

In the

Supreme Court of the United States

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:
RALPH NADER, :
:
Petitioner, :
:
v. : No. 75-455
:
ALLEGHENY AIRLINES, INC., :
:
Respondent. :
:
----- X

Washington, D. C.
March 24, 1976

Pages 1 thru 49

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Wednesday, March 24, 1976

The above-entitled matter came on for argument at
 2:28 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice
 HARRY A. BLACKMUN, Associate Justice
 LEWIS F. POWELL, JR., Associate Justice
 WILLIAM H. REHNQUIST, Associate Justice
 JOHN P. STEVENS, Associate Justice

APPEARANCES:

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 N.W., Washington, D. C. 20036, for the petitioner.

E. BARRETT PRETTYMAN, JR., ESQ., 815 Connecticut
 Avenue, N.W., Washington, D. C. 20006, for the
 respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 75-455, Nader against Allegheny.

Mr. Robertson, you may proceed when you are ready.

ORAL ARGUMENT OF REUBEN B. ROBERTSON III

ON BEHALF OF PETITIONER

MR. ROBERTSON: Mr. Chief Justice, and may it please the Court: This case is here on a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

On April 28, 1972, petitioner, Ralph Nader, arrived at National Airport to take an Allegheny Airlines flight to Hartford, Connecticut. When he arrived at the boarding gate in plenty of time for the flight, he had a confirmed reservation, he had a proper ticket for the flight. The agent told him that the plane was already full and he wasn't going to be able to get on. Allegheny had overbooked this flight and it had oversold it, and in the parlance of the airline industry, Mr. Nader had been bumped, just like 900 other people had been bumped that very month by Allegheny Airlines, and 16,000 other people had been bumped during a period of three and a half years.

QUESTION: I suppose it's not relevant to this case, but the reason the airlines bump people is because a lot of people who have made reservations don't show. They tried for

a while to impose a penalty for that, didn't they?

MR. ROBERTSON: Yes, they did, your Honor.

QUESTION: Did the Civil Aeronautics Board --

MR. ROBERTSON: The Civil Aeronautics Board approved and industry planned for a no-show penalty, but the airlines didn't like it and the public apparently didn't like it, although --

QUESTION: I suppose the no-shows who were penalized didn't like it.

MR. ROBERTSON: If the no-shows were penalized.

QUESTION: I suspect if there were a no-show penalty, your client would like that.

MR. ROBERTSON: One of the problems with the no-show plan that was tried, and they have never been able to work it out, is that apparently a lot of the no-shows really aren't the fault of the passenger. Apparently a minority of individual passengers who simply neglect to cancel their reservation or don't show up. A lot of the no-shows are caused by misconnecting flights, for example, traffic jams, and this is particularly so with the security apparatus at the airport now, people get hung up trying to get to the plane. So there are lots of mitigating factors that have made the no-show penalty concept a difficult one to work out.

QUESTION: You think none of them mitigate enough to spoil your case.

MR. ROBERTSON: I don't think so.

The problem here is not that there was overbooking, but that when Allegheny told Mr. Nader that he had a confirmed reservation, it didn't give him the most important piece of information of all, which was that there was a significant risk that he might be bumped from the flight. If he had known that in advance, he could have protected himself. He could have arrived earlier at the airport than he did to improve his chances of getting on the plane. He could have taken an earlier flight, or he could have even taken a train to Hartford. So it's not the fact that the airlines were overbooked that's involved here, but the fact that Allegheny concealed this practice and concealed the fact that bumping results from it. When the passenger finds out, it is simply too late for him to do anything. And when Mr. Nader found out about this, there was no way he could get to Hartford in time for his commitment. The speaking engagement went out the window and his hosts in Hartford were embarrassed and discredited in their fund-raising efforts. Thousands of people who were coming out to hear him during the lunch hour went away disappointed.

As a result, the petitioner filed suit for damages against Allegheny and two claims were pressed in this action: First, there was a statutory claim under the Aviation Act alleging discrimination in not honoring his reservation priority. And, secondly, and this is the claim that's involved

here, there was a tort claim of fraudulent misrepresentation arising under the common law of the District of Columbia. And after a trial on the merits, the district court found in petitioner's favor on both of these claims and awarded compensatory and punitive damages.

On appeal the D. C. Circuit issued a lengthy opinion in which it reversed and remanded the judgment of the district court. The only issue of that decision that is at issue here involved its holding on the misrepresentation claim as to which the appellate court divided two to one. The majority held that common law misrepresentation claims should have been referred for an initial determination by the Civil Aeronautics Board, and it held that regardless of language in the Federal Aviation Act that preserved common law remedies, the CAB must be given an opportunity to approve conduct by an airline that otherwise would be tortious misrepresentation. And if it does so, the majority held, any common law right of action to recover damages for an injury that is caused by that conduct would be distinguished.

Judge Fahy dissented on this point. He said that this result was not called for by the Aviation Act. In fact, it is contrary to that Act, and that's the issue before this Court.

The Federal Aviation Act --

QUESTION: Before you get into your argument, could

I just pose this question? As I understood it, neither Judge Fahy nor the majority actually decided whether there was a common law cause of action. Is that correct?

MR. ROBERTSON: That is correct, your Honor, but the district court --

QUESTION: It therefore follows, just to get your request in mind, that if you should prevail the relief you ask is that the matter be sent back to the Court of Appeals to decide that issue.

MR. ROBERTSON: I believe that would be correct, your Honor.

The Federal Aviation Act, of course, is the organic statute that sets forth in considerable detail the powers that the Civil Aeronautics Board has to regulate the airline industry. There are two sections of this Act that are directly involved in this case. First, is section 411. This section says that if the CAB finds that the public interest would be served, it may investigate and determine whether airlines or ticket agents are engaging in deceptive practices or unfair methods of competition. And if so, the CAB has cease and desist power to bring that conduct to an end.

QUESTION: What happened to the judgment under Federal law?

MR. ROBERTSON: The judgment under Federal law was

remanded for additional findings, relates the details of what happened at the boarding gate. And we are going to go back to the district court in due course and try to ascertain what those proper findings should be under the --

QUESTION: So the ruling wasn't that you couldn't get a judgment under Federal law.

