Approved March 28, 1988
Date

MINUTES OF THE SENATE SUBCOMMITTEE ON JUDICIARY #3

The meeting was called to order by Senator Audrey Langworthy at
Chairperson

10:00 a.m./~~p.m.~~ on March 25, 1988 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Langworthy and Steineger

Committee staff present:

Gordon Self, Office of Revisor of Statutes

Conferees appearing before the committee:

Attorney General Robert T. Stephan
Donald C. Morrison, Trans World Airlines
James L. Casey, Trans World Airlines
Harriet Lange, Kansas Association of Broadcasters

House Bill 3003 - Deceptive advertising of consumer products.

Attorney General Robert T. Stephan, appeared in support of the bill. He testified the language set forth in House Bill 3003 is needed to deal with what is becoming an increasingly common method of decptive advertising. I do not object to an amendment in line 75 which would exclude mail order delivery charges, airport security fees and customs surcharges. A copy of his testimony is attached (See Attachment I). Committee discussion was held with the attorney general.

Donald C. Morrison, Trans World Airlines, testified although the airline industry has serious reservations about the bill, we share the view of the attorney general that deceptive advertising practices are contrary to the best interests of our industry. We do not object to the the goals of the bill. Our objections instead focus on the lack of demonstrated need for the legislation and our concern that it undermines the higher goal of a single national standard. A copy of his statement is attached (See Attachment II). Mr. Morrison reported they have 1300 employees who live in the State of Kansas, and Eastern Airlines has 500 employees who live in the State of Kansas.

Mr. Morrison then introduced James L. Casey who was present to respond to questions from the committee. Mr. Morrison pointed out their concerns regarding the constitutionality of the bill and asked the committee to reject the legislation for those reasons. A committee member inquired of Mr. Casey if the California bill is similar to this bill. Mr. Casey stated the California bill is different than this bill. The committee member inquired if there is a federal case that has resolved this issue? Mr. Casey replied, it hasn't resolved the surcharge issue. Upon request from Senator Steineger copies of 1984 Night Circuit Court Opinion, a federal case, the California case and DOT orders will be made available to him.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./p.m. on March 25, 1988

House Bill 3003 continued

Harriet Lange, Kansas Association of Broadcasters, testified we do not see the need for this legislature to adopt legislation, that could cause loss of revenue to Kansas broadcasters, which is federally pre-empted, while the issues involved are being addressed by Congress. Copies of her handouts are attached (See Attachments III).

The hearings on House Bill 3003 were concluded.

The subcommittee discussed House Bill 2882. It was the consensus of the committee to discuss this bill with the chairman before making a decision.

The subcommittee discussed House Bill 2917. The consensus of the subcommitee was to recommend to the full committee the bill be adopted.

The subcommittee discussed House Bill 3003. They felt the bill needed more study.

The meeting adjourned.

A copy of the guest list is attached (See Attachment IV).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-25-88

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Harriet Lange	Topeka	Ks Assn Broadcasters
Ron Arvin	"	SWBC
PAT BARNES	Topeka	KS Motor Dealers Assn
Nancy Lindberg	Topeka	A.G.
Jeanne Kutzley	Topeka	AG
[illegible]	"	"
JIM CASEY	WASHINGTON, DC	AIR TRANSPORT ASS'N
JOHN C. BOTTENBERG	TOPEKA	" "
Donald C Monson	ST LOUIS	TWA/ATA
Steve Montgomery	Topeka	Avis
Bob Stephan	Topeka	Atty Gen.
Matt Tuell	Topeka	AP
BOB GRANT	"	KCCI

Att. IV

3-25-88

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

Testimony of Robert T. Stephan
Attorney General, State of Kansas

Before the Senate Subcommittee on Judiciary
Hearing on H.B. 3003

March 25, 1988

Mr. Chairman & Members of the Committee:

I requested the introduction of this bill which would add a section to K.S.A. 50-626 outlining practices which are deemed deceptive in connection with consumer transactions. The language set forth in H.B. 3003 is needed to deal with what is becoming an increasingly common method of deceptive advertising.

That is the advertisement of incomplete prices which do not properly reflect the true price for the goods or services which they advertise. During my recent participation in a national task force of the National Association of Attorneys General investigating deceptive advertising practices by the airline industry, it became apparent that airlines were advertising one-half of the round trip fare in large bold numbers. A consumer would then be required to read the fine

Att. I

print at the bottom of the ad to learn this was one-half the round trip fare and the ticket must be purchased as a round trip. Additionally, the consumer must read further to learn that to some cities, there were additional fuel or airport imposed surcharges. For example, a Braniff Airlines ad touted a $27 fare from Kansas City to Chicago. Only after reading the fine print at the bottom of the ad did you learn that the fares are one-way and require a round trip purchase. Therefore, the product or service advertised is $54. However, we're not done yet. The City of Chicago also imposed a $9 surcharge for flights leaving from its airports. Therefore, the true cost of the round trip ticket from Kansas City to Chicago was $63 not $27.

