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Robert J. G. McClurkin

THE GENEVA COMMISSION ON A MULTILATERAL AIR TRANSPORT AGREEMENT

By ROBERT J. G. MCCLURKIN

Assistant Director (International), Economic Bureau, Civil Aeronautics Board; Adviser to the United States Delegation to the Geneva Conference; University of Pittsburgh, A.B. 1931, M.A. 1932.

FOR more than three years there have been efforts to develop a generally acceptable multilateral treaty concerning the exchange of commercial rights in international civil air transport. The Chicago Conference produced the Air Transport Agreement, which was ratified by only 17 states, of which four, including the United States, have now withdrawn or given notice of withdrawal. Recognizing that the Air Transport Agreement lacked general acceptability, the nations that were members of the PICAO attempted unsuccessfully at the Interim Assembly of the Organization in 1946 to find a common basis for agreement. Discussion continued at the First Assembly of the permanent Organization in May 1947 at Montreal.[1] Again no area of general agreement was reached; but the discussion had probed more deeply than ever before into the basic issues, and it seemed that a concentrated effort apart from the Assembly where delegates had to occupy themselves with many other subjects might bear fruit.[2] The Assembly therefore formally resolved to convene "a commission, open to all Member States . . . for the purpose of developing and submitting for consideration of Member States an agreement respecting the exchange of commercial rights in international civil air transport."

The Commission met at Geneva from November 4 through November 27, 1947. Represented with duly authorized delegations were 30 nations.[3] The United States Delegation to the Commission had as its Chairman Garrison Norton, Assistant Secretary of State.[4]

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[1] See, Cooper, "The Proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport," 14 JOURNAL OF AIR LAW & COMMERCE 125 (1947).

[2] See report on the First Assembly, 14 JOURNAL OF AIR LAW & COMMERCE 378, 381 (1947).

[3] Argentina, Australia, Belgium, Brazil, Canada, China, Colombia, Czechoslovakia, Denmark, Dominican Republic, Egypt, El Salvador, France, Greece, India, Ireland, Italy, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Portugal, Sweden, Switzerland, Turkey, Union of South Africa, United Kingdom, United States, Venezuela. Representatives of Guatemala, Luxembourg, and Poland attended as observers.

[4] Vice Chairman of the Delegation was Oswald Ryan, Vice Chairman of the CAB. The U.S. Delegation also included Senator Owen Brewster, Congressmen Alfred L. Bulwinkle and Carl Hinshaw, Russell B. Adams, Livingston T. Merchant, Stuart G. Tipton, Paul T. David, John C. Cooper, and Robert J. G. McClurkin. As observers with the Delegation were a representative of the Army Air Forces, the U.S. Civil Air Attachés stationed in Europe, and representatives of several of the United States international air lines.

The discussion at the conference ranged over the same major topics as had previous conferences on this subject:

1. The method of determining what rates may be charged in international air transportation.
2. The procedure for settling any disputes which might arise over the interpretation or application of the agreement.
3. The method by which nations would grant or exchange the rights to operate on specific routes.
4. The general principles governing the capacity which an air line may provide on an international route.

Each of these topics had been extensively discussed in the course of all of the previous efforts to reach a multilateral agreement, but the Geneva Commission went further than ever before in a full international conference in that it proceeded to actual drafting. The close and detailed discussion engendered by the attempts to put the flesh of language upon the skeleton of ideas brought the Commission to a real understanding of the issues and of the underlying problems created by national attitudes and policies.

Working Groups, insofar as possible reflecting the differing opinions at the Commission, produced a capacity article and a rate article which were later refined in the fire of discussion by the full Commission. The close drafting process was further advanced by the formation on November 13 of a Drafting Committee[5] which further sharpened the language of the capacity article, the disputes provision, and the general principles governing route exchanges. In addition it labored with the final provisions and with the important preliminary provisions defining the relationship of the multilateral agreement to other agreements concerning air transportation. The draft articles produced by this committee and by the Working Groups, in the main under the general guidance of preliminary discussion in full Commission, assuredly represent an advance toward clarity, and even toward general agreement, over any prior document. As they stand in Annex III to the *Final Report* of the conference they will undoubtedly serve as the best basis for any future discussion of a multilateral air transport agreement.[6]

This penetration through generalities to what people really meant and the efforts to find the precise words for those meanings constituted the real achievement of the Commission. They gave the Commission the feeling which persisted throughout the first two and a half weeks that progress was being made toward an agreement. However, they were also responsible finally for the widening cleavage which resulted in the failure to reach an agreement.

