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THE BERMUDA CAPACITY CLAUSES IN THE JET AGE

BY JOHN C. McCARROLL

I. INTRODUCTION

INTERNATIONAL commercial aviation involves important political interests even though permission to operate is ordinarily phrased in terms of the commercial activities to be permitted. The Chicago Conference in 1944 produced one important base of international aviation: the International Air Services Agreement, which allows planes of signatory states to enter national airspace and land for noncommercial purposes but no agreement was reached on the exchange of commercial rights. The dispute over economic regulation was finally settled in February 1946, by an agreement signed at Bermuda between the United States and Great Britain which is commonly called the Bermuda Agreement. In return for Great Britain's retreat from demands for restrictions on the number of flights each airline might fly (frequency controls) and on the number of seats each airline could offer to a particular destination (capacity limitations) the United States, which had sought unregulated competition on the international routes, accepted direct control of rates. It was agreed that the prevailing rates would be those established by the International Air Transport Association. Other aspects of air service were

† Member of the New York Bar. This article was prepared from a paper, Regulation of Competition Among International Airlines, written for a seminar, International Business Regulation, given by Professor Phillip E. Areeda at the Harvard Law School. The author's thanks are extended to Professor Areeda for his helpful criticisms. This paper also formed the basis for Note, CAB Regulation of International Aviation, 75 Harv. L. Rev. 575 (1962). The author gratefully acknowledges the permission of the Harvard Law Review to use the material which is common to both the Note and this article.

Activities of foreign scheduled commercial airlines for which the privilege is granted are traditionally classified into five "freedoms." The first allows flight through the national skies; the second allows landing for noncommercial purposes. The third and fourth freedoms permit the foreign airline to land and discharge passengers and cargo from its home country in the granting country and to reload passengers and cargo for its return trip respectively. Without both, commercial flight between the two countries is impractical. The fifth freedom is the permission given by country C to country A's carrier, in the case of a flight from A to B to C, to land traffic picked up at B or to pick up traffic at C, on the return flight, destined for B. Since many of the passengers boarding at A can be expected to disembark at B, the flight to C may become uneconomical unless the airline can obtain passengers in B for C. Although the number of flights to C could be limited to those which would be sustained economically by passengers originating in A with C as their destination, the fifth freedom makes possible the establishment of a network of airline routes rather than a limited system of flights between two countries. See H. Smith, Airways Abroad 117 (1950); Report of the Task Force on National Aviation Goals, Project Horizon 114 (1961) (hereinafter cited as Task Force). Foreign airlines are usually not granted the privilege, termed "cabotage," of loading passengers and cargo in a foreign country for another destination within the same country. See Qantas Empire Airways, Ltd., 1A Av. L. Rep. 92262 (CAB 1959). See generally, Hesse, Some Questions on Aviation Cabotage, 1 McGill L.J. 129 (1953).

Dec. 7, 1944, 19 Stat. 1693, E.A.S. No. 487. Fifty-nine nations have now adhered to this convention. See Dep't of State, Treaties in Force 222 (1962).

†† Great Britain and the United States were in almost total disagreement. Compare 1 Department of State, Proceedings of the International Civil Aviation Conference 55-63 (1948) (American proposal), with id. at 63-74 (British proposal).

‡ Air Services Agreement with the United Kingdom, Feb. 11, 1946, 60 Stat. 1499, T.I.A.S. No. 1507.

§ Air Services Agreement with The United Kingdom, supra note 4 Annex II (d). IATA, a
limited only by general provisions. The Bermuda Agreement provided the model for a network of bilateral agreements exchanging commercial aviation privileges that encompasses the non-Communist world.

For the most part international aviation has prospered under the compromise reached at Bermuda and the rates set by IATA. Although commercial aviation in general has expanded greatly since the end of World War II, international operations have expanded faster than the average. Occasional dissatisfaction with the level of rates, the routes exchanged, or capacity limitations imposed by some countries had appeared to be disagreement on details rather than with the principles underlying the Bermuda Agreement. Within the past few years, however, the principles established at the close of World War II have been strained, and there are indications that these principles, at least as applied until now, may no longer be adequate for the development of international aviation.

With the introduction of jet planes, the available capacity increased rapidly. The North Atlantic, the most important airway for international aviation, exemplifies the problems. Traffic carried across this route has risen steadily. But with the introduction of jets in 1959, the capacity offered has risen even more rapidly. In the past decade all airlines have expanded the number of frequencies offered, and the number of airlines flying across the North Atlantic has increased from eleven in 1951 to nineteen in 1960. The greater number of seats in each plane means more capacity for the same number of frequencies. Yet because the individual passenger is more interested in the availability of schedules than total

private association of carriers, which now includes the major international carriers, was revived by the carriers in the spring of 1945, following the disagreement, at the Chicago Conference about regulation of international commercial aviation. IATA: The First Three Decades, 9 IATA Bull. 11, 42-44 (1949); Sheehan, The IATA Traffic Conferences, 7 Sw. L.J. 135, 137 (1953). For a list of IATA members, see IATA Member Airlines, World Air Transport Statistics 2-3 (1961). Rates are set by the carriers, subject to later government approval. If no agreement is reached, either because of carrier disagreement or government disapproval, carriers may file separate tariffs—open rates. Generally IATA has been able to agree on rates. See Note, CAB Regulation of International Aviation, 75 Harv. L. Rev. 375, 577-79 (1962). The difficulties which may arise if the agreed procedure fails were well illustrated by the recent struggle between the CAB and the air ministries of several European countries over the desirability of a fare increase. See N.Y. Times, May 15, 1963, p. 1, col. 3; id., May 16, 1963, p. 1, col. 4.

