

Essay

Air Service to Small Communities Since Deregulation

CELESTE R. GAMACHE*

TABLE OF CONTENTS

I. INTRODUCTION	345
II. REGULATION OF AIRLINES PRIOR TO THE ADA	346
III. THE AIRLINE DEREGULATION ACT OF 1978	347
A. <i>CONCERNS AND PREDICTIONS</i>	347
B. <i>SMALL COMMUNITY AIR SERVICE</i>	350
IV. THE EFFECT OF THE ADA ON SMALL COMMUNITIES	352
A. <i>REPLACEMENT SERVICE</i>	353
B. <i>DEPARTURES VS. SEATS</i>	354
C. <i>COMMUTER SERVICE</i>	355
V. OLD PROBLEMS, NEW PROVISIONS	357
VI. CONCLUSION	358

I. INTRODUCTION

The three most important industries to the growth of a societal infrastructure are transportation, communication and energy.¹ For any society to flourish, it must first have a solid infrastructure to support it. The economic growth of a society is particularly dependent on a reliable transportation system. Senator Jim Sasser recently pointed out:

[I]n the 19th century . . . if you lived in an area of water or river transportation, you flourished. Along came the railroad and it appeared to have the power of economic life or death over cities . . .

Now, a strong case can be made that air service has the same impact

* Ms. Gamache is a June 1989 graduate of the University of Denver College of Law. She is a private pilot, a member of the Lawyer-Pilots Bar Association and the Civil Air Patrol.

1. P. DEMPSEY & W. THOMS, *LAW & ECONOMIC REGULATION IN TRANSPORTATION 2* (1986) [hereinafter P. DEMPSEY & W. THOMS].

on economic development of a region that river traffic or rail access had in an earlier era.²

Because of the importance of transportation in our society, the government first regulated this industry in 1887 with the Act to Regulate Commerce. This legislation gave the newly formed Interstate Commerce Commission jurisdiction to regulate the railroads and protect consumers against price and service discrimination.³ Thus, transportation was the first industry to be regulated and now has been the first industry to be significantly deregulated. The Airline Deregulation Act of 1978 (ADA)⁴ was implemented to reduce governmental regulation and place "maximum reliance on competitive forces and on actual and potential competition. . . ."⁵ One of the most controversial issues of airline deregulation was its potential impact on small communities.

This paper will briefly examine the experience of small communities' air service. Specifically, it will examine (1) regulation prior to the ADA, (2) sections of the ADA devoted to small community service, (3) the impact the ADA has had on small community service.

II. REGULATION OF AIRLINES PRIOR TO THE ADA

The origin of airline regulation was the Civil Aeronautics Act of 1938.⁶ A major aspect of this Act was to create a new agency, the Civil Aeronautics Administration, which was later renamed the Civil Aeronautics Board (CAB). The CAB was given the authority to regulate all commercial activities of interstate air carriers, including entry into the industry, rates, fares, safety and subsidy payments to promote civil aviation. The regulations were not designed to promote competition which would allow the CAB "to foster sound economic conditions in air transportation, promote adequate economical and efficient service by air carriers at reasonable charges and develop competition to the extent necessary to assure the sound development of an air transportation system."⁷ The regulatory scheme set out by the CAB was basically unchanged for forty years until deregulation.⁸ The Federal Aviation Act of 1958 reaffirmed the role of the CAB and

2. *The Economic Impact of Federal Airline Transportation Policies On East Tennessee: Hearings Before the Sen. Comm. on Budget*, 99th Cong., 1st Sess. 19 (1985) (Statement of Senator James Sasser).

3. P. DEMPSEY & W. THOMS, *supra* note 1, at 11.

4. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified at 49 U.S.C. §§ 1301-02, 1305-08, 1324, 1341, 1371-73, 1376, 1378-82, 1386, 1389, 1461, 1471, 1473, 1482, 1490-1504).

5. 49 U.S.C. § 1302(a)(4) (1982).

6. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (codified at 49 U.S.C. §§ 1301-1352).

7. S. REP. NO. 631, 95th Cong., 2d Sess. 1 (1978).

8. *Id.* at 5.

created another new agency, the Federal Aviation Administration (FAA).⁹ The FAA took over the safety functions of the CAB.

