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THE POWER OF THE CIVIL AERONAUTICS BOARD TO GRANT INCLUSIVE TOUR AUTHORITY TO THE SUPPLEMENTAL AIR CARRIERS UNDER THE 1962 AMENDMENT TO THE FEDERAL AVIATION ACT

Recently an equally divided Supreme Court issued a *per curiam* opinion¹ affirming a Second Circuit Court of Appeals decision that the Civil Aeronautics Board lacked power under the 1962 amendment to the Federal Aviation Act² to grant inclusive tour authority³ to supplemental airlines.⁴ The challenge of the Board's authority was prompted by two Board orders issued on March 11, 1966. One order certified certain airlines "to engage in supplemental air transportation (including inclusive tour authority) with respect to persons or property . . . between any point in any State of the United States or the District of Columbia, and any other point in any State of the United States or the District of Columbia."⁵ The other certified certain transatlantic air carriers "to engage in supplemental air transportation (including inclusive tour authority) with respect to persons and their baggage . . . between points in Greenland, Iceland, the Azores, Europe, Africa, and Asia as far east as (and including) India . . ."⁶

The scheduled domestic carriers led by American Airlines immediately sought review⁷ of the first order in the Court of Appeals of the District of Columbia. The order was upheld. The United States transatlantic carriers led by Pan American World Airlines subsequently sought review⁸ of the second order in the Second Circuit Court of Appeals.

1. *World Airways, Inc. v. Pan Am. World Airways, Inc.*, 88 S. Ct. 1715 (1968), *aff'd by an equally divided court* *Pan Am. World Airways, Inc. v. CAB*, 380 F.2d 770 (2d Cir. 1967).

2. Pub. L. 87-528, 76 Stat. 143 (1962).

3. Inclusive tour charters allow tour operators to sell package tours (with lodging and recreation expenses included in the package price) to individual members of the public, after the tour operator has purchased the entire capacity of an aircraft.

4. Supplemental airlines, hereafter referred to as "supplementals," are those airlines which by law can engage only in charter service (the purchase of the entire capacity of an aircraft to transport passengers or luggage), as distinguished from the scheduled carriers who can engage in both charter service and individually ticketed service.

5. Supplemental Air Service Proceeding, Docket 13795, C.A.B. Order No. E23350 (March 11, 1966).

6. Reopened Transatlantic Charter Investigation, All Expense Tour Phase, C.A.B. Order No. E24240 (March 11, 1966).

7. *American Airlines, Inc. v. CAB*, 365 F.2d 939 (D.C. Cir. 1966).

8. *Pan Am. World Airways, Inc. v. CAB*, 380 F.2d 770 (2d Cir. 1967). The transatlantic carriers were unable to seek review immediately since Board orders pertaining to foreign air transportation do not become final, and hence reviewable, until approved by the President. Such approval was not forthcoming until September 27, 1966.

The ultimate favorable ruling by the Supreme Court in the latter case overrules the holding of the *American Airlines* case.

In the *American Airlines* case, numerous arguments were offered in the Board opinion and before the court supporting the Board's power to authorize supplemental carriers to offer inclusive tour service. The Board contended that although it has never granted inclusive tour authority in the past, the statute on its face does not deny it power to make such grants. In fact, the Board asserted, its previous abstention from granting inclusive tour authority was grounded on policy rather than legal considerations.⁹

Section 401(d)(3) of the amendment states that "[i]n the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate. . . ."¹⁰ Supplemental air transportation is defined in Section 401(33) as ". . . charter trips in air transportation, other than the transportation of mail by aircraft, rendered pursuant to Section 401(d)(3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to Sections 401(d)(1) and (2) of this Act."¹¹ The key phrase, "charter trip," was not defined in the Act, nor has it received much judicial gloss. In the "split charter" case,¹² the Court of Appeals of the District of Columbia approved an order of the Board declaring that the lease of one-half the capacity of an airplane to two separate groups, the Elks and the Masons, fell within the meaning of "charter," and affirmed the power of the Board to define charter trip. In the court's estimation ". . . Congress intended, although not without limits, that the Board should be free to evolve a definition in relation to such variable factors as changing needs and changing aircraft. . . ."¹³ The court averred that the only limit on the Board's power to define "charter trips" is that the definition which is promulgated must not contravene Congressional intent to preserve the distinction between group and individually ticketed travel.

