

CHARTERED FLIGHTS AND SCHEDULED AIRLINES

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PREFATORY NOTE

On December 30, 1971, after this article was written, the Civil Aeronautics Board announced a proposed new rule which would allow a charter organizer to form a group of 50 or more persons for the purpose of chartering an aircraft without any other rules being applicable except that the passenger list would have to be made up six months in advance of departure. If the new rule is adopted the charter flight would then be available to anyone regardless of membership in any club or society. The rule making regulations require a period for comment so that the proposed rule cannot be finally adopted until early March (now June). In an interview on the proposed new rule, Secor D. Browne, Chairman of the Civil Aeronautics Board said, "This will bring low cost air travel to a bigger part of the population who are not necessarily three-legged Armenians or librarians from Ashtabula belonging to a librarians society." *New York Times*, December 30, 1971.

During last summer there seemed to be regular mention in the press concerning the problems of international charter flights, or more particularly, charter passengers—the stranding of passengers in Europe, Civil Aeronautics Board suits against some individuals and companies alleging violation of charter rules, cancellation of charter flights (leaving many young people stranded in Europe), the filing of charges against sixty-five parties (including a number of U.S. and foreign supplemental and scheduled carriers) for violation of the United States' Civil Aeronautics Boards' Charter Flights Rules, the receipt of the second largest fine in the Civil Aeronautics Board's history (\$71,000.00) for violation of charter flight rules, all of which were rather typified by CAB Release 71-148, September 17, 1971 announcing that the U.S. Civil Aeronautics Board had filed suits against sixteen individuals and organizations charging violation of the Board's Charter Regulations and the Federal Aviation Act. It makes one wonder—What is going on here? Is the rising crime rate affecting charter flights? Are the socio-economic problems of our Country spilling into this area? The answers (without comment as to the answers to the rhetorical questions) seem to be economic.

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The Civil Aeronautics Board case mentioned above charges that sixteen individuals and organizations violated the Board's Economic Regulations relating to charter operations as well as the Federal Aviation Act by acting as "indirect air carriers". What the defendants allegedly were doing is forming their own groups for charter flights, i.e., acting as "passenger consolidators". In effect, the defendants are alleged to have either chartered an aircraft or part of an aircraft and then formed a group to occupy the space—making their profit either on the spread between what they paid for the space and what they charged, or on the commission, or both. The Civil Aeronautics Board takes the position that individuals engaged in "consolidating passengers" into groups of passengers are operating (in the case of foreign transportation) as "indirect foreign air carriers" within the meaning of the Federal Aviation Act Section 101(3) and 101(19) which respectively provide as follows:¹

"'Air carrier' means any citizen of the United States who undertakes, *whether directly or indirectly, by lease or any other arrangement, to engage in air transportation . . .*"

(19)

"'Foreign air carrier' means any person, not a citizen of the United States, who undertakes, *whether directly or indirectly or by a lease or any other arrangement, to engage in foreign air transportation.*"

And, therefore, the activities violated the Federal Aviation Act Section 402(a) [49 U.S.C. 1372(a)] which provides:

"No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Boarding authorizing such carrier so to engage."

The thrust of the Complaint being that the defendants were alleged to have been acting as "indirect air carriers" without a "permit", i.e., a "certificate of public convenience and necessity" from the Civil Aeronautics Board since they were allegedly soliciting "groups" in violation of the Board's Economic Regulations pertaining to charter activities.

The Board has issued numerous economic regulations concerning charter flights, which regulations generally attempt to set limitations on charter passengers so that the charter passenger may be distinguished from other passengers, i.e., "non-charter" passengers.

The Board has issued numerous regulations concerning "charter trips

1. 49 USC 1301(3) and (19).

and special services” and “charter trips by foreign air carriers”.² For the purposes of this note the regulations are the same where the charter trip is by a foreign air carrier or domestic air carrier. The Board has other economic regulations which pertain to “group” fares which are essentially the same as a charter except that they involve less than an entire aircraft. Generally, a charterer may charter either the entire aircraft or a part thereof. If the charterer charters less than an entire airplane and the charge to the passenger is on a time, mileage trip basis, the charter must be

“by a person (no part of whose business is the formation of groups or the consolidation of shipments for transportation or the solicitation or sale of transportation services), for the transportation or the solicitation or sale of transportation services), for the transportation of a group of persons as agent or representatives of such group”³