MR. ROBERTSON: That's right, your Honor. The rule was not that we could not. In fact, the ruling said that there was a possibility of a judgment --

QUESTION: Depending upon what the facts turned out to be.

MR. ROBERTSON: How the facts come out, yes.

Now, section 411 does not say that the CAB can approve any unfair methods of competition, and it does not say that it can approve unfair or deceptive practices. It does not say that the Board can immunize any practices from the common law liability.

The next section that's relevant here is 1106 which says as follows: Nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies. In other words, this means that provisions like 411 which create new remedies to deal with unfair practices and other kinds of problems in the airline industry, those remedies do not take away the older remedies that might exist

under State law.

The decision below simply ignores section 1106. The majority felt that the common law remedies for fraud and deceit cannot remain totally unaffected by the Federal Aviation Act. But section 1106 explicitly says the provisions of the Act are in addition to common law remedies, not that they undercut or restrict them in any way.

QUESTION: Would the Board have had the power to order the airline to behave just the way it did?

MR. ROBERTSON: I don't believe the Board has any such power to authorize any airline to conceal material facts from the public or deceive any passenger.

QUESTION: Have they got the power to authorize the airline or order the airline to establish a no-show policy?

MR. ROBERTSON: Yes, your Honor.

QUESTION: Including overbooking?

MR. ROBERTSON: Well, the point is we are not complaining about overbooking, now. What we are complaining about is that they don't disclose to you --

QUESTION: I understand your complaint. I just wondered if you felt the Board had the power to order the airline to overbook.

MR. ROBERTSON: As a matter of fact --

QUESTION: It has, hasn't it?

MR. ROBERTSON: There is a plan under which the

Board has approved a program that in effect is overbooking. This is the program of Eastern Air Lines.

QUESTION: And has the Board addressed the question of whether that program should be announced to the public or --

MR. ROBERTSON: Yes, it is announced to the public. It's set forth in tariffs, your Honor.

QUESTION: So that if anybody read the tariff, would you know that there might be overbooking?

MR. ROBERTSON: And furthermore the Board has made clear that the airline has to disclose to the passenger when he gets this kind of reservation he might be bumped.

QUESTION: You mean in addition to the tariff?

MR. ROBERTSON: In addition to the tariff, yes. And a similar factor occurs in the liability limitation area. The Board has made clear that it has to specifically make sure the passenger knows that when he checks his baggage, he is subject to the liability limitations. It's in the tariff; in addition the Board has imposed additional disclosure requirements, and this is true in the overbooking area.

QUESTION: When he gets his compensation, if he is bumped, doesn't the Board require that he be advised that the compensation is in lieu of common law remedies which he might otherwise have?

MR. ROBERTSON: He must be specifically advised. That is specifically set forth in the regulations.

Judge Fahy's dissent pointed out, correctly, I think, that the concept that the Board could ever immunize tortious misrepresentation by an airline from the liability under common law would really nullify section 1106.

QUESTION: What misrepresentation was Judge Fahy referring to?

MR. ROBERTSON: He was referring to the same thing we have been talking about and the Court of Appeals was talking about.

QUESTION: Failure to disclose.

MR. ROBERTSON: The failure to disclose the material, relationship between the bumping and the reservation that you think is going to assure you transportation.

Furthermore, when the majority below said --

QUESTION: The Court of Appeals called that nonrepresentation, I think, didn't it?

MR. ROBERTSON: Yes. That's really what we were talking about. It is a nonrepresentation. So I don't have any argument with the Court of Appeals on that.

QUESTION: It's a matter of nomenclature.

QUESTION: But what you are saying in effect permeating your whole case is the idea that people who travel on airlines more than once or twice in their lives don't already know all of this as a practical matter.

MR. ROBERTSON: Yes. That's absolutely right. I

think if somebody were bumped tomorrow, this very proceeding has made the situation somewhat different in terms of people's expectations about what happens at the airline gate. Each of these tort claims comes up under its own set of facts, and you have to prove it under the common law as you find it, and they could cross-examine the bumpee who suffered this tomorrow and say, "Well, didn't you know that Mr. Nader had been bumped?"

QUESTION: You mean, showing something in the nature of an assumption-of-risk defense.

MR. ROBERTSON: Yes, something like that.

QUESTION: Do you think we had to wait -- I read the papers, but I didn't know Mr. Nader had gotten bumped until I read the pleading in this case, or until petition for cert, I guess, was filed. Don't you think most people knew about this problem before?

MR. ROBERTSON: I don't know. I don't think most people know.

QUESTION: But that's one thing that remains to be tried, the assumption-of-risk idea, I suppose.

MR. ROBERTSON: Well --

QUESTION: The airline could undertake to show evidence -- I don't know how they would do it, but they might --

MR. ROBERTSON: Well, they did try that and the district court didn't find for them.

QUESTION: A poll of passengers.

MR. ROBERTSON: The district court made an affirmative finding that Mr. Nader's reliance was a reasonable one here, that he did expect that this was an assurance of accommodation on the flight.

QUESTION: A couple years ago there was a lot of publicity about Senator Smith, wasn't there, from Maine was bumped.

MR. ROBERTSON: I don't recall that, your Honor.

QUESTION: When she was still a Senator.

MR. ROBERTSON: Yes. I don't recall that. I know a number of --

QUESTION: So it depends on who reads the newspapers.

MR. ROBERTSON: Yes, that's right. All I am saying is there may be a different case and each one turns on its own facts when you are talking about the common law.

QUESTION: Mr. Robertson, does the record show what the percentage is in terms of 100 passengers or 1,000 passengers of one being bumped?

MR. ROBERTSON: Yes. The percentage is about 99.94 percent chance that you will be accommodated. Now, of course, that includes all the flights that aren't oversold at all because there are not even 100 passengers for the 100 seats.

QUESTION: Are your chances greater of being bumped than they are that the flight will not fly for mechanical or some other reason?

MR. ROBERTSON: I couldn't tell you that. My impression is, yes, they are.

