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PART III

CIVIL AERONAUTICS BOARD

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STATEMENTS OF GENERAL POLICY

Final Rules, Interim Rules, Proposed Rule, Request for Comments

[6320-01-M]

Title 14—Aeronautics and Space

CHAPTER II—CIVIL AERONAUTICS BOARD

SUBCHAPTER F—POLICY STATEMENTS

[Reg. PS-82; Amdt. No. 61; Docket 34683]

PART 399—STATEMENTS OF GENERAL POLICY

Standard Industry Fare Levels for Intrastate Pairs of Points in California, Florida, and Texas; Interim Suspension Policy

AGENCY: Civil Aeronautics Board.

ACTION: Interim Rule.

SUMMARY: The Board is adopting an interim suspension policy, as part of our policies for domestic fares, on standard industry fare levels for intrastate pairs of points in California, Florida, and Texas which may be lower than the ceilings otherwise calculated according to the *DPFI* coach fare formula under our PS-80 policies. The basis for the intrastate ceilings will be the lowest, unrestricted fare between a pair of points on July 1, 1977, adjusted for intervening cost increases, plus ten percent. That fare is presumed to be the predominant fare in a market unless a showing is made that more passengers used a higher fare. The ceiling will be increased eight percent on July 1, 1979, and semiannually thereafter until January 1, 1981, at which time the fare determined according to the PS-80 ceiling formula will become the standard industry fare level for the market. This rule is being issued on an interim basis, effective immediately. Comments are being requested in a separate issuance published in today's FEDERAL REGISTER (PSDR-55).

DATES: Adopted: February 7, 1979. Effective: February 14, 1979.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: Adopted by the Civil Aeronautics Board at its office in Washington, D.C. February 7, 1979.

I. BACKGROUND

On October 24, 1978, the Airline Deregulation Act of 1978, Pub. L. 95-504, became law. One of the provisions of the new Act is section 105 which preempts the authority of the individual states to regulate the fares charged and routes flown by airlines authorized by the Board to engage in interstate air transportation. This section is set forth in its entirety in the margin.[1] Our mandate is unqualified—jurisdiction attaches automatically to all authority of any air carrier now or hereafter authorized by the Board to engage in interstate air transportation. We do not take this charge lightly. It is a well-known fact, one that pervades the legislative history of Pub. L. 95-504,[2] that intrastate carriers have provided some of the lowest cost, most efficient air carriage available to domestic travellers and that the presence of this highly competitive service, conducted profitably, has forced other airlines to reduce their fares or leave the market. As we formulate a program to implement the new Act, we not only must recognize this accomplishment but seek to preserve the benefits to the public of the underlying competitive forces.

At the same time, we must keep in mind the purpose of the preemption section—to introduce uniformity to the regulatory environment in which interstate air carriers operate. The emergence of intrastate carriers into interstate operations and the reduction of state regulatory controls, directly or indirectly, over their operations and those of other carriers now or subsequently engaged in both intrastate and interstate air transportation sets the stage for the merger of previously different systems from an operational as well as a regulatory standpoint. It is our obligation to oversee the merger of these sytems with as smooth a transition as practical for the airlines, passengers, local communities, state authorities, and others concerned. The Board is instituting two proceedings to lay down an interim policy and review these matters in the light of public comments. In Docket 34684, issued concurrently, we deal with all matters other than fares. This docket sets forth the Board's proposed fare policy.

In general, the new Act provides for zones of reasonableness applicable to interstate and overseas passenger fares. The zones are to be based upon fare levels in effect on July 1, 1977, adjusted per 1002(d)(6) with a 50 percent downward range effective as of the date of enactment and a 5 percent upward range effective July 1, 1979.[3]

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[1] *Preemption.*—Section 105(a)(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act to provide interstate air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 401 of this Act, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

Proprietary Powers and Rights.—(b)(1) Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

(2) Any aircraft operated between points in the same State (other than the State of Hawaii) which in the course of such operation crosses a boundary between two States, or between the United States and any other country, or between a State and the beginning of the territorial waters of the United States, shall not, by reason of crossing such boundary, be considered to be operating in interstate or overseas air transportation.

Existing State Authority.—(c) When any intrastate air carrier which on August 1, 1977, was operating primarily in intrastate air transportation regulated by a State receives the authority to provide interstate air transportation, any authority received from such State shall be considered to be part of its authority to provide air transportation received from the Board under title IV of this Act, until modified, suspended, amended, or terminated as provided under such title.

Definition.—(d) For purposes of this section, the term "State" means any State, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, and any territory or possession of the United States.

[2] *See*, for example, the Committee Report on S. 2493, Report No. 95-631 at p. 103; Comments of Senator Kennedy during floor debate of S. 2493, Congressional Record-Senate S5860, April 19, 1978; Comments of Senator Cannon during floor debate of S. 2493, Congressional Record-Senate S5865, April 19, 1978; and the Committee Report on H.R. 12611, Report No. 95-1211 at p. 2.

[3] *See* section 1002(d)(4). Fares within the zones will, after July 1, 1979, not be subject to a finding of unreasonableness, except to the extent they are predatory. The Board still has authority to determine the reasonableness of increases filed before July 1, 1979, by all carriers and thereafter by monopoly carriers [defined under section 1002(d)(4)(A)] and decreases that would be predatory under the proviso to 1002(d)(4)(B). We read sections 1002(d)(4)(A) and 1002(d)(4)(B) to also permit the suspension of such filings. All other fares set within the statutory zones would not be subject to suspension. *See* section 1002(g) which provides that the Board shall not suspend any proposed tariff unless the Board is empowered to find the proposed fare unjust or unreasonable *and* empowered to determine and prescribe the

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The Act also provides for a mechanism to update the resulting standard industry fare levels on not less than a semiannual basis [4] and expressly gives the Board power to increase the downward zone of reasonableness. [5] The "Rule of Ratemaking" in section 1002(e) and the Declaration of Policy under section 102(a), both amended, make clear the intent of Congress that we rely on competitive market forces, actual and potential, in exercising our responsibilities under the Act. [6] Lastly, the Act contains sunset provisions that terminate our authority to regulate fares in interstate and overseas air transportation by January 1, 1983.[7]

We must implement the broad policies inherent in this law, and in the process, interpret its meaning. How we exercise our powers will, of course, reflect the amended "Rule of Ratemaking" and Declaration of Policy. The new Act, in many respects, requires interpretation. Congress enacted the provisions on fares in Pub. L. 95-504 to gradually replace our responsibilities to regulate fares, and the zones defined in the Act are there because Congress, fully aware of the Board's recent actions giving carriers more pricing freedom, wanted to keep our policies from sliding back to the more restrictive ones of the past and to minimize risks from legal challenges to the innovations.[8] Congress has recognized our authority to approve lower fares, without statutorily imposed zones.[9] On fare increases, Congress understandably held more reservations than on downward flexibility, but they did not take away the Board's powers to approve fares above the statutory zones,[10] even though section 1002(d)(7) expressly authorizes the Board to increase the zone for fare decreases but does not mention increases.

We conclude that Congress has left us the responsibility and necessary authority to determine in a reasonable way what the standard industry fare levels are and to regulate fares outside of the related zones of reasonableness.

II. The Board's Proposal

With the coming of preemption, we want to prevent a collision and, instead, promote a coalescence between the interstate fare policies promulgated by us in the *Domestic Passenger-Fare Rulemaking*, PS-80, Dockets 31290 and 30891,[11] and the existing fares of carriers formerly subject to separate policies developed by the respective States. In PS-80, we adopted the *DPFI* fare formula as the ceiling for our "no-suspend" zone policies. Those policies (1) permit carriers to set fares within broad zones relatively free from the risk of suspension; (2) replace uniform fares for all carriers in markets of equal distance with ceiling distance with ceiling fares; (3) provide downward fare filing flexibility of 50 percent [12] from the ceilings and upward flexibility of five and ten percent, depending upon the number of carriers authorized to serve a market; [13] and (4) eliminate the prescribed relationship between first-class and coach fares. We do not expect to change these policies drastically because of Pub. L. 95-504, but that will be the subject of another proceeding.

We are concerned, nevertheless, that abrupt changes in the intrastate fare systems that could result from preemption may work against a smooth, orderly transition from one set of standards, imposed by a separate jurisdiction, to our own. Our policies in PS-80 were obviously aimed at interstate markets, where the bulk of interstate markets, air transportation has existed, and not at the often protected, insular markets served by intrastate carriers. In PS-80, we expressly reserved our power to depart from its general policies in unusual or extraordinary circumstances. In markets where federal authority was not being exercised, or where prevailing fares charged were signficantly below the ceilings adopted in PS-80, we propose to phase in the permissible levels to which fares may be raised without risk of suspension so that eventually the standards that apply to interstate pairs of points will apply to intrastate operations of interstate air carriers.

