

Legal Proceedings today

C O N F I D E N T I A L

Department of Transport, 26/6
2 Marsham Street,
London, SW1.

26 June 1983

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MUS 27/6

Dear Michael,

US Anti-Trust Actions Against British Airlines

The Prime Minister asked for an account of recent developments in the aviation anti-trust cases, leading up to the strongly expressed US objections to the use of the Protection of Trading Interests (PTI) Act recorded in Brian Fall's letter of 24 June. A note on this cleared with FCO officials is enclosed; they will submit it to Sir Geoffrey Howe.

My Secretary of State suggests that the following points are important in this.

- (a) British Caledonian (BCAL) are in grave danger from the treble damage suit brought by the Laker liquidator in the United States. So are British Airways, with the risk of substantial penalties; and even if they were ultimately successful in their defence, the possible long duration of the proceedings could effectively prevent privatisation during this period. The only possibility that has been suggested that could prevent this suit proceeding would be if the Court of Appeal, now on Monday 4 July, reverse Mr. Justice Parker's judgement and enjoin the liquidator not to proceed with his suit. The Attorney General considered such a reversal improbable without the timely use of the PTI Act. It was unanimously agreed at the meeting called by the Foreign Secretary with Mr. King, Mr. Channon and the Attorney General that the Act should therefore be used, to express in English law our Government's position in the dispute with the US Government over the application of US anti-trust law to airline tariffs covered by the Bermuda 2 Agreement.
- (b) We should have had trouble with the Americans whenever the PTI Act was used, because they want us not to use the Act, and not to resist actions by them, which we consider contrary to our aviation treaty. We could not agree to this. And a consideration against delay in the use of the Act was the need for this action to be taken a reasonable period before the Court of Appeal hearing if we were to avoid criticism that we were prejudicing the rights of the parties.
- (c) The American negotiators in the Departments of State and Justice had four weeks (23/24 May) notice of the likelihood that we should need to use the Act. They had a week's notice (16 June) of the nature of the measures, including in particular the application to UK airlines in the US (considered by the lawyers essential to the measures' effectiveness in relation to the issues in the

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Court of Appeal). In consequence of views they then expressed it was decided that the S.1 Direction should not apply to US airlines. The Americans have been repeatedly assured that we should not let the use of the Act affect any of the commitments which we made under the "non-paper" (though it could hinder their investigations in the respects where we have given no commitment). The prohibitions we have imposed under the PTI Act are not absolute: the Secretary of State may give consent to relaxations. (This is a point the Americans continually disregard.)

- (d) The timing of the making of the Order was derived from the timing of the Court of Appeal hearing on 4 July, as noted above. The coincidence of timing with Vice President Bush's visit was clearly unfortunate and my Secretary of State has asked for a full report on how he was not advised of this visit prior to the making of the Order. When the US request, through Sir Oliver Wright, for a delay in the announcement of the measures because of the Bush visit was received on Thursday 23 June the Order had already been made. The legal advice was clear that the only way in which it could be cancelled, amended or delayed was by an additional Order, with both Orders required to be laid before Parliament. This would clearly have caused other difficulties. It was then agreed that the laying of the Order and the announcement should be deferred until late on Friday after the Vice President's discussions with Ministers; and that the Foreign Secretary would, as advised by Sir Oliver Wright, personally explain our reasons for this action to the Vice President before publication. It was also agreed that in the background briefing it would be made clear that the action was not intended as an escalation of the dispute and should not be interpreted as meaning that consultations had broken down. This low key presentation was well reflected in yesterday's British press.

As agreed with the Foreign Secretary it has been arranged for a team of officials to travel to Washington today for talks tomorrow. Their talks will cover the points being raised in Washington telnos 1765 and 1766 and their first task will be to try to clear up the persistent misunderstandings about our action, and to seek to defuse the issue by repeating our assurances that we stand by the non-paper attempts to find a resolution of these serious differences. My Secretary of State will of course continue to keep in the closest touch with the discussions, in which there is a real clash of interests between American and British positions and in which essential British interests, not least of British Caledonian, are most certainly at serious risk.

I am sending copies of this letter and enclosure to Brian Fall (FCO), Jonathan Spencer (Department of Trade and Industry) and Henry Steel (Attorney General's Office).

Yours,

Grain

MISS D.A. NICHOLS

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10 Downing Street.

