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# CHARTER ORGANIZERS AND TOUR OPERATORS: AIR CARRIERS OR TICKET AGENTS UNDER THE FEDERAL AVIATION ACT OF 1958?

## I. INTRODUCTION

In recent years American vacationers have discovered that they may obtain significant savings in the price of air travel by taking advantage of low cost charter flights offered by various air travel clubs.<sup>1</sup> Most of these travel clubs own and operate their own aircraft and, until recently, have escaped economic regulation by the Civil Aeronautics Board (CAB).<sup>2</sup> However, with the regularly scheduled airlines facing serious economic problems, the CAB has moved to restrict such "cheap" air travel provided through travel clubs and charter flights.<sup>3</sup>

The Federal Aviation Act of 1958<sup>4</sup> (the Act) charges the CAB with the economic welfare of the air industry. When Congress enacted the Act's predecessor,<sup>5</sup> it was faced with potentially destructive competition in an industry which required large investments of capital and regular, but not necessarily profitable, service.<sup>6</sup> Congress gave the Board responsibility for the "promotion of adequate, economical, and efficient service by air carriers at

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1. For example, a traveler may obtain round-trip air fare between Seattle and Brussels for only \$250, a savings of nearly \$450 over normal airline fares. Wall St. J., Sept. 23, 1974, at 1, col. 8.

2. *Id.*; *Voyager 1000 v. CAB*, 489 F.2d 792, 798-99 (7th Cir. 1973), cert. denied, 416 U.S. 982 (1974); see 7 Ind. L. Rev. 737 (1974).

3. *CAB v. Carefree Travel, Inc.*, 513 F.2d 375, 390 (2d Cir. 1975). See Pillai, *Government Regulation in the Private Interest*, 40 J. Air L. & Com. 29, 34-35 (1974); Russell, *The CAB and the Consumer*, 40 J. Air L. & Com. 51, 56 (1974). For an excellent but somewhat dated economic analysis of the regulated air industry, see R. Caves, *Air Transport and Its Regulators* (1962).

4. 49 U.S.C. §§ 1301-1542 (1970) [hereinafter cited as the 1958 Act].

5. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 [hereinafter cited as the 1938 Act]. The 1958 Act is substantially a recodification of the 1938 Act, as amended.

6. *Voyager 1000 v. CAB*, 489 F.2d 792, 798 (7th Cir. 1973), cert. denied, 416 U.S. 982 (1974); *Las Vegas Hacienda, Inc. v. CAB*, 298 F.2d 430, 432-33 (9th Cir., cert. denied, 369 U.S. 885 (1962)). "The scheduled air carriers . . . because they provide the country with a 'dependable and predictable air transportation service at all times, one that operates in peak and off-peak periods, to large cities and to small ones and in dense and thin traffic markets,' . . . are admittedly at an economic disadvantage when competing against charter services. Whereas the 'load factor' (average percentage of occupancy) of charter flights is near 100 percent, scheduled service normally operates at an average of 50 percent." *Saturn Airways, Inc. v. CAB*, 483 F.2d 1284, 1287 n.6 (D.C. Cir. 1973). For a general study of the legislative history of the 1938 Act, see C. Rhyne, *The Civil Aeronautics Act Annotated* (1939), especially chs. 8, 9, and 11. See also Pillai, *Government Regulation in the Private Interest*, 40 J. Air L. & Com. 29 (1974) ("The Federal Aviation Act . . . was drafted at a meeting of air carrier representatives held in a Washington hotel in late January and February of 1937."); Dept. of Justice Bull. at 10 (Feb. 6, 1975) (Testimony of Thomas E. Kauper, Assistant Attorney General, Antitrust Division, Dept. of Justice, Before the Senate Ad. Practices Subcomm., concerning Airline Regulation by the CAB) [hereinafter cited as Kauper] ("The protection of a subsidized air mail system was a vital objective of the drafters of the 1938 Act.").

reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."<sup>7</sup>

Air carriers which operate aircraft in flight are divided into two broad categories: regularly scheduled carriers which issue individual tickets to passengers, and supplemental air carriers which sell the capacity of an aircraft to an individual or group.<sup>8</sup> A regularly scheduled carrier files its routes,<sup>9</sup> flight times,<sup>10</sup> and tariffs<sup>11</sup> for CAB approval and must adhere to these schedules<sup>12</sup> regardless of whether the plane is full. In return for this often unprofitable service, the Board allows these air carriers to be relatively free from competition from other airlines.<sup>13</sup> The Board accomplishes this through its regulation of fares and services so as to insure only slight variations from carrier to carrier and by its control of the assignment and use of air routes.<sup>14</sup>

In competition with regularly scheduled carriers are supplemental airlines which provide efficient and economical transportation by operating at full capacity on flexible schedules and routes.<sup>15</sup> Charter organizers, tour operators, travel agents and travel clubs promote charter flights on supplemental air carriers for the cost conscious consumer.

The differing methods of operation of the regularly scheduled and supplemental air carriers illustrate the inherent conflict in the statutory duties of the CAB. The CAB must promote regular, dependable scheduled air service yet it must also promote economical and efficient service to the traveling consumer.

After nearly forty years of regulating the air industry, the CAB is under pressure from consumer advocates<sup>16</sup> and the Department of Justice<sup>17</sup> to provide less expensive air fares and to promote greater efficiency within the

7. 49 U.S.C. § 1302(c) (1970); see Comment, Presidential Powers over the Awarding of International Air Routes, 48 Tul. L. Rev. 1176 (1974).

8. *Saturn Airways, Inc. v. CAB*, 483 F.2d 1284, 1287 (D.C. Cir. 1973). A third category consists of regularly scheduled air carriers which also operate charter flights. 14 C.F.R. § 207.1 (1975); Booth, *Chartered Flights and Scheduled Airlines*, 4 Transp. L.J. 127, 131 (1972).

9. 14 C.F.R. § 201.4(c)(3) (1975).

10. *Id.* § 202.14(b) (1975).

11. 49 U.S.C. § 1373(a) (1970).

12. *Id.* § 1373(b) (1970); 14 C.F.R. § 202.1 (1975).

13. See generally R. Caves, *Air Transport and Its Regulators* 140-68 (1962); Dept. of Justice Bull. (Feb. 18, 1975) (Testimony of Donald I. Baker, Deputy Assistant Attorney General, Antitrust Division, Dept. of Justice, Before Senate Subcomm. on Ad. Practice and Procedure concerning Federal Regulation of Route Awards and Entry Into the Airline Industry) [hereinafter cited as Baker].

14. 49 U.S.C. § 1373 (1970) (tariffs of air carriers); *Id.* § 1371(e)-(j) (1970) (routes of air carriers). See generally Baker, *supra* note 13.