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lawful, or maximum, or minimum fare. With regard to fares within the zones that are not subject to a finding of unreasonableness but may be unjustly discriminatory, unduly preferential, or unduly prejudicial, the Board retains jurisdiction to investigate, but not to suspend, such fares and determine their lawfulness. *See* sections 1002(d)(1) and 1002(d)(2) and 404(b). In any proceeding under section 1002(d)(1), applicable to the interstate and overseas air transportation of persons, the party opposing any fare on the basis that it is too low has the burden of proof.

[4] Section 1002(d)(6)(B).

[5] Section 1002(d)(7).

[6] *See* introduction to Joint Explanatory Statement of the Committee of Conference, Conference Report on S. 2493, H. Rept. No. 95-1779, p. 53; Congressional Record-House H12650, October 12, 1978.

[7] Section 1601(a)(2).

[8] Comments of Senator Cannon during floor discussion of S. 2493, Congressional Record-Senate S5850, April 19, 1978; Representative Anderson (Calif.) in Committee of the Whole on H.R. 12611, Congressional Record-House H9842, September 14, 1978; Representative Johnson (Calif.) in Committee of the Whole on H.R. 12611, Congressional Record-House H9844, September 14, 1978.

[9] Representative Levitas in Committee of the Whole on H.R. 12611 stated that "much of what needs to be done to improve the regulatory system could be done under inherent powers of the Civil Aeronautics Board in existing law," Congressional Record-House H9845, September 14, 1978; Representative Ertel in Committee of the Whole on H.R. 12611 commented that there was a need for legislation "to catch up with the CAB," Congressional Record-House H9846, September 14, 1978.

[10] *See* Comments of Senators Magnuson and Stevenson, respectively, during floor discussion of S. 2493, Congressional Record-Senate S5859 and 5898, April 19, 1978.

[11] Amends Part 399—Statements of General Policy on Domestic Passenger-Fare Level, Structure, and Discount Fares, 43 FR 39522, September 5, 1978.

[12] Policy Statement.

399.31(f) Each carrier should have the opportunity to set fares in each market within a zone ranging to 50 percent below the ceiling fares. Also, on 40 percent of their weekly available seat miles, carriers should have the opportunity to set fares in each market down to a 70 percent level below the ceiling. Fares within these zones will not be suspended by the Board on account of the reasonableness of the level of the fare absent the following extraordinary circumstances:

(1) the high probability that the fare would be found to be unlawful after investigation;

(2) the substantial likelihood that the fare is predatory so that there would be an immediate and irreparable harm to competition if it were allowed to go into effect;

(3) the harm to competition would be greater than the injury to the travelling public if the proposed fare were unavailable; and

(4) the suspension is in the public interest;

(g) Carriers should be free to set market fares below these minima on the basis of such factors as their individual costs or specialized marketing needs, unless the level of the proposed fare reductions will result in an inability of the carriers in the market to provide adequate service to the public or the fares are otherwise unlawful[.]

[13] Policy Statement.

399.31(h) Each carrier should have the opportunity to set fares above the ceiling fares as follows:

(1) in markets where four or more interstate and intrastate carriers are authorized to provide nonstop service either on an unrestricted or restricted basis,[1] each carrier should have the opportunity to set fares in a zone ranging up to 10 percent above the fare ceiling;

[1] Carriers in a market having only fill-up authority or who cannot carry local traffic will not be counted.

(2) in markets where two or three interstate or intrastate carriers are authorized to provide nonstop service either on an unrestricted or restricted basis,[2] each carrier should have the opportunity to establish fares in a zone ranging up to 5 percent above the ceiling on 110 days throughout the year; and

[2] Carriers in a market having only fill-up authority or who cannot carry local traffic will not be counted.

(3) in monopoly markets, the carriers should have the opportunity to establish fares in a zone ranging up to 5 percent above the ceiling on 58 days throughout the year;

Fares within these zones will not be suspended by the Board on account of the reasonableness of the level of the fare absent a showing of unusual or extraordinary circumstances.

We propose to adopt, and will rely upon immediately for suspension purposes during the interim before finalization, a standard industry fare level for each intrastate pair of points based on the predominant fares in effect on July 1, 1977, adjusted for subsequent changes in costs as required by section 1002(d)(6), plus ten percent, provided that the ceiling fare determined under our policies for interstate fares (*i.e.*, PS-80) would not be exceeded. For markets where the predominant fare was at least 90 percent of the *DPFI* formula fare, the *DPFI* fare would be the ceiling fare. The fare ceilings, so determined, would be the ceiling on a "no-suspend" zone applicable to fare increases for each intrastate pair of points. The additional upward fare flexibility provided under our policies in PS-80 for interstate fares (ten percent in workably competitive markets and five percent in markets with a check on monopoly power) would likewise be afforded on top of the ceiling. On July 1, 1979, the "no-suspend" zone would become a zone of reasonableness as required by section 1002(d)(4),[14] and our powers to suspend fares within the zone would be limited to those which appear to be predatory. As of July 1, 1979, we propose to raise the ceiling on fares between intrastate pairs of points by eight percent and, thereafter, by an additional eight percent every six months until the fares in those markets reach the ceilings determined by our policies for interstate fares or January 1, 1981, whichever occurs first, when the PS-80 ceiling will be the standard industry fare level.

It is not our design to disturb the underlying findings, to the extent still applicable, in *Interstate and Intrastate Fares in California and Texas Markets*, Docket 24779,[15] that differences between fares charged interstate and intrastate passengers by federally certificated carriers were unjustly discriminatory and this unjust discrimination should be eliminated by the establishment of a single level of fares. However, our conclusion that the *DPFI* fares would be the fare charged, except that such fares could be lowered to meet competition from intrastate carriers, has been radically altered, of course, by the subsequent implementation of our *DPFI* Rulemaking (PS-80) and the enactment of P.L. 95-504. Because we no longer require carriers to charge fares determined by the *DPFI* fare formula, this element in our previous decision on *Interstate and Intrastate Fares* has become moot. Nevertheless, the fact that an interstate carrier was on July 1, 1977, charging the *DPFI* fare between a pair of points intrastate is relevant to a showing of which fare in that market was the predominant fare. By the same token, if an interstate carrier were charging the intrastate fare under our Order 77-4-22 modifying a partial stay of our decision in the *Interstate and Intrastate Fares* case (in Order 77-4-22, we permitted carriers to maintain either dual fares in markets where they did not compete with intrastate carriers or a single fare level in such markets for both interstate and intrastate passengers at the intrastate level), that fare would have been in effect on July 1, 1977.

Our tentative solution, as stated above, is to accommodate the interests involved by permitting gradual increases in the ceilings until they reach interstate levels at which time uniform regulations would be achieved in all of the markets subject to our jurisdiction, interstate and intrastate, served by interstate carriers. Our proposal consists essentially of two parts. First, between the effective date of this rule and July 1, 1979, the standard industry fare level between intrastate pairs of points will be the fare used on or about July 1, 1977, by a predominant number of passengers travelling between those points, updated according to section 1002(d)(6), plus an additional ten percent. As a practical matter, this would generally be the prime time, unrestricted, lowest K fare (commuter class) in the California markets and the S fare (standard class) in the Florida and Texas markets.[16] Carriers seeking a higher standard either for a market or for their own class of service would have the burden of justifying it.[17] Second, beginning on July 1, 1979, we would increase the standard industry fare levels as adjusted for increases in costs by an increment of eight percent then and every six months thereafter until January 1, 1981, at which time the PS-80 ceiling fare would become the standard industry fare level. In this manner, the standard industry fare levels effective between now and July 1, 1979 would be adjusted subsequently for interim changes in costs, then by an additional eight percent, on that date and every six months thereafter until January 1, 1981, or when the PS-80 ceilings are reached, whichever occurs first. The dates for the periodic increases will be as follows:

July 1, 1979: 8 percent.
January 1, 1980: 8 percent.
July 1, 1980: 8 percent.
*January 1, 1981:** Ceiling for interstate fares.

To illustrate the application of this fare policy, we will use the Los Angeles-San Francisco market as an example. Following is an array of fares in the market for July 1, 1977:

Carrier	Fare Class[1]	Dollar Amount	
		Intrastate	DPFI
TW	F	$34.80	
UA	F	35.40	
CO	F	73.00	$73.00
RW	S	26.00	
NW, PA, BN, CO	Y		49.00
	FN	34.70	
UA	FN	35.40	
	YN	25.50	
UA	YN	25.95	
PSA	[2]K	25.95	
UA	[2]K	25.95	
CO	[3]K	27.75	

[1] F = first class; S = standard class; Y = coach class; FN = deluxe night coach; YN = night coach.
[2] K = commuter.
[3] K = economy.

