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## Charter Air Travel: Paper Airplanes in a Dogfight (Comment)

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# Comments

## CHARTER AIR TRAVEL: PAPER AIRPLANES IN A DOGFIGHT

GERALD S. REAMEY

Air transportation has traditionally been considered the most expensive form of travel. In that price context, the charter is an anomaly, a stranger in a strange land. The charter is the highest hope of the cost-conscious consumer, particularly for recreation travel. Supplemental air carriers have built multi-million dollar businesses exclusively from the charter trade, and millions of passengers have flown by charter. But an anomaly is inherently suspect and becomes proportionally more suspect as it infringes upon the status quo. That suspect status has entangled every major airline, the Civil Aeronautics Board (CAB), supplemental carriers, and consumer groups in a struggle more intense and deadly serious than any casual observer could possibly conceive.

The CAB has provided an introduction to charter travel:

Now, where do we stand today? I think we must recognize that we already have a large charter transport industry. The U.S. supplemental air carriers alone carry more than 3 million passengers a year. Moreover, the volume of U.S. charter travel today is three times that which it was only a decade ago.

There is no question about it: The demand is there; the availability of charter air travel constitutes a matter of national interest; it is threatened by critical economic problems; and marketable and viable low-cost concepts must be found for those desiring and needing this form of transportation.<sup>1</sup>

Resolution of questions concerning the viability of the charter concept lies in a full understanding of the different charter forms available, the possible alternatives to these forms, the advantages and disadvantages of each, and the best way to accomplish the purported charter goal of economical recreation travel. This project

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<sup>1</sup> *Hearings on S.421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 48 (1975).*

has been undertaken by legal commentators,<sup>2</sup> government regulators, and, most recently, Congress.<sup>3</sup> There has been neither resolution nor evolution in charters; the area remains a fluid industry with heavy pressures from all sides. But the pressures reveal the motives, and the motives may lead to a solution. A study must begin with the definition of the basic charter forms, the shaped forms that must somehow be made to fit the shaped spaces.

#### AFFINITY CHARTERS

The earliest form of charter operation was the "social" club. The social club concept (or affinity charter) presupposes a prior common connection between the passengers on the flight for purposes other than travel.<sup>4</sup> The CAB engages in very limited regulation of these charters because they are of narrow scope both in percentage of the air market and in routes covered.<sup>5</sup> The infrequency of the flights, pro rata charge for the aircraft, and non-profit aspects of the affinity group satisfied the CAB, initially at least, and apparently convinced the certificated airlines that, if these limitations were enforced, social clubs would not prove a serious detriment to the individually ticketed, regularly scheduled air carriers.

The crux of the CAB's regulatory power is Section 401(a) of the Federal Aviation Act,<sup>6</sup> which requires a certificate of public convenience and necessity prior to operation as an indirect or direct air carrier. The affinity charter organization may utilize either supplemental non-certificated airlines or certificated carriers as a source of aircraft, but under either alternative the charter organization is limited by CAB regulations applicable to membership, advertising and pro ration of costs. The nature of the organization

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<sup>2</sup> See Kamp, *The Near Future of Air Charter Regulation: The Case for More Experimentation in Public Policy*, 41 J. AIR L. & COM. 389 (1975).

<sup>3</sup> See *Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. (1975).

<sup>4</sup> *Saturn Airways, Inc. v. CAB*, 483 F.2d 1284, 1287 (D.C. Cir. 1973).

<sup>5</sup> The CAB could regulate these services if it desired under the provision of Section 401 of the Federal Aviation Act of 1958:

No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

49 U.S.C. § 1371(a) (1970).

<sup>6</sup> *Id.*

sponsoring the flight, not the nature of the carrier per se, determines the extent of CAB regulation.

Certain areas of activity have been observed by the CAB in determining whether a charter operator is within the limitations prescribed for his operation. These include affinity, prior association of the passengers for the requisite period, pro ration of flight expenses, and limitations on solicitation or advertising.<sup>7</sup> The activity most susceptible of creating increased CAB regulation is affinity of the flight participants.<sup>8</sup> The CAB faces enforcement difficulties because of the relative ease with which a group can claim prior affinity where none actually existed. To expedite the factual determination necessary to ascertain affinity, the CAB has simply required membership in the group by the prospective passenger for at least six months prior to the flight.<sup>9</sup> The CAB, in employing this method to discourage the forming of a group solely for the purpose of evading airline fares on scheduled flights, has rationalized that a group with six months acquaintance had the trappings of a social club, and that substantial numbers of travelers, if required to plan months in advance of a vacation, would be dissuaded from affinity charter usage by inconvenience.<sup>10</sup> This reasoning has been applied by the CAB to its travel group charters and has been accepted by at least one court as a reasonable limitation.<sup>11</sup>

Similarly, pro rating the cost of an aircraft for social clubs has limited the availability of affinity charters to large groups which

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<sup>7</sup> See, e.g., *Voyager 1000 v. CAB*, 489 F.2d 792 (7th Cir. 1973); CAB Order No. 71-5-39 (May 10, 1971).

<sup>8</sup> See CAB Order No. 71-5-39 (May 10, 1971).

<sup>9</sup> In an enforcement proceeding against Educational Student Exchange Program, Inc., the Board found:

Many persons referred to ICEP by its affiliates, including ESEP, for participation on the above-mentioned flights had not been members of such affiliates for a period of six months and, in many instances, joined such affiliates, including ESEP, merely in conjunction with the transportation offered.

CAB Order No. 71-5-39 (May 10, 1971).

Such a finding is not unusual in cases where affinity organizations are suspected of being indirect carriers. Although not conclusive proof of wrongdoing, the failure of the passenger to have been affiliated with the suspect organization for more than six months has been cited as some indication of misuse of the affinity charter.

<sup>10</sup> The same reasoning was used by the CAB in defending its institution of travel group charters. 37 Fed. Reg. 222, 224 (1972).

<sup>11</sup> *Saturn Airways, Inc. v. CAB*, 483 F.2d 1284 (D.C. Cir. 1973).

plan ahead since smaller groups would be unable to recognize any savings through chartering an aircraft if the rental cost were divided among the membership. Even the CAB-approved split charter concept, the sharing of one airplane by two groups with the same destination, does not totally dispel the inherent limitation of cost,<sup>12</sup> and the increased administrative burden on both groups hampers its implementation.

Another facet of pro rata payment not conducive to expanding charter travel has been the ever-present possibility of loss to the passenger.<sup>13</sup> The pro rata payment has meant that passengers have no idea what their final bill for the flight will be. They make reservations based on the knowledge of the minimum price *if* all of the seats are filled. Cancellations usually result in forfeiture of deposit money for the cancelling party and a proportionally higher price for the remaining passengers. This CAB-required alternative purposely dilutes the benefit of cost savings to produce less competition for certificated carriers.<sup>14</sup>

Nor has the CAB been lenient in its inspection of the pro rata requirement. A fixed price paid before the flight has been considered evidence that the cost of the flight was not pro rated.<sup>15</sup> If a charter organizer does not divide the charter price equally and in an obvious manner, the adherence to pro rating has been questioned.<sup>16</sup> Although a showing that a single fixed price was charged before the flight is not proof that the flight does not conform to affinity charter regulations, it is an indication of attempted evasion of CAB regulation. This assumption is strengthened when the organizer

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<sup>12</sup> 29 Fed. Reg. 6005 (1964).