15. See note 6 *supra*.

16. E.g., Booth, *Chartered Flights and Scheduled Airlines*, 4 Transp. L.J. 127 (1972); Pillai, *Government Regulation in the Private Interest*, 40 J. Air L. & Com. 29 (1974); Russell, *The CAB and the Consumer*, 40 J. Air L. & Com. 51 (1974). But see Diederich, *Protection of Consumer Interests under the Federal Aviation Act*, 40 J. Air L. & Com. 1 (1974).

17. Kauper, *supra* note 6.

industry. The regularly scheduled air carriers and the supplemental air carriers, both of which own and operate the aircraft, are clearly subject to CAB jurisdiction under the Act.<sup>18</sup> The "ticket agent" who only sells passage on a flight is subject to very limited CAB regulation.<sup>19</sup> But the role of air travel clubs, charter organizers, and tour operators<sup>20</sup> is less clearly defined and these organizations have opposed comprehensive CAB regulation<sup>21</sup> on the grounds that they are merely ticket agents as opposed to air carriers as contended by the CAB.<sup>22</sup> The definition of their role within the air industry will probably determine their economic existence for if the charter promoters are air carriers as the CAB contends, they would be forced to operate within the strict limits of CAB regulations with the result that their services would become unattractive and/or unavailable to a large part of the traveling public.

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18. 49 U.S.C. § 1301 (1970); see, e.g., Diederich, Protection of Consumer Interests under the Federal Aviation Act, 40 J. Air L. & Com. 1, 4-8 (1974).

19. See notes 31-37 *infra* and accompanying text; Diederich, Protection of Consumer Interests under the Federal Aviation Act, 40 J. Air L. & Com. 1, 7 (1974).

20. Except for air travel clubs, the Board has defined each of these parties in its regulations. To avoid confusion with the terms as defined by the regulations, they will be referred to hereinafter as "charter arrangers", unless specifically named in a source.

The Board gives a very limited meaning to each of the terms it uses. Under 14 C.F.R. §§ 207.11, 208.6 (1975), charter flights are limited to air transportation pursuant to a Dept. of Defense contract, to air transportation where the capacity of an aircraft is engaged by a person for his own use, or to an agent of a group of charter participants, an air freight forwarder, a study group charterer under Id. §§ 373.1-.31 (1975), an overseas military personnel charter operator under Id. §§ 372.1-.40 (1975), a travel group charter organizer pursuant to Id. §§ 372a.1-.50 (1975) or a tour operator under Id. §§ 378.1-.31 (1975). An additional classification is the travel agent who engages "in the formation of groups for transportation or in the solicitation or sale of transportation services." Id. § 207.1 (1975). The only regulations expressly applicable to travel agents prohibit the "travel agent from receiving a commission from both the air carrier and the charterer, and . . . [require] a travel agent to execute a part of [an information report] to the effect that it has acted in a manner consistent with Part 207 of the Board's regulations." *CAB v. Carefree Travel, Inc.*, 513 F.2d 375, 387 n.21 (2d Cir. 1975).

The Board is careful not to expressly call these charter arrangers indirect air carriers or ticket agents. Instead it defines each party in terms of its relationship to the charter contract, and then, without stating that the arranger is an indirect air carrier, it grants an exemption from the requirement of a certificate of public convenience and necessity which is required of indirect air carriers. Providing this exemption moots the issue of the charter arranger's status until the charter arranger is found to be in violation of the regulations. At that point, the charter arranger claims that it was never subject to the regulations because it was a ticket agent rather than an indirect air carrier.

But see Diederich, Protection of Consumer Interests under the Federal Aviation Act, 40 J. Air L. & Com. 1, 4-5 (1974): "Within the class of indirect air carriers are such persons as air freight forwarders, cooperative shippers associations, and charter operators who provide inclusive tour charters, overseas military personnel charters, travel group charters or study group charters. The Board has also found a number of travel agents, organizations, and individuals to be operating as indirect air carriers . . ." (footnotes omitted). Mr. Diederich is an enforcement attorney with the CAB.

21. *Voyager 1000 v. CAB*, 489 F.2d 792 (7th Cir. 1973), cert. denied, 416 U.S. 982 (1974) (air travel club); see *CAB v. Aeromatic Travel Corp.*, 489 F.2d 251 (2d Cir. 1974) (travel agencies).

22. See, e.g., *CAB v. Carefree Travel, Inc.*, 513 F.2d 375 (2d Cir. 1975).

This Note will analyze the legislation, regulations and case law relevant to air carriers with the goal of providing guidelines which may facilitate a more precise definition of air carrier and thereby assist in the categorization of the various types of charter organizers and tour operators.

## II. FEDERAL AVIATION ACT OF 1958

The Federal Aviation Act of 1958 requires air carriers to have a certificate of public convenience and necessity,<sup>23</sup> or an exemption<sup>24</sup> and once either is granted, the air carrier must conform to the Board's regulations.<sup>25</sup> These regulations severely restrict price competition among regularly scheduled carriers and even competition in services—seating configurations, meals, time of departure, movies, etc.—is subject to Board regulation.<sup>26</sup>

Ticket agents on the other hand are subject to much less regulation by the Board. A ticket agent is forbidden to engage in "unfair or deceptive practices or unfair methods of competition."<sup>27</sup> But a ticket agent may conduct its business without Board authorization whereas an air carrier must obtain express authorization from the Board.

The term "air carrier" is defined in section 101(3) of the Act as "any citizen of the United States who undertakes, *whether directly or indirectly or by a lease or any other arrangement*, to engage in air transportation . . . ."<sup>28</sup> Air transportation is defined as "the carriage by aircraft of persons or property as a common carrier for compensation or hire . . . ."<sup>29</sup>

On the other hand, ticket agent is defined in section 101(35) as "any person, not an *air carrier* . . . and not a bona fide employee of an air carrier . . . who, as principal or agent, sells or offers for sale any air transportation, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges for, such transportation."<sup>30</sup>

23. "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." 49 U.S.C. § 1371(a) (1970).

24. An exemption from the requirement of a certificate is authorized under *Id.* § 1301(3) (1970); see note 20 *supra*; *American Airlines, Inc. v. CAB*, 178 F.2d 903, 906 (7th Cir. 1949); *Railway Express Agency, Inc.*, 2 C.A.B. 531, 541 (1941).

25. 49 U.S.C. § 1371(g) (1970).

26. *E.g.*, *Continental Air Lines, Inc. v. CAB*, No. 73-1718 (D.C. Cir. Nov. 7, 1974) (CAB abused its discretion in mandating certain seating configurations). See R. Caves, *Air Transport and Its Regulators*, chs. 14-15 (1962).

27. "The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent . . . investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find . . . that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition." 49 U.S.C. § 1381 (1970).

28. *Id.* § 1301(3) (1970) (emphasis added).

29. *Id.* § 1301(21) (1970). "'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." *Id.* § 1301(10) (1970).

30. *Id.* § 1301(37) (Supp. 1974) (emphasis added).

