



KJ05 GRC'S

From the Secretary of State

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Willie Rickett Esq
Private Secretary to the Prime Minister
10 Downing Street
London, SW1

18 March 1983

Dear Willie,

1 Sir Adam Thomson's letter of 15 March to the Prime Minister follows up his earlier visit to Mr Whitelaw, as a result of which I wrote to Michael Scholar on 8 March and circulated a relevant background note (which you may now feel should be shown to the Prime Minister).

2 The second round of consultations with the United States government mentioned in my letter of 8 March took place in Washington on 15 and 16 March. The United States government will consider the points put to them and will let us know their conclusions, probably about the middle of next week. If they are minded to proceed with the Grand Jury Investigation, we shall get a week's notice before they take the first formal steps by issuing subpoenas. The Department of Justice (DoJ), with its concern for United States law enforcement, is still running the show at the United States end, and we are proceeding on the assumption that as things stand the Department of Justice will be telling us that they intend to proceed with the fact-finding stage of the Grand Jury investigation in relation to all or most of the allegations before them. There will be further opportunity for us to express our interests if, after the fact-finding stage, the DoJ are minded to proceed with indictments. But the initiation of Grand Jury proceedings would itself be demanding and could also encourage further civil suits against the airlines.

3 If the DoJ cannot be deflected, there are major implications for our airlines and for Government policy. Sir Adam Thomson's concern is both natural and justified. The massive penal damages which could at worst arise from a combination of criminal and civil treble damage proceedings in the United States could destroy British Caledonian Airways (BCal), who are already faced with heavy legal costs in the civil action. BCal have firmly assured the Prime Minister in paragraph 2(c) of Sir Adam's letter, that they have engaged in no conspiracy; and we agree with his comment (paragraph 2(d)) that United States anti-trust suits are in themselves a serious and worrying matter almost irrespective of

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the innocence or guilt of the defendants. As regards British Airways, the threat of such damages if legal action dragged on could make it virtually impossible to privatise British Airways within a reasonable timescale.

4 Our strategy with the Department of Justice has been to put it to them that since as regards BCal they only appear to be concerned with one specific allegation (that described in paragraph 1(b) of our background note), and since this is already an issue in civil litigation in the courts of both countries, the matter should be resolved by that litigation without Department of Justice intervention. The Department of Justice concern with BA is not with the 1(b) allegation, but with wide-ranging allegations relating to fare fixing (paragraph 1(a) of the background note). Here our position is that airline pricing matters should be dealt with under our bilateral Treaty (paragraph 3 of the background note) and that it is wrong for the United States to act unilaterally in applying their standards of competition law to a jointly regulated industry.

5 We therefore consider that we should do all we properly can to support BCal (and BA). There is a possible presentational difficulty that the Government might be accused of taking sides against the interests of Laker's creditors. The answer is that if anything wrong has been done, there is just and proper remedy available in the English courts; our objection is to proceedings in the United States.

6 Against this background the Prime Minister has two specific requests from Sir Adam Thomson. We agree that a high level representation should be made forthwith to the United States government. Sir Oliver Wright, who has been taking a close personal interest in developments, has recommended this (see Washington Telegrams 664 and 665). He considers that the first step should be a personal message from Mr Pym to Mr Shultz, following up an earlier conversation between them. Sir Oliver's suggested text seems to us, subject to minor points, to strike exactly the right note. Although Sir Adam suggests that the Prime Minister should intervene with the President now, we feel that this approach should be held in reserve, not least because there are delicacies in intervening in what the United States see as a matter of enforcement of their domestic law. (Moreover, the Prime Minister is already sending another message to the President on agricultural problems.) The recommendation of Trade and FCO officials (which Mr Sproat endorses) is therefore that, subject to the view of the Prime Minister and Mr Pym, the immediate intervention

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Mr Pym
and
Lord
Cockfield
agree.
MCS



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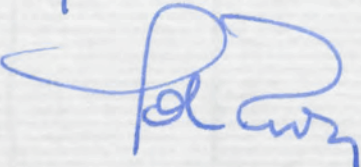
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should be made by Mr Pym on the lines recommended by Sir Oliver Wright (this will need to be done on Monday 21 March). When Lord Cockfield returns from an overseas visit on Monday, we shall ask him to consider a similar message to the new United States Secretary for Transportation.