<sup>13</sup> In discussing pro rata payment of its proposed travel group charters, the CAB said:

The nonvacationing traveler does not appear to be a likely candidate for a pro rata charter. Nor, in view of the conditions surrounding the proposed travel group charter rules, does it appear that the mainstream of the vacation travelers in the dense North American market is apt to be diverted to such charters. In our judgment, these charters will tend to attract primarily those price-conscious travelers who might not utilize scheduled services in any event.

37 Fed. Reg. 222, 224 (1972).

<sup>14</sup> *Id.*

<sup>15</sup> *Voyager 1000 v. CAB*, 489 F.2d 792 (7th Cir. 1973).

<sup>16</sup> See CAB Order No. 71-5-39 (May 10, 1971).

made no refund of any amount paid by the passengers in excess of the actual costs.<sup>17</sup>

The final limitation of affinity charters is the absolute prohibition of advertising for passengers.<sup>18</sup> Likewise, solicitation for memberships in the group or organization for the purpose of travel at reduced rates has on some occasions been characterized as an attempt to circumvent the certification proceedings.<sup>19</sup> Flights made available to the general public have historically been considered too similar to regularly scheduled carriers to avoid regulation. Several imaginative plans to avoid the solicitation limits, including the circulation of flight lists to other clubs for the purpose of allowing their memberships to take advantage of such flights, have been struck down by the CAB as advertising for passengers.<sup>20</sup> In one such case, United European American Club and International Club of California, both operating under the less stringent affinity provisions of air travel clubs, made memberships so easily available through nominal dues and publication of flight offerings to members and non-members that their rolls grew to approximately 50,000.<sup>21</sup> The CAB can easily detect cases of obvious solicitation by affinity organizers; it is the group operating just beyond the regulations while providing cheap and frequent air service that most concerns the CAB and threatens the certificated carriers. Not unexpectedly, these clubs have the best prospects for success and claim the largest shares of the travel market.

Although its detractors emphasize the necessity for replacing affinity charters with more attractive alternatives,<sup>22</sup> the underlying pressure for termination is inconsistent with the usage patterns engendered by the existence of affinity charters. Affinity charters account for eighty percent of all charter travel<sup>23</sup> and provide a large

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<sup>17</sup> *Id.*

<sup>18</sup> 14 C.F.R. § 207.40(b) (1973).

<sup>19</sup> *Voyager 1000 v. CAB*, 489 F.2d 792 (7th Cir. 1973).

<sup>20</sup> CAB Order No. 71-2-33 (Feb. 5, 1971).

<sup>21</sup> *Id.*

<sup>22</sup> The CAB has proposed elimination of the affinity charter, presumably because of its discriminatory nature. As will be discussed *infra*, this proposal met with such opposition that it was withdrawn by the CAB. See Notice of Proposed Rule Making EDR-237C (October 30, 1974) and CAB Special Regulation SPR-85, at 9 (August 7, 1975).

<sup>23</sup> *Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 64 (1975).

share of total revenue for supplemental carriers supplying charter service.<sup>24</sup> In a recent fare comparison of pro rata charters, one-stop inclusive tour charters, and round-trip tourist fares, the pro rata charter was significantly cheaper than either of the others.<sup>25</sup>

It is obvious from the statistics of affinity charters that the pressure for their termination is from the regularly scheduled trunklines, and not from consumers. Moreover, it is apparent that this oldest form of vacation charter, discriminatory though it may

<sup>24</sup> World Airways reported breakdown of charter revenue by type of charter is as follows:

**CHARTER REVENUES BY TYPE OF CHARTER, WORLD AIRWAYS, INC.**

Charter type	Year to date Nov. 30, 1974	
	In thousands	Percent of total
Pro rata (affinity) . . . . .	\$22,404	37.9
ITC . . . . .	16,328	27.6
Single entity . . . . .	11,820	20.0
TGC . . . . .	5,105	8.6
Cargo . . . . .	1,517	2.6
Wet Lease . . . . .	1,392	2.4
Study group . . . . .	499	.9
Total . . . . .	59,065	100.0

*Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Con., 1st Sess. 32 (1975).*

<sup>25</sup> The CAB recently released the following price comparison chart in support of its one-stop inclusive tour proposal:

Market	Pro Rata Charter Price	Estimated OTC Price	Round-Trip Tourist Fare	OTC Undercut
New York City-Miami/ Fort Lauderdale	\$70	\$115	\$188	\$73
Boston-Miami/ Fort Lauderdale	81	126	210	84
Chicago-Miami/ Fort Lauderdale	77	122	202	80
Cleveland-Miami/ Fort Lauderdale	70	115	188	73
New York City/ Orlando/Tampa	63	108	176	68
Boston-Orlando/ Tampa	75	120	198	78
Chicago-Orlando/ Tampa	65	110	178	68
Cleveland-Orlando/ Tampa	60	105	168	63
New York City- Acapulco	136	181	392	211
New York City- Bermuda	46	91	190	99

CAB Special Regulation SPR-85, at 88 (August 7, 1975).

be, is a viable alternative. More recently proposed charter forms, touted as consumer-oriented, have failed to compete financially with the maligned affinity charter.

#### AIR TRAVEL CLUBS

Air travel clubs and affinity charters are similarly regulated by the CAB, but the air travel club (ATC) allows charter travel without the prior affinity requirements of the social club. To be eligible for air travel club status, dues or membership fees must be paid in addition to the pro rata flight costs found in other charter forms. Unlike regularly scheduled carriers, the air travel clubs' flights are sporadic and non-profit, and only a certificate of safety from the Federal Aviation Administration is required for operation.<sup>26</sup> This escape from certificated carriage allows the air clubs to provide low-cost transportation without the hindrance of working only with prior affinity groups.

Although air travel clubs began as limited operations, their activities grew to significant proportions, causing concern to trunk-line carriers and, in turn, the CAB.<sup>27</sup> Without a prior affinity requirement, the air travel club would be more available to the general flying public, but the distinction between regularly scheduled, individually ticketed carriers and group travel in the air club would be narrowed. When that distinction is diminished, the trunk-line carriers feel threatened by the removal of one unattractive condition to air club travel. In an indirect sense the increased availability of air travel clubs, coupled with their growing acceptance by the vacationing public, influences the market structure of certificated lines. When charter operators begin causing the regulated services to lose revenue, the CAB will likely either tighten the restrictions on the charters or bring them under its direct regulation.<sup>28</sup>

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<sup>26</sup> 32 Fed. Reg. 1031 (1967).

<sup>27</sup> One such air travel club, Voyager 1000, had approximately 14,500 outstanding memberships representing an estimated 43,000 individuals eligible for the club's flights at the time the CAB's Bureau of Enforcement filed its complaint against the club. *Voyager 1000 v. CAB*, 489 F.2d 792, 795 (7th Cir. 1973).