The Civil Aeronautics Act of 1938 provided for a subsidy program to facilitate service to small communities. This subsidy program was initially to facilitate mail service, not passenger service.¹⁰ Later, it became evident that this subsidy was as much for passenger service as it was for mail service. In the Federal Aviation Act of 1958,¹¹ the subsidies for mail and passengers were separated. Under Section 406, a local service carrier subsidy was implemented to insure the continuation of passenger service to small communities.¹²

The intrastate commuter air carriers were not subject to the regulations of the CAB. This also meant they were not eligible for the subsidy under Section 406. As interstate airlines procured larger and larger aircraft, it became less profitable to serve small communities. As the large airlines left these markets, the intrastate commuters filled the gap. The use of the smaller aircraft by commuters was more economical in these markets than the larger aircraft. The success of a few commuter airlines was part of the impetus for some of the provisions in the ADA.

III. THE AIRLINE DEREGULATION ACT OF 1978

The small communities were very vocal in their opposition to the ADA. Many concerned citizens testified before legislative committees on their fears of losing air service and the adverse impact it would have on their communities. The supporters of deregulation countered that the ADA adequately addressed these fears and contained sufficient provisions to insure continued service to small communities.

A. CONCERNS AND PREDICTIONS

During the legislative hearings on the ADA, much attention was focused on the small, intrastate carriers in California, Florida and Texas.¹³ These carriers, which were not subject to CAB regulation, were able to offer service at approximately half of what the interstate carriers were required to charge.¹⁴ But, these examples did not calm the fears of small communities worried about deterioration in service as a result of the ADA.

9. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (Codified at 49 U.S.C. §§ 1301-04, 1321-25, 1341-57, 1371-87, 1401-06, 1421-32, 1441-43, 1461-63, 1471-74, 1481-89, 1501-17, 1521-23, 1531-42).

10. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

11. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958).

12. *Id.* at 738 (Section 406).

13. F. THAYER, *REBUILDING AMERICA* 79 (1984).

14. H.R. REP. NO. 1211, 95th Cong., 2d Sess. 3 (1978), *reprinted in*, 1978 U.S. Code Cong. & Admin. News 3737, 3738.

The small communities were concerned the airlines would be attracted to the large, more profitable markets

'like sharks to the smell of blood.' This would undermine one of economic regulation's most important objective—that companies cross-subsidized losses incurred in serving rural or small users of the service with profits earned from more lucrative market opportunities, so as to ensure that the largest number of consumers enjoy access to the system at a reasonable price.¹⁵

The small communities argued that when the airlines moved into these larger markets, they would compete for passengers primarily by reducing fares. As fares dropped, there would be less money available to cross-subsidize the routes to the small communities. With this reduction in profits due to the increased competition in the large markets, the airlines would cut service or abandon their less profitable service to small communities.¹⁶

Opponents of deregulation took this a step further and argued the price competitions could lead to predatory pricing.¹⁷ One airline would continue to lower fares, forcing the competitors to follow suit. This has been described as a "bleeding contest,"¹⁸ where the competitors hemorrhage dollars to lower fares and attract passengers. This destructive competition would cause airlines to abandon routes or file bankruptcy. With all competition wiped out, the remaining airline could then charge monopolistic prices.

The supporters of deregulation downplayed the fears voiced by the small communities. Senator Edward Kennedy characterized the fear of losing service to small communities as a "red herring strewn along the path to reform."¹⁹ The supporters felt the increased competition would be in the public interest. Prior to deregulation, planes were flying almost fifty percent empty. The supporters contended lower fares due to the increased competition would result in fuller planes. Therefore, the airlines would not lose their profits or go into bankruptcy as predicted by the opponents. Lower fares in the large markets also were predicted to increase the demand for air travel to and from the small communities, thus the service to those communities should increase, not decrease.²⁰

15. Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445, 447 (1987) [hereinafter Dempsey, *The Dark Side*].

16. Meyer, *Section 419 of the Airline Deregulation Act: What Has Been the Effect on Air Service to Small Communities?*, 47 J. AIR L. & COM. 151, 154-157 (1981) [hereinafter Meyer].

17. *Id.* at 155.

18. S. TOLCHIN & M. TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* 243 (1983) [hereinafter S. TOLCHIN & M. TOLCHIN].

19. Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation, 95th Cong., 1st Sess. 110 (1977).