QUESTION: Did Mr. Nader testify on the stand that if he had known there was a fraction of 1 percent, a matter of probabilities that he would be bumped, that he would not have taken this flight?

MR. ROBERTSON: I think, if I recollect his testimony, he did indicate that he might have taken an earlier flight. I can't recall exactly, Mr. Justice --

QUESTION: It's probably not a fair question, but have you ever heard of anybody who declined to fly in an airplane because of that probability?

MR. ROBERTSON: Oh, yes. As a matter of fact, we had some discussion whether Mr. Nader could be here today for the argument. He had to be in Michigan and he had to take an early flight because he --

QUESTION: As I understood the opinion below, it indicated that 4.5 people out of 10,000.

MR. ROBERTSON: Yes.

QUESTION: The odds are not bad, are they?

MR. ROBERTSON: Well, when you translate that out to the absolute numbers, what you are talking about is hundreds of thousands of people every year.

QUESTION: I am talking about each individual. That's all we are talking about here.

MR. ROBERTSON: That's right. I think the odds mount up if you travel a considerable amount of time. Whatever the case may be. This is a lot of people to be bumped, and it's something the airlines had known about and for some reason they haven't wanted the passengers to know about it. I think their concern is the passengers might not like that risk.

QUESTION: I suppose your position is that as an original matter, the kind of consideration that Mr. Justice Powell is questioning you about should be addressed by the common law jurisdiction, that is, deciding whether or not this was in fact deceptive. Maybe the Court of Appeals might decide, contrary to Judge Richey, that this was not really deceptive, but that at any rate you want to plead or make that decision on the basis of fraud law rather than preemption law.

MR. ROBERTSON: That's right, your Honor.

What this case really boils down to is the concept that's in the Court of Appeals' decision that the CAB might have the power to approve a common law fraud. This is a new doctrine of administrative law, deception in the public interest. And the whole point of section 411 is that deception is not good for you. 411 was designed to protect people from deception and not protect the deceivers.

QUESTION: You might state that proposition in other terms, I suppose, more legal terms, that the Board might say

the crux, the whole range of this problem, the doctrine of assumption of risk, is written into the implied contract between the passenger and the carrier.

MR. ROBERTSON: It's not an implied contract, your Honor. It's a very specifically detailed contract.

QUESTION: No, but I say that the Board might change that and say hereafter. Could the Board say, by promulgating a rule of some kind, that passengers assume the risk of, one, mechanical failure that cancels the flight; two, being bumped because of overbooking; and three, whatever the other reasons might be?

MR. ROBERTSON: Its purposes, under its statute, under section 411, it could and it has done precisely that.

QUESTION: Well --

MR. ROBERTSON: It could say --

QUESTION: But to block common law suits?

MR. ROBERTSON: I don't believe it could.

I think the best way to approach this is to look at the situation where the Board does have specific statutory powers to approve conduct that might violate law. In the anti-trust bill, you have three different sections in which the CAB is specifically given power, and it's very carefully spelled out, to approve conduct that would otherwise violate, or might otherwise violate, the anti-trust laws. Either sections 408, 409, and 412 of the Federal Aviation Act. When

the Board does give that kind of approval under these sections, under these specific provisions, section 414 of this Act specifically says that the transactions are thereby immunized from anti-trust liability. There is simply no comparable language in this Act that would authorize the Board to sanction deceit by the airlines under any circumstances or to immunize the concealment of material facts from --

QUESTION: Mr. Robertson, by analogy to your anti-trust example, supposing the Board -- your theory of fraud is a nonrepresentation, failure to disclose. Supposing the Board issued an order saying, "Do not disclose, because there are conflicting interests at stake and it would be harmful to do it," then what about the rationale of the Parker v. Brown case that the airlines would have no alternative but to obey the order and therefore it would be somewhat unfair to hold them liable as a matter of common law.

MR. ROBERTSON: That is just what the respondents here are saying the Board has said, "Do not disclose, it's against the public interest to even disclose the truth."

First of all, they simply haven't said anything of the kind. What they have said is if you retain your common law right, you go to court.

Now, I don't believe they would have any power to tell an airline that it may not disclose the truth. That's simply beyond --

QUESTION: Or that it must not disclose the truth.

MR. ROBERTSON: It must not --

QUESTION: That's the question.

MR. ROBERTSON: Yes.

QUESTION: And that's hypothetical.

MR. ROBERTSON: Yes. This Act simply gives the Board no such power.

QUESTION: If it did give it such power -- well, you just answered it, that it's a different case.

MR. ROBERTSON: Yes.

QUESTION: You don't to meet that case.

MR. ROBERTSON: If they did, I think that would be an entirely different case.

QUESTION: Would your responses to these questions conflict with an announcement by the CAB to the public generally that it was approving the overbooking practice, which is pretty close to what they have done, if they haven't done it. What quarrel do you have with that, again?

MR. ROBERTSON: Well --

QUESTION: I am not very clear on what your position was about that. You said they can do that all right, but they can't take away any common law action that you have.

MR. ROBERTSON: What they can do is say, for the purpose of section 411 and the other parts of its statute, they are not going to try to get into detailed regulation

in this kind of area. What they are going to do is leave this to free enterprise to work out, and that's what they have done here. But they have never said they are going to preempt common law remedies, and I don't think they could in this kind of area.

Now, suppose someone had come in and filed a tariff. If they filed a tariff saying, reservation means that you may be overbooked and you have an assumption of risk. That would be an entirely different case.

QUESTION: How about if they put a sign on the counter like they have for the liability on baggage, which thanks to a decision of mine they had to do, would that be satisfactory?

MR. ROBERTSON: It would certainly help, your Honor. I think you would have a lot harder time making out a common law tort claim.

QUESTION: Would you be satisfied with that?

MR. ROBERTSON: Well, I don't know what would be satisfactory for the airlines to do. I mean, there are lots of possibilities --

QUESTION: I am talking about what would be satisfactory to the traveling public which you represent.

MR. ROBERTSON: I think you are a little late by the time you get the guy to the airline counter and tell him that they overbook these flights.

QUESTION: What if it's on his ticket?