The term "ticket agent" was added to the Civil Aeronautics Act of 1938 by amendment in 1952.<sup>31</sup> The sparse legislative history of the 1952 amendment indicates that Congress sought to end misleading advertisements, misrepresentations of the quality and kind of transportation, and the sales of tickets at prices above tariff rates, or without a commitment from an air carrier to provide the service ticketed.<sup>32</sup>

The 1952 amendment defined "ticket agent" and added that term to sections 411<sup>33</sup> and 902(d).<sup>34</sup> Section 411 requires fair competitive methods and practices and authorizes the Board to issue orders to cease and desist from offending practices.<sup>35</sup> Section 902(d) provides criminal penalties for the giving of rebates or concessions on the sale of air transportation in violation of the Act.<sup>36</sup> The 1952 Annual Report of the Civil Aeronautics Board indicates the Board's intent in submitting the amendment:

As previously written, sections 411 and 902 related only to air carriers. Consequently, that part of the Board enforcement program involving ticket agents was one of indirection, and was accomplished by instituting against carriers proceedings for violation of ticket agency regulations, and for certain other practices of their agents attributable to them. Direct proceedings against ticket agents were limited to situations where it could be established that the agent himself was undertaking to engage in air transportation.<sup>37</sup>

The definitions of air carrier and ticket agent appear to overlap. An air carrier directly or indirectly engages in the carriage of persons or property as a common carrier for compensation or hire.<sup>38</sup> The air carrier sells air transportation as a principal and holds itself out to the public as one who sells,

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31. Act of July 14, 1952, Pub. L. No. 538, 66 Stat. 628.

32. H.R. Rep. No. 2420, 82d Cong., 2d Sess. 1-2 (1952). Prior to the amendment, the Board had attempted to regulate ticket agents by forcing air carriers to alter their relationships with irresponsible ticket agents. The Board also attempted to prove that persons engaged in the sale of air transportation were technically within the classification indirect air carrier as such term was defined in the act. *Id.* at 8.

33. 49 U.S.C. § 1381 (1970).

34. *Id.* § 1472(d) (1970).

35. *Id.* § 1381 (1970); see note 27 *supra*.

36. "Any air carrier, foreign air carrier, or ticket agent . . . who shall, knowingly and willfully, offer, grant, or give . . . any rebate or other concession in violation of the provisions of this chapter, or who, by any device or means, shall, knowingly and willfully, assist . . . any person to obtain transportation or services subject to this chapter at less than the rates, fares, or charges lawfully in effect, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be subject for each offense to a fine of not less than \$100 and not more than \$5,000." 49 U.S.C. § 1472(d) (1970).

37. 1952 CAB Ann. Rep. 33-34.

38. See notes 28-29 *supra* and accompanying text. Although not used in connection with ticket agents, the word "indirectly" was commented upon by the Board in *Railway Express Agency, Inc.*, 2 C.A.B. 531, 537 (1941): "The use of the word 'indirectly,' in addition to the terms 'directly' and 'by lease or any other arrangement,' appears to represent a studied effort to make the scope of the definition extremely broad." Cf. *CAB v. Carefree Travel, Inc.*, Civil No. 74 C 915 at 49 (E.D.N.Y., Sept. 30, 1974), *aff'd*, 513 F.2d 375 (2d Cir. 1975); also *CAB v. Aeromatic Travel Corp.*, 341 F. Supp. 1271, 1274 (E.D.N.Y. 1971) ("The definition of the term 'air carrier' is a broad one . . .").

provides, or furnishes such transportation. This is basically the definition of a ticket agent.<sup>39</sup> Reconciliation of the two terms can center only on the phrase "not an air carrier" appearing in the definition of ticket agent.

### III. CHARACTERISTICS OF AIR CARRIERS

#### A. *Legislative Intent and Initial Construction.*

By usage, air carriers have been classified as either direct or indirect.<sup>40</sup> A direct air carrier provides the aircraft, flight crew and physical in-flight operation of the aircraft in air transportation.<sup>41</sup> Both regularly scheduled and supplemental airlines are direct air carriers.<sup>42</sup>

The problem arises in ascertaining the scope of "indirectly or by a lease or any other arrangement" in section 101(3) of the Act. When the definition of air carrier was first codified in 1938, Congress was concerned primarily with the regulation of direct air carriers.<sup>43</sup> The inclusion of the phrase "or indirectly" was an apparent attempt to include air freight forwarders within the definition of air carrier. The early interstate commerce acts had regulated any common carrier by railroad<sup>44</sup> and the courts consistently had held that freight forwarders, who consolidated packages for shipment by the railroads, were not included in the definition and thus not within the scope of these statutes.<sup>45</sup>

39. See note 30 *supra* and accompanying text.

40. There is no statutory phrase "direct air carrier" or "indirect air carrier." The phrase is "whether directly or indirectly or by a lease or any other arrangement . . ." 49 U.S.C. § 1301(3) (1970). The interpretation of the disjunctive "or" has been less than precise. Some have divided air carriers into two classes: "directly" and "indirectly or by lease or any other arrangement." *Railway Express Agency, Inc.*, 2 C.A.B. 531, 536 (1941); accord, *Group Tour Excursion Fares*, 44 C.A.B. 803 n.4 (1966). A more recent decision indicated that the term air carrier included "not only those persons who engage directly in air transportation but also those who so engage 'by lease or any other arrangement'; that is, 'indirect air carriers.'" *CAB v. Aeromatic Travel Corp.*, 341 F. Supp. 1271, 1274 (E.D.N.Y. 1971). The court in *CAB v. Carefree Travel, Inc.*, Civil No. 74 C 915 at 43 (E.D.N.Y., Sept. 30, 1974), *aff'd*, 513 F.2d 375 (2d Cir. 1975) said that a defendant "was indirectly undertaking to engage in air transportation 'by a lease or any other arrangement' . . . ."

Most cases have talked simply of direct air carriers or indirect air carriers, ignoring "or by a lease or any other arrangement." E.g., *CAB v. Aeromatic Travel Corp.*, 489 F.2d 251, 252 (2d Cir. 1974); *National Air Taxi Conf., Inc. v. Hertz Rent A Plane Sys., Inc.*, 31 C.A.B. 41, 43 (1960).

41. *Group Tour Excursion Fares*, 44 C.A.B. 803 n.4 (1966) (actually operating the flight equipment); *Hacienda Hotels—U.S. Aircoach*, 26 C.A.B. 372, 378 (1958) (provide aircraft, flight crew and physical in-flight operation of aircraft).

42. See, e.g., *Diederich, Protection of Consumer Interests under the Federal Aviation Act*, 40 *J. Air L. & Com.* 1, 4 (1974).

