provide pilots with simultaneous visual and aural warnings of any terrain hazards when the aircraft descends below 3,000 feet above ground level and would be issued continuously while the hazard existed. The FAA has recognized that equipment is already available which may satisfy the need for a ground proximity warning system and the agency has approved its installation in a number of different types of aircraft.

Although the FAA has not yet developed technical standards for ground proximity warning systems, the agency's proposal requires that the equipment provide for warnings based on the rate of descent of the aircraft and the height of the aircraft above the terrain directly beneath the aircraft. The system also must be capable of providing a warning based on the computed height of the aircraft above the terrain along the aircraft's projected flight path. In addition, the equipment must be capable of being programmed to take into consideration the landing gear and flap

positions and the performance capability of the aircraft in determining the necessity of providing the required warnings.

As an interim measure, the FAA's proposal would require the airlines to modify existing radio altimeters on large turbine-powered aircraft to provide a discrete aural warning when the airplane descends below a predetermined height between 1,000 and 500 feet above the ground. The change would have to be accomplished within six months of the effective date of any final rule and would not apply to aircraft already equipped with a ground proximity warning system.

PRIOR AFFINITY CHARTERS

Recognizing the continuing demand for mass economy air transportation, the Civil Aeronautics Board has proposed the termination of existing "prior affinity" charter regulations and the establishment of a new type of charter, the "one-stop inclusive tour" charter (OTC). The new type of charter would be designed primarily for persons interested in an all-inclusive vacation package at a single destination. This so-called "hybrid" charter would complement the already existing "travel group" charter (TGC) and the proposed "special event" charter. Also contemplated is the termination of the "mixed" charter which is rarely operated since it is essentially the same as a "prior affinity" charter, except that the chartering organization or other entity bears part of the charter cost.

Although the Board has felt constrained to permit prior affinity charters to be continued so long as no viable alternative was available, such charters have long been recognized by the Board as unsatisfactory for two major reasons:

- (1) They inherently tend to be discriminatory, in that they are lawfully available to persons who belong to an organization (or are employed by an agency or company) which is large enough to mount a successful charter program. Thus, the availability of the kind of low-cost air transportation provided by charter service comes to depend upon the particular status of the prospective traveler, as determined by factors involving his personal or business life. Yet these factors should clearly be irrelevant to his right, as a member of the general public, to have equal access to all modes of service offered by common carriers, particularly a mode of air travel which is so economical.

- (2) The prior affinity charter regulations, as demonstrated by years of actual experience, are inherently difficult to enforce, and the flouting

of these regulations by passenger consolidators engaged in the illegal business of selling charter seats for a fixed price to apparent members of ostensible organizations has been widespread. Indeed, the very concept of the prior affinity regulations invites paper compliance with largely artificial requirements which the Board has found necessary to devise in order to overcome the obvious impossibility of determining the actual "bona fides" of individual members of each organization.

The principal features of the one-stop inclusive tour charter proposal are that the operator will offer these all-inclusive round-trip tours at a fixed price which may not be less than a prescribed minimum; that a list of the prospective passengers, including all participants who have made full payment, will be filed with the Board no later than 30 days prior to the flight date; that the tour must have a minimum duration (except for "long-weekend" tours in North American markets); and that no substitutions or additions may be made to the list of passengers after filing. Consistent with the all-inclusive nature of this type of charter, the price would have to include, at a minimum, overnight lodging for each night, breakfast plus one other meal per day, transfers to and from transportation terminals, and baggage handling. On the other hand, consistent with the concept of group travel, the price could not include a rental car or rail pass which might encourage individual travel; and if the tour includes more than one stop, then any travel between points would have to be as a group.

In establishing the new types of charters, the Board has stated its determination to fashion a charter regime that will make possible the elimination of prior affinity charters in a manner which is not likely to result in a net adverse effect on the general public or any segment of the air transportation industry—except those who have profited from unlawful prior affinity charters. In proposing one-stop ITC's, the Board reiterated its continuing concern for its responsibility to maintain the legally required distinction between charter service and individually ticketed service and to insure that scheduled service does not suffer undue diversion. Similarly, the Board indicated that it would continue to insure the availability of sufficient charter service to meet the public need while safeguarding the economic viability of the supplemental industry.

If the proposed changes are made final, it is contemplated that all prior affinity charter flights would cease by March 31, 1975, with charter contracts executed and filed prior to that date being performed, but only until December 31, 1975.