There are other regulations which deal with the economic relationship between the carrier, the organization chartering the airplane and the organization members who are travelling. Thus a “sale entity charter” means the organization pays, a “pro rata charter” means the passengers pay and a “mixed charter” means that the organization pays some of the expense and the passengers pay the other.⁴

However, the economic regulations which seem to cause the most difficulty are those revolving around the *persons* eligible to travel as a part of the group; i.e., the persons eligible to travel as a charter or group passenger. Thus the involved regulations seem to be:

(1) Only bona fide members of an organization, club or other entity and their immediate family may participate in a charter, provided that they have not been brought together by a solicitation of the general public and the organization is not so constituted as to ease of membership, and nature of membership, as to constitute a segment of the general public. [I don’t believe we need to comment on the factual nature of most of these requirements!] A member of one’s “immediate family” is a person living in the household of

2. Respectively Parts 207 and 212 of the Civil Aeronautics Board Economic Regulations, 14 C.F.R. Parts 207, 212.

3. 14 C.F.R. Part 212.8.

4. 14 C.F.R. Part 207.

the member who is also a spouse, dependent child or parent of the member.⁵

(2) A bona fide member of an organization, club or other entity is a person who has been a member for at least six months prior to the first flight sponsored by that organization, club or other entity.⁶

(3) A person may not arrange for charter air transportation as a representative of a group if such person is professionally engaged in the formation of groups for air transportation or in the solicitation or sale of transportation services.⁷

(4) The cost of a charter flight must be prorated equally among all of the charter passengers.⁸

(5) All announcements to prospective charter participants giving a price per seat must state that the seat price is a pro rata share of the total charter cost and is subject to increase or decrease depending on the number of participants. All Announcements must separately state the cost of ground arrangements, air transportation, administrative expenses and the total cost, as well as identify the carrier, the number of seats available and the type of aircraft to be used for the charter.⁹

(6) If an organization conducts four or more round trip charter flights per year, there must be no intermingling of round trip passengers between flights and each group of passengers must move as a unit in both directions. Regardless of the number of round trip charter flights conducted per year, one way passengers may not exceed, on any leg of any such charter, 5% of the passengers transported on such leg, and each leg of a round trip may not be chartered separately in order to avoid this limitation.¹⁰

Thus, in order to be able to fly with the High School Band Support Organization the poor traveler must be sure that he was not solicited by a person who was professionally engaged in the business of forming groups, that he and all other members who intend to travel must not have been brought together by a solicitation directed to the general public, that his organization is not so easy to join that it is in fact a segment of the

5. 14 C.F.R. Parts 207.40(a)(2) and (b) and .41, 208.210(a)(2) and (b) and 2.11, 212.40(a)(2) and (b) .41, and 214.30(a)(2) and (b) and .31.

6. 14 C.F.R. Parts 207.40(b), 2108.210(b), 212.40(b) and 214.30(b).

7.

8. 14 C.F.R. Parts 207.43, 208.213, 212.43 and 214.33.

9. 14 C.F.R. Parts 207.44, 208.214, 212.44 and 214.34.

10. 14 C.F.R. Parts 207.13(c), 208.32(f), 212.10(c) and 214.14(c).

general public, that all members who intend to travel have been a member for at least six months, that no solicitation of the general public has been made and that no solicitations have been made in advertising which would generally be directed to the general public,¹¹ that he knows that all of the costs of the charter flight must be prorated equally among all the passengers and that if any seats are not sold the price which he has agreed to pay will be increased in a yet undetermined amount depending on how many seats are not in fact sold, that he knows all the costs other than the flight cost, and that the organization is not conducting more than four round trip charter flights per year if he intends to return with a different group. One wonders why all of these rules are needed. It makes one suspect that there are really not very much economic differences between charter seats and regular seats.

Charters may fall into roughly three areas:

(a) Certain carriers are only certificated to carry charter passengers, i.e., the carrier itself may *not* engage in regularly scheduled service—these carriers in the United States are called *Supplemental Airlines*.

(b) Regularly scheduled carriers (or carriers which have authority to operate regularly scheduled flights) may also operate charter flights.

(c) Both Scheduled and Supplemental Carriers may charter less than an entire plane to one group. In other words either type carrier may operate a “split charter”—so that there are more than one group or organization’s members on any one flight. The scheduled carriers may use the split charter concept by using part of the aircraft for passengers flying as a passenger on a regularly scheduled flight and other seats for “groups”. Thus, the “group” and “charter” becomes roughly synonymous.

