

**AGE:  
A VALID BASIS FOR DETERMINATION OF AIRLINE FARES**

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*Introduction*

There is now pending before the Civil Aeronautics Board a case in which youth standby and young adult fares for air travel are challenged because they are unreasonable and unjustly discriminatory. The Court of Appeals found sufficient basis to remand the case to the Civil Aeronautics Board for an investigation of the legality of these fares. Examination of the background and pertinent law clearly shows that age is a valid basis for determination of these fares. The principle involved is new in this specific application, though it is an established principle in rate regulation.

In considering age in the determination of the legality of the youth standby and young adult discount airline fares, the court in *Transcontinental Bus System, Inc. v. Civil Aeronautics Board*<sup>1</sup> said:

“[A]ge alone is, as a general rule, not a relevant consideration. In so concluding, we are not intimating that the time honored exception for children under 12 is unjustly discriminatory.”<sup>2</sup>

The youth standby and young adult fares pertain to persons in the 12 to 22 age group, while children's fares refer to the under-12 age group, usually ages 2 to 12. Thus, the court is suggesting that age is not a valid consideration in one age range, while it is a valid consideration in another age range because the children's range is based on a “time-honored exception” to the general rule.

Reduced fares for children are traditional not only in air transportation but in all forms of transportation. In fact, reduced fares for children are common in all aspects of life. One need only look at the closest movie theatre, amusement park, sporting event, concert or other event to which tickets are sold. On the basis of cost, the baby under 2 (who usually travels free) may be held if there is no vacant seat, and his free transportation can be justified. In the case of the children's menu in a restaurant, the cost of a smaller portion will be less. However, in most areas of reduced rates, such as admissions, there is no cost basis to justify a reduced price for children. Nevertheless, reduced rates for children are accepted without question.

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1. 383 F.2d 466 (5th Cir., 1967); *cert. den.* 390 U.S. 920 (1968).  
2. *Id.* at 489.

The court in *Transcontinental Bus* suggested there is no valid basis for reduced children's rates and simply excused them as a "time-honored exception." Time alone cannot be the real basis for children's reduced fares. It may be that by now it is sufficient to justify children's fares as "time honored," because they have been accepted as valid for many years. Some indication of the length of time is the fact that when economic regulation was first introduced to the airlines, 32 years ago, children's fares were already a "time-honored exception."<sup>3</sup> But these fares were not always a "time-honored exception." At some place and time, they had to be validated. At some time and place, the validation was not merely time but some other factor. It is the thesis of this paper that the basic factor is age; that a rate based on any specific age group may be valid, whether it is children in the traditional 2-to-12 age group, or some new age group never before listed, such as ages 38 to 45.

*Youth Standby and Young Adult Fares:*  
*Transcontinental Bus System, Inc. v. Civil Aeronautics Board*

The question of the validity of rates based on age has been contested in the *Transcontinental Bus System* case and, in fact, is still being contested. It should be noted, however, that these are not the first youth fares offered, although the previous youth fares were not contested. Special airline fares for the 12 to 22 age group were first offered in 1961 in the form of fares equal to 50% of the regular adult fare on reservations made within three hours of flight time.<sup>4</sup> If no reservations were available, the youth had the privilege of "standing-by" and taking any unused seat at the same fare. While some of the local airlines continued these special fares until the contested youth fares were introduced, the trunk lines dropped them within a short time.<sup>5</sup>

The youth standby and young adult fares presently in question were instituted in December, 1965, when American Airlines filed its youth standby fares, a new discount fare for youths providing a no-reservation fare equal to 50% of the regular adult coach fare for youths at least 12 years of age and under 22.<sup>6</sup> At the same time, Allegheny Airlines filed its

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3. Children's fares were accepted in railroad transportation by 1900 and earlier.

4. Youth Fares Proposed by Domestic Carriers, C.A.B. Order No. E-17367, August 5, 1961.

5. All trunk lines dropped this fare in December, 1961. This fare was retained by the following local service carriers: Bonanza Airlines, Inc., Central Airlines, Inc., Frontier Airlines, Inc., Ozark Air Lines, Inc., Pacific Airlines, Inc., Southern Airlines, Inc., Trans-Texas Airways, Inc., and West Coast Airlines, Inc.

