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UNITED STATES REGULATION OF FOREIGN AIRLINES COMPETITION

By Nicholas N. Kittrie†

I. Introduction

THE forces of increasing international air travel competition have recently turned the Civil Aeronautics Board, the District of Columbia courts and Congress[1] into an arena wherein a fierce struggle is taking place between liberalism and restrictionism. Recently filing a complaint seeking an injunction against the Civil Aeronautics Board, in the United States District Court for the District of Columbia, a group of major foreign airlines launched their attack on the Board's authority to regulate the schedules and capacities of foreign airlines doing business in the United States.[2]

Specifically, it was the purpose of the complaint to restrain the CAB from adopting a regulation, and submitting it to the President for approval, under which foreign airlines would be required to file traffic data with the CAB and also submit their schedules to the Board for approval. Under this proposed regulation the CAB would have the authority to disapprove any schedule filed with it upon giving the foreign airlines twenty days notice.[3]

While the complaint, on its face, primarily challenged the power of the CAB, under the authority granted it by Congress, to require flight statistics and to control the schedules of foreign airlines, the vital issue behind it concerned the means that may be employed by the United States Government for the purpose of restraining undesirable competitive economic activities of such airlines. For students of constitutional law the controversy also raised again the long-debated question as to the validity of a Congressional authorization, and an administrative regulation proposed in pursuance thereof, in the face of a conflicting commitment made by the United States Government in an executive agreement with a foreign country. Claiming lack of authority on the part of the CAB to inquire into schedule and capacity questions, the foreign airlines stressed that their operations in the United States were under a mandate derived from the terms of several bilateral agreements between the United States and their respective governments under which no country was to exercise

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[1] See S. 2834 introduced in the 87th Cong., 2d Sess. (1962) at the request of the Air Transport Association of America, which would amend the Federal Aviation Act to expressly authorize the CAB to control the volume of service provided by foreign air carriers.

[2] BOAC v. Boyd, C.A. 3315-62; U.S. Dist. Ct. for D.C. Similar action was instituted in 1961, see BOAC v. CAB, 304 F.2d 952 (D.C. Cir. 1962).

[3] CAB Order No. E-16288 (Jan. 18, 1961).

any schedule or capacity controls whatsoever over the airlines of the other.[4] Overriding these specific legal issues is the political question of whether the tools to be employed for the resolution of conflicts concerning aviation between this and foreign governments should consist primarily of judicial tribunals, arbitration, diplomatic negotiations or administrative controls.

The history of international aviation in the United States since the end of World War II clearly illustrates that in the past foreign airlines were permitted to operate freely under their own uncensored schedules. Indeed, not only the airlines of countries which have bilateral agreements to that effect with the United States benefit from this lack of controls, but also the other airlines are permitted the same freedom.[5] At the present time there are sixty-eight foreign airlines flying to and out of the United States, and twenty-three United States flag carriers are authorized to engage in international operations to sixty-six foreign countries. These foreign airlines have previously been subject to United States supervision only for safety and other mechanical or administrative controls. No supervision was exercised by the United States over the economic phase of the operations such as the number of weekly flights and the type and capacity of the equipment used.

Traditionally, it was the opinion of the United States Government that freedom of competition in international aviation was the most stimulating and beneficial system for the overall development of the industry. Furthermore, it was the position of the American Government that artificial national restraints on the operation of airlines would be contrary to our own American interests, and that the scope of foreign airlines operations anywhere in the world should be determined, therefore, by the laws of supply and demand. Recently, the pressure of American carriers protesting the expanded operation of foreign airlines has apparently tended to produce a change in the United States' position. The additional complaint has been heard that several other countries have failed to afford equal and fair treatment to American carriers and indeed have subjected them to schedule supervision, and that only through similar retaliatory measures may we succeed in reversing or modifying the positions of the foreign nations.

This is a mere sketch of the background of the present controversy. Yet in light of America's past aviation policy, and in the face of recent reassertions of our faith in the freedom of aviation,[6] there is great interest in this recent attempt to change the United States' position, especially because the institution of the new control system is being attempted through a unilateral administrative regulation, rather than through a mutually agreed modification of the bilateral agreements under which the present freedom of operation is recognized.

