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Some Plain Talk About Airlines and Regulations

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INTRODUCTION

ANY regulatory framework influencing something as vast and important as this country's scheduled airline system should be the subject of continuing review. Even a good regulatory framework can be improved through intelligent reassessment, and there are some significant modifications that can and should be made in light of the economic impact of regulation of the airlines. Yet, any discussion of such regulation or the merits of attempts to modify the existing regulatory framework through legislative proposal cannot be viewed entirely in the abstract. Rather, emphasis must carefully be directed toward the results of the actual or anticipated regulatory changes on the various aspects of our national life, including factors which certainly extend beyond the scope of the economic spectrum. Such an examination necessarily includes analysis and comparison on many levels and would literally be capable of absorbing voluminous works. Instead, I feel that it is time for some plain talk about airlines and regulation.

In the main, the federal regulation of the scheduled airlines' system in the United States has been a homogeneous blend of regulation with reason and competition under common sense controls. The combination of the two has helped produce the world's finest and most productive air transport system; extending prices to passengers and shippers utilizing the system at a substantially lower rate within the United States than the prices offered to airline customers within the European countries or the remaining world markets. Airline service and management in the United States is of a higher quality, more plentiful, and offers a greater nationwide coverage than in any national market. As a result, a far greater choice of scheduling offered by competing airlines is clearly evident.

Measured by any consumer standard, whether the same be price, quality, safety, or service coverage, it is clear that the system which has developed continues to insure success when combined with that consumer's freedom of choice among the competing airlines. However, even though the system's dominance seems firmly established, much criticism[1] has been leveled at the current method of airline regulation alleging that it fosters not only inefficiency and non-competitiveness, but also higher rates and fares than should be required.

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[1] *See generally* 40 Fed. Reg. 28747-83 (1975), for a summary of the positions which have been taken on both sides of the regulation debate.

Current proposals for airline regulation, particularly those which are embodied in the proposed Aviation Act of 1975,[2] are advocated to produce more competition and result in lower prices for the ultimate consumer of airline services. Yet, by carrying out the proposals in this Aviation Act, the number of airlines now offering competitive service will ultimately decrease, and the coverage and quality of scheduled flights will be reduced, resulting finally in higher fares as a necessary consequence.

ROUTE SECURITY

Passengers and shippers stand to lose most from the proposals with regard to air route entry and exit. While entry by carriers into air transportation would be encouraged as a matter of declared policy,[3] the expansion of encumbent carriers is specifically contemplated,[4] and direct non-stop service in an untold number of city-pair markets is almost naively promoted,[5] a complete abandonment of service (exit) by air carriers would no longer remain solely within the discretion of the Civil Aeronautics Board (CAB).[6] An air carrier could abandon service to any given location if only one of three standards is met:

(1) If that carrier has operated a route or part thereof below fully allocated cost for at least one year,[7] or,

(2) If that carrier has operated below direct costs on that route for the three months immediately preceding the abandonment petition[8], or,

(3) If that carrier can demonstrate that another air carrier will provide service.[9]

The implications derived from these standards are readily apparent. Marginally profitable routes would be the most likely candidates for abandon-

[2] H.R. 10261, 94th Cong., 1st Sess. (1975); S. 2551, 94th Cong., 1st Sess. (1975).

[3] H.R. 10261, 94th Cong., 1st Sess. §4 (1975). However, the proposed Aviation Act of 1975 would leave unchanged 49 U.S.C. §1371(d)(1) (1963), which confers authority upon the Civil Aeronautics Board [hereinafter referred to as CAB] to issue certificates on a finding that the applicant is "fit, willing, and able to perform", and that such transportation is "required by the public convenience and necessity."

[4] *Id.* at §9.

[5] *Id.* at §§6(b),(c), 9. Section 6(b) would authorize the CAB to certify applicants for "air transportation between any two cities not receiving non-stop scheduled air transportation," and would permit financially responsible carriers of limited capacity to operate without a certificate of public convenience and necessity.

[6] 49 U.S.C.A. §1371(j) (1963), requires that the CAB find after notice and hearing that the abandonment be in the public interest.

[7] H.R. 10261, 94th Cong., 1st Sess. §8 (1975). Under this standard, however, the CAB could require service to be continued for an additional year if in the public interest.

[8] Elsewhere in the bill, "direct costs" are defined for rate making purposes in a manner at variance with traditional CAB/industry practice in at least one case. *Id.* at §14(e).