6. American Airlines youth standby fares, filed December 20, 1965. The tariff is subject

young adult tariff, providing reservations for the same age group at a discounted fare of 66 2/3% of the regular jet coach fare.<sup>7</sup>

The American and Allegheny fares have been under constant attack since they were instituted. Complaints were filed with the Civil Aeronautics Board (hereinafter referred to as CAB or Board) against both fares by Transcontinental Bus System, Inc.,<sup>8</sup> National Trailways Bus System,<sup>9</sup> and the American Society of Travel Agents. Complaints against the American fares were also filed by Delta, Northeast, United, Western and Trans World Airlines. The basis of these complaints was that the rates were, *inter alia*, unjustly discriminatory; in that, based on the age group, an artificially selected class of traffic was created. There was no real difference between this fare and the regular adult fare, and there was, therefore, no valid reason for a difference in the rates between the youth and young adult fares and regular adult fares.

The CAB found the fares not unjustly discriminatory and dismissed the complaints without an investigation, allowing the fares to go into effect on an experimental basis.<sup>10</sup>

The Court of Appeals<sup>11</sup> reversed the Board. It held that unjust discrimination was ultimately a fact question for decision by the Board, but it was an abuse of Board discretion to make such a determination without an evidentiary hearing. It also laid down guidelines for the Board to follow in making its determination, including its statement that age, in itself, is not a proper consideration in cases other than children's fares.<sup>12</sup>

On remand the proponent airlines argued that reduced fares to young

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to "black out periods" during which it cannot be used, such as the days of heaviest travel during the Christmas and New Years season. The youth is required to show an identification card when purchasing his ticket and when boarding the plane. This identification card is purchased from American on proof of age, for a fee of \$3.00, and remains valid until the holders' 22nd birthday. The standby passenger is boarded only after all reservation passengers and all military standby passengers are boarded, and the youth is subject to being "bumped" at an intermediate point to make room for a regular fare reservation passenger.

7. Allegheny Airlines, young adult fares, filed December 20, 1965. Allegheny provides for no "black out periods," so that a youth may ride under this plan on any flight on any day a reservation is available. Allegheny requires an identification card which is issued on proof of age at the cost of \$10.00 per year.

8. An organization composed of 46 independent motor carriers, licensed by the Interstate Commerce Commission.

9. A national trade association of motor bus operators.

10. American Airlines, Inc., Proposed Standby Youth Fares, Order No. E-23137, January 20, 1966; Allegheny Airlines, Inc., Proposed Young Adult Fares, Order No. E-23138, January 20, 1966.

11. Appeal from the Board Order was taken by Transcontinental Bus System, Inc. and National Trailways Bus System.

12. See quotation, *supra* page 1, covered by Footnote 2.

persons were traditional, not only in all fields of transportation, but also in other fields as well:

“Reduced rates for young people have been traditionally permitted by regulatory agencies and have not been considered in conflict with the anti-discrimination provisions of the law. Because price discrimination based on age is widespread all over the country and is traditional in transportation, the Court is at odds with the real world when it said that children’s fares are a ‘time honored exception.’”<sup>13</sup>

It was argued that the court passed over the traditional aspect too lightly. Fares for children under 12 on the railroads and those previously in effect on the airlines have never been seriously questioned . . . simply on the basis of age. Therefore, why is not another special age group also justified?<sup>14</sup> American Airlines argued that both airlines and surface carriers long offered special rates to the age of 12 and that for many years special rates had been offered to those under the age of 22 through the family fares.<sup>15</sup> In addition, both the railroads and the bus companies have offered discounts to young people aged 12-21 without objection from the Interstate Commerce Commission (hereinafter referred to as the ICC or the Commission).<sup>16</sup>

The Trial Examiner found age not to be a proper foundation for the discrimination of the youth fares, based mainly on the court rejection of the proposition that age alone is a relevant factor.<sup>17</sup> Nevertheless, the Board held, upon all of the evidence presented to the Examiner, that the fares were not unjustly discriminatory in that although such fares might be discriminatory:

“(T)he circumstances and conditions inhering in the youth fares are substantially dissimilar from those inhering in traffic generally.”<sup>18</sup>

The Board, however, again remanded the case to the Trial Examiner to gather additional evidence on the question of rate reasonableness, and

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13. Delta Reserved Seat Youth Fares, Order No. E-23656, May 9, 1966.