6 Final Act of The Civil Aviation Conference, Air Services Agreement with The United Kingdom, supra note 5, at 18-19.


8 Between 1952 and 1960 scheduled domestic traffic, as reported to the International Civil Aviation Organization, has increased by a little more than 200% while international aviation has almost trebled. See Development of Civil Aviation—1952-1960, 5 IATA World Air Transport Statistics 6 (1960); cf. 1960 CAB Ann. Rep. 63.

9 See North Atlantic Traffic—Summary, 1951-1960, 5 IATA World Air Transport Statistics 33-36 (1960). The trend has continued at least into the first part of 1962; in February the number of passengers carried on the North Atlantic was 17.7% above the previous year but the number of seats had risen 25.9%. N.Y. Times, April 2, 1962, p. 45, col. 7.

10 See North Atlantic Traffic of IATA Members, 5 IATA World Air Transport Statistics 35 (1960) (listing 18 member lines). Loftleidir, an independent, has operated since 1954. IATA defines the North Atlantic as the routes between Europe and the United States and Canada. See id. at 35. The CAB Bureau Counsel, evidently using a slightly different means for ascertaining the year a carrier begins operations, indicates 8 carriers operating across the North Atlantic to the United States in 1951 and 17 in 1961. Two Canadian carriers are not included in the CAB total. Exhibit BC-13, CAB Investigation.
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capacity, provided the latter is sufficient to provide him with a seat, the airlines have little incentive to decrease the number of frequencies offered.\(^\text{1}\)

The American carriers have expressed particular concern about the decline in the amount of traffic carried by American carriers from better than sixty per cent in 1950 to less than forty per cent in 1960.\(^\text{10}\) This argument conjures up the memory of American merchant marine and stresses the following factors increasing competition. Cities like Amsterdam and Copenhagen have developed "into important international gateways through which they attract a large volume of fifth-freedom, or 'beyond' traffic." Perhaps American carriers cannot cover all such cities as well as they do the major gateways: London, Paris, Frankfurt, and Rome. Four of the new lines represent countries previously without a carrier across the Atlantic.\(^\text{14}\) Most of these countries were previously served by the United States.\(^\text{15}\) Qantas Empire Airways and Air India International, the two new lines not representing either a European or an American country, compete from New York to the major gateways and divert little if any traffic from the secondary gateways.\(^\text{16}\) It should be noted, however, that diversion is not a complete explanation; much of the decline in the American share of traffic carried represents traffic lost by Trans World Airways which has been unable to offer effective competition because of internal dissension.\(^\text{17}\)

The problem of overcapacity has affected international commercial aviation generally, and almost all carriers have suffered. Reactions to this economic malaise accompanying the excess capacity have varied. First, some have urged significant rate cuts to generate new traffic.\(^\text{18}\) Second, various lines and countries, particularly in Europe, have considered forms of multi-national and interline cooperation.\(^\text{19}\) Third, the European countries have demanded access to interior American cities, considered by the American carriers to be domestic markets. They argue that the United States policy of seeking equal economic value in traffic rights received for American lines in return for the grants given foreign lines is outmoded and that their lines should have the same freedom of access to the United States market that American carriers have to the European market.\(^\text{20}\) Finally, there has been a renewed tendency to resort to capacity restrictions

\(^{11}\) In 1960 the number of flights on the North Atlantic declined 2.6% but the number of seats offered rose by almost 36%. *North Atlantic Traffic—Summary by Directions, 1951-1960*, 5 IATA World Air Transport Statistics 37, 39 (1960).

\(^{12}\) Task Force 107.

\(^{13}\) Task Force 116.

\(^{14}\) Loftleidir, Deutsche Lufthansa, Aerlínte Eireann, and Iberia. Austria, Poland, and Saudia Arabia have been reported to be considering seeking permission to fly across the Atlantic also. N.Y. Times, April 1, 1962, § 5, p. 13, col. 1.

\(^{15}\) See Lufthansa Exhibit 5, CAB Investigation (showing the decline in the percentage of traffic carried by American carriers to Germany since Lufthansa began transatlantic service).


\(^{19}\) See, e.g., Comment, 22 Rev. Générale De L'Air 188 (1959) (report on the discussion concerning Air Union, a proposed pool of the international operations of several European lines). Such organizations could not be easily assimilated to a framework based on bilateral relations.

when national lines are in trouble. This tendency is noticeable even in the United States where the concern both in the industry and in the government over a sagging share of the market may be leading towards a more restrictive American policy towards commercial freedoms. This article will consider the service provisions of the Bermuda-Type Agreements, and their relations to restrictions imposed on the service international lines can offer, particularly certain amendments proposed by the Civil Aeronautics Board for inclusion in the permits of all foreign lines.

II. THE BERMAUDA-TYPE AGREEMENTS

A. Third and Fourth Freedom Traffic

The bilateral agreements form the framework of international aviation. The basic unit of airline routes is the permission to carry traffic between pairs of countries—the third and fourth freedoms (permission to discharge passengers from the home country and land passengers for the return trip, respectively). Ordinarily, country A grants the airlines designated by country B permission to fly from any point in country B to certain specific cities or airports within A; conversely, B allows the carriers designated by A to fly from anywhere in A to specified points in B. In describing the terms of competition, most agreements have provisions similar to Article Eight which provides that "there shall be a fair and equal opportunity for the airlines of each contracting party to operate on any route specified." A literal reading of this language would permit the flag carriers of one country to fly all routes flown between the two states by the lines of the other, but such an interpretation would be clearly inconsistent with the grant of specific routes.

