RECENT DEVELOPMENTS

ADMINISTRATIVE LAW—FEDERAL AVIATION ACT—Civil Aeronautics Board ruling that Indiana-based air travel club has become a "common carrier" in violation of 49 U.S.C. § 1371(a) affirmed. —*Voyager 1000 v. CAB*, 489 F.2d 792 (7th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3626 (U.S. May 13, 1974) (No. 1033).

The United States Court of Appeals for the Seventh Circuit has recently decided a case which threatens to destroy the air travel club[1] as a viable form of recreational transport. In *Voyager 1000 v. CAB*[2] the court of appeals upheld,[3] as supported by substantial evidence and a reasonable basis in law, a Civil Aeronautics Board determination that Voyager, an air travel club, was operating as an "air carrier" in "air transportation" without a certificate of public convenience and necessity as is required by law.[4] The ultimate issue was whether or not Voyager's activities constituted those of a common carrier[5] under the Federal Aviation Act of 1958.[6]

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[1]*Cf.* The Indianapolis Star, Jan. 5, 1974, at 22, col. 4. There are thirty air travel clubs throughout the United States. This case represents the first one in which the Civil Aeronautics Board (CAB) has brought an action against any of them for not having obtained a certificate of public convenience and necessity. Since this action was commenced, however, the CAB has filed three other enforcement proceedings. Petitioner's Brief for Certiorari at 7, Voyager 1000 v. CAB, 489 F.2d 792 (7th Cir. 1973).

[2]Voyager 1000 v. CAB, 489 F.2d 792 (7th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3626 (U.S. May 13, 1974) (No. 1033).

[3]*Id.* at 802.

[4]Voyager 1000, 2 AV. L. REP. ¶ 22,107 at 14,307 (C.A.B. 1973). The Federal Aviation Act of 1958, § 401(a) provides that:

> No *air carrier* shall engage in any air transportation unless there is in force a certificate [of public convenience and necessity] issued by the Board authorizing such air carrier to engage in such transportation.

49 U.S.C. § 1371(a) (1970) (emphasis added).

[5]The Federal Aviation Act ultimately demands that an unlicensed air carrier be operating as a "common carrier" before it can be deemed in violation of section 401(a). An air carrier is defined as "any citizen in the United States who undertakes, whether directly or indirectly or by a lease

Voyager was organized in September, 1964, as a private air travel club under the Indiana Not-For-Profit Corporation Act.[7] Although the basic purpose of the club, which was to provide recreational travel for its membership, did not change over time, both Voyager's size and activity greatly increased.[8] When originally formed, Voyager had planned to limit its membership to 1000 dues paying individuals. Dues were set at four dollars per month with a $125 individual initiation fee or a $200 family initiation charge. By 1965, the club had achieved its membership goal and a new corporation, Voyager 2000, was founded. Eventually, the two travel clubs merged and Voyager 1000 retained a stable membership of 2,400 persons for the next two years. Early in 1968, however, the travel club entered a period of severe financial difficulty.[9] During this time it became apparent that a substantially larger dues paying foundation was needed if Voyager 1000 were to survive. A vigorous new membership drive was embarked upon. Initiation fees were lowered and in at least one case waived.[10] Advertisements for membership were widely published or broadcast and open houses were held.[11] Initially a goal was set of 5,000 members. This was increased in 1970 to 20,000. Additionally, in September, 1968, Voyager qualified for a certificate of operation under the newly adopted part 123 of the Federal Aviation Regulations. The rule was promulgated by the Federal

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or any other arrangement, to engage in *air transportation*. . . ." 49 U.S.C. § 1301(3) (1970) (emphasis added). Air transportation is defined under the same section as "interstate, overseas, or foreign air transportation . . . ." *Id.* § 1371(10). These terms are defined respectively as meaning "the carriage by aircraft of persons or property as a *common carrier* for compensation or hire . . . in commerce . . ." between the United States and another country, between the states, or between its states and territories or possessions. *Id.* at § 1371(21) (emphasis added).

[6]The Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* (1970) [hereinafter cited as 1958 Act].

[7]IND. CODE §§ 23-7-1 to -6 (1971).

[8]Petitioner's Brief for Certiorari at 31, 47, *quoting from* the initial decision of Administrative Law Judge William J. Madden.

[9]*See id.* at 30-32.

