Recent Developments in Airline Tariff Regulation: Procedural Due Process and Regulatory Reform

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I. INTRODUCTION

Recently, there have been several important judicial, administrative, and legislative developments concerning the authority of the Civil Aeronautics Board (Board) to regulate the form and, more importantly, the substantive content of air carrier tariffs pursuant to the provisions of the Federal Aviation Act of 1958, as amended (the Act).[1] Among the most significant of these developments are the potentially far-reaching decision of the District of Columbia Circuit in *Delta Air Lines, Inc. v. Civil Aeronautics Board,*[2] the administrative reaction of the Board to that decision, and the various "regulatory reform" proposals which seek to amend the Act, including its ratemaking provisions, to inject new pressures for additional competition into the statutory scheme for regulation of the Nation's air transportation system. It is the purpose of this article to review these developments and discuss their implications for future air carrier tariff regulation by the Board.

II. THE STATUTORY FRAMEWORK FOR AIR CARRIER TARIFF REGULATION UNDER THE FEDERAL AVIATION ACT

Sections 403, 404, and 1002 of the Act establish the general ratemaking scheme to be administered by the Board for tariffs involving air transpor-

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1. 49 U.S.C. § 1301 (1970).

2. 543 F.2d 247 (D.C. Cir. 1976) [hereinafter cited as *Delta*].

tation,[3] and section 801(b) provides the vehicle for Presidential disapproval of certain Board orders pertaining to rates, fares, or charges for foreign air transportation.[4] The following is a brief summary of the relevant provisions of these sections which is designed to provide a useful point of departure for discussing and evaluating these various developments.

Section 403 of the Act requires every carrier to file with the Board tariffs showing "all rates, fares, and charges for air transportation" and "to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation."[5] These tariffs must also be "filed, posted, and published, in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with [section 403] and *such* regulations. Any tariff so rejected shall be void . . . ."[6] Section 403(c) requires thirty-day advance filing,

3. "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft. 49 U.S.C. § 101(10) (1970).

Under the Act, "interstate," "overseas" and "foreign" air transportation are defined, respectively, in the following manner:

> "Interstate air transportation", "overseas air transportation," and "foreign air transportation," respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—
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> (a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;
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> (b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and
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> (c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation. 49 U.S.C. § 1301(20) (1970).

4. Section 406 of the Act also grants the Board authority to regulate rates for the transportation of mail. 49 U.S.C. § 1376 (1970).

5. 49 U.S.C. § 1373 (1970). Section 403 also mandates carrier observance of tariffs, specifically prohibits rebating, requires the filing of the established divisions of all joint rates, fares and charges for air transportation and authorizes free or reduced-rate transportation for persons identified in that section. As discussed *infra*, there are presently pending before the Congress several so-called "regulatory reform" bills which would amend the Act in various ways. Included among these proposed changes are bills which would expand the scope of section 403 so as to permit the carriers to provide reduced-rate transportation to the young, elderly and handicapped.

6. 49 U.S.C. § 1373 (1970) (emphasis added). By "rejecting" a tariff, the Board prevents that tariff from going into effect without giving any opportunity for hearing whatsoever. The Board's regulations promulgated under this section are found in 14 C.F.R. part 221 (1976), and specify the requirements concerning tariff rejection, who is authorized to issue and file tariffs, form and other specifications of tariff publications, contents of tariffs, requirements applicable to all statements of fares or rates and only to statements of property rates, governing tariffs, amendment of tariffs, suspension of tariff provisions by the Board, vacating the suspension of tariff matter, canceling suspended matter in compliance with a Board order, indexing of tariffs, filing tariff publications with the Board, posting tariff publications for public inspection, special tariff permission, waiver of tariff regulations, giving and revoking of concurrences to carriers

posting, and publishing of any change in any rate, fare, or charge, including classifications, rules, regulations, or practices affecting them or the value of service thereunder.[7]

Section 404 of the Act requires, *inter alia*,[8] every air carrier and foreign air carrier to establish, observe, and enforce just and reasonable classifications, rules, regulations, and practices relating to air transportation and foreign air transportation. Section 404(b) of the Act grants the Board authority to deal with undue or unreasonable preferences or advantage and unjust discrimination by air carriers and foreign air carriers in air transportation.

Section 1002 of the Act sets forth the Board's authority to investigate or suspend tariffs which raise substantive questions.[9] Section 1002(g) provides that if an air carrier files a tariff setting forth a "new" rate, rule, or regulation[10] in interstate or overseas air transportation,[11] the Board is empowered to enter upon a hearing concerning the lawfulness of such proposed rate, rule, or regulation. Pending the hearing and decision thereon, the Board may suspend the new tariff for up to 180 days upon the filing of a statement in writing of its reasons for such suspension. If, at the end of the 180-day period the Board has not prescribed a rule or regulation,[12] the proposed rate will go into effect, but the Board may nevertheless prescribe a rate to become effective thereafter.[13]

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and powers of attorney to agents, adoption publications required to show change in carrier's name of transfer of operating control, prescribed forms, and complaints against tariffs. As will be seen in the discussion concerning the *Delta* case, the permissible scope of the regulations issued under section 403 was an important issue in that proceeding. Moreover, as is discussed in section IV D *infra*, the use of the word "such" makes it clear that the Board is authorized to reject a tariff only for inconsistency with the Board's regulations issued pursuant to its authority under section 403.

7. 49 U.S.C. § 1373(c) (1970).

8. Section 404(a) of the Act also charges every air carrier holding a certificate of public convenience and necessity with a duty (1) "to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor . . ."; and (2) "to provide safe and adequate service, equipment, and facilities in connection with such transportation . . . ." As will be seen in the discussion in section III, *infra*, these common carrier responsibilities also play a role in the ratemaking process, since a carrier's tariffs constitute the extent of its "holding out" to the public.

9. From a procedural standpoint, use of the word "investigate" means that the Board must hold a hearing on the tariff, and, as specified in section 1002, the Board can only "suspend" a tariff (and thereby prevent it from going into effect) if the Board subsequently holds a hearing. 49 U.S.C. § 1482 (1970).

10. For the purpose of simplification, the phrase "rate, rule or regulation" will be used as a shorthand for the Board's statutory authority, which reaches any "individual or joint rate, fare, or charge, demanded, charged, collected, or received" or "any classification, rule, regulation or practice affecting such rate, fare or charge . . ." 49 U.S.C. § 1482(g) (1970).

11. "New" tariffs are those that state a rate, rule, or regulation different from that in an existing, effective tariff covering the same service. It does not apply to any initial tariff filed by any air carrier. 49 U.S.C. § 1482(g) (1970).

12. Section 1002(g) provides that "after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective." 49 U.S.C. § 1482(g) (1970).

13. *Id.* at § 1002(d), 49 U.S.C. § 1482(d).

Section 1002(d) gives the Board authority, after notice, to hold a hearing to determine whether or not a rate, fare, charge, rule, or regulation, in effect for interstate or overseas air transportation is or will be unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial. If the Board finds that a carrier's rate, fare, or charge fails to pass this test, it can set maximum, minimum, or both maximum and minimum levels for a lawful rate, fare, or charge. In the case of interstate air transportation, the Board can also determine the actual rate, fare, charge, rule, or regulation to be made effective.[14]

In 1972, Congress amended the Act principally to vest the Civil Aeronautics Board with specific authority to suspend, reject, or cancel tariffs in foreign air transportation.[15] This new authority was to be a discretionary one for the Board and, when exercised, would be subject to disapproval by the President. Section 1002(j) of the amended Act sets forth the Board's new authority with regard to rates, rules, and regulations in foreign air transportation.[16] Section 1002(j)(1) is somewhat similar in operation to the Board's authority concerning "new" tariffs for interstate and overseas air transportation,[17] but authorizes suspension of the tariff in question for a period of up to 365 days. Moreover, at the end of the hearing, the Board is authorized to "reject or cancel" such tariff and prevent the use of such rate, rule, or regulation. If the proceeding is not concluded prior to the expiration of the

14. In exercising its authority with respect to the determination of rates for the carriage of persons or property, the Board is required to take into consideration, among other factors,

(1) The effect of such rates upon the movement of traffic;
(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;
(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;
(4) The inherent advantages of transportation by aircraft; and
(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

49 U.S.C. § 1482(e) (1970). As indicated in section IV, *infra*, extensive amendment of this section is being urged by those advocating reform of the Act's economic regulatory provisions.

15. Pub. L. No. 92-259, 86 Stat. 95. Section 4 of the 1972 Act provided that the amendments to the Federal Aviation Act contained therein shall not be deemed to authorize any actions inconsistent with the provisions of section 1102 of the Federal Aviation Act, 49 U.S.C. § 1502 (1970) (concerning the need for the Board to take action consistently with any treaty, convention or agreement between the United States and a foreign country).

16. Section 1002(f) gives the Board authority to alter rates, rules and regulations which it determines to be unjustly discriminatory, unduly preferential, or unduly prejudicial to the extent necessary to correct such discrimination, preference, or prejudice and order the carrier to discontinue collecting such rates or enforcing such rules, regulations or practices. 49 U.S.C. § 1482(f) (1970). Section 1002(j)(4) indicates that compliance with section 1002(j) and any Board order issued pursuant thereto shall be an express condition on the operating authority of carriers performing such transportation and the continuation of the affected service. Section 1002(j)(5) sets forth the "rule of ratemaking" to be used by the Board in evaluating tariffs pertaining to "foreign air transportation."

17. As with tariffs for interstate and overseas air transportation, the Board's suspension and rejection authority for tariffs pertaining to foreign air transportation does not apply to an "initial" tariff filed by a carrier.

suspension period, the rate, rule, or regulation is permitted to go into effect, but is subject to being canceled when the proceeding is concluded. During the period of any suspension, or following rejection or cancellation of a tariff, including tariffs which have gone into effect provisionally, the carrier is required to maintain and use the rate, rule, or regulation "which was in effect immediately prior to the filing of the new tariff."[18]

Section 1002(j)(2), on the other hand, grants the Board significantly greater powers to deal with existing tariffs for foreign air transportation than the Board has with regard to tariffs involving interstate or overseas air transportation. This section authorizes the Board to suspend an existing tariff for 365 days while the Board is holding a hearing on its lawfulness. For purposes of operation during such suspension or following the cancellation of an existing tariff pending effectiveness of a new tariff, the carrier may file a tariff embodying a rate, rule, or regulation currently in effect (and not subject to a suspension order) for any air carrier[19] engaged in the same foreign air transportation.

