Airline Regulatory Reform: A Legislative Analysis; Note

Antonia M. Greenman
AIRLINE REGULATORY REFORM: A LEGISLATIVE ANALYSIS

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INTRODUCTION

The Air Transportation Regulatory Reform Act of 1977 (S. 689, the Cannon-Kennedy bill), and its House counterpart, the Air Service Improvement Act of 1977 (H.R. 8813, the Anderson-Johnson bill), are the most important commercial aviation bills since the Federal Aviation Act of 1958.1 The far-reaching provisions of the Cannon-Kennedy and Anderson-Johnson bills will have widespread ramifications.

Airlines have been regulated by the federal government since the Air Commerce Act of 1926,2 which empowered the Secretary of Commerce to regulate public air transportation. This act was revised in 1938, setting up the Civil Aeronautics Authority to regulate routes and rates, and was further amended by the Federal Aviation Act of 1958. The 1958 act redesignated the authority as the Civil Aeronautics Board and gave it additional regulatory authority.

Two federal agencies control all aspects of commercial aviation in the United States: the Civil Aeronautics Board and the Federal Aviation Administration. The FAA controls the requirements for and issuance of pilot licenses, creates airport requirements and enforces safety regulations. The CAB controls the lowering and raising of rates, the distribution of routes, issuance of certificates for new services and airline expansion, and the allowance of immunities from antitrust laws. Procedures regarding changes in rates, routes, and certificates are often unwieldy and frequently lengthy. Airlines are often unable to add new routes and services or change prices as rapidly as they would wish, and sometimes totally prohibited from taking these actions. These problems have caused Congress to consider various airline regulatory reforms.

Airline regulatory reform proposals have been under consideration by Congress for the past three years.3 The Cannon-Kennedy bill is a product of three years of deliberation and modification. It attempts to avoid the pitfalls of its predecessor bills; however, it has apparently not entirely succeeded in eliminating questions which have arisen in the minds of many influential and legitimately concerned people. Nevertheless, the need for reform in this area is urgent. For the past five years, the airline industry has only had a 3.6% rate of return, lowest among 30 major industries.4 The industry's projected

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capital needs for the coming 15 years is estimated at $60 billion for aircraft and equipment. It is evident that unless action is taken soon, the airline industry will face irreparable difficulties.

As Senator Birch Bayh indicates, "... there is a serious need for an overhaul of our regulatory system as it affects air travel in order to provide increased competition in the airline industry."6

Conservatives (Americans for Conservative Action), liberals (Americans for Democratic Action), Civil Aeronautics Board members (including Chairman Alfred E. Kahn), legislators, economists, executive branch officials, newspapers (such as The New York Times and The Wall Street Journal), presidents of both parties (former President Ford and President Carter), and airlines, generally agree that reform is needed. They disagree about the extent and direction of reform.8 Senators Howard Cannon and Edward M. Kennedy, and supporters of the Cannon-Kennedy bill, argue that this bill represents the best approach to solve the problems of airline regulation and protect the consumer interest.9 Opponents of the bill suggest that the Cannon-Kennedy proposals are too drastic, and would create more problems than they would solve.10

This note reviews the provisions of the Cannon-Kennedy and Anderson-Johnson bills, discusses their effects, and examines arguments for and against these proposals.

THE PROPOSED REFORMS

The Cannon-Kennedy bill proposes reforms in the areas of rates, routes, certificates, antitrust immunities, and subsidies, with the major emphasis on rates, routes and certificates.11 The Anderson-Johnson bill is similar in many respects; significant differences will be noted.

Rates

The changes in the rate limitations involve determinants for rate increases and decreases. Cannon-Kennedy permits 10% increases and decreases not below direct cost (actual cost of making a flight) per year without CAB approval.12 Anderson-Johnson permits 10% increases and 25% decreases the first year, and decreases of 50% thereafter, or 110% of direct cost.13 The Senate Commerce Committee has amended Cannon-Kennedy to allow 5% increases and 35% decreases without CAB approval.14 Changes in CAB's procedure and prescriptive power would also be made by Cannon-Kennedy. Rates changes under Section 21 of the bill would become effective after 60 days' notice to the CAB; the board would be forbidden from finding a rate too low or too high if it falls under the above-mentioned percentages and restrictions pertaining to costs.15 Anderson-Johnson has no similar provision.