When the United States and Great Britain signed the Bermuda Agreement in 1946, the terms were drafted to exclude limitations upon the competition for third and fourth freedom traffic on the routes granted; and the two countries have consistently affirmed that construction. Furthermore, Article Two grants general commercial rights, and Article Ten imposes some limitations on those rights only with respect to the

[Notes and references]

21 See, e.g., N.Y. Times, Jan. 9, 1960, p. 43, col. 1 (JAL expected to seek restrictions to combat Pan American's jet competition); id., Jan. 12, 1960, p. 42, col. 1 (Polish government restricts BEA's use of jets to protect the Polish line).
22 See, e.g., Hearings on International Air Transportation Problems Before the Aviation Subcommittee of the Senate Committee on Commerce, 87th Cong., 1st Sess. 22-23 (1961); Task Force 107.
24 See Brief for Petitioner, BOAC v. CAB, 304 F.2d 952 (D.C. Cir. 1962); Hearings on S. 1814 Before the Senate Committee on Inter-State and Foreign Commerce, 79th Cong., 2d Sess. 65 (1946); Task Force 111-16; International Air-Transport Policy, Joint Statement by U. S. and British Governments, 15 Dep't State Bull. 577 (1946); Masefield, Some Aspects of Anglo-American Civil Aviation, United Empire, Jan-Feb. 1947, p. 29-30.
25 Art. 2 reads:
(1) Each contracting party grants to the other contracting party rights necessary for the conduct of international air services by the designated airlines, as follows: the rights of transit, of stops for non-traffic purposes, and of commercial entry and departure for international traffic in passengers, mail and cargo at the points in its territory named on each of the routes specified in accordance with paragraph (2).
(2) The routes over which the designated airlines of the two contracting parties will be authorized to operate will be specified in a Route Schedule, mutually agreed upon, and set forth in an exchange of diplomatic notes.
26 Art. 10 reads:
(1) The air services made available to the public by the airlines operating under
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Carriage of fifth freedom traffic (traffic coming from or destined for a third country). The absence of similar restrictions on the carriage of third and fourth freedom traffic supports the reading that it is to be unrestricted. To support such a liberal interpretation of the agreements, Article Eight should be read as forbidding only actions designed to favor the national carrier or to deprive a foreign line of the opportunity to compete for the traffic on the routes granted to its government.

This liberal interpretation has not, however, received universal acceptance. Countries concerned about the ability of national carriers to compete have favored a more restrictive reading: "[F]air and equal opportunity . . . to operate" should mean not simply the absence of legal impediments but equality of practical capability to compete. They argue that, if one carrier's competitive position is too strong, the other may be unable to compete unless the dominant carrier is handicapped. The carrier to be protected might be allowed to charge lower rates, but the means of equalization ordinarily used is some limitation on frequency. 7 Article Nine 8 which prohibits operations which "affect unduly" the service of local or regional carriers supports this restrictive construction of Article Eight. Nonetheless, any such restrictive interpretation is contrary to the understanding of the parties to the Bermuda Agreement.

It is possible for particular agreements to be properly construed in a restrictive fashion. In an agreement between the United States and India, providing that airlines shall obtain the prior approval of the Indian government for any frequency changes, 9 a contemporaneous letter agreement gave Indian carriers practical equality of competitive opportunity. This would seem to be consistent with the bilateral. However, the Ameri-

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7 E.g., Air Services Agreement Between France and the Union of South Africa, Sept. 17, 1954, art. 9, 216 U.N.T.S. 29, 34, as modified, Sept. 24, 1956, 234 U.N.T.S. 414; see Hearings Before a Subcommittee on Appropriations, 86th Cong., 1st Sess. 315 (1959). A variation on this theme is the establishment of a formula allowing frequency or capacity increases when a predetermined amount is carried and requiring decreases when less than a minimum is carried. See, e.g., Air Services Agreement Between Spain and Peru, March 31, 1954, annex, 232 U.N.T.S. 65 (based on load factors). Such a restriction is tied to existing demand and hinders services designed to develop additional traffic.

8 Art. 9 states:

In the operation by the airlines of either contracting party of the air services over the routes described in accordance with paragraph (2) of Article 2 of this Agreement, the interest of the airlines of the other contracting party shall be taken into consideration so as not to affect unduly the services which the latter provide on all or part of the same routes.

can rejection of prior controls and the inclusion of a specific provision for the review of capacity increases, which were included in the agreement with Mexico, indicate a contrary intent. Therefore recent Mexican refusals to permit Pan American to increase its scheduled flights on the route from Miami to Mexico City seem to be unwarranted.

Whether capacity or frequency limitations are warranted by the bilateral is not so important a question as whether they are needed by smaller countries to protect a national need. Smaller countries with fledgling international lines have little to lose from a deadlock with a larger country about operating rights, and they will probably be able either to impose these controls in practice or to negotiate treaties with modifications permitting such controls. Despite their favorable bargaining position, these states cannot control competition by limiting the routes granted. A small State may have only one or two cities of commercial importance, and denial of access to such major cities makes a route exchange unattractive to the other country. Nonetheless, even if the validity of the interest in protecting national flag lines is assumed, frequency and capacity restrictions are sufficiently deleterious of international aviation to suggest the desirability of another means of affording the same protection. When frequency restrictions are imposed, the service available to the public is held to a level which will permit the least efficient carrier concerned to operate. Therefore the need for prior approval of any schedule increases or of the use of improved equipment will probably cause the supply of services to lag behind demand rather than preceding and perhaps developing demand.