14. Brief of Allegheny Airlines, Inc., to Examiner Arthur S. Present, Civil Aeronautics Board, Docket 18936, November 13, 1968. *See also* Briefs filed by Hawaiian Airlines, Inc. and Trans-Texas Airways, Inc.

15. Brief of American Airlines, Inc. at 10, to Examiner Arthur S. Present, Civil Aeronautics Board, Docket 18936, November 12, 1968.

16. *Id.* The youth fares offered by the bus lines were voluntarily withdrawn prior to commencement of their action attacking airline youth fares.

17. Initial Decision of Hearing Examiner, Arthur S. Present, Civil Aeronautics Board, Docket 18936, January 21, 1969, at 66.

18. C.A.B. Order No. 69-8-140, August 27, 1969 at 19.

reserved the right to re-examine the question of unjust discriminations based upon any new evidence produced.<sup>19</sup>

This case has now been pending four and one half years, and it has not yet been finally determined whether youth fares are unjustly discriminatory. Undoubtedly, the final decision is still some time away. After additional hearings and opinion of the Trial Examiner, the Board will again review the decision, and then additional court action may follow.

#### *Other Tariffs Based On Age*

In addition to the youth fares, there have been three different tariffs instituted by the airlines and structured on age, either wholly or in part. These are the children's fares, senior citizen or golden age fares and family fares. To better understand these tariffs, each will be examined individually.

##### *A. Children's Fares*

The history of children's fares in aviation is as old as the Civil Aeronautics Act (hereinafter referred to as the Act),<sup>20</sup> itself. Most carriers offered half fare rates for children under the original tariff required to be filed in conformance with the Act. The original rates provided for children aged 8-12, whether or not accompanied by an adult, and for ages 2-7, only if accompanied by an adult. Children under 2 were free. Two airlines did start with full fare for children over the age of 2, but both changed their policy so that by mid-1941 all airlines provided half fares for children from 2-12.

In July, 1942, all carriers suspended reduced fares for the duration of World War II, and all children's fares were included in this suspension. The children's half-fare rates were restored in December, 1945, without distinction as to whether accompanied or unaccompanied, although some airlines would not accept children under 12 without an accompanying adult. Starting in 1947, airlines refused to accept children under 8 without an adult. This rule was later modified to provide that the airline would accept an unaccompanied child if the child were emplaned by an adult and if there was assurance that the child would be met at the plane's destination.

In 1949, two airlines instituted the full adult fare for unaccompanied

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19. *Id.*

20. 52 Stat. 973 (1938). Now the Federal Aviation Act, 72 Stat. 731 (1958), as amended.

children aged 5 through 11, and one instituted the same fare for children 5 through 7. During the early 1950's, more and more of the airlines adopted the policy of charging full adult fare for an unaccompanied child. By July, 1955, 13 domestic carriers and 1 foreign carrier charged full adult fares for unaccompanied children 2-11. It was at that time that an investigation was ordered by the Board of this fare and which led to the *Investigation of Full Adult Fares for Unaccompanied Children*<sup>21</sup> which determined in 1956 that it was not unjustly discriminatory to charge full adult fares for unaccompanied children while charging half fares for accompanied children.

This case is the only airline case going directly to the question of reduced fares for children. This case makes no attempt to justify the reduced fare. It assumes the reduced fare to be legal and found a justification, in the higher costs to the airline, for the higher fare for a child who is unaccompanied. The actual point in contention here was not the reduced rate fare but rather the full fare for children traveling without adults. The court held that it was not unlawful to charge full fare for a child without an adult because the cost to the airline was higher than the cost of transporting a child with an adult. It further held that a difference between domestic and international rates was unjust discrimination because two children on the same plane could be charged different rates, one in domestic flight and the other in international flight. The reason for the difference was that it was customary in international flight to charge half fare, whether or not the child was accompanied by an adult. On this point, the Board held that the airline could either raise both rates to full fare or reduce both rates to half fare. Either fare would be legal. The only illegality would be in making a distinction between domestic and international flights.

