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International Agreements and International Air Transportation

INTERNATIONAL AGREEMENTS AND INTERNATIONAL AIR TRANSPORTATION*

THE vast importance to this country of international air transportation requires the committee to consider carefully the part being played by American carriers, the procedures being followed to assure this country's rightful place in world aviation and to determine whether the Congress is adequately exercising its responsibilities in achieving American goals. S. 2647 raises these issues by proposing that more of the international agreements affecting air transportation be subjected to Senate approval before becoming effective. To assess the problem this section will review the importance of international air transportation to American interests, the means by which rights are obtained for American operators and the governmental procedures followed to permit congressional review of these activities.

The importance of maintaining American air-transport services around the world is clear. Our people do business and travel in every free country. Thus a survey of people registered in the leading hotels in Tokyo, Bangkok, Hong Kong, and Calcutta in 1952 reveal that 61 percent were American citizens, only 11.9 percent were British subjects, and the registrations from other countries were less: Japan, 3.3 percent; Philippines, 2.9 percent; China, 2.6 percent, and Scandinavia, 2.2 percent.[1] The Korean war and the war in Indochina gave a new consequence to the events in lands on the other side of the globe. Since it is so important for our people and our products to go abroad, it has become important for the United States to maintain commercial air service around the world.

An indication of American interests in international air transportation was prepared during the war by the CAB, in consultation with the Departments of State, War, and Navy, and was expressed in the air-route pattern announced as essential by the Board in June 1944. That announcement called for the following extensions of American air routes after the war as follows:

In the Atlantic area, the United States, which in 1940 had permission to operate to Portugal, to France, to England and Ireland, in 1944 wanted routes to Iceland, Norway, Sweden, Finland, Russia, Germany, Czechoslovakia, Austria, Switzerland, Italy, Spain, Greece, Turkey, Iraq, Iran, and India.

In the Pacific in 1948, United States routes extended beyond United

* Section VII of AVIATION STUDY presented by Senator John W. Bricker, Chairman, Interstate and Foreign Commerce, 83rd Congress. Senate Doc. 163, 83rd Cong., 2nd Sess. (released January 11, 1955). Prepared for the United States Senate Committee on Interstate and Foreign Commerce on the basis of hearings held on S. 2647 of the 83rd Cong. (An Omnibus Aviation Bill by Mr. McCarran) under the direction of its Aviation Counsel, Edward C. Sweeney.

[1] Hearings of Senate Committee on Interstate and Foreign Commerce on S. 2647 (an omnibus aviation bill by Senator McCanen), p. 528.

States territory to only one area — Hong Kong-Macao. The 1944 goal required the United States to acquire additional rights to Japan, China, French Indochina, British Malaya, Indonesia, Australia, New Zealand, the Fiji Islands, New Caledonia, and the Canton Islands.

Of all the routes deemed essential in 1944, only those in South America had been relatively well established by that time through negotiations between private operators and the governments in that area.

In Africa, where in 1938 we had no operating rights, the announcement of 1944 declared it essential to have routes to French West Africa, Belgian Congo, South Africa, Egypt, and Tripoli.

Nor is the effort by the United States to maintain a leading position in international transportation a new one. As Senator McCarran pointed out, on page 109 of the hearings:

> Since the middle of the last century, we have been trying to maintain an adequate Merchant Marine. We made a serious mistake many years ago in permitting our Merchant Marine virtually to disintegrate so that by the beginning of the First World War we were pitifully weak on the seas. We have tried strenuously since that time to restore our position, but I do not believe that any one will say we have wholly succeeded * * * It is essential that we maintain our position in world aviation that the policies of our Government be carefully framed so as to accomplish this objective.

An evaluation of the effectiveness of current procedures for obtaining international rights can best be made against the background of American achievements in this field since World War II. During that time the United States obtained route privileges which were deemed essential to the national interest; the traffic rights along those international routes to permit operations on an economical basis, and the operating facilities and technical operating agreement necessary to enable aircraft to fly.