B. Fifth Freedom Traffic

Although carriers are afforded full freedom to compete for third and fourth freedom traffic under the Bermuda-Type Agreements, Article Ten imposes restrictions on the carriage of traffic to or from third countries—the fifth freedom:

services provided by a designated airline under the present Agreement shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such airline is a national and the countries of ultimate destination of the traffic. The right [to carry fifth freedom traffic] . . . shall be subject to the general principle that capacity should be related:

a) to traffic requirements between the country of origin and the countries of ultimate destination of the traffic;

b) to the requirements of through airline operation; and

c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

The United States had sought fifth freedom rights for its carriers because long-distance, multi-stop flights would be uneconomic without picking up passengers to replace those who had disembarked at intermediate stops. Subsection (b) reflects this underlying basis for the grant of fifth freedom rights. It gives a carrier the right to carry enough fifth freedom traffic to make some minimum number of flights economically feasible.

Subsection (c) also appears to have limited application. If it means

\textsuperscript{30} See supra note 1.
that fifth freedom traffic should be carried only when regional and local services are inadequate, the clause would nullify in many cases the grant of fifth freedom rights. A more qualified meaning that the carrier's fifth freedom carriage shall not unduly divert traffic from local and regional services seems to add little to the meaning which can be given to clause (a). Rather than imposing a limit on fifth freedom carriage, the clause would seem to permit a carrier to offer greater fifth freedom service than would ordinarily be proper when local service is non-existent or insufficient to satisfy the available demand.\(^\text{31}\) The major interpretative disagreements have concerned the meaning to be given clause (a) and the phrase "primary justification."

Until recently there has been no systematic application of any definition for determining the amount of fifth freedom traffic carried by a carrier or for enforcing the relation between primary justification traffic and fifth freedom passengers.\(^\text{32}\) The early attempts to define fifth freedom carriage floundered on the inability to define what constituted a single trip.\(^\text{33}\)

In some cases nations have reacted to conduct felt to be in violation of the governing treaty by unilaterally halting or restricting operations. For example Brazil in late 1961, denounced the bilateral with the Scandinavian countries, but before the notification period had expired, she suspended the commercial privileges of the Scandinavian Airlines System entirely for a short period because the inauguration of jet service was thought to be a violation of the agreement. SAS was later permitted to resume service but only with greatly restricted operating rights.\(^\text{4}\)

The CAB has now begun to formulate its interpretation of Article Ten.\(^\text{3}\) According to this definition, a passenger's ultimate destination is the furthest point on the trip measured by a great circle route. Thus, a passenger would be third freedom traffic for airlines of the country where he first boards and fourth freedom traffic for the furthest country from his point of origin. Even if the trip is composed of many short stopovers of approximately equal duration, the "ultimate destination" is the country furthest from the point of origin. To implement this definition, the CAB wants traffic carried on trips covered by single tickets classified according to its true origin and destination as shown by the ticket or waybill.\(^\text{5}\)

Once the statistics are available, an attempt can be made to police the ratio of fifth freedom to primary justification traffic. It is further contended that if primary is to be given meaning, it must require at least that the primary justification traffic be more than the secondary traffic.\(^\text{27}\)

Although several other interpretations have been suggested, the most

\(^{31}\) Cf. Lineas Aereas Costarricenses, S.A., 26 C.A.B. 429, 431, 437 (1958). Wassenbergh indicates that the first definition suggested has been used by some countries with the expected dampening effects. Wassenbergh, Post-War International Civil Aviation Policy and the Law of the Air 58 (1957).


\(^{33}\) See Wassenbergh, op. cit. supra note 31, at 49-52.

\(^{4}\) Aviation Daily, Feb. 28, 1962, p. 373; id., March 12, 1962, p. 31. Mexican objections to Pan American schedules, discussed at TAN 29 supra, are partly based on objections to what is considered excessive fifth-freedom carriage. Id., March 9, 1962, p. 59.


\(^{6}\) See Exhibit BC-3, CAB Investigation.

\(^{27}\) Examples offered by the CAB Bureau Counsel indicate that the proposed CAB power might be exercised in situations where the primary justification traffic constitutes only 25% or 30%. Rebuttal Exhibit BC-2, pp. 1, 4, CAB Investigation; but it seems likely that the Bureau Counsel is illustrating only a clear case.
important alternative to this interpretation is that a passenger's origin and destination should be determined by the point where the passenger boards and deplanes on a particular flight even though the flight is but a segment of a longer trip.\textsuperscript{38} It would seem that a stop simply to change planes, one in which the passenger does not pass through customs or perhaps does not stop more than a few hours, should not constitute a destination and new origin even under this definition. Any longer stopover in a country does make the passenger third or fourth freedom traffic for that country. Thus if one travels from $A$ to $B$ and then a day later travels on to $C$, the carriage of that passenger from $B$ to $C$ is third freedom for the lines of $B$, fourth freedom for those of $C$, and fifth freedom for $A$'s lines.

Because United States citizens still constitute a majority of the world's air travelers,\textsuperscript{39} and because most Americans make multi-stop trips, the reason for the difference in definitions is clear. India has used this broken-voyage definition to justify continued restrictions on American flights because the amount of traffic moving directly between the United States and India, the only primary justification traffic under this interpretation, is small.