5. Id.
15. S. 689, supra note 11, §21.
The airlines are divided over these rate provisions. United favors percentage determinants similar to those of Cannon-Kennedy, although it opposes the "direct cost" provisions, because they would involve problems such as difficulty of computation, variances in definition of direct cost, and changes in determination of direct cost simply by changing the type or schedule of aircraft in that market, and necessitate increased CAB discretion.16 Trans World Airlines President C. E. Meyer, Jr., supports the "zone of reasonableness" concept.17 American Airlines, although its former president, George Spater, had advocated a "zone of reasonableness" for fares, is presently opposed to current rate proposals.18 Hughes Airwest believes that "fare flexibility within a reasonable zone" will work favorably toward smaller, "high productivity" airlines.19 Delta's senior vice president and general counsel, R. S. Maurer, supports "parameters to be prescribed by Congress" through which the CAB would "grant airline managements reasonable flexibility to adjust their standard prices," although he believes the current provision of Cannon-Kennedy may be excessive.20 The Association of Local Transport Airlines favors the rate provisions, although it would only apply them to markets having more than 1,000 passengers a day.21

Most unions oppose the rate provisions. In testimony before the Senate Aviation Subcommittee, representatives of the Air Line Pilots Association (ALPA), the Flight Engineers Association, and the Transit Workers Union voiced concern that permitting "drastic" price cuts would result in job losses.22 Members of these unions who work for Pan Am, however, as well as Teamsters members who are Pan Am workers, support these provisions.23 The Brotherhood of Railway and Airline Clerks (BRAC) takes an intermediate position, supporting price flexibility while disagreeing with the "sweeping reforms" of Cannon-Kennedy.24

The unions have also voiced concerns that price cuts would cause reductions in airline safety. The AFL-CIO Executive Council, in a February 25, 1977 statement, said that the then-current proposals would "encourage cost cutting in such vital areas as safety . . . .". This has been disputed by James J. Hartigan, vice-president of operations services of United, who argues there is no correlation between airline profit and airline safety,25 and FAA Chief Administrator Langhorne Bond, who denies that regulatory reform of commercial airlines could lead to reductions in FAA safety operations.26 In addition,
new sections have been added to Cannon-Kennedy calling for an annual review of safety regulations by the Secretary of Transportation, and a continuing review of the fitness of all currently operating carriers.\textsuperscript{27}

The Airline Passengers Association, composed of more than 40,000 members, suggests that rate reform should be accompanied by a cut in the airline ticket tax from 8% to 6%. Harold J. Salfen, APA’s executive director, said, “A tax of only four percent is now adequate to finance the Airport Development Aid Program, leaving an ample two percent to provide funds for loans . . . to meet the noise abatement regulations.\textsuperscript{28}

Routes

The changes in route regulation also involve both substantive and procedural changes. Cannon-Kennedy permits automatic commencement of passenger service by certified carriers and the three most experienced non-certified carriers in markets currently authorized for nonstop routes which are not being serviced by those authorized. (Carriers now provide nonstop service in only 16% of the authorized markets.)\textsuperscript{29} It also permits route additions each year. Extremely large carriers are limited to one new route per year, of not more than 2,000 miles.\textsuperscript{30} Other CAB carriers and the three largest intrastate carriers are allowed up to four new routes per year, totaling not more than 4,000 miles.\textsuperscript{31} Anderson-Johnson has similar provisions. Cannon-Kennedy also amends the meaning of “public convenience and necessity” under current law,\textsuperscript{32} to emphasize the importance of new air service, lower fares and better efficiency, while at the same time indicating that the tendency to create a monopoly or excessive concentration is inconsistent with the public convenience and necessity.\textsuperscript{33}

Procedurally, Cannon-Kennedy speeds up other route cases, permitting changes to become effective if the Board does not act within prescribed limits of time.\textsuperscript{34} Anderson-Johnson sets a limit of one year for the CAB to decide any case.\textsuperscript{35} Cannon-Kennedy also places the burden of proof on the opposing party for demonstrating a route is against the public convenience and necessity, and limits such proof to strict evidentiary standards; if entry is denied, it allows the reviewing court to apply its expert judgment as to whether these standards have been adhered to.\textsuperscript{36} Anderson-Johnson has similar provisions.\textsuperscript{37}

Route provisions of Cannon-Kennedy have been substantially amended by the Senate Commerce Committee.\textsuperscript{38} Although the basic automatic entry provisions have been left substantially intact,\textsuperscript{39} permitting instead one new route per year for the two years after the legislation is enacted, and two routes in each of the following three years, not to exceed 3,000 miles in total, “protective