The Board further argued in *American Airlines* that inasmuch as the court's upholding of the split charter authority was without precedent, a fortiori, inclusive tour authority should be upheld since it can be shown to rest upon the decision in the *Tauck Tours* case.¹⁴ The latter decision sanctioned the Interstate Commerce Commission's issuance of a broker's

9. Supplemental Air Service Proceeding, Docket 13795, C.A.B. Order No. E23350 (March 11, 1966) at 7. The Board did not delineate the policy considerations involved.

10. Pub. L. 87-528, 76 Stat. 143 (1962) (codified as 49 U.S.C. § 1371(d)(3) (1964)).

11. Pub. L. 87-528, 76 Stat. 143 (1962), (codified as 49 U.S.C. § 1301 (33) (1964)).

12. *American Airlines, Inc. v. CAB*, 348 F.2d 349 (D.C. Cir. 1965).

13. *Id.* at 354.

14. *Tauck Tours, Inc. Extension*—New York, N.Y., 49 M.C.C. 491 (1949).

license to a travel agent authorizing him to charter buses from motor carriers licensed to engage only in charter service. The analogy to surface transportation is helpful but not controlling; a different agency and statute are involved, and unlike the Motor Carrier Act,¹⁵ the Federal Aviation Act possesses a legislative history which might be viewed as manifesting Congressional intent to prohibit all-expense (inclusive) tours.

The legislative history of the 1962 amendment to the Federal Aviation Act¹⁶ reveals a lack of unified Congressional intent. The bill which after undergoing amendment ultimately became law was prepared by the Board and introduced into both houses of Congress. The bill finally adopted by the Senate is notable for its definition of "charter service" which clearly, albeit circuitously, ceded to the Board power to authorize the supplementals to engage in all-expense-paid tours.¹⁷ In contrast, embodied in the final House version was a definition of "supplemental air transportation" which utilized the term "charter trip" without elaboration. The report of the House Committee in explication of the refusal to define "charter" stated:

The supplementals recommended that a definition of charter be written into the bill and this was given consideration by your committee. The bill passed by the Senate has such a definition. Your committee, however, after considering the problem, came to the conclusion that under the circumstances, authority to define charter service should be left, as at present, with the Board, subject to the limitations contained in the reported bill. This is a very difficult subject and any effort to freeze a definition of charter service into law could well lead to complications.¹⁸

A Joint Conference Committee finally adopted a bill which adhered to the House version and omitted the definition of "charter service."

In *American Airlines* the court opined that the adoption of the House bill possibly evinces an intent not to freeze the definition of "charter" but to leave the authority to define "charter" with the Board. Such reasoning

15. *National Business Traffic Ass'n v. United States*, 143 F. Supp. 689, 696-97 (D.N.J. 1956).

16. Pub. L. 87-528, 76 Stat. 143 (1962).

17. The grant of power appears in an exception to an exception in the Senate bill, which defined "charter service" to mean "air transportation performed by an air carrier holding a certificate of public convenience and necessity where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage or for the movement of property on a time, mileage, or trip basis, but shall not include transportation services offered by an air carrier to individual members of the general public or performed by an air carrier under an arrangement with any person who provides or offers to provide transportation services to individual members of the general public, other than as a member of a group on an all-expense-paid tour."

18. H. R. REP. No. 1177, 87th Cong., 1st Sess. 11 (1961).

is sound to the extent the Joint Conference Committee was aware of and accepted the interpretation placed on the House bill by the House Committee. The probability of such awareness, however, is small since "during floor debate on the compromise bill, six of the seventeen member conference committee stated that the authority to engage in 'inclusive tours' was not to be allowed under the proposed legislation."¹⁹

A theory propounded in the Board opinion to the effect that adoption of the House version over the Senate version meant not that inclusive tour authority was denied, but that the Senate retreated from its position that the Board be *required* to grant inclusive tour authority to supplementals was correctly rejected by the court. The language of the Senate version was clearly permissive rather than mandatory.²⁰

A third argument advanced in both the court and the Board opinions relied on statements by several senators and congressmen to the effect that the primary fear of the legislators was that the supplementals might divert traffic from the scheduled airlines by abuse of the inclusive tour authority which permitted the sale by travel agents of individually ticketed service on planes previously chartered by them. The court reasoned that because inclusive tour authority had never been granted previously, the fear was necessarily based on the supplementals' previous abuse of the ten-flight-per-month rule.²¹ The court continued:

The key to this case, we believe, is the fact that Congress at the time it passed the legislation had no way of knowing specifically how the Board would regulate the actions of the supplementals with respect to inclusive tour charters. . . . We believe an analysis of the regulations will demonstrate even further that the Board has effectively precluded the possibility that the fears apprehended by the legislators will in fact be realized.²²