Route Acquisitions

The first important step in the acquisition of the necessary air routes was to obtain permission to pass through the airspace of foreign countries. This was achieved by the International Air Services Transit Agreement whereby the subscribing nations agreed to open their airspace to permit (1) foreign aircraft to fly through and (2) foreign aircraft to land for refueling and other technical reasons. This agreement, known as the two freedoms agreement, was signed at the Chicago Conference in 1944 and has been ratified or adhered to by 41 countries; including every major country with vast land space over which aircraft must pass except Russia, China, and Brazil.

The second step was the negotiation of bilateral air-transport agreements with approximately 45 countries and the adoption of more than 20 amendatory actions to those bilaterals between the years 1944 and 1954, permitting the United States to engage in commercial carriage. By these steps, the United States obtained all those routes it had set

as goals for itself in 1944 except routes to Russia, China, and the other Iron Curtain countries.

Acquisition of Traffic Rights to Permit Economical Operations

If the operations were to be economic, the traffic rights must be free from such economic restrictions as limitations on the number of schedules, route monopolies, or the pooling of traffic. The Board, in its testimony at page 684 of the hearings, described these aims:

> The United States Government was extremely desirous that any agreement so negotiated allow the greatest latitude of action and managerial freedom for our flag carriers so as to promote the greatest development of the service in accordance with the policy declaration of the Civil Aeronautics Act.

These notions ran counter to the concepts of route monopoly and restricted competition which were followed abroad.

> As this committee well knows, the principle of competition is not so strongly endorsed abroad as it is in the United States. On the contrary, the nationalized carrier — the chosen instrument — the route monopoly — these are almost the invariable rule. Competition between public carriers of the same type is there regarded as detrimental to the public interest and indeed competition between different transport media is frowned upon. These factors produced a desire in many foreign nations to spell out the details of the operation in advance and strictly limit them in order to permit their own national carrier or carriers to compete on equal terms with any American enterprise.[2]

Thus, even in the agreements between the United States and Great Britain and France before the war, the schedules had been limited to 2 a week and 4 a week respectively. Another economic restriction included pooling arrangements whereby the traffic revenues were divided evenly between two countries regardless of which airline carried the traffic. In the bilateral transport agreements entered with 45 countries since the war, the United States has the right to pick up and discharge intermediate schedules subject only to general limitations on capacity which recognize the needs of the long-haul operator as well as those of the regional carrier.

Acquisition of Technical Facilities and Standard Operating Procedures Around the World

In addition to route and traffic rights there remained the technical requirements for physical equipment and rules governing operations. The physical equipment had to be obtained and installed at specified points; rules of the road and operating procedures had to be agreed to; and in many of the actions under the above two requirements, it was essential that there be agreement on standards. Furthermore, qualifications of personnel had to be agreed to.

These goals also were realized due in large part to the International

[2] Hearing on S. 2647, op. cit., p. 685.

Civil Aviation Organization. The Chicago Convention, a treaty ratified by the United States Senate in August 1946, established ICAO and provided that the states ratifying or adhering to that convention undertake to collaborate in securing the highest practical degree of uniformity and regulations, standards, procedures, and organizations, in all matters in which such uniformity will facilitate and improve air navigation.[3]

When ICAO came into existence, its immediate concern was the drafting of international standards and recommended practices. Divisional meetings, held in Montreal and elsewhere, were attended by technicians from member states and international organizations, and drew up recommendations for standards in each of the technical fields. The procedure originally laid down, and still maintained for the adoption of annexes and their amendment is as follows:

> Divisional recommendations are considered by the Air Navigation Commission; these recommendations, with changes when found necessary by the Commission, are then sent to member states for comment over a period not less than 3 months, and upon return are reviewed again by the Commission; the revised draft is then brought before the Council for approval or amendment at a special meeting called for this purpose; upon adoption by the Council the completed standards are then sent to member states, which are given a specified length of time — at least 3 months — for disapproval; if a majority of member states has not disapproved all or part of a standard within this specified time, it becomes effective and each contracting state is bound under the terms of the Convention either to put it into practice in accordance with the Council resolution of adoption, or to notify ICAO of any differences between any of its own practices and those established by the international standard.[4]

Within that framework, the United States prepares its position on proposed standards, somewhat as follows: The representatives of United States aviation interests are brought together to consider the problem through the offices of the Air Coordinating Committee, established by executive order, with representation of all departments of Government interested in aviation. A United States position is prepared after such consultation with all interested parties. A delegation representing the American point of view attends the meetings of ICAO and seeks by negotiation to reach an agreement.