43. *American Airlines, Inc. v. CAB*, 178 F.2d 903, 909 (7th Cir. 1949); accord, *Pan American World Airways, Inc. v. CAB*, 392 F.2d 483, 495 n.20 (D.C. Cir. 1968). See generally, C. Rhyne, *The Civil Aeronautics Act Annotated* (1939); Kauper, *supra* note 6, at 10.

44. E.g., Act of Feb. 4, 1887, ch. 104, § 1, 24 Stat. 379.

45. *United States v. American Ry. Express Co.*, 265 U.S. 425, 431 (1924); *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 188 (1920); *Southern Ind. Express Co. v. United States Express Co.*, 88 F. 659, 662 (C.C.D. Ind. 1898), *aff'd mem.*, 92 F. 1022 (7th Cir. 1899).

Freight forwarders were within the ambit of only those statutes which specifically included them.<sup>46</sup>

In August, 1935, Congress enacted the Motor Carrier Act<sup>47</sup> which defined "common carrier by motor vehicle" as: "any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property . . . for the general public in interstate or foreign commerce by motor vehicle for compensation . . ."<sup>48</sup> Cases decided by the I.C.C. described express companies and freight forwarders as "indirect operations" and held that they were not common carriers within this definition.<sup>49</sup>

When the Civil Aeronautics Act of 1938 was enacted, Congress used the language of the Motor Carrier Act and added the words "or indirectly" to "whether directly or by a lease or any other arrangement." Not surprisingly, the Civil Aeronautics Board concluded that Congress had aimed the term at air freight forwarders.<sup>50</sup> In *Railway Express Agency, Inc.*,<sup>51</sup> Railway Express Agency (REA) applied for a certificate of public convenience and necessity. Since REA did not own or operate aircraft, it was not a direct air carrier. REA collected shipments from the consignor, transported them to the originating airport, consolidated the packages into a bulk package which could be flown at a lower fare, and presented the bulk package under its own name to the direct air carrier. When the package arrived at the terminal airport, REA took delivery, broke the bulk package into its components, and delivered the smaller packages to the individual consignees. REA contracted with each direct air carrier that REA, not the direct carrier, would solicit and promote the air express service. REA charged the consignor one rate, covering the solicitation, promotion, and consolidation costs of REA as well as the physical in-flight transportation. In conducting the air express business, REA at no time operated its own aircraft; it purchased air capacity from the

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46. *United States v. American Ry. Express Co.*, 265 U.S. 425 (1924).

47. Act of Aug. 9, 1935, Pub. L. No. 255, 49 Stat. 543.

48. *Id.* § 203(14), 49 Stat. 543, 544.

49. *Acme Fast Freight, Inc.*, 2 M.C.C. 415, 420 (1937), rev'd, 8 M.C.C. 211 (1938), aff'd 30 F. Supp. 968 (S.D.N.Y.), aff'd mem., 309 U.S. 638 (1940). A clear expression of the I.C.C.'s usage appears in *Acme Fast Freight, Inc.*, 8 M.C.C. 211, 215 (1938): "[A]pplicant's operations as a carrier may for convenience be divided into those which are direct and those which are indirect. The direct operations are those in which the carriage is performed by vehicles under the immediate ownership or control of applicant and without utilization of the services of any other carrier, and are confined to motor-vehicle operations. The indirect operations, which are much more extensive, are those in which the services of other carriers, by rail, by water, or by motor vehicle, are utilized."

50. *Railway Express Agency, Inc.*, 2 C.A.B. 531, 538 (1941): "The conclusion is inescapable, therefore, that the addition of the words 'or indirectly' in the definition of 'air carrier', at a time when the Interstate Commerce Commission was dealing with operations which it terms 'indirect,' reflected an intention to embrace within the regulatory provisions of the Civil Aeronautics Act all common carrier operations by air, whether direct or indirect, and that those who, as common carriers, forward by air . . . should be 'air carriers.' No other conclusion reasonably could give adequate context to the words 'or indirectly' as distinguished from the words 'or by a lease or any other arrangement.' No other conclusion is necessarily required by the express terms of the Act."

51. *Id.*



direct carriers by contract.<sup>52</sup> Holding that REA was an indirect air carrier and thus within the definition of section 101(3),<sup>53</sup> the Board stated:

[REA] holds out to the public that it will undertake to transport property by air, and enters into contracts with shippers wherein it binds itself to discharge such an undertaking with respect to particular shipments. So far as the shippers are concerned, they are dealing solely with [REA] in obtaining transportation of their property by air. Even though it be an intermediary between the shipper and the ultimate operator of the aircraft in which the shipment is carried, it is apparent that [REA] is engaged in the business of transporting property by air. Moreover, it is engaged in that business as a common carrier.<sup>54</sup>

This first case holding that someone other than the operator of the aircraft was an air carrier, illustrates several characteristics<sup>55</sup> which singly or in some combination may define the contours of an indirect air carrier. These elements include: the holding out to the public that it will transport property or passengers by air, the purchase of air capacity from an air carrier, the receipt of compensation for the service, the provision of a service which includes something in addition to direct air transportation, and the assumption of responsibility for the air transportation as between the shipper/passenger and the indirect air carrier. To determine the parameters of "not an air carrier" in the definition of ticket agent, these elements must be examined as they relate to air carriers and ticket agents.

## B. *Characteristics of Indirect Air Carriage*

### 1. Holding Out to the Public

Under the Act, a party is not an air carrier if it is not a common carrier.<sup>56</sup> Since the Act does not define common carriage, common law principles apply. At common law, a common carrier is one who holds himself out to the public as being engaged in the business of transporting persons or property for compensation.<sup>57</sup> "Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does."<sup>58</sup> The dominant characteristics of a common carrier are its public profession or holding out of the service offered,<sup>59</sup> and its willingness to perform the service for all who choose to apply.<sup>60</sup> On the other hand, private

52. *Id.* at 532-33.

53. 49 U.S.C. § 1301(3) (1970).

54. 2 C.A.B. at 536-37 (footnotes omitted).

55. Four of the five characteristics are discussed in Brief for Defendant at 7-14, *CAB v. Carefree Travel, Inc.*, Civil No. 74 C 915 (E.D.N.Y., Sept. 30, 1974), *aff'd*, 513 F.2d 375 (2d Cir. 1975).

56. 49 U.S.C. §§ 1301(3), (10), & (21) (1970); see note 29 *supra* and accompanying text.

57. *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211 (1927); *Liverpool & Great W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 437 (1889).

58. *United States v. California*, 297 U.S. 175, 181 (1936).

59. *Id.* at 182; *Bank of Ky. v. Adams Express Co.*, 93 U.S. 174, 177 (1876).