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[5] The Committee was composed of representatives of Argentina, Belgium, Canada, China, Czechoslovakia, France, the Netherlands, Mexico, the United Kingdom, and the United States.

[6] The *Final Report* of the Commission, including Annex III, is set forth in this issue on page 92.

It should be pointed out that the progress being made in the close drafting process was not being made by means of final and irrevocable decisions. As issues arose, they were settled only tentatively. The general attitude was to agree to take a given step for the moment, but to reserve the right to look at the agreement as a whole before making a final determination. So the conference proceeded by a series of hypotheses – tentative decisions on the basis of which the Commission could advance to other related subjects. Such decisions were made, for example, with respect to basing the agreement upon bilateral route exchanges rather than upon a multilateral exchange, confining the agreement to the rights and obligations connected with the carriage of traffic rather than attempting to include the rights of transit and technical stop, and attempting to prepare a document in a form which could be opened for signature at the end of the conference. The technique was useful in getting ahead despite the objections of small groups of states on particular points, but it left an accumulation of unresolved issues which had to be faced in the closing days of the Commission, and it was the attempt to resolve one of these issues which was the immediate cause of the breakdown of the conference.

Even though the Commission failed to produce a multilateral agreement which could be opened for signature, it is of some importance to summarize the course of discussion on the major issues. Commercial airplanes will continue to fly internationally under bilateral arrangements of various sorts, and the trends of national thinking evidenced at Geneva have significant implications for those bilateral agreements as well as for any future efforts to reach a multilateral agreement in this field.

Elimination of Burdens Upon International Airlines

While this was not one of the major issues of the Commission, it is a matter of considerable concern to all air lines which operate internationally. The United States had presented five articles on this subject at the time of the consideration of the multilateral agreement at the First Assembly of ICAO and the United States Delegation to the Commission introduced the same articles at Geneva.[7] They cover the importation of ground equipment and supplies by an air line into a country other than its own, the relieving of all such supplies from laws of foreign states allowing their requisitioning for public use, the right of an air line to bring a reasonable number of supervisory and technical employees into any country into which it operates, the elimination of requirements for duplicate insurance, and the taking of measures toward the elimination of double taxation.

In his speech to the Commission Sir William Hildred, the Director General of IATA, laid particular stress upon the importance of these United States proposals and urged strongly that the Commission act favorably upon them. However, his recommendations bore no fruit.

[7] See Annex IV to *Final Report* of the Commission, page 106.

Some delegations maintained that they were without authority to deal with these problems which necessarily involved other departments of their own governments. Other delegations held that they were not appropriate subjects for inclusion in the multilateral agreement.

Having become convinced that there was no hope of securing Commission consent for these articles, the United States withdrew them, whereupon the Commission resolved "that such provisions were not suitable for inclusion in an agreement of the type under consideration, but . . . that they should be referred to the ICAO for further study and discussion at the next Annual Assembly." It is expected that the Second Assembly will give consideration of steps which might be taken toward the easing or elimination of these burdens upon international air lines.

RATES

There have always been two principal approaches to this problem, differing chiefly in the extent to which the method of rate-setting is spelled out. One approach has been to specify simply that rates shall be reasonable, to mention certain criteria which among others shall be considered in determining the reasonableness of an individual rate, and to allow any problems which arise to be worked out through the normal channels of consultation and the disputes procedure. Although there was some sentiment at Geneva in favor of this approach, it quickly became evident that this sentiment was much outweighed by a more widespread belief that it was essential to write a much more detailed provision in order to avert any possibility of costly and debilitating rate wars in international air transportation. Consequently, the Commission addressed itself to the task of writing such a provision.

At bottom there turned out to be only one major difference of opinion. There was general agreement that rates might be set by conferences of air lines, that they should be subject to the approval of the governments concerned, that individual governments should have the power to initiate action to revise rates, and that any disagreements should be resolved through consultation if possible and through the disputes procedure if consultation failed.

However, some of the nations which have operated most extensively in the international field, the United States among them, felt an imperative necessity for avoiding a situation in which the introduction of a new rate could be postponed virtually indefinitely while one or a few dissenting nations invoked the procedures for consultation and arbitration — procedures which conceivably might involve considerable time. In consequence they proposed a provision that in case of disagreement over a proposed new rate it could be introduced 180 days after the opening step in the consultation procedure, pending the eventual decision as to the reasonableness of the rate. This proposal aroused strenuous opposition from a number of countries which argued vigorously that it is against their national policy to allow any rate involving their territory to go into effect without their prior approval.