U.S.-MEXICO AIR TRAFFIC CONTROL AGREEMENT

The United States and Mexico have signed an agreement providing for coordination of air traffic control services for aircraft operating adjacent to the common boundary between the two countries. The agreement came after some fifteen years of negotiations and will make it possible for air traffic controllers on both sides of the border to direct aircraft into specific patterns secure in the knowledge that the neighboring facility is not sending aircraft into the same airspace at the same altitude. This will be accomplished by air traffic control facilities in six neighboring pairs of cities entering into "letters of agreement" setting forth communication requirements for specific flight procedures and methods of coordination to be followed at each location. The city pairs are El Paso/Juarez; Brownsville/Matamoros; San Diego/Tijuana; Reynosa/McAllen; Nuevo Laredo/Laredo; and Mexicali/Imperial, California. While all the local agreements were to have been in effect on November 1, 1974, a technical communications problem appears to have caused a delay in the implementation in the Reynosa/McAllen area.

PAN AMERICAN INVESTIGATION

Following a long period of subsidy-free operations, Pan American World Airways on April 3, 1974, petitioned the Civil Aeronautics Board for the establishment of a final subsidy mail rate for each annual period beginning with April 3, 1974, in the amount of \$194 million consisting of \$85.4 million to cover its operating losses plus \$108.6 million as a return on investment. In support of the petition, the carrier stated that as the principal U.S. flag international carrier, it is a national asset whose preservation is essential to the commerce, Postal Service, and national defense of the United States; that it had suffered losses of \$174.3 million in the last five years; and that in spite of rigid cost controls, schedule reductions, and numerous other courses of action, no amount of "self-help" would offset the losses that the carrier will incur by reason of the increases in the price of fuel. Trans World Airlines filed a similar petition on the same day. In addition to the \$194 million proposal, Pan American also requested a temporary subsidy of \$10.175 million per month effective on and after April 3, 1974.

The Board has denied Pan American's request for temporary subsidy; dismissed without prejudice TWA's above-noted petition; assigned for hearing Pan American's petition for final subsidy; and instituted an

informal, non-adjudicatory investigation to inquire into the management and business practices of Pan American and its subsidiaries and affiliates and to accumulate, compile, and evaluate information, data, testimony, and the like, with respect to the carrier's past, current, and future operational and financial practices and activities. In determining that the foregoing actions were required in the public interest, the Board made several important observations which are summarized below:

The material in Pan American's petition clearly supports the contention that the carrier's financial situation is indeed serious. For the six months ended June 30, 1974, the carrier experienced operating losses amounting to nearly \$50 million resulting from the combined effects of escalating expenses (particularly for fuel), and declining revenues resulting primarily from decreases in traffic volume. All these factors have impaired the carrier's ability to generate cash from its operations. While it is obvious that the carrier has taken measures to reduce its losses, it does not appear that the carrier's management has yet undertaken all of the "belt-tightening" measures normally associated with a cash crisis. The worldwide operations of Pan American can and must be operated, over the long term, on a non-subsidy basis, and it may be that a restructuring or route modification will be necessary. In this connection the carrier should explore such measures as further reductions in operational levels, discontinuance of uneconomic services, reductions in operating expenses through severe austerity measures, paring of capital expenditures, sale of capital assets not required to continue certificated service, and other actions which are characteristic of an enterprise confronted by a severe cash shortage. Since it appears that potential avenues available to prevent a further cash drain have not been exhausted, it cannot be concluded that the carrier has satisfactorily demonstrated that it faces such a crisis as to require an infusion of Government subsidy on a temporary basis. However, the petition for final subsidy should be set for evidentiary hearing.

The purpose of the informal nonadjudicatory fact-finding investigation is to gather data, information, and testimony, and based thereon, to conduct studies which may form the basis for recommendations by the Board with regard to voluntary actions by the carrier or that may be lawfully useable in proceedings to determine subsidy need and amount.

For a carrier to receive subsidy support it must qualify and be tested under the exacting requirements of the following standard: ". . . the need of each such air carrier (other than a supplemental air carrier) for com-

pensation for the transportation of mail sufficient to insure the performance of such service, and, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." (Federal Aviation Act, Sec. 406(b) (3).)

Whether Pan American can meet this standard will determine the final disposition of its application.