20. *Hearings on the Oversight of the Civil Aeronautics Board Practices and Procedures*

The supporters of deregulation believed that the predatory pricing would be impossible under deregulation because predatory pricing is only successful if a competitor, once driven out of the market, would not reenter it. Since aircraft are mobile, carriers could reenter new markets at will. This threat of new competition would keep the airlines from raising prices to predatory levels.²¹ Supporters of deregulation felt there were no "economics of scale"²² in the airline industry so there was nothing to prevent the small carriers from competing with the large carriers.²³

The cross-subsidization argument advanced by the opponents of deregulation was not accepted by the supporters of deregulation. The supporters felt that there was not a significant amount of cross-subsidization taking place and was only a "smokescreen" used by the large airlines. Their argument was that large airlines were losing very little in the small markets while regulation was maintaining artificially high fares in the large markets creating windfalls for the large airlines.²⁴ The supporters of deregulation also argued that the Section 406 subsidy program was not effective in protecting air service to small communities because it did not guarantee service. The ADA, on the other hand, does guarantee service and so would serve the interests of the small communities.

Even if the major carriers left the small markets, Congress would encourage the use of commuters as replacements for small communities through the subsidy program under Section 419 of the ADA.²⁵ It was felt the small commuter airlines could better serve small communities. The small, commuter aircraft would be more fuel efficient than the larger aircraft.²⁶ Since the commuters use smaller aircraft, they would fill a higher percentage of their aircraft per flight, covering more of their costs. Therefore, commuters would need less of a subsidy to serve the small communities. The CAB estimated if all subsidized service was transferred to commuter airlines, the annual subsidy cost after seven years would be reduced to \$21 million from the \$77 million of 1977.²⁷

Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) (reprinted in 41 J. AIR L. & COM. 607, 613 (1975)).

21. Meyer, *supra* note 16, at 157-158.

22. Any cost advantages enjoyed by the large carriers because of their size are offset by the increased costs and inflexibility of managing a large, complex system. Meyer, *supra* note 16, at 157 n.35.

23. Meyer, *supra* note 16, at 158.

24. *Id.*

25. S. REP. NO. 631, 95th Cong., 2d Sess. 88-89 (1978).

26. Oster, Jr. and Zorn, *Deregulation and Commuter Airline Safety*, 49 J. AIR L. & COM. 315, 319 (1984) [hereinafter Oster, Jr. & Zorn].

27. H.R. REP. NO. 1211, 95th Cong., 2d Sess. 12 (1978).

B. SMALL COMMUNITY AIR SERVICE

Section 419 of the ADA is devoted specifically to maintaining service to small communities.²⁸ The policy statement of the ADA states there will be a "maintenance of a comprehensive and convenient system of continuous scheduled interstate . . . service for small communities and for isolated areas in the United States, with direct Federal assistance where appropriate."²⁹ The ADA guarantees essential air transportation to all eligible points³⁰ for ten years which began on October 24, 1978.³¹ Essential air transportation is defined as:

scheduled air transportation of persons to a point provided under such criteria as the Board [Civil Aeronautics Board] determines satisfies the needs of the community concerned for air transportation to one or more communities of interest and insures access to the Nation's air transportation system at rates, fares and charges which are not unjust, unreasonable, unjustly discriminatory, unduly preferential, or unduly prejudicial. . . .³²

The minimum level of service was set at two round trips, five days per week, or the level of service provided by air carriers to such point based on the schedules of such air carriers in effect in 1977, whichever is less.³³ The guidelines set by the CAB to determine essential air transportation include: the number of designated hubs, specific airports, equipment, frequency of flights, maximum available capacity to be guaranteed by the Board, time of flights, number of stops permitted, load factor standard and overflights.³⁴ In determining which hub is serviced, the CAB will consider: the extent to which the hubs provide access to the national air transportation system; the commercial, geographic, and political ties of the hubs to the eligible point; the traffic levels to the hubs; the distance of the hubs from the eligible point; and the size of the hubs.³⁵ If an eligible point has ties to two hubs, service to both hubs may be approved, but in no case will essential air service be to more than two hubs.³⁶ The CAB does not require any specific type of aircraft, but does require the aircraft to have two engines and be operated by two pilots, meet FAA safety standards and be sufficient to accommodate the passengers and baggage at the eligible point.³⁷

28. 49 U.S.C. § 1389 (1982).

29. 49 U.S.C. § 1302(a)(8) (1982).

30. 49 U.S.C. § 1389(a)(3)(A) (1982).