The basis for a standard industry fare level for this market would be the

[14] This section provides that fare increases, either 50 percent below or five percent above the standard industry fare level in nonmonopoly markets, will no longer be subject to the Board's authority to find any fare unjust or unreasonable (excepting fares that are predatory):

1002(d)(4) The Board shall not have authority to find any fare for interstate or overseas air transportation of persons to be unjust or unreasonable on the basis that such fare is too low or too high if—

(A) with respect to any proposed increase filed with the Board on or after July 1, 1979 (other than any proposed increase in any fare filed by any air carrier if such proposed fare is for air transportation between any pair of points and such air carrier provides air transportation to 70 per centum or more of the persons traveling in air transportation between such points on aircraft operated by air carriers with certificates issued under section 401 of this Act), such proposed fare would not be more than 5 per centum higher than the standard industry fare level for the same or essentially similar class of service, except that, while no increase of any fare within the limits specified in this subparagraph may be suspended, an increase in such fare, above the standard industry fare level shall be found unlawful if that increase results in a fare which is unduly preferential, unduly prejudicial, or unjustly discriminatory; or

(B) with respect to any proposed decrease filed after the date of enactment of this paragraph, the proposed fare would not be more than 50 per centum lower than the standard industry fare level for the same or essentially similar class of service, except that this provision shall not apply to any proposed decrease in any fare if the Board determines that such proposed fare would be predatory.

[15] Order 76-7-23, 76-10-138, 77-1-137, and 77-4-22; *affirmed, People of the State of California v. CAB*, 581 F.2d 954 (C.A.D.C. 1978); *cert. denied*, U.S. Supreme Ct. Nos. 78-417 and 78-447.

[16] *See* Appendix A for a sampling of fares in intrastate markets.

[17] For markets where the *DPFI* fare was being offered pursuant to our determinations in *Intestate and Intrastate Fares in California and Texas Markets*, Docket 24779, Orders 76-7-23, 76-10-138, 77-1-137, and 77-4-22, a showing that this fare was the predominant fare would still be required.

*This should be the PS-80 formula fare which, in most intrastate markets, is now approximately 30 to 40 percent above the prevailing intrastate fares.

PSA fare of $25.95. It is the lowest standard fare offered by a carrier who operated large scale competitive levels of service in this market; consequently, we assume that it was the predominant fare paid by passengers between Los Angeles and San Francisco. This would, of course, be updated as required by section 1002(d)(6) in accordance with the method shown on Appendix B in order to obtain a standard industry fare level, and we propose to add ten percent to the adjusted fare in order to establish a ceiling fare for the "no-suspend" zone effective until July 1, 1979. For the market, the ceiling would be $32.00, as adjusted according to section 1002(d)(6) and projected forward with anticipatory costs through March 30, 1979, and including an additional ten percent. This standard would increase an additional eight percent plus an allowance for interim changes in costs on July 1, 1979. We recognize that in some markets containing an array of fares, the lowest unrestricted fare may not be the predominant fare. Our assumption to that effect is rebuttable. Those carriers who urge a higher fare, however, have the burden to demonstrate its predominance. For example, in the Miami-Tampa market, there were four basic unrestricted fares in effect on July 1, 1977, as follows:

Carriers	Fare Class	Dollar Amount	
		Intrastate	DPFI
NW, DL, EA, NA, TW.	F	.....	$54.00
NW, DL, EA, NA, TW.	Y	.....	36.00
QH.....	S	$30.00	.....
QH.....	K	18.00	.....

We would here recognize the trunkline "Y" fare as the predominant fare, based simply on the predominance of service offered at that fare.[18]

The result of our policy would, using the Eureka/Arcata-San Francisco market as an example, produce a ceiling of $38 on current fares there instead of the $47 permitted under our PS-80 policies (see Appendix A, p. 4). It is, however, not our intention to force a rollback of fares. Fares in effect on the date our proposed policy becomes effective would not be subject to refiling. However, to the extent they exceeded the applicable standard industry fare level, increases would not be permitted until the standard exceeded the existing fare or a showing were made that an increase was otherwise justified.

Before Congress enacted the section on preemption, they expressed concern that the marriage of the two systems, intrastate and interstate, be accomplished in a manner serving the common interests of the airlines, passengers, communities, and states.[19] Our proposed solution would establish a standard industry fare level for fares between intrastate points in California, Florida, and Texas[20] which takes into account the differences between the fares actually charged on July 1, 1977, and the *DPFI* formula fares, but simultaneously assures the attainment of the objective of preemption: the replacement of the double layer of regulations so that local policies which may conflict with the pro-competitive policies of Congress are removed.[21]

It is clear that we have the authority to provide for different standard industry fare levels between intrastate and interstate pairs of points. The Act describes the term "standard industry fare level" as follows:

> * * * "standard industry fare level" means the fare level (as adjusted only in accordance with subparagraph (B) of this paragraph) in effect on July 1, 1977, for each interstate or overseas pair of points, for each class of service existing on that date, and in effect on the effective date of the establishment of each additional class of service established after July 1, 1977. * * * [Section 1002(d)(6)(A)]

We believe that this description leaves us some discretion to decide, and does not prescribe, what the standard industry fare level is for the intrastate pairs of points. Neither the Act nor legislative history provide a ready definition of "standard industry fare level." We are thus confronted with the question what Congress intended as a standard industry fare level in markets between intrastate pairs of points. At the outset, we observe first that the statutory definition of "standard industry fare level" clearly requires a market-by-market analysis. It also appears that a "standard industry fare level" and the fares in effect on July 1, 1977, need not always be identical. This distinction is expressed in the legislative history.[22] Although there can be little question as to a "standard industry fare level" for fares charged between interstate pairs of points where our policies in the summer of 1977 prescribed uniform industry fares related to average costs in all markets of equal distance, the statutory definition of that term is subject to more than one reasonable interpretation with regard to markets between intrastate pairs of points. The first is that the term "standard industry fare level" means the fares in effect on July 1, 1977, in any given intrastate market. The second is that it means the fare level related to average costs as determined by the *DPFI* fare formula, whether or not a fare equivalent to that level was actually in effect on July 1, 1977. The former meaning—fares in effect—may be read to represent what the words in the statute describe, a "fare level * * * in effect on July 1, 1977, for each * * * pair of points, for each class of service. * * *" Moreover, there were intrastate pairs of points on July 1, 1977, served only by intrastate carriers, and there was no *DPFI* fare level applicable then to those markets.[23] Likewise, in the intrastate markets where interstate carriers operated, we permitted fares lower than those required by our *DPFI* fare level because of intrastate carrier competition. Despite this affinity between fares in effect and the statutory definition of fare level, the second meaning of "standard industry fare level"—an average cost fare formula—similarly fits the mold of the statutory definition. This is clearly the manner in which Congress understood the *DPFI* fare formula, and, as indicated previously, there was discussion in floor debate which reflects an average costs approach to the establishment of a fare level.[24]

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[18] *See* Official Airline Guide, July 1, 1977.

[19] Originally, the Senate bill 2493 contained a provision which would have limited our jurisdiction over carriers serving intrastate markets to those receiving more than 50 percent of their revenues from interstate operations. In the floor debate on S. 2493, Senator Cranston opposed an amendment to eliminate the shared jurisdiction concept in that bill (later eliminated by House-Senate compromise):

> * * * The situation today in California is such that our State public utilities commission estimates that Federal preemption of State regulation of intrastate air routes would result in higher, not lower, air fares for the thousands of Californians and visitors to our State flying the high density routes between Los Angeles and San Francisco, Oakland, Sacramento, and San Diego. (Congressional Record-Senate S5890, April 19, 1978.)

Also see comments of Senator Bentsen on the House-Senate Conference Report on S. 2493, Congressional Record-Senate S18790, October 14, 1978.

[20] Other states would not be covered by the policy proposed unless a showing is made that they be included. Otherwise, our policies in PS-80 for interstate fares would apply.

[21] *See* comments of Senator Heinz in floor debate on S. 2493 where he proposed to amend the bill in order to eliminate the shared jurisdiction concept (later adopted by House-Senate Conferees), Congressional Record-Senate S5890, April 19, 1978. *See* Note 19, *supra*.

[22] *See* comments of Senator Magnuson regarding the embodiment of an average cost concept in the term "standard industry fare level," Congressional Record—Senate S5859, April 19, 1978.

[23] For example, see Appendix A. Whenever one of these carriers receives authority from the Board to provide interstate air transportation, the standard industry fare level applies to its intrastate operations. *See* section 105, note 1, *supra*.

[24] *See* Note 22 on page 12, *supra*. Also, see reference in Committee Report on H.R. 12611, Report No. 95-1211 at p. 9 which describes the Board's *DPFI* formula:

> * * * The Board in the early 1970's established a formula for determining coach and first-class fares. Under the formula, the fare

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What we are left with are two reasonable interpretations of what a "standard industry fare level" should be for a market between intrastate pairs of points. The differences between the ceilings measured by one or the other interpretation can be significant.[25] We have thus turned to the preemption provision in the Act, and its legislative history, in order to determine what the meaning of "standard industry fare level" is for intrastate pairs of points. On the one hand, it is clear that Congress did not intend that the benefits of low, intrastate fares be wiped out by preemption. At the same time, the ultimate objective of preemption is uniformity of policy, both statutory and agency, for the routes and fares of carriers subject to our jurisdiction.[26] It is, therefore, appropriate to implement policies now that both assure that the ceilings applicable under our policies for interstate carriage (PS-80 and its progeny) within the 48 contiguous states will ultimately apply to the intrastate services of carriers authorized by us to provide interstate air transportation, and, at the same time, to ensure that competition has an opportunity to begin working before sharp increases in existing fares are permitted. Our proposed solution reconciles the often disparate relationships between fares in effect on July 1, 1977, for intrastate pairs of points and our *DPFI* fare levels, on the one hand, and the objective of preemption, on the other.