PAN AM-TWA REQUEST MASSIVE ROUTE RESTRUCTURING

The Civil Aeronautics Board has informed Pan American and TWA that expeditious processing of their request for approval of an agreement providing for massive route restructuring in many international markets could not be granted under their original application, and urged the filing of an application seeking suspension of service authority and other route modifications available through the Board's nonhearing suspension and exemption procedures. The agreement and request for approval was filed in apparent response to the Board's suggestion to the carriers to deal with their financial problems by exploring measures which include further reductions in operating levels and discontinuance of uneconomic services.

The agreement's major provision called for termination of TWA's round-the-world operations, with elimination of all services by TWA between the Middle East and Hawaii; withdrawal of TWA from Frankfurt and Pan American from Paris, together with a restructuring of European routes of both carriers; withdrawal of TWA from the Washington-London market and Pan American from the Chicago/Los Angeles/Philadelphia-London markets; addition of Bombay, Okinawa, and Taiwan to Pan American's round-the-world route; and substantial improvement in TWA's Los Angeles-Honolulu authority.

The Board stated that the carriers' filing does not permit positive Board action of any kind, much less expeditious action, and that the filing is more in the nature of a notice of intent, rather than a genuine application. In this connection, the Board indicated that the all-or-nothing approach of the agreement precluded expeditious consideration since the Board would have to consider a proposal of literally worldwide scope in every detail before the carriers would be willing to implement any individual part of the agreement.

The Board reiterated its earlier promise to render full cooperation on a highly expedited basis to proposals to ease the financial difficulties of Pan Am and TWA but put the applicants on notice that they should not rely upon the Board's concern for their health to gain approval of applications not directly related to markets where their operations are uneconomic, or which are not in the overall interests of the public. In addition, the Board suggested that if the carriers wish to receive prompt action on their requests, they should file applications embodying divisible requests since it intends to evaluate each item requested with a view toward granting or denying requests for nonhearing approval on the basis of the merits of each individual request after considering supporting justifications and answers of interested parties.

In response to the Board's suggestions the carriers have filed applications for authority to suspend service for temporary route authorizations, for amendment of approved service plans, and an application for expedited approval of a new agreement substituting for the Los Angeles-Hawaii proposal a proposal that contemplates Pan Am's suspension of service and TWA's institution of service to Austria for the term of the agreement.

In a related action, the Civil Aeronautics Board has set for hearing on an expedited basis the application of Pan American and Western Air Lines for approval of a route transfer agreement.

Under the agreement, Western would purchase for \$400,000 Pan American's route between the coterminals Portland and Seattle-Tacoma, the intermediate point Ketchikan, and beyond Ketchikan, the terminal points Juneau and Fairbanks. Western would also: purchase one B-707 aircraft from Pan American for \$6,250,000; assume Pan American's leasehold obligations in Fairbanks, Alaska, if Pan American requests it, and would, under certain conditions, either offer jobs to a specified number of Pan American's Fairbanks employees and bear part of the severance costs, should employees be released. The two airlines would also attempt to reach an agreement under which Western would buy any part of Pan American's ground equipment in Fairbanks.

AVIATION FUEL CONSERVATION

As a continuation of a seven-point fuel conservation program designed to increase aircraft operational efficiency, the Federal Aviation

Administration (FAA) has begun a study to determine whether towing aircraft to and from runways and accelerating the pace of instrument landing systems (ILS) installations are cost-effective means of achieving fuel consumption reductions at major airports. It is estimated that the two new measures have a potential for conserving approximately 11,600 barrels (487,200 gals.) of fuel per day, and could be operational within two years. The FAA plans to submit the results of the study to the industry for its consideration.

The study analyzing the towing of aircraft from gate locations to engine starting areas adjacent to runways and from runways to terminals will cover a three-month period during which FAA officials will visit the twenty busiest commercial airports to assess the actual fuel savings that might be achieved at each location. The ILS study is aimed at reducing arrival delays with resulting fuel economics at the top twenty air carrier airports where ceiling and visibility conditions are below visual flight rule (VFR) minimums about 15% of the time on the average. Airport capacity is greatly limited during these periods since operations are restricted to ILS-equipped runways with resulting arrival and departure delays.