31. 49 U.S.C. § 1389(a)(3)(B) (1982). Section 419 has been amended by Pub. L. No. 100-223, Title II, § 202(b)(1), 101 Stat. 1508, effective October 1, 1988. These amendments will be discussed later in the paper.

32. 49 U.S.C. § 1389(f) (1982).

33. 49 U.S.C. § 1389(f)(1) (1982).

34. 14 C.F.R. § 398 (1988).

35. 14 C.F.R. § 398.2 (1988).

36. *Id.*

37. 14 C.F.R. § 398.4 (1988).

Prior to termination, suspension or reduction to an eligible point, any certified or subsidized carrier must give ninety days notice to the CAB (now the DOT).³⁸ If the carrier is not certified or subsidized, then it is required to give only a thirty day notice to the CAB prior to exit.³⁹ If the termination or reduction of service by a carrier would cause the level of service to the community to drop below the point previously determined to be essential, then the carrier will not be allowed to terminate or reduce service. The carrier will be required to continue to serve the community while the CAB searches for a replacement carrier. If a replacement carrier has not been found at the end of the notice period, the CAB shall require the carrier to continue to serve the community for another thirty days. The CAB may continue to require the carrier to serve the community for subsequent thirty day periods until a replacement carrier is found.⁴⁰ If a carrier is required to continue service beyond the thirty or ninety day notice period, the carrier will be compensated for any losses incurred in continuing service while the search for a replacement carrier continues.⁴¹

After January 1, 1983, a carrier may file an application to replace a

38. 49 U.S.C. § 1389(a)(3)(A) (1982). This section provides:

No air carrier shall terminate, suspend, or reduce air transportation to any eligible point below the level of essential air transportation established by the Board . . . unless such air carrier—(A) if such air carrier—(i) holds a certificate . . . , or (ii) does not hold such a certificate, but is receiving compensation . . . has given the Board, the appropriate State agency or agencies, and the communities affected at least ninety days notice prior to such termination, suspension, or reduction. . . .

Id. The ADA contained a sunset provision, 49 U.S.C. § 1551(b)(1)(E) (1982 & Supp. IV 1986), whereby most of the CAB's authority was transferred to the Department of Transportation on January 1, 1985. Any reference to CAB action in this paper has now been transferred to the DOT.

39. 49 U.S.C. § 1389(a)(3)(B) (1982). This section provides:

if such air carrier does not hold such a certificate and is not receiving compensation . . . has given the Board, the appropriate State agency or agencies, and the communities affected at least thirty days notice prior to such termination, suspension, or reduction. . . .

Id.

40. 49 U.S.C. § 1389(a)(6) (1982). This section provides:

[i]f an air carrier has provided notice to the Board . . . of such air carrier's intention to suspend, terminate, or reduce service to any eligible point below the level of essential air transportation to such point, and if at the conclusion of the applicable period of notice the Board has not been able to find another air carrier which provided such notice to continue such service to such point for an addition 30-day period, or until another air carrier has begun to provide essential air transportation to such point, whichever first occurs. If at the end of such 30-day period the Board determines that no other air carrier can be secured to point essential air transportation to such eligible point on a continuing basis, either with or without compensation, then the Board shall extend such requirement for such additional 30-day periods . . . as may be necessary to continue air transportation. . . .

Id.

41. 49 U.S.C. § 1389(a)(7)(B-C) (1982).

subsidized carrier, either under the old⁴² or ongoing program, to any eligible point.⁴³ The applicant carrier must show the granting of its application will result in substantial improvement in air transportation or decrease the amount of compensation required to continue service to the eligible point.⁴⁴ Great weight will also be given to the opinions of the communities affected.⁴⁵

Under the ADA, commuter airlines, which were formerly exempt from CAB regulation, were brought under the regulation of the CAB and, of course, eligible for the subsidy.⁴⁶ The commuters also were required to conform to the safety standards set by the FAA.⁴⁷

IV. THE EFFECT OF THE ADA ON SMALL COMMUNITIES

Many of the provisions of the ADA were designed to insure the continuation of service to small communities, but this has not been enough. Since deregulation, many of the major trunk line carriers "are dropping unprofitable 'puddle jumps' to concentrate on the big-buck, long-haul business."⁴⁸ In the years since the passage of the ADA, the fears expressed by small communities prior to the ADA seem to have been justified. Deregulation has been described as a "natural experiment;"⁴⁹ a natural experiment which has "shot down more planes than the Red Baron."⁵⁰ For example, prior to deregulation, the CAB would deny an abandonment by a carrier only if it felt it was not in the public interest. Between 1960 and 1975, the CAB approved only 173 abandonments, or 9.6 per year. In the first two years of deregulation, abandonments rose to more than 50 per year.⁵¹ But, since deregulation, a CAB report estimated that between June 1978 and June 1984, 225 communities had service decline by 50% or more including some 119 that lost air service com-

42. Federal Aviation Act of 1958, P.L. 85-726, 72 Stat. 731 (Section 406).

43. 49 U.S.C. § 1389(a)(8)(A) (1982).