Because the service is more obviously equal we are referring herein to passengers flying on group rates on flights which also are regularly scheduled and the statistical data is limited to scheduled carriers. Further, we are generally limiting our comments to the international carriers although it can readily be seen that the vast market forces—although of lessor money pressure (in the vast majority of cases) are present in domestic markets. The Supplemental Carriers are omitted only because they limit *all* of their business to charter passengers and thus comparisons of the service they offer

11. 14 C.F.R. Parts 207.40(a)(1), 208.20(a)(1), 212.43 and 214.33.

are not so readily comparable to the service offered to (for lack of a better term) "scheduled passengers".

In all cases, the charter or group passengers pays much less (although he may or may not be getting the "same" service). Generally, therefore, it is in the *passenger's* economic best interest to be classified as a charter or group passenger. As will be explored further herein, it is also [assuming the traffic is in fact marginal or "added"] in the *carrier's* economic best interest to classify the passenger so that he qualifies for the lower rate. The hypothesis of this note is that the recent increase in the number of "charter" abuses results from these facts—and to advance the notion (without further defense) that these "abuses" respond to essentially two factors which are totally unrelated to the enforcement activities of the Civil Aeronautics Board, viz:

The "abuses" increase:

- (1) As the spread between the "regular" fare and the special fare increases (or becomes known), and
- (2) As the carriers percent of seats occupied out the total number of seats offered (the "load factor") decreases, or, stated conversely, as the number of *empty* seats increase.

The first factor operates primarily on the passenger, the second, primarily on the carrier.

The purpose of this note is not to either explore or wonder at the myriad of regulations concerning charters, groups, organizations, and relating to, in effect, reduced rate transportation. It may be more helpful to discuss the dynamics of the market, the history involved, and the resulting difficulties since it appears that these dynamics are responsible for the difficulties—the regulations being only a method to control the market forces at work.

The airlines (like all other transportation companies) are generally unique in that they sell a wasting asset. An empty seat on a light operating between any two points can *never be sold* once that flight is operated. Therefore, a very good case can be made out for marginal or added cost account as to that seat so that it is far better to have that seat occupied at a half or third of the normal fare than to have it totally unoccupied. The additional expense of having a passenger in the seat in terms of fuel, and meals is rather insignificant. Consequently, it might be fair to say that the higher the number of empty seats the greater pressure there is to occupy the seats.

Obviously, when decisions are made to cost the product a certain num-

ber of empty seats, in scheduled services, must be assumed. It is equally obvious, that whatever charges are developed will be higher per unit assuming a less than full aircraft (or freight car for that matter) than would be the case if all the seats (or space) were full. The justification for this additional cost revolves around the supposed convenience to the public resulting from regularly scheduled services.

The concept behind lower charges for seats on charter flights, then, is simply that seats can be sold on a per seat basis at a lower figure (frequently a much lower figure) if *all* of the seats in the airplane are sold than if they are not. It would also be true that the overhead or fixed *cost per passenger* on any given flight would be less to the extent that the charges were costed assuming more full seats than the number used in constructing the original fare—in other words, the cost per passenger must be great if one assumes that 55% of the seats are filled than it would be if one assumed that 65% of the seats were filled which figure would, in turn be higher than if one assumed that 75% of the seats were filled, etc. The charterer usually assumes 100% full seats and thus carries this to its logical conclusion.

Charter flights are a very important factor not only to supplemental carriers or "charter only" carriers which operate charter flights alone (with Certificates of Public Convenience and Necessity) but to carriers who operate primarily scheduled services as well. For example, in the year 1969, Pan American World Airways operated *charter* ton kilometers (passenger and freight) of 781,517,000. During that same year there were 104 members of the International Air Transport Association. Pan American World Airways operated more *charter ton kilometers than 80% of the members of the International Air Transport Association operated in both charter and scheduled service.*¹² Pan American in 1969 operated more charter revenue ton kilometers than any other international scheduled carrier but the figures are important to most international carriers. Other examples are:

12. The U.S. Supplemental Carriers had gross revenues of \$167,045,358 for the first six months of 1969. (C.A.B. Form 41). This, of course, would have been *all* charter traffic. While the IATA figures following are ton-kilometers and a comparison is difficult it is interesting to note that The Boeing Company has predicted 16,460 billion revenue passenger miles between the U.S. and Europe in inclusive tour passengers alone by 1975. Airline Management and Marketing, December, 1970.