Another example is a recent ad promotion by Hertz rent-a-car company. In that promotion, Hertz, in an attempt to make their advertised rates appear competitive with those of its discount competitors, lowered the large printed rate. Hertz, which has many of its locations located on airport property, pays a concession fee to the airport for the use of airport space. This concession fee amounts to a part of the car rental company's overhead. It is actually rent. In order to have its rates appear competitive with off airport locations which do not pay that fee, Hertz lowered its large advertised rate. Hertz then put an asterisk next to that rate corresponding to the fine print at the bottom that the rate

did not include airport imposed fees. These fees were mandatory and average from 8 to 12 percent. They were automatically added to the rental rate much to the consumer's surprise. When contacted by my office and others, Hertz agreed to discontinue the practice. Other rental car companies however fail to disclose in their rates up to $12.00 for a mandatory 1/2 tank of fuel.

The practice of advertising only a portion of the product or service is clearly deceptive. It is for that reason, that I request specific language to be added to the Consumer Protection Act to address this deceptive practice. If a business elects to advertise its products or services, consumers have a right to know the true price of those products or services.

I do not object to an amendment of H.B. 3003 at line 0075 which would exclude mail order delivery charges, airport security fees and customs surcharges.

Thank you.

KCT 3-24

It's time to put that on-again-off-again trip on again.

With TWA's low fares and Getaway Vacations, the time to do Europe is now.

If you've been putting off a trip overseas, you've just run out of excuses. TWA has low fares to just about anywhere in Europe, so stop procrastinating and start planning.

You might plan to take one of TWA's great Getaway® Vacation packages. "The Londoner," for example, gives you 8 days and 7 nights in London, with a theater ticket to a West End show all for just $389.*

Whether you prefer to travel on your own or with a group, there's an affordable Getaway Vacation to suit your budget and travel style.

So don't put off that trip any longer. Because whether we just fly you there or show you around when you get there, you can't do Europe any better than with TWA. For more information on our Getaway Vacations, call your travel agent, or TWA at 1-800-GETAWAY.

*Getaway prices do not include airfare, are per person, double occupancy, and vary by departure date. Prices may change without notice in the event of major currency fluctuations.

$458
Frankfurt
KLXNR

London _____ $607
QOXAP6M

Paris _____ $650
QLXABIM

For international fare information, call your travel agent, or TWA in Kansas City at **816-221-8050** or elsewhere at **1-800-892-4141.**

Fare Conditions: Fares may expire prior to end of promotional offers and may require ticketing by March 31st. Some fares are non-refundable or require penalty for refund or changes in itinerary. Fares have varying minimum and maximum stay requirements. Fares require either 21 or 30 day advance purchase. Seats are limited, may not be available on all flights, days of the week or certain holiday periods. Fares are subject to change and government approval. $23 U.S. departure tax, security surcharge and customs fee apply. Fares/service may vary by airport.

TODAY'S TWA. FIND OUT HOW GOOD WE REALLY ARE.™

3-25-88

Statement of Donald C. Morrison
Vice President, Public Affairs
Trans World Airlines, Before the Kansas
Senate Judiciary Subcommittee
On House Bill 3003
March 25, 1988

Good morning, my name is Donald C. Morrison, I am Vice President of Public Affairs for Trans World Airlines. I appear here today on behalf of the Air Transport Association, representing the U.S. scheduled airlines serving Kansas.

We appreciate the opportunity to present the views of the airline industry regarding House Bill 3003, legislation which would require that the total advertised price of an item or service must include any surcharges or other required extra charge, exluding taxes. As you may know, the bill would effectively implement Section 2.5 of the "Air Travel Industry Enforcement Guidelines" promulgated in December 1987 by the National Association of Attorneys General (NAAG).

Although the airline industry has serious reservations about House Bill 3003, we share the view of the attorneys general that deceptive advertising practices are contrary to the best interests of our industry. We do not object to the goals of H.B. 3003. Our objections instead focus on the lack of demonstrated need for the legislation and our concern that it undermines the higher goal of a single national standard.

When considering the issue of airline advertising, it is important to keep in mind that each one of us is in business

Att. II

for the long-term, and questionable business practices undermine that goal. Airlines simply have no reason to engage in deceptive advertising practices. Moreover, the travelling public would not tolerate that behavior. Consumers are entitled to advertisements that are informative, accurate and truthful. In this industry, at least, misleading advertising detracts from the value of the message and the ability of an airline to stimulate business.