44. *Id.*

45. 49 U.S.C. § 1389(a)(8)(B) (1982).

46. 49 U.S.C. § 1389(c)(2)(A-B) (1982). This section provides:

[t]he Board shall not provide any compensation . . . to any commuter air carrier . . . unless the Board determines that such commuter air carrier—(A) is fit, willing, and able to perform such service; and (B) that all aircraft which will be used to perform such service and all operations relating to such service will conform to safety standards established by the Administrator. . . .

Id.

47. *Id.*

48. *The Puddle Jump Problem*, NEWSWEEK (October 23, 1978), at 75 [hereinafter *The Puddle-Jump Problem*].

49. Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 YALE J. ON REG. 393, 394 (1987).

50. J. MEYER, C. OSTER, JR., I. MORGAN, B. BERMAN, & D. STRASSMANN, AIRLINE DEREGULATION: THE EARLY EXPERIENCE 120 (1981) [hereinafter J. MEYER].

51. *The Dark Side*, *supra* note 15, at 455.

pletely.⁵² Although the ADA was designed to protect small communities from total abandonment of air service as much as possible, it does not protect small communities from partial abandonments. In many communities, only a minimal level of service has been implemented to cover the service abandoned by a major carrier. But this minimum satisfies the "essential service level" prescribed by the ADA.⁵³

A. REPLACEMENT SERVICE

Replacement service to small communities has not always occurred without disruption. Many small communities have experienced lapses in service between the time one carrier terminates service and another begins service. For example, in Clinton, Iowa, a carrier terminated service in July 1985 and replacement service did not begin until September 1985.⁵⁴ Some communities have experienced a rapid turnover in carriers which is very disruptive. In Modesto, California, there have been five changes in airlines since deregulation. Fourteen schedule changes occurred in only eighteen months.⁵⁵

These disruptions in air service can have an adverse impact on a small community's economy. As one businessman noted, "[w]hen they cut you off from service . . . they cut you off from the rest of the world—and the rest of the world from you."⁵⁶ If a community does not have accessible air transportation, eighty-eight percent of the top 500 firms in America would not locate their facilities in that area.⁵⁷ Without adequate, convenient and reasonably priced air service, a community's ability to retain existing industries or attract new ones is diminished.⁵⁸ A comprehensive analysis of this problem was stated by Susan and Mark Tolchin:

The real problem with economic deregulation is that the transportation system . . . [is a] national resource, affecting many industries. A bankrupt

52. M. BRENNER, J. LEET, E. SCHOTT, *AIRLINE DEREGULATION* 98 (1985) [hereinafter M. BRENNER].

53. Note, *Airline Deregulation and Service to Small Communities*, 53 N. DAK. L. REV. 607, 627 (1981) [hereinafter Note].

54. Kihl, *The Impacts of Deregulation on Passenger Transportation in Small Towns*, 42 TRANSP. Q. 243, 249 (1988) [hereinafter Kihl].

55. M. BRENNER, *supra* note 52 at 101.

56. *The Puddle-Jump Problem*, *supra* note 48, at 75.

57. Dempsey, *The Dark Side*, *supra* note 15, at 458.

58. Brenner, *Airline Deregulation—A Case Study in Public Policy Failure*, 16 TRANSP. L.J. 179, 189 (1987) [hereinafter Brenner]. Others agree.

Deregulation has brought inconveniences to many and a sense of isolation to others, touching the lives of businessmen wanting connections to the national transportation system, and of the vacationers threat of further air service losses, at least disruptions, at the scheduled conclusion of federal subsidies, has been an additional psychological blow to communities seeking to develop or even maintain current status. . . ."