\textsuperscript{27} Draft 3 of S. 689, supra note 14, §§4 and 16.
\textsuperscript{28} Airline Passengers Association news release, Aug. 15, 1977 at 1.
\textsuperscript{29} Testimony of Sen. Edward M. Kennedy, supra note 7 at S. 4622.
\textsuperscript{30} S. 689, supra note 11, §9.
\textsuperscript{31} S. 689, supra note 11, §9.
\textsuperscript{32} Federal Aviation Act of 1958, §401(d), 72 Stat. 731, 49 U.S.C. §1301. “Public convenience and necessity” under this law involved the useful purpose of the new service balanced against the adequacy of existing routes or carriers and the possible “impairment” of the operations of existing carriers.
\textsuperscript{33} S. 689, supra note 11, §9.
\textsuperscript{34} S. 689, supra note 11, §8.
\textsuperscript{35} H.R. 8813, supra note 13, §25.
\textsuperscript{36} S. 689, supra note 11, §23.
\textsuperscript{37} H.R. 8813, supra note 13, §4.
\textsuperscript{39} S. 689, supra note 11, §9.
measures” have been added which change the effectiveness of the above-mentioned provisions. Each carrier, under the amended bill, could designate “immune routes” each year which would be protected. Regarding the prohibition of expansion, three routes could be designated during the first three years after enactment, two routes the fourth year, and one route the fifth. Regarding the permitting of competition, smaller local service or intrastate carriers could open competition to others on only two of their routes per year. Larger trunklines could open three routes to competition in the first year and four in the second. The largest trunkline carriers (American, Delta, Eastern Airlines, Trans World Airlines, and United Airlines) would be required to open all routes to competition, except those set aside under the expansion provision.

The airlines have generally opposed all provisions for freer entry. The president of American Airlines, Albert V. Casey, has said that increased numbers of carriers on routes will produce decreased load factors (percentages of seating capacity actually sold and used) and thereby drive up prices, and that airlines will drop out of markets, because more and more markets would become unprofitable, for one airline, while another would gain profit, thus lessening both service and competition. In contrast, United Airlines supports an automatic route expansion program for existing carriers, with limitations on the number of routes which could be added by new carriers. TWA also supports the limited automatic entry provisions: L. Edwin Smart, TWA’s chairman, stated that permitting airlines to add one route per year, while setting aside a given number of markets ineligible for entry in a given year, is “a good and properly cautious approach to the orderly expansion of the competitive environment in our industry.”

Braniff Airlines’ position is typical of the smaller airlines; it believes these provisions would only increase dominance by the extremely large carriers, forcing small carriers to merge, and reducing competition. Delta Airlines’ vice president for law and regulatory affairs, James W. Callison, has stated the automatic entry provisions are “deregulation of the wrong kind” and “a major cause of our strong opposition to the Senate bill.” He said it complicated the bill, noting because it has necessitated countervailing protections in the interest of small carriers and small communities. He added,

these ‘protections,’ in turn, have transformed the Senate bill into a 100-page complex morass of proposals for more, not less regulation, and more, not less subsidy. The Senate bill has now gone full cycle from the early days of the reform debate—in many respects it is not a deregulation proposal at all, but one for increased bureaucracy and more governmental interference...
The Airline Passengers Association, which generally supports the regulatory reform bill, expressed a different concern about automatic entry. Harold J. Salfen, the association's executive secretary, asserts that a serious disservice would be rendered to the air traveler if we should create a situation in which 15 or 20 different carriers were willing to fly him to his destination, but could not because of an insufficient fuel supply... A serious energy problem could develop.47

On the other hand, United's president, Richard J. Ferris, argues that the airlines have been leaders in fuel conservation, citing as an example that in 1976, U.S. carriers transported 7.4 million passengers more than in 1972, while using 8.5% less fuel.48

The liberalized routes provisions have been supported by both Charles L. Schultze, the chairman of the Council of Economic Advisors, and CAB Chairman Kahn. Dr. Schultze stated in testimony before the Senate Aviation Subcommittee that automatic entry should be phased in with pricing flexibility "sufficient to constitute a meaningful threat"49 of competition. Chairman Kahn has stated in correspondence to several senators that "... I do not fear disastrous consequences from automatic entry, and am anxious to see decisive movement toward more competition."50

Certification and Market Entry

The certification provisions of Cannon-Kennedy, while they have not received as much publicity as the rate and route provisions, are nonetheless important because they produce a substantial shift in direction. The Federal Aviation Act of 1958 only permitted issuance if it was required by the "public convenience and necessity."51 Cannon-Kennedy requires certificates to be issued by the CAB for scheduled, charter, or overseas passenger carriers, unless found to be inconsistent with "public convenience and necessity."52 Noncharter air carriers, however, are limited in the number of charter trips they may perform. All-cargo airlines meeting ordinary standards of fitness, willingness, and ability must be issued certificates after January 1, 1979, regardless of whether it is inconsistent with the "public convenience and necessity."53 Commuter airlines utilizing planes of under 56 passenger seats or 18,000 pounds payload would be exempt from certification by the CAB.54 The Anderson-Johnson bill provides the same limits.55

In addition, if a carrier does not utilize its authority for nonstop service, the certificate for that service shall be given to another carrier.56 Anderson-Johnson has an identical provision.57 A carrier will be permitted to terminate service required by its certificate upon 30 days notice to the CAB; however, the CAB