We have given considerable weight to the new "Rule of Ratemaking" and Declaration of Policy in the Act.[27] While they shift the locus of Board concerns to a more price and service competitive environment, the factors stated remind us that adequate service (especially to smaller communities and satellite airports), low fares, the effect of prices on the movement of traffic, encouragement of entry, and a responsive regulatory environment are all in the public interest and are factors which the Board must take into consideration in exercising its powers over fares.[28] These factors do not always lead us in the same direction.

In the short run, a policy which permits relatively higher fares may do more to preserve and encourage service to smaller communities and satellite airports than would a policy restricting increases. On the other hand, a policy which restricts fare increases will protect the consumer during the transition to a more freely competitive environment. Over the longer term, however, as more liberal entry and flexible pricing policies move the air transportation industry closer to a competitive environment, many of these seemingly conflicting factors will begin to undergo a fusion so that market forces through competitive entry and pricing will join to provide adequate levels of service as well as lower fares. Past regulatory policies, both state and federal, that have restricted entry have tended to restrain competitive forces so that they have not had a chance to work. Our policies now are providing a competitive environment where fares will not necessarily rise, but, as we have seen in many interstate markets, may go down, and where service levels should be more responsive to the needs of the public. If we were to lock carriers into their actual fares in effect on July 1, 1977, as the standard industry fare levels for these markets, we create the risk of withdrawals of equipment and reductions in service levels by incumbents who, under our more liberalized entry and exit policies, may seek higher returns in other markets promising more upward pricing latitude.[29] This result is not in the short-run interests of the travellers and communities accustomed to existing levels of service in intrastate markets.[30] On the other hand, if we were to permit immediate increases in intrastate fares to permissible *DPFI* formula levels, interstate carriers would in many markets be able to raise fares sharply without the prospect of interference by state regulators. This result, at least in the near term, certainly does not benefit travellers who must either pay the higher fare or travel by other means.[31] We se-

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Footnotes continued from last page

level is determined by the average costs of all carriers. • • •

[25] *See* discussion on page 10, *supra*, of fares in effect and the *DPFI* fare levels on July 1, 11977, and Appendix A.

[26] *See* comments of Senator Cannon during debate of S. 2493, Congressional Record—Senate S5890, April 19, 1978.

[27] Sections 1002(e) and 102(a).

[28] Section 1002(d), the "Rule of Ratemaking," provides:

In exercising and performing its power and duties with respect to determining rates, fares, and charges described in paragraph (1) of subsection (d) of this section, the Board shall take into consideration, among other factors—

(1) the criteria set forth in section 102 of this Act;

(2) the need for adequate and efficient transportation of persons and property at the lowest cost consistent with the furnishing of such service;

(3) the effect of prices upon the movement of traffic;

(4) the desirability of a variety of price and service options such as peak and off-peak pricing or other pricing mechanisms to improve economic efficiency and provide low-cost air service; and

(5) the desirability of allowing an air carrier to determine prices in response to particular competitive market conditions on the basis of such air carrier's individual costs.

Section 102(a), the Declaration of Policy for Interstate and Overseas Air Transportation, contains several factors as being in the public interest which militate towards a gradual implementation of higher intrastate fares:

(a) In the exercise and performance of its powers and duties under this Act with respect to interstate and overseas air transportation, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity;

• • • • •

(3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, the need to improve relations among, and coordinate transportation by, air carriers, and the need to encourage fair wages and equitable working conditions.

(4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (b) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital.

(5) The development and maintenance of a sound regulatory environment which is responsive to the needs of the public and in which decisions are reached promptly in order to facilitate adaptation of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States, the Postal Service, and the national defense.

(6) The encouragement of air service at major urban areas through secondary or satellite airports, where consistent with regional airport plans or regional and local authorities, and when such encouragement is endorsed by appropriate State entities encouraging such service by air carriers whose sole responsibility in any specific market is to provide service exclusively at the secondary or satellite airport, and fostering an environment which reasonably enables such carriers to establish themselves and to develop their secondary or satellite airport services.

• • • • •

(8) The maintenance of a comprehensive and convenient system of continuous scheduled airline service for small communities and for isolated areas, with direct Federal assistance where appropriate. • • •

• • • • •

(10) The encouragement of entry into air transportation markets by new air carriers, the encouragement of entry into additional air transportation markets by existing air carriers, and the continued strengthening of small air carriers so as to assure a more effective, competitive airline industry.

[29] As we have indicated, *supra*, intrastate fares have been held below *DPFI* fares in many markets because of state regulatory policies and/or lower-cost intrastate operations. *See* Appendix A, for examples. The opportunity afforded by our more liberal policies to exit and enter an interstate market with a higher permissible fare level could prove enticing to a carrier serving a low fare, thin intrastate market. We say that this is a risk, rather than a certainty, because we cannot predict how a carrier might react in any given set of circumstances.

[30] The prospect of relatively lower fare levels may also deter new entry by potential competitors into markets where intrastate ceilings were imposed.

[31] The opportunity to charge relatively higher fares in some intrastate markets not served by a purely intrastate carrier still

Footnotes continued on next page

riously doubt that Congress intended fares to double overnight in these markets without risk of Board scrutiny. The reallocations of scarce resources that follow from either approach—an intrastate fare ceiling or a *DPFI* fare ceiling—cannot be avoided completely under any approach. The incentives, however, whether artificial or real, can be reduced by the phased approach exemplified by our proposal.

We have the authority to do what we propose. As we previously observed, the ambiguity of the Act in this area requires us to interpret the meaning of the standard industry fare levels under section 1002(d)(6), and to rationalize the conflicting interpretations in a manner that maximizes the different statutory policies. The Board, moreover, retains its general powers under section 204(a) to administer the Act as we deem necessary to carry out its provisions and to exercise and perform our powers and duties under it; and there can be no question that our proposed policy conforms to those factors articulated by Congress as being in the public interest.[32] We have tried to avoid overly dogmatic analyses to rationalize a result which we believe is right. Our proposal is sound and founded on the Act. Those persons affected or otherwise interested now have ample opportunity to persuade us that our preliminary formulations should be modified.

Therefore, we adopt for immediate effectiveness an interim suspension policy applicable to fare increases filed for air transportation between intrastate pairs of points in California, Florida, and Texas. This policy will provide ceiling fares (standard industry fare levels) for such pairs of points based upon the predominant fare charged in those markets on July 1, 1977, as adjusted per section 1002(d)(6) of the Act, plus ten percent. For purposes of determining the ceiling fare, we will presume that it was the lowest, unrestricted fare charged, provided that a higher fare may be justified as the ceiling for a pair of points upon a showing that more passengers used it than used the lower fare. On and after July 1, 1979, these ceilings would become the standard industry fare levels for a zone of reasonableness. On that date, we propose also to begin raising the ceilings eight percent semiannually until January 1, 1981, when the PS-80 formula fare level will become the standard.

Because the Airline Deregulation Act requires immediate application of its provisions on fares, the Board finds, for good cause shown, that notice and public procedure are contrary to the public interst, and that the interim rule should be made effective immediately. However, by a notice in this issue of the FEDERAL REGISTER, the Board is soliciting public comments on the interim rule. The Board will then reconsider the interim rule in light of the comments.

We find and conclude that our proposal is not a major federal action significantly affecting the environment. The purpose of these policies is to minimize, over the near term, changes which might otherwise occur to fares and existing service levels in the markets affected. In those markets where PS-80 ceilings already dominate, we have previously made findings on the environmental implications of the related policies.

Accordingly, we find and conclude that we should adopt the following as an interim suspension policy:

INTERIM RULE

The Board amends, on an interim basis, § 399.33 of 14 CFR Part 399, *Statements of General Policy,* to read as follows:

§ 399.33 Domestic passenger fare-structure policies.

The Board's policy on the structure of passenger fares for scheduled services by trunk and local service carriers in markets within the 48-contiguous states and the District of Columbia is as follows:

(a) Ceiling trunk coach fares [1] for trips of any given distance should be based upon the fare formula established by the Board in Phase 9 of the Domestic Passenger-Fare Investigation (Docket 21866-9) as adjusted by the Board's fare level standards and for cost increases in all markets except intrastate pairs of points within the states of California, Florida, and Texas where ceiling fares should be based upon the predominant fare charged on July 1, 1977, adjusted for cost increases, plus ten percent,[2] provided that this ceiling will be raised eight percent on July 1, 1979, and every six months thereafter as adjusted for cost increases until January 1, 1981,[3] at which time the ceiling will be the DPFI formula; coach fare proposals priced above this ceiling or the upper limits specified under section 399.31(h) should be suspended unless otherwise justified; [4] carriers may propose fares lower than the ceiling in individual markets;

(b) Carriers should be free to set the level of first-class fares; and

(c) There should be joint fares in all markets over all routings at a level not to exceed the sum of the maximum local fares permitted by this policy statement minus one tax-rounded coach ceiling terminal charge for each interline connection. All required joint fares should be divided according to the relative costs of the mileage flown by each carrier participating in the interline movement, provided, however, that where joint fares are based on the actual sum of the local fares, each carrier should get the local fare as its share of these joint fares.