The court recognized that legality of both half fare and full fare rates was in issue. It made every effort to insure that its opinion was understood as such when it said:

“ . . . we think it is clear that the lawfulness of both the half fare and the full fare were in issue insofar as discrimination and prejudice are concerned, and the Board has full authority to direct that any unlawfulness in this regard be removed.”<sup>22</sup>

While it is clear that rates for children, whether equal to half or full

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21. *Investigation of Full Adult Fares for Unaccompanied Children*, 24 C.A.B. 408 (1956).

22. *Id.* at 411.

adult fare, are legal, the basis of their legality is not clear. Some light is shed by the opinion of Vice-Chairman Adams, in which he agrees with the result of the Board but disagrees with its approach. The majority found it lawful to charge full fare because of the extra service required in case of travel by a child unaccompanied by an adult. The dissent held that the cost of the unaccompanied child should be compared to the accompanied child, not to an adult. The children's half fare is legal, and as such should be the starting point for considering extra fare for extra service.

But if the children's fare is legal, *i.e.*, not unjustly discriminatory, even though it is less than full adult fares, on what basis is it legal? There is no allegation that special circumstances remove it from the category of full fares, and the Board does not justify it as such. Nor is there any claim that ages 2-12 is a special age group entitled to special consideration.

What is the situation in other areas of the transportation industry? Again, children's fares are accepted but usually without reason. There are, however, two important cases decided by the ICC, which shed considerable light on this subject.

In the first of these cases, *In the Matter of Regulations Governing Sale of Commutation Tickets to School Children*,<sup>23</sup> a rate was set that was only open to students of a certain class, specifically providing for the exclusion of pupils attending various other kinds of schools. The Commission held this fare unjustly discriminatory under Section 2 of the ICA. The Commission added, ". . . (B)ut . . . carriers may lawfully offer and use a commutation ticket limited in sale and use to children or young persons between certain stated ages (as, for instance, from 12 to 21 years of age)."<sup>24</sup>

It was suggested by the court in *Transcontinental Bus*<sup>25</sup> that this language should be discounted because it is dicta. If the Commission's only duty were to rule on the legality or illegality of the proposed tariff, the court would be correct. However, the Commission had the same duty the Board has under the FAA. Specifically, under Section 1002(d), it is provided that if the Board finds a rate illegal, the Board shall determine the lawful rate.<sup>26</sup> In view of this Board duty, it can hardly be said that the

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23. *In the Matter of Regulations Governing Sale of Commutation Tickets to School Children*, 17 I.C.C. 144 (1909).

24. *Id.* at 144.

25. *Transcontinental Bus System, Inc.*, *supra* note 1 at 488.

26. The Hepburn Act of 1906, 34 Stat. 584, was an amendment to the Interstate Commerce Act. This amendment became effective August 29, 1906, and provided, *inter alia*,

exercise of a duty under its regulatory powers is dicta. It is, in fact, to the point of the matter that the Commission has found a rate illegal and announced what it would accept as being legal. It is directly in point here as it specifically used as an example the age group with which the current youth fares are concerned.

The court in *Transcontinental Bus* also said that the actual decision of the *Commutation ticket Case* was based on *In Re Party Rate Tickets*, in which the Commission had held that party rate tickets could not be limited to a particular class but must be open to the whole public alike, and such rate could not be limited based on vocation.<sup>27</sup> The Commission said in regard to the application of the Party Rate Doctrine:

“The rule that if carriers desire to establish rates, such must be open to the general public and cannot be limited to a particular class is equally persuasive as to the unlawfulness of tickets limited to the use of school children.”