MR. ROBERTSON: If it's on his ticket, I think that -- I mean, that would be an entirely different case. It might be a defense to a claim that the plaintiff had been deceived.

QUESTION: This would bring in perhaps something like an assumption of risk.

MR. ROBERTSON: Yes.

QUESTION: In other words, "You are hereby notified that you might be bumped, and if you are bumped, there will be no liability on the part of the carrier."

MR. ROBERTSON: But that doesn't involve the slightest bit of concealment. I mean, they are telling you here. They are telling you, and you can assume that risk safely, it seems to me, and make your own judgment.

As I say that's the genius of this Eastern Air Lines system in which they do tell you that, "Look, you are in a class of people that might get bumped here, and if you don't like it, take another flight or go on another airline, and if you do get bumped, you might the denied-boarding compensation penalty.

QUESTION: Mr. Robertson, did I understand you to say that mere inclusion in the tariff would be sufficient, in your opinion.

MR. ROBERTSON: It would be an entirely different case. I don't know how it would come out. As a practical matter, people don't read the tariffs, but they are held to be

binding as a matter of law. You are deemed to have notice of everything that's in the tariff, and the cases have consistently held this. I think it would be a very different case than the one we have here.

So the decision below would turn the Act on its head. 411 says that the CAB can eliminate deceptive practices. The Court of Appeals says that it can approve deception in the public interest. 1106 says that the common law remedies survive and that new statutory powers here are in addition to these remedies. The Court of Appeals says that the common law must be altered and these remedies are subordinated to administrative powers that aren't even stated in the Act. I think that this decision calls for a major reallocation of functions between the common law courts and the Federal agency. This would seriously disrupt the statutory scheme, and as Judge Fahy said, it's plainly contrary to the intent of Congress.

So we respectfully urge you to reverse the decision below.

MR. CHIEF JUSTICE BURGER: Mr. Prettyman.

ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR.,

ON BEHALF OF THE RESPONDENT

MR. PRETTYMAN: Mr. Chief Justice, and may it please the Court: This case presents only one single and very narrow question, and that is whether the CAB does have power to

regulate in the area of notice to the public of overbooking by regulated carriers.

Now, we have to start with overbooking itself, even though it's not directly involved here. In the first place, petitioner concedes that overbooking itself is not illegal per se, and in the second place, the overbooking part of the case, if you will, has been remanded back and it's not before you.

But the reason that we have to start with the overbooking, the reason that it's relevant, is that if petitioner is successful here, there will be an end to overbooking. He has a letter in the record indicating that's really what he is trying to do. He is not trying to get damages for fraud or misrepresentation. He is using that as a vehicle to stop overbooking. And the CAB has said in fact that if notice is published, overbooking will stop.

Now, that's exactly what 25,000 --

QUESTION: If what?

MR. PRETTYMAN: If notice is given to the public, overbooking is going to have to stop. Obviously, if somebody -- one of two things is going to happen. Somebody calls up on the phone and he says, "I want to make a reservation to go to Chicago," and they say, "All right, we are giving you a reservation, but we should tell you that it isn't really a reservation because there is a chance that you may not get on

the plane.

QUESTION: Well, the CAB has approved precisely that kind of a tariff in that Eastern Air Lines plan.

MR. PRETTYMAN: Sir, that is a very special kind of a plan whereby Eastern tells you in advance --

QUESTION: That you might be bumped.

MR. PRETTYMAN: And you therefore choose to go out to the airport because you really don't want to get anywhere necessarily at that time, and if you don't get that flight, you can get some other flight, and you get it free.

But the point of it is, sir, that that isn't what the 174 million passengers a year who travel want. Most people don't go --

QUESTION: They want confirmed reservations.

MR. PRETTYMAN: That's right. They don't go on Eastern's leisure plans.

QUESTION: They don't want what Mr. Nader got in this case.

MR. PRETTYMAN: That's exactly right.

QUESTION: He thought he had a confirmed reservation when he didn't.

MR. PRETTYMAN: That's very true, sir.

QUESTION: They also want to reserve to themselves the privilege of not showing up and not being penalized for it. I suppose that's the other side of that coin, isn't it?

MR. PRETTYMAN: Well, I think there is the other side of the coin, but I would suggest to you that these are precisely the kinds of questions that the CAB has now been struggling with for 20 years, because this goes back to 1956 when they first took a look at this whole problem, and since then, as I am going to detail for you, they have dealt with it at some length and in some depth and they have reached a number of conclusions which I think you ought to know about because what you are going to do if you hold for him is you are going to take this whole problem away from the CAB that has been attempting to deal with it now for 20 years and has detailed regulations on the subject, has detailed regulations on the subject, and you are going to say, now we are going to allow \$25,000 awards which in effect is going to not only bring a stop to overbooking, which the CAB has said definitely is in the public interest --

QUESTION: I am not sure I understand that. You assert the CAB has power to regulate this practice and to insulate the airlines from these sort of actions. I take it you think it does.

MR. PRETTYMAN: We say that the CAB has power to regulate both in the area of overbooking and in the area of notice to the public.

QUESTION: And you think enough has happened so that these kinds of actions may not be maintained.

MR. PRETTYMAN: Oh, absolutely.

QUESTION: All right, now, suppose -- if all a court did was to say, well, the CAB might be able to do that, but it hasn't done it yet, you certainly haven't driven any hole through the Civil Aeronautics Board or the Civil Aeronautics Act.

MR. PRETTYMAN: Well, Mr. Justice, we say two things.

QUESTION: The CAB, if it turns around that sort of an approach, the CAB could turn around tomorrow and make it clear, if it had the power to do it, as you say it does, that the airlines must do this and that we are preempting these.

MR. PRETTYMAN: That's what the Court of Appeals was saying here, is that this is a matter which should first be sent to the CAB to determine, first of all, whether they have already ruled on it, as we think they have, and, secondly, if they haven't ruled on it, to get the benefit of their judgment before the courts try to decide in the first instance whether this amounts to fraudulent misrepresentation.

QUESTION: Let's not read section 1106 right out of this lawsuit.