Ott, *Upper Midwest Mulls Service Options*, AV. WEEK & SPACE TECH., July 12, 1982 at 35, 36 [hereinafter Ott].

airline can leave a city without adequate air transportation, damaging that city's ability to compete in the business community and reducing the quality of life for its residents A bankrupt airline . . . represents upheavals with such enormous impact that some measure of public protection is more than justified.⁵⁹

B. DEPARTURES VS. SEATS

One of the areas supporters of deregulation point to as an indicator of the success of deregulation is increase in the number of departures from small communities. From 1978 to 1987, non-hubs⁶⁰ experienced only a one percent decline in departures, while small hubs experienced a forty-two percent increase in departures.⁶¹ This sounds impressive and implies that there has not been any decrease in service, but, the real indication of the actual level of service to a community is the number of seats available to that community. During the same period of 1978 to 1987, the number of seats available to passengers at non-hubs declined by seventeen percent whereas the number of seats available to passengers at medium and large hubs increased by sixty-six percent.⁶² In Salem, Oregon, the number of departures rose by over forty-six percent from 1978 to 1980 but, the number of seats available declined by nearly thirty-five percent.⁶³ So, while the number of departures from small communities may be up, the number of seats actually available to small communities has declined.

The reason the number of seats has declined is the increased use of the smaller commuter airlines in replacing large airlines. The use of commuter aircraft has also been a source of complaint by small communities. Commuter airlines feel they must "persuade travelers that the dark ages of aviation haven't descended just because the big, deregulated trunk lines have stopped flying jetlines in many marginal markets."⁶⁴ The small communities counter that "[n]o matter how you look at it . . . if you have lost service, it seems that you're going back to the aviation of the

59. S. TOLCHIN & M. TOLCHIN, *supra* note 18, at 250. A similar conclusion was reached by William Wills, General Manager of the TVA:

There is an important trend in economic development . . . toward greater growth in the non-manufacturing or service sector, especially in the higher-technology industries. These firms rely . . . heavily on recent technological advances in communications and information systems, and good air service has become an essential ingredient in their location decisions. Air service is as important to these firms as electricity and telephone communications; and in this sense, air service should be considered a public utility. . . .

60. A hub is defined as "any point enplaning more than 0.05 percent of the total enplanements in the United States." 14 C.F.R. § 398.2(a) (1988).

61. Kahn, *Airline Deregulation—A Mixed Bag, But a Clear Success Nevertheless*, 16 *TRANSP. L.J.* 229, 247 (1988).

62. Brenner, *supra* note 58 at 210-211.

63. Meyer, *supra* note 16 at 182.

64. *Id.* at 172-173.

1930's."⁶⁵ The ADA only guarantees quantity, not quality. As stated earlier, the ADA does guarantee a minimum level of essential service but, it does not guarantee that small communities will receive the same quality of air service.⁶⁶ The small communities discovered this fact very quickly and have made their views on commuter service public.

C. COMMUTER SERVICE

Small communities have made four main objections to commuter service: (1) the lack of amenities, (2) the inconvenience of travel, (3) fares, and (4) the safety record of commuters.⁶⁷ Small communities have lost the aspects of service which can make air travel comfortable and appealing.⁶⁸ Many of the commuter airlines do not offer amenities the larger airlines offer. Many commuters are so small that they do not allow passengers to stand up during travel. There are no stewardesses, stewards or meals.⁶⁹ Many passengers complain that small unpresurized aircraft are less comfortable, especially when flying at higher altitudes.⁷⁰ Commuters usually fly at a lower altitude than the larger carriers which subject their passengers to much more turbulence.⁷¹ All of these factors combine to make the flight on the commuter aircraft less pleasurable than on larger aircraft.

The convenience of air travel to and from small communities also has declined. Due to the hub-and-spoke⁷² operations of airlines, there are fewer direct flights to and from small communities making air travel more circuitous for many passengers.⁷³ Because only a limited number of aircraft can land at an airport at any one time, many of the larger hubs have only a limited number of landing slots available. Most of those slots belong to the major airlines. The commuter airlines cannot acquire the slots or find them too costly to acquire.⁷⁴ As a result, the commuter airlines cannot get into the major airports at convenient times or are forced to use

65. Ott, *supra* note 58 at 40.

66. Havens & Heymsfeld, *Small Community Air Service Under the Airline Deregulation Act of 1978*, 46 J. AIR L. & COM. 641, 659 (1981).