47. Airlines Passengers Association news release, supra note 28.
51. Federal Aviation Act of 1958, supra note 32.
52. S. 689, supra note 11, §9.
53. S. 689, supra note 11, §9.
54. S. 689, supra note 11, §19.
55. H.R. 8813, supra note 13, §18.
56. S. 689, supra note 11, §9.
57. H.R. 8813, supra note 13, §6.
may suspend this termination.\(^{58}\) Also, the authority of the President of the United States to approve or disapprove the issuance, transfer, suspension, revocation, or modification of any certificate is eliminated by the repeal of Section 801 of the 1958 Act.\(^{59}\) The chairman of Pan Am, William T. Seawell, has strongly opposed this elimination, on the grounds that it would have an adverse effect upon agreements for international air traffic. He states that the repeal of Presidential authority “in foreign and overseas air transportation, foreign air carrier permits, and international fares and rates . . . [would] be a serious mistake.”\(^{60}\) He also cites a Supreme Court ruling which states the necessity of Presidential intervention in air transportation, and a U.S. Court of Appeals ruling from the Second Circuit which expressly recognizes Presidential power with respect to international air transportation.\(^{61}\)

A proposal in Anderson-Johnson which is also in the Senate bill involves “domestic fill-up rights.” This provision permits airlines who are carrying passengers between cities on international flights (e.g., Los Angeles-New York-London) to carry local, i.e., U.S., passengers. A carrier would be permitted to obtain this right for three routes in the first year and two routes per year in subsequent years.\(^{62}\) This proposal has the strong support of carriers such as Pan Am and TWA.\(^{63}\)

The airlines have generally opposed easier certification. Frank Borman, president of Eastern Air Lines, contends that it will not aid competition at all. “Who is going to enter the airline industry today? . . . It just can’t be done,” he argues.\(^{64}\) Richard J. Ferris counters that airlines which are against liberalized certification measures want to restrict competition. “They don’t want any new airlines to be let into the club,” he said.\(^{65}\) Nevertheless, United believes that the current provisions regarding “PC&N” should be retained, and that hearings should be held to determine fitness, willingness, and ability of new carriers, as well as their “PC&N”.\(^{66}\) TWA has a similar view; Chairman L. Edwin Smart has stated that changing the “PC&N” doctrine as proposed by Anderson-Johnson would “open [the doors] so wide that the plans for the automatic entry door become meaningless.”\(^{67}\)

Commuter and local carriers have supported most of the new certification provisions, particularly the CAB’s right to revoke certificates authorizing nonstop service which are not being exercised, and to reissue the certificates to other “fit, willing, and able carriers.” As Frank Lorenzo, chairman of the Association of Transport Airlines, stated, “We believe that it is only fair that carriers holding route authority that others could operate profitably either use it or lose it . . . ”\(^{68}\) TWA strongly opposes this section, pointing out that carriers often have nonstop authority between points which have not developed sufficient

\(^{58}\) S. 689, supra note 11, §14.
\(^{59}\) S. 689, supra note 11, §20.
\(^{61}\) United States v. Curtiss-Wright, 299 U.S. 304 (1936); Pan American v. CAB, 121 F.2d 810 (2d Cir. 1941).
\(^{62}\) H.R. 8813, supra note 13, §7.
\(^{63}\) Testimony of William T. Seawell, supra note 60 at 7.
\(^{64}\) Interview of Frank Borman, President, Eastern Air Lines, Inc., Chicago Tribune, Oct. 3, 1977, §6 at 12, cols. 4-5.
\(^{67}\) Testimony of L. Edwin Smart, supra note 44, at 8.
\(^{68}\) Frank Lorenzo, “Reform with Caution,” Aviation Week and Space Technology, Mar. 28, 1977 at 9.
traffic for nonstop service. Carriers which attempt to provide these points with multi- or one-stop service until market growth is sufficient would thus be deprived of the right to do so.\(^6\)

Unions, including the Brotherhood of Railway and Airline Clerks, have expressed concern over the erosion of the “PC&N” doctrine. BRAC believes it will cause “excessive, wasteful competition in major air travel markets” while causing problems with service to “forgotten city-pairs” (i.e., less profitable markets).\(^7\)

**Antitrust Provisions**

Other sections of Cannon-Kennedy provide for the elimination of antitrust immunities, and for establishment of subsidies. The airlines have traditionally been permitted to make agreements with each other which would otherwise be considered violations of antitrust laws. This was originally permitted because the airlines were considered a “fledgling industry,” needing such “protection;” although this need no longer exists, the protections have been continued. As a result, airlines have made agreements to limit capacity, to not compete for certain routes, to cut back on routes, and even to not transport certain categories of passengers.\(^7\)

Although some agreements, such as standardized passenger and baggage agreements, have been beneficial to the consumer, the majority of these transactions have been in restraint of trade.