<sup>28</sup> In testimony before the Senate Subcommittee on Aviation, Arnold J. Barer, legal counsel for Airclub International, made the following observation:

The real reason they (the CAB) went after Voyager was because Voyager and Air Club International are the two largest, two most



One of the most significant CAB attacks on air travel clubs occurred in *Voyager 1000 v. C.A.B.*<sup>29</sup> Voyager 1000, a non-profit organization, began operating as an air travel club in 1964. Its growth was steady, and by 1968 the club's membership stood at a fairly constant 2,400. The directors decided in 1968 that the club's financial difficulties could best be resolved by increased membership.<sup>30</sup> This goal was achieved by a vast drive to attract new members to the club through magazine advertisements, brochures with flight schedules, and special student discounts.<sup>31</sup> Additionally, Voyager held open houses for members and non-members at which memberships were solicited and dues were often reduced by as much as fifty percent. Large organizations in Indiana, home of Voyager, as well as individuals contacted through mailing lists were solicited to join the club. The regular initiation fee of two hundred dollars for a family and one hundred twenty-five dollars for an individual membership was cut to ten dollars, and monthly dues were set at six dollars.<sup>32</sup>

Voyager expanded its privately-owned fleet of aircraft to include a Boeing 720 jet, two Lockheed Electras, two DC-7's and two Martin 404's. International as well as domestic flights were offered with increased frequency and at very low cost. Massive solicitation

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successful air clubs in the business. They are the ones that have the largest membership and fly the aircraft.

It presents no effective threat to the Board's jurisdiction to take a situation where they want to go after an outfit that flies one DC-3 or DC-7 on a very sporadic basis. Certainly maybe they advertise; a lot of them do. We have four or five other clubs; several of them have jets. They have approached those clubs indirectly. They have gone to the FAA; they have given the FAA an advisory letter, and as a result, Jet Set had their 123 certificate revoked. Sunfari has its 123 certificate under revocation, and now they have issued it pending the *Air Club* case.

They haven't had to bring the enforcement because they (the CAB) are accomplishing the same result indirectly by in effect enunciating what the carriage—the common carriage rule is, and then going over to the FAA, which obviously in part is one of the requirements of a part 123 certificate. It is that it be legal.

*Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 133 (1975).*

<sup>29</sup> 489 F.2d 792 (7th Cir. 1973).

<sup>30</sup> *Id.* at 794.

<sup>31</sup> *Id.* at 795.

<sup>32</sup> For a closer examination of the facts of Voyager 1000, see CAB Order No. 73-3-1 (March 1, 1973); 7 IND. L. REV. 737 (1974).

and low dues, together with the extensive flight offerings and frequency of flights, induced the CAB, in response to scheduled carrier pressure, to find that Voyager 1000 was no longer acting within the purview of the air charter limitations.<sup>33</sup> The CAB ruling, affirmed by the Seventh Circuit Court of Appeals,<sup>34</sup> held that Voyager was acting as a public carrier and was not entitled to exemption from CAB regulation. In this particular case, Voyager's solicitation, ease of membership, and direct competition with certificated airlines produced the kind of market depletion that is almost certain to lead to regulation. Although the decision has been criticized,<sup>35</sup> its importance lies in the willingness of the CAB to declare a travel club a common carrier under less than absolute violations of charter sanctions.<sup>36</sup> Voyager's soliciting of new members was arguably no more than informing the traveling public of the availability of memberships.<sup>37</sup> There is no indication that non-members were allowed to participate in the club's trips. Nor did the club's charges violate the intent of the pro ration rule, even though the charges were not necessarily changed with each flight. In short, the facts of the Voyager operation would hardly stand as a prima facie case of charter violation.

In a subsequent case, *Club International*,<sup>38</sup> the court used the *Voyager* rationale to find the club was operating in essentially the same way as Voyager 1000. The CAB reiterated its stand that the solicitation of members, regardless of whether that solicitation is a colorable issue, coupled with relatively liberal membership requirements, will suffice to classify an air charter as an indirect carrier.<sup>39</sup> The CAB's action against Club International is typical of

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<sup>33</sup> CAB Order No. 73-3-1 (March 1, 1973).

<sup>34</sup> 489 F.2d 792 (7th Cir. 1973).

<sup>35</sup> See 7 IND. L. REV. 737 (1974).

<sup>36</sup> It is fairly clear that the CAB is itself unsure of the boundaries of legality for ATC's. Nevertheless, it is obvious from the *Voyager* decision that no presumption of innocence attaches to ATC's in the eyes of the CAB. For an insight into the CAB difficulty with ATC enforcement proceedings, see note 101 *infra*.

<sup>37</sup> The "advertisements" of Voyager 1000 were addressed to "Voyager Members Only," but invited non-members to join. There was apparently no solicitation for flights by non-members as such, but only for memberships. 489 F.2d at 795.

<sup>38</sup> CAB Order No. 74-9-70 (September 19, 1974).

<sup>39</sup> In its finding, the CAB said about Club International:

In sum, the Club International operation involved indiscriminate solicitation of every member of the public with as little as \$15 in

its enforcement proceedings against ATC's. After finding the club was acting as a common carrier, the CAB ordered cessation of all income producing activities pending appeal,<sup>40</sup> an action which virtually assured the demise of the club regardless of the final determination of higher courts.<sup>41</sup>

The air travel club cases demonstrate a CAB effort to extinguish all successful competition with certificated carriers.<sup>42</sup> But if an air

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his pocket (\$25 for a family man) to enjoy the pleasures of Club International travel at savings far exceeding the "membership" charge. As the Board said in *Voyager*, "the very reason for . . . (Club International's) existence is the provision of transportation"; "the basic reason for obtaining 'membership' is to take advantage of its transportation service," and "members are solicited from the public at large and join with ease (i.e., for a small fee and with no screening) for the purpose of obtaining transportation at reduced rates." (Order No. 73-3-1, at 10-11). CAB Order o. 74-9-70 (September 19, 1974).

<sup>40</sup> Describing the CAB's action against the air club of which he is vice president, Edward J. McDevitt of Airclub International told the Senate Subcommittee on Aviation:

The CAB opened hearings aimed at finding us a common carrier in violation without a certificate in 1972. Further hearings led to a Board decision in September of 1974 which branded us as outlaws and gave us 60 days in which to cease operations in violation of the law.

During those 60 days we were forbidden to advertise or in any way promote the advantages of the club. We could not accept any new members, and in general were given a most emphatic shove towards bankruptcy.

This tactic had already worked quite well for the Board in disposing of several other clubs in other parts of the country, most notably the "Voyager 1000" club base in Indianapolis.

New memberships which, incidentally, only cost \$25 per year per couple, were a major factor in meeting our ongoing expenses. These immediately ceased.

Bookings for future flights dropped like a goose full of buckshot because, naturally, the members felt quite nervous over the notoriety and possible demise of the club. Refunds had to be made. Flights had to be canceled because too few people were now committing to go on them.

At the same time, creditors became extremely nervous, demanded that all accounts be brought up to date immediately, and cash in advance was demanded for such necessities as fuel, food, office supplies, and all the myriad logistic details that go into the operation and well-being of four large aircraft.

*Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 124 (1975).*

<sup>41</sup> *Id.*

<sup>42</sup> See note 101 *infra*. The current CAB proposals would indirectly eliminate ATC's by combining them with other charter forms under one CAB-regulated charter device.

travel club does not provide competition of at least a limited nature, it is not a viable means with which to provide the consumer an inexpensive and responsive means of vacation air travel. Moreover, the air travel clubs have worked under guidelines which provide no clear definitions of their true limitations, in part because of the CAB's reluctance to develop definitions.<sup>43</sup> A hardship has been worked on clubs like Voyager 1000 when they have expanded in expectation of being allowed to continue, only to be struck down by the CAB. This game of blind-man's-bluff is hardly conducive to air travel clubs' survival.