If the Board finds that the government or aeronautical authorities of any foreign country have refused to permit the charging of rates, fares, or charges contained in a proper tariff of an air carrier filed under the Act for foreign air transportation to such foreign country, the Board is empowered to take action concerning tariffs of foreign air carriers serving the United States and such country. In such circumstances, the Board is authorized to (1)

18. In PAN AMERICAN WORLD AIRWAYS v. CIVIL AERONAUTICS BOARD, No. 76-1997 (D.D.C. Nov. 12, 1976), the court was called upon to interpret the meaning of the clause contained in section 1002(j)(1) providing that "the affected air carrier or foreign air carrier shall maintain in effect and use the rate fare or charge . . . which was in effect immediately prior to the filing of the new tariff." Federal Aviation Act § 1002(j)(1), 49 U.S.C. § 1482(j)(1) (Supp. 1973). In that case, the Board had suspended and set for investigation, on October 15, 1976, certain of the individual fare increases proposed by the various members of the International Air Transport Association, which suspension was approved by the President. (In the past, member carriers of IATA have generally been able to reach an agreement on appropriate fare levels, such an agreement is then filed with the Board, and individual member carriers file tariffs implementing that agreement. Last year, however, the carriers were unable to reach agreement on North Atlantic passenger fares for the 1976-77 winter season (November 1—March 31) to supersede the shoulder season fares scheduled to expire on October 31, 1976.) In rejecting the Board's claim that when, for example, a winter season tariff is suspended, the airlines must maintain in effect the prior winter season fares under section 1002(j)(1), the court found, on the basis of the plain meaning of the statute, that the word "immediately," in the statute refers to those fares in effect immediately prior to the filing of the new tariffs, *i.e.*, the 1976 fall shoulder season (September 1—October 31) fares, not the 1975-76 winter season fares which were not in effect at that time and had not been in effect for several months. It should be noted that, although this interpretation was of "benefit" to the carriers in this instance (the 1976 shoulder season fares being higher than the 1975-76 winter season fares), the court noted that this interpretation could benefit the air traveler, if, for example, the carriers were to file new tariffs during the spring "shoulder" season (April 1—May 31), containing peak season fares higher than the prior peak season fares, this new tariff were to be suspended, and the airlines would then be required to maintain in effect the lower spring shoulder season fares.

19. "Air carrier", under the Act, is defined as "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." 49 U.S.C. § 1301(3) (1970).

suspend the operation of any existing tariff of any foreign air carrier providing services between the United States and such foreign country for a period or periods not exceeding 365 days in the aggregate from the date of such suspension, *and* (2) during the period of such suspension, order the foreign air carrier to charge rates, fares, or charges which are the same as those contained in a properly filed and published tariff (designated by the Board) of an air carrier filed under the Act for foreign air transportation to such foreign country. The effective right of an air carrier to start or continue service at the designated rates, fares, or charges to such foreign country shall be a condition to the continuation of service by the foreign air carrier in foreign air transportation to such foreign country.

Finally, section 801(b) provides that any order of the Board issued pursuant to section 1002(j) suspending, rejecting, or cancelling a rate, fare, or charge for foreign air transportation, and any order rescinding the effectiveness of any such order, shall be submitted to the President before its publication. The President may disapprove any such order within ten days if he finds that disapproval is required for national defense or foreign policy reasons.[20]

The preceding discussion constitutes a brief summary of the scope of the Board's ratemaking authority under the Act, which, as will be seen in the following section, was necessarily the primary focus of the court's attention in the *Delta* case and, as discussed in section IV, *infra*, has become one of the principal targets of the advocates of regulatory reform.

III. Delta Air Lines, Inc. v. Civil Aeronautics Board and Its Progeny

A. *The* Delta *Decision*

In the *Delta* case,[21] one of the most comprehensive judicial explications of the scope of the Board's ratemaking authority in the history of the Act, the U.S. Court of Appeals for the District of Columbia Circuit recently delineated with great particularity the proper scope of the Board's authority to (1) reject

20. Recently, President Carter, acting under the authority granted by section 801(b), 49 U.S.C. § 1461, wrote to the chairman of the Civil Aeronautics Board and stated that, as part of his Administration's efforts to encourage price competition among carriers, his future policy on proposed rate or fare decreases in foreign air transportation would be as follows:

> As a general matter, therefore, I am opposed to suspensions or cancellations of fare or rate decreases in international aviation cases, and in the future I would expect to disapprove such suspensions in the absence of compelling circumstances. I would ask the Board to keep this policy in mind as it considers future applications by carriers for fare or rate decreases.

CAB Docket No. 30716, issued in conjunction with CAB Order No. 77-4-107 (Apr. 26, 1977) (emphasis added).

21. As discussed *infra*, this case involved the lawfulness of Board action under the ratemaking provisions of the Act regarding certain hazardous materials tariffs which had been filed by several air carriers. The focus of this article's discussion of the *Delta* case is upon the implications of this decision for future Board action in the ratemaking area. A previous note published in this Journal, *Delta Air Lines, Inc. v. CAB: Air Line Control of Radioactive Cargo*, 8 Transp. L.J. 293 (1976), discussed, in great depth, the implications of that decision for hazardous materials transportation regulation.

tariffs, (2) prescribe the content of tariffs, and (3) take action with regard to tariffs which have been permitted to become effective.

This consolidated appeal involved a challenge to five separate orders of the Board relating to tariff revisions filed by four air carriers. These tariff revisions provided that the air carriers would not transport certain items designated as "dangerous articles" by the Federal Aviation Administration (FAA) and the Department of Transportation (DOT).[22] In the five challenged orders, CAB Orders 74-9-14,[23] 75-1-124,[24] 75-2-105,[25] 75-3-13,[26] and 75-4-

22. At the time of this litigation, the Federal Aviation Administration (FAA), an operating administration within the U.S. Department of Transportation (DOT), was responsible administering part 103 of the Federal Aviation Regulations, 14 C.F.R. part 103 (1975). This part set forth the FAA/DOT safety regulations applicable to hazardous cargo transportation and prescribed a comprehensive set of "rules for loading and carrying dangerous articles and magnetized materials in any civil aircraft in the United States and in civil aircraft of United States registry anywhere in air commerce." 14 C.F.R. § 103.1(a) (1975). The authority to promulgate such regulations has since been delegated to the Materials Transportation Bureau, another entity existing within the DOT, but this redelegation does not have any effect whatsoever concerning the holding of the court in the *Delta* case. *See* 49 C.F.R. § 1.53 (1976).

23. CAB Order No. 74-9-14 (Sept. 5, 1974) was an order concerning a tariff revision (*i.e.*, a "new" tariff under section 1002) filed by Delta Air Lines, Inc., which restricted Delta's acceptance of radioactive materials to those which the shipper certified in writing as "(1) intended to be administered to humans for diagnostic or therapeutic medical purposes; (2) to be used in the analysis, for medical purposes, of biological materials from humans; or (3) essential to the conduct of medical research having direct application to medical welfare." Order 74-9-14 at 1. In addition, Delta proposed not to accept individual packages of radioactive materials having a Transport Index (a radiation dose rate measure) in excess of 5.0. *Id.* Finding Delta's proposed restrictions "considerably more stringent than either existing provisions or recommended revisions of the FAA's regulations," the Board rejected the tariff. *Id.* at 2.

24. CAB Order No. 75-1-124 (Jan. 29, 1975) involved another Delta radioactive material tariff, similar to the first, which was filed subsequent to enactment of the Transportation Safety Act of 1974, 49 U.S.C. § 1801 (Supp. IV, 1974), but prior to the publication of proposed amended regulations in accordance with the mandate of section 108 of that Act. Choosing not to reject, the Board deferred action on the complaints filed against the tariff (which sought rejection of the tariff) until after adoption of regulations pursuant to section 108 of the Transportation Safety Act.

25. CAB Order No. 75-2-105 (Feb. 26, 1975) involved tariffs filed by Eastern Air Lines, Inc., and Frontier Airlines, Inc., which mirrored the second Delta tariff. (By the time the Board acted upon the Eastern and Frontier tariffs, the DOT had promulgated proposed regulations which, if adopted, would have authorized the carriage of radioactive materials intended for nonhuman, nonmedical research as well as for human-related medical research.) The Board, once again, deferred action on a complaint requesting rejection (filed by the DOT/FAA), but noted that the Eastern/Frontier tariffs and other similar tariffs already in effect (*e.g.*, the Delta tariff) appeared "more narrow in scope with respect to allowed radioactive 'research' and medical materials than as proposed in the FAA rulemaking." Order 75-2-105 at 3. Consequently, the Board stated that it "expect[ed] the carriers promptly to conform their tariff provisions to the FAA *proposed* rulemaking." *Id.* (emphasis added).

26. CAB Order No. 75-3-13 (Mar. 6, 1975) involved a tariff revision filed by Allegheny Airlines, Inc., which, if permitted to go into effect, would have banned the carriage of materials labeled "Poison B," a category of poisonous articles which are toxic to man and regulated by the DOT. Finding that the Allegheny proposal "would be more restrictive than current FAA Regulations, as well as rules currently proposed by FAA . . . ," the CAB rejected Allegheny's tariff "without prejudice to the carrier's refiling tariff provisions reflecting FAA's *proposed* rules." Order 75-3-13 at 2 (emphasis supplied). The Board further expressed its "expect[ation] that other carriers that currently have in effect tariffs refusing to accept Poison B materials will promptly conform their tariffs to the proposed FAA Regulations." *Id.*

75,[27] the CAB rejected (or reserved the right to reject) the carriers' tariffs on the ground that they were inconsistent with a Board regulation which required tariff rules governing the carriage of hazardous cargo to conform with applicable FAA/DOT safety regulations.[28]

The air carriers seeking review challenged the Board's rejection of these tariffs on the ground that, under the Act, the Board can only prevent a properly filed tariff from going into effect and prescribe a lawful tariff by following the suspension and investigation procedures of section 1002. Thus, the air carriers sought to have these orders set aside insofar as the orders (1) rejected the tariffs, (2) reserved a right to reject the tariffs after effectiveness, (3) rejected the tariffs after effectiveness, or (4) directed the air carriers to conform their tariffs to a pending rulemaking proceeding. The Board, on the other hand, asserted that section 403 of the Act and the Board's implementing regulations empowered the Board to reject the tariffs.

In agreeing with the airlines, the court found that the Act does not authorize the rejection procedures employed by the Board with regard to the tariffs at issue.[29] In making this finding, the court reviewed the Act and relevant case law and determined that the Act authorizes the rejection of a tariff *only* (1) where technical requirements of form and order have not been satisfied, and (2) "where the filing is so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold . . . ."[30] The court held that absent either of these conditions, the Board can prevent a new, proposed tariff from

27. CAB Order No. 75-4-75 (Apr. 15, 1975) was, in essence, a "housekeeping" order issued by the Board which dealt with all hazardous cargo tariffs still pending before the Board (including certain proposed tariff revisions on which the Board had not yet acted and those as to which the question of rejection had been deferred, including the Delta, Eastern and Frontier tariffs). As to these tariffs, that order concluded:

> The tariff provisions proposed or in effect for [the carriers] that restrict the carriage of hazardous materials permitted by present or proposed DOT/FAA Regulations present essentially the same problems as discussed . . . for embargoes. However, as to refusals to carry hazardous articles pursuant to tariffs, the Board must defer to the position of DOT/FAA to the effect that freight which complies with FAA Regulations must be accepted for carriage by the carriers, and that Section 1111 does not permit their refusal. These tariffs are not consistent with Section 221.38(a)(5) of the Board's Economic Regulations and will be rejected pursuant to the provisions of Section 403 of the Act and subpart O of Part 221 of the Board's Regulations. Order 75-4-75 at 7.