More important from the United States standpoint is the definition's relevance to North Atlantic traffic. The United States argues that some European lines offer an excessive number of frequencies from their countries to the United States and can do so because the passengers have a true origin or destination in other countries reached by the foreign line's connecting flights. Because the national carriers can blanket these routes, American carriers are handicapped in competing on routes to these countries and are deprived also of traffic which would normally be carried on other routes.\textsuperscript{40} Such carriage is defended on the grounds that the stopover makes the passenger third and fourth freedom traffic for the country concerned.\textsuperscript{41}

\section*{III. Service Regulation by the United States}

\subsection*{A. CAB Proposals}

Early in 1961 the CAB took the first steps to permit the enforcement of its proposed interpretation of Article Ten. It proposed to amend all foreign-air-carrier permits to require all foreign air carriers to "furnish traffic data to the Board and submit their schedules for approval by the Board."\textsuperscript{42} Without a foreign-air-carrier permit issued by the CAB, no foreign airline may fly into the United States.\textsuperscript{43} In granting such permits the CAB is directed by the Federal Aviation Act to consider the applicant's qualifications along with the public interest.\textsuperscript{44} Permits have ordinarily been issued to a foreign carrier as a matter of course after

\begin{footnotes}
\item[38] See Aviation Week, Dec. 26, 1960, p. 30.
\item[39] Exhibit BC-4, CAB Investigation.
\item[40] See Task Force 116, Wassenbergh, \textit{op. cit. supra} note 31, at 71. Analytically such traffic may be distinguished from ordinary fifth-freedom traffic because carriage from points not on the routes granted is involved. But the carrier of the intermediate country is carrying traffic which would be primary justification traffic for the terminal countries but for the diversion. It is not at all clear that article ten is limited to third countries \textit{on the route}. Article Ten, perhaps, should be read as applying to third-country carriage when either terminus is on the granted route.
\item[41] CAB Order No. E-16288 (Jan. 18, 1961), CAB Investigation (order initiating the proceeding).
\item[42] Federal Aviation Act \textsection 402(a), 72 Stat. 757, 49 U.S.C. \textsection 1372(a) (1958).
\item[43] Federal Aviation Act \textsection 402(b), 72 Stat. 758, 49 U.S.C. \textsection 1372(b) (1958).
\end{footnotes}
negotiations between the carrier's government and the State Department have been completed. When issuing a permit, the CAB is empowered to attach "such reasonable terms, conditions, or limitations, as . . . the public interest may require." The CAB seeks through the exercise of this power to attach terms or conditions to control the service offered by the foreign airlines.

Most conditions that the CAB has imposed, such as requiring the carrier to conform to American safety regulations, have expressed merely the agreement reached between the two countries. The CAB has, however, used this power to further policy objectives related to statutory policy. For example, acting on the theory that the Act does not contemplate operation by a United States citizen under a foreign-air-carrier permit, the CAB has used permit conditions to restrict control by Americans of foreign carriers. Nevertheless, permits have been granted to such controlled carriers when the CAB found no injury to the public interest or where the foreign country had no other airline it could designate to fly the routes granted. But in at least one case the CAB has imposed conditions on the permit to minimize the effect of control of a foreign line by an American carrier; the controlled carrier was forbidden to disclose its connection with the American carrier in any advertising, and the American carrier was forbidden to act as agent for the sale of tickets on the controlled carrier's routes. In the past the CAB has also used conditions in permits to achieve a result not expressly authorized by either the statute or the applicable air service agreement. Since 1951, permits issued to foreign air carriers have been conditioned on the carrier's agreement to waive the defense of sovereign immunity in a suit brought in the United States upon any occurrence arising out of a flight authorized by the permit.

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40 See N.Y. Times, Aug. 15, 1959, p. 36, col. 2. Once a Bermudan-Type Agreement is signed, the exchange of routes can be initiated by either party. American carriers are usually first certificated by the CAB; the State Department then opens negotiations with the other country to obtain the necessary landing permission. If the other country seeks permission to land here, its diplomatic representatives first make contact with the State Department. In the negotiations, the State Department consults the CAB and through it interested American carriers; not infrequently, a CAB representative is included in the negotiating team. Once an exchange of routes is concluded, a country may designate a line or lines to fly the route. This line must then apply to the CAB for a foreign-air-carrier permit. See generally Hearings on the Independent Offices Appropriations for 1961 Before a Subcommittee of the House Committee on Appropriations, 86th Cong., 2d Sess. 488 (1960); Calkins, The Role of the CAB in the Grant of Operating Rights in Foreign Air Carriage, 22 J. Air. L. & Com. 253 (1955). Examples of the circumstances under which the CAB will grant a permit to a line not designated under an international agreement are Transportes Aereos Nacionales, S.A., 25 C.A.B. 59 (1957) (no agreement with Honduras, flight between the two countries continuing on a reciprocity basis); P. G. Taylor Proprietary, Ltd., 25 C.A.B. 109 (1957) (non-scheduled flight by an Australian company to south sea islands too small to sustain scheduled flights); Balair AG, 1A Av. L. Rep. ¶ 21085 (CAB 1960) (supplemental carrier certificated to enable Swissair to operate an uninterrupted schedule).


42 E.g., Sabena, 26 C.A.B. 659 (1958). Limitations agreed upon between the countries in negotiations prior to certification will also be included in permits. E.g., Pacific W. Airlines, Ltd., 26 C.A.B. 65 (1958) (non-scheduled airlines).


