

1952

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Recommended Citation

R. R. Hackford, *The Colonial Airlines Challenge to U.S.-Canadian Transport Agreement*, 19 J. Air L. & Com. 1 (1952)
<https://scholar.smu.edu/jalc/vol19/iss1/1>

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THE JOURNAL OF AIR LAW AND COMMERCE

Volume 19

WINTER, 1952

No. 1

THE COLONIAL AIRLINES CHALLENGE TO U.S.-CANADIAN TRANSPORT AGREEMENT

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RECENTLY Colonial Airlines attempted for a period of several months to prevent the United States Government from implementing an air transport agreement with Canada. Colonial finally terminated its court action against the Government and the matter was closed. Actually, however, the withdrawal of the case from the docket of the United States Supreme Court did not answer any of the basic issues which could be summarized under the heading of the mutual responsibility of government and business with regard to the international position of the United States. Americans generally feel that the political officials in Washington carry the burden of formulation and implementation of our foreign policy, but in these times of constant crisis the requirements of national self-preservation demand that every private citizen, every business executive as well as every government official consider the implications of his actions as they affect our relations with other states.

The thesis that businessmen should be responsible for guaranteeing the consonance of their business activity with national foreign policy often has been overworked by those who imagine businessmen under a special obligation for virtuous behavior in order to justify their influential position within our culture. There have been times when the business community could not discover what the foreign policy was in a given area of activity because in fact we had no definite policy for that segment of our relations with other states. There have been other times when conflicting viewpoints in high government places produced situations in which any business action might later be judged as incorrect and contrary to the interests of the United States. In brief even omnipotence could not be a universal guarantee of business activity in strict accord with the specific policies of the government at a given time. While foreign policy is in the formulation stage, business is certainly entitled to be heard and to press its position with

vigor (which happens frequently), but once decisions have been taken it becomes essential for all citizens corporate and otherwise to fall in line. This does not mean that undesirable policies must be accepted passively without murmur: there are recognized and accepted procedures for repealing laws and reversing administrative courses of action undertaken by the government. The major point is simply that we can no longer avoid the luxury of private sabotage of public policy. We must maintain maximum strength not only to restrain our enemies but also to impress our friends and consequently we cannot indulge in irresponsible actions running counter to official policies because such actions can create abroad only the impression of internal dissension and uncertainty. At a time when our national existence may be threatened, it becomes the self-interest of each individual not to undercut the foreign policies of the government. All this exhortation will not, however, prevent any company from protesting strenuously when it is hurt by government action. It would be foolish to expect either man or corporation not to contest a public step which seemed to threaten existence itself. The Colonial Airlines affair is a case in point.

NETWORK OF BILATERAL AIR TRANSPORT AGREEMENTS

The international air transport route structure established since the end of World War II rests upon a network of bilateral agreements which spell out in detail the actual routes and privileges exchanged between each state and all the others. Under the existing international law of the air, every state controls the airspace above its territory and thus is able to deny passage to alien aircraft until a satisfactory agreement has been reached. This situation produced many cases of international extortion during the Long Armistice but recently most nations have been willing to grant commercial aviation privileges without undue restraint. The privileges conferred may range from the simple rights of free passage and transit stop to the opportunity to pick up and discharge passengers traveling to or from any other country. Some states like Canada preferred to limit the passengers handled by a foreign airline operating in Canadian territory to those either coming from or going to the country of the foreign airline's origin. In other words, under this arrangement the air carriers of one state cannot pick up passengers in a second state and carry them to a third, nor can they transport people from any third state to the second. The effect is to place a severe handicap upon any airline operating over long distances through many countries. Widespread application of this kind of privilege exchange would make it practically impossible from a financial viewpoint for United States international carriers to operate their globe-circling routes, and consequently we have a vested interest in securing through our bilateral agreements the fuller privileges of carrying passengers from one foreign state to another. This explains in brief our constant activity since 1944 to obtain the widest privileges from as many states as possible.