On this point a special Working Group composed of Argentina, France, Sweden, the United Kingdom, and the United States succeeded in reaching a compromise. As the article was redrawn it sets time limits within which consultation must occur and within which any disagreement remaining after consultation must be submitted to the International Court of Justice, then provides that the Court may make a binding interim provision of "measures which ought to be taken to preserve the rights of the parties."

Disputes

The discussion of all other portions of the agreement was tempered by the realization that it would be acceptable to few nations unless adequate means were provided for the settlement of disputes; for it was generally recognized that in any field so new, so competitive, and so rapidly expanding as international air transportation disputes of grave importance would almost inevitably arise.

In a number of individual cases the United States has agreed to the binding settlement of particular disputes on an *ad hoc* basis; and of course the United States by action of the Senate has accepted the compulsory jurisdiction of the International Court of Justice. When the formal discussion of the disputes article was reached, the United States therefore introduced a brief draft article providing for the use of the International Court under Article 36 (2) of the Statute of the Court, or in the alternative, upon the specific agreement of both parties, for the use of *ad hoc* arbitral tribunals. The United Kingdom proposed two additions. The first one provided for a binding *modus vivendi* pending the settlement of a dispute, the second for the creation of panels of jurists and technical experts from which arbitral tribunals would be selected. These suggestions together with the original United States proposal were then referred to the Drafting Committee, which drew up what now appears as Article 21 of Annex III to the *Final Report* of the Commission.

Considering the importance of the subject, the discussion had not been lengthy, and much of it had centered around what was really a side issue — the problem created by the fact that neither Ireland nor Portugal has accepted the jurisdiction of the International Court.

Routes

Earlier considerations of the multilateral agreement had devoted much time to long debate over the method of route exchanges. One group of nations had insisted that anything short of a multilateral exchange of the right to operate would be a backward step and therefore unacceptable to them. Their proposals of course included specific provisions defining the limits of the rights exchanged, but it was intended that nothing should be left to bilateral negotiations. A second, and growing, group of nations had contended that it is not practical in the present state of international aviation to attempt anything

so far-reaching, and that the exchange of routes must therefore be left to separate bilateral negotiations.

At the opening of the discussion of this subject at Geneva, Canada proposed as a compromise solution that the agreement provide for an automatic exchange of the right to operate Third and Fourth Freedom services, but that Fifth Freedom rights be left entirely to bilateral negotiation.[8] Although there was some support for this proposal, the majority sentiment was clearly opposed to it. The United States and a number of other nations stated their unqualified insistence upon complete freedom for the separate bilateral negotiation of routes, with no obligation of any kind being imposed upon any nation to agree to grant a route to another nation. Route exchanges, that is, were not to be justiciable matters.

With only one dissenting vote the Commission finally decided to proceed with the drafting of the agreement upon the hypothesis that it would be based upon this viewpoint.

Capacity

This subject is the economic heartland of the multilateral agreement, since it involves the vital question of the number of passenger seats and the amount of mail and cargo space which an air line will be allowed to operate along its international routes. Actually, in the course of the last three years, there has been a progressive narrowing of the area of difference. While unanimity of opinion has not been reached, especially on precise language, it is fairly generally agreed that there will be no advance determinations of the capacity which may be operated, that the primary determining factor will be Third and Fourth Freedom traffic, that there will be scope for developmental activity, and that there will be provision for the carriage of Fifth Freedom traffic. The most difficult remaining problem is that relating to Fifth Freedom traffic, since a reasonable opportunity to carry such traffic is essential to the economic operation of long-range international air lines. On the other hand there is a very real fear on the part of some nations that the granting of too broad an entitlement to Fifth Freedom traffic may result in the ruin of their local and regional air lines. The problem is to find the exact point of balance.