The antitrust immunity provisions of the Cannon-Kennedy bill eliminate CAB mandatory jurisdiction over consolidation, merger, or acquisition of control, arrangements to cut back the number of flights, and any similar agreements. A procedure is set up whereby the Attorney General would review all agreements and actions in this area. If the Attorney General finds an antitrust violation, he is to notify the CAB and the parties involved; this suspends the transaction. The Attorney General is permitted, however, to exempt agreements which do not restrain competition or effect the control of a carrier directly engaged in the operation of aircraft in air transportation.\(^7\)

The CAB also retains the right to make exemptions in the public interest (such as standardized baggage and ticket exchange pacts).\(^7\) No similar provisions are included in Anderson-Johnson. Many of the airlines are hesitant about altering the present system of antitrust immunities. Some, such as United, are concerned that it may prohibit cooperative agreements which benefit the public.\(^7\) United’s Richard J. Ferris stated that it will “subject the carriers to unnecessary and very costly legal harassment.” He pointed out that if the CAB were allowed to retain jurisdiction over these agreements, this would “not only preserve this network and its associated public benefits, but would allow new entrants, if they chose, to compete as participants in that network.”\(^7\)

Other airlines, such as TWA and American, oppose any changes in this area. Albert V. Casey, president and chairman of American Airlines, has argued that limitations on passenger capacity should not only be allowed, but mandated by the CAB.\(^7\) Smaller airlines, such as Braniff, vehemently disagree with this assessment.

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71. Testimony of Edward M. Kennedy, *supra* note 7, at S. 4623
73. S. 689, *supra* note 11, §19.
74. Cannon-Kennedy has specifically provided for this by allowing the CAB to permit agreements (between air carriers) which are in the public interest.
76. Loving, Jr., *supra* note 45, at 212.
Braniff’s chairman, Harding Lawrence, has stated, “you are destroying the free enterprise system when you put capacity limitations on it. I find it repugnant!”

Support Our Service (SOS), an employees’ association largely composed of Western Airlines personnel, has argued that the entire system of “interlining,” i.e., transfer of passengers, baggage or cargo from one airline to another during one trip for a single ticket transaction, would “come under a cloud” as a result of this provision. They believe that “literally thousands of interline agreements [would need to] be reviewed and revised.” Allegheny’s president, Edwin I. Colodny, asserts that other legitimate agreements would be affected as well. He gives as an example his company’s agreements with 12 commuter carriers that link 37 small cities with Allegheny routes, in return for services and facilities given to them by Allegheny. Since the agreements involve capacity, equipment, schedules, and fares, they might be vulnerable to antitrust dismantling under the new provisions.

Subsidies

Cannon-Kennedy provides for a federal subsidy program which attempts to insure adequate air service to communities which require but are unable to obtain service from a national air carrier. The bill is not specific as to how such a program would operate. Senator Kennedy has set forth his views as to how such a program would work. The government would subsidize particular air service, not particular airlines. Small communities presently receiving service would be included in this program. All qualified airlines would be eligible to provide the required service and thus receive the subsidy. Passengers traveling to and from small towns on subsidized flights would be given the advantages of interlining, joint fares and other similar conveniences, regardless of whether the service was provided by a certificated or a noncertificated carrier. Aircraft loan guarantees would also be extended to noncertificated carriers who otherwise qualify. Anderson-Johnson contains provisions to subsidize small community service, preserve passenger advantages, and provide aircraft loans. It also includes a provision guaranteeing service for the next ten years to any city presently receiving CAB certificated air service; if the certificated carrier terminates this service, the CAB is required to subsidize a commuter replacement for ten years.

The Senate Commerce Committee has reduced the subsidy provisions of Cannon-Kennedy. The committee’s bill would permit airlines to drop unprofitable flights, while subsidizing commuter carriers to offer this service and assuring small cities of some service for ten years.

Not surprisingly, the commuter airlines strongly favor this proposal. The president of the Commuter Airline Association of America, Thomas S. Miles, said, “We agree with the provisions of the draft covering the small community service program [and] federal subsidy . . . .”

77. Loving, Jr., supra note 45, at 212.
78. SOS (Support Our Service) pamphlet; see Cong. Rec. (daily ed.), Apr. 28, 1977 at S. 6635.
80. H.R. 8813, supra note 13, §19.
81. H.R. 8813, supra note 13, §19.
82. H.R. 8813, supra note 13, §19.
Sam I. Aldock, president of Systems Analysis and Research Corporation, sees serious problems arising from this measure. Drawing on his 18 years of experience with the CAB (prior to founding SARC), he points out that this program will increase regulation of this sector, not lessen it. He also says that deterioration of this service is probable under these provisions, since the fixed term guarantee of service is really no guarantee at all, and could eventually permit service to be phased out completely. American's Albert Casey posits a unique contention: that by proposing this subsidy program, deregulators are “arguing, in effect, that federal planning is superior to market forces as a means of deciding who shall and who shall not receive service.”