Other major features of the FAA's fuel conservation program include: revision of gate hold procedures and air traffic flow control procedures, use of optimum aircraft cruising speeds, assignment of optimum cruise altitudes, reduction of circuitous routings whenever possible, taxiing with fewer engines, and increased use of simulators. Since implementation in November 1973 of the seven-point program which was designed to save up to 20,000 barrels (840,000 gals.) per day, FAA has also worked with airport sponsors on developing and expediting new runway and taxiway construction, and implemented optimum descent profile procedures at airports. These actions have achieved an estimated jet fuel savings of 5,000 barrels (210,000 gallons) per day.

HAZARDOUS MATERIALS

In 6 *Law. Am.* 900-902, 1974 this report contained a section concerning a recent Federal Aviation Administration (FAA) evaluation of its hazardous materials program, and noted that the FAA was conducting a nationwide survey to gather information concerning the transportation of hazardous materials by air in the United States. That survey has been completed and the results released.

The survey was conducted by FAA field inspectors on a systemwide basis at some 400 airports throughout the United States. Approximately 150,000 individual cargo load manifests of passenger flights of some 100 operators were examined. The survey also provides data concerning hazardous and/or radioactive shipments carried by cargo-only flights. The survey gives the following percentages of hazardous and radioactive shipments carried by types of passenger aircraft: domestic/flag—4.2 and 1.9%; commercial operators—2.9 and .6%; supplemental air carriers—1.7 and .5%; and air taxi—.2 and .05%. These result in an average of 3.8% with hazardous materials and 1.7% with radioactive shipments. Of the almost 7,000 cargo manifests of some 54 cargo-only operators reviewed, almost 24% included hazardous cargo and just over 4% included radioactive materials.

As revealed in the FAA's most recent evaluation of its hazardous materials program, the shippers' noncompliance with applicable regulations is the single most serious problem in hazardous materials transportation. It should be noted, however, that the FAA is taking steps to remedy this situation by intensifying surveillance by FAA inspectors and by holding training courses in the handling of hazardous materials shipments for carriers and shippers, as well as its own inspectors.

FOREIGN AIRCRAFT TRANSIT RIGHTS

The Civil Aeronautics Board has determined that it is no longer in the public interest to grant blanket approval of transit flights through United States airspace. Therefore, the Board has proposed to amend Part 375 of its Special Regulations (relating to authority for the navigation of foreign civil aircraft in scheduled international air service in transit over the United States) so as to provide that an operator of foreign civil aircraft desiring to conduct a scheduled international air service (which is not authorized by a section 402 permit) which transits the United States shall obtain a permit from the Board prior to the operation of the service.

Section 501 of the Federal Aviation Act of 1958 makes it unlawful for any person to navigate foreign civil aircraft within the United States, including the overlying airspace thereof (Section 103(36)), except as provided in section 1108 of the Act. Section 1108(b) of the Act permits the navigation of foreign aircraft only if such navigation is authorized by permit, order, or regulation issued by the Board. In this connection,

the Board has stated that Section 1108(b) necessarily encompasses the authority to determine whether a particular scheduled international flight operated with foreign aircraft falls within the scope of flights permitted under the International Air Services Transit Agreement.

At one time express Board approval was required of any scheduled transit operation of foreign aircraft over the United States, but in 1954 the regulations were amended so as to eliminate the requirements for specific route approval. The revised regulation provided blanket approval subject to appropriate approval from the Administrator of the Federal Aviation Administration. Ordinarily, if the applicant's home government is a signatory of the International Air Services Transit Agreement, appropriate approval is routinely granted. However, recent discussions with the FAA indicate that the Administrator does not consider that he should determine whether a proposed operation falls within the scope of the Board's regulation concerning transit flights.

In this regard, the Board has stated that pending litigation (*Air Europe International v. Robert D. Timm et al.*, Civil No. 74-1400, filed September 24, 1974) makes it clear that a specific administrative procedure should be available for the resolution of such issues. Comments supporting and objecting to adoption of the proposed amendment to Part 375 have been filed with the Board. Final Board action is expected soon.

CAPACITY REDUCTION AGREEMENTS

In a recent initial decision an Administrative Law Judge (ALJ) at the Civil Aeronautics Board has concluded that the capacity reduction agreement involving American, TWA, and United Air Lines covering four transcontinental markets is adverse to the public interest. Although the Board had granted interim approval of the agreement, such approval was allowed to lapse on March 15, 1974. Therefore, the investigation was conducted pursuant to the general investigatory powers of the Board. The ALJ characterized the purpose of the investigation as an attempt by the Board to determine whether agreements to limit capacity can and should be employed in the industry as a means of maintaining load factors in line with the 55% standard established in the *Domestic Passenger Fare Investigation*, to promote low-cost service, and to achieve profits that will render a 12% rate of return to the trunkline carriers. In instituting the proceeding, the Board directed that the economic issues governing the approvability of capacity agreements be isolated from the impact of the recent fuel shortage for purposes of the investigation.