The above facts support the conclusion proffered but not by the reasoning process chosen by the court. The rationale should not be that later regulations by the Board authorize the court to re-legislate what the legislature would have enacted had it known what restrictions the Board would eventually place on inclusive tours, but that the regulations add

19. Sayre, *Federal Aviation Act—Statutory Interpretation—Inclusive Tours*, 33 J. AIR L. & COM. 179, 181 (1967).

20. See the definition of "charter service" in note 15 *supra*.

21. Designed to prevent the supplementals from competing with the scheduled carriers, the ten-flight-per-month rule prohibited any supplemental carrier from offering more than ten flights per month between the same two cities. The supplementals ultimately set up pooling agreements under which they effectively offered a regular schedule between several sets of cities, while at the same time each was complying with the ten-flight-per-month rule. Sayre, *supra* note 19, at 180.

22. *American Airlines, Inc. v. CAB*, 365 F.2d 939, 946 (D.C. Cir. 1966).

reasonableness to the definition of a term which Congress did not define and which legislative history left ambiguous.

The regulations²³ greatly limit the scope of the supplementals' authority. A joint application from the tour operator and the supplemental air carrier must be filed with the Board ninety days before the tour begins. Copies of the application are to be filed with the scheduled air carriers who serve the points involved in the tour, so that they can file answers if they so desire. A tour prospectus must also be filed specifying the name and address of the operator, the time of the flight, the equipment to be used, the itinerary, the tour price per passenger, the charter price, the individually ticketed fare, the number of persons participating in the tour, and samples of advertising to be used. The tour operator is required to furnish a bond of not less than twice the amount of the charter price. The length of the tour must be at least seven days. The land portion of the tour must provide overnight hotel accommodations at a minimum of three places other than the point of origin. The tour price must include, at a minimum, all hotel accommodations. The charge per passenger must not be less than 110 per cent of any available fare charged by any route carrier for individually ticketed service over the same route. Within thirty days after completion of the tour, the tour operator and the supplemental air carrier must file a joint post tour report indicating, *inter alia*, any deviations from the tour proposed in the application and the reasons for such deviations.

Certainly these regulations, if enforced, will prevent inclusive tours from diverting daily commuter traffic, one way non-return point to point traffic, round trip traffic when the time of return is not known well in advance to coincide with the tour return time, and round trip traffic involving stays of less than seven days. Nonetheless, it will divert the traffic of persons planning trips or vacations of seven days or more who might otherwise purchase scheduled air transportation and provide their own accommodations. This diversion, however, would probably be of minor significance relative to the traffic not diverted. Furthermore, as the Board has indicated with probable accuracy, inclusive tours might encourage air travel on the part of some who have not flown previously. For example, the lower price of inclusive tours might induce middle income families to take vacations by air although they have not been able to afford air transportation on the scheduled carriers. The pre-planned itinerary would also appeal to such families although travel agents for the scheduled carriers provide similar service.

That many travel agents would become tour operators and channel substantial portions of their pleasure traffic to the tours in order to pro-

23. C.A.B. Special Regulations, 14 C.F.R. § 378 (1968).

tect their investment was also contended by American Airlines. The Board responded that due to "substantial commitments, as well as financial risks, in connection with chartering aircraft, reserving hotel space, and the like, as well as heavy marketing and promotional expenditures,"²⁴ tour operations are likely to be undertaken primarily by the larger or wholesale travel agents. The bulk of travel agents, who are too small to take the financial risks of inclusive tours, can not withstand the economic pressure of having to fill chartered aircraft. The contention is buttressed by the fact that since the agent's commission is based on a percentage of the tour fare, the travel agent will have a greater incentive to sell the higher priced tour on a scheduled carrier. Nonetheless, this reply is inapt. Surely, knowledge that only the largest travel agents will divert traffic to the supplementals will be of no great comfort to the scheduled carriers.

In the *Pan American* case²⁵ the Second Circuit Court of Appeals, after denying application of the doctrine of *res judicata* by distinguishing the case from *American Airlines* on the ground foreign air transportation differed substantially from domestic air transportation, denied that the Board had power to authorize supplementals to engage in transatlantic inclusive tours. Noting the absence of specific statutory language and the difficulties of interpreting the committee reports, the court based its opinion entirely on the Congressional intent expressed in statements by the floor managers in each house. The court observed that the floor managers "were members of the legislative committee that held extensive hearings and were responsible for formulating the legislation."²⁶

Typical of the floor managers' statements are those of Senator Cotton and Representative Williams. Senator Cotton stated:

The conferees agreed to drop the language in the Senate bill which defined charter service, and permitted the sale of tickets on charter flights to individual members of the general public who were on all-expense-paid tours. I am wholly in accord with the action in eliminating the all-expense tour provision and thus refusing to confer this power on the Board.²⁷

Representative Williams stated:

The Senate receded and accepted the position of the House on that provision The all-expense tours that were provided

24. Supplemental Air Service Proceeding, Docket No. 13795, C.A.B. Order No. E23350 (March 11, 1966).

25. *Pan Am. World Airways, Inc. v. CAB*, 380 F.2d 770 (2d Cir. 1967).

