

AIRLINE REGULATION: The U.S. Example

by Paul Stephen Dempsey
Director, Institute of Air & Space Law
McGill University

Copyright © 2009 by Paul Stephen Dempsey



*"If it moves, tax it. If it keeps moving, regulate it.
If it stops moving, subsidize it."*

President Ronald Reagan



US Airline Legislation

- ◆ The Kelly Act (Contract Air Mail Act of 1925) gave the Postmaster General authority to award contracts for the carriage of mail to private carriers.
- ◆ The Air Commerce Act of 1926 authorized the Secretary of Commerce to regulate the design of aircraft and materials used in their construction, as well as the safety and maintenance of airways, airports and air navigation facilities.
- ◆ The Civil Aeronautics Act of 1938 created the Civil Aeronautics Board [CAB] to manage competition between airlines, vesting in it jurisdiction over safety and economic (pricing, entry and antitrust) regulation.
- ◆ The Federal Aviation Act of 1958, which gave safety jurisdiction to the then Federal Aviation Administration, which became a part of the U.S. Department of Transportation [DOT] when it was established as a cabinet-level agency in 1966.
- ◆ Economic regulation over pricing and entry was largely abolished by three pieces of legislation:
 - ◆ the Air Cargo Deregulation Act of 1977,
 - ◆ the Airline Deregulation Act of 1978 [ADA], and
 - ◆ the International Air Transportation Competition Act of 1979.
- ◆ The Civil Aeronautics Board was terminated by the CAB Sunset Act of 1984, with its remaining authority transferred to the DOT.
- ◆ Today, the principal statute is still referred to as the *Federal Aviation Act of 1958*, as amended.

Other Relevant US Laws

- ✦ Airport and Airway Development Act of 1970, along with its attendant Airport and Airway Revenue Act of the same year (that established the Airport and Airway Trust Fund).
- ✦ The Aviation Trust Fund was then perpetuated by the Trust Fund Code of 1981.
- ✦ The Railway Labor Act of 1926 governs labor relations in commercial aviation as well as the railroads.
- ✦ More generic statutes that influence commercial aviation include:
 1. the antitrust laws (e.g., the Sherman and Clayton Acts),
 2. the environmental laws (e.g., the National Environmental Policy Act), and
 3. the Bankruptcy Code.

Certificates of Public Convenience and Necessity

- ◆ Applicants seeking air carrier operating authority to provide interstate scheduled transportation of persons, property or mail as a common carrier must secure a Certificate of Public Convenience & Necessity [PC&N].
- ◆ The larger, so-called "Section 401" carriers must prove that they are "fit, willing, and able" to provide the proposed operations and to comply with the federal rules and regulations.
- ◆ In determining whether a new applicant is fit, the DOT assesses whether the applicant:
 - ◆ (1) has the managerial and operational ability to conduct the proposed operations;
 - ◆ (2) has sufficient financial resources available to commence operations without undue risk; and
 - ◆ (3) will comply with its statutory and regulatory obligations under the law (or in the regulatory language often used, has demonstrated satisfactory "compliance disposition")
- ◆ The carrier must also be certified by the FAA to conduct operations (under Part 121 of the Federal Aviation Regulations [FARs], which assesses the carrier's safety and operational ability);
- ◆ Before operations it must obtain adequate liability insurance.

FOREIGN OWNERSHIP RESTRICTIONS

- ✦ Cabotage is restricted to US airlines.
- ✦ The Federal Aviation Act requires that an applicant for an air carrier certificate of public convenience and necessity be a citizen of the United States—that the President and two-thirds of the Board of Directors and other managing officers be U.S. citizens, and that at least 75% of the voting stock be owned or controlled by U.S. citizens.
- ✦ A U.S.-flag carrier must also be “controlled” by U.S. citizens, although in the late 1980s the DOT ruled that U.S. citizens need control no more than 51% of non-voting equity to remain in compliance.

FOREIGN-FLAG AIR CARRIER PERMITS

- ◆ In order to receive a permit, an applicant must demonstrate:
 1. it is “fit, willing, and able” to perform the proposed service,
 2. that it has been designated by the government of its registry to serve the route in question under an applicable bilateral air transport agreement (or in the absence of bilateral rights, on the basis of comity and reciprocity), and
 3. that issuance of the permit would be in the “public interest”.

CONSUMER PROTECTION

- ◆ 14 C.F.R. Parts:
- ◆ 250, "Oversales;"
- ◆ 252, "Smoking aboard aircraft;"
- ◆ 253, "Notice of terms of contract of carriage;"
- ◆ 374, "Implementation of the Consumer Credit Protection Act with respect to air carriers and foreign air carriers;"
- ◆ 379, "Nondiscrimination in federally assisted programs of the Board—Effectuation of Title VI of the Civil Rights Act of 1964;" and
- ◆ 382, "Nondiscrimination on the basis of handicap."
- ◆ 254, "Domestic baggage liability;"
- ◆ 205, "Aircraft Accident Liability Insurance."

Other aviation laws

◆ ***SMOKING***

- ◆ Smoking has been banned on all U.S. domestic and international flights. Federal law imposes a \$2,000 maximum penalty for tampering with a lavatory smoke alarm.

◆ ***GAMBLING***

- ◆ Gambling aboard U.S. or foreign air carriers serving the United States is prohibited by statute.