| <i>Carrier</i> | <i>Charter Ton Kilometers As A Percent of Total Ton Kilometers—1969</i> |
|----------------------|---|
| Air Canada | 4.36% |
| Air India | 7.53% |
| Austrian Airlines | 18.5% |
| Braniff | 35.61% |
| Canadian Pacific Air | 8.2% |
| KLM | 13.3% |
| Air France | 5.59% |
| Sabena | 8.71% |
| TWA | 8.61% |

This, of course, is not to say that “charters” do not have their bad side—they also *may* divert traffic which would pay the full fare. Therefore, while charter operations are important to scheduled air carriers it is equally important for the air carrier to try to keep the charter operations *truly* “charter” so as not to divert any passengers (or the minimum possible number of passengers), who would otherwise be prepared to pay a full fare. Thus, the economic regulations, to the extent they are designed to achieve this goal, tend to be in the carriers’ economic best interest. Of course, in the attempt to fill up the excess space the Board and the carriers are engaged in the great no-no of all transportation law, that is, discrimination among passengers. The justification for the discrimination is that the charter passengers are not obtaining the same service as the passenger who is not a “charter passenger” since the “charter passenger” did not have the same selection as to time of departure, time of arrival, number of stops, etc. This *may* be true and to the extent it is true it is probably more nearly true in whole plane charters (i.e., the organization or group charters the entire aircraft). However, a charter does not have to be a whole plane charter (as mentioned above) and you may have forty passengers or thirty or fifty charter (“group”) passengers on a flight which is otherwise a scheduled flight. At the time the group was making its decision it had the same selection (assuming enough advance notice) as to departure time, etc. as did anyone else. The extent that any individual member of the group is discommoded or inconvenience would be as a result of the group decision rather than the availability of service—of course this accommodation to a group decision would not be present if the passenger were paying the regular fare—*and*, not travelling in a group.

The tour operator (such as the defendants in the CAB cases) can, if it operates a sufficient number of flights, offer the charter passenger considerable flexibility in terms of schedules. For example, if the tour operator is operating one flight to Europe and one flight from Europe every week he can offer to let a passenger extend his stay on a trip to Europe so that passenger can return on a *later* flight (but with a different group) on the return from Europe. To the extent that the tour operator is operating flights more frequently than once a week, it can offer even greater flexibility; and, obviously, to the extent it is operating flights on a less frequent basis it is handicapped but can still offer some flexibility. As the regulations quoted above mentioned, if the operator is sponsoring four or more round trip charter flights per year there may be no intermingling of round trip passengers and even if the organization conducts less than four round trip charter flights one way passengers may not exceed on any leg of the charter 5% of the passengers transported on that leg.

These rules might (with no intended inference that they are not) operate to accomplish the desired goals—that is to keep charter passengers distinct and separate from noncharter passengers and the two services different so that the charter passenger may fairly be said to receive a *different* service with the airline receiving the additional revenue from the reduced rate transportation while at the same time not diverting passengers to the reduced rate service who would otherwise be willing to pay the full fare. However, practical problems of enforcement present themselves at once. Who is to know whether or not the individual presented is an “immediate family member” of a member of the group. Immediate family members are defined as “mothers, fathers, brothers and sisters”. When you are talking about the group of, for example, the Honey, Texas High School Band Patrons, who can say whether or not the female presented as Mrs. Jones is or is not the sister of Mr. Black. Because of our custom of changing names upon marriage the opportunities are obviously endless. Further, *so long as the traffic is truly marginal* or added traffic then it is not in the economic best interest of the carrier to be too careful about who the passengers are—back to the original statement concerning the wasting asset—it is obviously in the carriers’ economic best interest to have a passenger travelling at a reduced rate than to have no passenger at all. Further, the carriers don’t want to make enemies—the carriage of passenger by air is a highly competitive business and the carriers are not interested in insulting anybody in the hopes of finding someone who does not qualify—and, therefore, someone who it can then refuse to let ride—losing the revenue and possibly making an enemy in the process.

Further, the organization (in the case of an entire plane charter) is

obligated to rent the airplane—that is the Charter. CAB Regulations require that the organization must rent the airplane and then advise the individual members of the organization that the seat price quoted or per passenger price quoted assumes *a full airplane* and that if all seats are not sold then the per seat price will be increased. This puts pressure on the organization to sell all the seats. The more seats it sells the lower the per seat charge. Consequently, it would run contrary to the stream of human experience to expect that the organization would be too careful in weeding out “new” members or “immediate family members” when the organization had already determined that it was unable or incapable of selling all of the seats in the airplane to its own bona fide (as defined by the CAB) members.