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[4] For a prototype of these agreements see Agreement between the Government of the United Kingdom and the Government of the United States of America relating to Air Services, concluded February 11, 1946 (60 Stat. 1499).

[5] CAB, Docket 12063, Recommended Decision of Hearing Examiner, p. 13 (June 21, 1962). (I am indebted to Hearing Examiner Edward T. Stodola for the opportunity to discuss with him the background of his Recommended Decision.)

[6] See position of United States delegation at Third Regional Conference of Civil Aviation at Bogota, Colombia, in Feb. 1962, III CRAC-40, CEC-09 - Eng. (Feb. 7, 1962).

II. The Bilateral Aviation Agreements

Of the bilateral agreements providing for the freedom of aviation the earliest and the one which has served as a prototype for all others is the 1946 Bermuda Agreement under which the British Overseas Airways Corporation, The British West Indian Airways, and the Bahamas Airways operate in this country. The resolution which preceded this agreement, concluded between the British and the United States Governments at Bermuda on February 11, 1946,[7] expresses the determination of the two governments "to foster and encourage the widest possible distribution of the benefits of air travel for the general good of mankind at the cheapest rate consistent with sound economic principles."[8] The resolution proceeds to state that it is the understanding of both governments that service provided by designated air carriers under the agreement "shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic."[9]

The agreement proper does not deal specifically with the question of schedule and capacity controls. Article 2 of the Agreement states that:

> The designated air carrier or carriers may be required to satisfy the aeronautical authorities of the Contracting Parties granting the rights that it or they is or are qualified to fulfill the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operations of commercial air carriers.

Article 8 of the Agreement states that:

> Except as otherwise provided in this Agreement or its Annex, if either of the Contracting Parties considers it desirable to modify the terms of the Annex to this Agreement, it may request consultation between the aeronautical authorities of both Contracting Parties. . . . [W]hen these authorities agree on modification to the Annex, these modifications will come into effect when they have been confirmed by an Exchange of Notes through the diplomatic channel.

The Agreement provides further, in Article 9, that any dispute between the contracting parties relating to the interpretation or application of the Agreement which cannot be settled through such consultation is to be referred for an advisory report to the Interim Council of the Provisional International Civil Aviation Organization. Finally, the Agreement provides in Article 13, that each contracting party may request consultation with the other party in order to initiate amendments to the Agreement, and that pending the outcome of such consultation either party may give notice to the other of its desire to terminate the agreement, which termination is to become effective twelve months after the date of notice.

Although the body of the Agreement nowhere specifically exempts schedule and capacity controls from the national jurisdiction, this exemption has been officially recognized by the United States Government. Indeed, it was apparently the American Government which initially pressed for such exemptions and it was considered a great achievement for the

[7] 60 Stat. 1499.
[8] Para. (1) of Resolution.
[9] Para. (6) of Resolution.

American delegation to the Bermuda Conference that such controls were not incorporated in the agreement.

The position of the United States at Bermuda is clearly attested to by testimony before the Commerce Committee of the United States Senate.[10] In the testimonies of George P. Baker, Chairman of the United States Delegation, and L. Welch Pogue, a member of the Delegation, it appears that complete freedom with regard to schedules and capacity was the American aim and accomplishment.

Pertinent excerpts from the transcript read as follows:

> Mr. Baker . . . it was agreed that there should be no control such as there had been very strongly enforced up to this date on the frequency of operation. . . .
>
> The Chairman. That means that the British may send planes here as frequently as they choose and we may send them there. (Hearings, Page 27).
>
> Mr. Pogue. The first point I want to mention about the unlimited schedules is that it is true that this Agreement provides no conrol over frequencies, and that was basically our position. . . . (Hearings, Page 40).
>
> The United Kingdom, on the other hand, although desiring to control frequencies as well, agreed to modify its position in this regard so that the Agreement has no limitation upon frequencies and permits each nation to determine for itself the number of frequencies which its own air carriers shall operate. (Hearings, Page 45).
>
> We are most anxious to have the full right to run such frequencies as our traffic justifies because Americans have a tendency to travel much more extensively than many other peoples and further because of the probability that all frequency limitation agreements would ensure to each government 50% of the schedules permitted. This would force many travellers to ride on certain airplanes regardless of their desires—a result contrary to sound principle. . . . [a]ll these and other important objectives which are important to the United States have been achieved in this bilateral Agreement. . . . (Hearings, Pages 48-49).
>
> Senator McClellan: Mr. Pogue . . . Now is there any control or is there anything involved in this Agreement with respect to the control of capacity, the number of passengers that may be carried in any one ship?
> Mr. Pogue. No Senator, we are very careful to avoid that like the plague, so to speak, because when it comes to control and capacity, as an alternative for controlling schedules, we feel that it is subject to much more serious evils. . . . (Hearings, Page 55).