Under the auspices of ICAO technical requirements of vast importance were provided. Along international routes some 40,000 facilities were located or services rendered. Rules of the road and operating procedures were adopted which took into account the experience of the United States in commercial flying.

The third class of requirements was the agreement on safety equipment. Standards of aircraft and navigation aids were adopted, which conformed sufficiently to American standards to permit our operators

[3] Art. 37, Convention on International Civil Aviation.
[4] Hearing on S. 2647, op. cit., p. 986.

and manufacturers to compete in international operations and in the world market for aviation products.

Standards for qualifications of airmen and airworthiness of aircraft were adopted which permitted Americans to operate abroad and maintained safety standards adequate to protect our people when foreign operators flew to the United States.

Procedure for Entering Aviation Agreements

The debate as to whether more of the aviation agreements should be entered into by treaty rather than by executive agreements was revived by the provisions in section 802 (b) of S. 2647 which would require three types of aviation agreements to be entered into by treaty.

From the preceding discussion it can be seen that American success in the international field has been achieved by the combined use of two types of international agreements. First, a treaty was used to establish the International Civil Aviation Organization. This organization solved many of the technical problems of international air transport operations. Second, executive agreements were entered into to obtain routes and commercial rights on these routes.

Section 802 (b) of S. 2647 specifies three types of aviation agreements that should be entered into by treaty. These are:

1. An agreement respecting the formation of, or participation of the United States in, an international organization for regulation or control of international aviation or any phase thereof;

2. An agreement generally granting to a foreign government or a foreign airline a right or rights to operate in air transportation or air commerce, other than as a foreign air carrier or a foreign air contractor;

3. An agreement with a foreign government restricting the right of the United States or its nationals to engage in international air-transport operations.

There was no objection by either the executive agencies or the industry to the requirement that an agreement setting up an organization of the type described in paragraph 1 above should be entered into by treaty. It was pointed out by both the Department of State[5] and the carriers that there is not at the present time any international organization which has the power actually to regulate or control international aviation. The International Civil Aviation Organization created by the Convention on International Civil Aviation performs extensive functions largely in the technical field. However, the job of ICAO is to coordinate the regulations and actions of its member governments dealing with civil aviation rather than actually exercising any measure of control. Even though its functions are thus limited, the convention which established this organization was ratified as a treaty.

With respect to the second type of agreement mentioned, the

[5] Hearings on S. 2647, op. cit., p. 808-9.

Department of State said the existing agreements "do not run counter to" this prohibition.[6] The carriers stated that such agreements should properly be regarded as treaties because the agreement referred to is one which generally grants to foreign governments or foreign carriers rights to serve this country. Thus it refers to a multilateral agreement rather than the customary bilateral agreements which have been relied upon to grant traffic rights to foreign carriers. If the United States were to consider a grant of traffic rights to all foreign carriers whose governments are signatory to an open-end multilateral agreement, it was argued by the airline spokesman, this would be a matter which would call for all of the safeguards surrounding the execution of treaties.

As to the third type of agreement there was a greater divergence of views. The third type of agreement referred to was assumed to be the familiar type of bilateral agreement under which United States carriers are given rights to serve a foreign country, usually in return for a grant of similar rights to a foreign carrier to serve the United States. The agreement is described in the bill as one which "restricts the rights of the United States to engage in air-transport operations." Actually, of course, a United States carrier under international law has no right to engage in air-transport serve to a foreign country. Each nation reserves its sovereignty in its own airspace, and special permission must be granted to the foreign carrier to provide service there. Thus our standard bilateral agreement under which such permission is secured could be construed not as an agreement which restricts the right of an air carrier to serve a foreign country, but an agreement which obtains a new right, namely the right for a carrier of the United States to serve the foreign country. These new rights, however, may be subject to certain conditions. For these reasons there was some doubt whether the type of agreement referred to in the bill includes the ordinary bilateral agreement, but in the discussions it was assumed that the intention of section 804 (b) was to require that the customary bilaterals were also to be entered into by treaty.