7 As regards a possible intervention by the Attorney General in the High Court in support of BCal's requested injunction, we understand that this has been considered earlier today and that the Attorney General has informed the Prime Minister of his view that the best way to assist is to write to the Judge offering to intervene if that would be helpful to the Court.

.... 8 On the basis that the Prime Minister accepts the view that our airlines need our full support, I attach a draft reply to Sir Adam Thomson.

9 I am copying this to Roger Bone (FCO) and to Henry Steel (Attorney General's Office).

Yours sincerely,


JOHN RHODES
Private Secretary

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DRAFT LETTER FOR THE PRIME MINISTER TO SEND TO:

Sir Adam Thomson CBE
Chairman
British Caledonian
Caledonian House
Crawley
Sussex
RH10 2XA

Thank you for your letter of 15 March. I share your concern about the potentially serious damage to your interests, and indeed Government interests, posed by current and possible future action under United States anti-trust laws.

We and

has sent

Francis Pym ~~will be~~ sending a personal message of concern to Mr Shultz; and your legal advisers will doubtless have told you that the Attorney General has written to the judge here offering to give assistance to the Court if required.

Arthur Cockfield in particular is keeping a close watch on the position as it develops. *We are doing all we can to help.*

END

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QRS 570
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DESKBY 171700Z
FM WASHINGTON 171545Z
TO IMMEDIATE F C O
TELNO 664 OF 17 MARCH 1983.

YOUR TELNO 413

BRITISH AIRLINES: US ANTI-TRUST ACTION

1. IT IS CLEAR TO ME, FROM THE ACCOUNTS I HAVE HEARD FROM OUR PEOPLE WHO TOOK PART IN THIS WEEK'S TALKS, THAT THE JUSTICE DEPARTMENT OFFICIALS THINK THEY ARE ON TO A WINNER AND THAT THE OFFICIAL IN CHARGE SEES AN OPPORTUNITY TO MAKE HIS REPUTATION. I MAY BE DOING SEIDEN AN INJUSTICE, BUT AMBITION WOULD SEEM TO COMBINE WITH DUTY IN ENCOURAGING HIM TO LET THE LAW TAKE ITS COURSE THOUGH THE HEAVENS FALL. DESPITE YOUR INTERVENTION WITH SHULTZ ON THE WEST COAST AND MINE WITH WALLIS EARLIER THIS WEEK, THE STATE DEPARTMENT HAS BEEN UNABLE OR PERHAPS UNWILLING TO CONVINCE THE JUSTICE DEPARTMENT THAT THE ISSUE SHOULD BE SORTED OUT UNDER THE BILATERAL AVIATION AGREEMENT.
2. KNIGHTON WILL HAVE A BETTER FEEL FOR THE NEGOTIATING SITUATION THAN I HAVE, BUT IT SEEMS TO ME THAT, IF ANYTHING, ATTITUDES HERE HAVE HARDENED. WE HAVE BEEN LISTENED TO WITH COURTESY BUT WE HAVE NOT CARRIED CONVICTION. IF THAT IS SO, THE GRAND JURY INVESTIGATION IS LIKELY TO BE LAUNCHED QUITE SOON. WE HAVE BEEN GIVEN A WEEK'S NOTICE. THE INVESTIGATION COULD THEREFORE BE SET IN TRAIN AS EARLY AS THE WEEK BEGINNING 29 MARCH.
3. THE QUESTION IS WHAT, IF ANYTHING, WE CAN DO ABOUT IT. AS I SEE IT, WE HAVE TWO DIFFICULTIES: ONE IS THAT WE HAVE A POOR CASE IN AMERICAN LAW: THE SECOND IS THERE IS LITTLE WE CAN OFFER THE AMERICANS IN EXCHANGE FOR THE ABANDONING THEIR ANTI-TRUST CASE, EXCEPT THE PROSPECT OF NOT ADDING ONE MORE ROW TO THOSE ALREADY IN PROSPECT (FARM SURPLUSES, EXPORT CONTROLS ETC). FURTHERMORE, ALTHOUGH WE CANNOT BE CERTAIN OF THE EVIDENCE THAT WILL BE ADDUCED TO THE JURY OR OF THE JURY'S REACTION, THE WORST CASE SCENARIO LOOKS PRETTY HORRIFIC. ANTI-TRUST IS AN AMERICAN RELIGION AND SHULTZ (AND EVEN THE PRESIDENT) MAY BE UNWILLING TO SEEM TO BE TRYING TO DIVERT THE CAUSE OF AMERICAN JUSTICE. THE FACT THAT WHAT THE BRITISH COMPANIES ARE ACCUSED OF DOING IS NOT A CRIMINAL OFFENCE UNDER BRITISH LAW CUTS NO ICE : BA AND BCAL ARE EXPECTED TO OBSERVE US LAW ON US TERRITORY.
4. I HAVE OF COURSE CONSIDERED WHETHER TO ADVISE CONSULTATION WITH THE OTHER US AIRLINES INVOLVED: BUT ON THE WHOLE I THINK THAT MIGHT BE COUNTER-PRODUCTIVE.