The consensus of the Agreement reached at Bermuda was expressed also in a joint statement issued simultaneously by both governments on September 19, 1946, which declared: "[b]oth parties believe that in regulating any new bilateral agreements with other countries, they should follow the basic principles agreed at Bermuda including particularly . . . the elimination of formulae for the predetermination of frequencies or capacity or of any arbitrary division of air traffic between countries and or national airlines.[11]

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[10] Hearings on S. 1814 before the Committee on Commerce, United States Senate, 79th Cong., 2d Sess. (1946).

[11] State Dep't Press Release No. 660 (Sept. 19, 1946).

Bilateral agreements, substantially similar to the Bermuda Agreement, have subsequently been entered into between the United States and forty-seven other countries. Under the authority of these agreements airlines designated by the various foreign governments have been coming to the United States. Some twenty additional foreign airlines also operate in the United States on the basis of reciprocal special permits, without the benefit of bilateral agreements.

III. Increasing the CAB Regulatory Powers

When operating in this country, foreign airlines are not completely free of United States administrative controls. The Civil Aeronautics Board is vested, under Section 402 of the Federal Aviation Act of 1958,[12] with the power to issue permits to foreign air carriers before they may commence operations. The Act authorizes the Board to "prescribe the duration of any permit" and to "attach to such permit such reasonable terms, conditions, or limitations as, in its judgment, the public interest may require."[13]

Section 1102 of the Federal Aviation Act qualifies, however, the power of the Board by providing that: "In exercising and performing their powers and duties under this Act, the Board and administrators shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be enforced between the United States and any foreign country." The exercise of the Civil Aeronautics Board's authority to issue foreign air carrier permits must therefore fit within the confines of both of these sections.

In the past those permits merely specified the areas to be served by the foreign carrier, reasserted the requirement of airworthiness and provided, finally, that the permits were to remain in effect until the termination of the treaty, convention, or agreement under the provisions of which the foreign carrier was operating.

After some fifteen years of this tradition, the CAB on January 18, 1961, introduced the proposal for a departure from the traditional non-interference policy with regard to the economic operations of the foreign airlines.[14] The exercise of the new economic controls was to take place through an amendment of the permits issued to foreign air carriers, under which modification the CAB could require the submission to the Board of traffic data and also of existing and future schedules for approval. Admittedly, the purpose of this amendment is to establish a machinery in the Board for the possible imposition of capacity and frequency limitations on the operation of foreign airlines.

Since Section 402(f) of the Federal Aviation Act provides that "any permit" may be modified or amended if, after notice and hearing, it is found that such action would be in the public interest,[15] the Board ordered a public hearing on the proposed amendment. Notice of the proposed permit changes was also given to the President, in accord with Section 801 of the Federal Aviation Act which provides that "the issuance, denial, transfer, amendment, cancellation, suspension or revocation of, and the

[12] 49 U.S.C., § 1301 *et seq.*
[13] Section 402(e); 49 U.S.C. § 1372(e).
[14] CAB, Order No. E-16288 (January 18, 1961).
[15] 49 U.S.C. § 1372.

terms, conditions, and limitations contained in any . . . permit issuable to any foreign air carrier under Section 402 of this Act shall be subject to the approval of the President. Copies of all applications in respect to such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof."[16]

On June 1, 1961, BOAC and other foreign companies including SAS, KLM and Sabena moved the CAB to dismiss them from this proceeding, on the ground that the Board lacked the power to amend their foreign air carrier permits in the manner proposed. It was the allegation of the airlines that the Bermuda Agreement does not permit either party to control the capacity or frequency of service offered by the carriers of the other party and that Section 1102 of the Federal Aviation Act of 1958 requires the Board to act consistently with the Bermuda Agreement and other applicable bilaterals. This motion was denied by the CAB on July 27, 1961.[17]