I would like to briefly review our concerns regarding the constitutionality of H. 3003 and the practical effects that are likely to occur if the legislation is adopted.

Our objections to H.B. 3003 are straightforward.

- o State regulation of airline surcharge advertising is federally preempted.
- o H.B. 3003 is unnecessary. Federal regulations already address airline fare surcharge advertising.
- o The need for such a statute has not been demonstrated.
- o Enactment of this bill would set a precedent for a patchwork of diverse state laws concerning the airline industry.

- o Arbitrary restrictions on fare advertising could result in less fare advertising and increased costs to Kansas consumers.

AIRLINE FARE ADVERTISING IS FEDERALLY PREEMPTED

State regulation of airline surcharge advertising is federally preempted. The U.S. Department of Transportation has clearly and forcefully exerted its regulation of airline price advertising. In a letter dated March 2 to Attorney General Stephen, the Department states "The State and Federal governments share the goal of ensuring clear dissemination of airline price information. In our view, however, Congress had made clear that these efforts must be consistent with the mandate of the Airline Deregulation Act to encourage price competition." H.B. 3003 conflicts with the U.S. DOT's rule, which allows advertisements to list the ticket price separately from other charges, a practice which we believe to be clear and understandable to the consumer.

The DOT goes on to state that "the States may not regulate the advertising of air fares in this manner. Where there is actual conflict with a Federal rule, where there is an irreconcilable difference between the Federal rules and the State provision, or where the state regulation will be an obstacle to the Federal policy, the Federal regulation takes precedence."

Separately, the legislative history of section 105 of the Federal Aviation Act of 1958, which is the preemption provison of that law, contains repeated, unmistakable expressions of Congress' intention that air carriers operating under federal authority be shielded from state economic regulation. In the Airline Deregulation Act of 1978 which provided for the phased withdrawal of the Civil Aeronautics Board's regulation in favor of the more limited regulation of its successor, the Department of Transportation, Congress determined that the domestic system should not be subject to regulation by fifty individual states. Therefore, the Act included a preemption provision, which is codified at section 105 (a) of the Federal Aviation Act, which states in part that:

> "no State. . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any carrier having authority under subchapter IV of this chapter to provide air transportation."

In deliberating the Airline Deregulation Act, Congress stated that federal preemption was needed to "rationalize a confusing system of dual regulation of federally certificated air carriers that [had] evolved in some States."

Decisional law has also supported the premise of federal preemption. A federal appeals court observed in Hingson v. Pacific Southwest Airlines, that:

> "preemption is not limited to those state laws or regulations that conflict with federal law. It preempts state laws and regulations relating to rates, routes, or services."

H.B. 3003 IS NOT NECESSARY

As I've indicated, the U.S. Department of Transportation has regulations in place that specifically address the concerns expressed by proponents of H. B. 3003. In 1984 the Civil Aeronautics Board (CAB) adopted a price advertising policy statement, 14 CFR 399.84, which has governed advertising of flights, tours, or components of tours ever since.

An exemption to that rule has permitted separate listing of the international departure taxes in advertisements for air transportation. On March 10, 1988, the U.S. Department of Transportation issued an Order amending and broadening the exemption to permit advertising of surcharges and service fees separate from the total advertised price. If not included in the total advertised price, however such charges must be stated clearly and conspicuously. The purpose of the rule is to

ensure that consumers know what they are paying for in the total transportation package. The airline industry supports this amending Order and we think it is consistent with the goals of H.B. 3003. A copy of the Order has been submitted to the Subcommittee for the record and I ask that you examine it carefully to ensure that it does indeed address the concerns expressed by proponents of H.B. 3003.

NO DEMONSTRATED NEED

The need for a special statute governing airline surcharge advertising has not been demonstrated. As stated in the DOT Order, separate disclosure requirements do not appear to cause any particular compliance problems for advertisers or for consumers. There have been few complaints from consumers indicating that they have been deceived by advertisements or promotional materials that in fact identify special services and display the additional charges separately in legible type. There is simply no basis for prohibiting adequate separate disclosure as provided for in the federal regulation.

Experience indicates there is no pattern of complaints which would justify this legislation. Airline surcharge advertising is not a major source of consumer complaints. The U.S. Department of Transportation, "Air Travel Consumer Report," dated February 8, shows that fewer than one percent of

all complaints for January 1988 addressed airline advertising -- all airline advertising. An estimated 35 million passengers traveled on U.S. airlines in January, but fewer than 25 of those passengers complained about airline advertising. Although the number of complaints submitted to the Kansas attorney general's office has not been made available, it is highly probable that it is modest when compared to the number of airline passengers who purchase air transportation in Kansas. No studies have been conducted or testimony taken to confirm that the practices attacked in this legislation are as harmful as the legislation presumes, or that the relief imposed is appropriate.