(Secs. 204, 403, 404, and 1002 of the Federal Aviation Act of 1958, as amended; 72 Stat. 743, 758, 760 and 788, as amended; 49 U.S.C. 1324, 1373, 1374, and 1482; and 5 U.S.C. 553).

By the Civil Aeronautics Board.

PHYLLIS T. KAYLOR,
Secretary.

Footnotes continued from last page

subject to state regulation could also lead interstate carriers to transfer equipment out of the intrastate markets subjected to state-imposed ceilings to these more lucrative markets.

[32] *See* discussion on pp. 13-14 and *Permian Basin Area Rate Cases,* 390 U.S. 747, 767, 88 S.Ct. 1344, 1360 (1968) re an agency's powers to devise methods of regulation capable of equitably reconciling diverse and conflicting interests.

[1] The Board's policy with regard to the coach, regional or jet custom fares of local service carriers appears on section 399.32 of this Part.

[2] It is presumed that the lowest, unrestricted fare in effect on July 1, 1977, for a market was the predominant fare; however, this presumption may be rebutted by a showing that more passengers used a higher fare. If the predominant fare is at least 90 percent of the DPFI ceiling, it would be the ceiling.

[3] Or when the fares reach the DPFI formula ceiling, if that occurs before January 1, 1981.

[4] For peak fares above any of these levels, the justification should include a showing that off-peak fares are available in the market.

[6320-01-C]

APPENDIX A.—FARES IN SELECTED INTRA-STATE MARKETS
June, 1977, December, 1978, and Ceiling Fare Levels

City Pair, Mileage, and Carriers	June, 1977 1/ Fare Class	June, 1977 1/ Fare	December, 1978 1/ Fare Class	December, 1978 1/ Fare	D.P.F.I. Fare "Y" Class June	D.P.F.I. Fare "Y" Class Dec	Ceiling Fare Fare Class	Ceiling Fare Fare
Miami - Tampa (MIA-TPA)								
204 miles	F	54.00	F	47.00	37.00	41.00		
DL, EA, NA, NW	(AC) A	40.00	(AC) A	40.00				
TW, BN	(QH) S	30.00	(QH) S	38.00				
	Y	36.00	Y	39.00			Y	41.00
AC (Air Sunshine)	FN	36.00	FN	39.00				
QH (Air Florida)	YN	29.00	YN	31.00				
	(QH) K	18.00	(QH) K	18.00				
			K	35.00				
Miami - Tallahassee (MIA-TLH)								
403 miles	F	87.00	F	72.00	56.00	62.00		
EA, SO, NA	(QH) S	50.00	(QH) S	59.00				
	S	56.00	S	60.00				
QH (Air Florida)	Y	56.00	(SO) SL	52.00			Y	62.00
	(QH) K	25.00	Y	60.00				
			FN	60.00				
			(QH) K	29.00				
Miami - Melbourne (MIA - MLB)								
160 miles	F	48.00	F	42.00	32.00	36.00		
EA, NA	Y	32.00	Y	35.00			Y	36.00
	FN	32.00	FN	35.00				
	YN	26.00	YN	28.00				
Dallas/Ft. Worth - Houston (DFW-IAH) (DAL-HOU)								
224 miles	F	58.00	F	50.00	39.00	43.00		
TI, BN	(FY)A	43.00	FN	42.00				
	(WN)S	25.00	(WN) S	28.00			S	31.00
	(TI)V	15.00	(TI) V	18.00				
WN (Southwest)	(TI)S	39.00	(TI) S	42.00			S	43.00
FY (Metroflight)	Y	39.00	Y	42.00				
	(WN)K	15.00	(WN) K	18.00				
	(TI)K	25.00	(TI) K	28.00				
			YN	34.00				
El Paso - Midland/Odessa (ELP-MAF)								
247 miles	F	61.00	F	53.00	41.00	46.00		
CO, TI	Y	41.00	Y	44.00			Y	46.00
	FN	41.00	FN	44.00				
WN (Southwest)	YN	33.00	YN	35.00				
	K	17.00	K	28.00				
	KN	30.00	(WN) S	28.00				
			(WN) K	18.00				
Harlingen - San Antonio (HRL-SAT)								
233 miles	(WN) S	25.00	(WN) S	28.00	39.00	44.00	S	31.00
TI	(WN) K	15.00	(WN) K	18.00				
WN (Southwest)								
Sacramento-San Diego (SMF-SAN)								
480 miles	(WA) F	32.05	S	40.00	61.00	70.00		
RW, UA, WA	(PS) F	32.30	Y	68.00				
	(OC) F	32.19	K	40.00				
PS (Pacific Southwest)			(WA) K	32.55				
OC (Air California)			(WA) KL	24.00				
			(PS) KL	25.00				
			(PS) K	40.00			K	40.00
San Diego - Stockton (SAN-SCK)								
423 miles	(PS) K	31.75	(PS) K	40.00	57.00	64.00	K	40.00
UA, RW								
PS (Pacific Southwest)								
Long Beach - San Jose (LBB-SJC)								
324 miles	(PS) F	26.95	(PS) K	32.00	48.00	54.00	K	33.00
			(PS) KL	20.00				

1/ Official Airline Guide, North American Edition.

APPENDIX A.—FARES IN SELECTED INTRA-STATE MARKETS—Continued

June, 1977, December, 1978, and Ceiling Fare Levels

City Pair, Mileage, and Carriers	June, 1977 1/ Fare Class	June, 1977 1/ Fare	December, 1978 1/ Fare Class	December, 1978 1/ Fare	D.P.F.I Fare "Y" Class June	D.P.F.I Fare "Y" Class Dec.	Ceiling Fare Fare Class	Ceiling Fare Fare
Monterey - San Francisco (MRY-SFO)								
77 miles	F	20.30	C	21.00	25.00	28.00		
UA, RW	Y	16.00	S	16.00			Y	20.00
	S	18.34	(RW) C	23.00				
DK (California Air)	(DK) A	21.60	Y	13.30				
PS (Pacific Southwest)			(UA) Y	14.00				
			K	10.00				
			(PS) K	15.00				
			(PS) KL	10.00				
			(RW) K	18.34				
			Q	10.00				
Bakersfield - Sacramento (BFL-SMF)								
265 miles	(WI) A	37.50	A	40.50	42.00	47.00		
UA, RW			C	34.00				
			(WI) A	40.50				
WI (Swift-aire)			(RW) C	37.00				
			K	29.60			K	29.60
Eureka/Arcata - San Francisco (ACV-SFO)								
257 miles	S	30.93	(1K) A	40.00	42.00	47.00		
RW	(1K) A	36.99	C	36.00			S	38.00
1K (Eureka Aero)			(RW) C	39.00				
			K	30.93				
Los Angeles - San Francisco (LAX - SFO)								
337 miles	F	34.70	F	35.40	49.00	55.00		
TW, UA, CO, RW	(TW) F	34.80	(TW) F	34.80				
NW, BN, PA, WA	(UA) F	35.40	(WA) F	35.00				
	(CO) F	73.00	(UA) F	36.00				
PS (Pacific Southwest)	S	26.00	C	32.00				
OC (Air California)	Y a/	49.00	(RW) C	35.00				
	FN	34.70	Y	19.00				
	(UA) FN	35.40	(BN) Y	25.95				
	YN	25.50	(WA) Y	53.00				
	(UA) YN	25.95	FN	19.00				
	K	25.50	(WA) FN	35.00				
	(UA) K	25.95	YN	15.00				
	(CO) K c/	27.75	(WA) YN	28.10				
	(OC) K	28.20	(TW) K	19.00				
	(PS) K	25.95	K b/	28.10				
			(WA) KL	19.00				
			(PS) KL	20.00				
			(UA) K	30.00				
			KN	20.00				
			(PS) K	32.00			K	32.00
			S	34.00				
			K	25.00				

a/ NW, PA, BN conditional traffic only

b/ WA, UA, RW

c/ Economy class.