In the course of proceedings on its proposed regulations the CAB determined that it has the power to condition foreign-air-carrier permits to require the carriers to file traffic statistics and, whenever the CAB finds "that the public interest so demands," to submit flight schedules to the Board for its approval. A statutory amendment allowing the Board to suspend the effectiveness of a foreign carrier's proposed rates is also being considered. If the power to impose such conditions is sustained, the Board can expand its authority over international travel by attaching further conditions to foreign-air-carrier permits whenever the public interest, in its view, so requires and the President approves.

An attempt by the CAB to extend by conditions, its authority to matters over which no substantive authority is given by either the act or an applicable bilateral may be an illegal use of the Board's power to condition in the public interest. Moreover, the reach of statutory authority varies depending on the nature of the flight and the nationality of the carrier. An early congressional proposal for aviation regulation made no distinction between interstate and international flights; provisions for regulation applied to foreign and domestic carriers alike. The bill enacted, however, distinguished both between interstate and international transportation and between domestic and foreign carriers.

In opposing the proposed conditions, the foreign carriers argued that a comparison of the detailed regulation to which the domestic carriers are subject with the relative freedom accorded foreign carriers indicates a congressional intent to leave foreign carriers unregulated. The CAB rejected this argument and ruled that the provision for conditioning permits indicates a congressional intent to leave such questions to the Board's discretion. While this may be sound, it does not necessarily follow that Congress left equal discretion for all types of regulation.

The need for economic data from foreign carriers can be sufficiently related to the Board's functions under the statute of approving IATA agreements and advising the President and State Department about the economic consequences of route exchanges to justify such a condition. At the other extreme, an attempt to regulate rates by permit condition would conflict with implied limitations contained in the statute. In contrast to the statutory silence on the filing of traffic data by foreign carriers, the act explicitly sets forth the CAB's authority with regard to rates in foreign air transportation. In view of the provision granting the Board

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64 Cf. FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961). In this case, the Supreme Court held that the FPC could consider, in determining whether an application was in the public interest, matters that it had no power to regulate directly. Congress had intended that the entire field of natural gas production and distribution be regulated either by the states or the FPC; the extension of FPC consideration was held necessary to effectuate this overriding purpose.
full authority to set domestic rates, the provision limiting the Board's power with respect to rates in foreign air transportation to the elimination of discrimination would appear to circumscribe the Board's power over international rates. That the CAB has been able to exert influence over international rates through its power to disapprove IATA resolutions is irrelevant. Such power is concerned largely with the anti-trust implications of agreements; a requirement that an exemption from the anti-trust laws be in the public interest compels an examination of economic effects if the agreement establishes rates. The power to regulate service (the equipment used, frequencies flown, or class of carriage offered) by disapproving proposed schedules falls in between these powers. On the one hand, service regulation is not closely related to any specific Board function. But the explicit denial of the power to restrict the equipment used or frequencies flown by domestic carriers by condition in certificates of convenience and necessity suggests that such restrictions would otherwise be an appropriate condition. Thus, where there is no bilateral, the statute does not seem to bar permit conditions to restrict capacity. The proposed conditions go even further and would allow the CAB to disapprove schedules without notice or hearing. Such procedure would conflict with the statutory requirement that permit changes be made after notice and hearing.

The Federal Aviation Act further provides that the Board shall exercise its powers in harmony with the obligations assumed by the United States in any treaty or agreement with a foreign country; presumably this precludes the insertion of any condition that directly contravenes the bilateral agreement between the United States and the foreign carrier's country. Although the United States has negotiated some agreements which specifically provide that the American carrier will supply statistics, many countries require the filing of various statistics without a specific grant of such power in the bilaterals, and such a requirement would not seem inconsistent with the bilaterals which make carriers subject to all laws and regulations normally applied and are otherwise silent. However the Bermuda-Type Agreements do have specific provisions for disagreements about rates and capacity, and permit conditions giving the granting country power unilaterally to regulate either would seem inconsistent with these provisions. It might be argued that Article Eleven contemplates the CAB's possession of power over rates, but this article does not permit the exercise of such power over foreign carrier rates. The CAB has contended that the mere inclusion of these conditions is

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63 E.g., Air Transport Service Agreement with Mexico, Aug. 15, 1960, art. 10, T.I.A.S. No. 4675.
64 See Exhibits PA-1, PA-2 (Pan-American), CAB Investigation (traffic data and scheduling filing requirements with which Pan American must comply). The use of such data and statistics apparently varies from country to country, from estimating traffic flow at airports to capacity and frequency control.
65 Art. 5(2):

The laws and regulations of one contracting party relating to the admission to or departure from its territory of passengers, crew, or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo of the other contracting party upon entrance into or departure from, and while within the territory of the first contracting party.
66 Art. 10, supra note 26.
not a violation, and that only an exercise of the powers in a manner inconsistent with the agreement would constitute a violation. Unless the conditions contemplate unilateral action, however, they would seem to have no purpose because any action acceptable to the foreign country involved would be enforced by that country. It is exactly such unilateral action which would be a violation of the Bermuda-Type Agreements. The Board further argued that, even if the use of the proposed conditions would be contrary to a Bermuda-Type Agreement, the Board could impose the condition because there might not be an applicable bilateral in force when the powers were needed. But such a possibility does not justify present imposition of conditions on those carriers now covered by a Bermuda-Type Agreement. The bilaterals require notice of intention to terminate some months, usually one year, before the termination becomes operative, and this period would allow time for the Board to amend the carrier's permit and still be able to exercise the powers when the bilateral ceases to act as a bar.