The considerable powers of the attorney general's office and the many laws governing truth in advertising that are already in place are more than adequate to successfully defend the public from those who deliberately attempt to deceive consumers.

PRECEDENT FOR A PATCHWORK OF STATE LAWS

Airline operations are highly integrated and complex. If fifty states were to regulate those operations, the variations of the regulatory actions could create costs and confusion which would be unacceptable. Without uniform national standards, any degree of coordination or efficiency would be

virtually impossible. The U.S. Department of Transportation has provided that needed policy coordinating role concerning this matter.

This legislation would set a precedent for a proliferation of state laws and a variety of interpretations of those laws that would be disparate and would ultimately restrict or alter airline fare advertising in negative ways.

COUNTERPRODUCTIVE RESTRICTIONS

H.B. 3003 could be counterproductive for Kanss consumers. As it becomes more difficult for airlines to advertise their fares in Kansas, price as an area of competition is likely to diminish. Airlines will direct their advertising to less encumbered topics, such as service and other amenities. As this happens, tha availability of discounted fares could diminish. Less fare advertising would reduce demand, forcingthe airlines to raise fares to cover the added costs of empty seats. For the discretionary traveller, this would mean significant added costs. Less fare advertising would reduce demand, forcing the airlines to raise fares to cover the added costs of empty seats.

What is the role of Kansas broadcasters and other communications media in this equation? How would local

business be impacted? If airlines cannot advertise fares in Kansas without unwarranted restrictions, it is possible that they would move to out of state broadcast and print media. Thus, local business could be negatively impacted.

We believe that the full ramifications of this legislation need to be carefully considered. Air travellers are the beneficiaries of nearly $10 billion a year in savings through deeply discounted fares. This type of legislation jeopardizes such future savings -- there is no demonstrated need for H. 3003 -- and the bill's negative ramifications are disturbing.

Underlying all of our concerns is the basic question of the informative value of advertising and the ability of business to communicate with the public. Where the information being communicated to the public is nondeceptive -- as is the case with airline fare advertising -- government should not determine the content of those communications.

On behalf of the scheduled airlines serving Kansas, I urge you to carefully consider the implications of this proposed legislation and to reject it as unwarranted and counterproductive.

3-25-88

TESTIMONY
BEFORE THE SENATE JUDICIARY SUBCOMMITTEE
RE: HB 3003
March 25, 1988
By Harriet Lange, Executive Director
Kansas Association of Broadcasters

I am Harriet Lange, executive director of the Kansas Association of Broadcasters. We appreciate the opportunity to appear before you to express some concerns we have if HB 3003 becomes law.

We believe that state-by-state adoption of price advertising requirements, causing a patch-work or non-uniform set of standards among the fifty states, will interfere with the free flow of information to the consumer about nationally or regionally marketed products and services.

What this means to Kansas broadcasters is the possibility of losing national and regional revenues from advertisers whose commercials do not meet the state's price advertising standard. Kansas radio stations receive from 10 to 15 percent of their time sales revenues from national and regional advertisers, while Kansas television stations receive from 30 to 40 percent.

In regard to airline advertising, both the U.S. Department of Transportation and the Federal Trade Commission agree that the Federal Aviation Act and DOT rules pre-empt actions by states concerning price advertising. Attached are letters which outline their arguments. And Congress is considering legislation concerning consumer awareness and disclosure requirements by the airlines.

Consequently, we do not see the need for this legislature to adopt legislation that could cause loss of revenue to Kansas broadcasters, is federally pre-empted, while the issues involved are being addressed by Congress.

Thank you for your consideration.

Att. III

U.S. Department of
Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

March 2, 1988

Mr. Robert Abrams
Attorney General
State of New York
State Capitol
Albany, NY 12224

Dear Mr. Abrams:

A recent memorandum from seven Attorneys General to all airlines and interested parties, signed by the Attorneys General of New York, Massachusetts, Kansas, Texas, Colorado, Missouri, and Wisconsin, requests compliance with the section on full price advertising of the Guidelines of the National Association of Attorneys General (NAAG) for air transportation advertising. In addition, we understand that some Attorneys General have contacted airlines to enforce the section on roundtrip pricing of the Guidelines. Both of these matters are clearly preempted by Federal law. The State and Federal governments share the goal of ensuring clear dissemination of airline price information. In our view, however, Congress has made clear that these efforts must be consistent with the mandate of the Airline Deregulation Act to encourage price competition.