The process of bilateral negotiation for air transport rights rests upon national sovereignty over airspace and this in turn confers an equality of bargaining power upon the participants. The smallest state can and does expect to receive the same privileges it grants to any other state. The acceptance of less would indicate inferiority and no diplomat in today's nationalistic world can bring a suggestion of subordinate status to the people at home. Quid pro quo then is the basis of international air transport rights. If we expect to fly to and through another country, we must be willing to permit the airlines of that country to fly to and through the United States. Some observers, pointing out the excessive competition which could result if every country utilized its privileges, argue that our government should demand a unilateral grant of privileges and enforce such non-reciprocity by the use of economic pressures of various sorts. Another group, likewise seeking to reduce the competition facing our international carriers, suggests that recipients of economic aid from the United States should not be permitted to engage in subsidized international air transportation — and all such transportation is subsidized at present — because otherwise we are helping foreigners to take business away from our own airlines which consequently require more support from the public treasury. Both of these opinions are rooted in the belief that the United States should take whatever steps may be necessary to secure for its businessmen a share of this international industry in a proportion which would not be granted willingly by other sovereign states. Two arguments against such a policy are apparent immediately. In the first place, the United States declares itself to be the champion of economic competition within a profit system. One of the sacred books in our economic bible describes the way in which excessive competition will sooner or later be checked by the cruel law of loss and bankruptcy, and how could we expect others to accept the faith when we label it as unworkable internationally by trying to reduce competition through political and economic pressures beyond the scope of aviation? Secondly, the United States, being accused constantly of economic imperialism, must never give evidence to support the charge. Whether we like it or not, there is no doubt that much of the world suspects us of harboring intentions to dominate the economic life of the world for our own ends. This suspicion is constantly fed by Soviet propaganda. It would appear therefore, that the United States simply cannot afford to alienate friends and antagonize onlookers by pressuring other countries into accepting superior transport privileges for our commercial aircraft. Respect for the equality of bargaining position between states then seems to be forced upon us by the very nature of the position in which we find ourselves, if nothing else.

UNITED STATES-CANADIAN AIR TRANSPORT AGREEMENT OF JUNE 4, 1949

When Newfoundland officially became part of Canada in 1949, the Canadian Government acquired jurisdiction over the Newfoundland

airspace. This meant that the Canadians by gaining control of the air over the field at Gander, an important stop on the transatlantic route, gained new bargaining power. This led to a suggestion that the United States should renegotiate its bilateral air agreement with Canada; in fact, the Canadian Government stated its intentions to cancel our Gander privileges in the absence of a new agreement. Our delegation, headed by C.A.B. member Russell B. Adams, concluded a new agreement with the Canadians on June 4, 1949. This document included the usual exchange of trans-border routes between adjacent countries and provided, moreover, for a liberalization of the Canadian position toward the carriage of Canadian passengers by United States airlines to and from third countries. In view of our overall policy regarding international air transport, this change in Canada's attitude was both gratifying and encouraging. The improvement in our neighbor's bargaining position did not produce a deterioration in our international position, but one of the concessions caused considerable difficulty.

The Canadians requested and received the privilege of operating from Montreal which is one of their major traffic-generating centers to New York City which is obviously one of the greatest traffic points of the world. It does not seem unreasonable for a neighboring state to wish to fly the busiest route between the two countries, but in this case the fact that Colonial Airlines pioneered the route, in 1928 and has been flying it since that time produced serious complications. Colonial's management decided that non-stop competition by Trans-Canada would be little short of ruinous; in fact Colonial soon released data purporting to show that the carrier would lose one million dollars annually which meant an increase in its subsidy requirements by that amount or financial ruin. Colonial chose the financial ruin theme and declared publicly that the Department of State and the Civil Aeronautics Board conspired and then secretly bartered away the life blood of American business, i.e., its hitherto non-competitive route to Montreal.

Talk started about the undemocratic and unconstitutional nature of the kind of executive agreement by which the exchange of privileges had been effected.¹ Congress was approached: the Senate Interstate and Foreign Commerce Committee which was investigating the airline industry at the time listened to Sigmund Janas, President of Colonial Airlines, explain his grievances. Later, when it became obvious that no action would be taken by the committee, many senators traditionally uneasy over the use of executive agreements and always willing to wear the United States flag over patriotic shoulders signed a letter of protest to the President:

¹ Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation*, 17 *J. of Air L. & Com.* 436 (1950) and 18 *J. of Air L. & Com.* 12 (1951).