[9] *Id.* at §8.

ment[10] with the prospect of depriving those passengers and shippers in all but the most densely populated areas of the quantity and quality of service currently being offered. While the requisite standards could be met by a petitioning carrier in such cases, virtually nothing would prevent an air carrier from ultimately abandoning service where its costs exceed its income, regardless of its maintenance, unless such pleas were accompanied by financial guarantees from the local community or state involved.

The result naturally flowing from these circumstances would be mass air service perhaps involving an at least temporarily increased level of competition, among approximately 25 airports within the United States serving the largest metropolitan concentrations of population and commerce.[11] The remaining 425 air terminals representing the less densely populated and industrialized sectors of the country would be tied into the air transportation system with only sporadic service at best.

"Deregulation" used to be the battle cry. Now the shibboleth is "regulatory reform". But if reform still carries with it a connotation of improvement, then proposals that would admittedly reduce the coverage and quality of scheduling air service cannot be advocated in the name of reform. The proponents of the Aviation Act admit that there would be less dependable, regularly scheduled airline service for the country as a whole. While individual proponents may differ as to degree, few deny the likelihood that their proposals will foster a concentration of services on the heaviest traveled and most profitable air routes. Obviously, these proponents fail to appreciate that the concept of route security[12] premised upon the widespread availability of

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[10] *See, e.g.*, Pan American—UMCA Acquisition Case and UMCA Abandonment Proceeding, 29 C.A.B. 392 (1959). *See generally* Eads, *The Effect of Regulation on the Cost Performance and Growth Strategies of the Local Service Airlines*, 38 J. AIR L. & COM. 1 (1972).

[11] *See* H.R. 10261, 94th Cong., 1st Sess. §9 (1975), which in part would remove all present restrictions on those airlines holding certificates within six years. The effect would be to allow unfettered competition among certified airlines on any of the established domestic air routes and predictably would tend to concentrate on only the most profitable routes which serve only a limited number of cities.

[12] *See* Civil Aeronautics Bd. v. Delta Air Lines, 367 U.S. 316, 324, 331 (1961), in which Chief Justice Earl Warren concluded:

> It is clear from the statements of the supporters of the predecessor of the Aviation Act—the Civil Aeronautics Act of 1938—that Congress was vitally concerned with what has been called "security of route"—*i.e.*, providing assurance to the carrier that its *investment in operations* would be protected insofar as reasonably possible. And there is no other explanation but that Congress delimited the Board's power to reconsider its awards with precisely this factor in mind . . . .
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> In short, our conclusion is that Congress wanted certificated carriers to enjoy "security of route" so that they might invest the considerable sums required to support their operations; and, to this end, Congress provided certain minimum protections before a certificated operation could be cancelled. We do not think it too much to ask that the Board furnish these minimum protections as a matter of course . . . .

See also American Airlines, Inc. v. Civil Aeronautics Bd., 359 F.2d 624, 634-37 (D.C. Cir. 1966) (Burger J. dissenting).

air transportation. It is indisputable that the unreliability of existing air service was one of the primary factors which initially prompted Congress to delegate to the CAB the authority to issue certificates of operation *in the public interest.*[13] Congress was concerned not only with the prevention of destructive competition, but also with the handicapping uncertainty which would result from a completely unregulated air transportation industry.[14]

The elimination of route security would result in a number of certain as well as probable consequences of a harmful and disruptive character. A small sampling with relatively little detail is sufficiently indicative of the scope of possible repercussions.

Intercity Public Air Transportation. As previously mentioned, by implementing the tenets of the proposed Act, the curtailment or even abandonment of service is a near certainty for a majority of the presently serviced air terminals in the United States. This would mean the loss of the most convenient form of intercity public transportation particularly between the lesser traveled urban routes. For many years, scheduled air service has accounted for far more public travel between these cities than land transportation by bus and rail combined.[15] In meeting the public travel needs, the air industry has offered the only growing service, and often, the only practical means of transport of individuals and goods. The inevitable shrinkage of the scheduled air service network would work an unnecessary hardship upon millions of individuals who have come to depend upon this pervasive system, and cessations of service would prove to be intolerable in many instances.