The memorandum of the Attorneys General requests that airlines not just include somewhere in the advertisement the amount of mandatory fees, surcharges, and service charges, but instead that they state a full ticket price in the advertisement that includes all such charges. The Department's rule allows advertisements to list separately the ticket price from other charges. The NAAG Guidelines further require that for fares advertised on a one-way basis that are available only through a roundtrip purchase, the roundtrip purchase price also be listed. The Department's rule does not require the display of the roundtrip fare so long as the advertisement is clear on the roundtrip conditions. Under sections 204 and 411 of the Federal Aviation Act, the Civil Aeronautics Board (CAB), after notice and public comment, adopted a rule (14 CFR 399.84) that requires full price advertising for all components of the advertised air transportation. In consistent interpretations by this Department since assuming jurisdiction from the CAB for this rule, we have specifically permitted the type of advertising to which the Attorneys General object. (*See, e.g.*, Order 85-12-68 (enclosed)). By adopting this rule and issuing these interpretations, the Federal government has preempted this aspect of State price advertising regulation.

In my opinion, the States may not regulate the advertising of air fares in this manner. Where there is actual conflict with a Federal rule, where there is an irreconcilable difference between the Federal rules and the State provision, or

where the State regulation will be an obstacle to the Federal policy in the area, the Federal regulation takes precedence. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 159 (1982).

Also, the United States has entered into air services agreements with more than 80 countries that include detailed provisions on prices, as well as governmental or other authority user charges. Negotiations with foreign countries about these prices and charges and their advertisement are frequent. In this respect, we consider State advertising regulation in conflict with that of the Federal government to be preempted when the action "prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments." *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979). Further, Congress has required that user fees for Federal immigration services be separately listed on the ticket (Pub. L. 99-372). This legislation is consistent with our price advertising rule. For these reasons, I believe that the attempt by the Attorneys General to specify how the airlines construct their fare listings, where the Federal government has already so specified, is preempted.

In view of the above, I am asking you and the other Attorneys General not to take further action in this matter that could lead to our being opposing litigants rather than partners without thorough discussion at both State and Federal levels. In this connection, my staff and I would be glad to attend your upcoming NAAG meeting in Washington next month to share our views and to meet with you prior to the initiation of any other State action that could potentially be preempted. If threats to enforce the particular sections of the Guidelines continue, we will be forced to consider taking formal legal action to prevent their enforcement. I am confident that this result can be avoided through constructive and cooperative discussion.

Sincerely,

B. Wayne Vance
General Counsel

Enclosure

cc: Christopher Ames
Deputy Attorney General of
California

Identical letters sent to:

Mr. Duane Woodward (Colorado)
Mr. Robert T. Stephen (Kansas)
Mr. William L. Webster (Missouri)
Mr. Donald J. Hanaway (Wisconsin)
Mr. James M. Shannon (Massachusetts)
Mr. Jim Mattox (Texas)

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY

Mr. Christopher M. Ames
Deputy Attorney General
Office of the Attorney General
Department of Justice
350 McAllister Street, Room 6000
San Francisco, California 94102

Dear Mr. Ames:

On September 10, 1987, Attorney General William L. Webster, Chairman of the Consumer Protection Committee of the National Association of Attorneys General, invited the Commissioners to comment on the September 2 draft of enforcement guidelines prepared by NAAG's task force on the air travel industry. He asked that comments regarding the "substance, form, effect, [and] unintended results" of the proposal be forwarded to you by September 30, 1987. Although the limited time available does not permit a comprehensive analysis of all the issues thus presented, the Commission is pleased to offer its general comments on some of the essential features and important consequences of the proposed enforcement policy.

With these draft guidelines, the task force is considering recommending that NAAG adopt specific regulatory schemes for three areas of the air travel industry. First, the guidelines would require all advertisements of fares to disclose prominently all material conditions connected with the purchase of tickets and require that airlines make available a sufficient number of seats on each flight to meet reasonably anticipated demand for any advertised fare. Second, the guidelines would regulate some terms and conditions of frequent flier programs. Third, the guidelines would require disclosure of all terms and conditions of incentives offered to induce passengers to surrender their seats on over-booked flights.

For the reasons explained below, the Commission recommends that the task force refrain from recommending these draft guidelines.

The Commission is seriously concerned that the remedies contemplated in the guidelines, especially the advertising provisions, could have the unintended consequence of substantially inhibiting effective price competition among the airlines. In addition, the draft guidelines might result in inconsistent federal and state regulation. Rules such as those in the current proposals could reduce the estimated $10 billion of annual benefits -- in lower fares and more flights -- that are flowing from deregulation.[1] Unless the task force has evidence indicating that airline fare advertising, frequent flier programs, or overbooking compensation policies are generally unfair or deceptive, the legal and factual bases for the draft guidelines are not clear. All of these issues deserve careful consideration prior to adoption of these guidelines.