July 28, 1949

The President
The White House
Washington, D. C.
Sir:

The recently concluded Air Transport Agreement between the United States and Canada has resulted in such serious damage to United States air carriers, one airline especially, and to the general interest of our country that we, the undersigned members of the United States Senate, are prompted to call the matter to your attention.

It is our feeling that there are inherent faults in the procedures whereby agreements pertaining to air transport operations are entered into by executive agencies without ratification, or even consultation, by the Senate. The United States-Canada Agreement is a flagrant example of how this procedure can result in unjust and unsound discrimination against United States companies, their employees and stockholders.

Testimony before the Senate Interstate and Foreign Commerce Committee on June 8th has established that the exchange of rights between the two countries has resulted in the granting of very substantial rights to Canada in return for rights which are of little or no value to the United States. An inevitable result of this action will be a considerably increased subsidy burden on the Treasury of the United States.

Furthermore, the testimony discloses that negotiations leading to the agreement were conducted in secrecy and in such a way that United States carriers were deprived of valuable property and other rights without opportunity to be heard.

Apparently the executive agencies which perpetrated this agreement pursued the same line of thinking which led the Economic Cooperation Administration to allocate almost \$50 million for direct subsidy of certain foreign airlines which are in competition with the United States air carriers.

We respectfully invite your attention to this matter and request that you take the necessary steps to assure that the agreement is not implemented until such time as a method has been devised to remedy damage to United States air carriers.

Respectfully,

(Senators signing this letter)

Democrats: 23—Byrd, Chavez, Ellender, Humphrey, Johnson, Johnson, Johnston, Kefauver, Kerr, Kilgore, McCarran, McClellan, McMahan, Magnuson, Maybank, Miller, Murray, Myers, Neely, O'Connor, Pepper, Sparkman, Taylor.

Republicans: 26—Aiken, Baldwin, Brewster, Bridges, Butler, Cain, Capehart, Cardon, Ecton, Flanders, Hendrickson, Ives, Jenner, Kem, Langer, McCarthy, Malone, Martin, Mundt, Reed, Schoepfel, Taft, Thye, Tobey, Wherry, Young.

It is important to note that the letter did not suggest setting aside the Agreement but proposed delay in implementation until United States air carriers had been compensated for their damages. Congressional interest in this matter, however, failed to produce any remedial action; the Government continued taking the steps legally necessary to permit the inauguration of service to New York by Trans-Canada.

COLONIAL SEEKS JUDICIAL PROTECTION

The Civil Aeronautics Board went through the necessary motions to grant the Canadian airline a certificate for operation from Montreal to New York, but before they were completed, Colonial took the whole case to court to protect its position by judicial means if possible. Two weeks before the Board began its hearing at the end of August 1949 to determine the fitness of Trans-Canada in accordance with section 402 of the Civil Aeronautics Act,² Colonial entered Federal District Court to prevent the hearing by injunction or failing that to stop the Board from submitting its decision to the President for his approval and then granting the foreign air carrier permit. The hearing was not enjoined by the Court, but the issuance of the permit was prohibited until the constitutional issues raised by Colonial were settled in the courts of the United States. The constitutionality of sections 402b and 801 of the Civil Aeronautics Act was questioned; in effect, Colonial was challenging the whole executive agreement procedure by which the executive branch of the Government exchanged air transport privileges with other countries without any participation by Congress either in consultation or by the formal process of treaty procedure. A private corporation thus prevented the United States from carrying out the obligations it had assumed in negotiation with another sovereign state. A judicial procedure designed to preserve domestic justice checked movement in international relations.

A statutory three-judge court of the United States District Court announced the first decision in this case on November 16, 1949 in the District of Columbia. Two of the three judges upheld the disputed sections of the Civil Aeronautics Act as being a constitutional delegation of power to the executive branch. The dissenting voice of Judge T. Alan Goldsborough was not sufficient to protect Colonial's claim; the airline lost the first judicial battle but it made immediately clear its intention to exhaust the last remedy by appealing the case to the Supreme Court.