Refusing to reconsider the denial of the petitioner's request, the Board stated:

> In spite of the necessary concomitants of national air space sovereignty and even though Section 402 is clear in its provisions regarding our authority to attach terms and conditions to foreign air carrier permits, it is urged that because of the provisions of outstanding bilateral air transport agreements to which the United States is party, Section 1102 limits our authority to act under Section 402 of the Act with respect to the permits of those foreign air carriers whose countries are also parties to such agreement. However, there is no express provision in Section 1102 that the Board shall disregard any other express authority or prohibition of the Act . . . . [I]t is clear that the provisions of Section 1102 do not abandon our national air space sovereignty, especially when viewed in conjunction with the outstanding international agreements to which Section 1102 alludes. Further, there is nothing in the international agreements that deprives the Board of the right to perform its functions under Section 402 of the Act.[18]

BOAC, joined by a group of major foreign airlines, then petitioned the United States Court of Appeals for the District of Columbia Circuit to review the CAB orders denying their request. The Board moved the Court to dismiss the petition for review on the ground that no final order concerning the amendment of the foreign carrier permits had been issued and that, furthermore, this matter was not within the reviewing jurisdiction of the Court because of Section 1006 of the Federal Aviation Act of 1958. This Section provides that "(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this Act, shall be subject to review by the Courts of Appeals of the United States . . . upon petition, filed within 60 days after the entry of such order."[19]

On July 19, 1962, the Court of Appeals denied the petition on the ground that under Section 1006 it lacked jurisdiction to review orders of

[16] 49 U.S.C. § 1461.
[17] Order No. E-17235.
[18] Order E-17537.
[19] 49 U.S.C. § 1486(a).

the CAB concerning foreign airlines. The Court further held that this determination was without prejudice to the airlines' right to proceed in the District Court, "if and when" the regulation was promulgated.[20]

During the pendency of the airlines' petition for injunction before the Court of Appeals, the companies also appeared at the hearings held before the Board's hearing examiner during the period of December 5, 1961, to January 12, 1962. Although reserving their rights to challenge the Board's jurisdiction and power to effectuate the amendment, the companies nevertheless filed briefs and participated fully in the hearings before the Board. On June 21, 1962, the hearing examiner's recommended decision was entered, recommending against the adoption of the proposed regulation and the proposed permit amendments. Oral arguments before the Board in opposition and in support of the hearing examiner's recommended decision were held on October 24, 1962. With this the public process comes to an end, and it became the function of the Board to make a final determination whether or not to adopt the proposed amendments and to advise the President of their decision.

Still fearing an adverse decision by the CAB, the airlines again proceeded to ask for judicial relief. Appearing before the United States District Court for the District of Columbia, the airlines moved for a summary judgment declaring that the Civil Aeronautics Board is without statutory power and authority to make the proposed amendment in the foreign air carrier permits, and further requested that an order be entered to restrain the CAB from transmitting to the President any decision or order affecting or recommending such amendment.[21]

The Government again objected to the request of the foreign airlines. The request of the foreign airlines, the Government argued, is premature until such time as the regulation has actually been promulgated. Because the final decision as to whether the foreign air carrier permits will in fact be amended is a matter committed to the President and he may take action different from that of the Board, the Government argued that judicial intervention at this time would constitute an unauthorized restraint upon the President in the discharge of his Constitutional and statutory responsibilities. The CAB went on to state that the proposed regulation would be within its statutory authority if adopted, but conceded that the airlines could nevertheless challenge any such regulation upon adoption as ultra vires provided that there is a proper showing at that time of its adverse impact upon the airlines. The Government concluded by stressing that since the question as to what action will ultimately be taken by the United States is wholly speculative, there was no justiciable controversy existing at the time. In a decision entered on January 9, 1963, Judge Burnita Matthews rejected the motion of the foreign carriers and dismissed the complaint.