The Commission is well aware of reports that the dramatic increase in air travel has resulted in problems. A recent surge of complaints -- primarily concerning late flights, lost baggage, slow refunds, and poor service -- has commanded wide publicity, as well as the attention of both the Congress and the Department of Transportation. These complaints have accompanied, and in large measure appear to reflect, the rapid growth of air travel spurred by deregulation.[2] However, the problems consumers have encountered do not appear to stem from the advertising and marketing practices these guidelines address. Recent DOT complaint statistics indicate that barely one percent of the complaints DOT receives involve advertising.[3] Despite this small percentage of complaints, the task force guidelines would impose substantial barriers to price advertising which is critical to competitive pricing and low fares.

Finally, the task force's proposal ignores the important question of federal preemption. The Federal Aviation Act specifically preempts state regulation of airline rates, routes or services.[4] Some portions of the guidelines would appear to regulate rates and services indirectly, or at least have a substantial impact on them. Moreover, the guidelines as a whole

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[1] S. Morrison & C. Winston, The Economic Effects of Deregulation 1 (1986). The authors' estimate of these benefits, which are given in 1977 dollars, have been converted to 1986 dollars.

[2] According to the Department of Transportation, air travel has increased by over 50% since 1977, based on "enplanement" data accumulated by DOT.

[3] Department of Transportation, Air Travel Consumer Complaint Report, June and Year-to-Date 1987.

[4] 49 U.S.C. § 1305(a)(1)(1978).

ignore the uniquely interstate nature of the advertising at issue. The Department of Transportation already regulates airline advertising under section 411 of the Federal Aviation Act, which generally prohibits unfair or deceptive acts or practices. Under this authority DOT reports that it has already taken informal action to correct questionable advertisements[5] and, in addition, maintains a consumer affairs office to resolve individual consumer complaints, including complaints about advertising. In light of DOT's active regulatory presence, the guidelines would impose duplicative and often inconsistent requirements.[6]

Section 1 - Fare Advertising

Under this section every "restriction, limitation or other requirement which in any way affects the use or refundability" of an airline ticket must be prominently disclosed in all advertising of airline fares -- whether print, radio, or television. The guidelines, by way of example, specifically list 13 separate types of restrictions that must be disclosed. In print ads disclosures must be made in 10 to 14 point type either adjacent to the fare price or in a box with the heading "Restrictions and Limitations." In television and radio ads, the same disclosures must be made orally in the "same pace and volume as the fare information."

The Commission has long recognized that omission of material information can make an advertisement or representation unfair or deceptive.[7] The Commission has been equally cognizant that this principle must be interpreted in a manner that will not stifle

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[5] Testimony of Matthew Scocozza, Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, Before the House Subcommittee on Aviation, Committee on Public Works and Transportation (June 9, 1987).

[6] We are aware of one state lower court decision upholding state regulation of airline advertising. That decision specifically reserved the issue of whether the state regulation had more than an incidental impact on airline rates. By contrast, the impact of the proposed guidelines would seem substantial. People v. Western Airlines, Inc., 155 Cal.App.3d 597, 202 Cal.Rptr. 237 (Cal. Ct. App. 1984).

[7] See, e.g., International Harvester Co., 104 F.T.C. 949, 1055-62 (1984).

truthful advertising.[8] But the extensive disclosure requirements the task force has proposed could severely curtail the price advertising in this industry. As is true in other industries,[9] advertising has been a primary source of price competition in the airline industry. The beneficiaries of aggressive advertising and competition are consumers. Advertising restrictions such as those that are contemplated in these guidelines would make it very costly to advertise present fare structures in print and all but impossible to do so on radio and television. Fifteen, thirty and sixty second commercials do not allow lengthy recitals of contract terms and conditions, yet are an important means of ensuring price competition. An airline would have little incentive to reduce fares if it could not advertise them. We urge NAAG not to take any action which will deprive consumers of the net benefits of fare advertising by airlines.