28. Section 221.38(a)(5) of the Board's regulations provided that the carrier rules and regulations relating to the transportation of dangerous or restricted articles must be "in conformity with" the FAA/DOT hazardous materials regulations. 14 C.F.R. § 221.38(a)(5) (1975). 14 C.F.R. § 221.180 (1975) provided that tariffs not consistent with the Board's regulations set forth in 14 C.F.R. part 221, *e.g.*, section 221.38(a)(5), can be rejected. 14 C.F.R. § 221.38(a)(5) (1975). Consequently, the issue presented was whether the air carrier tariffs were "in conformity with" the DOT/FAA regulations, for, if they were "in conformity", the Board's rejection of those tariffs was unlawful.

29. It should be noted that the issue presented was not what the Board would ultimately approve as the proper substantive content for the tariffs finally put into effect. Instead, the issue was whether the Board must proceed under section 1002 with due notice, hold a hearing, and receive evidence bearing on a number of factors which the carriers contended were never considered by the Board in issuing the orders challenged in the appeal.

30. 543 F.2d at 263 (quoting Municipal Light Bds. v. FPC, 450 F.2d 1341, 1346 (1971)).

becoming effective *only* by suspending it for a maximum of 180 days, pending a hearing of its lawfulness.[31]

Turning to the particular facts presented, the court found that the Board had not rejected the tariffs for any formal or technical defect, but instead for what the Board believed to be substantive deficiencies.[32] On this point, the court determined that the carrier tariffs did not contain any substantive deficiencies warranting rejection under section 403, finding that the tariffs were in conformity with part 103 of the Federal Aviation Regulations[33] and, consequently, were consistent with section 221.38(a)(5).[34] To do otherwise, the court held, would be to deny the carriers a hearing for the purpose of considering those economic and other issues reserved to the Board, *not* the FAA.[35]

Since the Board had stated in Orders 75-2-105 and 75-3-13 what it *expected* the carriers to do regarding the tariffs at issue, the court was required to reach the question of the Board's authority to impose tariffs without hearing. Initially, the court found that section 1002(d) was the only provision of the Act which authorized the Board to determine and prescribe the lawful rates, rules, and regulations to be made effective in tariffs.[36] In interpreting that section, the court held that the Board could only impose a tariff upon a finding of unlawfulness and only after acting on notice and hearing.[37]

In disapproving the "short cut" pursued by the Board with regard to the tariffs at issue, the court found that:

> *[T]he Board was attempting to determine and prescribe the rules and regulations applicable to hazardous cargo, without notice and hearing, i.e.,* the Board was telling the carriers exactly what rules and regulations to include in their tariffs. Under any realistic interpretation, these orders involved the legislative determination of rules and regulations affecting petitioner's rates, and therefore the Board should have adhered to Section 1002, the statutory provision explicitly designed for the prescription of such rates, rules, and regulations "after notice and hearing."[38]

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31. *Id.* at 261.
32. *Id.*
33. 14 C.F.R. part 103 (1975).
34. 14 C.F.R. § 221.38(a)(5) (1976).
35. 543 F.2d at 262. In this regard, the court held that, since the Board, not the FAA, had the responsibility under the Act to conduct a hearing to consider economic costs, safety hazards (accepting the outer limits of safety as found by the FAA), common carrier responsibilities, and other factors affecting the transportation of hazardous cargo, the phrase "in conformity with Part 103" must be interpreted, under the regulatory scheme established by Congress, to mean "not in violation of Part 103," lest the Board evade its statutory responsibilities to consider and decide those economic and other issues which are reserved, not to the FAA/DOT, but to the Board.
36. 543 F.2d at 268.
37. *Id.* at 266.
38. *Id.* at 267 (emphasis in original). In Moss v. Civil Aeronautics Board, 430 F.2d 891 (D.C. Cir. 1970) (involving a challenge to a Board order that suspended and set down for investigation rates proposed by various air carriers and went on to set forth a ratemaking formula which the Board proposed to accept), the District of Columbia Circuit struck down

Since the Board had also permitted two of the tariffs at issue (the Eastern-Frontier and the "second" Delta tariff) to become effective (pending decision on the deferred question of rejection) and then rejected these tariffs,[39] the court was required to determine the scope of the Board's authority to take action with regard to already effective tariffs. The court determined that, once a tariff is permitted to become effective, the Act authorizes modification of an existing tariff only after an investigation and hearing and a finding of unlawfulness pursuant to section 1002. Specifically, the court found that (1) given the preemptory nature of rejection, it is a regulatory device properly used only *prior* to a tariff's effective date, and (2) in view of the plain words of section 1002(g) (*i.e.,* what "would be proper" *after* a tariff "had become effective"), "it is clear that once the Board has permitted a tariff to become effective, it may not reject or suspend that tariff; it may only investigate and take appropriate action after notice and hearing."[40]

In summary, the principal holding of the court in the *Delta* case was that, in the absence of any of the tariff filing deficiencies specified in section 403, the only lawful manner in which the Board can prevent a proposed tariff from going into effect is suspension pursuant to section 1002(g), based upon a finding of possible unlawfulness and a determination to set the tariff for hearing. Once it is determined that a tariff filing has been made "in compliance with the basic formal requirements and minimal substantive requirements" of the Act, it must be accepted by the Board "*for filing*" and "substantive concerns regarding the lawfulness of the rules or regulations in such a tariff (unless, of course, the tariff is, on its face, a substantive nullity) can only be resolved after a hearing, during which time the Board may suspend the tariff for up to 180 days."[41] In short, the Act simply does not permit the Board, on its own motion and without hearing, to reject a tariff filing simply because the Board believes that the particular rates, rules, or regulations set forth in the tariff are substantively improper.

B. Board Reaction to the Delta *Decision*

Notwithstanding this rather clear explication by the court of the limits of the Board's authority with respect to tariff filings under the Act, actions taken by the Board subsequent to the *Delta* decision indicate, at least in certain

another Board attempt to prescribe rates without notice and hearing, that time by using its suspension, rather than its rejection, authority. In *Moss*, the court stated:

> As a practical matter, the Board's order amounted to the prescription of rates because, as the Board admit[ted], the pressures on the carriers to file rates conforming exactly with the Board's formula were great, if not actually irresistable. All the carriers had indicated an urgent need for an immediate increase in revenues; the Board had made it clear, by threatening to use its power to suspend proposed rates, that only rates conforming to its detailed model would be accepted and not suspended.

430 F.2d at 897 (footnote omitted).

39. CAB Order No. 75-4-75. *See* note 27, *supra*.

40. 543 F.2d at 268-69.

41. *Id.* at 269 (emphasis in original).

circumstances, an ongoing eagerness on the part of the Board to avoid the procedural strictures established by the Act for controlling Board action in the ratemaking area. These actions may foreshadow a Board determination to attempt to "live" with the Act's hearing requirements, through the adoption of so-called "paper" hearing procedures.

1. *The* Delta *Decision and Subsequent Board Regulation of Hazardous Materials Tariffs*

In CAB Order No. 76-10-24,[42] the Board vacated its requirement, previously imposed by CAB Order No. 75-11-31[43] and stayed in CAB Order No. 75-11-92,[44] that certain carriers cancel their tariff provisions refusing acceptance of hazardous materials, including the tariff provisions considered in the *Delta* case. Subsequently, two separate hazardous materials tariff revisions were filed, and the Board's action on these proposed tariffs appears to be instructive as to future Board action regarding hazardous materials tariffs.

The first order,[45] involved certain revisions to the carriers' materials tariff governing carriage of hazardous materials.[46] In this order, the Board (a) permitted the carriers' proposed shipper certifications to become effective, finding that, although the tariff requirements were more stringent than the requirements imposed by the DOT regulations, the tariff provisions did not place an undue burden upon shippers, but (b) *rejected* the proposed provisions for transporting gallium metal, taking the position that the carriers had failed to provide *any* economic justification for that proposal.[47] There-

42. CAB Order No. 76-10-24 (Oct. 5, 1976).

43. CAB Order No. 75-11-31 (Nov. 11, 1975).

44. CAB Order No. 75-11-92 (Nov. 24, 1975). Essentially, Order 75-11-31 had vacated a stay of the effectiveness of Order 75-4-75 (subsequently found unlawful in the *Delta* case) by which, *inter alia*, the Board had rejected these tariff provisions. Subsequently, the Board issued Order 75-11-92, which stayed the effectiveness of Order 75-11-31, insofar as it required cancellation of those tariff provisions, until 15 days after issuance of the court's mandate in the *Delta* case.

45. CAB Order No. 76-12-88 (Dec. 15, 1976).

46. The carriers had proposed to (a) revise the required shipper's certification forms for radioactive and non-radioactive restricted articles shipments, and (b) add provisions for gallium metal which sought to (1) classify this commodity as "ORA.C" rather than "ORM-B" as in the Department of Transportation regulations, (2) prohibit transportation of liquid gallium, and (3) add certain other limitations on acceptance of solid gallium metal. CAB Order No. 76-12-88 at 1-2.

47. The Board cited 14 C.F.R. § 221.165 (1975), which provides, in pertinent part, that:

> When a tariff publication is filed with the Board which contains new or changed local or joint rates, fares, or charges for air transportation, or new or changed classification, rules, regulations, or practices affecting such rates, fares, or charges, or the value of the service thereunder, the issuing air carrier, foreign air carrier, or agent shall submit with the filing of such publication in or attached to the transmittal letter:
>
> (a) An explanation of the new or changed matter and the reasons for the filing, including (if applicable) the basis of rate making employed.
>
> . . .
>
> (b) Economic data and/or information in support of the new or changed matter, including, in cases where pertinent,

fore, the Board believed these provisions to be in violation of the tariff justification requirements set forth in that section. In the second order,[48] the Board investigated, but did not reject or suspend, a tariff rule of United Air Lines, in which United proposed to refuse to carry containers of materials classified as Other Regulated Material, Class D (ORM-D). [49] In so deciding, the Board noted that United's refusal to accept ORM-D materials in containers would constitute a restriction not included in the DOT regulations and, therefore, the proposal should be subjected to the scrutiny of an investigation. However, the Board refused to suspend the proposal on the ground that the operation of the proposed rule would not result in the imposition of higher charges on ORM-D shippers.[50]

While, it may be difficult to argue that two cases constitute a "trend" in Board policy, these cases nevertheless indicate that the Board remains uncomfortable in regulating hazardous materials tariffs. This is particularly true in view of the *Delta* court's reaffirmance of the Board's substantive responsibilities in this area and the court's concomitant denial of any authority in the Board to deal preemptorily with these tariffs through reliance on the Department of Transportation's regulatory scheme and the Board's rejection powers. Consequently, as may be seen from the Board's action concerning the gallium metal provision, it will look carefully at the justification submitted by the carriers in support of proposed hazardous materials tariffs. If such a justification is not submitted and the tariff is challenged, it may well attempt to reject the tariff on that basis.[51] On the other hand, the Board's decision in

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(1) Estimates of costs of service, with supporting details and references to sources, and

(2) Estimates of the aggregate effect of the new or changed matter upon such carrier's traffic, and schedules, and revenues, and an explanation of the basis for the estimates (including, where available, data as to past traffic, schedules and revenues). 14 C.F.R. § 221.165 (1976).