This seems to be a required interpretation in view of the fact that similar language was used in S. 12, a bill which was reported favorably by the committee, report No. 482, and passed the Senate on December 15, 1950, which was interpreted there to bar the use of executive agreements for the grant of air-transport rights.

Before summarizing the testimony on the issue raised by this third provision in section 802 (b) of S. 2647, it is possible to further limit the area of discussion. There was little criticism of the results thus far achieved in the bilateral negotiations. In fact, the airlines' testimony was that the program by which routes and the commercial rights on those routes were acquired has been successful. The program achieved, to the extent possible in our divided world, the national goals that had been announced by the CAB in 1944.

This leaves the question, however, whether in the future, agree-

[6] Hearings on S. 2647, op. cit., p. 808.

ments of such import should be entered into without ratification by the Senate. Can Congress under the practice of entering bilateral air-transport agreements by executive action alone discharge its responsibility to safeguard the vital American interests involved? To answer that question involves a balancing of the advantages which have accrued from the flexibility of the existing practice with the desirability of increasing congressional review.

The most important advantage of entering these agreements by executive action has been that it was the most expeditious means available for entering the necessary agreements. This was emphasized by the Civil Aeronautics Board (although the Board did not voice any opinion on the merits of the issue as to whether bilateral air-transport agreements should be ratified as treaties or continued as executive agreements) and by the carriers. Since the war the United States has entered bilateral agreements with 45 countries and there have been more than 20 amendatory actions with respect to these. If each agreement and amendment had required the ratification of the Senate a heavy burden would have been imposed on this body by the consideration of those details. The extent of that burden is indicated by the fact that since January 1, 1945, 127 treaties have been considered and ratified by the Senate. If the 65 bilaterals and amendments would have also had to be ratified it would have increased the burden on the Senate arising out of the consideration of treaties by half again. Such consideration by the Senate might well have delayed the negotiation of air-transport rights in the very critical period when it was of the greatest urgency that the United States speedily obtain rights in foreign countries to permit prompt operations in the international airlanes. This need for speeding negotiations was more essential to the United States than for the European states because American aircraft could operate across the Atlantic only if permissions were obtained to land in Canada, Newfoundland, Iceland, and Ireland. Some of our competitors, however, held or could acquire rights by virtue of their control of, or association with the jurisdictions which controlled, the vital land areas. They were under less compulsion. The Board emphasized that only by prompt negotiations did the United States prevent the adoption of restrictive air-transport patterns.

> In the early part of 1946, European nations generally were extremely desirous of reopening their intra-European air routes. Had the United States not been able to come to an immediately effective agreement with the United Kingdom and shortly thereafter with France and Belgium, the restrictionistic philosophy almost surely would have prevailed as between European countries. Once such a pattern had been set, this country would have faced overwhelming odds in attempting to negotiate an agreement suitable to our needs.
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> What I desire to stress is that the ability to act quickly and decisively in 1946 permitted the United States to establish a pattern which has become almost worldwide and under which our carriers have expanded and prospered.[7]

[7] Hearings on S. 2647, op. cit., p. 685.

On the other hand, there remains the question of whether, in matters of such great importance, that procedure provides for Congress an adequate opportunity to discharge its responsibility to safeguard vital American interests.

On this question it was argued that adequate supervision of these agreements already exists.

Congress has already established a procedure under which the airline route structure of American carriers abroad is carefully supervised by the Civil Aeronautics Board, an agent of Congress. Its actions in this field are subject to review and revision by the President. Foreign routes can be flown only after certificates of convenience and necessity have been issued by that agent. In addition, Congress has maintained a direct check on the character and expansion of our international air-transport system through its control over subsidy appropriations.

With respect to the operation of foreign carriers to the United States, Congress has established a further check upon the entry of such carriers into the United States by requiring that each carrier receive a permit from the Civil Aeronautics Board which, under existing law, may be denied even though there exists a bilateral agreement granting the foreign carrier the right to come to the United States. Such a denial has never taken place, but the established procedures do permit the Board to review, as a matter of first instance, the application of the foreign carrier even though a bilateral agreement has been negotiated. For these reasons, argued the carriers, Congress has made adequate provisions for consideration of the subject matter of the bilateral agreements and it its not necessary for it to go further and require the bilaterals and the amendments to be ratified as treaties.