B. A Proposed Interpretation of Article Ten

The definition of primary justification traffic in the Bermuda-Type Agreements recognizes the interest of both the country where the trip originates and the traveler's destination. Any interpretation of this allocation of traffic must consider the multi-national pattern of international aviation if the result is to be realistic. There is, for example, an arbitrary quality to the Indian argument that an American traveler ceases to be primary justification traffic for American carriers because he has stopped on the way to India. In a personal sense, he probably still thinks of his trip as originating in the United States. Further, the contacts of the trip are still very much American. All portions of the trip were planned in the United States; the traveler's intent is to return to the United States; and the United States is the direct source of payment for the entire trip. Therefore while it is impractical to weigh the contacts of each individual trip, the interest of the traveler's home country as the originating country in this type of trip should be recognized.

The interpretation offered by the CAB also has an arbitrary quality and involves logical difficulties. If on a trip covered by a single ticket a passenger flies from A to D with intermediate stopovers at B and C, the American construction classifies him as third freedom for A, his true origin. If D's line carried our traveler, it would be on the return trip from A to D, and parity of reasoning suggests he is fourth freedom traffic for D (assuming that D is the furthest country from A) on all legs of the trip. What is his status for B and C? It would be incongruous and probably unacceptable to the intermediate countries to assert that neither B nor C could classify him as primary justification traffic for any portion of the trip. In addition, if the D carrier is not permitted to fly between B and C, only A's flag line would be entitled to include him as a part of its primary justification traffic on that leg. Furthermore, if the time spent in B or C is approximately equal to or greater than that spent in D, it is arbitrary to allow D's carriers to claim the traveler as primary justification traffic when the contacts of the trip with B or C are equal to those with D.

68 Ibid.
The CAB's definition would also add to the influence of the American flag lines on the destination of tourist travel in Europe. If convenience and frequency of service affect the tourist's decision about the countries to visit, a reduction in the ability of the smaller countries to offer attractive service will also handicap efforts to attract tourists because American lines have tended to concentrate their schedules on the major gateways such as London or Paris rather than the other cities such as Amsterdam or Copenhagen.

In the model discussed all four countries have an interest in the traffic from B to C, and carriers from each country should be able to include the traveler as primary justification traffic carried. The language of Article Ten permits such classification easily for the carriers of A and D, and it is unlikely that either B or C would object to classifying him as third or fourth freedom traffic for their carriers. While the language of the bilaterals might be redrafted to give explicit recognition to the interest of B or C in both legs touching that country, origin and destination can be read as having a dual meaning referring to either the trip origin and destination or the segment origin and destination.

Even this interpretation will be arbitrary in some cases. In a circular journey, in which stopovers of approximately equal duration are made at four countries B, C, D, and E, the passenger's true destination cannot be said to be any single country. If such a trip were from the United States to Europe, the A-B and E-A segments across the Atlantic would be the most important. Following the CAB interpretation, A and D (the most distant country) could consider the traveler as primary justification. The interpretation suggested in considering the first model examined would include the interests of B and E in their respective segments. Neither recognizes C's interest in the trans-Atlantic flight even though the traveler, in his own mind, may be visiting C as much as any of the other three countries. To admit C's interest in the A-B leg would leave little of the original division of traffic between third-fourth freedom and fifth freedom; the relevant points would become the regions of origin and destination—a change beyond the scope of the present agreements. Nor does the suggested interpretation reflect the interest a carrier's country has in the service of transportation as an end in itself. Recognition of this interest disregards the continued rejection of commercial freedom of the air and the implied qualification in the Bermuda-Type Agreements that the commercial rights granted are divided into third, fourth, and fifth freedoms. Thus to acknowledge C's interest in either the trans-Atlantic segments or the interest in the service of transportation is inappropriate under the Bermuda-Type Agreements as now written.

If a stopover in a country creates a segment destination and origin, and determines whether the traveler is primary justification traffic on the touching segments for the carriers of that country, stopover must be defined. The speed of modern planes has brought all but the longest

69 See testimony of James C. Buckley, pp. 19-20, and Exhibits KLM R-19, R-20, CAB Investigation. On the other hand, it has been charged that the excessive capacity carried by the foreign lines inhibits the development of American flag. In 1963 Pan American announced that it would expand coverage to several other cities, particularly Copenhagen, Brussels, and Amsterdam, a development which should test this charge.

flights within the limits of endurance of most travelers. Consequently where non-stop service is available, any stop may represent an interest in the way station, and perhaps simply passing through customs ought to constitute a stopover. But a definition allowing stops for only a few hours to be classified as stopovers would offer too great an opportunity for evasion of the requirement that the country have some contact beyond the interest in the transportation itself. Yet because a tourist may spend two days or less in several countries on a tour, the duration of a stopover cannot be very long. Twenty-four hours, though arbitrary, appears to accommodate all but the shortest of tourist stops and provides sufficient interruption to deter use for through traffic. It would not be necessary to require a stay long enough to ensure that the traveler would have visited the country regardless of the frequencies offered. A stay of twenty-four hours indicates some desire to visit or do business in the country and would provide sufficient contact.

IV. THE DISADVANTAGES OF UNILATERAL ACTION

Should the Civil Aeronautics Board be successful in its attempt to establish its power to control capacity, other nations would be encouraged to be less hesitant about acting unilaterally to protect national carriers from competition. At present international aviation problems are dealt with in a narrow perspective with national flag lines seeking government protection whenever threatened with commercial setbacks.