As discussed *supra*, section 221.180 of the Board's regulations authorizes rejection of tariffs not "consistent with" regulations issued in part 221, including section 221.165. The lawfulness of this position is discussed at note 51 *infra*.

48. CAB Order No. 77-3-110 (Mar. 18, 1977).

49. As explained by the Board in Order 77-3-110, an ORM-D material, as defined in the Department of Transportation's regulations, is a material, such as a consumer commodity, which, although otherwise subject to the DOT hazardous goods regulations, presents a limited hazard during transportation due to its form, quantity, and packaging. 49 C.F.R. § 173.500(a)(4) (1975). If a material comes within this classification, it is generally exempted from most of the DOT's hazardous materials regulations. *See* CAB Order No. 77-3-110 at 1.

50. Another rule, set forth in the same tariff, provided that restricted articles (including ORM materials) tendered as outside pieces with a containerized shipment will be rated as though tendered outside the container, thus resulting in the same charge for the shipper.

51. In this regard, it is important to remember that, in response to the Board's petition for rehearing in *Delta*, which pointed out that only safety justifications, and no economic justifications, were advanced by the carriers when they filed the tariffs there at issue, the court noted that this fact did not eliminate the need for a hearing in this case or legitimize the CAB's rejection of the carriers' tariffs. As the court stated, its decision did not preclude the possibility that the Board retains a small residue of jurisdiction over safety matters whereby it could approve these tariffs based on safety justifications above. In any event, the court made it clear that, while the Board may have the authority to require air carriers to transport all cargo which the FAA/DOT defines as acceptably safe, "it does not have the authority to accomplish this result by the shorthand method of rejection." 543 F.2d at 267.

the *United* case indicates that the Board, in view of the court's explication of its responsibilities in the *Delta* case, will attempt to evaluate more rigorously than in the past the merits of a hazardous materials tariff including the accompanying justification and the allegations contained in any complaint filed against such a tariff in reaching a threshold determination as to the lawfulness of the tariff, which, in turn, would form the predicate for the Board's decision as to whether such a tariff should be suspended or investigated. In this regard, the carriers have recently filed a tariff revision designed to implement massive changes in the Department of Transportation's hazardous materials regulations and, significantly, the complaining shippers have sought only investigation, not rejection or suspension, of the proposal.[52]

2. *Notice and What Kind of a "Hearing"?: Board Action Concerning Air Carrier Overbooking and Baggage Liability Tariff Rules*

In what is probably the most significant development since *Delta*, the Board has stated, in two recent cases,[53] its view that the notice and hearing requirements contained in section 1002 do not necessarily require an adjudicative-type oral hearing in every instance. This position is a marked departure from the Board's previously invariable practice of conducting oral, adjudicatory hearings in tariff proceedings. Indeed, the last time that the Board examined the carriers' baggage liability tariffs, the subject of the second case discussed *infra*, the Board conducted a full oral, evidentiary hearing.

In the first case, Delta Air Lines, in reaction to the Supreme Court's decision in *Nader v. Allegheny Airlines, Inc.*,[54] filed a proposed tariff rule to give notice to the public that Delta's flights are subject to overbooking and that a possible result of overbooking might be its inability to carry a passenger with a confirmed reservation.[55] Without making *any* determination as to

52. The carriers had filed an earlier tariff revision which had proposed, through inadvertance, to authorize carriage of certain materials which were prohibited from carriage on aircraft by the Department of Transportation regulations. Certain shippers and the DOT filed complaints against this tariff revision seeking rejection, and the tariff was withdrawn by the carriers prior to effectiveness. Pursuant to an order issued by the Board under section 416(b) of the Act, the carriers have been exempted by the Board from the tariff filing requirements of the Act from January 1, 1977 (the effective date of the new DOT regulations) to June 25, 1977 (the effective date of the carrier's recently-filed tariff. CAB Order No. 77-2-59 (Feb. 11, 1977); CAB Order No. 77-4-71 (Apr. 14, 1977).

53. In the Domestic Passenger-Fare Investigation, the Board utilized rule-making procedures without objection for three phases of the investigation: (a) standards for the depreciation, life and residual value of current aircraft types for ratemaking purposes; (b) appropriate treatment of leased aircraft for ratemaking purposes; (c) treatment of deferred federal income taxes for ratemaking purposes. CAB Order No. 70-2-121 (Feb. 26, 1970).

54. 426 U.S. 290 (1976).

55. Delta's exception read as follows:

(Applicable to DL only) All of the carrier's flights are subject to overbooking which could result in the carrier's inability to provide previously confirmed space for a given flight or for the class of service reserved. In that event, the carrier's obligation to the passenger is

lawfulness of the tariff, the Board suspended the Delta proposal and similar rules of other carriers "to afford the Board a more adequate period of time within which to evaluate the proposals," merely indicating that the "Board contemplates reaching its conclusion on this matter at an early date."[56] Significantly, in denying a motion seeking an evidentiary hearing in a rulemaking proceeding instituted by the Board to reexamine its existing policies relating to deliberate overbooking and oversales, the Board stated the following with regard to the nature of the hearing required pursuant to section 1002 of the Act:

> Nor does the fact that this proceeding now includes the *tariff* issues consolidated by Order 76-9-72 lead us to conclude that an oral hearing will necessarily be required. The question of what tariff provisions describing the carriers' overbooking practices should be permitted or prescribed may well be self-evident, or essentially constitute a determination of policy, once this rule-making proceeding is concluded, and we reject the notion that an evidentiary hearing is required in each and every investigation set pursuant to section 1002 of the Act, regardless of the nature of the issues to be determined therein.[57]

In a similar vein, the Board has recently denied a motion, filed by sixteen air carriers, which had sought an evidentiary hearing (an adversary, adjudicative-type oral hearing with all interested persons having the right to cross-examine witnesses) in a proceeding involving air carrier tariff rules. In March 1975, the Board issued Order 75-3-18,[58] (a) stating its tentative view that certain of the existing rules governing baggage acceptance and liability were unlawful and that it would be necessary to eliminate or modify these rules in a number of significant respects, (b) making certain tentative findings as to the lawful content of such tariffs, and (c) ordering interested persons to show cause why these findings should not be made final. The carriers filed comments on the show-cause order and filed a separate motion for a full adjudicatory hearing in which it was contemplated that all parties would have an opportunity to explore fully, through the presentation of testimony and the cross-examination of witnesses, the factual considerations underlying the Board's order.

In denying the carriers' motion, the Board held that a full adjudicatory hearing is not necessarily required to meet the notice and hearing requirements of the Act. Determining that "there is some flexibility in the statutory framework," the Board found "no need for unthinking application of proce-

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governed by Rule 380(D). The term 'overbooking' as used in this Rule means the limited acceptance of more confirmed reservations for a class of service on a given flight than the seating capacity of that class of service on the aircraft.

See CAB Order No. 76-9-72 at 1-2 (Sept. 14, 1976).

56. CAB Order No. 76-8-58 (Aug. 11, 1976) at 1. It was not until the Board issued an order over a month later that it "tentatively conclude[d] that the proposed tariff is unreasonable in the absence of . . . additional notice [*i.e.*, distribution of forms indicating the carrier's overbooking practices]." CAB Order No. 76-9-72 at 3 (Sept. 14, 1976). The Board has subsequently completed that rulemaking proceeding, and the Delta tariff provision has gone into effect.

57. CAB Order No. 76-9-73, at 3 (Sept. 14, 1976) (emphasis added).

58. CAB Order No. 75-3-18 (Mar. 6, 1975).

dures that are not required either for the protection of the parties or the development of a sound record."[59] On reconsideration, the Board made clear its position that: "The current proceeding is similarly based upon industry-wide data and is designed to establish rules for application to all certificated air carriers. We are acting in a legislative, not a judicial, capacity here. Accordingly, we are not required as a matter of law to hold trial-type proceedings."[60]

In short, the Board, in each of these two cases, has begun to take the position that the hearing required by the Act and discussed by the *Delta* court need not necessarily be an adjudicative-type oral hearing, at least in certain, but as yet not fully defined circumstances.[61] This is notwithstanding the fact that it has, in the past, invariably conducted oral, evidentiary hearings in tariff proceedings. Whatever the merits of this legal position,[62] and whatever the practical consequences for the development of an adequate record may be,[63] these cases seem to make it clear that the Board, (a) having been told by the *Delta* court that it can act on the substantive issues raised by carrier tariffs only after hearing, (b) perceiving itself to be under pressure to move quickly,[64] (c) experiencing difficulty in resolving adjudicatory cases quickly, and (d) desirous of pursuing procedural expedition as an

59. CAB Order No. 77-2-9 at 12 (Feb. 2, 1977).

60. CAB Order No. 77-4-73 at 10 (Apr. 15, 1977). By CAB Order No. 77-4-82 (Apr. 18, 1977), the Board suspended *thirteen words* of a baggage liability rule proposed by United Airlines rather than suspend the tariff in its entirety. United has recently petitioned the Board for reconsideration of that order on the ground that the Board has prescribed a rule without a hearing in violation of Moss v. Civil Aeronautics Board, 430 F.2d 891 (D.C. Cir. 1970).

61. Although the precise type of hearing to be held was not before the *Delta* court, the court's opinion makes it clear that it expected the Board to hold an oral evidentiary hearing. *See, e.g.*, 543 F.2d at 260-61, 269-70.