Another protection for the interests of American citizens in bilateral route negotiations is the consultation between the government agencies negotiating the agreements and those air carriers whose routes will be affected by the rights bargained away. In air-transport agreements, when the United States is seeking permission for our flag carriers to operate into foreign states, the United States is called upon to grant rights in this country to foreign carriers. Rights to operate to the United States gives those foreign carriers access to the richest market in the world. The right to carry United States traffic is comparable to opening the United States market for an industrial product by lowering or removing tariff duties. When such steps are taken, the affected carriers should be given an opportunity to present their views.

Such an opportunity to hear the carriers' views is also a valuable source of information for United States negotiators. The carriers know the foreign markets. They can evaluate the routes offered by foreign states and can keep the United States advised of the operating problems and advantages of specific exchanges.

The consultation here envisaged is in the same spirit as that required in negotiations leading to tariff reductions under the Reciprocal

Trade Act (June 16, 1951, sec. 3 (c), 65 Stat. 73, as extended, Public Law 464, July 1, 1954), which provides:

> Before any foreign trade agreement is concluded with any foreign government or instrumentality thereof under the provisions of this part, reasonable public notice of the intention to negotiate an agreement with such government or instrumentality shall be given in order that any interested person may have an opportunity to present his views to the President, or to such agency as the President may prescribe; * * *

The consultation which does and should occur in air-transport negotiations is not as formal as that envisaged in the above statute. It does not, at this time, required legislation. But it does require a continued recognition by the government agencies of the importance of consultation with the interested carriers as an important method of maintaining essential safeguards for American interests. These consultations should be relied upon to the fullest extent feasible.

On the issue of congressional review, the Congress should consider a middle ground between the procedure which is being followed now and that which is proposed in S. 2647. At the present time, none of the executive agreements nor any of the amendments are submitted for review by the Senate. Under the proposal in the bill not only all agreements but also all of the amendments to the agreements would have to be, not only reviewed but also approved by the Senate. This obviously would increase the workload of the Senate enormously and might lead to the imposition of so much detail in some of the minor amendments of the agreements, that the Senate would be impelled to deal only summarily with all of the mass of aviation agreements presented and thereby, in taking on too much, lead to a failure to consider important basic policy.

A proposal which would take a middle ground between these two propositions is one which would require that executive bilateral agreements be filed with the President of the Senate who, in turn, would refer those agreements to the appropriate committee. There are two versions of this proposal. One would require the filing of executive agreements within 30 days after they become effective. The other version would require the filing of such agreements within a specified period before they become effective. The latter is similar to the proposal incorporated in the Atomic Energy Act of 1954, Public Law 707, August 30, 1954. Section 123 of that act provides that no cooperation with any nation shall be undertaken until the agreement has been submitted to the Joint Atomic Energy Committee and 30 days have elapsed. That section reads:

> SEC. 123. COOPERATION WITH OTHER NATIONS.—No cooperation with any nation or regional defense organization pursuant to sections 54, 57, 64, 82, 103, 104, or 144 shall be undertaken until— * * *
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> c. the proposed agreement for cooperation together with the approval and the determination of the President, has been submitted to the Joint Committee and a period of thirty days has elapsed while

> Congress is in session (in computing such thirty days, there shall be excluded the days on which either House is not in session because of an adjournment of more than three days).

With reference to the aviation agreements discussed here your committee recommends the notice to the Senate version. This middle ground would require bilateral agreements to be filed with the Senate within 30 days after their adoption, and thus would provide the Senate with an additional opportunity to consider international air-transport agreements which is not available under the present procedure and without the disadvantages flowing from the provision in S. 2647. It would permit the executive agencies to continue their flexible and speedy handling of the many air-transport problems which is the advantage of the present procedure and at the same time permit the Senate to review these activities and afford an opportunity to exercise its responsibilities with respect to them.