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[This is obviously garbled]

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5. THE BEST SUGGESTION I CAN MAKE IS THAT YOU SHOULD CONSIDER ADDING A WRITTEN MESSAGE TO YOUR ORAL WARNINGS TO SHULTZ. PERHAPS LORD COCKFIELD SHOULD REINFORCE IT WITH ONE TO DOLE. AT THIS DISTANCE, I AM NOT SURE WHAT VIEW YOU AND YOUR COLLEAGUES TAKE OF THE PROSPECTS FOR THE CASE AND THEIR POLITICAL REPERCUSSIONS BOTH DOMESTICALLY AND ON THE ANGLO/AMERICAN RELATIONSHIP. QUITE CLEARLY WE ARE GOING TO GET NOWHERE ON THE OFFICIAL LEVEL. THE ONLY HOPE IS TO APPLY POLITICAL PRESSURE ON POLITICAL GROUNDS. IN THE BELIEF THAT AN OUNCE OF HELP IS WORTH A TON OF ADVICE, I HAVE TRIED MY HAND AT A COCKSHY DRAFT IN MY IFT. ON THE TIMING, THE QUICKER THE BETTER, IF POSSIBLE BEFORE THE DOT TAKE THEIR DECISION TO PROCEED. THIS MEANS A MESSAGE ON MONDAY 21 MARCH. IN ADDITION, MR PETER REES WILL BE IN WASHINGTON AT THE END OF NEXT WEEK ON OTHER BUSINESS AND WILL BE ABLE TO REINFORCE ANY MESSAGE YOU AND LORD COCKFIELD CHOOSE TO SEND.

FCO PLEASE ADVANCE TO KNIGHTON (DOT).

WRIGHT

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NAD
MR THOMAS
MR ADAMS
SIR IAN SINCLAIR
MREVANS

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MR HEALEY } IAT DOT
MR KNIGHTON }
MR AUST LEGAL ADVISER

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DESKBY 171700Z
FM WASHINGTON 171547Z
TO IMMEDIATE FCO
TELEGRAM NUMBER 665 OF 17 MARCH 1983

MIPT
BRITISH AIRLINES: US ANTITRUST ACTION: DRAFT MESSAGE TO
MR SHULTZ

MESSAGE BEGINS

WHEN WE MET IN CALIFORNIA I MENTIONED MY CONCERN ABOUT THE INVESTIGATION WHICH THE US DEPARTMENT OF JUSTICE WERE PROPOSING TO LAUNCH INTO THE ACTIVITIES OF BRITISH AND OTHER AIRLINES WHICH ALLEGEDLY HELPED BRING ABOUT THE BANKRUPTCY OF LAKER AIRWAYS.

WINCE THEN OUR OFFICIALS HAVE HAD TWO ROUNDS OF TALKS, AT WHICH OUR PEOPLE ARGUED STRONGLY THAT THE RIGHT WAY TO SORT OUT ANY PROBLEMS WAS THROUGH THE MACHINERY OF OUR BILATERAL AVIATION AGREEMENT (QUOTE BERMUDA II UNQUOTE).