MR. PRETTYMAN: Sir, section 1106 is precisely the language that went way back to 1906 in the Texas & Pacific Railway case.

QUESTION: Wherever it came from, and it may be boilerplate, but it does say something, and it must be listened

to.

MR. PRETTYMAN: This Court has ruled on a number of occasions that all it means is that all of your remedies are preserved except for those which are in conflict with the agency's determination. That's all that means. That's what they said in Texas & Pacific where they tried to bring a suit because of bad rates. And they said, no, that's in conflict with the agency's jurisdiction to determine rates, and therefore, despite what this says, even though --

QUESTION: That's quite a different case.

MR. PRETTYMAN: Well, no --

QUESTION: Apparently it was a different case.

MR. PRETTYMAN: It isn't a different case, your Honor. Let me make this very clear to you. Back in 1967 the CAB issued detailed regulations dealing with overbooking and with denied boarding and compensation, and they decided that because of the extraordinary no-show problem which amounts to almost 10 percent of your sales -- I think you have got to get a picture of what goes on here at these airports. Twenty-eight percent cancellations. There's a 20 percent turnover in seats in the last six hours before the flights take off.

QUESTION: But that is induced by the airlines, isn't it? They don't want to penalize no-shows.

MR. PRETTYMAN: Sir, only a very small part of it, we say. And the figures here are in conflict. The hearing

examiner decided it was somewhere between 50 and 60 percent, he couldn't decide who was the major contributor to no-shows. But certainly a great number of no-shows, I would say at least in the area we have, are simply people who make reservations and who do not turn up.

Now, that problem was costing the airlines industry over \$18 million a year and the Board, being extremely concerned with this, decided that they would issue detailed regulations and allow overbooking to take place, and if there was an over-sale, to allow a specific amount for denied boarding compensation.

All right. The next thing that came along was this problem of notice, and I will be very frank with you, their first reaction to it was the same as Mr. Nader's. Their first reaction was, well, it's kind of deceptive not to tell the public, and consequently, we will have -- their first suggestion was 24 hours notice before flight time, and then the second suggestion, and this they were actually going to make a rule, they issued a notice of proposed rule-making, that you had to give 12 hours notice if you overbook to the passengers on the plane. What happened? The airlines came in and they showed --

QUESTION: Mr. Prettyman, let me interrupt you just a minute. You are saying that this is just what Mr. Nader is asking for. If I understand it, what the CAB was talking about there was notification of individual passengers who had

reservations within the 12-hour or 24-hour period, and what Mr. Nader's argument is that the airlines either by implication representing that there is no problem to the general public that a confirmed reservation means just that. I think those two could stand consistently with one another.

MR. PRETTYMAN: Well, I would respectfully disagree, your Honor, because I think that what he is saying is that when he called to make a reservation, they failed to give him notice that they might not get on the flight because of an overbooking situation.

You have got to understand this overbooking. This isn't designed to create oversales; if the thing works perfectly, there is no oversale. For example, just take this very flight. This very flight had a history of leaving with an average of six empty seats on every flight. So what they were doing was overbooking in an attempt to compensate for those empty seats. They had only had one prior incidence of overbooking on this particular flight. So you shouldn't get the impression that this thing is just a sloppy method; it is done through a computer in an attempt to make every flight leave with every seat taken. And that's why the CAB, very concerned about oversales, said in effect that we are going to approve an overbooking so long as you have three conditions, they are very important: First of all, you have to get denied boarding compensation has to be handed to the man if there is an oversale, right on the

spot. Secondly, you have to have priority rules so that your fare -- oversales, if you have more than one, that they are treated in a proper manner. And, finally, you have to file with us wuarterly and monthly detailed reports with the CAB of your oversales. They get monthly reports about this.

QUESTION: How about overbooking?

MR. PRETTYMAN: Sir?

QUESTION: How about -- do they --

MR. PRETTYMAN: Overbooking is meaningless until it runs to an oversale, your Honor.

QUESTION: I know, but don't they tell how -- doesn't an airline tell the Board it as an airline is calculating its overbookings?

MR. PRETTYMAN: No, it doesn't.

QUESTION: Some airline might be reasonable about it and others might not.

MR. PRETTYMAN: The statistics show whether they are being reasonable, because if they are overbooking --

QUESTION: How can the CAB know they are being reasonable unless the airline tells them?

MR. PRETTYMAN: Your Honor, because if they have too many oversales, it's an obvious indication that the overbooking is not working. In other words, by the reports they get every month of oversales, they can tell whether an airline is out of kilter in terms of its overbooking, because if it has too

many oversales, obviously the system is not working right.

We, for example, Allegheny, are below the average --

QUESTION: You report every month the fellows who are left at the gate.

MR. PRETTYMAN: Yes, sir. Absolutely. And more detail than that. It's in the record as to precisely what the reports are.

Now, I want to get back to this notice thing again because I think it's extremely important. When it was suggested that the public be told about the overbooking situation and that they might not get on the flight --

QUESTION: When you say the public, you mean a general message or notification of people with reservations?

MR. PRETTYMAN: I think that the notice would be of the kind that he seeks here, and that is when you call up they qualify your confirmation. In other words, they say, All right, we are going to put you on this plane, but you should be aware of the fact that you might not get on it.

Now, listen to what the Board said when it rejected a rule specifically designed to do that. It said, this is the Board's words, not what the airlines argue to them, it said, "The resultant confusion, alarm, bitterness, and cancellation of reservations." It referred to the very sizable number of people needlessly alarmed by the notification of their overbooked status. They referred to reservations that would have been

cancelled on flights which actually could have accommodated the passengers. They talked about the large number of passengers who would be denied reservations on flights which because of reservation turnover and no-shows would depart with empty seats.

What are they saying here? They are saying that here in an effort to make up for the problem of no-shows, they are going to allow you to overbook, then if you are going to give notice, you are going to exacerbate the very problem that we are faced with in the first place, because you are going to have people making multiple reservations and a lot of people not showing up, and instead of six empty seats on Allegheny Flight 864, you are going to have 15 or 30 seats if you start telling the public this.