The local transport airlines are also in opposition. ALTA contends that turning over their operations to commuter airlines would downgrade service, in some cases from jet to air taxi, or even eliminate it. They believe that cities currently served by “local” airlines should retain the right to that service, with government subsidy, if necessary, to those carriers.

Allegheny has seen another flaw in the subsidy measure. Its president, Edwin I. Colodny, in his testimony before the Senate Aviation Subcommittee, pointed out that service to small communities will only be seen as essential in light of “degree of isolation” and “availability of alternative means of transportation.” This could conceivably result in severe limitations on what communities would receive subsidy, and therefore service. United has stated, however, that it “can accept the idea of government financial support for carriers who are required to continue air service to unprofitable communities where the services are deemed essential.”

Additionally, some senators from predominately rural states, or states with a widely dispersed population, have seen this bill as a backward step. Senator George McGovern, in a statement to the Senate Committee on Commerce, Science and Transportation, expressed fears that commuter airlines would be financially unstable even with subsidies, and provide insufficient service for states which depended greatly on air transportation for both intra- and interstate travel, such as South Dakota. (There is no Amtrak in South Dakota.) Senator Theodore Stevens of Alaska has said that he agrees “with the goals of the small community service provisions,” but he is “not sure if the bill is how to get there.” He would be willing, to support the bill, but only after modifications.

88. ALTA, the Association of Local Transport Airlines, is composed of: Air New England, Air Midwest, Alaska Airlines (which has broken with ALTA’s position on entry), Allegheny Airlines, Aloha Airlines, Frontier Airlines (which has also broken with ALTA’s position on entry), Hawaiian Airlines, Hughes Airwest (which has broken with ALTA’s position on the entire regulatory reform issue), North Central Airlines, Ozark Airlines, Piedmont Airlines, Reeve Aleutian Airways, Southern Airways, Texas International Airlines, Wien Air Alaska.
91. Testimony of Richard J. Ferris, supra note 4, at 27.
are made which would assure him that the bill will not harm air transportation in Alaska, because of Alaska’s almost total dependence on air transportation.94

These concerns by senators about the effects of the bills’ subsidy provisions are by no means insignificant. Even Senator Bayh of Indiana, who has voiced concern about the CAB’s having “consistently opposed attempts to reduce air fares”, and who favors regulatory reform, says that he has “some reservations about the effect of legislation of this nature on small communities”.95

CAB Procedures

Cannon-Kennedy also changes basic CAB hearing and decision making procedures. The need for CAB approval of rates (within the set percentages) is eliminated. A time limit is set, within which the CAB must decide any route case; if the board does not act within the prescribed time, the route is automatically awarded. The bill also shifts the burden of proof in route cases to the party in opposition to the granting of the route: that party must demonstrate that the route is against the public convenience and necessity. The board is required to adhere to strict evidentiary standards and allows a reviewing court to apply its expert judgment as to whether these standards have been adhered to.96 The procedure regarding antitrust matters is altered to eliminate CAB jurisdiction, except for the power to allow immunities in the public interest, and grants that jurisdiction to the Attorney General. It is his duty, under this bill, to inform the parties involved if there is a violation of antitrust law, and upon his reporting it to them and to the CAB, the transaction is suspended.

POTENTIAL EFFECTS OF THE REFORMS

The effects on free competition, on consumers, on employees, on communities, and on the airlines themselves, must be considered. Conceivably, at worst, competition in some areas would be scarcely opened, some consumers might be forced to pay higher prices, some employees might lose jobs, some communities might lose certain services, and some airlines might sink deeper “in the red.” On the other hand, free competition in many areas could be opened, many consumers could benefit from substantial savings on fares, many new jobs could be created through expansions and additional carriers and services, many communities could receive new service or be guaranteed present service, and many carriers could finally be “in the black” or expand.

All of these fears and hopes concerning the effects of Cannon-Kennedy have been raised by different groups, interests, and individuals. Examining the effects of this legislation on these groups may allow us better to forecast its effects.

Competition

Proponents of Cannon-Kennedy assert that it will increase competition among the airlines through less regulation of rates, routes, and certificates. Flexibility in pricing allows carriers to set competitive rates in the various markets according to direct costs and demands. Automatic addition of routes

96. S. 689, supra note 11, §23.
facilitates expansion of services. Freer certification provisions permit newer or smaller airlines to enter different markets, and medium-sized carriers to expand.

If these provisions stood by themselves, there would be a strong possibility of their working both ways. Free price regulation by itself is no guarantee of competition: one airline could price another completely out of the market (especially if it were larger than its former competitor); automatic route addition by itself is no assurance of growth for smaller carriers: a major airline could take over even more routes; easier certification by itself gives no certainty that more certificated carriers would result: existing carriers could expand that much more easily.