IV. Background of the New CAB Position

The ruling had the effect of postponing the decision on whether granting the CAB the power requested by it would violate the Federal law and the applicable bilateral international agreements, until such time as the required action by the president might officially approve the grant of this

[20] BOAC v. CAB, 304 F.2d 952 (D.C. Cir., 1962).
[21] BOAC v. Boyd, C.A. 3315-62, U.S. Dist. Ct. for D.C.

regulatory power to the CAB. Instead of awaiting such development, the foreign airlines may decide to take an appeal from the decision of the District Court to the higher courts. But while the decision as to what procedural strategy would best serve the interests of the foreign carriers is still pending, a review of the reversal by the United States Government of the position originally taken by it at Bermuda, may be of interest not only to practitioners of international trade, but also to students of international law. Indeed, while there is no clear evidence available to indicate that the proposed amendment to the foreign carrier permits has been blessed by the Administration it is unlikely that the CAB would have gone this far without some preliminary clearance with the Department of State or the White House.

The actual reasons for the CAB's reversal of position are almost lost in an obscure portion of the Board's brief before the United States District Court for the District of Columbia. Says the CAB:

> [I]f plaintiffs are correct in their assertion that a condition in the area here involved is in conflict with the bilaterals, it would seem that other nations would recognize and give to the agreements the interpretation for which plaintiffs contend. Other nations do not, and the actual practices indicate that the reservation proposed by the Board does not conflict with the bilaterals. Indeed, the plaintiff's Scandinavian Airline System (SAS) is in the position of asserting that the United States is precluded from subjecting it to the same type of requirement which its governments imposed on our carriers. . . . Further, the examiner found . . . that there are at least 24 nations with which this country has Bermuda-type agreements which require our carriers to file their schedules and which assert a power to disapprove them.[22]

The competitive position of the American flag carriers vis-a-vis the foreign airlines has been a subject of great concern in recent years. Having originally pleaded for complete economic laissez faire on the hope that the forces of supply and demand would enure to the benefit of the United States lines, our domestic carriers have been finding the competition of the revitalized foreign carriers much too hard to meet. Statistics show that despite a growth in the absolute number of passengers carried, the share of the United States flag air carriers in the international air travel to and from the United States has been waning. In the period between 1957 and 1960 the passenger traffic of foreign-flag carriers in the United States international market increased by eighty-one percent, while the increase of the U.S. flag carriers was a mere thirty-one percent. Consequently, the percentage of the U.S. flag carriers in the total United States international air travel market fell from 62.6 percent in 1957 to 54.7 percent in 1960,

[22] See Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss for Summary Judgment, U.S. Dist. Court for the Dist. of Columbia at 14, C.A. 3315-62. It is indeed the position of the CAB that the adoption of the proposed regulation is not intended to establish an overall system of schedules and capacities controls over foreign airlines. The CAB asserts that the great number of departures from the Bermuda principles by other countries puts the United States at a disadvantage and that such departures may continue and increase in number unless the United States asserts the power to retaliate. The power to regulate the schedules of foreign-flag carriers is therefore looked upon as a weapon to compel the compliance of other countries with the Bermuda principles. (I am indebted to Mr. J. C. Watson, Director of the Bureau of International Affairs of the CAB for a personal opportunity to discuss the problems that the CAB is facing in this area.)

while the foreign carriers share went up from 37.4 percent to 45.3 percent of the market.[23]

Searching for culprits, the American airlines have been inclined to blame unfair practices by foreign carriers and undue restraints by foreign nations. While the freedom of air traffic under the bilateral agreements was founded on the general assumption that each international air carrier would be primarily designed to meet the travel needs between its own country and the country of final destination,[24] some European and Latin American carriers have apparently found such popular response as to give them a share of the market beyond that attributable to their own national traffic. (This applies particularly to the so-called Fifth and Sixth Freedom traffic encompassing travellers picked up by a contracting carrier in a foreign country other than the country of the carrier's origin and set down in the country of another contracting party, and vice versa.) Complaints have also been heard that restrictive schedule controls by some countries have made it difficult for U.S. carriers to develop profitable overseas markets. On the other hand, recognition must be given to the fact that air travel is very much a "service" rather than a "commodity" business and in being so it suffers from some of the competitive disadvantages typical to American "service" businesses. Attention must also be given to the fact that recent years saw a greater percentage increase in alien over United States citizen travel to and from the U.S., and the increased foreign carrier share in the market may be attributable to the alien travellers' preference for their own national airlines.[25]