“In this connection it should be remembered that the Commission’s ruling does not prohibit the publication of commutation rates for children of specified ages, but merely holds that such rates must be open to all children within the ages stated in the tariff.”<sup>28</sup>

The Board in *Commutation Tickets* recognized fully the impact of *Party Rates*, but simply did not consider that an age group was a closed class. Instead, age was considered a valid distinction. It has been further argued that this case could not be considered because Section 22 of the ICA excises commutation tickets from the unjust discrimination provisions of Section 2.<sup>29</sup> This is incorrect. The Supreme Court has held that nothing in Section 22 in any way restricts the Commission from declaring a rate unjustly discriminatory, unduly preferential or unreasonable.<sup>30</sup>

The second case is similar to the *Commutation Ticket Case*, and the Commission again states that a special fare cannot be provided for

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the Commission with power to prescribe maximum future rates. See also Sharfman, *The Interstate Commerce Commission* 14 (1931).

27. *In the Matter of Party Rate Tickets*, 12 I.C.C. 96 (1907).

28. *In the Matter of Commutation Tickets to School Children*, *supra* note 23, at 292.

29. *Transcontinental Bus System*, *supra* note 1, at 488.

30. *NASVILLE, C. & St. L. Ry. v. Tennessee*, 262 U.S. 318 (1923); *United States v. Pennsylvania R.R.*, 266 U.S. 191 (1924).

students, but that special rates can be provided for young persons based on age:

“No sufficient reason is shown, however, why special commutation rates for young persons between certain ages should not be established provided the rates are not limited to pupils of schools of any particular kind or class and do not exclude other persons between the same ages who travel under substantially similar transportation circumstances and conditions.”<sup>31</sup>

Neither of these cases, decided over 60 years ago, has been overruled by the Commission, the Board or a Court. Both cases are clear in holding that age is a valid basis for reduced fares. The ICC, like the CAB, made no attempt to determine why children are in a privileged class. As a matter of fact, the Commission does not say that children are special. Rather it is simply that a specific age group is special *vis-a-vis* another age group. The Commission in the *Commutation Ticket Case* specifically suggested that another proper age group might be 12-21,<sup>32</sup> the specific age range in question in *Transcontinental Bus*. It may be the Commission felt it was so obvious that a fare could be set by age group that it felt no explanation was necessary. Regardless of the reason, the ICC in these cases is clear that age is a valid basis for setting of rates.

#### B. Senior Citizen Fares

In the search for additional traffic during the decade just past, a new promotional fare has been tested, again based on age, but rather than on children or youths, as in the past, these fares are for senior citizens, basically those in the “over 65” class. In 1966, the Board allowed a standby fare for senior citizens to go into effect without an investigation, based on its similarity to the youth standby fares.<sup>33</sup>

In the first senior citizen case presented, The Board allowed a Mohawk Airlines’ fare to go into effect in a case in which the fare provided a special round trip ticket for women over 62 and men over 65, because of the need of the carrier to improve its revenue and because of the Board’s policy of encouraging experimentation with promotional fares.<sup>34</sup> In 1965, when Ozark Airlines filed a similar tariff, it was suspended, pending

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31. *J.H. Bitzer v. Wash. Va. Ry. Co.*, 24 I.C.C. 255, 257 (1912).

32. 17 I.C.C. at 144 (1909).

33. Senior Citizen Standby Fare Proposed by Trans-Caribbean Airways, Inc., C.A.B. Order No. E-23889, July 1, 1966.

34. Mohawk Airlines, Inc., Golden Age Excursion Tariff, C.A.B. Order No. E-17111, July 6, 1961.

investigation, because the Mohawk fare had been in effect over three years, and the Board was not convinced that it was economically successful. The Board also said that the tariff might be discriminatory because it was based on age alone.<sup>35</sup> Both tariffs were withdrawn before hearing. No evidence was presented, and the Board made no findings in either case. The Board gave as its reason for suspending and investigating the fare only that it "may be" discriminatory, but no finding that the rate was discriminatory was made. No argument was made to the Board in either case that it was not discriminatory simply because it referred to traffic based on age.

Finally, in *Group Senior Citizen Excursion Fares Proposed by Trans-Caribbean Airways, Inc.*,<sup>36</sup> the Board allowed the fare to go into effect pending an investigation. In this order, the Board did not indicate any concern with age as a group. The investigation was ordered on the basis of the disparity of age (62 for women and 65 for men) and because a very low fare was being offered in a city pair (New York-San Juan) that already had one of the lowest fare levels in the market. The real basis for the investigation was the great probability that such fare was non-compensatory and unreasonable, rather than unjustly discriminatory.