[10]489 F.2d at 795. Note also that dues were raised. *Id.*

[11]*Id.* For examples of Voyager's advertising through the public media, see Brief for Petitioner, Appendix at 121-28.

Aviation Administration (FAA)[12] to set safety standards for air travel clubs[13] using large aircraft.

On November 16, 1971, when the CAB's Bureau of Enforcement filed its complaint against Voyager 1000, the club's outstanding memberships numbered approximately 14,500. This represented an estimated 43,000 individuals eligible for the club's flights due to family memberships.[14] Voyager employed over eighty persons, owned five aircraft, and operated two others.[15] The number of flights operated and passengers carried during any one period varied.[16]

The Bureau's petition for enforcement alleged that Voyager was operating as a common carrier for compensation or hire without authority from the Board in violation of section 401(a) of the Federal Aviation Act.[17] The major assertions of the complaint were that Voyager: 1) solicited the general public through its advertising, 2) had no membership criteria, although it did require "nominal" payment of fees and dues, and 3) possessed a membership that was not in fact private but constituted a segment

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[12]Under the 1958 Act both the economic and safety regulation of commercial aircraft are provided for. In order to comply with the law, an air carrier must obtain the appropriate safety clearance from the Federal Aviation Agency, 49 U.S.C. §§ 1421-31 (1970), and economic authority from the Civil Aeronautics Board, *id.* §§ 1371-87.

Part 123, 14 C.F.R. §§ 123.1-.53 (1973), was adopted by the FAA in 1968 in order to assure that the safety levels demanded of commercial operators, *id.* § 121 *et seq.*, were also met, with minor operational modifications, by air travel clubs. Should it later be discovered that a person is operating as an *air carrier*, then such person is required to obtain a certificate of operation from the CAB as well as a new certificate of operation, issued under part 121, from the FAA. Brief for Petitioner, Appendix at 99, *quoting from* the memorandum of the Department of Transportation as Amicus Curiae.

[13]Under part 123 an air travel club is defined as "a person who engages in the carriage by airplanes of persons who are required to qualify for that carriage by payment of an assessment, dues, membership fee, or other similar type of remittance." 14 C.F.R. § 123.1(b) (1973).

[14]489 F.2d at 795.

[15]*Id.* As of November 11, 1973, Voyager had reduced its staff to fifty-four persons and was operating two aircraft. Paid memberships numbered approximately 13,000. Indianapolis Star, Nov. 18, 1973, § 3, at 5, col. 2.

[16]*See* 489 F.2d at 795 n.5, 796.

[17]*Id.* at 796.

of the public.[18] On June 22, 1972, an Administrative Law Judge, after evidentiary hearings, dismissed the complaint.[19] The Bureau of Enforcement petitioned for review to the Board and the prior ruling was reversed.[20] Voyager initiated the instant appeal.

Although the term "common carrier" is not defined by the Federal Aviation Act, the CAB has sought to clarify its meaning in a number of cases and in a variety of contexts. However, the decisions have been less than harmonious,[21] and "these precedents leave a considerable area of choice which the Board necessarily exercises in applying the broad definition of the statute to particular carriers . . . ."[22] Consequently, the underlying issues in the *Voyager* appeal were whether, in light of prior case law, the Board's determination that Voyager 1000 operated as a common

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[18]Brief for Petitioner, Appendix at 4, *quoting from* the Bureau of Enforcement Complaint.

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> On the basis of the foregoing findings and conclusions and all the facts of the record, it is found that Voyager 1000 at the outset was intended to be a private club providing transportation for its members in a capacity of a private carrier; it has operated in this concept and, despite expansion of the membership from that originally planned, it has not moved into the status of common carrier.

Petitioner's Brief for Certiorari at 47, *quoting from* the initial decision of Administrative Law Judge William J. Madden.

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> In sum, viewing its activities objectively, we find that Voyager widely promoted and provided air transportation to the general public in return for payment of money. Despite the various labels Voyager attaches to itself and to various aspects of its method of operation, it is "furnishing transportation by air to the general public on a commercial basis." (*Las Vegas Hacienda v. C.A.B., supra,* 298 F.2d at 436) . . . .

2 Av. L. Rep. ¶ 22,107, at 14,307.

[21]

> Generally speaking, a common carrier is defined as one who holds himself out as ready and willing to undertake for hire the transportation of passengers or property from place to place, and so invites the patronage of the public.