The Cannon-Kennedy bill, however, has safeguards which would assure that this would not happen. The percentage limits remain on fares and the CAB retains power to find rates outside these limits unjust or unreasonable; the smaller carriers are allowed to add more routes per year than are larger carriers or extremely large trunklines and to protect some routes from competition; the CAB retains some control over the certification process through the assertion of incompatibility with the public convenience and necessity.

Consumers

Consumers are directly affected by the rate and route provisions. Obviously, price cuts will "give the consumer a break" and route expansion will provide greater areas of service. The chance that rates will be increased is also existant, as is the possibility that three or four (perhaps fewer) airlines will dominate the industry, thus limiting (or eliminating) choices for the consumer.

In regard to rates, however, the Cannon-Kennedy bill has been amended to permit only rate increases of 5% while allowing cuts of 35%. This tilts the advantage in the consumer's favor. As for routes, the limitations on additions, especially the one-per-year limit on extremely large carriers should obviate the possibility of domination by them. The fact that all routes of large carriers (with a very few minor exceptions) will be open to competition from all other carriers will further prevent this from occurring.

Airline Employees

Airline employees have serious concerns about these reforms. Price cuts could easily be obtained through job eliminations; route cutbacks of "red-ink runs" could cause reductions in positions; extremely strong competition causing loss of routes could have the same result. To the employees, the possibility of other jobs through expansions (although very likely) seems too tentative.

In its February 25, 1977 statement, the AFL-CIO Executive Council asserted that current legislation "would adversely affect the stability of air transport industry and the job security of over 300,000 airline employees."

In response to these concerns, the Senate Commerce Committee has amended Cannon-Kennedy to protect airline workers from job losses due to freer competition and Anderson-Johnson has similar provisions. Nevertheless, United's president, Richard J. Ferris, has astutely recognized problems which could occur with this provision, such as unnecessary government intervention and cause/effect problems of how to distinguish general business circumstance job losses from those possibly resulting from reforms.

98. H.R. 8813, supra note 13, § 27.
Small Communities

Small communities appear to obtain some advantages from Cannon-Kennedy in the subsidy, certificate, and route provisions. Subsidies to commuter airlines and others serving small towns would, in theory, assure service for the next ten years. The changes in the certification procedures, including the redefinition of the "public convenience and necessity" formula, the transfer of the burden of proof to opponents of certificates, and the elimination of hearings in routine cases would facilitate certification of the small, presently uncertified carriers serving communities, by facilitating certification. Automatic route additions would allow larger carriers to provide service to some small communities.

Nevertheless, there are still problems in this area. Ten-year guarantees of subsidies would insure service only to those presently served by certificated carriers. The mere facilitating of certification might increase the number of certificated carriers; it is important to remember, however, that the ten-year provision only applies to communities now receiving certificated-carrier service. Also, airlines will not necessarily add routes to smaller communities because such routes are not always profitable; in fact, under the new provisions airlines could more easily drop unprofitable flights to small communities. The subsidy provision would not cover a situation if there were no "fit, willing, or able" commuter airline to take over the dropped route.

Although this problem has not been given extensive attention, it is a severe one: in the last 15 years, 170 cities have lost certificated air service, and less than 100 of these have been taken over by the commuter airlines. Perhaps the better solution is to permit airlines to drop "unprofitable" flights only if there is another "fit, willing, and able" carrier. If there is not a replacement carrier, the airline could receive a government subsidy in order to continue the service.

The Airlines

The airlines have voiced concerns that lower fares would lead to less frequent and less reliable service. Corner-cutting, marginal profits, and the weakening of the economic base of the air transportation industry caused by automatic entry would lead to dominance by one or two airlines. Mergers would become necessary to "stay in the running" with expanded large carriers but would be restricted by the provisions on antitrust immunities. These are valid concerns; even though some emotionalism has been generated regarding regulatory reform, at the bottom of it all lie deep concerns for what sort of future the airline industry will have. The future of this industry depends on the respective success of several different types of carriers. Their concerns about Cannon-Kennedy are disparate.

Concentration of business among a few large carries is a concern of comparatively small carriers. Nevertheless, smaller, aggressive, lower-priced airlines can make inroads into the widespread systems of extremely large carriers and thereby move into more lucrative markets, while the extremely large carriers would be forced to juggle their resources, responding more slowly to competition from many carriers over numerous routes. At the same time, smaller carriers would be protected from having to "fight for" routes they already served, because only two of their routes per year would be open to competition.