62. Under section 1006 of the Act, petitions for review of the baggage liability order must be filed in the Court of Appeals by mid-June 1977. The joint petitioners' principal argument in support of their request for hearing was that section 1002(d) of the Act is the only provision which could authorize the action taken by the Board and exercise of that authority (a) requires notice and hearing, and (b) is taken by "order", which, in turn, must set forth the findings of fact on which it is based, 49 U.S.C. § 1485(b) (1970), and these findings must be supported by substantial evidence. 49 U.S.C. § 1486(e) (1970). In these circumstances, the carriers argued, even if the Board considered the proceeding to be rulemaking, (a) section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1970) requires that an evidentiary hearing be held in the relevant statute, that rulemaking be accomplished "on the record after opportunity for an agency hearing," and (b) that the courts have held that the requirement for "notice and hearing," when coupled with a "substantial evidence" test, as in the Federal Aviation Act, requires an evidentiary hearing. *See, e.g.*, Independent Bankers Association v. Board of Governors, 516 F.2d 1206 (D.C. Cir. 1975).

63. In this regard, the Federal Communications Commission has, under its regulatory statute, adopted a "paper case" procedure in an effort to expedite hearing cases, in which all evidence is submitted in writing and oral hearings only after a showing had been made that the omission of cross-examination was prejudicial, but this system has not been without its problems. *See* Digital Data Services Case, FCC 76D-34 (1976), FCC 77-35 n. 4 (1977); AT&T Charges, Regulations, Classifications and Practices for Voice Grade/Private Line Service (High Density-Low Density), 55 F.C.C.2d 224 (1975); 58 F.C.C.2d 362 (1976); AT&T Charges for Private Line Service (Multi-Schedule Private Line Service), FCC 76-1123 (1976).

64. In each of the two cases discussed *supra* the Aviation Consumer Action Project (an aviation consumer group that participates, from time to time, in Board proceedings) had urged the Board to act expeditiously.

end in itself, has decided to attempt to pursue "paper" hearings as one solution to this dilemma. Consequently, until such decisions are reversed by a court of appeals or the Board changes its policy, it appears advisable for persons seeking an adjudicative, oral hearing to bring to the attention of the Board, in any document seeking such hearing, (a) the subject or subjects believed to require an oral hearing, (b) the types of facts to be adduced at such a hearing, (c) the particular facts which require exploration by cross-examination at oral hearing, and (d) any other material or information which would be supportive of the need for a trial-type hearing in the particular circumstances presented.

Although the impact of the *Delta* decision will, of course, be most significant for those carriers whose tariffs are regulated by the Civil Aeronautics Board, the broad bases upon which the decision rests make it clear, for several reasons, that it will have important implications for other regulated industries as well. First of all, notwithstanding the fact that the court's discussion of the permissible bounds of the Board's rejection authority was principally in the context of the Federal Aviation Act, the logic of the court's discussion is equally applicable to any other regulatory statute which similarly restricts the rejection authority of an agency. Moreover, the court's discussion of the limits of the Hazardous Materials Transportation Act (*i.e.*, that the Act does not *require* carriers to transport hazardous materials) has important ramifications for efforts by surface carriers, over whom economic and common carrier regulatory authority resides in the Interstate Commerce Commission, to limit their "holding out" with regard to the carriage of hazardous materials through the tariff process. Thus, while the most direct impact of the *Delta* decision will be felt by the Board and the carriers it regulates, the decision transcends those regulated by the Federal Aviation Act and may well find application to other agencies charged with similar regulatory responsibilities and duties.

IV. "Regulatory Reform" and Proposed Amendment of the Board's Ratemaking Authority Under the Act

Over the past two years, advocates seeking reform of the existing mechanism for regulation of the air transport system in the United States have urged that the Federal Aviation Act be amended in several respects so as to place greater reliance on competitive market forces in determining both the nature and scope of the nation's air transportation system, most particularly in the areas of increased pricing flexibility and liberalized entry requirements.[65] Although it is still too early to predict with any certainty the

65. The initial impetus for the so-called regulatory reform movement came from a White House Task Force on revision of regulatory statutes, and hearings subsequently held by Senator Kennedy's Senate Subcommittee on Administrative Practice and Procedure during 1975. Hearings on S. 2551 before the Subcommittee on Administrative Practice of the Senate

eventual outcome of this congressional debate concerning the need for regulatory reform, [66] it is nevertheless useful to delineate the portions of the Board's present ratemaking authority which would be modified (in both a substantive and procedural sense) by the various proposals presently before the Congress.[67] This will indicate not only the possible directions in which such regulation may go in the future, but also the Board's own thinking in this area. For example, the ratemaking provisions set forth in S. 292, a bill introduced in the current session of Congress by Senators Pearson and Baker, were adopted from a Board proposal which had been introduced during the last session of Congress. Accordingly, the following discussion will address five ratemaking areas which could be affected by enactment of the reform proposals presently before Congress:[68] (1) mandating a "zone of reasonableness," (2) reduced regulation of charter, cargo, and mail rates, (3) proposed alteration of the substantive content of the "rule of ratemaking," (4) modification of the Board's tariff rejection authority, and (5) denigration of the hearing requirements for tariff proceedings, three of which are designed to reduce the level of Board regulation and two of

Committee on the Judiciary, 94th Cong., 1st Sess. (1975). The product of the efforts of this task force was S. 2551, the Aviation Act of 1975, which was introduced in Congress in October of 1975 (the companion bill, introduced in the House of Representatives, was H.R. 10261). Subsequently, Senator Kennedy introduced his own bill, S. 3364, the Air Transportation Act of 1976, the Board developed its own legislation, S. 3536, the Federal Aviation Amendments of 1976, and Senator Cannon also introduced a bill of his own, S. 3830, the Aviation Improvement Act of 1976. Extensive hearings were held by the Senate and House aviation subcommittees during 1976, consuming over 3,000 pages of testimony, but a bill was not reported by either committee.

66. One of the principal controversies at the heart of this debate is whether it is necessary to enact massive amendments to the Act so as to authorize the results urged by the reformers. In this regard, as may be seen in the following discussion concerning adoption of a "zone of reasonableness," there exists a serious question, for example, as to whether Board policy, rather than the statute, must be "amended" to accomplish this result. *See* Callison, *Airline Deregulation-A Hoax?*, 41 J. AIR L. & COM. 747 (1975) (an excellent article which challenges both the need for, and desirability of, the changes suggested by the reformers). *See also* Rasenberger, *Deregulation and Local Airline Service—An Assessment of Risks,* 41 J. AIR L. & COM. 843 (1975).

67. At the present time, the Senate Aviation Subcommittee has concluded hearings on the Commercial Aviation Regulatory Reform Act of 1977, S. 292, 95th Cong, 1st Sess. (1977) (introduced by Senators Pearson and Baker), and the Air Transportation Regulatory Reform Act of 1977, S. 689, 95th Cong., 1st Sess. (1977) (introduced by Senator Cannon, the Chairman of the Subcommittee), the two bills which have been introduced to date in this session of Congress which deal with this subject, but the Committee has not yet begun to "mark up" these bills. It should be noted that, in introducing S. 689, Senator Cannon stated that, although he strongly supported this bill, his "views are not cast in stone." 123 CONG. REC. 52488 (daily ed. Feb. 10, 1977). In this regard, Senator Cannon gave a speech on April 26, 1977, before the Aero Club of Washington on this subject, and indicated certain changes which he believed should be made in S. 689 as a result of the testimony given in these hearings. Remarks of Senator Howard W. Cannon before the Aero Club of Washington (April 26, 1977), The Ebb and Flow of Airline Regulation-Was 1938 Really a Vintage Year? (hereinafter Aero Club Speech). The House Aviation Subcommittee has tentatively scheduled hearings in late spring on this subject, and Chairman Anderson is expected to introduce shortly a regulatory reform bill of his own.

68. S. 292, 95th Cong., 1st Sess. (1977); S. 689, 95th Cong., 1st Sess. (1977).

which, offered in the guise of reform, may well have the effect of increasing the Board's authority and the level of its regulation.[69]

A. Mandating a "Zone of Reasonableness"

As described in section II, *supra*, section 1002(d) of the Act gives the Board authority to deal with the problem of unfair rates, fares, or charges.[70] Under the Act, the Board is authorized to deal with this problem by the creation of limits for rates, fares, or charges—either maximum or minimum, or maximum and minimum levels.

Prior to the Board's decision in phase 9 of the *Domestic Passenger Fare Investigation* (*DPFI*),[71] this statutory scheme, as implemented by the Board, gave the carriers considerably more pricing freedom than presently exists—the carriers initiating rate/fare changes, and the Board taking action in the event of complaint or on its own motion with respect to these specific, individual proposals. Today, however, in light of that decision (in which the Board chose to use average industry costs, and established a uniform cost

69. Although not intended as a regulatory reform measure, both S. 292 and S. 689 contain a provision which would modify the time requirements provided in the Act for the filing of tariffs by carriers and require the Board to act on such tariff filings by a specified date. In this regard, the Board oftentimes withholds its decision on a proposed tariff until literally the eleventh hour, failing to notify the affected carrier or carriers of its decision until as late as the afternoon prior to the effective date for the tariff—a practice which is lawful under the Act, but extremely burdensome to the carriers and confusing not only to carrier personnel and agents but also to the traveling and shipping public. S. 292 and S. 689 are each responsive to this problem, with (a) S. 292 requiring that tariff changes be filed by a carrier at least 45 days prior to effectiveness (rather than on 30 days prior notice as under the present Act), and requiring the Board, if it determines to investigate a tariff, to issue a suspension order at least 15 days prior to the effective date of the proposed tariff change, and (b) S. 689 establishing the same framework, but with 60 and 30 day time periods, respectively. A 45/15 day provision, as proposed in S. 292, has already been passed by the House of Representatives as an independent bill, H.R. 26, 95th Cong., 1st Sess. (1977); 123 Cong. Rec. H 1245-48 (daily ed. Feb. 22, 1977), and is now pending in the Senate. While the differences between the approach taken by S. 292 and S. 689 do not appear to be significant, it may be that the 60 day advance filing requirement would unnecessarily constrict necessary carrier flexibility in making tariff modifications.

70. 49 U.S.C. § 1482(d) (1970).

71. *Domestic Passenger-Fare Investigation-Phase 9 Fare Structure*, No. 21866-9, CAB Order No. 74-3-82 (March 18, 1974); CAB Order No. 74-12-109 (Dec. 27, 1974). [hereinafter cited as *DFPI*]. This massive proceeding was instituted, in January of 1970, as a general investigation of the level and structure of passenger fares in the scheduled services of the domestic trunkline and local service air carriers within the 48 contiguous States and the District of Columbia. *See* CAB Order No. 70-1-147 (Jan. 29, 1970). The issues to be considered in the fare structure phase included:

> whether or not a uniform industrywide formula should be adopted; what should be the elements of any such formula; whether line-haul rates should be based upon mileage, hours, or some other basis; whether there should be a taper in line-haul rates, whether or not there should be a separate terminal charge and, if so, whether such charge should be uniform or variable, and what should be the basis for the charge; whether the fares in each market should be set so as to provide approximately the same relative profit contribution or whether different relative profit elements are required; in what way, if any, should value of service be considered in fare structure, and, in this connection, what is known or can be learned about comparative elasticities of demand in various types of markets; what are the appropriate bases for differentials among first-class fares, coach fares, other classes of normal fares, and discount fares; and what, if any, provision should be made for stopovers at the through fare. CAB Order No. 70-2-121 (Feb. 26, 1970) at 6-7.

and mileage-related formula that produces equal fares for trips of equal distance) and the Board's refusal to establish a zone of reasonableness, the carriers have been denied the freedom (without the risk of suspension) to modify standard, basic fares within a range (deemed reasonable by the agency) about the midpoint of a "basic" fare produced by the Board's market-by-market fare formula.[72] Thus, while the Board has the full authority to create such a zone of reasonableness under the existing Act, it has steadfastly refused to do so, and it now appears that a legislative nudge in this area may be necessary.