It is in light of these developments that the proposed action by the CAB to regulate foreign carrier schedules must be viewed. The opposition to unilateral United States attempts to remedy the situation stems not only from the foreign carriers but also from several foreign governments. The government of Great Britain, in a note delivered to the United States Government, protested the proposed action.[26] The foreign airlines predicate their opposition on the premise that the number of flights operated and the types of equipment utilized by foreign air carriers are matters wholly beyond the purview of the Federal Aviation Act and that, therefore, if the economic operations are to become subject to any control at all this must be accomplished through diplomatic channels or arbitration as specified in the applicable international agreements. In sum, the conclusion is invited that the operation of foreign carriers is within the bounds of "foreign commerce" over which Congress has primary jurisdiction under the Constitution and that Congress did not confer sufficient authority on the Board or even the President to cope with the actualities of foreign operations in this area.[27]

The CAB alleges, on the other hand, that the concept that each nation has sovereignty over its own air space is a generally accepted one, being also specifically recognized in Section 1108 of the Federal Aviation Act,[28] and that:

[23] CAB, Docket 12063, Recommended Decision of Hearing Examiner (June 21, 1962).
[24] See Bermuda Agreement, 60 Stat. 1499 at para. (6) of Resolution.
[25] CAB, Docket 12063, Recommended Decision of Hearing Examiner, p. 40, 41 (June 21, 1962).
[26] The Note, dated May 16, 1961, was not made public.
[27] U.S. Const., art. I, § 8, clause 3: "To regulate Commerce with foreign Nations . . . ."
[28] 49 U.S.C. § 1508.

> As a matter of legal theory, therefore, foreigners conduct operations to this country on our terms, just as our operations to their countries are conducted on theirs. True, concessions may be made on both sides so that operations can be conducted, but that does not alter the fact that this Nation has power, if it wishes to exercise it, to exclude foreign carriers altogether, or to impose such conditions as it sees fit on their entry.[29]

The Board points out in this connection that pursuant to Section 402(f) of the Federal Aviation Act[30] it is empowered, after observing the procedures specified therein and upon the concurrence of the President, to terminate a foreign air carrier permit for any "public interest" reason and that "it would be strange indeed if the lesser power were absent to impose conditions designed to ensure reciprocity of treatment or adherence to the terms on which the initial entry was permitted, and we submit that the Congress did not withhold such powers."[31] (It is important to note that this exact language of the statute granting the Board its termination authority dates back to the original 1938 legislation establishing the Board and therefore precedes the signing of the bilateral agreements.[32] The CAB finally rests its claim for specific authority to control schedules upon Section 402(e) of the Federal Aviation Act,[33] again dating back to 1938 and prior to the signing of the bilateral agreements, which authorizes the Board, subject to the approval of the President, to attach to a foreign air carrier permit "such reasonable terms, conditions, or limitations as, in its judgment, the public interest may require."

The Civil Aeronautics Board has consistently held to the view, which it now seeks to test, that Section 1102, requiring adherence with the provisions of treaties and other international agreements, or for that matter the bilateral agreements themselves, do not limit or supplant Section 402, which grants the Board the general power to protect the "public interest." Making this assertion, the CAB indeed touches upon a much broader legal question which has been subject to debate by constitutional law commentators for several years and which concerns the binding power of executive agreements. The sum total of the CAB argument is, in fact, that the bilateral aviation agreements lack the force to override the statute granting the CAB its authority. The Board's position thus raises not merely the general question as to whether or not an executive agreement has the force of a treaty with the consequence, among others, of overriding a statute,[34] but also a host of narrower technical questions. (1)

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[29] See Memorandum of Points, *supra* note 22.

[30] 49 U.S.C. § 1372(f).

[31] See Memorandum of Points, *supra* note 22.

[32] See 1958 U.S. Code Cong. and Adm. News, p. 3741. Civil Aeronautics Act of June 23, 1938, 52 Stat. 973.

[33] 49 U.S.C. § 1372(e).