### C. Family Fares

Family fares provide reduced fares for all members of the family traveling with the head of the household, who pays full fare. The spouse, youths 12-22 and children 2-12 all travel at reduced fares, the exact percentage of reduction varying according to the airline and number of persons traveling.<sup>37</sup>

This fare was first introduced in 1948, over 20 years ago. Not until 1957 were these fares first questioned when Capital Airlines filed a tariff providing for family fares that would be available on Saturdays for the first time.<sup>38</sup> The Board sustained this new tariff on the basis that family

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35. Senior Citizen Excursion Tariff Proposed by Ozark Air Lines, Inc., C.A.B. No. E-21973, March 31, 1965.

36. C.A.B. Order No. E-23370, March 15, 1966.

37. The most common plan in present use provides that one parent pays full fare; the other parent pays 75% of full adult fare; all youths, aged 12 to 22 pay 66 2/3% of full adult fare; and children, aged 2 to 12 pay 50% of full adult fare. If only one parent is traveling, the first youth in the 12 to 22 age group pays 75% of full adult fare, and additional youths in this age bracket pay 66 2/3% of full adult fare.

Since these fares have been in force, the percentages have varied slightly from time to time. The youth rates have been as low as 50% of full adult fare, and the children's rates have been as low as 33 1/3% of the full adult fare.

38. Previously, family fares had been limited to the slack days of the week: Monday through Thursday.

fares had been successful in generating new traffic, and it was desirable to leave solution of financial and competitive problems to managerial discretion.<sup>39</sup>

During 1957, the Board instituted a general investigation into family fares.<sup>40</sup> In 1962, this investigation was dismissed upon a finding that family fares served a useful purpose.<sup>41</sup>

Another investigation was initiated in 1963,<sup>42</sup> and this investigation was dismissed in 1964.<sup>43</sup> The last attack on the family fares was commenced in 1967 by the Transcontinental Bus System, Inc.,<sup>44</sup> the same complainant as in the youth and young adult fares case.

Proponents of the tariff attempted to take advantage of the "time honored exception" rule espoused by the court to justify children's fares in the youth fares case. This would apparently be a strong argument as family fares were in force 20 years. While this would not be a long time in relation to the time during which children's fares have been recognized, nevertheless, in relation to the time during which airline fares have been regulated, 40 years, the time factor is substantial. The court rejected the argument. It held that tradition appeared doubtful because several attacks had been made on these fares during this period. These challenges to the fares recognized the questionable character of the tariff.<sup>45</sup> This court already seems to be chipping away at the "time honored exception" argument. It not only rejected 50% of the time of regulation but did not offer any specific criteria on how to qualify for the "time honored exception." A portion of this discount fare is based on age, but the age argument has not been based on a separate age group. Rather, the argument has been whether there is sufficient justification for what is assumed to be an otherwise unjustly discriminatory rate. This case is also still pending, and because of the similarity of issues, it has been consolidated with the youth and young adult fares case for final decision.<sup>46</sup>

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39. Capital Family Plan, 26 C.A.B. 8 (1957).

40. C.A.B. Order No. E-11867, October, 1957.

41. C.A.B. Order No. E-19121, December 20, 1962.

42. C.A.B. Order No. E-20099, October 16, 1963.

43. C.A.B. Order No. E-21617, December 28, 1964.

44. Family Fare Tariffs—Complaint of Transcontinental Bus System, Inc., C.A.B. Order No. E-26431, February 29, 1968, 2 Av. L. Rep. sec. 21,782, at 14,555.