I WAS DISAPPOINTED TO LEARN THAT OUR ARGUMENTS HAVE NOT YET BEEN ACCEPTED.

I DO NOT WANT TO GO OVER THEM AGAIN. BUT I FEEL BOUND TO SAY THAT I SEE A REAL RISK OF UNDERMINING THE BASIS OF TRUST WHICH HAS HITHERTO ENABLED US TO MANAGE OUR AVIATION RELATIONSHIP SUCCESSFULLY DESPITE OUR PHILOSOPHIC DIFFERENCES. MOREOVER, THE LEGAL PROCEEDINGS COULD - IN THE WORST CASE AND IF HMG DO NOT TAKE REMEDIAL ACTION - LEAD TO THE BANKRUPTCY OF OUR MAJOR PRIVATE AIRLINE AND DAMAGE TO OUR STATE AIRLINE WHICH MIGHT EFFECTIVELY PREVENT ITS PRIVATISATION AN OBJECTIVE TO WHICH HMG IS PUBLICLY COMMITTED. I DO NOT NEED TO UNDERLINE THE POLITICAL IMPACT THIS WOULD HAVE IN BRITAIN AND IN CONSEQUENCE ON ANGLO AMERICAN RELATIONS. IT IS BECAUSE SEE POTENTIALLY VERY SERIOUS TROUBLES AHEAD IF THE JUSTICE DEPARTMENT PROCEED WITH THE ACTION, THAT I AM ASKING YOU TO SEE IF YOU CAN INTERVENE BEFORE IT IS TOO LATE.

FCO PASS ADVANCE TO KNIGHTON (DOT)

(ADVANCED AS REQUESTED)

WRIGHT

LIMITED
MAE
NAI
MR THOMAS
MR ADAMS
SIR I. SINCLAIR
MR EVANS

COPIES TO:
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MR HEAKEY } IAT, D.O.T.
MR KNIGHTON }
MR AUST, LEGAL ADVISERS

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10 DOWNING STREET

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Prime Minister

Yours There is an account
of what we are trying to do
to help at Nag A.

MUS 22/3

It is very serious for
us must do every thing
possible
M.I.



cc PS/PUSS
PS/Secretary
Mr Beckett, Sols
Mr Sunderland, OT 2
Mr Blanks, CAP
Mr Healey, OT 2
Mr Bourke, OT 2
Mr Fortnam, IAT

From the Secretary of State

Michael Scholar Esq
Private Secretary to the Prime Minister
10 Downing Street
London, SW1

March 1983

Dear Michael,

UNITED STATES GRAND JURY INVESTIGATION OF NORTH ATLANTIC
AIR TRANSPORTATION

1 Colin Walters copied to you his letter to me of 1 March referring to a meeting at which Sir Adam Thomson had expressed his concern to the Home Secretary about recent developments in the United States affecting British Caledonian.

2 You may like to know that the talks last week between the United States Justice Department and Department of Trade and FCO officials referred to by Sir Adam resulted in agreement to hold a further round of consultations in Washington on 15 March and that in the meantime no subpoena will be issued. In view of Sir Adam's concern, the Prime Minister will also be reassured to know that had the talks failed, contingency arrangements had been made for Lord Cockfield, who is taking a close interest in this matter, the Foreign Secretary and our Ambassador in Washington to intercede with the United States government.

3 The Attorney General will have noted that the note by British Caledonian which Sir Adam Thomson handed to the Home Secretary sought an intervention by the Government in the civil litigation in the High Court in which BCal have sought an order restraining Laker from proceeding with the prosecution of his civil antitrust suit in the United States. There is to be a hearing on 21 March. Such an intervention could, of course, only be by the Attorney General, who did intervene a few years ago in the antitrust litigation by Westinghouse against RTZ (the uranium case). However, since Sir Adam spoke to the Home Secretary, British Airways and BCal have obtained some further interim relief from the courts and for the moment they are not pressing the question of an intervention. The airlines have not so far established grounds on which the Attorney General could be asked to consider an intervention - this is not like the uranium case, a straightforward extraterritoriality matter. We shall, however, keep this aspect under review.