The subject agreement limits capacity in specified markets on nonstop flights with differing capacity shares being specified for peak and off-peak periods. After one year of operations, the agreement states that the carriers may provide traffic forecasts at which time capacity allotments may be reviewed and revised through negotiations. While the carriers may not ordinarily exceed their respective allotted capacity in an agreement market, it is provided that the carriers may operate extra sections for operational reasons or unusual demand, but that such extra sections may not be published, advertised, or otherwise held out to the public. The agreement contemplates the substitution of aircraft with higher standard seating configurations for aircraft with lower standard seating configurations in order to meet unusual operational requirements so long as such adjustments are on an irregular and infrequent basis. In addition, it is also provided that each of the member carriers shall maintain a minimum of one nonstop schedule in each direction in each of the three agreement markets.

In finding that approval of such agreements must be limited to circumstances which clearly pose an immediate threat of causing major disruptions in air transportation services, the Board's ALJ made many interesting observations concerning the detrimental aspects of such agreements. Certain of his findings are set forth below.

Harm to the Public Interest

As a result of the agreement, there was a 25% decrease in the quantity of service and a corresponding decrease in the quality of service provided in terms of denied service, delays, and the discomfort, inconvenience, and frustration that inevitably accompany more crowded conditions. Since the number of flights during peak hours were not appreciably reduced, there had to be sharper decreases in flights at other times to the disadvantage of consumers who either desired or needed to travel at off-peak hours. Moreover, the reduced quantity and quality of service has not been accompanied by a corresponding reduction in price. In fact, fares have steadily increased since the agreement went into force. Another result of the agreement which has reduced the quality of service, is the increase in multi-stop flights following the reduction of nonstop flights in agreement markets. Prior to the inception of the capacity agreement, only 2% of the passengers in the transcontinental markets traveled on multi-stop flights. After the agreement became effective, 9 or 10% of the passengers were traveling on multi-stop flights. It could not be found that such declines in service would be desirable even if fares were reduced accordingly.

Harm to Other Carriers

The subject agreement has resulted in a reduction of over 30,000,000 plane miles per year in the capacity provided with some of the freed capacity being used to compete with non-agreement scheduled carriers. While the extent of the "dumping" of capacity could not be determined in the subject proceeding, it is clear that freed capacity has been utilized to the detriment of competition in non-agreement markets. Since the agreement carriers schedule on an incremental cost basis where the addition of capacity in a market is concerned, the added cost, or reduction in losses, requires only a limited increase in traffic to be justified (in the carrier's opinion) in the non-agreement market, since the freed aircraft would otherwise be idle.

Since approval of the first agreement in 1971, the agreement carriers, except Eastern, have also used freed capacity in competition with the supplemental air carriers resulting in a severe economic impact. In 1972, the agreement carriers operated some 53.5% more charter revenue passenger miles than in 1971, while charter service among non-agreement trunk carriers increased by only 7.2% and that of supplementals by only 1%. Therefore, the routine use of agreements to limit capacity will disrupt the competitive balance between carriers and between groups of carriers and eventually undermine competitive principles and upset the finely-tuned balance between the scheduled and non-scheduled carriers.

Harm to the Agreement Carriers

It was concluded that capacity agreements will harm the agreement carriers themselves by shielding them from the consequences of their own management decisions concerning investments, scheduling, and marketing. The agreement carrier should not be led to believe that the Board will come to their rescue should their managements prove to be lacking in efficiency, economy, and innovativeness. If the carriers are convinced that the Board will not rescue them, they will be motivated to exercise the kind of efficiency, economy, and innovation in the level of capacity offered that springs from competition. Moreover, the availability of capacity agreements may even encourage carriers to take investment or scheduling risks on the theory that if they do not work out well it will not matter very much whereas if they are successful the carriers can reap the benefits. The Government departments that participated in the proceeding, the members of Congress, the civic parties, and the non-agreement carriers uniformly believe and have demonstrated that the United States' civil air

transportation system would not have achieved its position of prominence without the vitalizing force of competition. The approval of the particular agreement involved here and a favorable decision concerning the capacity agreement concept in general, even as a temporary expedient, would cause such agreements to proliferate into other routes and once those carriers that are eager to escape the rigors of competition have their foot in the door the flood gates would be opened.