Now, the point I want to make to you is this --

QUESTION: They didn't tell them not to tell the public and they didn't tell them to overbook.

MR. PRETTYMAN: Sir, what they did was, if you look at part 250 in the regulations, they had a detailed plan for what happens when you overbook and have an oversale --

QUESTION: I understand that, but they didn't --

MR. PRETTYMAN: And the second thing you have --

QUESTION: No airlines is in violation of an order of the CAB if it does not overbook.

MR. PRETTYMAN: You mean if it says that it's overbooked?

QUESTION: No. If it just does not overbook.

MR. PRETTYMAN: That's absolutely correct. That's absolutely correct.

QUESTION: No airline is in violation of any CAB order if it overbooks and tells people it is.

MR. PRETTYMAN: It may go out of business, but it's not in violation of any CAB order, that's correct.

QUESTION: So the CAB left the airlines on their own in this respect, didn't they?

MR. PRETTYMAN: Sure. I'll tell you this. I think that if tomorrow an airline began telling the public that they might not get on these flights, there is a serious question whether the CAB --

QUESTION: They don't have to tell them. It's just that your opposition's position is that you may have to pay a judgment now and then.

MR. PRETTYMAN: Well, the point I am trying to make is that you and I may argue about the wisdom of both overbooking and denied boarding compensation and notice, but the real point is that we shouldn't be here arguing this, we shouldn't have 40 pages of brief and talk back and forth about whether this is wise or not. This is what the CAB is for. This is precisely what it is designed to do, to take into consideration the pros and the cons of notice. There are things to be said against notice, there are things to be said in favor of it. But this is

precisely what this agency is designed to do, is to take the public interest, not Mr. Nader's particular problem, which of course is serious to us, but to take the entire public interest problem into consideration and say, Now, wait a minute. We were going to issue this rule requiring notice. We find, as I have read here to you --

QUESTION: May I just interrupt.

MR. PRETTYMAN: Certainly.

QUESTION: Your whole argument proceeds on the premise, as I understand it, that overbooking really is at stake in this case. Is it not entirely possible that we could reverse and send the case back to the Court of Appeals and they would find there is no common law fraud by reason of the failure to disclose?

MR. PRETTYMAN: They might find that there is no --

QUESTION: You haven't conceded that there is common law fraud?

MR. PRETTYMAN: No, I have not conceded there is a common law fraud.

QUESTION: Is it not correct that it is not necessarily true that the kind of notice you are describing is at issue but merely you would have an obligation to give sufficient notice to have a defense to a common law fraud action? In other words, if you had on every ticket, you have one chance out of 10,000 if you don't get there 15 minutes early that you may be

bumped, something like that. That would probably be an adequate defense, even though it wouldn't be the kind of notice that you are saying he wants.

MR. PRETTYMAN: The difficulty, your Honor, is that the primary jurisdiction problem enters the case before that. In other words, where it should enter the case is when --

QUESTION: But does it enter it with respect to the question that we have to decide which was presented by the certiorari?

MR. PRETTYMAN: It certainly enters it in connection with notice, that's right. He is claiming that he did not receive notice --

QUESTION: I know what he is claiming, but you certainly aren't admitting that that's the only kind of notice that would be an adequate defense to a common law fraud case, are you?

MR. PRETTYMAN: No, that's true.

But the point I do want to make is that when the case first comes up and it is first presented in the district court is at the point where this Court, it seems to me, has said in innumerable cases, cases like Ricci, for example, not just that you have to go to the CAB because they have some kind of exclusive jurisdiction over this, even. We think they do. But even to get their view about this is helpful for us in deciding this kind of case.

QUESTION: Mr. Prettyman, what about the CAB, assuming it has some authority to regulate safety conditions on airplanes, does that mean that --

MR. PRETTYMAN: The FAA.

QUESTION: OK, the FAA. Does that mean that before a passenger can sue an airline as a result of an aviation disaster, he has to first present his claim to the CAB?

MR. PRETTYMAN: No. But that is more like our priority problem here, which is a different problem. Now, the Court of Appeals has said that if you have your priorities on file and if you violated your priorities, then that is a court question, and there have been a number of recoveries because priorities are set out clearly and there is nothing for the CAB to do, assuming that the priorities that you have are fair. And if you have violated your priorities, then you can recover in court, just as he may be able to recover on the remand of the other section of the case, because, you know, we obviously claim we filed our priorities, but if we are wrong --

QUESTION: The Federal law claim. But I am asking you whether in order to make a State law claim for negligence against an airline as a result of a disaster, you have to first go to the CAB and see if they approve it.

MR. PRETTYMAN: Well, you do if the question that is involved is whether a particular safety regulation, for example, was in effect or was violated or an issue as to a regulation

relating to safety. As soon as that becomes involved, the whole case doesn't go to the CAB, or in that case the FAA, but that section interpreting the safety regulation is then shifted to the FAA for determination, for its interpretation of that safety regulation.

QUESTION: Is that well established in cases? I hadn't realized that.

MR. PRETTYMAN: Sure. That's what the whole line of primary jurisdiction cases that you've established says, and that is in any one of these cases where you get into an interpretation of a board or agency's regulations or rules that instead of the court deciding, it should be sent to the agency, if the agency has not heretofore decided the question.

QUESTION: Are there any primary jurisdiction cases involving negligence claims?

MR. PRETTYMAN: I am not familiar with them either.

Oh, yes, sir --

QUESTION: A lot of anti-trust cases, I know.

MR. PRETTYMAN: Yes. There are a couple of exculpatory cases, your Honor. Let me just give you an example of the type of case that have been referred to agencies or thrown out. The Lichten case. It's in our brief, L-i-c-h-t-e-n, is the one that seems most obvious where there was a common law claim and where in fact there was nothing specific giving the Board jurisdiction, and yet in which -- that was a case

involving jewelry on a plane that was delivered to the wrong person, and the court ruled that the CAB tariff controlled and that the passengers assumed the risk unless the carrier was specifically notified of the jewelry. Now, otherwise, that would have been a clear case of a common law recovery and there was nothing specific that gave the CAB jurisdiction in that case, and yet they said that that was a matter which did come under the CAB.