Transocean Air Lines, 11 C.A.B. 350, 352 (1950). *Compare id.* at 353 (when service is limited to a particular few who contract with the carrier, this may require a conclusion that such carrier is a private carrier for hire), *with* 298 F.2d at 434 (it is immaterial that services offered attract only a limited group and are performed pursuant to contract).

[22]Las Vegas Hacienda, Inc. v. CAB, 298 F.2d 430, 433 (9th Cir. 1962).

carrier was supported by substantial evidence[23] and prospectively, whether the CAB's decision to exercise its powers fulfilled the underlying policies of the 1958 Act.[24]

No federal court, prior to the Seventh Circuit Court of Appeals in the instant case, had ever been presented with the problem of distinguishing what type of operation constituted a common carrier as opposed to an air travel club. The Bureau of Enforcement refused to take a position on the criteria to be used,[25] and policy pronouncements which were made in conjunction with the adoption of part 123 proved to be of limited value.[26] An FAA

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[23]49 U.S.C. § 1486(e) (1970) provides that "[t]he findings of facts [sic] by the Board or Administrator, if supported by substantial evidence, shall be conclusive." In Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966), the Supreme Court reaffirmed its definition of the substantial evidence standard as meaning that which a reasonable mind might accept as adequate to support a conclusion. It was noted that Congress adopted the standard out of a desire to free reviewing courts from the time consuming task of re-weighing evidence and to give proper credit to administrative expertise. *Id.* For a more complete discussion of the substantial evidence standard as it relates to judicial review of administrative decisions, see K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 29 (1958, Supp. 1970).

[24]Since the reviewing court could not substitute its interpretation of policy for that of the CAB, the majority limited itself in this respect to a consideration of policies under the 1958 Act only as they might relate to a common carrier definition. That the court was not unaware of broader policy issues, however, is indicated by its comment in footnote thirteen, *see* note 43 *infra*, of its decision and Circuit Judge Pell's concurring opinion.

[25]2 AV. L. REP. ¶ 22,107, at 14,307. Delineation of the boundary between air travel clubs and common carriers is of more than casual interest to operations such as Voyager whose assets were claimed to be in the neighborhood of $2,000,000. By definition, air travel clubs border on the status of common carriers. The CAB "probably" participated in the air travel club definition's drafting, 489 F.2d at 797. In view of such a fact situation, Voyager's pleas for leniency and legal clarification deserved more consideration than the cavalier statements of the Board suggest they received. *See* 2 AV. L. REP. ¶ 22,107, at 14,307-08. The CAB may be asking the remaining clubs to take a risk that is unreasonable. *See* Aeronauts Int'l Travel Club, Inc., No. 25,517 (Admin. L. Ct., Jan. 3, 1974):

> It *may be* that there *can* be such a thing as a bona fide air-travel club under FAR 123, but those examined in formal proceedings before the Board so far fail such status.

Id. at 40 (emphasis added).

[26]Little weight was accorded 33 Fed. Reg. 12,887 (1968), which identifies the primary characteristics of an air travel club as its nonprofit organization, sporadic flight scheduling, and relatively small number of hours spent in flight time.

opinion to the effect that Voyager was not a commercial carrier engaged in common carriage[27] was summarily dismissed by the court as not logical.[28] Consequently, the court was compelled to consider the problem in light of the purposes underlying CAB regulation and prior case law which was analogous to, but not identical with, the fact situation represented in *Voyager*.

Under the Federal Aviation Act, the CAB is charged with the responsibility of providing the public with "economical and efficient service at reasonable charges, and [avoiding] destructive competitive practices."[29] Thus, the court reasoned that an attempt by the CAB to define common carriage necessarily involves the delineation of the regulated (individually ticketed) from the non-regulated (group) market.[30] By having formulated the issue in this manner, the court of appeals has, in effect, said that a person becomes a common carrier, subject to regulation, when he *competes* with the commercial air carriers in furnishing transportation by air to the individually ticketed *public*.[31]

In order to determine whether Voyager had been fairly classified as a common carrier, the court of appeals turned its consideration to the recent case *Saturn Airways, Inc. v. CAB*.[32] The issue in *Saturn Airways* was not one of common carrier status, but dealt with the distinction between individually ticketed and group fare markets. It was noted by the *Voyager* court, however, that the market to be served under the proposed travel group

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[27]Brief for Petitioner, Appendix at 75, *quoting from* a letter from the Federal Aviation Administration to Voyager 1000, Aug. 2, 1971. *See also* Club Int'l, Inc., No. 24,387, at 14 n.9 (Admin. L. Ct., June 6, 1973) (FAA letter to Argosy Air Travel Club, dated March 15, 1971, advising the club on the permissibility of its membership solicitations).