[6320-01-M]

APPENDIX B.—*Methodology for Determining Change in Operating Expense Per Available Seat-Mile*

Year ended June	Trunks	Locals	Trunks plus locals	Total psgr./ cargo
1978				
Total Oper. Exp. [1]	$13,721	$1,935	$15,644	$15,978
Less: All-Cargo Exp. [2]	279		279	279
Less: Belly offset [3]	869	142	1,001	1,054
Less: Non-Sched. [4]	212	50	262	275
Less: Trans. Related [5]	380	25	405	409
Psgr. Oper. Expense	$11,981	$1,718	$13,687	$13,961
Sch. Svc. ASM's (000)	258,266	26,167	284,433	287,465
Oper. Exp./ASM	.04640	.06566	.04813	.04858
1977				
total Oper. Exp. [1]	12,112	1,647	13,759	14,051
Less: All-Cargo Exp. [2]	247		247	247
Less: Belly offset [3]	740	99	839	879
Less: Non-Sched. [4]	225	37	262	276
Less: Trans. Related [5]	306	26	331	335
Psgr. Oper. Expense	10,594	1,486	12,080	12,314
Sch. Svc. ASM's (000)	243,448	24,004	267,452	270,264
Oper. Exp./ASM	.04352	.06191	.04517	.04557
Percent change in Oper. Exp/ASM	6.62	6.06	6.55	6.61
Projected change from June, 1977 to March 30, 1979 [6]				11.85

[1] Total operating expenses for all operations and services.
[2] Operations performed in all-cargo services, carrier estimate.
[3] Total cargo revenues (less carrier all-cargo revenue) carried as by-product in aircraft belly compartments (freight, express, mail, ex. baggage).
[4] Total non-scheduled revenues times .95.
[5] Total transported-related expenses, less any excess of expenses over total transport-related revenues.
[6] For fares effective through July 1, 1979, with costs projected through March 30, 1979. Projection factor is 106.61 to the 1.750 power – 1.750 log 106 61 = 1.1185.

Sources: *Air Carrier Financial Statistics, Air Carrier Traffic Statistics.* "C.A.B. Forms 41 and 242".

[FR Doc. 79-4866 Filed 2-14-79; 8:45 am]

[6320-01-M]

[Reg. PS-83; Amdt. No. 62; Docket 34684]

PART 399—STATEMENTS OF GENERAL POLICY

Implementation of Preemption Provisions of the Airline Deregulation Act of 1978

AGENCY: Civil Aeronautics Board.

ACTION: Final Rule.

SUMMARY: This rule sets interim Board policies for regulation of intrastate routes of airlines with interstate authority. The policies go into effect immediately, but by a notice published in this issue of the FEDERAL REGISTER (PSDR-56) we are inviting comments on them to aid our adoption of final policies. Policies of rate regulation for intrastate routes are the subject of a separate rulemaking also published in this part (PS-82).

DATES: Effective: February 14, 1979; Adopted: February 7, 1979.

FOR FURTHER INFORMATION CONTACT:

John Freeman, Office of the General Counsel, Civil Aeronautics Board, 1825 Connecticut Avenue, NW., Washington, D.C., 20428, (202) 673-5792.

SUPPLEMENTARY INFORMATION: Adopted by the Civil Aeronautics Board at its office in Washington, D.C. February 7, 1979. This rule sets interim Board policies for regulation of intrastate routes of airlines with interstate authority. The policies go into effect immediately, but, by a notice published elsewhere in Part III of this issue of the FEDERAL REGISTER we are inviting comments on them to aid our adoption of final policies. The Board has concluded that it, not the States, is responsible for economic regulations of all the routes, rates or services of any airline holding either a certificate of public conveniences and necessity to provide interstate air transportation or an exemption under section 416 of the act from the requirement for such a certificate. Tentatively included within the types of regulation that are preempted are those governing scheduling, in-flight amenities, bonding, insurance, minimum capitalization and other regulations designed to affect the quality of air service. In occupying the entire field of economic regulations, we recognize that there are some types of state regulation that we may want to consider adopting uniformly for all air carriers, and, until we have considered these regulations carefully, we conclude that the public interest is best served if we adopt the existing state requirements as our own. This aspect of the rule is discussed in more detail below.

The starting point for our analysis is the Airline Deregulation Act of 1978 (ADA) (Pub. L. 95-504) which became effective on October 24, 1978. In broad outline, the ADA sets deadlines and policies for deregulating economic aspects of interstate air transportation, culminating in the sunsetting of the Board's principal domestic rate and route authority. By phasing out economic regulation of airlines, Congress sought to encourage a more competitive and efficient airline industry.

As part of this deregulation effort, Congress enacted a provision (section 4 of Pub. L. 95-504; section 105 of the Federal Aviation Act) specifically preempting State regulation of the rates, routes or services of air carriers having authority under Title IV of the Federal Aviation Act to provide interstate air transportation. Section 105(a) provides:

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having

authority under title IV of this Act to provide interstate air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 401 of this Act, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

Other paragraphs of that section provide that when an intrastate airline receives federal authority, any authority it had received from a State shall be considered to be part of its authority to provide air transportation received from the Board; and that State and local authorities may continue to exercise their proprietary powers and rights as owners or operators of airports served by federally certificated air carriers.

One policy behind section 105 was to prevent State economic regulation from frustrating the benefits of decreased Federal regulation. In the section-by-section analysis of a precursor to the ADA, the House managers of the Bill stated:

> • • • with the passage of legislation . . . loosening Federal regulation of airline service and fares, it is possible that some States will enact their own regulatory legislation, imposing utility type regulation on interstate airline service and fares. The [Act] includes a specific statutory provision precluding State interference with interstate service and fares. Section-by-section analysis of H.R. 8813, Cong. Rec., September 23, 1977, H. 10007-8.

Another policy was to avoid the confusion caused under existing law which permitted dual State and Federal regulation of the same carrier. Prior to the ADA, carriers were often subject to dual and conflicting State and federal regulation. The Board granted authority to carry passengers whose journey began in one State and ended in another, and it regulated those passengers' rates. Many States engaged in similar regulation of passengers on intrastate journeys. Since the passenger's ultimate origin and destination was determinative in establishing regulatory jurisdiction,[1] a single flight would frequently carry both interstate and intrastate passengers, regardless of whether the plane itself crossed State boundaries.

Conflicts arose because of differences in State and Federal operating authority and in State and Federal rate regulations. While the State's authority over federal carriers was subject to challenge under traditional doctrines of implicit Federal preemption, in the absence of an explicit Congressional statement, the outcome of this kind of challenge was by no means clear.[2]

The House Report accompanying the Act indicates that the preemption provision was designed to "prevent conflicts and inconsistent regulations . . ." 95th Cong. 2d. Sess. House Report No. 95-1211, p. 16. To remedy the situation Congress concluded that a federal grant of authority to an air carrier to engage in interstate transportation should give the Federal Government the sole responsibility for regulating that carrier. 95th Cong. 2d. Sess. Senate Report No. 95-631, p. 98. Accordingly, the Board now has economic regulatory responsibility for all operations of carriers with Federal authority to the exclusion of the States.

We are aware of some State regulatory actions that contravene section 105. For example, California continues to exert rate jurisdiction over intrastate routes of all federally authorized carriers under compulsion of the State constitution.[3] Some States have required state certification of air taxis registered under Part 298 of the Board's Economic Regulations (14 CFR Part 298). For example, Texas has required federally authorized carriers to obtain certificates of operating authority conditioned on compliance with insurance, liability, bonding and/or capitalization requirements. Some airports have tried to bar new entrants under the guise of exercising proprietary functions, while at the same time permitting existing carriers to expand their operations. At least 27 States claim statutory authority to regulate the economics of air transportation in one form or another.

Because Congress by statute has charged the Board with the responsibility for economic regulation of all of the operations of interstate carriers, and has established a program of deregulation of those operations, we find it important to establish our policies on this matter immediately to avoid unnecessary confusion and overlapping regulation during the transition to an unregulated industry. In the absence of clear predictable policies, the threat of unlawful state regulation may well chill the enthusiasm of carrier management to make competitive route and rate decisions—for example, to enter new markets or adopt innovative pricing policies. This is especially true for small commuter air carriers or wholly new entrants who generally do not have the resources to assert their commercial rights as effectively as large certificated carriers. This could prevent important parts of the industry from achieving the state of competitive efficiency Congress sought. It could also seriously hamper our ability to fulfill our statutory responsibilities under section 102(8) of the Act, *viz*, "The maintenance of a comprehensive and convenient system of continuous scheduled airline service for small communities."

Accordingly, we find good cause why it is in the public interest to adopt these policies on preemption and make them effective immediately on an interim basis. We are interested in receiving public comments in order to aid us in developing final policies.

Which Carriers Are Covered

Certificated carriers. The first question to face is which carriers fall within the scope of section 105 so as to preempt State route, rate and service regulation. The operative language is "air carriers having authority under Title IV of the Act to provide interstate air transportation". There can be no question that this language includes all air carriers holding Federal certificates under Title IV no matter how small a percentage of their total operations that certificate accounts for. Congress specifically rejected a provision that would not have triggered federal preemption until 50 percent of revenues of former intrastate carriers were derived from the carrier's interstate traffic (Section 17 of S. 2493) in favor of the House version triggering preemption upon the receipt of federal authority in any market.[4]

The next question is when preemption of State regulation of a certificated carrier is triggered. Both the plain wording of the Act and sound policy dictate that preemption occurs when the certificate becomes effective. The Act preempts state regulation of carriers *having authority.* It is difficult to read that statutory language in any way except that preemption occurs with the effectiveness of federal authority. This is a sound result because the alternative interpretation—*i.e.*, that preemption occurs only after the carrier begins to operate under federal authority—would create unnecessary uncertainty about the date for trans-

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[1] *The People of the State of California, et al.* v. *Civil Aeronautics Board,* 581 F.2d 954, 956 (D.C. Cir. 1978), cert denied, U.S. (1979); *Civil Aeronautics Board* v. *Friedkin Aeronautics,* 246 F.2d 173 (9th Cir. 1957).