[34] For detailed discussions of this question, and favoring the supremacy of executive agreements, see Lissytzyn, *Legal Status of Executive Agreements on Air Transportation,* 17 J. Air L. & Com. 436 (1950). In his article Professor Lissytzyn in fact forecasts a situation similar to the one involved in this case and asserts the supremacy of the executive agreement. Says Lissytzyn:

> "Section 1102 is a limitation on the powers of the Board under Section 402. . . . If there is an obligation to issue a permit to a designated foreign air carrier, failure to do so would be a violation of the Board's statutory duty, even if the record, apart from the international agreement, would require a finding that the proposed service is not in the public interest."

Id. at 450. On the affirmative see, also Matthews, *Constitutional Power of the President to Conclude International Agreements,* 64 Yale L.J. 345, 370, 389 (1955). For the opposite view see United States v. Capps, 204 F.2d 655 (1953); Borchard, *Treaties and Executive Agreements,* 40 Am.

Is the fact that the bilateral agreements were entered subsequent to the original statutory grant of authority to the Board sufficient to override the statutory language? (2) Must an executive agreement specifically override a statute in order to become supreme authority? (3) What was the effect of the Congressional reenactment of the Board's authority at a time subsequent to the time of the bilateral agreements?

Although asserting full powers over foreign carriers in spite of the bilateral agreements, the CAB has nevertheless claimed its willingness to modify and limit its controls in the immediate case only to situations where no bilateral agreement was in effect or else to situations where the Board would specifically wish to act notwithstanding the existence of a bilateral agreement. "Such situations would arise where a foreign country had taken restrictive action against United States' carriers, where consultations had failed to resolve a problem of excessive capacity, or where the action the Board would take would be to carry out the termination of an arbitration award under the terms of a bilateral."[35]

The foreign airlines make the final argument that the proposed new amendment would enable the CAB to regulate, through the power of disapproval, the schedules and equipment of foreign air carriers on a continuing day-to-day basis. Say the foreign air carriers:

> The planning of schedules and utilization of equipment is one of the most vital functions of an airline's management. In seeking to substitute its judgment in this field for that of management the Board is asserting a most sweeping regulatory jurisdiction over foreign air carriers. Indeed, it seeks the power of life and death over their business.[36] In conclusion the foreign carriers state: [T]he complaint herein shows the extent of plaintiffs' investment in their United States business. The Board seeks the power to place this investment in serious jeopardy. . . . [I]n essence, the proposed [regulation] represents an unlawful intrusion by the Board into the field of foreign affairs, which is reserved to the President.[37]

V. Conclusions

The powers that the CAB is seeking are extensive indeed and do not consist merely of clear cut administrative responsibilities. The hearing examiner appointed by the CAB in this case correctly observed that presumably the Board would use the powerful weapon of schedule approval or disapproval as a sort of bargaining tool in those situations where it thought our flag carriers were unfairly treated by foreign governments or where the carriers of other foreign governments violated the capacity clauses of existing bilaterals. In either case, a full power of retaliation against foreign air carriers would be lodged with the Board.[38] Basing their argument on this finding of the examiner the foreign airlines concluded that:

Pol. Sci. Rev. 729, 733 (1946); Comment, *Shall the Executive Agreement Replace the Treaty?* 53 Yale L.J. 664 (1944); Comment, *The St. Lawrence Waterway and Power Project,* 43 Am. J. Int'l L. 411, 429 (1949); See also, Simpson, *Legal Aspects of Executive Agreements,* 24 Iowa L. Rev. 67 (1938), and McLaughlin, *The Scope of the Treaty Power in the United States,* 42 Minn. L. Rev. 709, 767 (1958).

[35] "Statement of Material Facts" submitted by the CAB in the case of BOAC v. Boyd, C.A. 3315-62, U.S. Dist. Court for D.C.

[36] Memorandum of Points and Authorities in support of Plaintiffs' Motions for Summary Judgment and for a Preliminary Injunction, p. 12.

[37] *Id.* at 15, 16.

[38] CAB, Docket 12063, Recommended Decision of Hearing Examiner, p. 65 (June 21, 1962).

> [B]argaining with foreign governments and retaliating against their citizens is not one of the functions of the Board or, for that matter, of any Federal administrative agency. These matters are at the core of the conduct of United States foreign policy, which is "the very delicate, plenary power of the President as the sole organ of the Federal Government in the field of international relations."[39]

But regardless of whether this power can be delegated to the Board, it is obvious that no clear expression of the Presidential or Congressional intent to make such delegation has hitherto been made.