QUESTION: Mr. Prettyman, the claim under Federal law, under the Federal statute is sustained eventually. Would it be fair to conclude, if that happened, that not --

MR. PRETTYMAN: What happens where? I am sorry, I didn't hear.

QUESTION: The claim under Federal law is sustained. Wasn't there a judgment in the district court under Federal law?

MR. PRETTYMAN: Yes, but that has been remanded.

QUESTION: I understand. Let's assume ultimately it is sustained. Let's assume that the Court of Appeals had affirmed it. Would it be fair to conclude from that that not only is the fraud -- would it be fair to conclude that the Federal law would not protect this kind of action from a State fraud judgment?

MR. PRETTYMAN: Well, that's precisely why the Court of Appeals ruled as it did. It said first of all that overbooking was not per se illegal, and secondly, therefore,

the only question that was properly up was whether the priority rules had in fact been followed. And there was a dispute about that and therefore it was sent back for a determination of that single question. So that's why the Court of Appeals decided the way it did on the Federal cause of action. I mean, you are asking me to assume a result which I would say would be wrong under my theory, Mr. Justice.

QUESTION: Well, maybe. It seems to me that it's an awfully difficult thing to claim that you are protected from a State cause of action because of a Federal law that you violated.

MR. PRETTYMAN: Because of a Federal law that we violated. Well, of course, our claim is --

QUESTION: If you violated the priorities.

MR. PRETTYMAN: Yes. Well, but that would be a section 404 claim. That would be a claim of unjust discrimination and so forth under 404. That would be that there was nothing wrong with the overbooking, but that when the man turned up, since there were three people waiting, we let the wrong person on or we didn't take the right person off the plane.

QUESTION: In the anti-trust area sometimes an agency has the power to insulate you from the anti-trust section as long as you do things the right way. If you do them the wrong way, you can get sued under the anti-trust laws.

MR. PRETTYMAN: But the priorities have absolutely nothing to do with the notice issue that's in front of the Court now, your Honor. It has nothing to do with it at all. Priorities has to do with whether, if you have more than one oversale, how you are going to treat them. The issue before this Court is whether, since he claims that he was entitled to notice and the CAB has been working with this issue and dealing with it and deciding not to tell carriers to give notice, in fact, absolutely doing away with the proposed rule that would have required us to, whether you do not turn to the CAB in the first instance and say, number one, have you decided in the past and already, back in '67, that not giving notice is proper? Or if you have never decided this question, give us your best advice now as to how you would decide prospectively, because that would aid us in this case. That's precisely the line of cases that you have had here in so many instances. This is precisely the kind of question that is referred to the Board for its expertise and in order to avoid conflict.

Now, may I just present to you --

QUESTION: Mr. Prettyman, let's assume that what the Court of Appeals did here was correct and that this now goes to the CAB and the CAB says, "No, we never decided this in the past, but now that you ask us, we think we will probably decide in the future and we can tell you now that we will hold that not giving notice is all right." Then would it be your submission

that that ends this claim, that that's an absolute defense?

MR. PRETTYMAN: I would take this position, your Honor, that if they say that not because of all the considerations, the balancing considerations, that notice should not be given, that that should strongly influence the court in deciding that in fact there was no fraudulent misrepresentation back in 1972.

QUESTION: Should it be determinative?

MR. PRETTYMAN: I would personally think it would be determinative, but I concede that the court would have some role to play because it might decide that simply because of what the Board is deciding now, it doesn't necessarily preclude it back several years ago.

QUESTION: You couldn't get rid of the jury, could you?

MR. PRETTYMAN: Pardon?

QUESTION: Would you have a jury trial?

MR. PRETTYMAN: You could have a jury trial, your Honor.

QUESTION: Then the judge wouldn't have much to do with it.

MR. PRETTYMAN: Well --

QUESTION: Wouldn't you think that was a jury question? I think it would be.

MR. PRETTYMAN: Of course, I would take a position that this would really be a legal question.

QUESTION: Right.

MR. PRETTYMAN: But let me make one point very strongly here, because I am not sure that I've gotten this across, and that is that you cannot have a \$25,000 recovery in this case and the CAB operating in the area that it thinks it's operating in, as it told the Court of Appeals it think it's operating in, both going on at the same time. The CAB has an investigation right now, and has had since 1973, into this whole problem. It has an ongoing investigation. Since the Nader case was decided, the remand from the Court of Appeals, it informed the industry --

QUESTION: Did you say the CAB had informed the Court of Appeals?

MR. PRETTYMAN: When the Court of Appeals decided the Nader case, the CAB informed the industry of the result and solicited its views in the light of the ongoing investigation that's going on of this entire business of overbooking practices and notice --

QUESTION: I notice the CAB hasn't filed anything here, have they?

MR. PRETTYMAN: No, not here, they did in the Court of Appeals.

QUESTION: Did they enter into the argument?

MR. PRETTYMAN: They filed amicus briefs fully supporting us in the Court of Appeals.

QUESTION: Saying what?

MR. PRETTYMAN: Saying that they thought that they had primary jurisdiction in this area.

QUESTION: Did they also say that this is what we meant all along?

MR. PRETTYMAN: No. No. What they did was --

QUESTION: They said they want to maybe have a new swing at it.

MR. PRETTYMAN: No. They detailed everything that had gone on and this extraordinary number of orders and backing and filling on this entire problem, and the regulations that they have and how they worked the denied boarding compensation out, and the notice --

QUESTION: Did their brief address both the common law issue and the statutory issue?

MR. PRETTYMAN: Both. Yes, sir. And they said they had primary jurisdiction --

QUESTION: Is their brief in the record, I wonder?

MR. PRETTYMAN: It can easily be supplied to this Court.

QUESTION: Did they explain what they meant about saying that you could keep your common law remedies if you didn't take the denied boarding compensation?

MR. PRETTYMAN: Yes. You see, what that means, your Honor, is that there are two types of cases that are kind of

left over. One is the Ella Fitzgerald type case where an airline denied boarding to a passenger solely on the basis of race. Now, there is no way that the CAB can approve that. There is nothing to refer to the CAB. That is a racial discrimination case. You go into court and you can recover. Therefore, there is no primary jurisdiction in that kind of case.