67. Note, *supra* note 53, at 630.

68. Ott, *supra* note 58, at 36-39.

69. Meyer, *supra* note 16, at 173-174.

70. Dempsey, *The Deregulation of Intrastate Transportation: The Texas Debate*, 39 BAYLOR L. REV. 1, 20 (1987) [hereinafter Dempsey, *Intrastate Transportation*].

71. Meyer, *supra* note 16 at 174.

72. In the hub and spoke operation, an airline will fly most planes through its "hub" airport and then send them on to their destination airport. See E. BAILEY, D. GRAHAM & D. KAPLAN, *DEREGULATING THE AIRLINES* 73-79 (1985).

73. Dempsey, *The Dark Side*, *supra* note 15 at 456.

74. Kihl, *supra* note 54 at 252.

secondary airports. Thus, passengers from small communities are forced to deal with less convenient service.

The third area where small communities have been adversely impacted is fares. "As a result of deregulation . . . fares for traveling between small points have increased rapidly; and commuter air carrier fares are reported to be particularly high in most cases."⁷⁵ Since deregulation, there has not emerged a consistent pattern of fares per mile. For example, a ticket from New York to Norfolk cost 13 cents per mile while a ticket from St. Louis to Cincinnati cost 53 cents per mile even though these two routes are within eleven miles of the same distance.⁷⁶ The fares for the New York-Norfolk route are about 19% below the 1978 fares while fares for the St. Louis-Cincinnati route are 231% above the 1978 fares.⁷⁷ These discriminatory pricing practices have been described as "outrageous" or "nightmarish."⁷⁸

Deregulation was expected to halt any cross-subsidization taking place between the large and small markets. It seems the cross-subsidization has merely been reversed, not eliminated.⁷⁹ As carriers wage fare wars in the large markets to attract passengers, small communities pay higher fares for poorer service to subsidize the losses the airlines are losing in the battles in these large markets. "In short, some parts of the public get bargains, while other passengers are subsidizing those bargains by the steep escalation in their fares."⁸⁰ Without competition or regulation to bring fares back into line, these discriminatory pricing practices will continue.

The final area which worries small communities is commuter safety. Some statistics show that the safety records of the commuters are three to thirty times worse than those of the larger carriers.⁸¹ These statistics are based on passenger miles. The greatest risk of an accident is during takeoffs and landings. Commuters make many more takeoffs and landings but amass fewer miles than the long-haul carriers which will have only one takeoff and landing but amass many miles.⁸² If a comparison is done based on departures, commuters have 0.94 fatalities per 100,000 departures while large airlines have 1.55 fatalities per 100,000 departures.

75. Addus, *Subsidizing Air Service to Small Communities*, 39 *TRANSP. Q.* 537, 549 (1985).

76. M. BRENNER, *supra* note 52 at 37.

77. *Id.* See also, Brenner, *supra* note 58 at 198.

78. Dempsey, *Transportation Deregulation—On a Collision Course?*, 13 *TRANSP. L.J.* 329, 358 (1984).

79. Dempsey, *The Empirical Results of Deregulation: A Decade Later, and the Band Played On*, 17 *TRANSP. L.J.* 31, 56 (1989) [hereinafter Dempsey, *And the Band Played On*].

80. Brenner, *supra* note 58 at 198.

81. Dempsey, *Intrastate Transportation*, *supra* note 70 at 20.

82. Oster, Jr. & Zorn, *supra* note 26, at 325-326.

tures.⁸³ Although these statistics are persuasive, the overall public sentiment still views commuters as less safe.

V. OLD PROBLEMS, NEW PROVISIONS

The previous sections of the ADA have been in effect since the advent of airline deregulation in 1978. The end of the ten year period has past, therefore, beginning October 1, 1988, the amended Section 419⁸⁴ of the ADA took effect. This section will highlight only the changes to Section 419 discussed in the previous section.