[28]489 F.2d at 797. The FAA had concluded that nonprofit air travel clubs were not common carriers since they could not fly passengers for hire, but only members for pleasure. It was stated by the court that this was clearly insufficient reasoning since air travel clubs provide transportation for a price which omits the profit factor. Therefore, they would represent the strongest type of competition to commercial airlines.

[29]49 U.S.C. § 1302(c) (1970).

[30]489 F.2d at 798.

[31]This analysis ignores the fact that a regulated market does not always provide the most economical and efficient service to the public. It also assumes that even limited free market competition within the air transportation industry is to be discouraged. That any segment of society is denied access to air travel, which might not otherwise be available to it as a result, is regrettable. *See id.* at 802 (Pell, J., concurring).

[32]483 F.2d 1284 (D.C. Cir. 1973).

charter (the group market) as it was authorized by the CAB and the market served by Voyager bore a heavy resemblance to one another.[33]

The major question in *Saturn Airways* was whether the CAB could legitimately authorize the Travel Group Charter for supplemental air carriers[34] without an evidentiary hearing as to its diversionary effects on the regularly scheduled airline passenger market. It was held that the CAB had acted permissibly for two reasons. Although the Travel Group Charter did away with the old "nontravel affinity between charter members"[35] requirement inherent in earlier regulations, other equally effective restrictions were imposed to protect the individually ticketed market.[36] Secondly, the travel group charter regulations were experimental and due to be terminated in 1975 pending investigation of their effect.[37]

In *Voyager*, particular signifigance was assigned to the limitations placed upon the travel group charter by the CAB. The court noted that such limitations served to eliminate from the charter market those members of the traveling public "who require transportation on short notice without risk of cancellation or restrictions on return accomodations."[38] The Board's determination below, it was said, focused upon those characteristics of Voyager 1000 which failed to eliminate from its service members of the individually ticketed market.[39] Factually, the court's statement gives the Board's analysis more than its due. It implies a weighing of the equities between safe air travel at a moderate price and the modicum of economic competition that the air travel clubs might offer commercial carriers. This did not take place.

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[33]489 F.2d at 798.

[34]49 U.S.C. §§ 1301(33), 1971(d)(3) (1970) authorize the Board to certify supplemental air carriers for charter business as the term is defined by it. Section 1301(32) defines a supplemental air carrier as an air carrier engaging in supplemental air transportation, *i.e.*, charter trips.

[35]This term is the Board's shorthand way of referring to a social relationship which arose between travel participants prior and unrelated to their application for a charter flight.

[36]483 F.2d at 1292. For a discussion of the more important restrictions imposed, see page 747 *infra*.

[37]483 F.2d at 1293.

[38]489 F.2d at 299.

[39]*Id.*

The approach taken by the Board in review of the original administrative decision for Voyager is the same that it has followed in all cases turning on the common carrier issue since 1950. This approach centers on whether the alleged common carrier has "engaged as a regular business in offering air transportation to the general public in the commercial market."[40] It is doubtful whether any carrier for compensation could pass the test once applied. The Board has held that it is immaterial that the service offered is performed pursuant to special contract and may be attractive to only a limited group.[41] So long as the service is patronized by the *public,* it is a common carrier. The public market, of course, can be as broad or as narrow as the CAB chooses to make it.[42]

In its review of the Board's decision, the Seventh Circuit Court of Appeals also failed to deal with the equitable balance between an offering of economical and efficient air service to qualified members of the public and the competitive harm which would result to regularly scheduled point-to-point air carriers. Doubtlessly, the court was aware of such a weighing test as applied by the District of Columbia Circuit in *Saturn Airways.*[43] Following

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[40]Las Vegas Hacienda, Inc. v. CAB, 298 F.2d 430, 434 (9th Cir.), *cert. denied,* 369 U.S. 885 (1962) (resort hotel operator selling package tours from Los Angeles to Las Vegas, including "free" air transportation). *See* Consolidated Flower Shipments, Inc., 16 C.A.B. 804, 814-15 (1953), *aff'd,* 213 F.2d 814 (9th Cir. 1954) (flower shipping cooperative formed for purpose of consolidating shipments was engaged indirectly in air transportation); Transocean Air Lines, Inc., 11 C.A.B. 350, 352 (1950) (transportation of passengers on international flights upon a regular basis and without restriction constitutes common carriage).