The obvious display of Colonial Airlines intent to delay if not prevent competition by Trans-Canada on the Montreal-New York route created justifiable dissatisfaction on the part of the Canadians. They had negotiated in good faith, they had met the requirements of the Civil Aeronautics Board for operation into the United States, they were able to provide service, but they were kept waiting at the border by the very company which flew several flights in and out of Montreal every day. What good was the word of the United States? Few people outside Government circles were much worried over Canadian thought on this problem; the matter so far as the United States was concerned rested in the judiciary where time and motion are not of the essence. This quiet situation was interrupted suddenly for Colonial at 11:35 A.M. on December 2, by the arrival of a registered letter from the Air

² C.A.B. Docket No. 3964.

Transport Board of Canada. The content was Order No. 530 which directed:

That Colonial Airlines Incorporated do appear before the Air Transport Board of Canada at a Public Hearing to be held in the Board Room at Number 3 Temporary Building in the City of Ottawa, Canada, at 10:00 o'clock in the forenoon of the 12th day of December, 1949, to show cause why its License No. A.T.B. 9/46(N) should not be suspended.

This document left no doubts over the reason for the action:

Whereas Colonial Airlines Incorporated has by action in the Courts of the United States of America prevented the granting of the operating authority required by Trans-Canada Air Lines to enable it to exercise its privileges . . . it would appear to be inequitable to permit Colonial Airlines Incorporated to continue to enjoy the privileges granted to it . . . while at the same time the actions of the said Colonial Airlines Incorporated have prevented and continue to prevent Trans-Canada Air Lines from enjoying the privileges to which it is equally entitled under the same agreement.

A minor international crisis followed immediately. Colonial notified the State Department of its predicament and was told to meet all Canadian requirements while the case would be discussed by diplomats of the two governments. The airline filed an application with the Civil Aeronautics Board to suspend service on its Canadian routes and it informed various employees of possible lay-off. Postal officials, connecting airlines, managers of the airports from which Colonial operated, the mayors of the towns and cities served by Colonial, even the governors of New York, New Jersey, Maryland and Pennsylvania—all received by registered mail copies of Colonial's application to suspend operations. Tension increased. The show-cause hearing was held in Ottawa, but no revocation of permit was ordered. At the close of the meeting the President of Colonial released to the press a statement which explained the legal aspects of the situation and then emphasized the contributions Colonial was making toward Canada's dollar resources in a dollar-scarce world. Opinions between the two Governments were exchanged on the diplomatic level and apparently Colonial's position was explained satisfactorily to the Canadians for they never did fulfill the suggestion that Colonial's privileges might be suspended. This successful diplomacy eased a strained situation, but the basic problem remained unsettled.

QUESTIONING THE CONSTITUTIONALITY OF AGREEMENTS

The question which Colonial Airlines put to the United States Supreme Court concerned the whole position of the United States in international commercial aviation.³ Our privileges abroad had been obtained by granting reciprocal rights here through executive agree-

³ See, *Lissitzyn*, *op. cit.*

ments in the very same way we promised to permit a qualified Canadian air carrier to operate into New York under the terms of the bilateral agreement of June 4, 1949. A finding that such executive agreements were somehow unconstitutional and thus illegal could stop United States airplanes at our borders with disastrous results for our air transport industry. The process of translating some forty odd executive agreements into treaties, each requiring a two-thirds vote in the Senate, would be interminable. The Senators ought to be busy doing many other things and this fact alone would give those who refuse to understand reciprocity a great advantage in their efforts to prevent the granting of concessions to other countries. Some comprehension of this confusion penetrated the thoughts of the officials of Colonial Airlines. Whether the process was autonomous or encouraged by Government explanation is not known, but the fact is that Colonial in February 1950 withdrew its case from the U.S. Supreme Court. The action was explained to stockholders in the 1949 Annual Report:

Due to the increasing gravity of the international situation, your management concluded that it would not be justified, in the interests of its stockholders, to challenge the executive power of the Government to make Executive Agreements with foreign powers, and to challenge, the validity of numerous Executive Air Transport Agreements then in force. Consequently this appeal was withdrawn.

The judicial barriers to flight were thus removed and Trans-Canada began its Montreal-New York service in the Spring of 1950. The difficulties of the moment had dissolved, but the whole incident served to sharpen some of the problems in our foreign policy.