Although it appears that a legislative change to establish a zone of reasonableness may be necessary, the approach taken in section 16 of S. 292[73] falls far short of mandating the establishment of a zone of reasonableness, especially with regard to the Board's authority concerning maximum fares.[74] This failure is especially noteworthy in comparison with S. 292's proposal for airfreight rates and charter rates, discussed *infra*. (In short, in circumstances where the Board wants to create pricing flexibility in the Act, it knows how to accomplish that result.) Moreover, the mechanism established in section 16 is unnecessarily intricate, and could, if enacted, result in uneven administration of this authority.[75]

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72. In Phase 9 of the *DPFI*, several air carriers, the Department of Transportation and the Department of Justice argued that the Board should establish such a "zone", and that a tariff filed within that zone should not be suspended as being unjust or unreasonable. Although the Board did not hold that it was without authority to establish such a zone, it nevertheless chose not to establish such a zone, principally on the policy grounds that adoption of such a system would preclude meaningful regulation of passenger fares and the proposals contained no safeguards to prevent unreasonable increases in the overall fare level. CAB Order No. 74-3-82 (Mar. 18, 1974) at 121.

73. Section 16 of S. 292 would amend, as here relevant, Section 1002(d) as follows:

> Power to Prescribe Rates and Practices of Air Carriers
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> (d)(1) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected, or received by any air carrier for scheduled interstate or overseas air transportation of persons.
>
> (A) is or will be unreasonably high, the Board shall determine and prescribe the lawful maximum fare or charge thereafter to be demanded, charged, collected, or received;
>
> (B) is or will be predatory or tend to restrain competition among air carriers, the Board shall determine and prescribe the lawful minimum fare or charge thereafter to be demanded, charged, collected, or received; or
>
> (C) does or will preclude the provision of adequate service by the carrier in the market to which the fare or charge is applicable, the Board shall determine and prescribe the lawful minimum fare or charge thereafter to be demanded, charged, collected, or received.

This section adopts S. 3536, the Board's proposal introduced during the last session of Congress, S. 3536, 94th Cong., 2d Sess. (1976).

74. The Board has urged that this authority not be changed. *See e.g., Hearings on S. 2551, S. 3364, and S. 3536 Before the Aviation Subcommittee of the Senate Comm. on Commerce*, 94th Cong., 2d Sess. 394 (1976). [hereinafter *Senate Hearings*].

75. In this regard, compare the provisions of proposed section (d) (1), set forth *supra*, with proposed section (d)(4):

> (4) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for scheduled interstate or overseas air transportation of persons or property, or any classification, rule, regulation, or practice

On the other hand, S. 689 is more effectively designed to assure that carrier tariffs falling within a specified zone will not be suspended, but it too, as presently drafted, also contains certain problems. Under section 21(a) of S. 689, section 1002(d) of the Act would be amended so as to preclude the Board from suspending a tariff on the grounds of being too high,

> unless the rate, fare, or charge is, with respect to determinations before January 1, 1980, more than 10 percent higher, or after December 31, 1979, more than 20 percent higher than the rate, fare, or charge in effect for the service at issue one year prior to the filing of the rate, fare or charge.[76]

While an increase of this magnitude might be appealing to a particular airline, especially if it has a significant number of monopoly markets, it does

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affecting such rate, fare, or change, or the value of the service thereunder, is or will be unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board may alter the same to the extent necessary to correct such discrimination, preference, or prejudice and make an order that the air carrier shall discontinue demanding, charging, collecting, or receiving any such discriminatory, preferential, or prejudicial rate, fare or charge or enforcing any such discriminatory, preferential, or prejudicial classification, rule, regulation, or practice.

76. S. 689, § 21(a) 95th Cong., 1st Sess. (1977) would amend section 1002(d), 49 U.S.C. § 1482(d) (1970), in the following manner:

Power to Prescribe Rates

(d) Whenever, after notice and hearing on the record, upon complaint, or upon its own initiative, the Board shall determine that any individual or joint rate, fare, or charge demanded, charged, collected, or received by an air carrier for interstate or overseas air transportation, or any classification, rule, regulation or practice affecting such rate, fare, or charge, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the maximum or minimum lawful rate, fare, or charge thereafter to be demanded, charged, collected or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: Provided, however, That (i) the Board may not find any rate, fare, or charge in interstate or overseas air transportation to be unjust or unreasonable on the basis that it is too high unless the rate, fare, or charge is, with respect to determinations before January 1, 1980, more than 10 percent higher, or after December 31, 1979, more than 20 percent higher than the rate, fare, or charge in effect for the service at issue one year prior to the filing of the rate, fare, or charge; (ii) a rate above direct costs may not be found to be unlawful on the basis that it is too low, and the Board may not require an air carrier to charge, demand, collect, or receive compensation in excess of that carrier's direct costs for the service at issue. 'Direct Costs' means the direct operating costs of providing service to which a rate, fare, or charge applies, and shall not include such items as general and administrative expenses, depreciation, interest payments, amortization, capital expenses, costs associated with the development of a new route or service, and other costs which do not vary immediately and directly as a result of the service at issue.

S. 689, 95th Cong., 1st Sess. § 21(c) (1977) would add the following to Section 1002(g), 49 U.S.C. § 1482(g) (1970):

Provided further, That the Board may not suspend any proposed tariff because of a proposed rate fare or charge contained in the tariff unless the Board is authorized under subsection 1002(d) of this Act to find the proposed rate fare or charge unlawful; Provided further, That the Board may not suspend any proposed tariff on the basis that a proposed rate, fare or charge contained in the tariff is too low unless the Board, after notice and hearing, first finds there to be a substantial probability that:

(1) the proposed rate, fare or charge will be found by the Board to be unlawful under subsection 1002(d); and

(2) the complaining party will suffer substantial injury if the proposed rate fare or charge is not suspended pending the full hearing and final order under subsection 1002(d); and

(3) the complaining party has no adequate alternative remedy other than suspension to compensate any substantial injury if the proposed rate fare or charge is not suspended.

not appear necessary, at least at this time, to have such a high upper limit for the "zone." Senator Cannon recognized this fact in his Aero Club speech in stating that "a pricing zone of reasonableness should not extend upward above 10 percent a year [including, however, an allowance for anticipated future cost increases]."[77]

As to the lower limit of such a zone, the Board, under S. 689 as presently drafted, may not suspend a carrier tariff on the grounds of being "too low" and the Board may not require an air carrier to charge, demand, collect, or receive compensation in excess of its "direct costs" if the proposed fare is in excess of that carrier's "direct costs" for the service at issue. In apparent response to testimony concerning the difficulties occasioned by the use of this "direct cost" standard,[78] Senator Cannon indicated in his Aero Club speech, that

> [T]he direct cost test used in S. 689 is not practical. It would create administrative difficulties as the Board would have to determine, on a route-by-route basis, what direct costs were. It is preferable to use a percentage figure on the down side below which a carrier could reduce his fares but subject to CAB suspension. I am considering a figure in the 25 to 35 percent range.[79]

During the course of the Senate hearings, Delta Air Lines (an advocate of the zone of reasonableness in the *Domestic Passenger Fare Investigation*) suggested, in lieu of the zone of reasonableness proposed in either S. 689 or S. 292, its own revision to section 1002(g) which would, for a two-year experimental period, essentially create a ten percent zone of reasonableness both above and below the basic rate, fare, or charge for a market. This would thereby preclude the Board from suspending tariffs setting forth rates, fares, or charges falling within the zone as calculated in accordance with that provision.[80] Moreover, this proposal would provide for individual

77. Aero Club Speech, *supra* note 67, at 14. Historically, the Board, in regulating rates and fares, has precluded the carriers from establishing fares on the basis of anticipated cost increases. Under the methodology which has evolved from the *DPFI*, carriers are permitted to project, in their fare justifications, cost increases only to the effective date of the proposed fare increase. *See* CAB Order No. 75-6-72 (June 13, 1975).

78. For example, as Delta pointed out in its testimony, (1) the definition is not entirely clear, most particularly that portion of the definition which would exclude "other costs which do not vary immediately and directly as a result of the service at issue" (which might permit an individual carrier, under traditional classifications of variable costs in the industry, to justify costing of its service at prices as low as 25 % of the basic (fully allocated cost) fare, (2) such a low fare would permit large, well-financed carriers to drive smaller, less well-financed carriers out of markets, and (3) the range created (20% up and as low as "direct costs") is so great as to permit an unraveling of the rationalized fare structure. Testimony of Richard S. Maurer on Behalf of Delta Air Lines, Inc. Before the Aviation Subcommittee of the Senate Commerce Committee (March 29, 1977) at 91-93 [hereinafter Maurer Testimony].

79. Aero Club Speech, *supra* note 67, at 15. Recent press reports indicate that the Secretary of Transportation is in the process of drafting his own "regulatory reform" bill which would authorize a "zone of reasonableness" with an annual upper limit of 7% to a lower limit of 20%. 231 Aviation Daily 58 (May 11, 1977).

80. Delta recommended that the following language be added to section 1002(g), 49 U.S.C. § 1482(g) (1970):

market, rather than system, freedom. And finally, it would help preserve the benefits of the present structure (even while allowing considerable freedom) by focusing on the reality that the day coach fare is the key to the *Domestic Passenger Fare Investigation* fare structure. Consequently, under the Delta proposal, when a change is made in the level of the day coach fare in any market, the percentage relationship between it and other fares would be maintained by simultaneous changes in the other fares. While one could amend section 1002(g) so as to permit individual adjustments for each class of service (*e.g.,* day coach, night coach, or first class) without requiring that other classes of service be correspondingly adjusted, a proliferation of such adjustments could ultimately undermine the rationalized and generally beneficial overall fare structure (both for establishing coach fares and determining their relationship to other fares) which was developed in the *DPFI.*

Although it is simply not possible, at this time, to predict whether Congress will go forward with airline regulatory reform or not, it does seem clear that, if the Congress is to amend the Act, some form of zone of reasonableness will be legislatively mandated, even though the nature of such an amendment is not certain at the present time.