Antitrust Considerations

It has been held that when such agreements run afoul of the policies and principles of the antitrust laws, as the proposed capacity agreements do, they can be approved only if the proponents present convincing evidence demonstrating that such agreements are required by a serious transportation need or are necessary in order to secure important public benefits. In view of the positive and unequivocal holdings of the Supreme Court and the lower Federal courts, and based upon all the evidence as to the nature and effect of the transcontinental capacity limitation agreement, it must be concluded that, as a matter of law, it could not be approved. The injurious encroachment of the agreement upon antitrust principles and the public detriment resulting therefrom are so serious and so pernicious in the eyes of the law, that it does not lie with the realm of discretion to approve such agreements pursuant to the standards of section 412 of the Act.

ANDEAN AIRLINES ASSOCIATION

Bolivia, Chile, Colombia and Venezuela have agreed to associate in the establishment of an airlines association which will study flight schedules so as to develop cooperative flight patterns, where this is possible. Cooperation in the services required at international airports is another objective of the newly formed association.

AIR LAW CONFERENCES

The First Symposium on Airline Cooperation, sponsored by the Ibero American Air and Space Law and Commercial Aviation Institute, was held in Madrid on December 12-13, 1974. Information concerning the Symposium is available from the sponsoring Institute at Duque de Medinaceli No. 4, Madrid 14, Spain.

The XII Inter-American Aviation Law Conference and the VIII Latin American Meeting of Air and Space Law will be held in Guatemala April 29-May 2, 1975. The Conference as in previous years, will be sponsored by University of Miami School of Law and the Latin American Association of Air and Space Law. Joining the above two entities in the co-sponsorship are the Guatemalan Civil Aeronautics Board, the Faculty of Law of the University of San Carlos and the Guatemalan Bar Association. Further information may be obtained from the *Lawyer of the Americas*.

RECENT U.S. CASE LAW

McCarthy v. East African Airways, 13 *Avi.Cas.* 17,385 (1974)

This proceeding before the United States District Court for the Southern District of New York involved the provisions of Article 28(1) of the Warsaw Convention, 49 U.S.C. 1502 (1971), 49 Stat. 3000, which provides that, "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of domicile of the carrier or his principal place of business or where he has a place of business through which the contract has been made, or before the court at the place of destination." Plaintiffs brought their action in the Federal Court in New York on the theory that New York was the "place of destination" of their trip. The defendant carrier moved for an order dismissing the action for lack of subject matter jurisdiction.

The plaintiffs desired to travel from Nairobi, Kenya to New York via London and requested tickets from a Nairobi travel agency for the defendant carriers service between said points. The plaintiffs were informed by the travel agency that they could only purchase tickets for carriage from Nairobi to London but upon their arrival in London could purchase the additional tickets to New York from a branch office. The plaintiffs contended that the travel agency knew that their ultimate destination was to be New York and that said agency was acting as the agent for the defendant carrier in selling the tickets to the plaintiffs. The defendant argued that the travel agent was not acting as its agent and that the "place of destination" of the trip was London.

In granting the defendant's motion to dismiss, the court stated that it need not be concerned with the plaintiffs' agency argument and noted the fact that the travel agency was unable to sell the plaintiffs a ticket

to New York but could only provide passage as far as London. Although the plaintiffs intended to continue their journey on to New York from London, this fact was not evidenced in the contract of carriage in which London was specified as the "place of destination." In rejecting consideration of the plaintiffs' additional arguments, the court reiterated the well established rule that Art. 28(1) of the Warsaw Convention enumerates not only a rule of venue but also jurisdiction, and that the question of pendent or ancillary jurisdiction could not be considered unless the prerequisite of international or treaty jurisdiction was first satisfied .

The court also rejected the plaintiffs' argument that Art. 28(1) of the Convention unconstitutionally deprived them of the right to litigate in the Federal courts. The court noted that the jurisdiction of such courts extends only as far as Congress permits, which in some cases is less than the limits of the federal jurisdictional power as set forth in Article III of the Federal Constitution. Art. 28(1) of the Convention, as a treaty provision having the force and effect of the domestic laws of the United States, may and does restrict the subject matter jurisdiction of the Federal courts. Therefore, the defendant's motion to dismiss for lack of treaty jurisdiction was granted.