[41]298 F.2d at 434.

[42]*Compare* 483 F.2d at 1292 (in which the *Saturn Airways* court sets forth the five differences between conventional and travel group charter travel which the Board claimed were "substantial and vital"), *with* Brief for Petitioner, Appendix at 4, *quoting from* the Bureau of Enforcement Complaint (in which it is claimed that Voyager's operations, which served substantially the same market, held out transportation to the *public*).

[43]Referring to the *Saturn Airways* decision, it said:

> The court's analysis quite properly demonstrated the limitations on the Board's statutory duties. *The desired result is not to remove all operations which compete with commercial airlines* but rather to regulate *only* those operations which affect the *economic soundness* of regularly scheduled point-to-point air transportation.

489 F.2d at 799 n.13 (emphasis added).

the path of least resistance, however, the lopsided CAB approach was taken. Voyager's activities as they related to a "holding out to the public or a segment of the public"[44] of a transportation service indiscriminately available, were investigated. In particular its membership qualifications were scrutinized.

Petitioner, in reply to the Bureau of Enforcement's charges, contended that: 1) its uniqueness and capacity to provide convenient service at a moderate price set it apart from commercial carriers, 2) its advertising was permissible since such solicitation was not aimed at obtaining business from the public, but new memberships, 3) there was no evidence that the advertising diverted persons from the individually ticketed market, 4) Voyager members acquired a social affinity separate from the general public, and 5) as a practical matter the club's members failed to receive individually ticketed service.[45] The court did not accept these arguments.

Claims of distinctive service were said to relate only to whether a certificate of exemption should issue under section 416 of the Federal Aviation Act and not to the determination of common carrier status. This analysis of petitioner's argument would appear to be correct when viewed in light of the appropriate statutory language.[46] However, it assumes that competition of the type contemplated by the Act is already taking place. This is the crucial point in the *Voyager* decision. Was the CAB's ruling supported by substantial evidence that the club was holding itself out as a carrier for hire in the individually ticketed market?

The *Voyager* court perceived the proper inquiry as whether the club's advertisements solicited prospective members where membership was undifferentiated from the traveling public at large.[47] Consequently, the court reasoned that even if Voyager's advertisements solicited only new members and were not meant to attract public patronage generally,[48] this fact was irrelevant.

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[44] *Id.* at 799.

[45] *Id.* at 800.

[46] 49 U.S.C. § 1386(b)(1) (1970) allows the CAB to exempt an air carrier or air carriers from terms, conditions, or regulations under the 1958 Act if they constitute an undue burden upon the carrier and are not in the public interest.

[47] 489 F.2d at 801.

[48] Most, if not all, of the club's advertisements which appeared in the public media were addressed "to Voyager members only." However, the court's analysis puts the inquiry of how widely club memberships were solicited and

Alternatively, the court focused on the two factors that the Administrative Law Judge had concluded *did* separate club members from the public generally. These were the substantial fees paid by members and the declared affinity between travel minded persons. It was first decided in *Voyager* that to use travel-mindedness as the basis for travel club affinity begs the question[49] and secondly that membership fees paid by individuals cannot provide a real basis for distinction from the public where these fees are insignifigant in terms of the fare bargains made available through their payment.[50] The court of appeals also found that the record was devoid of criteria sufficient to differentiate individually ticketed service from that offered by the club.[51] Thus, the Board's opinion was affirmed.

Voyager represents more than another case involving the definition of the term common carrier. It involves a search into basic policy considerations behind the Federal Aviation Act of 1958, as well as an inquiry into the proper functions of the Board and administrative agencies generally. Section 102(a) of the Act states that one of the basic duties of the Board is to encourage the development of "an air-transportation system properly adapted to the present and future needs of foreign and domestic commerce . . . ."[52] Fulfillment of this duty contemplates nonregulation

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from whom, after the basic question of whether a club's membership is sufficiently separated from the "public" that carriage of its members constitutes private transportation. How differentiated a group would have to be so as not to be adjudicated a part of the public is not clear. The court's decision would seem to suggest that a club's dues and initiation fees must be high enough to eliminate fare bargains in the flight transportation packages offered to its members.

[49]489 F.2d at 801. Why the affinity arising out of Voyager members' specialized air transportation arrangements was not sufficient does not appear.