45. Trailways of New England, Inc., et al. v. Civil Aeronautics Board, 412 F.2d 926, 934 (1969).

46. C.A.B. Order No. 69-8-140, August 25, 1969. This action in itself may raise some question. The youth fares case is based strictly on age. The family fare is based only partly on age. Even if the age group were held valid, family fares would still raise a question of

*The Solution*

In the early ICC cases, there were clear decisions based on specific age groups.<sup>47</sup> These cases were unequivocal; a fare based simply on age is valid. Not only did the *Commutation Ticket Case* enunciate the principle that a rate would be valid based on age, it even used as an example the age group 12 to 21, the exact range in question in the youth fares case.<sup>48</sup> *Full Fare for Unaccompanied Children*,<sup>49</sup> the only case dealt with by the CAB, is equally clear that validity of the fare was based on age.

None of the recent CAB cases has been decided on the basis of age as a valid group in itself. The basic argument presented by the proponents of the fares, as well as the basis for the decisions, has been that while such fares may discriminate against other groups, the fare is nevertheless valid because there are sufficient circumstances and conditions in the specific case to prevent the discrimination from being unjust. Therefore, the fare is legal. It is not all discrimination which is proscribed by the Act; it is only unjust discrimination with which the Act is concerned.<sup>50</sup>

If age is a valid basis for rate determination, should it be necessary to distinguish the rate in a particular age group, from any other age group or from regular adult fares? The only basis for such is the language of the Federal Aviation Act, which prohibits setting a rate which is unjustly discriminatory.<sup>51</sup> The Act does not define an unjust discrimination, and the Board has, therefore, taken the definition of the Interstate Commerce Act,<sup>52</sup> which provides that a rate is unjustly discriminatory if it grants *different treatment to like traffic, for like and contemporaneous service, offered under substantially similar circumstances and conditions*.<sup>53</sup> Even assuming different treatment of like traffic for like and contemporaneous service is discriminatory, if the circumstances and conditions are sufficiently dissimilar, then the discrimination will not be unjust. Attention is usually directed to the question whether the circumstances

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discrimination within the age, *i.e.*, youth traveling alone *vis-a-vis* youth traveling with his family. There are also other considerations as the reduced fare for the second spouse is not based on age and would raise a question of discrimination *vis-a-vis* unmarried travelers.

47. In the Matter of the Regulation Governing Sale of Commutation Tickets to School Children, *supra* note 23; *J.H. Bitzer v. Wash. Va. Ry. Co.*, *supra* note 31.

48. In the Matter of the Regulation Governing Sale of Commutation Tickets to School Children, *supra* note 23, at 144.

49. 24 C.A.B. 408 (1956).

50. *Texas & Pacific R.R. Co. v. I.C.C.*, 162 U.S. 197 (1896).

51. 49 U.S.C. §1374(b) (1958).

52. 49 U.S.C. §102 (1964).

53. *Wight v. U.S.*, 167 U.S. 512 (1897); *Transcontinental Bus System, Inc.*, *supra* note 1; *Summer Excursion Fares Cases*, 11 C.A.B. 218 (1950).

and conditions are such that they prevent any discrimination from being unjust. However, the basic question which should be investigated is one that has been completely overlooked. It is a question the answer to which has simply been assumed, but with no justification for such assumption. The first requirement for unjust discrimination is that there be different treatment of *like traffic*. Unjust discrimination of a like kind of traffic is prohibited, but there can be no discrimination where the traffic is of different kinds or classes not competitive with each other.<sup>54</sup> The Interstate Commerce Commission ruled that no discrimination is involved when different rates were applied to different traffic, each kind of traffic being open on equal terms to all.<sup>55</sup> But what makes differences in traffic? While there are many different tariffs covering many different situations, both under the Interstate Commerce Commission and the Civil Aeronautics Board, there never has been a studied analysis of what constitutes different types of traffic, and how far such difference may extend.

Like traffic would have to be, at the very least, traffic that is sufficiently similar so that ratewise it would have to be treated in the same manner.

Both the ICC and the CAB have ruled, and been sustained by the courts, that children is an age group that does not have to be treated the same as other age groups. The validity has not been based on justification for the unjust discrimination. The only justification has been that it is a specific age group. The logical, and only, conclusion is that the difference is in the basic definition of unjust discrimination. A specific age group is *unlike traffic vis-a-vis* regular adult traffic or any other specific age group. Therefore, there is no need to justify the rates for one age group *vis-a-vis* another age group. As a separate class of traffic, a rate may be set in regard to itself only. It is not necessary to justify rates different from rates set for another group. Rates for *unlike traffic* are not in competition with each other, and the question of discrimination does not arise. Thus, a tariff based on any specific age group should be valid because it is traffic *unlike* any other group, and, therefore, it is not subject to comparison with the fares for any other traffic.