B. Proposed Alteration of the "Rule of Ratemaking"

Section 1002(e) of the present Act, as mentioned in section II, *supra*, established a "rule of ratemaking" to be utilized by the Board in exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons and property. The advocates of regulatory reform have attacked the existing provision as containing contradictory statements and precluding the Board from placing sufficient emphasis on competitive and carrier efficiency considerations in fare decisions. Not surprisingly, therefore, both S. 292 and S. 689 contain proposals to amend section 1002(e) in such a manner as to, in the Board's words, "give preemi-

Provided further, that for a two-year period beginning with the effective date of this Act, the Board may not suspend the operation of a tariff stating a new individual basic rate, fare or charge for an individual market, or several such rates, fares, or charges, for interstate or overseas air transportation having an expiration date within one year from its effective date unless (a) the proposed tariff, either alone or in conjunction with other tariffs filed within the twelve months next preceding the effective date, would result in an increase of more than ten percent over the basic rate, fare or charge applicable to the same service in effect one year prior to the effective date of the proposed change, or (b) the proposed tariff, either alone or in conjunction with other tariffs filed within the twelve months next preceding the effective date, may result in an unfair or deceptive practice or an unfair method of competition or would result in a decrease of more than ten percent from the basic rate, fare or charge applicable to the same service in effect one year prior to the effective date of the proposed change; provided further, that all other fares, rates or charges which are constructed from the basic rate, fare or charge (or rates, fares or charges) being changed shall be adjusted to maintain the same percentage relationship with the basic rate; fare or charge (or the basic rates, fares or charges) in effect prior to the tariff filing in each market affected by such filing; and provided further that during the two-year period referred to in the second proviso of this subsection, the Board may not determine and prescribe the maximum and minimum lawful rate, fare or charge pursuant to subsection (d) of this section with respect to any market covered by a tariff filed under the second proviso of this section. For purposes of this subsection, "basic rate, fare or charge" means the rate, fare

nence to encouraging competition and efficiency of operations."[81]

In this regard, section 16(b)[82] of S. 292 would amend section 1002(e) of the Act (a) to make it applicable only to rates for the carriage of persons and mail (consistent with the thrust of S. 292 to reduce the Board's regulation of charter and cargo rates), (b) to incorporate the pro-competitive policy set forth in S. 292's amendments to section 102 of the Act,[83] (c) to eliminate what the Board believes are carrier-protective criteria, and (d) to emphasize the need to control maximum, but not minimum, fares in considering the economic and financial impact of a specific fare proposal on the carrier.

On the other hand, S. 689 contains essentially the "rule of ratemaking" provision initially proposed in the Aviation Act of 1975, the Ford Administration "deregulation" proposal. Under section 21(b) of S. 689[84] subsections

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or charge set forth in the tariff currently in effect which established the air market or markets covered by the tariff and from which all other fares or charges for the market or markets are constructed for the carriage of persons and/or their baggage or the general commodity rates or charges for the carriage of property.

Maurer testimony App. I, at 11-12.

81. *Senate Hearings, supra* note 74, at 394.

82. S. 292, 95th Cong., 1st Sess. § 16(b) (1977) provides as follows:

Rule of Ratemaking for Interstate and Overseas Air Transportaion and Transportation of Mail

(e) In exercising its power and performing its duties with respect to the determination of fares and charges for the carriage of persons pursuant to subsection (d)(1) of this section and of rates for the carriage of mail pursuant to subsection (d)(3) of this section, the Board shall take into consideration, among other factors—

(1) the criteria set forth in section 102(a) of this Act;

(2) the effect of such rates, fares, and charges on the movement of traffic;

(3) the need in the public interest of adequate and efficient transportation of persons and mail by air carriers at the lowest cost consistent with the furnishing of such services; and

(4) with respect to maximum rates and fares, the need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

83. S. 292, 95th Cong., 1st Sess. § 2 (1977), if adopted, would amend the existing declaration of policy in the Act, section 102, 49 U.S.C. § 1302 (1970), as here relevant, in the following manner:

Declaration of Policy: The Board

Sec. 102(a) Interstate and Overseas Air Transportation.—In the exercise and performance of its powers and duties under this Act with respect to interstate and overseas air transportation, the Board shall deem the following, among other things, to be in the public interest:

(1) The maintenance of an efficient private enterprise air transportation system responsive to the present and future needs of the foreign and domestic commerce, the Postal Service, and the national defense of the United States.

(2) The progressive transition to an air transportation system which relies on natural competitive market forces to determine the variety, frequency, quality, and price of air services without unjust discrimination, undue preferences or advantages, or unfair, deceptive, or predatory practices.

(3) The reliance on entry or potential entry of new carriers into all phases of air transportation to provide the stimulus for the provision of efficient and innovative air transportation with meaningful price competition and optimal carrier efficiency.

(4) The continued access of rural or isolated areas to the Nation's air transportation network with direct Federal assistance where appropriate.

(5) The maintenance of the highest degree of safety in air commerce.

84. S. 689, 95th Cong., 1st Sess. § 21(b) (1977) provides as follows:

Standards for Board Ratemaking

(e) In exercising and performing its powers and duties under subsection (d) of this section the Board shall take into consideration, among other factors—

(3) and (4) of the existing section 1002(e) would be deleted and four new subsections would be adopted. In addition to the present standards set forth in section (e)(1), (2), and (5) of the Act, the Board would be directed to consider the pro-competitive public interest criteria set forth in section 102(a), including the need for price competition[85], the quality and type of service required or preferred by the public in each market, the desirability of a variety of price and service options, and the desirability of determination of prices by individual air carriers in response to the particular competitive market conditions experienced by the individual carrier.

As one will note in comparing these two provisions, the principal difference is the greater emphasis placed by S. 689 on a more explicit delineation of the desirability of relying upon competitive forces and particular carrier efficiencies in determining fares in individual markets.

In the last analysis, however, the ultimate resolution of the need to amend section 1002(d) is closely related to the overall debate concerning the need for amending section 102 of the Act to place a greater emphasis on competition when the Board makes "public interest" and "public convenience and necessity" determinations. Should Congress decide that there is a need to amend the Act to place greater emphasis on competitive principles in section 102, then it seems clear that section 1002(e) will be similarly amended. As previously discussed, one of the significant debates in this area is whether it is the Board's unnecessarily rigid fare *policy* or the ratemaking provisions of the Act which is in need of amendment.

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(1) the criteria set forth in subsection 102(a) of this Act;
(2) the need in the public interest for adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;
(3) the quality and type of service required or preferred by the public in each market;
(4) the need of each carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service;
(5) the effect of rates upon the movement of traffic;
(6) the desirability of a variety of price and service options such as peak and off-peak pricing or other pricing mechanisms to improve economic efficiency; and
(7) the desirability that individual air carriers determine prices in response to the particular competitive market conditions experienced by the individual carrier.

85. S. 689, 95th Cong., 1st Sess. § 5 (1977) would amend section 102 of the Act in pertinent part, to read as follows:

(a) In the exercise and performance of its powers and duties under this Act with respect to interstate and overseas air transportation, the Board shall consider the following, among other things, as being in the public interest, and consistent with the public convenience and necessity:
(1) The maintenance of an efficient air transportation system responsive to the present and future needs of the public, of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
(2) The encouragement, development and attainment of an air transportation system which relies on competitive market forces to determine the variety, quality, and price of air services;
(3) Reliance on actual and potential competition to provide a variety of efficient and innovative low-cost transportation services;
(4) The encouragement of new carriers;
(5) The provision of a variety of adequate, economic, and low-cost services by air carriers without unfair or deceptive practices;
(6) The promotion of safety in air commerce.

C. Reduced Regulation of Charter, Cargo, and Mail Rates

1. Charter and cargo rates

One of the most significant thrusts of the regulatory reform legislation is to reduce substantially the level of Board regulation for domestic all-cargo carriers, domestic air freight rates, and charter air transportation. In pursuit of this objective, both S. 292 and S. 689 significantly reduce the Board entry requirements for charter and cargo operations and S. 292 would specifically reduce the level and scope of rate regulation for each of these two categories of transportation. Clearly, however, if either of these proposals were adopted there would be a reduction in the level of rate regulation by the Board, especially in rate minimums.

Under the present statute, the full range of the Board's regulatory powers concerning rates, fares, and charges, specified in detail in section II, *supra* are available to the Board for regulating rates, charges, rules, and regulations for charter and cargo transportation. If S. 292 were enacted, however, the Board's authority in this area would be reduced significantly by (a) limiting the Board's authority concerning passenger charters to regulation of the reasonableness only of carrier rules, not carrier charges, and (b) amending sections 403, 404, and 1002 of the Act to eliminate carrier duties and Board regulation with respect to the reasonableness of scheduled and charter freight rates in "domestic" (interstate and overseas) air transportation. The Board would retain jurisdiction only over discriminatory air freight rates in scheduled transportation and reasonable rules for domestic scheduled and charter freight transportation.

As mentioned in the previous section, the range of the zone of reasonableness prescribed in section 21(a) of S. 689 is sufficiently broad (particularly the minimum rate provision) that it is not necessary, as a practical matter, to except charter and cargo transportation from the ratemaking provisions set forth in that proposal. Presumably, these carriers would not operate below their direct costs for an extended period of time. Since the zone established in S. 292 is not nearly as broad as that in S. 689, however, it is necessary, under the scheme established in S. 292, to make the specific reductions set forth in the level of rate regulation otherwise applicable to charter and cargo operations.

2. Mail Rates

If enacted, S. 292, would also substantially modify the manner in which mail rates are determined. Under the present regulatory scheme, the Board, rather than the carriers, is required to establish rates for the transportation of mail.[86] As a consequence, each time a carrier or the Postal Service has petitioned for a change in service mail rates the Board is required to hold lengthy evidentiary hearings. The practical problem occasioned by this

86. *See* Federal Aviation Act of 1958, § 406, 49 U.S.C. § 1376 (1970).

process is that mail rates may remain unsettled for several years, with neither the carriers nor the Postal Service knowing that their respective revenues and costs will be during this "open" period. When the Board has finally determined the lawful rates (often after protracted hearings), either the carriers must reimburse the Postal Service for overpayments or the Postal Service must pay additional compensation to the carriers. During this process, neither can make any final accounting.

Under section 7 of S. 292, the air carriers would be required to file their mail rates (or changes in those rates) with the Board in the form of tariffs. If the Postal Service does not object to the rates and the Board does not order the tariffs investigated, the new tariffs would go into effect forty-five days after they are filed. In such cases, the Board would not be called upon (as under present law) to make an affirmative finding, after notice and opportunity for hearing, that the rates were fair and reasonable. This modified tariff system would thus enable the Postal Service and the carriers to institute new rates promptly. On the other hand, if the Postal Service objects to an existing rate or a new carrier-proposed rate and the Board decides to investigate, the Board would have full powers, after notice and hearing, to prescribe just, reasonable, and nondiscriminatory mail rates for the future.