If the CAB is successful in its attempt to effectively eliminate air travel clubs, or at least their most attractive aspects as an alternative to air carriage,<sup>44</sup> the public will have only the choice of social clubs or individually ticketed carriers. While the social clubs undeniably have a great deal to offer their members, the membership is discriminatory and the services available are relatively limited. Air travel clubs, on the other hand, have often been able to maintain their own landing facilities and terminals as well as their own aircraft.<sup>45</sup> These features enable the clubs to offer more frequent and attractive flights at even lower rates because the maintenance and flight operation expense is borne by the club rather than a certificated or supplemental carrier. The social club is typically a chartering service which must lease its aircraft, resulting in higher costs to its passengers, and less frequent, sporadically scheduled flights.

If the principal difference between social clubs and air travel

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<sup>43</sup> See note 101 *infra*. In his appearance before the Senate Subcommittee on Aviation, Harry R. Maugana, Jr., manager of the Atlanta Skylarks Air Travel Club remarked:

As a medium-size air travel club in an industry which has previously discouraged large growth, we face many problems. Uppermost of these problems is the grey area in which we operate in regard to government regulatory agencies.

*Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 173 (1975).*

<sup>44</sup> The CAB's attempt to eliminate air travel clubs is obvious in cases like *Voyager 1000*, but the CAB proposed abolition of the affinity charters as well in October of 1974. Notice of Proposed Rule Making EDR-237C (October 30, 1974).

<sup>45</sup> *Voyager 1000*, for example, maintained its own terminal at Weir Cook International airport and owned a fleet of aircraft to serve its members. CAB Order No. 73-3-1, at 5 (March 1, 1973).

clubs is the prior affinity of their members, and the real operating difference is that only air travel clubs can provide attractive services competitive with certificated carriers, the apparent CAB dislike of air travel club amounts to a preference for the industry it regulates at the expense of the consumer. Some commentators have suggested that ATC's must operate as a business, but do so in the public interest.<sup>46</sup> The CAB has seized upon the "business" aspect of ATC operation to attack the most successful clubs, ignoring the manifest consumer desire for the service. *Voyager 1000*,<sup>47</sup> *Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc.*<sup>48</sup> and *Club International, Inc.*<sup>49</sup> demonstrate a consistent effort by the CAB to curtail sharply and perhaps destroy the air travel club. Each of these cases involved a club of significant size competing with regularly scheduled carriers for travel trade.<sup>50</sup> If the prospect of CAB intervention is necessarily concomitant with success as an air travel

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<sup>46</sup> Arnold Barer, counsel for Airclub International, presented the ATC's view of the business/public service nature of ATC's in recent testimony before the Senate Subcommittee on Aviation:

I think in fact that air travel clubs have to be businesses. Obviously if they don't operate on business—on the terms of sound business judgment, if there isn't risk capital provided for them, which demand a return, they cannot exist.

The board has siezed (sic) upon the fact that it—virtually every travel club, there has been somebody who has come along and who has attempted to put the thing together and who has by the necessity had to put up an investment and expects a return upon investment and are a combination of business. They are a combination of business and the fact that they are membership organizations.

Without the promotion, the membership organization cannot exist. Without the membership organization, the business can't exist. And, because of that, it is really unfortunate that the Board would like to think of air travel clubs as businesses. They are just another guy maneuvering in to get part of that industry; but that is a very simple listing, very erroneous idea; and one that was effectively, I think, rejected by the hearing examiner who came out to Seattle, sat in a Federal hearing room and saw the literally hundreds of people who appeared every day because it was their club that was involved. He rejected that finding.

But the Board came back and put it in. They hadn't been there to see the people.

*Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 128 (1975).*

<sup>47</sup> 489 F.2d 792 (7th Cir. 1973).

<sup>48</sup> 466 F.2d 552 (9th Cir. 1972).

<sup>49</sup> CAB Order No. 74-9-70 (September 19, 1974).

<sup>50</sup> See note 28 *supra*.

club, very few clubs are likely to make any effort to establish themselves in a self-destructive market.

#### TRAVEL GROUP CHARTERS

In January of 1972 the CAB published a proposed rule<sup>51</sup> establishing a new class of charter operation: the travel group charter. This form of charter was implemented on an experimental basis with permanent rules to be formulated consistent with suggestions offered by interested parties and a review of the success of the venture. In adopting this posture, the CAB believed that

the practice of limiting group charters to groups having a prior affinity may discriminate against persons who are either not members of any charter-worthy organizations or are members of organizations to (sic) small to mount an extensive and attractive charter program, and embodies a concept very difficult, if not impossible to enforce.<sup>52</sup>

The travel group charter (TGC), as initially proposed, was to consist of a group of fifty or more persons with no prior affinity forming a charter group at least six months in advance of the flight.<sup>53</sup> Each member of the group would be required to pay a nonrefundable deposit equal to not less than twenty-five percent of the transportation charges.<sup>54</sup> These deposits could only be returned in the event that a replacement participant was obtained, and the replacements could not total more than twenty percent of the initial list submitted by the charter organizer. No mass media advertising would be allowed and all charges would be prorated among the participants.<sup>55</sup>

As might be expected, the consumer groups generally supported the proposal with some qualms that the restrictions might prove overly burdensome.<sup>56</sup> The travel agency industry also supported the

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<sup>51</sup> 37 Fed. Reg. 222 (1972).

<sup>52</sup> *Id.*

<sup>53</sup> 37 Fed. Reg. 222, 224 (1972).

<sup>54</sup> *Id.*

<sup>55</sup> For the conditions of the proposed travel group charter, see 37 Fed. Reg. 222, 223, n.1 (1972).

<sup>56</sup> In its proposed TGC rule making, the CAB said:

Consumer groups voiced their support for the proposal on the basis of need for low cost, charter travel. However, some concern was ex-

measure as did the supplemental carriers.<sup>57</sup> Not surprisingly, the scheduled carriers and the unions representing their employees strongly opposed the idea.<sup>58</sup> Weighty opposition notwithstanding, the CAB urged the adoption of TGC's, stressing the inherent discrimination against passengers under the affinity charters and the enforcement problems with affinities and air travel clubs.<sup>59</sup> The necessity of maintaining a distinction between charter service and individually ticketed service was met by the limitations, especially proration of cost and the assumption of financial risk by the participants.<sup>60</sup>

In response to the specific charges of the certificated carriers that the TGC would infringe on their market, the CAB enumerated several reasons why it believed that the carriers' expectations were premature or ill-founded.<sup>61</sup> Those reasons included the fact that the payment by the passenger six months in advance of the flight would deter all but those making very long-range

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pressed that the implementing regulations would prove overly restrictive and burdensome.

37 Fed. Reg. 222, 223 (1972).

<sup>57</sup> 37 Fed. Reg. 222, 223 (1972).

<sup>58</sup> *Id.*

<sup>59</sup> The CAB said, in citing its reasons for establishing TGC's:

(I)t has always been recognized that it may be inherently discriminatory to confine the benefits to persons who happen to belong to groups formed for nontransportation purposes, while members of the general public who do not belong to such groups are ineligible for these benefits. Moreover, enforcement of the affinity charter concept has proven to be very difficult, particularly in the area of assuring that charter participants are in fact bona fide members of a bona fide organization, and because of the ease with which travel promoters have been able to form groups for ostensible nontransportation purposes but which are in fact subterfuges for the furnishing of individually ticketed transportation.