Another kind of case would be the priorities case. That is, if you have violated your priorities, there is nothing to go to the CAB about. Therefore, you can choose to turn down your denied boarding compensation and go in and get higher damages than you would get under denied boarding compensation, because they have violated their priority. It's those kinds of things that are still left over, and that's the reason why some passengers turn down their denied boarding compensation. There is a recent case before Judge Gesell, for example, where a paraplegic was denied entrance to an airplane because he didn't have somebody with him, and the CAB has not dealt in any way with that problem, and therefore that presumably would not have to go to the CAB.

But the point I have to drive home --

QUESTION: Did the CAB indicate what should happen to this case?

MR. PRETTYMAN: Yes. It thought that it should have primary jurisdiction.

QUESTION: To do what?

MR. PRETTYMAN: To decide what the correct practices should be.

QUESTION: Well, yes, but does it indicate that furthermore if we decide that the correct practice should be no notice, that therefore there is no cause of action in this case?

MR. PRETTYMAN: Well, your Honor, I can't go that far. My memory doesn't serve me best to tell you whether they went that far, but what they did say was that they were heavily involved in this entire problem, there were ongoing investigations, that they should have a hand, at least, in giving the court the best advice that they could about what the practices should be.

But, again, if I can just say one word, and that is I want to emphasize it so you know what you do here when you allow a \$25,000 award, you are not only allowing that, but you are eliminating overbooking. The CAB has said so. You are eliminating overbooking, and I think that you are placing yourself, with all due respect --

QUESTION: The \$25,000 as an independent punitive damages recovery is still another hurdle that they have to get over.

MR. PRETTYMAN: That's right.

QUESTION: You are not conceding they are entitled

to punitive damages --

MR. PRETTYMAN: No, no, no. But what I am saying is if you allow them the option of trying for punitive damages and getting this kind of award, you are doing away with overbooking, and, as I say with great respect, you are putting yourselves, I think, in the shoes of the CAB, because that is a CAB decision and not your decision.

QUESTION: One more question, Mr. Prettyman. Your friend responded -- I won't call it a concession -- but he responded certainly not negatively that if the ticket, airline ticket on the back said something to the effect that there is one chance in a hundred or maybe two chances in a hundred if they wanted to be safe that you will not be accommodated as a passenger on the flight covered by this ticket either because of mechanical failure, bad weather or overbooking.

Now, it can't be that simple that that would solve this problem, or I should think it would have been done. What's the flaw in that?

MR. PRETTYMAN: Well, I think the answer is it certainly would do away with any claim of fraudulent misrepresentation, but I think the problem from the airline industry's standpoint is that right now there is a tremendous amount of multiple booking going on. People make reservations on any number of flights, and they only take one, if they take any.

QUESTION: Did anyone ask the plaintiff in this case

whether he had ever done that?

MR. PRETTYMAN: He had been bumped twice before.

QUESTION: That he had made multiple reservations.

MR. PRETTYMAN: No one asked him. But I think it would tremendously exacerbate that problem. It would result in many more multiple reservations than we have got, and this, as I say, is precisely why the CAB is allowing overbooking in the first place, trying to get --

QUESTION: You may be assuming that most people read their tickets. I have been traveling on airlines since they began. I have never read a ticket yet. I don't know what's on them. Your fears may be ungrounded.

Well. Very well.

MR. PRETTYMAN: Of course, the point I think you are trying to make is if you really gave people notice. I mean, if you are just going to give them a formal notice to get away from your fraudulent misrepresentation claim, that's one thing, but if you are going to put up a big sign and say, we don't really confirm this space because you may not get on the plane, if you don't think that is going to have an impact in terms of people either taking trains or making multiple reservations or having no-shows, why, you are just wrong. And that's what the CAB is saying and that's what they are fighting with. It's not an easy problem they have got.

QUESTION: Mr. Prettyman, could you conveniently

arrange to have the members of the Court supplied with the copies of the brief filed by the CAB in the Court of Appeals?

MR. PRETTYMAN: Absolutely. I certainly will.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Robertson?

REBUTTAL ARGUMENT OF REUBEN B. ROBERTSON III

ON BEHALF OF THE PETITIONER

MR. ROBERTSON: Just one brief clarification, your Honor.

On the 1967 proposal, I think it's important to point out, I have submitted to the Court a set of the relevant CAB materials for your convenience, lodged with the clerk.

QUESTION: A set. Do you mean one or --

MR. ROBERTSON: Ten sets, lodged with the clerk, so that if you want to look at these documents that are sometimes hard to find, this was the rule-making code EDR-95, and that did contemplate a general warning to be given to all passengers. What it was talking about was that the airlines would have to figure out 12 hours ahead of time every flight that was likely to be overbooked, that was overbooked at that time, and it would have to call up every passenger, sometimes long distance, to warn them that they might be bumped. And the airlines said they simply couldn't do that. They didn't have the data processing capacity, they didn't have the personnel. It would involve millions of calls every year. It would be enormously

costly.

The CAB had noted that every airline said it recognized on their own the obligation to give a warning, and the purpose in this rule-making is simply to regularize those procedures. The CAB finally concluded that it didn't need to regularize those procedures at the cost of such flexibility. That's EDR-95, page 4. So I don't think we are talking about the same kind of thing here.

QUESTION: Mr. Robertson, do you know why the CAB isn't here?

MR. ROBERTSON: I have wondered about that a great deal, your Honor. I can't draw any conclusion one way or the other.

QUESTION: Did the court ask them to participate in the Court of Appeals or did they come in by themselves?

MR. ROBERTSON: They said at the Court of Appeals level that the case was so important that they should be permitted to file a brief five months after all of the briefs were due, I must say, over my objection. But then they apparently lost interest in the case. I assume they feel that I can adequately represent their interests.

(Laughter.)

MR. CHIEF JUSTICE BURGER: Well, then, we will let the record show that

(Laughter.)

Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:27 p.m., oral argument in the above-entitled matter was concluded.)