100. Testimony of Sen. Edward M. Kennedy, supra note 7, at S. 4623.
Many carriers have reacted unfavorably to the price provisions. Permitting 35% price cuts while allowing only 5% price increases has seemed unbalanced to some carriers who would have preferred the allowance of 10% increases or decreases or some similar "equal" figures. This would not, however, facilitate competition as much as the allowance of deeper price cuts. It might even reduce the competitive factor; if an airline raises rates 10% on a number of routes and lowers them 10% on an equivalent amount, outside competing forces would not have much effect. The chances of this happening under the 5%/35% system are much less, because a 5% cut balanced with a 5% increase probably would not prove sufficiently worthwhile, especially in terms of attracting passengers.

The elimination of most antitrust immunities would benefit the smaller carriers. Elimination of "agreements to cut back" and similar arrangements would greatly lessen the encroachment of larger carriers upon smaller carriers' markets. Some of the extremely large carriers have been apprehensive regarding how the antitrust provisions would affect agreements they have made or intend to make which they consider proper or in the public interest. It must be remembered that if an agreement is in the public interest, it will be upheld by the CAB, regardless of the Attorney General's interpretations.

Prospects for Enactment

The Cannon-Kennedy bill was introduced by Senators Cannon and Kennedy, along with co-sponsors Senators James Abourezk, Frank Church, and James Allen, on February 10, 1977, and referred to the Senate Committee on Commerce, Science, and Transportation. Hearings were held in late March, 1977. The bill was amended, voted upon by the committee, and ordered reported on October 27, 1977.

The Anderson-Johnson bill was introduced by Representatives Glenn Anderson and Harold Johnson, along with co-sponsors Representatives Teno Roncalio, Allen Ertel, Norman Mineta, and John Fary, on August 5, 1977, and referred to the House Committee on Public Works and Transportation. Hearings were held at the beginning of October, 1977.

The Senate and House will vote on both of these bills in 1978, and some form of airline deregulation legislation is expected to be enacted. The Senate will clearly pass some variation of Cannon-Kennedy within the next few months, and prospects are very strong for passage of comparable legislation in the House before the close of the 95th Congress. The greatest likelihood is that a slightly amended version of Cannon-Kennedy will form the basis for legislation in both the Senate and House. In view of strong support for regulatory reform within both the executive branch and Congress, it is considerably more likely than not that the Senate/House Conference Committee will be able to reconcile differing versions of the bill passed by each house of Congress, and that airline regulatory reform will be enacted into law before the end of 1978.

CONCLUSION

The Cannon-Kennedy bill will provide extensive reform of the airline industry. As Senator Bayh points out, "It is my feeling that legislation in this area should be enacted."101 The major portions of the bill composed of

permissible percentages for rate increases and decreases, automatic route additions and easier certification for new services and carriers, would eliminate much of the restrictiveness and delay of the present system. Other provisions of the bill deal with different aspects of the same problem. The elimination of antitrust immunities will increase competition; the providing of subsidies for less profitable routes will facilitate small-town service; the procedural reforms will make decision-making more efficient.

Although it is probable that some form of airline deregulation will be enacted in 1978, some doubt and opposition lingers with regard to the Cannon-Kennedy and Anderson-Johnson bills. "Airline deregulation" (more accurately, regulatory reform) has a startling connotation to it, which has caused unnecessary anxieties. It does not mean that all limitations on rates, routes, or certificates will be eliminated. Cannon-Kennedy has built-in safeguards and retains certain necessary restrictions in each of these, as has been previously discussed. It does not mean that safety standards will be lowered; the bill does not effect Federal Aviation Administration rules, and it is a non sequitur that price cuts mean less safety.

Cannon-Kennedy does mean that flexibility in rates will be facilitated, that financial assistance will aid airlines in providing small community service, that new carriers will be able to enter the airline industry more easily, and that existing carriers will more easily be able to engage in new types of service.

The need for airline regulatory reform has perhaps been most succinctly stated by C. F. Eckel, director of regulatory affairs of United Airlines:

Our basic premise is that the men and women who manage the nation's airlines are more able to determine routes, service, and prices for their customers than is a government agency. Management should be tested by the market place, not by formulas or analysis by clerks. Most American businesses operate without government control of what they sell, where they sell and what they charge. We think airlines should have the same freedom.102

As Rush Loving, Jr., stated in his Fortune article, "The deregulators are clearly correct in believing the time is ripe for reform."103 President Carter favors airline regulatory reform, and this support for deregulation by the President is consistent with his goals for executive branch reorganization.104 The chairman of the relevant regulatory agency, CAB Chairman Alfred E. Kahn, has been a strong proponent of reform of the CAB's regulatory procedures and of the relationship between government and the nation's airlines.

With the President and the relevant executive branch administrators favoring airline regulatory reform, and momentum in Congress supporting the changes set forth in the Cannon-Kennedy and Anderson-Johnson bills, it is clear that the authority and jurisdiction of the Civil Aeronautics Board over the nation's airlines, and the competition between and among the airlines, will be substantially different by the close of the 95th Congress.

103. Loving, Jr., supra note 45.