Advertising is seldom an appropriate vehicle for disclosing all material characteristics of a product or service. Consumers do not rely on advertising of this type to make a final purchase decision, and it does not serve that function. The goal of most advertising for discount airfares is to signal that bargain prices are available and suggest that consumers inquire further when they contact a travel agent or airline to make specific travel plans. Requiring too much information in ads can have the paradoxical effect of stifling the information that consumers receive. The Commission has recognized this in many other contexts. For example, in 1973 the Commission declined to require certain disclosures sought by the staff, recognizing that the disclosures sought would be "tantamount to a de facto ban on ... advertising through the radio and TV media."[10] In 1979, the Commission rejected a staff proposal to require detailed disclosures of the conditions affecting a particular savings claim. Citing concerns about discouraging savings claims, the Commission adopted a provision simply requiring a general

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[8] See, e.g., International Harvester Co., 104 F.T.C. 949, 1062 (1984); ITT Continental Baking Co., 83 F.T.C. 865, 965 (1973).

[9] See, e.g., J. Cady, Drugs on the Market: The Impact of Public Policy on the Retail Market For Prescription Drugs (1975); W. Jacobs et al., Staff Report on Consumer Access to Legal Services: the Case For Removing Restrictions on Truthful Advertising (1984); Kessides, Advertising, Sunk Costs and Barriers To Entry (1983); 15 Benham, The Effects of Advertising on the Price of Eyeglasses, 4 J.L. & Econ. 337 (1972); Steiner, Does Advertising Lower Consumer Prices? J. of Marketing, Oct. 1973, at 19.

[10] ITT Continental Baking Co., 83 F.T.C. 865, 965 (1973).

disclosure that more detailed information was available.[11] A similar approach was adopted in the Commission's recent revision of its Guides Against Deceptive Advertising of Guarantees, where the Commission was again concerned that detailed disclosure requirements had discouraged useful advertising. The revised guides provide for a general disclosure that the full terms of the warranty are available prior to sale.[12]

There is probably even less reason for imposing detailed disclosure requirements in the airline industry than in the industries where the Commission has already rejected them. At least 75 percent of all airline tickets are now purchased through travel agents,[13] who are knowledgeable about the various conditions that apply to discount fares. Full disclosure of all restrictions also can be obtained by direct ticket purchasers by calling the airline. Based on the information we have seen to date, it seems better for consumers that airlines remain free to make only general disclosures.

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[11] In its Statement of Basis and Purpose for the Commission's Trade Regulation Rule on Labeling and Advertising of Home Insulation, the Commission said:

> [Savings] claims are designed to persuade consumers to purchase the products. Yet, because so many factors affect the savings achieved by an individual homeowner, any savings claim is untrue with respect to many consumers. . . .
>
> > Instead of the approach suggested by the staff, the Commission has adopted a much simpler and far less burdensome disclosure provision. This provision is based on the conclusion that, to remedy the deception inherent in savings claims, consumers must be told that savings depend on many factors, and what those factors are. Since a disclosure containing all of this information would be lengthy, however, section 460.1(b) of the Rule simply requires a brief statement that savings vary and a reference to the fact sheets for further information.

44 Fed. Reg. 50218, 50234 (1979).

[12] 50 Fed. Reg. 18621 (1985).

[13] Testimony of Matthew Scocozza, Assistant Secretary for Poli and International Affairs, U.S. Department of Transportation, Before the House Subcommittee on Transportation, Tourism, and Hazardous Materials, Committee on Energy and Commerce (May 19, 1987

Other provisions of Section 1 raise similar concerns.[14] The most troubling of these remaining provisions is Section 1.7, which requires that any advertised fare must be available in sufficient quantity so as to meet reasonable demand on every flight. If such fares are not available, the advertisement must disclose two specific restrictions in accordance with earlier provisions and "disclose the quantity of seats available [at the discounted fare] on specific flights."

This requirement could substantially reduce the number of discount seats that airlines now offer consumers. Airlines currently employ extremely sophisticated computer programs to allocate fares on a flight-by-flight, day-by-day basis under "yield management" systems designed to ensure that each flight takes off with as many seats filled as possible.[15] Under this system, airlines continuously analyze the demand for seats on each flight and alter the mix of different fares in order to fill the flight. The number of seats available at different fares can change up to the departure of the flight. As a result, the number of seats allocated at a particular discount fare may be taken 10 days before a flight, but cancellations or a change in demand may result in additional discount seats becoming available two days before departure. Similarly, seats on flights departing at off-peak times may be offered at deeper discount fares in order to attract more customers. Moreover, fare adjustments are also made in order to meet competition from other airlines.

The complexity of the yield management pricing system is virtually impossible to explain in advertising. The flexibility to respond to demand by adjusting prices to fill each flight would be lost under the more static seat allocation program the task force's guidelines could impose. Depriving airlines of the necessary flexibility to offer deeply discounted fares will raise the cost of airline service while significantly restricting consumers' access to low fare air travel. As long as consumers understand that advertised low fares are available for only limited seating, there is no apparent basis for requiring the disclosure of the specific number of low fare seats available on each flight.