60. *McCallum v. United States*, 298 F. 373, 375 (9th Cir.), *cert. denied*, 266 U.S. 606 (1924); *Kelly v. General Elec. Co.*, 110 F. Supp. 4, 6 (E.D. Pa.), *aff'd mem.*, 204 F.2d 692 (3rd Cir.), *cert. denied*, 346 U.S. 886 (1953).

carriers do not hold out to carry all persons indiscriminately but transport only for themselves or for a specified, unchanging entity.<sup>61</sup>

The Civil Aeronautics Board has adopted these common law principles, stating that "[g]enerally speaking, a common carrier is defined as one who holds himself out as ready and willing to undertake for hire the transportation of passengers . . . from place to place, and so invites the patronage of the public."<sup>62</sup>

In *Alaska Air Transport, Inc. v. Alaska Airplane Charter Co.*,<sup>63</sup> the court set out a three-fold test of common carriage by air: the air carrier must retain the in-flight operation of the aircraft even though it yields the exclusive use of the plane; the air carrier at least temporarily must hold out its service to the public; and the air carrier must serve at least a limited portion of the public.<sup>64</sup> The CAB subsequently analyzed the last two elements of this test in the case of an uncertificated direct air carrier which did not solicit business but only accepted business that came to it.<sup>65</sup> The CAB found the direct air carrier to be engaged in common carriage, stating:

Regardless of the method by which it is done, the carrier has accomplished the holding out if he has gotten the offer of available service across to the public. . . . "Holding oneself out to the public does not necessarily consist in public declaration or advertisement. . . . [O]ne who follows carrying for a livelihood, or who gives out to the world in any intelligible way that he will take goods, chattels or persons for transportation for hire, is a common carrier."<sup>66</sup>

Although the Board uses broad language, the courts have also held that an air carrier may be holding out to the public when it holds out to a limited group.<sup>67</sup> A nonprofit cooperative flower shipping association provided a drayage service to and from airports for its members. The association claimed there had been no holding out of the service to the public but the Ninth Circuit<sup>68</sup> ruled that the association was an indirect air carrier: "[t]he service of the cooperative seems to have been open to all who would join. There was very active solicitation of memberships and, through memberships, business."<sup>69</sup> The court in effect equated "holding out the service to the public" with "holding out the service to members who are solicited from the public." The Seventh Circuit has recently extended this principle to members of a nonprofit air travel club.<sup>70</sup>

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61. *Home Ins. Co. v. Riddell*, 252 F.2d 1, 2 (5th Cir. 1958); cf. *Kelly v. General Elec. Co.*, 110 F. Supp. 4 (E.D. Pa.), *aff'd mem.*, 204 F.2d 692 (3d Cir.), cert. denied, 346 U.S. 886 (1953).

62. *Transocean Air Lines, Inc.*, 11 C.A.B. 350, 352 (1950).

63. 72 F. Supp. 609 (D. Alas. 1947) (holding out by advertisement in newspapers and on radio).

64. *Id.* at 610.

65. *Joiner Investigation Case*, 12 C.A.B. 879 (1951).

66. *Id.* at 883, quoting *Stoner v. Underseth*, 85 Mont. 11, 277 P. 437 (1929).

67. *Voyager 1000 v. CAB*, 489 F.2d 792 (7th Cir. 1973), cert. denied, 416 U.S. 982 (1974); *Consolidated Flower Shipments, Inc. v. CAB*, 213 F.2d 814 (9th Cir. 1954).

68. *Consolidated Flower Shipments, Inc. v. CAB*, 213 F.2d 814 (9th Cir. 1954).

69. *Id.* at 817.

70. *Voyager 1000 v. CAB*, 489 F.2d 792 (7th Cir. 1973), cert. denied, 416 U.S. 982 (1974).

Because an indirect air carrier is required to be a common carrier, it must hold out its service to the public. A ticket agent by definition is not an air carrier engaged in air transportation. It follows that a ticket agent is not a common carrier and thus not an indirect air carrier. In two CAB cases,<sup>71</sup> parties have been classified as ticket agents and as such have been found guilty of unfair or deceptive practices in violation of section 411.<sup>72</sup> In both cases the respondents held out to the public that they were undertaking to transport persons by air. They advertised that they were direct air carriers,<sup>73</sup> but in actuality they only provided the service of ticketing.<sup>74</sup> The Board ruled in each case that the advertising was in violation of section 411's prohibition of unfair or deceptive practices since it was exactly this deceptive holding out that Congress had sought to prevent when it passed the 1952 amendment adding ticket agents to the Civil Aeronautics Act.<sup>75</sup>

The problem in analyzing these cases is that the Board's decisions did not depend on the status of the offenders. If the respondents had been held to be indirect air carriers instead of ticket agents, they still would have been in violation of section 411. An indirect air carrier which holds itself out as a direct air carrier would be in violation of section 411 as would a ticket agent.

However, if a ticket agent holds itself out as an *indirect* air carrier, the agent might actually be held to be an indirect air carrier. Because the statutory overlap in definitions of ticket agent and indirect air carrier provide a basis for such a decision,<sup>76</sup> there is some justification for the contention that the mere holding out of *indirect* air transportation will be sufficient to make the party an indirect air carrier. A ticket agent or tour operator who does not wish to be classified as an indirect air carrier should take precautions not to represent himself as an air carrier to the public or he may find himself classified as such and in violation of the CAB regulations.

The air travel club owned and operated several planes exclusively for its members. Its membership fees dropped from an original \$125 to as low as \$10. Memberships and flights were heavily publicized. The court stated that an increase in membership alone did "not necessarily result in the transformation from private to public carriage. Rather, the proper inquiry is whether the ads solicit[ed] prospective members where the membership is defined in such a manner as to be undifferentiated from the traveling public at large." *Id.* at 801. See generally 7 *Ind. L. Rev.* 737, 738-39 (1974).

71. Southeast Airlines Agency, Inc., 25 C.A.B. 89 (1957); Airline Reservations, Inc., 18 C.A.B. 114 (1953).

72. 49 U.S.C. § 1381 (1970). Section 411 applies to both air carriers and ticket agents. See note 27 *supra*.

73. Southeast Airlines Agency, Inc., 25 C.A.B. 89, 92 (1957); Airline Reservations, Inc., 18 C.A.B. 114, 118 (1953).

74. The respondent in *Airline Reservations, Inc.*, 18 C.A.B. 114, 118 (1953), advertised "fly NORTH STAR Aircoach" and distributed a brochure containing a picture of an aircraft with "North Star" printed in large letters across the side. None of the ads or brochures indicated that respondent was an agent of a supplemental air carrier.

75. Southeast Airlines Agency, Inc., 25 C.A.B. 89, 107 (1957); Airline Reservations, Inc., 18 C.A.B. 114, 120-21 (1953); see notes 31-37 *supra* and accompanying text.