Health Needs and Medical Services. The effectiveness and availability of pharmaceuticals used in medical diagnosis, treatment, and research would be substantially impaired by a disruption of delivery frequency and regularity. These pharmaceuticals now move in scheduled air service to more than 3,000 hospitals and other medical facilities located throughout the country. These centers are not confined to major air hubs, but to the contrary, many are found in medium-sized and even small rural areas and communities. An even more important consideration in some situations is the extremely short life spans of many of these diagnostic materials required in the medical profession, necessitating rapid transport. In short, the nature of these materials, combined with the hallmark characteristic of air transportation—speed, demands their movement by air with dependability.

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[13] *See* 49 U.S.C. §1302 (1963).

[14] *See generally* Gilliland, *The Role of the Civil Aeronautics Board in the Development of the Domestic Air Carrier Route System,* 47 NOTRE DAME LAWYER 32 (1971); Gilliland, *Development of Governmental Regulation Over Aviation,* 30 FED. B.J. 264 (1971).

[15] C.A.B., HANDBOOK OF AIRLINE STATISTICS. 187-88 (Supp. 1975).

Commercial Marketing. Producers in the Far West, in the upper Midwest, in the Southwest, and in the Southeast—sections likely to lose varying amounts of scheduled air service if the proposed Aviation Act were to be enacted—have been making greatly increased use of the regularly scheduled airlines to reach distant markets in the United States and throughout the world. This is an encouraging marketing trend which would be severely dampened if the availability of scheduled air service is materially decreased.

Monetary Policies. Banks, credit card companies and other enterprises depend upon regularly scheduled air transportation to expedite the flow of checks and other negotiable instruments. This recycles money back into productive use more rapidly, preventing the waste that occurs when money floats idly in slower transportation. Such waste may be increased by any substantial loss of air service. Any additional costs are likely to be borne by consumers.

Employment. Heavy abandonment of air routes and a climate in which carriers move freely in and out of markets would cut deeply into the stable employment base not only of the airline industry, but into the employment base of the airframe and engine manufacturing industries as well. It requires little imagination to realize that the impact would also be recognized in the employment of subcontractors and other suppliers throughout the country.

Airport Maintenance. Long-term assurance of a certain level of scheduled airline service is a key support in marketing local government bonds intended directly for airport usage. Widespread loss of regularly scheduled air service would prevent further improvement of some airports and make it difficult for some others to stay in business due to loss of financial stability.

Mail Service. The Postal Service now depends upon the scheduled airlines to transport eight out of every 10 letters in intercity first class mail. Postal authorities can count on such a high level of service because of the airlines' network of 58,000 city-pairs.[16] These city-pairs are the combination of cities in this country between which a person, a letter, or a freight shipment can move in dependable, regularly scheduled air service. Shrinking this service will knock out much of the country's present overnight, first-day and even second-day mail delivery. Such service is necessary and vital for present day business practices dependent on the speedy receipt of commercial documents; indeed it plays a key role in the maintenance of quick

[16] Section 10 of the Proposed Aviation Act of 1975 would eliminate from 49 U.S.C.A. §1375(b) (1963), the authority of the Postmaster General to establish additional schedules between existing city-pairs, and would eliminate the authority to disapprove or modify any proposed changes in existing schedules. *See* 14 C.F.R. §§231.5, 232 (1975).

and universal communication, be it for business purposes or non-business purposes, which is an essential feature of today's mobile society.

COMPETITION AND PRICING

The goal of the proponents of the Aviation Act of 1975, to reduce prices by allowing unfettered competition, does not appear to be realistic or well grounded. Even assuming *arguendo* that the proposed act would promote competition and result in lower costs for air transportation in certain markets, it is doubtful that this vision is worth the price of the substantial curtailment of service which would result from the scrapping of route security. Moreover, at best, isolated potential benefits are speculative in light of the inflationary trends of the major elements of airline costs and could not realistically be expected to prevail over long terms.

The price of air transportation is not substantially affected by the deregulatory process. The key to reducing the price lies in reducing the cost of producing the service.[17] While some costs may be saved by airlines by the discontinuance of air routes which are unprofitable, the continually spiraling costs of jet fuel,[18] wages for skilled airline employees, and landing fees and other charges imposed by airport operators bear a more direct relationship to the consumer expense. The proposed Act will not, therefore, materially increase competition, except for a brief period in the thick markets, nor will it initiate a reduction in fares to consumers to any significant or recognizable degree

CONCLUSION

Major curtailment of the present system of scheduled air service will materially diminish the social and economic quality of American life. Deregulation under the proposed Aviation Act of 1975 would ultimately be the catalyst for this consequence; it offers no concrete economic benefits to offset the detrimental results.