26. *Id.* at 782.

27. 108 CONG. REC. 12284 (1962).

for in the Senate definition were not accepted by the House, and the Senate receded and concurred in our position on that, also.²⁸

GENERAL CONCLUSIONS

With respect to the definition of "charter trip," it should be recognized that the only document which in theory under our system of government expresses the intent of Congress is the bill which Congress finally enacts. Congress does not enact the legislative history. Congressional debate, committee reports, and remarks in Congressional hearings relate the intent of only a small number; the ultimate expression of intent is embodied in the act itself. Only where the statute is ambiguous and there is near unanimity in the legislative history should legislative history be a relevant consideration in discerning Congressional intent.

The legislative history of the Act is ambiguous at best; some support may be mustered for either interpretation. Under these circumstances the term "charter trip" should be defined within the context of the Act and in conformity with any purpose expressed in the Act itself with some weight given to any portion of the legislative history which inexorably points in a single direction and is not inconsistent with the plain meaning of the Act itself. By focusing on the Act, one concludes that the fact that the 1962 amendment allowed the supplementals to engage *only* in charter service, while the scheduled carriers relied mainly on non-charter (individually ticketed) service indicates—or at least is consistent with—the view that Congress intended that the supplementals were not to compete to any substantial extent with scheduled carriers.

Further, the Board, the Second Circuit Court of Appeals, the District of Columbia Circuit Court of Appeals, and those who would point to legislative history are in complete agreement that one of the main purposes of the Act was to assure the viability of both carriers, supplementals and scheduled, to the extent possible without allowing the supplementals to compete effectively with the scheduled carriers.

With no definition of "charter trip" given in the Act, a board of experts charged with administering the Act, a universally accepted overall purpose of preventing effective competition between the supplementals and the scheduled carriers, and an ambiguous legislative history behind the Act, the issue meriting attention would seem to be the reasonableness of the definition offered by the Board in light of the universally accepted purpose of the Act. That the Board's definition is reasonable is attested to by the fact that it provides a reasonable possibility of increasing the supplementals' viability without substantially injuring the scheduled car-

28. 108 CONG. REC. 12322 (1962).

riers, all of whom at present are operating without government subsidy. By increasing their civilian traffic—while diverting only a relatively small amount of traffic from the scheduled carriers—the supplementals can better afford more up-to-date planes and equipment, remain better equipped to perform their statutorily imposed duty of meeting the needs of our national defense, and accord with the defense department's new ruling that military charters will only be awarded to supplementals who perform thirty per cent of their operations for civilian traffic.²⁹ Further enhancing the reasonableness of the Board's definition are the fact that inclusive tour authority has been granted only for a five year experimental period and is subject to review at the end of that period, the power of the Board to modify the regulations or revoke certificates at any time an abuse is discovered, and the possibility of broadening the base of potential air travelers.

Even if it be granted that the Board may fail to enforce some of its regulations, the risk of diversion is still not sufficiently great to warrant abolishing inclusive tour authority. Enforcement of the mere basics of the inclusive tour regulations, such as the 110 per cent price rule, the seven day rule, and the minimum three stopover rule, would prevent setting up schedules suitable for daily commuter service or any other service involving trips of less than seven days. In addition, as the 1962 amendment itself illustrates, Congress has shown its willingness to act upon the Board's failure to regulate in accordance with Congressional wishes. Significantly, the scheduled carriers are certain to function as "watch dogs" for the Board and Congress and may be expected to make known the most minuscule of violations or injuries to scheduled operations.

Accordingly, it is submitted that the Supreme Court should have reversed the Second Circuit Court of Appeals, thereby declaring the 1962 Amendment to have constituted no bar to the action of the Board in authorizing the supplemental carriers to engage in inclusive tours.³⁰

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29. Sayre, *supra* note 19, at 183 n.30.

30. Subsequent to the preparation of this note Congress has amended "charter trip" to include inclusive tours. Pub. L. 90-514, 82 Stat. 867 (1968). This amendment will afford an opportunity to test the validity of the policy arguments offered herein.