In addition, if the organization cannot succeed in selling all the seats and the price per seat therefore increases as to those members who *are* travelling the possibility always exist, as to the air carrier, that the organization itself will be unable to charter the airplane, i.e., that the effort will be a failure. If the aircraft has 100 seats and the airplane charter cost is \$10,000.00 then the cost per seat is \$100.00. If the organization can only sell, within the rules, 50 seats then the cost *per seat* and therefore per passenger is \$200.00. It would obviously be better for the organization, if it could sell all the seats on the airplane to somebody at \$100.00 per seat. Indeed, it might make an organization willing to sponsor a trip which it might not otherwise be willing to sponsor—in effect, since selling tickets to strangers would make the cost to the organization’s bona fide members less than it would otherwise be.

Moreover, if the organization has already leased the airplane, i.e., made the charter, then if it is incapable of selling the seats it is then faced with the problem of absorbing the loss. It is not difficult to imagine that there would be very few bona fide organizations with membership interests other than air travel, who would be willing to absorb losses of a significant amount when these losses could be avoided by allowing several “mothers-in-law and father-in-law, sisters, and sisters-in-law, brothers-in-law” etc., to travel on the flight.

It is interesting to note that the thrust of the cab’s enforcement procedures have been against the individual who allegedly were stimulating the formation of groups and not against the members of the groups themselves. However laudible it may be to create different classes of international air passengers for purposes of the so-called “charter flights” it is readily apparent that the dynamics of the market place are such as to create an almost overwhelming pressure for violation of those rules from the members of the organizations themselves. Perhaps this is unavoidable when the item being sold is totally fungible (certainly where the same

carrier is involved) except for scheduled times—keeping in mind that it would seem that most international air travellers would plan their trips well in advance so that it could be argued that the item sold, i.e. the seat and the trip, is *totally* fungible.

The large amount of charter traffic suggests that the nature of the international markets are not necessarily entirely scheduled in the first place. The 27th annual general meeting of the International Air Transport Association scheduled in Honolulu for November 15-18, 1971 had as Item 17 on the agenda "Symposium: 'The Scheduled Air Lines and the Changing Market' ". While it is beyond the scope of this note, it would seem apparent to any interested observer that the considerable pressure on the scheduled air lines to reduce international rates (as we are all aware from "The Red Barron's" offer of New York-Franfort round trip at \$210,000) is coming from the charter passenger—further than the international markets may *not* be truly scheduled but instead a large number of passengers use charter service. It could therefore be argued that the scheduled carriers be reducing fares are feeling the pressure and are responding by lowering the cost of their unit, i.e. a seat mile, in the hopes of operating at higher load factors and at greater revenue per flight—in other words, they are recosting their product assuming a higher load factor.

Pan Am is reportedly considering having an area on its 747 Aircraft for charter groups so that the aircraft would carry first-class, tourist and charter passengers in one aircraft.¹³ In March the "charter" vs. "scheduled" problem was the subject of a meeting between the U.S. State Department and the European Civil Aviation Conference.¹⁴ Pan American's President Najeeb Halaby told a Senate group in February that the charter/scheduled problem was so great that "it is the very existence of an effective and dependable air transport system that is at risk".¹⁵ All of which seem to demonstrate and evidence the growing pressure.

All of the observable evidence would tend to indicate that the difficulties in the enforcement of the Board's economic regulations in the area of determining exactly what is a "charter" passenger flow from this price pressure—coupled with the possibility that at least the North Atlantic markets may be more "charter" markets than otherwise. It would seem that if the charter passenger were really different from other passengers then it would not be so necessary to constantly monitor the differences;

13. Airline Management, April, 1971.

14. Ibid.

15. Ibid.

that is, that market forces would operate so that there would be self-selection. Also, the rather dramatic difference between tourist fares and charter fares adds increased pressure. It may be that all of this year's travelers travelling on the reduced fares which will be approved by IATA before summer will owe a considerable vote of thanks to those individuals who violated the Civil Aeronautics Board's economic regulations—certainly, to the extent that the number of violations indicated the considerable pressure present, the two factors are at least a result of the same market dynamics.