Goldhirsch v. Air France, 13 *Avi. Cas.* 17,307 (1974)

In this New York Civil Court case the plaintiff sought recovery for lost wages, expenses, and damages for inconvenience resulting from the alleged breach of contract and negligence of the defendant foreign air carrier by reason of its cancellation of the plaintiff's reservation for a transatlantic flight and its failure to give the plaintiff actual notice of its reconfirmation requirement as set forth in the carrier's tariffs. The defendant moved for a summary judgment.

Plaintiff had purchased a ticket from the defendant foreign air carrier for roundtrip transportation between New York and Paris. As a result of the plaintiff's failure to reconfirm his return reservation he was one day late in returning to New York. The plaintiff contends that the failure of the defendant carrier to alert passengers by actual notice of its reconfirmation requirement gives rise to his cause of action. The court rejected the plaintiff's arguments and granted the defendant's motion for summary judgment.

The court noted that Title 49 U.S.C.A. 1373(a) provides, that every foreign air carrier must file with the Civil Aeronautics Board and keep open to public inspection, tariffs indicating among other things, all classifications, rules, regulations, practices and services in connection with its

operations authorized by the Board. It was also noted that it appeared that the defendant carrier had operated subject to and in compliance with such requirements. In granting the defendant's motion for summary judgment, the Court recognized the well-established rule that when a carrier sells a ticket which states that it is subject to tariff regulations, and one of such regulations is a requirement that the ticket holder reconfirm his reservation, the carrier is not liable for cancellation of a reservation where the holder fails to reconfirm. Furthermore, as the Court pointed out, passengers are, as a matter of law, charged with constructive notice of such tariffs, and that actual notice is not essential with respect to matters required or authorized to be included in a tariff regulation on file with the Board.

United States v. Anderson, 13 Avi. Cas. 17,306 (1974)

This case involved an appeal from a conviction for attempted manslaughter in which the jurisdiction of the federal court pursuant to the "special aircraft jurisdiction" of the United States, 49 U.S.C. 1301(32) was challenged. The appellant had given birth to a child while aboard a commercial aircraft operating between Pittsburgh, Pennsylvania, and Youngstown, Ohio. It was established that some fifteen minutes after the aircraft departed Pittsburgh the appellant entered the aircraft's lavatory where she remained until some fifteen minutes after the aircraft had arrived in Youngstown. Testimony at the trial indicated that the child was dropped in the aircraft's lavatory refuse receptacle (which contained at least two inches of liquid) contemporaneously with its birth. Subsequent to the departure from the aircraft of the flight crew and the appellant, a ground crew discovered the full term child alive. The appellant was indicted and after having waived a jury trial was tried before a District Judge in the United States District Court in Ohio. The only appellate issue of significance concerns federal jurisdiction.

The "special aircraft jurisdiction" of the United States includes civil aircraft of the United States and for purposes of the definition an aircraft is considered to be in flight "from the moment power is applied for the purpose of takeoff until the moment when the landing run ends." At the trial the parties had stipulated that the appellant had given birth to a child "during the flight" in question. (It is noted here that the Antihijacking Act of 1974 expanded the definition of "special aircraft jurisdiction" of the United States with respect to when an aircraft is "in flight." The new definition provides that an aircraft is in flight "from the moment when all external doors are closed following embarkation until the moment

when one such door is opened for disembarkation, or in the case of a forced landing, until the competent authorities take over the responsibility for the aircraft and for the persons and property aboard.”)

On appeal the appellant contended that the said stipulation was a stipulation to federal jurisdiction, that jurisdiction did not in fact exist, and that the trial court’s jurisdiction could be contested on appeal. The appellee argued that the said stipulation was a stipulation of a fact which had a bearing on jurisdiction and was binding on the appellant. After noting that the appellant was represented by counsel at her trial and that both she and her counsel were present when the stipulation was agreed upon, the court held that the stipulation was not a stipulation to federal jurisdiction which is a purely legal question, but, on the contrary, was a stipulation to a fact which served to establish federal jurisdiction. The court, finding no ambiguity in the language of the stipulation, stated that the common meaning of the words “during the flight” would refer to the period during which the aircraft was in the air and that such period was clearly included within the statutory period required to establish federal jurisdiction. Citing an early U.S. Supreme Court case, the court reiterated the rule that parties may admit the existence of facts which show jurisdiction and that courts may act judicially upon such an admission. In affirming, a two judge majority held that the District Court had jurisdiction pursuant to the “special aircraft jurisdiction” of the United States and that the facts established at the trial supported the trial judge’s verdict of guilty.