This tendency was especially noticeable when jet aircraft were being introduced. It quickly became clear that even turbo-props could not compete with the jets. In many cases where the national flag line was not yet ready to introduce jets, the government took steps to prevent full-fledged competition by other lines. Italy refused to permit Pan American to fly jets into the Rome airport unless a surcharge was added to the regular fare. Great Britain which had tolerated Pan American one-stop flights from New York to Jamaica under a grandfather-route clause in the Bermuda Agreement suddenly insisted that all passengers change planes at the stopover. They alleged that the operations before the Bermuda Agreement had been different and that the grandfather clause did not cover the present operations.

Unilateral action by the United States to restrict operations of other countries according to an American definition of the fifth-freedom clauses would no doubt invite similar actions by other countries. Thus in Asia and South America it is the American carriers which are criticized for excessive fifth-freedom operations, and the favored local interpretation

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71 See, e.g., N.Y. Times, April 1, 1962, § 10, p. 28, col. 1 (BOAC advertisement for sixteen day tour visiting eight countries).

72 The time can only be arbitrary in the absence of empirical data. It may be that tourist or business stops of only a few hours are sufficiently frequent to require a time of only a few hours for a segment destination.


75 See, e.g., Aerolineas Peruanas, S.A., CAB, Docket 12714 (complaint that Panagra is carrying excessive fifth-freedom traffic).
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operates to restrict American operations. Unilateral action by the CAB would encourage countries feeling aggrieved by American operations to retaliate. Regardless of the net effect of such a series of restrictions on the share of the traffic carried by American carriers, such restrictions would curtail the growth heretofore enjoyed by American carriers.

The precedent of unilateral interpretation of the bilateral agreements would have further serious consequences if other nations sought to develop restrictions based on a theory of regional cabotage. International traffic, the basis of the commercial rights granted in Articles Two and Ten, is not defined and could easily be interpreted to exclude traffic within the region. The possibility of organizing air traffic within some regions as a unit has been discussed, but it would seem that any reorganization along regional lines ought to be the subject of negotiations in which the United States can receive other compensating advantages if the commercial rights must be yielded.

One advantage of the bilaterals is thought to be flexibility for each agreement can be tailored to the individual needs of the signatories. In attempting to impose its definition upon all carriers simultaneously, the CAB is creating a united opposition and ignoring the advantages of a case-by-case development of a new principle. Any agreed definition of fifth-freedom traffic, whether it is that proposed by the CAB or one similar to the construction suggested in this article, should be developed by amendments to the bilaterals making explicit the meaning to be attached to Article Ten.

The United States will probably be under continuing pressure to grant increased landing rights, for which it has had little to ask in exchange in the past. Such negotiations would seem an appropriate place to insist on the insertion of a definition of fifth-freedom traffic which recognizes the four interests in an intermediate segment but which excludes carriage where the only national interest is in the carriage itself. It has been reported that the United States has offered to exchange landing rights on the West Coast, requested by Alitalia and KLM, in return for acceptance of the straight American interpretation. As of yet there is no indication that either has accepted. In the long run, the advantages of the new stops and the pressure of direct capacity discussions may lead to acceptance. In the meantime the rejection of the United States offer itself relieves some of the pressure on American aviation. If the CAB feels that unilateral action must be taken in retaliation for similar restrictions on American carriers or if the violations of one carrier are so serious as to outweigh

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77 See Hearings on International Air Transportation Problems, supra note 53, at 7-8. Either party can, of course, force negotiations by denouncing the treaty, but the United States has never seemed to feel such a course was advantageous.
78 See Aviation Week, April 24, 1961, p. 38 (proposed offer to KLM); id., June 26, 1961, p. 45 (offer to Italy).
79 The first attempt at adjusting disagreements through direct negotiations, made with the Scandinavians, was unsuccessful. Testimony of Joseph C. Watson, pp. 7-8, CAB Investigation.
80 See Task Force 111: "Among these are rights to populous metropolitan areas in the heart of the country which not only result in increased competition with U. S. international operations, but also dilute domestic trunkline business. Every transpolar route grant from the West Coast to Europe represents some drain on U. S. transcontinental business."
81 See Rebuttal Exhibit BC-2, pp. 2-3, CAB Investigation.
the disadvantages of unilateral action, they could initiate unilateral action to amend the particular permit as appropriate for the individual case.a

a The CAB, in justifying the possibility of unilateral action, has noted the unfairness which results when a foreign government restricts an American carrier or delays approval of changes in the carrier's operations. Even if the difficulties are eventually resolved by negotiation, the American carrier is restricted during the interim while the foreign carrier is not. Testimony of Joseph C. Watson, p. 6, CAB Investigation; see Hearings on International Air Transportation Problems, supra note 53, at 24. The arguments for quick action are strongest in such a case, but the proposed conditions are not phrased restrictively and permit summary imposition of capacity limitations in any case. See Proposed Reg. 213, 26 Fed. Reg. 796 (1961). The need for prompt action is not so apparent when a carrier is thought to be offering excess capacity or carrying an undue amount of fifth-freedom traffic, and there seems to be little reason to discard the procedural safeguards afforded by a full hearing and presidential review of the proposed conditions. See Federal Aviation Act §§ 402(f), 801, 72 Stat. 758, 782, 49 U.S.C. §§ 402, 801 (1958).