[50]This language is taken directly from the Board's decision, Petitioner's Brief for Certiorari at 71 & n.12, *quoting from* Civil Aeronautics Board Enforcement Proceeding. The statement that the financial outlay for members was insignificant when viewed in light of the fare bargains available is based on an unfair comparison of commercial verses Voyager's rates. Voyager's total rates and fees for a tour to Zurich were compared with commercial rates for the same trip during the peak travel season. The fact that only twelve percent of the passengers traveling to Europe on American carriers used this peak travel fare in 1972 was ignored. Alternatively, most travelers obtained charter or group rates which were lower than the costs to Voyager members. Reply Brief for Petitioner at 18.

[51]489 F.2d at 802.

[52]49 U.S.C. § 1302(a) (1970).

as well as regulation by the CAB in some areas. This fact has been implicitly recognized by the Board through the adoption of its travel group charter regulations.[53]

In *Saturn Airways*, opposition to the travel group charter concept was registered by scheduled carriers who objected to the absence of any nontravel affinity restrictions. However, the Board correctly replied that nontravel affinity is not necessarily a prerequisite for charter legality under the Act. It merely serves as a useful basis for separation of the group and individually ticketed markets. It was recognized that totally unrelated persons could group together solely for travel purposes and "nonetheless have a true affinity arising solely from the special terms and conditions governing their transportation arrangements."[54]

The special terms and conditions which were found sufficient to separate the individually and group ticketed markets in *Saturn Airways* are signfigantly like those under which Voyager members were, as a practical matter, flying prior to issuance of the Bureau's cease and desist order. Under the CAB's regulations, travel group charter organizers must meet five major requirements prior to their exemption from section 401 of the Federal Aviation Act. The prior conditions are that: 1) travelers under the charter are to be assessed a pro rata share of the air transportation costs, 2) all charter participants must pay a nonrefundable twenty-five percent deposit of these costs, 3) full payment is due from each person sixty days or more prior to flight departure, 4) the charter must be on a round trip basis, and 5) the charter must be arranged by a person acting solely as an agent for the charterers and not otherwise connected with the carrier. Although Voyager's charges were not pro rated for specific flights, they did reflect the per member costs of previous like trips.[55] Rates per passenger mile were adjusted as the occasion arose. This cost projection method of charging travel participants is exactly what may be anticipated for use under the travel group charter system. The advantages of group travel and unscheduled air transportation arise out of the lower rates

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[53]Charter organizers who fulfill the travel group charter requirements are exempted from section 401 and various other provisions of the 1958 Act under 14 C.F.R. § 372a.20 (1973).

[54]37 Fed. Reg. 20,808 (1972).

[55]Petitioner's Brief for Certiorari at 36-37, *quoting from* the initial decision of Administrative Law Judge William J. Madden.

which may be charged upon full utilization of aircraft.[56] Therefore, similar fully-loaded charter flights will predictably lead to more or less standard and quotable pro rata prices. Charter organizers will assuredly exploit this fact. This is no more than Voyager did.

Travel group charter limitations on charter fee payments and nonrefundability are similarly indistinguishable from Voyager's practices. Despite the fact that travel group charter fees are nonrefundable, a participant's interests are "assignable" under the CAB regulations.[57] The price of the interest assigned is to be no more than was paid by the charter participant. Voyager would refund fees paid by members until thirty days prior to flight departure. In practical effect, this was less than what the charter regulations allow.[58] It is one of the factors extolled by both the *Saturn Airways* and *Voyager* courts as useful in distinguishing between the individually ticketed and group fare markets.[59] If risk of loss from short notice cancellation of flight reservations is one of the relevant factors in the public-private distinction, then Voyager members could have been deemed less a part of the public than the participants in a travel group charter. The club's membership paid substantial[60] dues which were continuous despite flight cancellations, unavailability of trips at desired times and of desired length, or nonuse of club facilities.[61]

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[56]*See generally* 483 F.2d at 1287 & n.6.

[57]14 C.F.R. § 372a.13 (1973).

[58]An assignment of a charter participant's interests is made through the group organizer for cash. Voyager practice was apparently only to give flight scrip if cancellation was made within the thirty day period.

[59]Saturn Airways, Inc. v. CAB, 483 F.2d 1284, 1292 (D.C. Cir. 1973); Voyager 1000 v. CAB, 489 F.2d 792, 799 (7th Cir. 1973).