[2] *Opinion of the Justices,* 271 N.E. 2d. 354 (Mass. 1971); *Pioneer Airways* v. *City of Kearney,* 199 Neb. 12, 256 N.W. 2d. 324 (1977). *See also, Baltimore Shippers and Receivers Association, Inc.* v. *The Public Utility Commission of California,* 268 F. Supp. 836 (N.D. Cal. 1967), aff'd, 389 U.S. 583 (1968). Compare, *People of California* v. *Western Air Lines,* 42 Cal. 2d. 621, 268 F.2d 723 (1954).

[3] California's decision in this regard is the subject of a challenge by several federally certificated carriers. Civil Action No. C 78-2880 SW, United States District Court, Northern District of California. The United States and the Civil Aeronautics Board have intervened in this suit and have asked for an injunction to prevent the State of California from illegally asserting jurisdiction over federally authorized carriers.

[4] 95 Cong. 2d. Session Senate Report No. 95, p. 171, Cong. Rec. April 19, 1978, p. S. 5910.

fer from state to federal regulation. Moreover, the language of section 105(c) federalizing all authority granted by the state upon *receipt* of authority under Title IV is additional plain language indicating that federalization is triggered when the federal authority becomes effective.

Accordingly, we conclude that federal preemption is triggered as of the date any carrier's federal certificate becomes effective.

Air taxis. We also conclude that an air taxi exemption granted under section 416(b) of the Act (49 U.S.C.A. 1386(b)) or Part 298 of the Board's Economic Regulations (14 CFR Part 298) is sufficient to trigger preemption. Beginning with the plain words of the statute, air taxis are exempt from the certification requirement of section 401 based on the Board's power under section 416, and their authority therefore stems from the requirements and provisions of the Title IV. Moreover, in Alaska Congress made it clear that the basis for federal authority in the state of Alaska must be a certificate. Section 105(a)(2). That specific exception would not have been necessary unless, in other states, a federal exemption is sufficient to trigger preemption.

Legislative history of the ADA reinforces the above interpretation. The Senate Bill (S. 2493)[5] specifically triggered preemption for any carrier "certificated or exempted by the Board" under Title IV, and the Conference Committee's selection of even broader House language, "authority under Title IV", includes at least the two forms of authority specifically mentioned in S. 2493. In explaining the Senate provision, Senator Cannon stated that if Part 298 taxis retain their exempt status, federal law would preempt state regulation over them. Cong. Rec., April 19, 1978, S. 5873. Thus, Congress intended that air taxis registered under Part 298 be exempt from state economic regulation.

Accordingly, we conclude that all air taxis registered under Part 298 or other federal air taxis regulations qualify as federal carriers under section 105.[6]

It should be noted that particular carriers may have a choice of federal or state regulation. Under section 401(d)(4), true intrastate carriers with more than 30 seat aircraft can interline with Federal carriers without coming under federal jurisdiction. Those carriers therefore have a choice of operating pursuant to the exception in section 401(d)(4) or registering as a federal air taxi under Part 298. A carrier choosing the former route would not be a federal carrier for preemption purposes unless it were to have some other authority under Title IV.

Federal Regulation Under Section 105

Congress has created a scheme of federal regulation of all operations of federally authorized carriers. When a carrier operating under intrastate authority receives federal authority, all of its intrastate authority is to be considered part of the authority to provide air transportation received from the Board. Section 105(c). The Conference Committee in summarizing the Senate Bill indicated that when preemption occurs for a particular carrier (in that Bill, after more than 50 percent of its revenues are derived from interstate operations), *all* of the carrier's operations become subject to Board jurisdiction. 95th Cong. 2d. Sess. Report 95-1770 p. 95. Thus, Congress did not preempt in such a way as to create a regulatory vacuum. It guaranteed newly federalized carriers federal authority that is at the outset coextensive with their state authority, and it intended that the Board would exercise sole and complete economic regulatory jurisdiction over all federal carriers' operations.

It is likely that certain carriers whose operations have thus far been regulated principally by the states will fall entirely under Board jurisdiction by virtue of section 105. In general, we see no basis for distinguishing between carriers that are new to complete federal regulation from those that have been subject to the Board's authority for some time now. It is useful to spell out what the implications of federal regulation are for newly federalized carriers.

Air taxis. The adjustment to federal regulation for air taxis should not be difficult. Registration under Part 298 and compliance with the Board's requirements under that Part qualifies a carrier to engage in interstate air transportation with small aircraft in all markets by virtue of an exemption from the certification requirement of section 401(a) (49 U.S.C.A. 1371(a)). See § 298.11(a) of the Board's Economic Regulations (14 CFR 298.11(a)). No tariffs need be filed for such operations except for through joint fares with air carriers or foreign air carriers that are subject to tariff filing requirements (14 CFR § 298.11(b)) and such other requirements as the Board may prescribe by order. Other requirements that apply to air taxis operators (reporting, liability insurance, filing of agreements) are familiar to the registrant and designed to minimize its burden. Accordingly, we do not anticipate that Part 298 operators with substantial intrastate operations formerly regulated by the states will encounter difficulties in coping with the transition to complete federal regulation. All that is necessary is to keep abreast of Part 298 requirements and, in the transition phase, to comply with certain existing state regulations as outlined below.

Certificated Carriers. Some large aircraft operators had been operating virtually entirely pursuant to state economic regulatory authority before the ADA, but will come entirely under Board regulation by virtue of federal certification for interstate service. Air Florida, PSA, Air California and Southwest Airlines are examples. As their federal authority becomes effective, those carriers will have to file tariffs with the Board governing their intrastate routes and their intrastate authority will be part of their federally granted authority for purposes of other provisions in the Act, for example sections 401(d)(5) and (7) permitting limited automatic entry and entry into markets where federal authority has been dormant.

Various other Board requirements such as denied boarding rules, no-smoking rules and minimum baggage liability rules will apply with equal force to new and old federal carriers. We are in the process of revamping data reporting rules and newly federalized carriers should be in contact with the Board's Bureau of Carrier Accounts and Audits to facilitate compliance with any reporting or accounting requirements that apply to them. We are also considering minimum insurance requirements under section 401(q) (49 U.S.C.A. 401(q)). It should be emphasized that, while we do not plan to make regulatory distinctions based merely on whether a carrier is a new as opposed to an existing federal carrier, we are prepared to consider temporary relief from the burden of regulations for any carrier or class of carriers when an exemption is consistent with the public interest under section 416(b) (49 U.S.C.A. 1386(b)).[7]

Finally, with respect to rate regulation of newly certificated federal carriers, we will develop policies that will ease the transition to deregulation while preventing exploitation of consumers during that transition. Those policies are the subject of a separate rulemaking.

State Regulation of Air Carriers

Section 105 forbids state regulation of a federally authorized carrier's

[5] Id.

[6] Section 416(b)(4) provides automatic federal authority for small aircraft operators (less than 56 seats or 18,000 pounds of payload) who comply with Board insurance and liability regulations and such other reasonable requirments as the Board may adopt. Thus far, Part 298 is the Board's only regulation on air taxi authority, so all air taxis operate pursuant to Part 298. We recognize that carriers other than those discussed may acquire limited federal authority, such as by temporary exemption under 416(b), and we will deal with any problems that arise on a case-by-case basis.

[7] Southwest Airlines has filed such a request in Docket 34527.

routes, rates, or services. Clearly, states may not interfere with a federal carrier's decision on how much to charge or which markets to serve. Thus, a state may not establish licensing requirements for federal carriers and may not require carriers to adopt any particular rate or zone of rates. Similarly, a state may not interfere with the services that carriers offer in exchange for their rates and fares. For example, liquidated damages for bumping (denial of boarding), segregation of smoking passengers, minimum liability for loss, damages and delayed baggage, and ancillary charges for headsets, alcoholic beverages, entertainment, and excess baggage would clearly be "service" regulation within the meaning of section 105.

Additionally, we conclude that regulation of capital structure, minimum insurance requirements, bonding, etc. motivated by a desire to protect the quality of service is included with the preemption imposed in section 105. Such regulations necessarily involve a balancing of such considerations as the need to assure carriers' financial integrity and further other goals of consumer protection, and at the same time, to reduce the barriers to entry and encourage competition. Such balancing is essential to the success of deregulation and reliance on the free market, and it is specifically within the Board's province. For states to impose different requirements would interfere with the federal deregulation program both by imposing different priorities than those selected by the Board and by creating confusing multiple regulations of the same subject matter.

