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## Airline Regulation in America: Effects and Imperfections by William A. Jordan

Stanley Rosenfield

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## BOOK REVIEW

*Airline Regulation in America: Effects and Imperfections.* BY WILLIAM A. JORDAN. Baltimore, Maryland: The Johns Hopkins Press, 1970. Pp. 340. \$12.00.

The term public utility brings to mind gas, electric or natural monopolies. Government regulation in these public utilities is accepted without question because such monopolies require protection for the consumer. Transportation is also a public utility, but at least in the case of intercity and interstate transportation, it is not a natural monopoly. In both railroad and air transportation there is competition between carriers. Nevertheless, without the protection of the government, the private citizen would be at the mercy of the industry. There is no better illustration of this fact than the railroad industry. The Interstate Commerce Commission was founded for the specific purpose of doing away with special rates, rebates, special pricing, unfiled tariffs, tariffs which were not observed when they were filed, and other practices which not only discriminated against members of the public, but which, in many instances, determined whether or not a citizen could stay in business. The midwest farmer was particularly dependent upon the railroad, and the Grange Movement was one of the leaders in the demand for railroad regulation.<sup>1</sup>

In the 1930's, regulation of commercial airlines was first considered. There was some talk of a need to prevent the practices that had led to regulation in the railroad industry a half century earlier. In fact, however, the situation in the airline industry was entirely different. The airlines were not yet a major form of transportation, and the hauling of freight by air was almost non-existent. Instead of protection of the public from the airline industry, the leading proponents of airline regulation were the airlines themselves. The major demands for regulation came from airlines with government mail contracts, which were already subject to some governmental control; the demands for regulation were directed against the airlines without airmail contracts, which were subject to no control whatsoever.<sup>2</sup> Nevertheless, the stated purpose of the Civil Aeronautics Act was the protection of the public.<sup>3</sup>

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1. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION (1931)*; Atchinson, *The Evolution of the Interstate Commerce Act, 1887-1937*, 5 *Geo. Wash. L. Rev.* 289 (1937); Rosenfield, *A Case for the Legality of Youth Standby and Young Adult Airline Fares*, 36 *J. of Air L. & Com.* 615, 646 (1970).

2. RHYNE, *THE CIVIL AERONAUTICS ACT ANNOTATED (1939)*; THOMAS, *ECONOMIC REGULATION OF SCHEDULED AIR TRANSPORT (1951)*; JONES, *Anti-Trust and Specific Economic Regulation: An Introduction to Comparative Analysis*, 19 *ABA ANTI-TRUST Section* 261 (1961).

3. 72 *STAT.* 740, § 102.

Today, the airlines have grown up and are a major factor in the transportation of both persons and freight. The Civil Aeronautics Board (hereinafter referred to as the C.A.B.) regulates commercial aviation. This regulation relates to entry, exit, service and price, and is little short of total. Protection of the public by insurance of the best possible service and lowest possible price is more important today than at any time during which the airlines have been regulated. Yet, today we read more and more of expansion of routes to the point where some routes have five or six competing carriers, or even more; while at the same time we are reading about financial losses being suffered by almost all of the airlines, followed by demands for higher fares. In fact, the C.A.B. is today in the midst of an examination of the whole fare structure in the airlines.<sup>4</sup> The question being asked today is whether the complete regulation of the C.A.B. has, in fact, benefitted the general public. Is the C.A.B. accomplishing the desired result? Increasingly, total regulation is under scrutiny. Increasingly, a new look is being demanded at regulation in the airline industry. There is a searching for some satisfactory alternative to the failures being pointed out in the present regulation.

As one of those concerned with the aviation industry and as one not satisfied with the results achieved by the C.A.B., I looked with particular anticipation to *Airline Regulation in America* because it is a study of the effect of regulation in the airline industry. Professor Jordan hypothesizes that: 1.) regulation protects the consumer from the producer; 2.) regulation has no significant effect on regulated industry; or 3.) regulation protects the producers by helping them to form a cartel to obtain monopoly benefits. Professor Jordan concludes that the third hypothesis, the cartel hypothesis, is most applicable in the regulation of aviation. He contends that regulation by the C.A.B. has actually acted to protect airline inefficiency and that less regulation would lead to greater public benefit.

The method of analysis used is a comparison of the certificated trunk airlines, those operating in interstate transportation, and therefore, subject to regulation by the C.A.B., with the intrastate California carriers which are not subject to C.A.B. regulation but only to regulation by the state of California. The period of study is 1946-1965, a period during which the California Public Utilities Commission (hereinafter referred to as the P.U.C.), the regulatory agency for California carriers, exercised control over increase in fares but not over entry, exit or the lowering of fares.

While Professor Jordan concludes that his third (cartel) hypothesis most closely describes the commercial airlines subject to C.A.B. regulation, he also attempts to show that, based on the California experience, the lack of regulation would provide greater benefit for the general public than is presently provided by the regulation of the C.A.B. I have no quarrel with Professor Jordan in regard to the effect of regulation by the C.A.B. If he simply stopped at this point, his thesis would be supported even though I would see little value in stopping at this point. He would simply be presenting the problem, and the problem is obvious to anyone

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4. Domestic Passenger Fare Investigation, Docket 21866, Order 70-1-147, Jan. 29, 1970.

who has looked, and could be made obvious to those who have not looked, in far fewer than the 244 pages utilized by this book. But Professor Jordan does not simply rest upon his hypothetical thesis. He argues that the lesser regulation provided by the P.U.C. would be of greater value to society. It is with this conclusion that I have difficulty. It is not that I disagree; it is that I do not believe the evidence presented tends to bear out the thesis that minimal regulation would be to the general benefit. Actually, the study tends to show that regulation of a greater nature than that exercised by P.U.C. is necessary, although regulation to the extent exercised by the C.A.B. may not be desirable.