37 Fed. Reg. 222, 223 (1972).

<sup>60</sup> The CAB itself has expressed uneasiness with the artificial requirement for maintaining a distinction between charter and individual travel. In hearings on Senate Bill 421, Acting CAB Chairman Richard J. O'Melia said:

The distinction between individual and group travel is an arbitrary one from the point of view of the prospective passenger, and does not serve any necessary regulatory purpose. So far as I am aware, this distinction is unique to our own legal system. The legal requirement that the distinction must be maintained creates uncertainty as to the extent of the Board's power to authorize charters, and the distinction is largely immaterial in terms of economic policy.

*Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 49 (1975).*

<sup>61</sup> 37 Fed. Reg. 222, 224 (1972).

travel plans and would force the passenger to assume the risk that his money would never be refunded in full, that the flight would ultimately be canceled or that the price would be higher than anticipated. That kind of financial arrangement, the CAB argued, would preclude use of the TGC by nonvacationing passengers and would be of little interest to the mainstream of vacation travelers.<sup>62</sup> Also, the CAB pointed out that the dire predictions made on previous occasions by the regularly scheduled carriers had proven inaccurate.<sup>63</sup> As a conclusion to the justifications offered by the CAB, it is important to note that the CAB assured opponents of TGC's that, if necessary, more stringent restrictions might be applied to curtail massive diversion of passengers to the charter service.<sup>64</sup> The CAB's forecast concerning the small impact of TGC's on the certificated market was later proven correct.

The proposed addition of TGC's to the charter scheme caused considerable agitation within the aviation industry. While TGC's circumvented the most severe limitations of charter availability (affinity and the stifling scrutiny of air travel clubs), the distinction between charter service and regularly scheduled service has been retained. Although the CAB may have believed its initial proposal would be desirable to travelers, that supposition was proven inaccurate soon after the adoption of TGC regulations on September 27, 1972.<sup>65</sup> Reiterating the purpose of the TGC enunciated in the prior proposed rule making, the CAB substantially ignored the urging of the certificated carriers and eased the initial restrictions on TGC's.<sup>66</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> In answering the charge of the certificated carriers that adoption of TGC's would be catastrophic, the CAB said:

The Board wishes to emphasize that, in proposing these travel group charter rules, it has no purpose or intention of impairing the viability of scheduled services. In assessing the contentions of the route carriers that such will be its effect, we cannot ignore the fact that these carriers have in the past made similar predictions in response to proposals to expand the authorization of supplemental air carriers or to liberalize the conditions under which they operate. Notwithstanding these predictions, the traffic carried by route carriers in their scheduled services has continued to grow in the markets most competitive with charters.

*Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 37 Fed. Reg. 20808 (1972).

<sup>66</sup> *Id.*



The first adopted version of the travel group charter reduced the minimum six-month lead time to three months; added a minimum seven day stay requirement for North American charters and ten days for all other charters; reduced the minimum group size to forty; allowed the organization of TGC's in foreign countries; relaxed restrictions on refunds of the twenty-five percent deposit; and, most surprisingly, allowed advertising of the charters to the public at large.<sup>67</sup>

The first year of operation under the adopted version of TGC's proved disastrous.<sup>68</sup> The onerous administrative requirements and travel restrictions resulted in only six hundred ninety-eight TGC flights during the first twenty-one months of service.<sup>69</sup> This figure represented less than seven percent of the TGC's filed with the Board.<sup>70</sup> The TGC as adopted failed for reasons that might be explained by its experimental nature, filing requirements, higher cost, or travel restrictions. The failure of TGC's, operating under CAB-prescribed guidelines, forced further CAB experimentation.

Additional liberalization of TGC requirements was announced by the CAB in 1974.<sup>71</sup> The amended rules reduced the lead time to two months and allowed up to fifteen percent of the passengers to assign their seats to the general public if they were unable to fly.<sup>72</sup> These steps made the TGC considerably more attractive in a number of important ways. The reduction of lead time permits the traveler to avoid planning his trip seven or eight months in advance. Allowing assignment for travelers who wish to change their minds relieves most of the concern that the prepaid fare will be lost. These provisions, coupled with the elimination of advertising restrictions, insure the widest dissemination of charter plans and a greater potential for their acceptance.

In its adoption of the rules, the CAB was careful to point out that the plan was for an experimental period extending until

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<sup>67</sup> *Id.*

<sup>68</sup> See Kamp, *The Near Future of Air Charter Regulation: The Case for More Experimentation in Public Policy*, 41 J. AIR L. & COM. 389, 398 (1975).

<sup>69</sup> *Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 11 (1975).

<sup>70</sup> *Id.*

<sup>71</sup> CAB Reg. SPR-78 (August 12, 1974).

<sup>72</sup> *Id.*

December 31, 1975.<sup>73</sup> This deadline was dropped by the CAB after the adoption of TGC's, and the program was extended indefinitely,<sup>74</sup> a step indicating the CAB's belief that the TGC as amended is a workable alternative to other charter forms.<sup>75</sup> This assumption remains unsupported, and cannot be proven until the TGC is fully developed. Development to that extent may only provide an opportunity to proclaim liberalized TGC's "unmarketable," a phrase used by the CAB to describe the originally adopted version.<sup>76</sup> The experimentation recommended by one author<sup>77</sup> is, in fact, no more than the course followed by the CAB in the past. Whether the present experimental TGC form will prove more attractive to the consumer is highly speculative, but continued experimentation seems an ineffective and imprecise means of finding an adequate low-cost charter form. There is no evidence that such an approach has worked before, or that it is working now.

Shortly after the adoption of TGC's by the CAB, the certificated carriers brought suit to test the validity of the concept. In *Saturn Airways, Inc. v. C.A.B.*,<sup>78</sup> the District of Columbia Court of Appeals upheld the TGC's as a valid exercise of the CAB's administrative authority. In so holding, the court found that the restrictions imposed by the CAB adequately limited the application of charter service and precluded its untoward encroachment upon scheduled routes.<sup>79</sup> Because restrictions on TGC's have been eased since the *Saturn* decision, that finding is now suspect concerning TGC com-

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<sup>73</sup> 37 Fed. Reg. 20808 (1972).

<sup>74</sup> Notice of Proposed Rule Making SPDR-40 (November 27, 1974).

<sup>75</sup> Kamp, *The Near Future of Air Charter Regulation: The Case for More Experimentation in Public Policy*, 14 J. AIR L. & COM. 389, 400 (1975).

<sup>76</sup> CAB Reg. SPR-78 (August 12, 1974).

<sup>77</sup> Kamp, *The Near Future of Air Charter Regulation: The Case for More Experimentation in Public Policy*, 41 J. AIR L. & COM. 389 (1975).

<sup>78</sup> 483 F.2d 1284 (D.C. Cir. 1973).

<sup>79</sup> The *Saturn* court held that the nature of the TGC was so different from conventional charter forms that experimentation would be required to determine its effectiveness and that the CAB might later change its approach:

(T)he Board remains free at all times to adjust its regulations in the interim to adapt to unexpected results. The Board's experience with charter definitions in the past and the comments and oral arguments submitted to it led it to believe that this experimentation approach was the proper manner in which to proceed. We cannot fault such an approach.