Withdrawal of this case from the U.S. Supreme Court did not settle the issue of executive agreements, but the obvious utility of this device has been recognized through the whole political history of the Republic. The actual issue is not the use of executive agreements instead of treaties, but rather how Congress can direct the State Department and the Civil Aeronautics Board in their formulation and implementation of our international aviation policy. The Civil Aeronautics Act of 1938 is the governing statute in this situation and the question arises whether Congress can exert any influence over the exchange of air transport privileges without passing a new law. The executive branch of the Government is, of course, susceptible to many kinds of Congressional pressure short of the passage of legislation, yet before Congress hurries to make changes it is correct to ask whether changes need to be made in the method of obtaining concessions. Have the air carriers of the United States been denied routes as a result of poor work on the part of Government officials because they were utilizing the executive agreement technique? There is no evidence to substantiate such a claim, and even if there were, the way out of the difficulty would be probably some method of increasing rather than decreasing the bargaining power of our negotiators. The record indi-

cates considerable diligence on the part of the Civil Aeronautics Board and the State Department in opening the world's airways to American aircraft. They have not been able to avoid international competition, to the vocal concern of some Congressmen, but it is hard to see how they could have done so without generating animosity in foreign lands at a time when our international friendships may have much to do with our eventual survival.

UNRESOLVED PROBLEMS

The major matter implicit in the Colonial Airlines affair is the way in which the United States can satisfy internal economic pressures without endangering foreign political and economic policies. On the assumption that Canada has the right to fly between Montreal and New York, or at least equal rights with the United States, it is difficult to understand how the Canadians could be denied entry without expecting a reciprocal denial to our air carriers. This is another way of saying that Colonial's exclusive position on the route could not be expected to stand in the face of the realities of international relations. If Colonial had expected competition, then all its cries of injury would have been unjustified, but competition was not anticipated and consequently Colonial took steps to protect its interests despite the fact that it was compromising the international position of the United States. Private economic interest usually supersedes public political interest in our society and no amount of moralizing will produce quick changes. It is useless to chide Colonial: what businessman would have behaved differently? The problem is one of devising means of compensating our industries which are actually hurt by foreign competition no matter how it develops whether through executive agreements on aviation, reduced tariff barriers, improved customs procedures or some other method. The idea is not to provide a continuing subsidy which would place a never-ending drain on the public treasury, but to provide assistance either in liquidating the assets or in developing other lines of business in substitution for the activity which could not stand foreign competition. The possibilities for abuse of some compensation system are many, and the development of specific plans would be a difficult task. In the case of Colonial Airlines, the company sought compensation from the Civil Aeronautics Board in the form of other air transport routes. Officials of the company estimated revenue diversion as high as one million dollars annually. The 1950 traffic figures revealed, however, that Colonial carried approximately the same number of passengers as it had before Trans-Canada began its service. Any quick conclusion about cries of "Wolf" before the beast had arrived needs to be qualified by two comments: (1) most of the United States air carriers during 1950 experienced passenger increases ranging as high as 20%, and (2) Colonial spent more money to meet competition, notably for the purchase of new equip-

ment and additional advertising. Unofficial figures published by American Aviation for the first half of 1952 (Oct. 15, 1951, p. 50) indicate that Colonial is well above industry average gains in this period. The obvious conclusion is that competition with Trans-Canada has failed to put Colonial out of business and actually may have prodded the United States airline to offer more attractive service to air travelers. Difficulties ostensibly foreseen failed to materialize.

The simple fact that Colonial Airlines has not withered away into bankruptcy postpones any need of solving a problem in compensation, but it does not mean that the issue has been met. The CAB has not granted any compensatory routes. The justice of the denial is not a matter of concern here; the simple fact is that no redress was made. The statute regulating our airline industry makes provision, however, for subsidization to cover actual losses as long as these losses are not due to inefficient operations, and consequently the Colonial Airlines affair is not a perfect example of a compensation problem. If the Agreement of June 4, 1949 actually had meant the financial ruin of Colonial Airlines, it is reasonable to assume that the Company would have continued its efforts to prevent implementation of the Agreement as long as possible despite the unfortunate effects upon our foreign policy. Moreover, the response Colonial obtained in the Senate suggests that a private corporation might overturn careful policies designed to produce long run benefits for the United States. Contemplation of such an unhappy development lends additional emphasis to the last sentence of the Senators' letter: "We . . . request . . . that the agreement be not implemented until such time as a *method has been devised to remedy damage** to United States air carriers."

* Italics supplied.