Accordingly, we conclude that preemption extends to all of the economic factors that go into the provision of the *quid pro quo* for passenger's fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing; and we hereby occupy these fields completely. We recognize however that the transition from state to federal regulation will take time, and that the Board has not yet fully evaluated the need for certain types of regulations that have been imposed by some states. For example, according to a survey by the National Association of State Aviation Officials, 20 States require airlines to have bodily injury and property damage liability insurance. Amounts vary but are generally in the range of $50,000 to $100,000 per seat. Some states (for example, Arizona and Texas) have bonding requirements of up to $100,000. Many states take the carrier's capital structure into account in licensing them for intrastate operations, and Texas specifically requires a minimum of $50,000 capitalization.

The Board will eventually consider the need to adopt uniform regulations on insurance and bonding (see, *e.g.*, section 403(g)). Until we do, we conclude that consumer interests will be served and the transition to Federal regulation will be smoothed if we adopt existing respective state regulations on bonding and minimum liability insurance as our own. Any filings that states require to enforce those regulations should be made with the Special Authorities Division of the Board, Room 915, 1825 Connecticut Avenue, N.W., Washington, D.C. 20428. On the other hand, we view minimum capitalization requirements as attempts to regulate fitness and rates, rather than as consumer protection, and we see no need to inject state requirements on this subject into existing Federal policies of fitness, rate and accounting regulation. We do not here decide what minimum capitalization requirements, if any, the Board would consider in developing Federal fitness concepts.

Finally, we conclude that Congress has not changed the *status quo* with respect to the rights and powers of local governments to take certain actions in their capacity as airport owners and proprietors under case law. See, *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635, n. 14 (1973). The full scope of those rights and powers has yet to be developed, but it is clear that the airport proprietor must be acting on its own, not under legislative compulsion, and that its actions must be reasonable, nondiscriminatory, nonburdensome to interstate commerce and reasonably prompt. *British Airways* v. *Port Authority of New York*, 558 F. 2d 75 (2d Cir. 1977); 564 F. 2d 1002 (2d Cir. 1969). As a general rule, States' proprietary rights must be exercised to accomplish legitimate interests in a manner that does not conflict with the provisions and policies of the ADA.

Accordingly, the Civil Aeronautics Board amends Part 399 of its Policy statements (Part 399 of Chapter II, title 14, Code of Federal Regulations) as set forth below.

1. The table of contents is amended to add a new subpart J as follows:

Subpart J—Policies Relating to Federal Preemption of State Economic Regulation

Sec.
399.110 State economic regulation of Federally authorized carriers prohibited.
399.111 All operations of Federally authorized carriers to be regulated by the board.

2. A new Subpart J is added to read as follows:

Subpart J—Policies Relating to Federal Preemption of State Economic Regulations

§ 399.110 State economic regulation of Federally authorized carriers prohibited.

(a) Section 105 of the Act states, that except as provided in paragraph (b), no State or political subdivision thereof and no interstate agency of two or more States shall enact or enforce any law, rule, regulations, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of the Act to provide interstate air transportation.

(b) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under Section 401 of the Act, the provisions of paragraph (a) shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

(c) Except for air transportation conducted wholly within the State of Alaska, any air carrier holding an effective certificate of public convenience and necessity issued pursuant to section 401 or 418 of the Act, an exemption from those sections pursuant to Part 298 of this chapter, or any other authority under title IV of the Act to provide interstate air transportation qualifies as a federally authorized carrier for purposes of the preemption of State regulation under this subpart.

(d) Examples of regulatory actions preempted under this section include, but are not limited to, tariff filing, certification, regulations governing flight frequency, mode of operation, in-flight amenities, liability, insurance, bonding, and capitalization.

(e) The Board adopts as its own existing State regulations governing insurance and bonding of Federally authorized carriers until the Board has reviewed the need for Federal regulation in those areas. Proof of compliance with state rules, as required by State law, shall be filed with the Special Authorities Division, Civil Aeronautics Board, 1825 Connecticut Avenue NW., Washington, D.C. 20428.

(f) This subpart shall not limit the authority of any State or politicial subdivision thereof or any interstate agency or other political agency of two or more States, as the owner or operator of any airport served by any air carrier certificated by the Board, to exercise its proprietary powers and rights, when such exercise is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate State objective in a manner that does

not conflict with the provisions and policies of the Act.

§ 399.111 All operations of federally authorized carriers to be regulated by the Board.

(a) All operations of Federally authorized carriers are subject to the requirements of title IV of the Act, including certification and tariff-filing requirements, unless otherwise exempted from one or more of those requirements by Board order or regulation.

(b) When any intrastate air carrier that in August 1, 1977, was operating primarily in intrastate air transportation regulated by a State receives the authority to provide interstate air transportation, any authority received from such State shall be considered to be part of its authority to provide air transportation received from the Board under Title IV of the Act, until suspended, amended, or terminated as provided under such title.

(Sections 102, 105, 204, 401, 403, and 416 of the Federal Aviation Act of 1958, as amended; 72 Stat. 740, ———, 743, 754, 758, 771; 49 U.S.C. 1302, 1305, 1324, 1371, 1373, and 1386.)

By the Civil Aeronautics Board.

PHYLLIS T. KAYLOR,
Secretary.

[FR Doc. 79-4867 Filed 2-14-79; 8:45 am]

[6320-01-M]

CIVIL AERONAUTICS BOARD

[PSDR-56; Docket 34684]

[14 CFR Part 399]

STATEMENTS OF GENERAL POLICY

Implementation of Preemption Provisions of the Airline Deregulation Act of 1978

FEBRUARY 7, 1979.

AGENCY: Civil Aeronautics Board.

ACTION: Proposed rule.

SUMMARY: The Board is issuing, as PS-83 in this part of the FEDERAL REGISTER, a rule setting policy for regulation of intrastate routes of airlines with interstate authority. Although the rule is effective immediately, the Board hereby invites comments on that rule, and will consider revising the rule on the basis of information and arguments submitted by all interested persons.

DATES: Comments by: April 16, 1979. Comments and other relevant information received after this date will be considered by the Board only to the extent practicable.

FOR FURTHER INFORMATION CONTACT:

John Freeman, Office of the General Counsel, Civil Aeronautics Board, 1825 Connecticut Avenue, N.W., Washington, D.C. 20428 (202) 673-5792.

(Secs. 102, 105, 204, 401, 403, and 416 of the Federal Aviation Act of 1958, as amended; 72 Stat. 740, —, 743, 754, 758, 771; 49 U.S.C. 1302, 1305, 1324, 1371, 1373, and 1386).

By the Civil Aeronautics Board.

PHYLLIS T. KAYLOR,
Secretary.

[FR Doc. 79-4868 Filed 2-14-79; 8:45 am]

[6320-01-M]

[PSDR-55, Docket 34683]

[14 CFR Part 399]

STATEMENTS OF GENERAL POLICY

Domestic Intrastate Fare Increases; Request for Comments on Interim Rule

FEBRUARY 17, 1979.

AGENCY: Civil Aeronautics Board.

ACTION: Request for comments on interim rule.

SUMMARY: The Board has adopted an interim rule, published in this issue of the FEDERAL REGISTER (PS-82), establishing an interim policy for domestic intrastate fare increases. The Board is inviting comments on the interim rule, which is effective immediately, with a view to finalizing Board policy and issuing a revised rule if necessary.

DATES: Comments by: April 16, 1979. Reply comments by: May 7, 1979.

Comments and other relevant information received after these dates will be considered by the Board only to the extent practicable. All filed comments must include a full presentation of all evidence and arguments upon which the commenter wishes to rely in support of his position, or in rebuttal of facts relied upon by the Board. We have decided that all relevant issues can be determined on the basis of written comments, and that oral evidentiary procedures will not be required.

ADDRESSES: Twenty copies of comments should be sent to Docket Section, Civil Aeronautics Board, 1825 Connecticut Avenue, NW., Washington, D.C. 20528. Individuals may submit their views as consumers without filing multiple copies. Comments may be examined in Room 711, Universal Building, 1825 Connecticut Avenue, NW., Washington, D.C., as soon as they are received.

FOR FURTHER INFORMATION CONTACT:

Steven K. McKinney, Trial Attorney, Bureau of Pricing and Domestic Aviation, 202-673-6064, or Mark Kahan, Assistant Chief, Pricing and Entry Division, Office of the General Counsel. 202-673-5205, Civil Aeronautics Board, 1825 Connecticut Avenue, NW., Washington, D.C. 20428.

(Sec. 204, 403, 404, and 1002 of the Federal Aviation Act of 1958, as amended; 72 Stat. 743, 758, 760 and 788, as amended; 49 U.S.C. 1324, 1373, 1374, and 1482; and 5 U.S.C. 553)

By the Civil Aerouautics Board.

PHYLLIS T. KAYLOR,
Secretary.

[FR Doc. 79-4869 Filed 2-14-79; 8:45 am]