*Id.* at 1293.

petition with certificated lines. Nevertheless, no subsequent case has been brought, probably because of the demonstrated financial failure of TGC's.

The travel group charter could be a great improvement to the previous air club-social club dichotomy. The introduction of the TGC may extinguish the illegal air travel club and promote the goals of low-cost air travel.<sup>80</sup> Whether abuse of air charter provisions will be curtailed by the TGC remains to be seen, but the CAB has at the least provided a charter form of its own regulation. CAB regulation of TGC's, if that charter form is now marketable, may bring about a period of relative peace in the charter field; a time when the effective organization of TGC's could produce a de facto competitor to the certificated services.

#### ONE-STOP INCLUSIVE TOUR CHARTERS

In August of 1975 the CAB adopted yet another charter form. The one-stop inclusive tour charter (OTC) was adopted to serve the international market, replacing the foundering inclusive tour charter.<sup>81</sup> The basic concept combines air travel with a ground package, often including hotel fares and meals. Restrictions similar to those imposed on TGC's apply to OTC's, but contain provisions for minimum stay requirements.<sup>82</sup>

Coupled with the OTC is a Special Event Charter (SEC) for "specific and significant"<sup>83</sup> special events. The SEC, despite its separate title, is little more than a domestic variation on the OTC.<sup>84</sup> The OTC and SEC represent another CAB experiment in charters. Much as the CAB-regulated TGC was adopted and strict enforcement against ATC's promulgated, the OTC appeared at the same time affinity charter abolition was proposed by the CAB.<sup>85</sup> Even as the CAB admitted the success of charters,<sup>86</sup> it continued to propose

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<sup>80</sup> 39 J. AIR L. & COM. 463, 469 (1973).

<sup>81</sup> See Kamp, *The Near Future of Air Charter Regulation: The Case for More Experimentation in Public Policy*, 41 J. AIR L. & COM. 389 (1975).

<sup>82</sup> *Id.* at 402-03.

<sup>83</sup> CAB Special Reg. SPR-85, at 13 (August 7, 1975).

<sup>84</sup> *Id.*

<sup>85</sup> Kamp, *The Near Future of Air Charter Regulation: The Case for More Experimentation in Public Policy*, 41 J. AIR L. & COM. 389, 402 (1975).

<sup>86</sup> *Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 48 (1975).

new forms designed and regulated by the CAB. Whether the CAB believed that experimentation could best be accomplished through tight regulatory control or merely acted to protect the certificated airlines is not entirely clear. Only the CAB's desire for complete charter control is manifest from its actions.

This CAB domination has not resolved the ambiguities in charter schemes. The TGC and OTC have been recently characterized as "just too complicated"<sup>87</sup> for practical use; and the CAB has admitted the accuracy of this criticism. In hearings on the Low-Cost Air Transportation Act, Acting CAB Chairman Richard J. O'Melia said, "[t]he present regulatory situation affecting charters is quite complicated to say the least. We have a proliferation of provisions and technical requirements that are difficult to understand and interpret."<sup>88</sup> Changing proposals, CAB-intervention, termination, and "experimentation" cannot be expected to remedy the situation. The CAB has been unable to clear the muddied waters after years of enforcement and pseudo-regulation; it is unlikely now to be endowed with the insight or ability to remedy charter shortcomings.<sup>89</sup> If Senator Howard Cannon is correct in his assertion that "the Board has considered itself completely above any policy inputs from the Congress or the public,"<sup>90</sup> only a radical break with plodding charter trial and error will produce improvement.

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<sup>87</sup> *Id.* at 46.

<sup>88</sup> *Id.* at 48.

<sup>89</sup> In his opening statement to the Subcommittee on Aviation, Chairman Howard Cannon characterized the CAB's actions in charter regulations:

Time and again the Board (the CAB) has ruled against efforts toward lowering air fares, against innovative discount proposals designed to get more people to fly, against lower cost economy fares for persons who desire fewer inflight amenities, and against carriers who wish to offer wider seats or against carriers who wish to provide lounges in their aircraft.

At the same time, the Board has followed a policy of unduly restricting the charter air transport business without regard to the fact that charter operations provide the only true low-cost air travel alternative to the great majority of Americans.

Late last year the Board even went so far as to put out a notice of rulemaking indicating that it was going to abolish the affinity charter, the only type charter operation of any significance in the United States today.

In short, the Board, in my opinion, has lost sight of its basic responsibility: That of promoting the public interest in air transportation.

*Id.* at 1.

<sup>90</sup> *Id.* at 2.

## PROPOSED CONGRESSIONAL ACTION

Presently pending before the Senate is a bill, introduced by Senators Howard Cannon and Edward Kennedy, responding to the seeming inability of the CAB to find an appropriate means of concurrently satisfying consumers and airlines.<sup>91</sup> The bill retains the affinity charter which the CAB has attempted to abolish<sup>92</sup> until such time as the Congress finds the demise of the affinity charter concept necessary.<sup>93</sup> Additionally, the bill provides for inclusive tour charters and changes the travel group charters to "advance-booking charter" trips with even more liberalized regulations.<sup>94</sup> The purpose of the bill is to define more precisely the charter forms and force CAB compliance with those standards.

The introduction of the advance-booking charter would take one more step, perhaps the last step, in trying to provide a saleable charter commodity. The proposed form would be a liberalized version of the already twice-liberalized travel group charter. The distinctions in travel limitations between the TGC and the advance-booking charter are: (1) the advance-booking charter would require purchase of transportation by the charter passenger no more than thirty days from the departure date; (2) the charter organizer would be prohibited from selling up to twenty-five percent of the seats on the advance-booking charter at any time prior to the departure date, apparently to avoid the long lead time requirements; (3) the charter organizer could not be prohibited from assuming the commercial risk on any advance-booking charter and could be required to offer seats at a pro-rated price; and (4) the advance-booking charter would not have to exceed three days duration if within the Western Hemisphere or seven days if outside the hemisphere.<sup>95</sup>

Advance-booking charters would boost consumer participation in low-cost flights with service similar to the certificated lines. The

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<sup>91</sup> S. 421, 94th Cong., 1st Sess. (1975).

<sup>92</sup> The CAB withdrew its initial proposal to terminate affinity charters, but future reassessment of that position can be expected unless congressional action is taken.

<sup>93</sup> S. 421, 94th Cong., 1st Sess. § 4 (1975).

<sup>94</sup> *Id.* at § 3.