The immediate reaction to such proposal is that this would allow the airlines complete freedom in setting of rates because they would have to be justified in no way, and, in fact, the CAB would lose control over airline rates. Nothing could be further from the truth. There will not only still be the same CAB control over airline rates, but an airlines will still be prohibited from setting rates indiscriminately.

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54. Pa. Miller's State Ass'n. v. Philadelphia & Reading Ry. Co., 8 I.C.C. 531 (1900).

55. National Knitted Outerwear Association v. Akron, Canton & Youngstown R.R. Co., 156 I.C.C. 629 (1929).

In addition to the statutory proscription against unjust discrimination, the statute also proscribes rates that are unjust and unreasonable.<sup>56</sup> By the terms unjust and unreasonable reference is made to the proposition that a rate must be economically sound. It is a basic rule, not only of ratemaking but of all business, that a rate must cover the cost of doing business, as well as providing a reasonable profit to the investors. In transportation ratemaking it is required that the rate level must have a reasonable relationship to attainable cost level.<sup>57</sup> While a rate need not meet all costs of operation at all times, it must nevertheless be reasonably related to the cost of doing business,<sup>58</sup> and it must at all time be reasonably related to an expected future level of costs.<sup>59</sup>

It is undoubtedly true as the Board stated in the *Family Fare Tariffs* case,

“In the absence of some indication to the contrary it is reasonable to assume that the carriers would not urge the continuance of . . . tariffs unless, as corporations operated with a profit motive, it was to their advantage to do so.”<sup>60</sup>

The profit motive is undoubtedly strong in the airlines, as in all business. Nevertheless, restraint in setting rates is not limited by such profit motive. An airline could set a rate based on any age group, but any age group set would have to be proven economically sound. If a rate is not economically justifiable, then it will fail, and this will be so without regard to the question of discrimination. It should be noted that the present status of the youth fares case is that it has been remanded by the Board to the Trial Examiner to take additional evidence for the purpose of determining rate reasonableness.<sup>61</sup> The real protection to the public in the case of youth fares, senior citizen fares, children's fares and any other tariff based upon an age group will be the necessity of showing that a tariff based upon the age group in question is economically sound.

### *Conclusion*

It is evident that age is a viable consideration in the determination of air fares. The thesis here presented is radical, at least in the sense that it is

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56. 49 U.S.C. § 1374(b) (1958).

57. Pittsburgh-Philadelphia No Reservation Fare Investigation, 34 C.A.B. 508 (1961); Air Freight Rate Investigation, 9 C.A.B. 340 (1948).

58. Air Freight Rate Investigation, *supra* note 57, at 345.

59. Air Freight Rate Investigation, *supra* note 57.

60. Family Fare Tariffs, *supra* note 44, at 14,558.

61. C.A.B. Order No. 69-8-140, August 27, 1969, at 19.

new. Age, by itself, has never been presented as a valid basis on which to set fares, nor has any record been found where it has been argued before any regulatory agency or court that a tariff based on an age group alone is unlike *traffic vis-a-vis* regular adult traffic. This is not surprising, however, in view of the relative newness of the importance of airline economics. It is only in the past 20 years that any consideration has been given to the problems of promotional fares. It is only today when the size and cost of airplanes are rapidly increasing while passengers and revenue are decreasing that such matters are of critical importance.<sup>62</sup> Nevertheless, novelty should not detract from the force of the argument where it has been, as here, based upon the law, practice and decided cases in the transportation industry. The conclusion can only be that age is a valid basis upon which to base airline fares.

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62. The passenger load factor, the percentage of seats filled, has been steadily declining to 49.9% on the trunk lines and 42.9% on the local service airlines. 1970 Air Transport Facts and Figures, at 26. The load factor has continued to decline since these figures were published.