Once again, amendment of the Act to make changes in these three areas is dependent, to a great extent, on whether Congress will decide to reduce the overall degree of regulation over cargo, charter, and mail transportation.[87] To the extent that Congress deems it necessary to amend the Act to change the level of competition in these areas, amendment of these rate provisions would follow.

D. Expansion of the Board's Tariff Rejection Authority

As may be seen from the court's discussion of the scope of the Board's rejection authority in the *Delta* case,[88] the principal determinant in the court's finding that the Board's authority to reject tariffs was limited to the "formal" and "technical" was the court's reading of section 403 of the Act as authorizing rejection only on the basis of inconsistency with Board regulations dealing with the form and manner of filing tariffs (*i.e.*, Board regulations promulgated pursuant to the Board's limited authority under section 403).[89]

87. The more controversial proposals in the mail area are provisions which would amend the Act and the Postal Reorganization Act, 39 U.S.C. § 5402(a) (1970), to recognize the authority of charter air carriers to carry mail and enhance the mail contracting authority of the Postal Service.

88. 543 F.2d at 254.

89. In the *Delta* case, the court held that:

> Summarizing the most important aspects of section 403 and its underlying regulations, we repeat that no other relevant statutory provision authorizes "rejection," and section 403 itself strictly limits the use of this authority to tariff filings that are inconsistent with (1) the form and information requirements of section 403 or (2) the Board's regulations (14 C.F.R. Part 211 (1976)) establishing the proper form and manner for filing, posting, and publishing tariffs. In other words, section 403 only authorizes rejection for technical deficiencies in the form, the manner of filing, and the information content of proposed tariffs. 543 F.2d at 254 (footnote omitted).

Section 7 of S. 292 (which, as discussed previously, has incorporated much of the Board's proposal for regulatory reform introduced during the last session of Congress) is designed [90] to amend section 403(a) of the Act to empower the Board to reject any tariff which is not consistent with section 403 and *any* of the Board's regulations, not simply those which are promulgated under section 403 relating to the form and manner of filing tariffs. S. 292 thus creates the potential to undermine the court's holding in *Delta*.

Such a change would authorize the rejection of tariffs inconsistent with any of the Board's regulations, not only those relating to the form, manner, and information content. This would greatly expand the Board's authority to *control* carrier tariffs without any right to a hearing—a result contrary to the overall objective of the regulatory reform bills which is to reduce, rather than increase, the Board's ability to limit carrier flexibility in the ratemaking area. Moreover, as was fully understood and vigorously precluded by the *Delta* court,[91] such an amendment could well have the ultimate effect of undermining the other ratemaking provisions of the Act through Board adoption of regulations covering the gamut of potential tariff filings and subsequent rejection of carrier tariffs not consistent with those substantive regulations. Significantly, S. 689 does not contain such a provision and, hopefully, Congress will reject this agency-inspired proposal.[92]

E. Modification of the Hearing Requirement for Tariff Proceedings

As discussed in both sections II and III, *supra*, the Board is only empowered to *determine and prescribe* rates, fares, and charges, and rules, regulations, and practices relating thereto *after* notice and hearing. In this regard, section 15 of S. 292[93] would add a new subsection (b) to section

90. Section 7 of S. 292 would amend Section 403(a) as follows:

> Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information as the Board shall by regulation prescribe, and the Board is empowered to reject any tariff so filed which is not consistent with this section and *its* [rather than "such" as in the present Act] regulations (emphasis added).

91. As noted by the court, in rejecting the Board's argument that its authority to promulgate regulations pertaining to "information" which must be set forth in carrier tariffs authorized rejection of the tariffs at issue:

> In its brief the CAB seems to suggest that the term "information" as used in section 403(a) permits the Board to impose substantive ratemaking requirements via the rejection procedure of the Act. Brief for Respondent at 4 & 23-25. We vigorously deny the existence of any such authority. To sanction this erroneous interpretation urged by the CAB, would permit the Board to issue substantive ratemaking requirements in 14 C.F.R. Part 221, to require future tariffs to contain "information" conforming to these requirements, to reject tariffs not providing such "information", and, thereby, to circumvent completely the ratemaking procedures of the Act. 543 F.2d at 253, n. 8.

92. Indeed, it appears more than significant that the impact of this proposed amendment is not discussed at all in the section-by-section analysis accompanying either S. 3536, 94th Cong., 2d Sess. (1976) or S. 292, 95th Cong., 1st Sess. (1977).

93. S. 292, 95th Cong., 1st Sess. § 15 (1977) would add the following new section (b) to Section 1001 of the Act:

> (b) Notwithstanding any provision of this Act requiring the Board to act after notice and hearings, the Board may by order, entered after notice and such opportunity for interested persons to file appropriate written evidence and argument as it shall by rule provide, dispense with an oral evidentiary hearing and proceed to final decision, with or without an

1001 of the Act permitting the Board, in situations where it is only authorized to act after notice and hearing, to dispense with an oral evidentiary hearing after following certain procedural steps and proceed to final decision (with or without an opportunity for further written or oral argument before the Board) if it finds that there are no significant issues of material fact in the case which require an oral evidentiary hearing for their determination. Thus, section 15, in addition to authorizing show cause procedures in, for example, licensing proceedings, will also authorize show cause procedures for rate proceedings that also must be decided after notice and hearing. While, as discussed *supra*,[94] the Board has asserted that it has such authority under the present Act, it has admitted that the purpose of this amendment is to "give an express statutory underpinning to the Board's employment of Show Cause procedures."[95]

In this regard, a bill[96] introduced by Senator Cannon during the last session of Congress would have made sections 554, 556, and 557 of the Administrative Procedure Act[97] inapplicable to the expedited procedures authorized by that bill concerning action taken by the Board pursuant to an application for interstate or overseas air transportation filed with the Board pursuant to Title IV of the Act,[98] thereby raising a question as to the status of ratemaking actions which are regulated, in part, under Title IV.[99] Section 23 of S. 689 (Senator Cannon's proposal introduced during this session of Congress), adding a new section 1010 for the purpose of expediting procedures concerning Title IV applications, does not contain a provision, such as

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opportunity for further written or oral argument before the Board, in any case where it finds on the basis of the record before it, and of facts of which it is entitled to take notice under its rules of procedure, that there are no significant issues of material fact in the case which require an oral evidentiary hearing for their determination. In such a case the Board shall, on its own initiative or at the request of an interested party, first issue an order to show cause, describing specifically the action it proposes to take setting forth its tentative findings of fact and conclusions of law in support of such action, and requiring any interested party opposed to such action to show cause why such action should not be taken, and, if such party requests an oral evidentiary hearing, why such a hearing is essential to determine significant issues of material fact in the case and why any relevant and material facts the party proposes to adduce cannot be adequately put into the record by written submissions. Upon receipt of answers to its order to show cause, the Board shall proceed to final decision in the case, set the case down for an oral evidentiary hearing, or take such other action as may be appropriate under its rules.

94. *See* section III B 2 *supra*.

95. 122 CONG. REC. S8663 (daily ed. June 8, 1976).

96. S. 3830, 94th Cong., 2d Sess. (1976).

97. 5 U.S.C. §§ 554, 556, 557 (1970).

98. Title IV of the Federal Aviation Act of 1958, entitled Air Carrier Economic Regulation, contains the Board's basic authority to regulate the economic aspects of air carrier operations, including routes, rates, mergers, and agreements. 49 U.S.C. §§ 1371-87 (1970).

99. S. 3830, 94th Cong., 2d Sess. § 16 (1976) would have provided:

(a) Whenever an application pertaining to interstate or overseas air transportation is filed with the Board pursuant to title IV of this Act, the Board shall, within 30 days of receipt of such application, determine whether the public interest requires that the application be set for a public hearing.

. . . .

(e) The provisions of sections 554, 556, and 557 of title 5, United States Code, shall not apply to proceedings under this section.

that in S. 3830, declaring the inapplicability of the above-referenced provisions of the Administrative Procedure Act. Moreover, the description of that provision, contained in the accompanying section-by-section analysis for S. 689, states that it is not intended to affect ratemaking procedures, but instead is designed "to provide expedited and streamlined procedures for the Board to follow when considering route and entry applications."[100]

While, at first blush, it might appear that increased use of show cause procedures in ratemaking matters pursuant to the authority proposed in S. 292 would introduce new flexibility into the ratemaking process and reduce regulatory lag, enactment of such a provision could also result in increased intrusion by the Board into carrier tariff matters, particularly if the Board is thought to possess discretion in making determinations as to the existence of material issues of disputed fact. As noted *supra*, the Board invariably conducts trial-type, adjudicatory hearings in rate proceedings. Consequently, the present requirement for notice and hearing with its concomitant demand on the Board's resources has also had a salutary effect on the Board's proclivity to interfere unduly in these matters. The availability of arguably less burdensome show cause procedures, on the other hand, might induce the Board to increase, rather than reduce, its rate regulation. Moreover, use of a show cause procedure in rate proceedings is no guarantee of expeditious action, as it took the Board twenty-three months (the time between the date of the show cause order and the Board's final order) to decide the Board-instituted baggage liability case discussed in section III B 2, *supra*. Thus, Congress must carefully evaluate the need for, and desirability of, a show cause provision such as that proposed in S. 292, at least insofar as it would be applicable to rate proceedings, in order to assure that such a provision is not, once again, the proverbial "wolf in sheep's clothing."

In summary, as with the *Delta* decision, the significance of this effort to reform the system for regulating air transportation transcends this industry and, indeed, has important implications for other regulated industries as well. In this regard, President Carter has recently stated that, in addition to reform of air transportation economic regulation, he will seek "deregulation" of the motor carrier industry, notwithstanding the fact that a similar effort undertaken in the last Congress met with little success. Thus, while at the present time the airline industry is the principal target of those seeking reform, it can safely be assumed that, if the effort in that area is successful, similar attempts to reform the regulatory schemes applicable to other industries will follow.

V. Conclusion

As one may see from even this brief summary of developments, the past two years have been busy and, in at least one sense, anomalous ones

100. 123 Cong. Rec. S2494 (daily ed. Feb. 10, 1977).

for air carrier tariff regulation. On the one hand, we see the Board attempting to abandon adjudicative oral hearings in an apparent reaction to pressure to have its will imposed on carrier tariffs more quickly. On the other hand, we see the regulatory reformers and even the Board, to a limited degree endeavoring to free the carriers, in making rate and fare decisions, from Board control. Where this will all end up is anyone's guess at this time, but one thing is clear: the developments over the next two years in air carrier tariff regulation will, in all likelihood, be as far-reaching as those of the last two.