<sup>95</sup> *Id.* at § 2. Comparisons between the ABC and TGC as well as between the ITC and OTC are represented by the following chart:

legislation would provide clearer guidelines for the charter organizers and dispense with the witch hunt instituted by the CAB against air travel clubs. The proposed Act requires the CAB to define air travel club operation in "specific terms" within ninety days after the effective date of the Act.<sup>98</sup> This would permit the valid air travel club charters to operate without fear of destruction if they are able to maintain a sufficient portion of the market. It is impossible to predict the effect of advance-booking charters on air travel clubs, but it is possible that, in time, if successful, the advance-booking charter would effectively displace the air travel club. That displacement would be far preferable to the killing of

	CAB-approved TGC	S. 421 ABC
1. Advance filing period	60 days	30 days
2. Mandatory nonrefundable deposit	25% of pro rata price	None
3. Fixed price	No	Yes
4. Mandatory cancellation if certain load factor is not achieved	Yes	No
5. Substitution or tophoff	15% substitution	25% tophoff
6. Tour operator assumes risk	No	Yes
7. Minimum length of stay	North America: 7d Other markets: 10d	Western Hemisphere: 3d All other: 7d
	S. 421 OTC (ITC)	Proposed OTC
Advance purchase requirement	None	30 days
Minimum tour price	Just and reasonable fare for charter transportation + compensatory charge for land arrangements	N. America: per seat price of air transportation + \$25 per day. Foreign: 110% of lowest scheduled fare between same points
Domestic quota	None	.25% of total passengers in scheduled service between same points in past 12m.
Minimum length of stay	Domestic: 3d Foreign: 7d	N. America: 7d; 3d when return leg is on Sun/Mon. Foreign: 11/1 - 3/1:7d; 4/1 - 10/1:10d
Minimum number of stops	1	1
Purchase of ground accommodations	Mandatory	Mandatory

*Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 16 (1975).*

<sup>98</sup> S. 421, 94th Cong., 1st Sess. § 5 (1975).

ATC's before a suitable replacement is in existence. In any event, the demise of the air travel club as we now know it seems certain, brought about either by continued strict CAB enforcement or congressional initiation of an even more liberalized charter service. This tardy congressional recognition of the need for a clear definition of service restrictions may give the advance-booking charter a potent tool with which to avoid the fate of the air travel club.

### CONCLUSION

The air traveler in America is presented with a deceptively broad choice in low-cost air transportation. In actuality, the passenger's selection may be so circumscribed as to provide no truly attractive alternative to regularly scheduled, individually ticketed carriage. As the charter situation stands, the CAB is promoting untested versions of the TGC, OTC and SEC. The CAB has attempted de jure termination of affinity charters and de facto elimination of ATC's. The motive for this genre of CAB activity is manifest upon scrutiny of its ramifications.

A pragmatic approach to appraisal of charter effectiveness begins with the financial success of ATC's and affinity charters.<sup>97</sup> If the affinity share of charter market approaches the eighty percent figure claimed by its advocates,<sup>98</sup> abolition of that form clearly flies in the face of consumer demand. The unprecedented public support for affinity charters engendered by the CAB termination threat speaks eloquently in behalf of ATC's.<sup>99</sup>

The lack of CAB attacks on affinity charters hints at acceptance of the form. And if the form is attractive to consumers, only the

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<sup>97</sup> See note 24 *supra*.

<sup>98</sup> *Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 64 (1975).*

<sup>99</sup> Mimi Cutler, Director, Aviation Consumer Action Project, described the hue and cry at affinity termination to the Senate Subcommittee on Aviation:

The public opposition to the abolition of affinities has been unprecedented. Well over 20,000 letters poured into the Board, and the dockets section received more than 4,000 sets of formal comments, 12 copies of each, from members of the public who opposed the abolition of affinities. This strong evidence of nonsupport appears to have had some effect. Two weeks ago the Board granted affinities a stay of execution. However, it has not yet issued a final order and could order the elimination of affinities with no satisfactory alternative to become effective at some time during 1976.

*Id.* at 64.

supposition that it is too attractive remains. CAB discussion of affinity discrimination and enforcement problems lacks conviction. Assuming that affinities discriminate in acceptance of passengers, there is no reason to suppose they were ever intended to satisfy the entire charter market's needs. It is far more important to recognize from their obvious public acceptance that affinities very adequately serve a lion's share of the present charter market even with discriminatory passenger intake. The CAB-proposed OTC, SEC, and TGC discriminate in their services offered, a distinguishing feature that lacks a difference. Obviously, no single charter form is expected to cover all consumer needs, and argument that affinities are discriminatory is specious. Similarly, enforcement difficulties do not militate against continuance of affinity charters. The relative lack of enforcement proceedings against affinity charter organizers is mute testimony to the ease of compliance with affinity restrictions.

The CAB's strict enforcement against ATC's demonstrates a motive consonant in its implications with the proposed affinity charter termination. A review of CAB enforcement proceedings against ATC's reveals one distinct common denominator. All ATC violators have been sizable clubs making a significant impact on the charter market. ATC organizers are well aware of the increased likelihood of enforcement concomitant with growth.<sup>100</sup> Only when the ATC reaches a plateau enabling serious competition with certificated carriers has enforcement been initiated. In part this may reflect the regularly scheduled carriers' desire to restrict sharply ATC activity because ATC's usually own their aircraft, effectively denying any portion of their market to certificated carriers through lease arrangements. CAB claims of enforcement problems with ATC's<sup>101</sup> are well founded, but mostly of the CAB's own making.

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<sup>100</sup> See note 28 *supra*.

<sup>101</sup> The following exchange between the CAB's Acting Chairman, Richard J. O'Melia, and Senator Howard Cannon took place during Senate hearings on S. 421:

Senator Cannon. Now, in refusing to adopt rules and regulations regarding the operation of air travel clubs, the Doard (sic) has been criticized by some for failing to spell out exactly what is permissible carriage.

Some flying clubs complain that the Board's policy has made it impossible to determine in advance what is permissible.

As you said in your supplemental statement that the adoption



There is no question about the CAB's authority to promulgate such regulations and guidelines as may be necessary to clarify the role of ATC's, although no clarifications have been issued. This dilatory refusal to fulfill its duties to the ATC's in any benevolent manner leaves the conclusion that the CAB is inconspicuously trying to murder the patient by substituting poison for medicine.

If the transition from affinity charters and ATC's to TGC's, OTC's, and SEC's is completed, the results may well be more regressive than beneficial. Affinity charter acceptance is a fact of aviation life, as is the potential for wide-spread ATC utilization. The dismal showing of TGC's, on the other hand, has required continuous revamping by the CAB.<sup>102</sup> The OTC and SEC are too new for proper evaluation, but even assuming they fare well, they are of little practical use. Considering the purpose of OTC's and SEC's, the restrictive nature of these charters far surpasses any discrimination attached to affinity charters. At their best OTC's and SEC's serve a small portion of the vacationing public. Many

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of regulations defining the boundaries between private carriage and common carriage, so far as flying clubs are concerned, would be little less than futile.

Why do you believe this to be the case and how can flying clubs be expected to understand Board policy in this area unless you adopt definitions and regulations?

Mr. O'Melia. Senator, this has been a problem perplexing me for a long time. As former Director of the Bureau of Enforcement, it bothered me.

I always thought that a flying club should be, for example, where people in this room would all buy part of the airplane and we would own an interest in it. We could then use it whenever we wanted to. But when you get outside of owning an interest in that airplane and are just a member of the general public being solicited by an organization, whatever its name—travel club—for the purpose of travel alone, then you are violating the present Board's regulations on charters.

Now, if the act is amended as we suggest, any travel club, whether it is a flying club, a social club, or whatever its name, would be eligible to go on planeload charters.

Senator Cannon. You are really saying there would be no necessity for the flying club if the act were so amended; is that correct?

Mr. O'Melia. That is my view, with the exception of ownership of the aircraft. If the club owns its own aircraft and then is engaged as a commercial operator, it would have to come in and get a 401 permit from the Board if it wants to solicit participants from the general public.

*Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 59-60 (1975).*

<sup>102</sup> See note 68 *supra*.

consumers simply do not require ground packages, tours, hotel rooms, or transportation;<sup>103</sup> nor are special events likely to serve the needs of vacationing travelers. Only the TGC can fulfill those needs under the CAB concept, and there is no indication that under even the present form, TGC's will assume an important share of the market.

The thrust of these CAB-regulated proposals is the tight control of the charter industry by the CAB. There is no inherent evil in such domination, but the trend to accept non-competitive charter forms over tested concepts manifests the airlines' influence with the CAB. No other conclusion is logically supportable. Affinity charters and ATC's, the only proven and successful charters, have been criticized and persecuted by the CAB. The most prominent beneficiary of the CAB-backed proposals is the certificated airline industry. This is true for two reasons: the airlines gain passengers any time charter travel participation declines; and the CAB's proposals, unlike the ATC's, enable certificated carriers to share the charter market with supplementals through lease agreements with charter organizers. Assuming these considerations do constitute the primary reason for the CAB's action, the motive need not destroy the result if the public and industry are served by the changes. Unfortunately, there is no reason to believe that CAB-initiated charters will offer consumers more. As shown, however, there are numerous indications that the CAB proposals will have a very detrimental impact on the consumer and the supplemental carriers.

The congressional alternative to continued CAB action is a more sensitive and sensible approach. The ABC is the first truly liberalized charter replacement for affinity charters and ATC's. Rather than making minuscule and confusing changes in the ill-conceived TGC, a one-step adoption of the ABC would prove or disprove conclusively the efficacy of a liberalized charter. Certificated carriers seemingly have nothing to fear from the ABC or any other charter form; civilian domestic charters accounted for only 4.05

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<sup>103</sup> In regard to the consumer demand for OTC's, Edward Driscoll, President, National Air Carrier Association, pointed out:

I might add here that OTC could never replace affinity since it is coupled with a package and, as I mentioned previously, 53 percent of those traveling affinity did not opt for the package.

*Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 11 (1975).*

percent of the total domestic revenue passenger miles flown by certificated and supplemental air carriers in 1974.<sup>104</sup> Supplemental air carriers, unlike the trunkline carriers, have received all of their annual transport revenues from charter service since 1971.<sup>105</sup> These

<sup>104</sup> The CAB published the following information concerning domestic revenue passenger-miles, showing the charter and scheduled service in each class:

**DOMESTIC REVENUE PASSENGER-MILES  
CERTIFICATED ROUTE AND SUPPLEMENTAL AIR CARRIERS  
(Millions)**

Item	CALENDAR YEAR				
	1970	1971	1972	1973	1974
1. Over-all Domestic Charter Revenue Passenger-Miles	5,224	4,279	4,905	6,137	5,735
2. Military Charter	3,178	1,859	1,267	591	247
3. Civilian Charter:					
Route Carriers	1,154	1,618	2,457	3,570	3,720
Supplementals	892	802	1,181	1,976	1,768
Total	2,046	2,420	3,638	5,546	5,488
4. Scheduled Services	104,147	106,438	118,138	126,317	129,731
Total Charter and Scheduled Services	109,371	110,717	123,043	132,454	135,466
Civilian Charter Percent of Total	1.87%	2.19%	2.99%	4.19%	4.05%

CAB Special Regulation SPR-85, at 82 (August 7, 1975).

<sup>105</sup> The following data were published by the CAB as an Appendix to Special Regulation 85:

**CHARTER REVENUES AS A PERCENT OF EACH GROUP'S  
TOTAL TRANSPORT REVENUES, ALL SERVICES  
CALENDAR YEARS 1955-74**

Year	Total Certificated Industry	Certificated Route Air Carriers			Supplemental Air Carriers
		Total	Domestic	International and Territorial	
1955	4.2	1.8	1.1	3.7	62.9
1956	5.6	3.7	3.0	5.9	62.1
1957	5.6	4.1	3.3	6.7	73.2
1958	5.8	4.0	3.1	6.9	70.0
1959	4.8	3.2	2.4	5.9	65.1
1960	4.8	2.8	2.3	4.4	74.1
1961	5.6	3.9	2.6	7.9	69.6
1962	7.2	4.9	3.8	8.1	80.3
1963	6.0	3.8	2.6	7.4	93.0
1964	6.0	3.7	2.5	7.1	95.8
1965	7.1	4.4	3.0	8.6	99.5
1966	10.0	6.8	3.6	15.1	99.3
1967	11.0	7.7	3.6	18.4	99.6
1968	10.4	6.8	2.7	17.9	99.8
1969	9.8	6.1	2.3	16.7	99.8
1970	7.8	4.5	1.8	13.6	99.8

figures reflect the minor portion of the industry captured by charter travel under any charter form, and demonstrate the complete reliance on charter service by supplementals. A considerable growth in charter markets would not seriously undermine the certificated routes,<sup>106</sup> and would finally provide low-cost recreation air travel.

While providing for testing the ABC, the Senate proposal would also maintain affinity charters until specifically eliminated by congressional, not CAB, action. The bill would require CAB clarification of ATC guidelines, a measure that would restore the potential of ATC's, even if the need is eventually eliminated by ABC's. This solution is surely preferable to continued experimentation by the CAB under pressure from certificated carriers. Positive action to protect the consumer is needed; not a politically expedient and practically useless compromise.

The "Low-Cost Air Transportation Act" includes the following indictment of the CAB:

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1971	8.0	4.7	1.8	14.7	100.0
1972	6.9	4.1	1.7	12.3	100.0
1973	6.3	3.4	1.5	10.2	100.0
1974	5.9	3.2	1.4	9.4	100.0

CAB Special Regulation SPR-85, at 81 (August 7, 1975).

<sup>106</sup>In stating the case for the charters and explaining the ill-founded fears of the certificated carriers, Edward Driscoll, President, National Air Carrier Association, told the Senate Subcommittee on Aviation:

The irony of the situation is that in the air transportation industry, as in most others, what is good for the consumer is also good for the industry. As the committee pointed out in its report on S. 1739, there is no evidence to support the myth that expanded charter service will cause serious damage to scheduled service. On the contrary, all of the available evidence indicates that charter service actually stimulates the demand for all forms of air transportation, including scheduled transportation.

There is just no justification for denying the consumer the kind of transportation he wants and needs. If people are willing to put up with the lesser convenience and flexibility of charter service in order to benefit from the low fares that plane-load economics make possible, they are entitled to do so. The plight of the American traveler of modest means, in the face of sharply increased fares on scheduled service, is a very real one—and low-cost charter services by both scheduled and supplemental airlines offer a practical solution. In our view, government should be responsive to these needs and desires of the public, rather than adhering rigidly to the patterns of the past. Unfortunately, the actions of the CAB make clear that it is unwilling to face up to today's realities, and to take the kind of action which is required.

*Hearings on S. 421 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 13 (1975).*

The Civil Aeronautics Board has failed consistently to provide for responsible regulation of such [charter] services consistent with the need to encourage and develop such services.<sup>107</sup>

An agency may assuredly regulate and encourage services simultaneously. It may, however, be quite impossible for an agency to regulate and encourage two services vying for the same market. It is for Congress to decide what services should be made available to the nation and delineate precisely the means for implementing those services. Congress has delegated its regulatory authority to the CAB, but it can never delegate its responsibility for the regulation.

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<sup>107</sup> S. 421, 94th Cong., 1st Sess. § 2 (1975).