FALSE AND MISLEADING ADVERTISING

- ✦ DOT enforcement practices allow advertising of one-way fares conditioned on round-trip purchase, so long as seats at such prices are available in reasonable quantity, and the round-trip condition is prominently (i.e., the text print must be large enough to alert a reader of the actual fare), and proximately (i.e., the text must be located close to the fare) disclosed with the fare.
- ✦ The DOT Office of Aviation Enforcement and Proceedings also allows carriers to list government-imposed or government-approved passenger charges (e.g., customs, immigration, agricultural inspection, ticket surcharges, international departure taxes, security, and passenger facility charges) separate from the advertised price so long as the ad clearly reveals the nature and amount of the charges.
- ✦ The regulations also require that any advertising of on-time performance be accurate, be based on recently published data, indicate the basis of the calculation, the time period involved, the carriers with which the advertiser is comparing itself, and the geographical scope of the data reported.
- ✦ The position of the DOT's Enforcement Office is that "large type, prominent on-time performance claims must in and of themselves be accurate, without resort to fine print, non-proximate disclaimers or disclosures."

AIRLINE REPORTING REQUIREMENTS

- ✦ *On-time performance*—To dissuade airlines from publishing unrealistically short schedules, the DOT in 1987 promulgated on-time performance reporting requirements. DOT regularly makes certain reported data public in its Air Travel Consumer Report, reporting for example, carrier on-time arrivals and departures. Flights are considered reportably “late” by DOT only if they are delayed by more than 15 minutes, and the cause of delay is attributable to other than a mechanical or weather problem. *Baggage handling performance*—Airlines also are required to report the total number of mishandled baggage reports filed with the carrier on a monthly basis.
- ✦ *Overbooking and denied boarding*—Airlines must report the number of passengers “bumped” from flights on a quarterly basis.

LABOR REGULATION

- ◆ U.S. airlines are subject to the Railway Labor Act [RLA], administered by the three-member National Mediation Board [NMB].
- ◆ The NMB supervises the election of, and certifies the exclusive bargaining representative for, the employees; it also oversees the collective bargaining process.
- ◆ A union desiring to gain recognition as the bargaining representative submit an application to investigate a dispute (Form NMB-3) accompanied by authorization cards signed by at least 35% of the craft or class employees.
- ◆ Disputes under the RLA fall into one of three major categories: representation disputes, major disputes, and minor disputes.
- ◆ *Major disputes* involve formation or modification of collective bargaining agreements (e.g., wages, work rules, working conditions). They are disputes with respect to "the formation of collective agreements or efforts to secure them". A major dispute focuses on the terms an agreement should contain. These disputes are designed to be resolved through collective bargaining between the labor unions and management. The statute mandates a meet-and-confer process, with good faith negotiations, mediation, nonmandatory arbitration, and if all else fails, intervention by a Presidential Emergency Board. Until these procedures are exhausted, neither party may upset the *status quo* by engaging in self-help.

SAFETY REGULATION

- ◆ The Federal Aviation Administration licenses and regulates airline flight operations personnel, including flight crews, maintenance personnel and dispatchers, and exercises plenary jurisdiction over airline safety, training and maintenance procedures, technical flight standards, communications and ground equipment.
- ◆ The FAA has implemented a number of requirements on aircraft manufacture and airline maintenance programs, including inspection and maintenance of aging aircraft, and corrosion control.
- ◆ The FAA has broad jurisdiction over aircraft certification and registration.
- ◆ Airlines must have and maintain FAA certificates of airworthiness for all of their aircraft.
- ◆ An airline's flight personnel, flight and emergency procedure, aircraft and maintenance facilities are subject to periodic inspection and tests by the FAA.
- ◆ The FAA also holds broad jurisdiction over navigation and air traffic control, including collision avoidance and wind shear detection.

SECURITY REGULATION

- ✦ *The Antihijacking Act of 1974* implemented the Hague Convention of 1970; it imposed penalties for carrying weapons or explosives aboard aircraft, and a penalty of 20 years imprisonment or death if a passenger is killed during a hijacking; it authorized the President to suspend the landing rights of any nation that harbors hijackers;
- ✦ *The Air Transportation Security Act of 1974* authorized the screening of passengers and baggage for weapons;
- ✦ *The Aircraft Sabotage Act of 1984*, implemented the Montreal Convention of 1971; it imposed penalties of up to \$100,000 or 20 years imprisonment, or both, for hijacking, damage, destruction or disabling an aircraft or air navigation facility;
- ✦ *The International Security and Development Act of 1985* authorized expenditures for enhancing security at foreign airports;
- ✦ *The Foreign Security Airport Act of 1985* required the U.S. DOT Secretary to assess security at foreign airports, and notify the public or suspend service if a foreign airport fails to correct a security breach; it also required that foreign airlines serving the United States adopt and implement security procedures prescribed by the U.S. government;
- ✦ *The Aviation Security Improvement Act of 1990* mandated background checks for airline and airport employees, and imposed additional training, educational and employment standards upon them; it also required deployment of bomb-detection technology for baggage;
- ✦ *The Federal Aviation Administration Reauthorization Act of 1996* required passenger profiling, explosive detection technology, procedures for passenger/bag matching, and certification for screening companies;
- ✦ *The Omnibus Consolidated Appropriations Act of 1997* authorized the purchase of advanced screening equipment for baggage;
- ✦ *The Aviation Security Improvement Act of 2000* required fingerprinting and background checks of airport and airline security personnel at Category X airports;
- ✦ *The Aviation and Transportation Security Act of 2001* federalized the airport screening function, establishing the new Transportation Security Administration [TSA] under the DOT to regulate security in all modes of transportation; it also enhanced baggage screening procedures, and imposed more stringent personnel qualifications on security employees; and
- ✦ *The Homeland Security Act of 2002* consolidates 22 agencies, including the TSA, into a new cabinet-level Department of Homeland Security. The agency was given jurisdiction, *inter alia*, over transportation security, customs, immigration and agricultural inspections.

welcome to the institute of

AIR & SPACE LAW

Postgraduate
Law Degrees
and
Certificate
Programs