76. See notes 28-39 *supra* and accompanying text.

## 2. Purchase of Air Capacity

Normally an indirect air carrier purchases air capacity, i.e., space on the aircraft, by contract from a direct air carrier.<sup>77</sup> But other parties such as a freight forwarder may purchase air capacity from an intervening indirect air carrier and still be considered an indirect air carrier.<sup>78</sup>

The Board has indicated that the purchase of air capacity is an assumption of the economic risk of the venture<sup>79</sup> and one who does assume such risk, such as a tour operator<sup>80</sup> who purchases air capacity in his own name for resale to the public as part of a tour package, functions as an indirect air carrier. In such a tour arrangement, "[t]here would be no direct contractual relationship between [the direct air carrier] and the tour participants . . . ; the tour operator would act as a middleman—entrepreneur between the producer and ultimate user of the air transportation, assuming the risks and retaining the profits from the venture."<sup>81</sup>

A borderline case on the purchase of air capacity was *National Air Taxi Conference, Inc. v. Hertz Rent A Plane System, Inc.*<sup>82</sup> Hertz entered into licensing agreements with small direct carriers who received Hertz's nationwide promotion, merchandising, and reservation system in return for severe restrictions on their freedom of operation and a percentage of the direct carriers' gross rental receipts. The licensee entered into agreements directly

77. See *Intra-Mar Shipping Corp.*, 27 C.A.B. 568, 570-72 (1958); *Air Freight Forwarder Case*, 9 C.A.B. 473, 479 (1948); *Railway Express Agency, Inc.*, 2 C.A.B. 531, 532 (1941).

78. *Universal Air Freight Corp.*, 3 C.A.B. 698 (1942). The freight forwarder had no choice but to tender the shipment to Railway Express Agency because, at that time, Railway Express Agency had "contracts with substantially all domestic airlines . . . under which such airlines agree[d] . . . not to accept property for transportation by air from any other person." *Id.* at 700.

79. *Group Tour Excursion Fares*, 44 C.A.B. 803 (1966); accord, *World Airways, Inc. v. Northeast Airlines, Inc.*, 349 F.2d 1007 (1st Cir. 1965), cert. denied, 382 U.S. 984 (1966). A travel agent entered into an agreement with a supplemental air carrier to purchase air capacity on a number of flights. The parties attempted to make the contract an agency agreement to avoid violation of the direct air carrier's certificate prohibition of selling air capacity to a travel agent. The agency agreement, had it been upheld, would have avoided the Board's objection to the travel agent acting as a principal or entrepreneur. But the First Circuit held that a clause requiring the travel agent to pay liquidated damages if the required number of flights were not purchased, defeated the agency relationship and violated the direct carrier's certificate.

If the travel agent were forced to pay liquidated damages, it would be purchasing the air capacity as a principal or entrepreneur. According to the First Circuit, that would make it an indirect air carrier. *Id.* at 1012-13.

80. 14 C.F.R. § 378.2(d) (1975) provides: "Tour operator" means any citizen . . . (other than a direct U.S. air carrier), authorized hereunder to engage in the formation of groups for transportation on inclusive tours." This definition provides little help in separating the terms air carrier and ticket agent. The problem is often mooted by the Board's exemption of the charter arranger from the requirement of a certificate of public convenience and necessity. The tour operator, whether he is an indirect air carrier or not, can operate within the regulations and avoid costly litigation. Or he can operate outside of the regulations and fight the classification of indirect air carrier should the Board decide to take action against him. A number of charter arrangers evidently have decided to operate outside of the regulations, resulting in "a large black market" of charter flights. *CAB v. Carefree Travel, Inc.*, 513 F.2d 375, 390 (2d Cir. 1975).

81. *Group Tour Excursion Fares*, 44 C.A.B. 803, 804 (1966).

82. 31 C.A.B. 41 (1960).

with the public;<sup>83</sup> Hertz did not purchase air capacity from the licensee in its own name or in the name of the passengers. Nevertheless, Hertz was held to be an indirect air carrier and as such, operating without a certificate despite an exculpation clause in all contracts relieving Hertz of any responsibility.

Hertz did not assume the full economic risk of the venture. It invested in advertising and increased its reservation system, but at best, Hertz shared the risk with the licensee.

Although the purchase element was weak in *Hertz*, the Board seemed anxious to find Hertz within its jurisdiction because of the influential Hertz name and the attempted exculpation of Hertz's responsibility in the actual contract.<sup>84</sup> Nevertheless, the Hertz case can be reconciled with earlier cases if the licensing agreement is viewed as a purchase of air capacity, since it guaranteed that the aircraft would be available to renters when and if Hertz persuaded them to rent.<sup>85</sup>

The two cases previously discussed dealing with ticket agents<sup>86</sup> also emphasized an agency relationship with the direct carrier. But as defined in the Act, a ticket agent is not merely an "agent" in the traditional sense since he may sell air transportation as a "principal".<sup>87</sup> The cases have not clarified the exact role of a ticket agent, but the possibility does exist that a ticket agent may find himself classified as an indirect air carrier depending on the nature of agreements with direct air carriers.

### 3. Receipt of Compensation

There is little doubt that an air carrier must receive compensation for the service it provides. When an indirect air carrier purports to offer free air transportation with a tour package consisting of services for which a fee slightly below the normal air fare is charged, the indirect air carrier receives compensation.<sup>88</sup>

The absence of profit in the operations of an air carrier is immaterial.<sup>89</sup> A nonprofit direct air carrier was not disqualified from the status of "a common carrier for compensation or hire . . .", since it was "furnishing . . . transportation by air to the general public on a commercial basis."<sup>90</sup> The same rationale applies to a nonprofit indirect air carrier.<sup>91</sup>

83. *Id.* at 42-43.

84. See text accompanying notes 103-04 *infra*.

85. *National Air Taxi Conference, Inc. v. Hertz Rent A Plane Sys., Inc.*, 31 C.A.B. 41, 43-44 (1960).

86. See notes 71-76 *supra* and accompanying text.

87. 49 U.S.C.A. § 1301(37) (Supp. 1975); see text accompanying note 30 *supra*.

88. *M & R Investment Co. v. CAB*, 308 F.2d 49 (9th Cir. 1962); *Las Vegas Hacienda, Inc. v. CAB*, 298 F.2d 430 (9th Cir.), cert. denied, 369 U.S. 885 (1962).

89. *Voyager 1000 v. CAB*, 489 F.2d 792 (7th Cir. 1973), cert. denied, 416 U.S. 982 (1974); *M & R Investment Co. v. CAB*, 308 F.2d 49 (9th Cir. 1962); *Las Vegas Hacienda, Inc. v. CAB*, 298 F.2d 430 (9th Cir.), cert. denied, 369 U.S. 885 (1962).

90. *Voyager 1000 v. CAB*, 489 F.2d 792, 798 (7th Cir. 1973), cert. denied, 416 U.S. 982 (1974), quoting, *Las Vegas Hacienda, Inc. v. CAB*, 298 F.2d 430, 436 (9th Cir.), cert. denied, 369 U.S. 885 (1962).

91. *Consolidated Flower Shipments, Inc. v. CAB*, 213 F.2d 814 (9th Cir. 1954).