One additional argument has been advanced, to the effect that the proposed regulation is objectionable because it would discriminate against the foreign carriers in favor of local carriers. Since the proposed CAB power to approve or disapprove schedules would not apply to any United States flag carriers, the schedules and equipment of such carriers will not be subject to the Board's controls and will remain unrestricted. This, the foreign airlines argue, would result in this discriminatory treatment in violation of the guarantees of equal opportunity obtained in the bilateral agreements.[40] The argument, indeed, touches also on the question whether the proposed amendment would accord the foreign carriers less than the "national" treatment, as guaranteed to foreign companies by the Friendship, Commerce and Navigation Treaties between this and the other countries involved.[41]

Unless the CAB withdraws the proposed regulation of foreign carrier schedules or else the President so decrees, it remains possible that the resolution of the issues and questions contained in this conflict may take place in the courts of law of the United States. Yet the fact remains that the basic problems involved in this case are not merely legal. Assuming that the mere enactment of the proposed regulation would not constitute a violation of the international obligation of the United States under the bilateral agreements until after the powers claimed for the CAB under the regulation are actually exercised, and even conceding that the bi-lateral agreements were not intended to sanction the indiscriminate expansion of the Fifth and Sixth Freedom traffic and, indeed, possibly envisioned "ex post facto" adjustments between the parties—the question still remains as to the political advisability of the manner by which the CAB proposes to proceed.[42] It is clear that the issues involved in the extension of the CAB's economic regulatory powers may have a direct bearing not only on the obligations of the United States under international treaties, but also upon the foreign relations of this country and the development of retaliatory economic restrictionist movements abroad. It is regrettable therefore that the CAB, with or without the blessings of other parts of the Administration, took it upon itself to make such radical changes in a traditional United States position through unilateral action.

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[39] Memorandum of Plaintiffs at 17, quoting the Supreme Court in United States v. Curtiss-Wright Export Corp., 229 U.S. 304, 320 (1936).

[40] See, Bermuda Agreement, 60 Stat. 1499, para. (4) of Resolution.

[41] See, for example, Article VII, Friendship, Commerce and Navigation Treaty with Japan, April 2, 1953, T.I.A.S. No. 2863. 4 U.S.T. 2066. Transportation is usually exempted, however, from the requirement of national treatment.

[42] I am indebted to Professor Stanley D. Metzger of the Georgetown Law Center for the opportunity to read his paper on "Bilateral System of Exchanging Traffic Rights" (unpublished) which deals with this general problem. The views expressed above are not those of Professor Metzger.

It is uncertain whether or not the decreasing share of U.S. flag carriers in the international air travel market is merely a temporary phenomenon and, in any event, whether the relative decrease bears any important consequences. A highly qualified commentator recently observed that:

> Preoccupation with the share of U.S. flag air carriers in world air transport activities—or, more commonly, with their share in passenger travel to and from the United States—serves to divert much needed attention from the problem of assuring a healthy over-all rate of growth of world air transport. Yet without such growth the optimum development of the United States air transport industry is not likely to become a reality.[43]

Regardless of whether this view is generally accepted, the tools proposed to be used by the CAB to remedy the evil are not merely improper in terms of our international obligations and the management of our foreign relations, but are also inadequate in terms of effective administrative process. Testimony before the Commission has demonstrated that only a very small number of foreign air carriers are responsible for the situation which the CAB seeks to cure.[44] Most of the offenders are carriers which operate in this country without benefit of bilateral agreements but are admitted, instead, under reciprocal operating permits. In the latter case, the operating permits can be modified to meet specific new conditions without the necessity of an overall reversal of the position endorsed in some forty-eight bilateral agreements. For the resolution of problems produced by carriers operating under bilateral agreements, full advantage should first be taken of the remedial avenues set up under the agreements and only as a last resort, and upon full consultation with Congress and the White House, should the drastic tool of unilateral controls be exercised.

[43] Lissitzyn, *The Participation of the United States in World Air Transport: Statistics and the National Interest*, 28 J. Air L. and Com. 1, 15 (1962).

[44] CAB, Docket 12063, Recommended Decision of Hearing Examiner, p. 49-51 (June 21, 1962).