In bilateral negotiations the capacity principles set forth in the Bermuda Agreement between the United States and the United Kingdom (the so-called "Bermuda principles") have found wide acceptance, but there has in the past been considerable resistance to including them in the multilateral agreement on the ground that they are better fitted to a bilateral pattern. At Geneva a Working Group composed

[8] Although the terms are misnomers, "Third Freedom," "Fourth Freedom," and "Fifth Freedom" have become standard in the discussion of traffic rights in international aviation. In brief, from the viewpoint of United States air lines, "Third Freedom" refers to the carriage of traffic from the United States to another country, "Fourth Freedom" refers to the carriage of traffic from another country to the United States, and "Fifth Freedom" refers to the carriage of traffic from a second country to a third country.

of Canada, France, the United Kingdom and the United States produced over the first conference weekend a draft capacity article which represented a clarification of the Bermuda principles and an adaptation of them to the somewhat differing necessities of a multilateral agreement. After some preliminary discussion, the draft article was referred to the Drafting Committee for polishing, then brought up for a second reading on November 20. It met with considerable minority opposition, all directed toward emphasizing that local and regional air lines have a prior right, as against the through operator, to their own local traffic. Several proposed amendments lost, but by increasingly narrow margins. At the instance of the United Kingdom a separate article was inserted to state the general principle that "the development of local and regional services shall not be unduly prejudiced"; and with no substantive amendments having been made the paragraph-by-paragraph discussion of the capacity article was completed.

Contracting-out of the Fifth Freedom

As soon as this detailed debate on the capacity article had ended, Canada raised a closely related issue which had been briefly discussed at an earlier session of the Commission. Any attempt to settle it, however, had been postponed until later in the conference. Now Canada renewed insistence that any nation be free to agree with any other nation that on the routes agreed bilaterally between them neither nation should exercise Fifth Freedom rights, or that each nation could exercise only certain Fifth Freedom rights. The United States, the United Kingdom, and France (among others) maintained that, so long as route negotiations remained within the control of the individual nations, there would be no dangerous results. On the other hand, they felt that to include a provision allowing the elimination of Fifth Freedom traffic rights from agreed routes would vitiate the value of the agreement for them.

Discussion continued through Saturday afternoon, November 22, and a long Sunday morning session, with emphasis throughout that this was a critical issue. At last a roll-call vote was taken on a Mexican motion embodying the substance of the Canadian proposal. A counter-proposal by the United States had been before the Commission, but the debate had revealed drafting defects in it; and a weary Commission agreed to vote on what appeared to be the clear-cut issue presented by the Mexican motion. In the voting, five nations abstained, each of them stating that it was doing so until it had an opportunity to see the reworded United States proposal. The vote on the motion was as follows:

For

Australia	Colombia	India	New Zealand
Brazil	Egypt	Italy	Portugal
Canada	Greece	Mexico	Turkey
			Venezuela

Against	*Abstaining*	*Absentees*
Denmark	Argentina	Dominican
France	Belgium	Republic
Ireland	China	El Salvador
Netherlands	Czechoslovakia	Nicaragua
Norway	Union of South	
Sweden	Africa	
Switzerland		
United Kingdom		
United States		

It was this vote and the discussions on capacity and on the general Fifth Freedom problem which had immediately preceded it which convinced the Commission that general agreement was not possible. A secondary factor was the pressure of time; for the three weeks originally scheduled for the conference had already ended, and it was known that a number of Delegations would have to leave by November 26 and 27. However, the hard fact was that on the root economic issue there was a clear cleavage between the nations who feel the need for protecting local and regional air services and those who do not. In general, the countries which are now the major operators of long-range international services have not yet succeeded in convincing the other nations of the world that local operators stand to gain more than they lose through providing in a multilateral agreement for a reasonable balance between the two kinds of operation — or else they have failed to convince the local operators that the kind of agreement which they have been advocating actually will provide an equitable balance.

After the key roll-call vote the Commission concluded its work as rapidly as possible by drawing up a *Final Report* explaining the point which it had reached in its labors, and referring the *Report* for the consideration of Member States of ICAO, either individually or at the Assembly. The most important portion of it is Annex III, which is a complete draft multilateral agreement, annotated to show the precise status in which the discussion of the Commission had left each article.

The Commission made no decision as to when further consideration of a multilateral air transport agreement should take place. The consensus was that serious study of the implications of the failure at Geneva would be required before any determinations could be made as to future action. Some statements made to the Commission indicated a feeling that a considerable period of time may have to elapse before enough additional experience in actual operations has been gained so that it will be possible to reach agreement on the basic issue. On the other hand it seemed possible that the discussion at Geneva might have cleared the air, and upon further study of the much-widened area of agreement it may appear worthwhile to renew discussion soon. In any event a consideration of the *Report* of the Geneva Commission is an item on the Agenda of the Second Assembly of ICAO, scheduled to meet at Geneva on June 1, 1948, and some decision as to future efforts can be expected to come from that meeting of the Assembly.