In looking at the new provisions of the ADA discussed earlier, many of the provisions seem to address the complaints of the small communities under the "old" ADA. The new Section of the ADA seems to be more specific than the old Section 419. The definition of basic essential air service has been amended to address many of the most common complaints of the small communities. Basic essential air service is now defined as:

scheduled air transportation of person and cargo to a hub . . . which has convenient connecting or single-plane air service to a substantial number of destinations beyond such airport. Such transportation shall include, at least the following elements: (A)(i) . . . 2 round trips 6 days per week, with not more than 1 intermediate stop on each flight; . . . (B) flights at reasonable times taking into account the needs of passengers with connecting flights at such airports and at rates, fares and charges which are not excessive when compared to the generally prevailing fares of other air carriers for like service between similar pairs of points; . . . (D) service which accommodates the estimated passenger and cargo traffic at an average load factor . . . ; (E) service provided in an aircraft with at least 2 engines and using 2 pilots . . . ; (F) in case of service which regularly exceeds 8,000 feet in altitude, service provided with pressurized aircraft.⁸⁵

It is evident from this definition that this new section codifies many sections set in place by the CAB through the administrative process. It also seems to take into account the needs of the community and is responsive to the complaints small communities have lodged against deregulation and commuter airlines in the last ten years.

There are other provisions in the new Section 419 which demonstrate the greater emphasis on the needs of small communities. In several places, the new Section 419 states that the Secretary of Transportation must consider the views of the community before making a decision.⁸⁶ The new Section 419 allows small communities to submit plans to the Secretary as to what they feel is essential air service for

83. J. MEYER, *supra* note 50 at 153.

84. Pub. L. No. 100-223, Title II, § 202, 101 Stat. 1508.

85. *Id.* codified at 49 U.S.C. § 1389(k)(1) (1988).

86. *Id.* at 49 U.S.C. § 1389(b)(1)(A) and (b)(3)(A)(iv).

them.⁸⁷ The Secretary must consider several factors before selecting a carrier to provide basic essential air service. These factors include the carrier's (i) reliability; (ii) contractual and marketing arrangements made with larger carriers at the hub airport; (iii) interline arrangements with larger carriers; and (iv) preferences to actual and potential users . . . at the eligible point . . .⁸⁸ Communities who are not eligible for the subsidy also have the opportunity to submit a plan to the Secretary and possibly get some subsidy for air service.⁸⁹

The procedure to terminate services is similar except that all carriers must give ninety days notice.⁹⁰ Although there are two situations in which a carrier must only give a thirty day notice before termination, suspension or reduction in service. The first occurs if a community has submitted a proposal to the Secretary for enhanced essential air service to a level or type it feels is appropriate.⁹¹ The second occurs if a community has submitted a plan to the Secretary for compensated air transportation.⁹²

The new provisions under Section 419 seem to be responsive to the complaints lodged by small communities and seem to be striving to better serve their needs. Only time will tell if these new provisions will alleviate their complaints and improve their plight to retain convenient and affordable air service. The results will be interesting to observe.

VI. CONCLUSION

It has been ten years since the Airline Deregulation Act was implemented. The ADA was designed to insure essential air service to small communities. Many provisions were specifically included to guarantee that small communities would continue to receive air service after deregulation. But this was not enough to calm the concerns of small communities about losing service. Many of these concerns have become realities and small communities are struggling to cope.

The realities many small communities are facing today are those concerns they voiced prior to deregulation. In many small communities, the major carriers have abandoned the routes to their communities in favor of the more lucrative large markets. These small communities have been forced to deal with the small commuter airlines. Sometimes they have

87. *Id.* at 49 U.S.C. § 1389(c).

88. *Id.* at 49 U.S.C. § 1389(b)(3). These sections also indicate the current trend of commuter airlines to become affiliated with large airlines. Today 48 of the 50 small air carriers affiliate themselves with the megacarriers. Dempsey, *And the Band Played On*, *supra* note 79, at 53.

89. 49 U.S.C. § 1389(d).

90. 49 U.S.C. § 1389(b)(2).

91. 49 U.S.C. § 1389(c)(4).

92. 49 U.S.C. § 1389(d)(6).

1989]

Air Service to Small Communities

359

had to deal with several successive airlines and deal with lack of airline service after an abandonment until a replacement carrier is found.

The problems the small communities have had with air service are numerous. The fares charged today are much higher than the fares prior to deregulation. The fares charged for travel between small communities is higher than the fares for the same distance between two larger hubs. Because many small communities are being served by commuters now, the number of seats available has decreased. There is a decline in service in that commuter airplanes may not have stewards or stewardesses, food or restrooms. Many passengers are also concerned about commuter safety. These problems have not been easy for communities to deal with and these communities will continue to voice their complaints until their needs are met.

Now there is a new Section 419 of the ADA. Many of the changes seem to address the complaints the small communities have voiced over the past ten years. Hopefully these changes will provide better service to the small communities to make a stronger transportation system in this country.