[60]Voyager's members paid higher fees than any other air travel club with one exception. Their dues were also higher than many of the social clubs whose members are eligible for group fares. Brief for Petitioner at 18.

[61]A Voyager survey of 200 of its members showed that "only one arranged for transportation at the time of joining—on the average new members took their first flight 5½ months after joining . . . ." Reply Brief for Petitioner at 17-18. A survey taken by the CAB of the membership in another club showed, out of 410 members surveyed, and 260 responses received, the following results, with regard to trips taken: no trips, 200, one trip, 47, two trips, 9, and three trips, 1. When asked whether a reservation was made at the time of joining, the answers were: 200 no and 42 yes. Club Int'l, Inc., No. 24,387, at 19 (Admin. L. Ct., June 6, 1973). *See also* note 50 *supra*.

Round trip transportation is required under the CAB regulations. Voyager's arrangements for club members implicitly embodied the same requirement.[62] Members normally could not determine the length of their visit individually, nor in some cases could they separate air and ground charges.[63]

Finally, the rules governing the travel group charter require an independent travel organizer who is unassociated with the carrier. In this respect, air travel club practices are not similar to the travel group charter requirements. Nevertheless, the intended purpose of the restriction, which is to discourage the marketing of individual tickets to the general public,[64] is fulfilled by the nonprofit travel club. There is no incentive for these associations to compete with the scheduled carriers for business.[65] Similarly, there is no reason to permit a larger membership than is necessary to keep the club on a stable financial footing.[66]

In sum, analysis will support the statement that the CAB has taken a contradictory stance concerning Travel Group Charters and air travel clubs. Perceptibly, it has taken this inconsistant position due to the possibility for abuse by these clubs of their exempt noncommon carrier status under part 123.[67] Yet, to gain

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[62]Not all air travel clubs require this, however. *See* Club Int'l, Inc., No. 24,387, at 26 (Admin. L. Ct., June 6, 1973).

[63]Brief for Petitioner, Appendix at 171, 178.

[64]483 F.2d at 1294.

[65]These statements assume a true nonprofit standing on the part of the air travel club concerned. Voyager 1000 apparently was in such a position prior to and during the time of its appeal. It did, however, have plans to lease property from interested parties at one time. *See* Indianapolis Star, Mar. 9, 1972, at 20, col. 1. Both Aeronauts International and Club International were substantially linked with for-profit ventures. *See* Club Int'l, Inc., No. 24,387, at 10-11 (Admin. L. Ct., June 6, 1973) (air travel club used travel agency operated by party that formed it); Aeronauts Int'l Travel Club, Inc., No. 25,517, at 41 (Admin. L. Ct., Jan. 3, 1974) (club aircraft leased from for-profit venture owned by club management).

[66]Voyager's history shows a record of expansion only at times when increased membership was necessary to keep it on a firm financial footing. *See* Petitioner's Brief for Certiorari at 30-31, *quoting from* the initial decision of Administrative Law Judge William J. Madden.

[67]This fear is not completely unjustified as the *Aeronauts International* and *Club International* enforcement proceedings show.

Both clubs were nonprofit in name only. The inference was clear in many of the Club International advertisements that one-way or roundtrip ticketing was available without limitation as to the duration of one's stay at

the power of regulation over them, the Board must find that they are common carriers as supported by substantial evidence. Arguably, it failed to do so[68] in Voyager's case. Since the substantial evidence standard has been interpreted so broadly by the courts, however, the likelihood of an administrative decision being overturned solely on this point is minimal.[69] However, if it is asked who is responsible for the possibility of abuse of the air travel clubs under part 123, the answer is clear. To be sure, the CAB did not make Voyager 1000 violate the law. What it may have done was to affirmatively mislead the club into acting in such a manner. This would constitute ground for the issuance of an administrative estoppel.[70] That the CAB took a part in the actual drafting of part

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the point of destination. Club Int'l, Inc., No. 24,387, at 26 (Admin. L. Ct., June 6, 1973). Aeronaut International's "activity schedules" in some cases urged remittance of club membership fees along with tour fees upon joining. The same schedules show frequent flights to and from the same destinations. Aeronauts Int'l Travel Club, Inc., No. 25,517, Appendices G at 2 & H at 1 (Admin. L. Ct., Jan. 3, 1974).