Certainly all is not well within airline economics as evidenced by the possibility of record losses for the year of 1975 for the industry as a whole.[19] But, the major causes of these losses cannot be attributed to the present regulatory system, but rather to other totally unrelated causes. This is not to say that the air transport system and its consumers would not benefit from certain changes and modifications in the present regulatory system.

[17] *See* G. DOUGLAS & J. MILLER, ECONOMIC REGULATION OF DOMESTIC AIR TRANSPORT: THEORY AND POLICY 7-18 (1974).

[18] C.A.B. REPORTS TO CONGRESS (1974), stating that costs had increased almost one hundred percent from the previous year.

[19] Interstate air passenger traffic had declined by almost three percent through October, 1975, as compared to 1974 figures. *See* AIR TRANSPORT WORLD, January, 1976, at 13.

They would, and attention should be focused on such improvements in lieu of the proposed deregulation.

Procedures of the Civil Aeronautics Board should be modified to reduce regulatory lag. This could be done by specifying firm and reasonably short time limits during which administrative law judges and the CAB must either hear or dismiss petitions and applications. In addition, reporting burdens imposed by the CAB can be eased by eliminating unnecessary reports.[20]

Further, a procedure should be developed to permit airline management reasonable latitude to make necessary pricing adjustments without governmental intervention.[21] Such flexibility is necessary to cope with sudden changes in cost pressures and it may be well to try it for a test period. Such a concept is popularly known as a "zone of reasonableness"; but, the manner in which this point has been addressed in the proposed Aviation Act of 1975[22] overreaches the goal of flexibility. In suggesting a zone with an upward limit of 10 per cent and a downward limit of 40 per cent or lower, to the point of meeting only direct operating costs, proponents of the proposed Aviation Act of 1975 have injected too much imbalance on the down side.[23] One might conclude that the proponents of such a one-sided approach point the way towards a "zone of recklessness". What should be considered is an equitable zone not weighted specifically in favor of either upward or downward movement, but a zone giving airline management the freedom to make reasonable adjustments in either direction in responding to changing costs and other conditions of the marketplace.

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[20] *See generally* 14 C.F.R. §§200 *et seq.* (1975).

[21] 49 U.S.C. §1482(g) (1963) presently permits the CAB to suspend the operation of new (other than initial) tariffs for a period of 180 days pending its review and final decision concerning its lawfulness.

[22] H.R. 10261, 94th Cong., 1st Sess. §10 (1975).

[23] *Id.* This would condition the authority to the CAB under 49 U.S.C. §1482(g) (1963) to suspend tariff rates only if:

> (a) with respect to any proposed increase the proposed tariff would be more than 10 per centum higher than the tariff in effect one year prior to the filing of the proposed tariff; or
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> (b) with respect to any proposed decrease, there is clear and convincing reason to believe that the proposed tariff will be below the direct costs of the service at issue; or
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> (c) with respect to any decrease filed within one year following the enactment of this paragraph, the proposed tariff would be more than 20 per centum lower than the tariff in effect on the day of the enactment of this paragraph and the Board believes the tariff will be found to be unlawful; or
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> (d) with respect to any decrease filed in the period commencing one year from the enactment of this paragraph and ending two years from such enactment, that the proposed tariff would be more than 40 per centum lower than the tariff in effect on the day of enactment of this paragraph and the Board believes the tariff will be found unlawful.

Yet another improvement in the regulatory process would be achieved by removing political influence upon regulatory decisions on international routes and rates.[24] The President's power to overrule the CAB in these matters should be limited strictly to foreign policy and national defense considerations, and a veto should not be permitted strictly on economic grounds.[25]

These steps, both procedural and substantive, are examples of timely and appropriate modification needed in the current regulatory system, a regulatory system which is imperative to an efficient and satisfactory national airline service. Modifications combined with the development of better national policy guidelines on fuel costs and on other inflationary factors beyond the control of the airlines' management, will help to build an economically stronger airline industry, an industry assured of the continued ability to provide the quality and scope of service American consumers expect and depend upon, and to which they are entitled.

[24] "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation . . . or any permit issuable to any foreign air carrier . . . shall be subject to the *approval* of the President." 49 U.S.C.A. §1461(c) (Supp. 1976) (emphasis added). *See also* §1461(b) in regard to approval for rates.

[25] *See* Comment, *Presidential Powers Over the Awarding of International Air Routes,* 48 TUL. L. REV. 1176 (1974).