Ticket agents generally receive a commission from the direct air carrier<sup>92</sup> and thus there would be little doubt that they meet the requirement that an indirect air carrier must receive compensation for services rendered.

#### 4. Service in Addition to Direct Air Transportation

The provision of an additional service is closely related to the compensation characteristic since the air carrier will seek to be paid for the additional service as well as for the flight fare.<sup>93</sup> Air forwarders provide surface drayage<sup>94</sup> and charter arrangers provide land accommodations<sup>95</sup> in addition to the air transportation. In each case, it is a service which is more than the flight alone.

Consolidation of passengers into groups to achieve a lower per passenger fare is analogous to the activity of air freight forwarders. One court<sup>96</sup> held that a social club whose primary purpose was to consolidate "groups of passengers to fill the [aircraft] space"<sup>97</sup> was in violation of the Act as an uncertificated indirect air carrier. Similarly, the creation of a nationwide reservation system with a network of licensees willing to rent planes was sufficient to place one in the category of indirect air carrier.<sup>98</sup>

It may be argued that at a minimum a ticket agent provides a service of convenient flight arrangements. But this service is so closely associated with the flight as to be inseparable from it<sup>99</sup> and in itself, it would probably be an insufficient basis for including a ticket agent within the classification of air carrier.

#### 5. Assumption of Responsibility

In one of the early CAB cases<sup>100</sup> defining the role of air freight forwarders, the Board stated that in addition to holding out the service to the public and even though an intervening forwarder existed between the air freight forwarder

92. H.R. Rep. No. 2420, 82d Cong., 2d Sess. 4 (1952).

93. Although the fare is composed of two parts—flight expense and additional service expense—the consumer is quoted one fare. See, e.g., *Foremost Int'l Tours, Inc. v. Qantas Airways Ltd.*, 379 F. Supp. 88 (D. Hawaii 1974); *Group Tour Excursion Fares*, 44 C.A.B. 803 (1966).

94. *Consolidated Flower Shipments, Inc. v. CAB*, 213 F.2d 814 (9th Cir. 1954); *Railway Express, Air-Surface Cargo Agreements*, 39 C.A.B. 860 (1964).

95. *M & R Investment Co. v. CAB*, 308 F.2d 49 (9th Cir. 1962) (hotel accommodations); *CAB v. International Exch. School*, 357 F. Supp. 819 (D. Utah 1973) (study abroad); *Group Tour Excursion Fares*, 44 C.A.B. 803 (1966) (lodging plus sight seeing trip, ground transportation, car rental, or meals).

96. *Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552 (9th Cir. 1972), cert. denied, 410 U.S. 967 (1973).

97. *Id.* at 553.

98. *National Air Taxi Conference, Inc. v. Hertz Rent A Plane Sys., Inc.*, 31 C.A.B. 41, 42-43 (1960); see text accompanying notes 82-85 *supra*.

99. The respondents in *Southeast Airlines Agency, Inc.*, 25 C.A.B. 89 (1957), provided some baggage service in their own name, but evidently no other additional service was provided by the ticket agents. This is in contrast to most of the indirect air carrier cases where a substantial additional service was provided to the consumer.

100. *Universal Air Freight Corp.*, 3 C.A.B. 698 (1942).

der and the direct air carrier, "[r]espondent receives shipments, assumes control of them, transports the shipments at the beginning and end of the journey, and assumes the responsibility that the property will be transported from the original consignor to the ultimate consignee."<sup>101</sup> The freight forwarder was bound by contract to move the property from the consignor to the consignee. The Board's position consistently has been that if there is an actual assumption of the responsibility the party will be treated as an indirect air carrier.<sup>102</sup>

The CAB analyzed the Hertz Rent A Plane activities as an assumption of responsibility by Hertz for the provision of the air transportation.<sup>103</sup> Hertz, however, was a licensor, not the owner/operator of the aircraft. Nevertheless, the Board held that Hertz so obscured the name of the direct air carrier that, as far as the passengers were concerned, Hertz had provided the transportation. From the facts, it appeared that Hertz held out that it would be responsible for the transportation even though it did not actually assume that responsibility. The Board said:

The passenger is unaware of any other party other than Hertz to the rental agreement for the use of a plane until he reads the "smaller" print on the reverse side of the agreement which contains an exculpation clause absolving Hertz from legal responsibility for the passenger's carriage.<sup>104</sup>

Hertz made a deliberate attempt *not* to assume the responsibility. The Board's decision is not clear<sup>105</sup> as to whether it denied effect to the exculpation clause thereby requiring Hertz actually to assume the responsibility, or whether the exculpation clause failed to negate an apparent assumption of responsibility. If apparent assumption of responsibility, rather than actual assumption, is sufficient, the term indirect air carrier is broadened considerably.

The form of the ticket issued may determine whether a ticket agent has assumed or has appeared to assume responsibility for his customers' transportation. The ticket agents in both *Southeast Airlines Agency, Inc.*<sup>106</sup> and *Airline Reservations, Inc.*<sup>107</sup> issued exchange orders which could not be honored legally by an air carrier under the regulations as promulgated by the

101. *Id.* at 706.

102. E.g., Brief for Plaintiff, *CAB v. Carefree Travel, Inc.*, Civil No. 74 C 915 (E.D.N.Y., Sept. 30, 1974), *aff'd*, 513 F.2d 375 (2d Cir. 1975); *National Air Taxi Conference, Inc. v. Hertz Rent A Plane Sys., Inc.*, 31 C.A.B. 41, 43-45 (1960); *Hacienda Hotels—U.S. Aircoach*, 26 C.A.B. 372, 376 (1958); *Universal Air Freight Corp.*, 3 C.A.B. 698, 705 (1942); *Railway Express Agency, Inc.*, 2 C.A.B. 531, 536-37 (1941).

103. *National Air Taxi Conference, Inc. v. Hertz Rent A Plane Sys., Inc.* 31 C.A.B. 41 (1960).

104. *Id.* at 44.

105. "Certainly an operation, such as advertised to be provided by respondent herein, cannot escape regulation by merely inserting an exculpation clause in small type on the reverse side of a contract for hire. The public interest demands that the identity of the contracting parties as well as the responsibilities be clearly established." *Id.* at 45.

106. 25 C.A.B. 89 (1957).

107. 18 C.A.B. 114 (1953).

Board.<sup>108</sup> The difference between a ticket and an exchange order "is material, because the purchaser who believes he has a commitment on behalf of an air carrier binding such carrier to provide transportation has in fact no rights as against any air carrier but merely a claim against [a ticket agent]."<sup>109</sup>

The ticket agents had represented that they would provide the direct air transportation, and as such had assumed apparent responsibility to provide the flight. But if they had not so represented themselves, there would have been no assumption of responsibility.