[68]As the appellate decision indicates, an increase in the membership of an air travel club alone does not make it a common carrier. The key question is whether its members are defined in a manner so as to be undifferentiated from the public at large. 489 F.2d at 801. The Bureau of Enforcement made three arguments in this respect: 1) that Voyager members ceased membership after one flight, 2) that "numerous" applicants paid initiation flight and fees at the same time, and 3) that Voyager's fees were only "nominal." Brief for Petitioner, Appendix at 4, *quoting from* the Bureau of Enforcement Complaint.

Referring to the first point made, the Administrative Law Judge said "there is no factual basis to sustain this allegation." Petitioner's Brief for Certiorari at 46, *quoting from* the initial decision of Administrative Law Judge William J. Madden. His statement was never refuted. Point two of the complaint was rebutted by Voyager's survey. *See* note 61 *supra*. Again, the Bureau failed to come forward with evidence. Finally, the Bureau of Enforcement's third contention was apparently only supported by the Board's observation which is of doubtful value. *See* note 50 *supra*.

[69]This is not meant to imply that the standard is a poor one, but only that it may lead to unnecessary judicial deference to administrative determinations in borderline cases.

[70]United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 674-75 (1973) (Army Corps of Engineer's consistent limitation of its regulation to certain types of pollutant discharge might have deprived defendant of fair warning that its actions would be considered illegal). *Cf.* Cox v. Louisiana, 379 U.S. 559 (1965) (defendant who was advised that planned demonstration at certain location was not "near" the courthouse could not later be convicted for same); Raley v. Ohio, 360 U.S. 423 (1959) (appellants who relied on privilege as represented to them by investigating committee could not later be convicted for wrongful exercise).

123 in cooperation with the FAA is not clear from the record.[71] Nevertheless, the Board's inaction under the circumstances[72] should have been sufficient to cause a modification of the Board's order, which was not aimed at forcing Voyager to comply with the law per se, but at the club's destruction.[73]

The reader should note that *Pennsylvania Chemical* is apparently the first case to hold that a government agency may be estopped by its own inaction and the implied representations arising therefrom. *Voyager* might be distinguishable on the grounds that a criminal sanction was not applied. Alternatively, the amount of capital involved should have convinced the Supreme Court that the instant case was one of moment. For an exhaustive analysis of the relatively new doctrine of administrative estoppel, see K. DAVIS, ADMINISTRATIVE LAW TEXT § 17.01 *et seq.* (1972); Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374 (1953); Note, *Applying Estoppel Principles in Criminal Cases*, 78 YALE L.J. 1046 (1969).

[71]Why this point was not pursued further, under the Freedom of Information Act, 5 U.S.C. § 552 (1970), does not appear. Perhaps the material to be sought was exempted from discovery under section 552(b)(5) relating to interagency memoranda not available to a party other than an agency in litigation with an agency.

[72]Fairness demands that the Board not be held accountable for not having foreseen every possibility for abuse or accidental infringement under the 1958 Act. *See generally* Las Vegas Hacienda v. CAB, 298 F.2d 430 (9th Cir. 1962). However, Voyager's setting is quite distinguishable. Some air travel clubs, of which Voyager was one, have been in operation at least seven years. Travel club growth has been in the administrative eye since 1967. *See* 32 Fed. Reg. 10,311 (1967) (FAA). It cannot be seriously contended that the Board did not contemplate an eventual trespass (be it purposeful or accidental) into the regulated market by their activities.

How the CAB should have acted to make its views known prior to taking court action is itself a matter of some dispute. One avenue that has been suggested is section 416(a) of the 1958 Act, 49 U.S.C. § 1386(a) (1970). This would probably have been insufficient since the provision applies only to "air carriers," *i.e.*, common carriers by definition. The air travel clubs are not wholly without fault. The record is barren of any requests for guidelines from the CAB directly. Nevertheless, it is not unusual for an organization to look solely towards the agency under whose auspices it operates for guidance. Either there was a culpable breakdown in communication between the FAA and CAB, or the Board acted inequitably in refusing at least informal comment. That it could have clarified the situation if it desired is exemplified by its commendable work with the travel group charter regulations. The after-the-fact commentary of its own Administrative Law Judges indicates the same. Aeronauts Int'l Travel Club, Inc., No. 25,517, at 40 n.75 (Admin. L. Ct., Jan. 3, 1974).

[73]2 AV. L. REP. ¶ 22,107, at 14,307: "Voyager must cease holding out air transportation even to its so-called members."