One of the members of the three judge appellate court was not in accord with the majority, and in a dissenting opinion concluded that the district court’s jurisdiction had not been established and that appellant’s conviction should be reversed. The dissenting opinion argued that the appellant did not agree that delivery took place before the end of the landing run, or if the child was born aloft, or that with the requisite criminal intent, she abandoned it within the “special aircraft jurisdiction.” She stipulated only that she gave birth to a child “during the flight,” an act that is not criminal. In addition, the dissent pointed out that the word “flight” may be defined as “a trip made by or in an airplane” or “an airplane making a scheduled flight,” citing Webster’s New Collegiate Dictionary. He also argued that the deficiency of the stipulation was not remedied by the evidence adduced at the trial since the appellant was not asked if the birth occurred while the aircraft was in the air and since her uncontradicted testimony indicated that she was not even aware that she had delivered a baby.

City of Los Angeles v. Japan Air Lines, 13 *Avi. Cas.* 17,279 (1974).

This proceeding arose from an action in inverse condemnation brought by certain property owners in the vicinity of Los Angeles International Airport. The plaintiffs alleged that the defendant, the City of Los Angeles, as owner and operator of the airport, had, by authorizing the regular flight of Boeing 747 and other jet aircraft to and from the airport, taken an avigation easement for noise, smoke, and vibration over plaintiffs' real property. The city filed a cross-complaint for declaratory relief contending that the city was entitled to contractual or equitable indemnification from thirty-one of its lessee carriers and that the city was entitled to equitable indemnification from two jet airframe manufacturers. The trial court, in rendering judgment in favor of the plaintiffs, found that the city had taken "an easement for navigation purposes over, near, and around" each of the plaintiffs' parcels of real property. With respect to the cross-complaint, the court rendered judgment in favor of the cross-defendants (the carriers and airframe manufacturers) adjudging that the cross-defendants had no obligation to indemnify the city for any loss, damage, liability, or expense which it incurred or suffered as a result of or in connection with the action filed against it by the plaintiffs. The trial court awarded compensation to the plaintiffs and condemned to the use of the city and to the use of the public an easement for air navigation purposes over, near, and around the property in question.

The plaintiffs had relied solely on the concept of inverse condemnation and asserted no claim of negligence, maintenance of a nuisance or other theory of liability as against the city, and the cross-defendant carriers were not named as parties defendant in the complaint. On appeal, the city did not dispute its liability in inverse condemnation to the plaintiffs, but contended that it was entitled to indemnity from its lessee carriers either under the indemnity provisions contained in the lease agreements between the city and the cross-defendant carriers or by virtue of the doctrine of equitable indemnity. Therefore, the question on appeal was whether, under the circumstances presented, the carriers were liable on any theory to indemnify the city with respect to the city's liability for taking of an avigation easement with payment of just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and of Article 1, Section 14, of the California Constitution. The California Court of Appeals, recognizing that the issue presented was one of first impression in that state, looked to the California statutes, decisions of the U.S. Supreme Court, and courts of sister states for guidance.

In affirming the trial court's judgment, the Court of Appeals relied heavily upon the United States Supreme Court case of *Griggs v. Allegheny*, 369 U.S. 84, 82 S. Ct. 531. In that case, it was held that the county which owned and operated the subject airport had taken an avigation easement over the petitioner's property for which the county was required to pay just compensation under the Fourteenth Amendment where noise from the taking off and landing of aircraft had rendered the residential use of petitioner's property undesirable and unbearable. In response to the contention that the carriers' utilizing the airport or the C.A.A. acting as an authorized representative of the United States had in fact been responsible for the taking, the court held that the promoter, owner, and lessor of the airport was the one who took the easement in the constitutional sense and that the carriers were not under an independent duty to make compensation on the theory that the taking was effected with their aid.

The appeals court also rejected the city's argument that the indemnification provisions of the lease contracts required the carriers to indemnify the city for any harm to adjoining landowners as an inevitable consequence of the exercise by the carriers of the very rights granted to them by the leases.