#### IV. TOWARD A DEFINITION

Any reconciliation of the statutory terms "air carrier" and "ticket agent" must center around the phrase "not an air carrier" in the definition of ticket agent.<sup>110</sup> Absent that phrase, the terms overlap so substantially that most indirect air carriers would be ticket agents. Since air carriers were defined in the original 1938 Act and ticket agents were not added until 1952, fourteen years later, it seems apparent that the statute directs that inquiry first be addressed to the question of whether the party is an air carrier. If the party is found not to be an air carrier, then the question of whether the party is a ticket agent is reached. Put succinctly, no question arises under the definition of a ticket agent until and unless it is concluded that the party is not an indirect air carrier. As a corollary observation, the definition of a ticket agent cannot be manipulated to restrict the scope of the term indirect air carrier. The legislative history of the 1952 amendment<sup>111</sup> clearly shows that the addition of ticket agents to the Act enabled the Board to acquire jurisdiction, albeit limited jurisdiction, over parties who exhibit some of the characteristics of indirect air carriers, or, perhaps, exhibit all of these characteristics but not in sufficient quantum to justify the Board's extension of regulation to them.

The cases illustrate that an indirect air carrier demonstrates a combination of five characteristics: holding out to the public that it will transport property or passengers by air, the purchase of air capacity from an air carrier, receipt of compensation for the service, provision of a service which includes something in addition to direct air transportation, and the assumption of responsibility for the air transportation as between the shipper/passenger and the indirect air carrier. While not all of the elements are discussed in every case involving the definition of an indirect air carrier, they do outline the contours of an indirect air carrier. The varied factual situations in which the elements appear support the theory that the characteristics are a test of indirect air carriage rather than merely factual repetitives.

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108. "It is the policy of the Board to regard any of the following enumerated practices (among others) by a ticket agent as an unfair or deceptive practice or unfair method of competition . . . . (k) Selling or issuing tickets or other documents to passengers to be exchanged or used for air transportation knowing or having reason to know or believe that such tickets or other documents will not be or cannot be legally honored by air carriers for air transportation." 14 C.F.R. § 399.80 (1975).

109. *Airline Reservations, Inc.*, 18 C.A.B. 114, 115 (1953).

110. 49 U.S.C.A. § 1301(37) (Supp. 1975).

111. H.R. Rep. No. 2420, 82d Cong., 2d Sess. (1952).



The elements of an indirect air carrier provide a guide to the role of charter arrangers. Their classification under the Act depends upon their methods of operation. If a charter arranger holds out that it will provide ground tours in connection with air transportation provided by a supplemental air carrier, it has not held out that it will provide air transportation.

It is difficult for a charter arranger not to purchase air capacity in its own name because the supplemental air carrier requires a firm commitment well in advance of the flight. The charter group, however, is not formed by the charter arranger until a time close to the flight. A contingent contract with a supplemental air carrier which provides for an assumption of liability by the charter participants at a set time prior to the flight might be a solution to the problem. Such a contract should not contain a liquidated damages clause.<sup>112</sup>

An itemized payment for the tour would further emphasize the distinction between the land tour and the air transportation and it would distinguish the ground tour as a specific service of the tour arranger rather than as a service in addition to the air transportation. Finally, a charter arranger should make it clear to the charter participant that the supplemental air carrier is responsible for the aircraft. Although the charter arranger may help the tour group find a new supplemental air carrier should the original one fail, there should be no actual assumption of the responsibility for providing the air transportation.

Because of the limited number of cases discussing ticket agents, the contours of a ticket agent are defined less clearly. However, the paucity of decisions involving a ticket agent may be an indication that in borderline cases the Board and the courts will hold the party to be an indirect air carrier.<sup>113</sup> The Civil Aeronautics Board continues to assert<sup>114</sup> a definition of indirect air carrier, first enunciated in *Hacienda Hotels—U.S. Aircoach*:

[I]t is the view of the Board that in general, a person not directly engaged in the operation of an aircraft is an indirect carrier if such person sells transportation by aircraft to the general public other than as an authorized agent of a direct carrier in the consummation of transportation arrangements between the operator of an aircraft and the passengers.<sup>115</sup>

But to say that the distinction between air carriers and ticket agents depends on an authorized agency of the direct air carrier contradicts the statute. A ticket agent may, as *principal or agent*, sell or offer for sale any air transportation. Nevertheless, in *CAB v. Carefree Travel, Inc.*,<sup>116</sup> the Second Circuit recently approved the CAB rationale holding: "the CAB quite properly argues that by selling aircraft transportation to the general public other

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112. Group Tour Excursion Fares, 44 C.A.B. 803 (1966); see note 79 supra.

113. The most notable example is *National Air Taxi Conference, Inc. v. Hertz Rent A Plane Sys., Inc.*, 31 C.A.B. 41 (1960).

114. Brief for Plaintiff at 18, *CAB v. Carefree Travel, Inc.*, Civil No. 74 C 915 (E.D.N.Y., Sept. 30, 1974), aff'd, 513 F.2d 375 (2d Cir. 1975). The brief was submitted in the form of a proposed opinion of the court.

115. 26 C.A.B. 372, 385 (1958).

116. 513 F.2d 375 (2d Cir. 1975).

than as an authorized agent of a direct carrier and by consummating transportation arrangements, the [defendants] have acted as indirect carriers."<sup>117</sup> This analysis in effect reads "as principal" out of the statute.

The lower court had advocated policy considerations when it held the defendant to be an indirect air carrier.<sup>118</sup> To hold otherwise, according to the court, would allow the defendant to subvert the statute by permitting it to do those things which are forbidden to the holder of a certificate.<sup>119</sup> Again, the Second Circuit affirmed the lower court and endorsed the CAB position that the defendants "were indirect air carriers in the sense that they were 'usurping' air carrier functions, and functions which were in violation of CAB regulations."<sup>120</sup> While the policy underlying a statute is important, it is not helpful to the potential charter arranger or ticket agent who looks to the law as a guide for his conduct. While the Second Circuit may feel "that there are no rigid requirements for being an indirect air carrier . . .",<sup>121</sup> there are some identifiable characteristics which may help the potential entrant into the charter field decide whether he is subject to the CAB's regulations as an indirect air carrier. Depending upon the organization and operation of such individuals, one or a combination of these characteristics may be sufficient to bring them under the ambit of the CAB. The CAB will probably continue to attempt to broaden its jurisdiction and until the courts provide a more precise definition, charter organizers would be wise to structure their organization so as to avoid, as far as possible, any of the five characteristics which have been used to describe indirect air carriers.

*Beth E. Wortman*

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117. *Id.* at 387.

118. *CAB v. Carefree Travel, Inc.*, Civil No. 74 C 915 at 47-49 (E.D.N.Y., Sept. 30, 1974), *aff'd*, 513 F.2d 375 (2d Cir. 1975).

119. *Id.*

120. 513 F.2d at 388.

121. *Id.*