Let me illustrate with three examples from this study. The first relates to entry into and exit from the field of commercial aviation. It is noted that there were 16 trunk carriers in 1946, at the beginning of this study, and that this total dwindled to 11 by 1965. No new trunks were certificated by the C.A.B., and all five exiting were merged into existing carriers. This is in contrast to the total of 16 different intra-state carriers that operated at some time during this period in California. However, the California total was in a constant state of flux. In 1946, there was only one carrier in existence. There were seven in 1949 and three in 1965. At the end of 1965, only one remained in existence. From this comparison, Professor Jordan concludes that except for the C.A.B. there would be a substantially larger number of trunk carriers.

Undoubtedly, without C.A.B. regulation there would have been more entries. One need only look at the figures to note that the C.A.B. has certificated no trunk carriers except those certificated under the Grandfather Clause when regulation was first enacted in 1938.<sup>5</sup> But no great benefit is shown from entry alone. We are interested in the public, and the next question to be asked is what will the effect of unlimited entry be? If California is used as a measuring stick, it provides a large number of entries, but also a large number of exits. It is not explained how the public will benefit from a large and ever changing number of weak carriers, each of whom will be forced to exit at the first economic crisis.

A second comparison Professor Jordan makes is in the fare structure in three major California markets. The markets studied are Los Angeles-San Francisco, Los Angeles-San Diego and San Francisco-San Diego. In these markets, first class service was offered only by the certificated carriers, and during the period under study these fares rose steadily without fluctuation, the increase amounting to approximately 87.8%. Coach fares, where there was competition between the certificated carrier and the California intrastate carrier, fluctuated, with an overall increase of only 35%. Thus, the author concluded that without substantial competition from the intrastate carrier, the interstate coach fares would have increased as much as the first class fares, though the consumer would have received no more service.<sup>6</sup> This is undoubtedly true, but again, if it is the consumer with whom we are concerned, it is necessary to go further to see what result would occur if the trunk airlines were subject to the same

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5. CAVES, AIR TRANSPORT AND ITS REGULATIONS 169 (1962).

6. JORDAN, AIRLINE REGULATION IN AMERICA 92 (1970).

control as the intrastate carriers. Initially, competition would reduce the fares as in California, but what will the effect be when free entry and exit has reduced the total number of carriers to one or two? Can it be said that the remaining one or two carriers will continue to provide lower fares than those of the trunks? No evidence is presented on this. If there is one unregulated carrier left, why can it not now set any rate it desires? If more than one carrier remains, is there any reason to believe that one of the two following causes will not be followed? (1) Agreement among the remaining unregulated carriers on fare level, *i.e.*, Professor Jordan's cartel theory, but without the regulation of the C.A.B.; or (2) fare war until there is only one survivor, who is again free to set fares at any desired level. Certainly it is difficult to see any advantage in this situation for the public.

The final example I would like to note refers to markets served. Without regulations a carrier is free to pick only the most lucrative routes and to avoid the disadvantages of the less desirable routes. Professor Jordan concedes that the California carriers did to some extent "skim the cream," that is, limit operations to the most desirable routes. He offers as evidence that this is not really true, and that unregulated carriers will voluntarily serve minor as well as major markets, the fact that the California carriers during the period studied served a total of 40 California markets. He concedes, however, that service on 32 of those 40 routes was very brief a matter of a few months, and in some cases even less.<sup>7</sup>

An excellent example of the fact that the California experience tends to support the "skim the cream" theory and does not necessarily operate in the best public interest is Pacific Southwest Airlines, the one California intrastate carrier that survived the period studied. It entered the market in 1949, and while it did serve Long Beach and San Jose for short periods, other than these brief periods, its service was limited to Los Angeles-San Diego and San Francisco-San Diego. These three routes are respectively the 1st, 9th and 23rd busiest routes in the United States.<sup>8</sup> All unquestionably lucrative routes. Even as late as 1969, the only routes added to this network have been Long Beach, San Jose and Sacramento, all major cities.<sup>9</sup> Yet, by 1969, while still an intrastate carrier, Pacific Southwest Airlines had become one of the ten largest airlines in the United States.<sup>10</sup> While lack of regulation may provide service for the public in the largest cities, there is certainly no showing that airline service in California to the smaller markets has been improved by the lack of regulations.

In the above examples, as well as the other areas studied by Professor Jordan, the figures tend to show that regulation of the airline industry by the C.A.B. has benefitted the existing airlines, but it completely fails to show that minimal regulation as practiced in the P.U.C. necessarily benefits the public.

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7. *Supra* note 6, at 258-59.

8. *Supra* note 6, at 237.

9. ESSO AIR WORLD (Nov./Dec. 1969).

10. *Id.*

I have difficulty trying to determine whether Professor Jordan is recommending the minimal regulation as practiced by the P.U.C. during the period studied, in which case I cannot agree with his conclusions, or whether he is simply content to show that the activity taking place within the C.A.B. regulation fits into his preconceived definition. If this is his conclusion, then my reaction is—so what? Rather than the conclusion, I would consider this the beginning. The point from which we would proceed to find the combinations which will improve the regulation by government and maximize the benefits to the public.

STANLEY ROSENFELD\*

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\* LL.B. (1951), University of Minnesota School of Law; LL.M. (1970) Southern Methodist University School of Law; Assistant Professor, DePaul University College of Law.