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[14] In addition to the restrictions on fare advertising, several other provisions, § 1.8 (Prompt Refunds), § 1.9 (Surcharges), and § 1.10 (Round Trip Advertising), regulate matters that it is our understanding DOT rules or orders already encompass. Moreover, it is our understanding that the task force proposal may conflict with those DOT regulations.

[15] See Washington Post, High Sky Balancing Act As Airlines Juggle Discounts, Overbookings, May 17, 1987, at H1.

The draft guidelines do not offer an explanation of the factual or legal basis for such burdensome affirmative disclosure requirements in airline advertising. Nor does the information we have seen to date suggest that the failure to make the sweeping disclosures required by these guidelines could be viewed as an unfair or deceptive act or practice. Settled precedent and sound policy argue strongly against such requirements.

Law enforcement action may, of course, be needed when specific advertising is deceptive or omits critical information. It is our understanding that the Department of Transportation attempts to monitor advertising for such occurrences. On balance, action against particular instances of unfair or deceptive conduct may be preferable in this industry to more general regulation that also burdens advertising that is truthful and nondeceptive.

Section 2 - "Frequent Flyer" Programs

Section 2 of the NAAG proposal sets forth a comprehensive substantive regulation of the terms and conditions of "Frequent Flyer Programs." There is only cursory discussion of the factual basis for these guidelines and no discussion of the legal basis for them.[16] However, this area would seem to be one in which careful consideration of both the facts and law is particularly critical. First, press reports and Congressional testimony of the Department of Transportation indicate that although certain airlines attempted to change their frequent flyer programs in the past, these changes were largely rescinded in response to concerns expressed by air travelers. In light of this response, it is not clear why NAAG believes there is a need for guidelines in this area. Second, the Department of Transportation has reviewed airline disclosures in frequent flyer programs and concluded that they give adequate notice to consumers of possible future changes.[17] Thus, it is unclear that the airlines are guilty of any unfair or deceptive acts or practices. Absent such a showing, the proposed remedial scheme, which imposes substantive requirements such as a one year pre-notification of any changes in terms of the program, would seem to lack justification.

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[16] In Orkin Exterminating Co., D. 9176 (Dec. 15, 1986), the Commission held that under some conditions it is an unfair practice, under the Federal Trade Commission Act, to systematically breach contracts. But there is no discussion in this proposal indicating that these conditions are present here. Moreover, we are aware that a number of states have not enacted prohibitions against unfair acts or practices, on which authority we presume the task force would base such guidelines.

[17] Testimony of Matthew Scocozza, supra note 13.

Section 3 - Denied Boarding Compensation

Section 3 deals with disclosure of policies on compensation for voluntary denied boarding. The Department of Transportation has regulations governing denied boarding compensation.[18] Although these regulations do not specifically govern disclosure of conditions or restrictions on offers made to induce passengers to give up their seats in the event of overbooking, DOT has taken action in the past where problems existed. Again, without any factual analysis of the current need for this guideline, it is difficult to evaluate why the task force believes that state intervention is necessary here.

Conclusion

The economic evidence is clear that airline deregulation is providing major benefits to American consumers. A recent Brookings Institution study estimates that travelers save $10 billion each year from lower air fares and increased flight frequencies due to deregulation.[19] These gains were made possible by eliminating regulatory restraints that prevented carriers from taking advantage of the economies available in improving route structures and resource allocation. Most importantly, airlines are now also free to compete on price, with the result that from 30 to 50 percent of seats sold today are offered at a discount.[20]

Among the biggest winners in airline deregulation have been discretionary travelers who can plan their trips well ahead of time.[21] Because of deregulation, airlines can now offer this class of customer deeply discounted fares. Air travel is up 50 percent from 1977,[22] as the skies have been opened up to millions of people who could not afford air travel in a less competitive

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[18] 14 C.F.R. § 250 (1987).

[19] See S. Morrison & C. Winston, supra note 1. We do not have precise estimates of the nature and amount of any costs of airline deregulation, but have not seen evidence that they are significant compared to the benefits.

[20] See Washington Post, supra note 15, at H7 (quoting Robert Baker, Director of Intergovernmental and Consumer Affairs, U.S. Department of Transportation). It should be noted that there need be no inconsistency between economic deregulation of the airline industry and ensuring the safety of air travel.

[21] See S. Morrison & C. Winston, supra note 1, at 33-35.

[22] See supra note 2.

environment. The task force's draft guidelines may significantly reduce these benefits by subjecting the airline industry to burdensome and unnecessary new regulation while providing consumers very little in return. We therefore urge that the task force reconsider the need for these guidelines.

By direction of the Commission.

Emily H. Rock
Secretary