4 Although the United States Department of Justice have been headed off for the moment, the issue is indeed potentially serious, both as regards the implications for our airlines and United States/United Kingdom government relations, and it is too soon to predict the outcome.



From the Secretary of State

5 I enclose a background note, primarily for the Attorney General's use, but which you, Roger Bone and Colin Walters, to all of whom I am copying this, may also like to see - though I do not suggest you should trouble the Prime Minister with it at this stage. I am copying this also to James Nursaw (Attorney General's Office)

Yours sincerely,
John Rhodes

JOHN RHODES
Private Secretary

GRAND JURY INVESTIGATION OF NORTH ATLANTIC AIRLINE OPERATIONS

The projected US Grand Jury investigation of North Atlantic airline operations has to be seen against the background of the private one billion dollar treble damage anti-trust suit launched a few months ago in the United States courts by the Laker liquidator, undoubtedly prompted by a US law firm which previously handled Laker's affairs in the US. The allegations in this suit are (a) conspiracy by Pan Am, Trans World Airways and British Airways to adopt pricing policies designed to drive Laker out of business and (b) collusive pressure by international airlines including British Caledonian, on McDonnell Douglas to withdraw from a financial rescue package and thereby precipitate Laker's downfall. Since this suit was launched there has been something of a tug of war between the US District Court of Washington DC and the English court, as to jurisdiction. The Midland Bank, who were threatened by the liquidator with being joined in the US case, have obtained an interim injunction preventing this pending trial of the issue in the UK; Mr Justice Parker in granting the injunction commented in scathing terms on the allegations in relation to the Midland Bank. The two British airlines have succeeded in obtaining temporary injunctions preventing the liquidator from proceeding further in the US Court: a hearing on whether these injunctions should be continued pending trial of the issue in the UK is set for 21 March. The airlines' case on the issue of jurisdiction is that the claim of the English court is superior and that pursuit of the claim in the English court would avoid offensive elements of US law, including the contingency fee system, the treble damages aspect, the discovery process and the inability of a successful defendant to recover his costs from an unsuccessful plaintiff. When the Midland Bank injunction

was obtained the Bank of England supported the case with an affidavit setting out certain public policy arguments; rather different public policy arguments may be valid in support of the airlines' case on the allegations relating to fares.

2 The decision of the US Department of Justice (DoJ) to launch a Grand Jury criminal antitrust investigation, appears to derive from the private suit. There is one new alleged mischief - namely a conspiracy by BA, Pan Am, TWA and Laker to fix fares in the period when Laker was successfully operating. Despite probing, the DoJ have been reserved about the nature of their information about these allegations and we have reached no view about their validity as regards the facts. (Note: We have agreed with the Department of Justice that the content (as distinct from the fact) of their consultations with us will be treated in the strictest confidence: any leakage, especially of the allegations, to the airlines would seriously damage our ability to influence the course of US action).

3 None of these allegations entails extraterritoriality: broadly speaking, the US has a claim to territorial jurisdiction. However, in our view airline pricing arrangements are governed by a bilateral treaty (the Bermuda 2 Air Services Agreement) and against that background there are strong arguments against the unilateral action, entailing possible criminal sanctions, proposed by the US Government. There are also wider arguments, which apply equally to the non-pricing allegation, relating to the appropriateness of the US Government narrowly pursuing

anti-trust cases, especially on the basis of criminal sanctions, without proper regard for international considerations.

4 There are therefore treaty and other grounds why the DoJ should not proceed in this way; two of the three allegations are in any event being pursued in private litigation. The implications for our airlines are wide ranging and grave not only in the Federal antitrust proceedings but also because of the way in which these could encourage further private treble damage suits; and in the political context (pipeline etc) there could be another serious case of US antitrust enforcement harming UK/US relations.

5 It has been made clear to the US that HMG is fully prepared to consider valid US concerns constructively on a bilateral inter-governmental basis. The further discussion will be pursued firmly, but the Department of Justice enjoys considerable independence on matters of antitrust enforcement and the outcome cannot be predicted at this early stage.

Department of Trade

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