PRINCIPAL RECENT DEVELOPMENTS IN THE AVIATION ANTI-TRUST CASES

Monday 13 June

Sir Adam Thomson wrote to the Prime Minister. He expressed satisfaction with the negotiations with the US Government over the Grand Jury Investigation. He was concerned about the threat posed by the Laker liquidator's US treble-damage action and asked that, to assist BCAL's attempt in the Court of Appeal to have this stopped, the Government should use the Protection of Trading Interests (PTI) Act and that the Attorney General should appear in the Court of Appeal in support of BCAL and British Airways. These proposals reflected knowledge of what was already being considered by Departments.

Thursday 16 June

The Secretary of State for Transport wrote to the Secretary of State for Trade and Industry proposing that the PTI Act should be used on 20 June, for several reasons, but essentially as the only course likely to lead the Court of Appeal (then expected to sit on 27 June) to check the US treble-damage action, which otherwise threatened severe financial damage to BCAL and British Airways. He warned of the risk of criticism in the US. The proposal was copied to the Prime Minister, the Foreign Secretary, and the Attorney General.

Friday 17 June

Mr. Parkinson and the Attorney General conveyed their agreement to Mr. King's proposal. However, initial adverse reaction by the US officials to the prospect of the use of the Act was then received, together with Sir Oliver Wright's comment that if action was taken there could be a risk of losing the "non-paper" embodying understandings between the American and British Governments about the handling of the dispute over the Grand Jury Investigation, and other progress made.

On Sir Geoffrey Howe's instructions, this advice was reviewed in the FCO by Mr. Rifkind with officials of the Departments concerned. Mr. Rifkind decided, subject to any further comments of Sir Oliver Wright, to recommend to the Foreign Secretary that the Act should be used. It was noted that it was desirable to sign the Order on 20 June

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in order to avoid any claim of the parties on 27 June that they had not had sufficient time to consider the implications of the Order.

Monday 20 June

A meeting of Ministers chaired by the Foreign Secretary, and including the Secretary of State for Transport, the Minister for Trade and the Attorney General, decided that the PTI Act should be used for the reasons proposed by Mr. King. The meeting decided that the US Government should be told of this decision as soon as possible and that action should be taken as soon as possible thereafter and not later than Wednesday 22 June (based on the Court of Appeal hearing on 27 June). The meeting were informed of the possibility of the Court hearing being postponed by a week to 4 July.

Tuesday 21 June

The hearing was in fact postponed and this information conveyed to officials in the Departments concerned. The Foreign Secretary was not informed by his officials until the evening of 23 June. In view of the postponement the effective date of the Order was replanned for Monday 27 June, to restore the 7 days' notice desired earlier for legal reasons. It was planned that the Order should be made and laid on Thursday 23 June to allow a brief interval before the effective date. Our Embassy in Washington were instructed to give prior warning to US officials on Wednesday 22 June.

Thursday 23 June

Sir Oliver Wright reported by telegrams received on Thursday morning the State Department's reaction and request that the announcement of our action should be delayed, to give time for reactions to cool in Washington and because of Vice President Bush's visit. Later in the morning the US Ambassador in London called on Department of Transport and FCO officials with the further request that the issuance of the Order should be delayed. The Order had however already been signed (before the telegrams were received) preparatory to laying that morning. However action on laying was suspended immediately. Legal advice, however, was that the Order must be laid and could only be cancelled, amended or delayed by a further Order which would also need to be laid, with evident difficulties. Unless such an amending Order were made, it would be necessary to lay the original Order not later than the rising of the House on Friday so that this would be done

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before the effective date of Monday 27 June. Postponement of that effective date would also reduce once again the 7 days interval desired for legal reasons before the Court of Appeal hearing. The balance of considerations pointed to the decision that the laying of the Order and the announcement should be as late as practicable on Friday 24 June and that the Foreign Secretary should be advised to explain personally the reasons for the measures to the Vice President.

These developments and the proposals for handling them were reported in a letter from the Private Secretary of the Secretary of State for Transport to the Private Secretaries to the Prime Minister, the Foreign and Commonwealth Secretary, the Secretary of State for Trade and Industry and the Attorney General.

Friday 24 June

Sir Geoffrey Howe explained our intended action to Vice President Bush on Friday morning, but the latter did not appear to be briefed. It is understood that this was not raised by Mr. Bush at his subsequent meeting with the Prime Minister. Sir Geoffrey Howe sent a personal message to Mr. Shultz early on Friday afternoon giving a full explanation of why we had to take the action. However the US Ambassador called on the Foreign Secretary later that afternoon to convey the strongly worded instruction apparently intended for delivery by Mr. Bush but received too late from Washington. The details were conveyed to No. 10 and other Ministers.

The Order was laid just before the House rose. In non-attributable briefing accompanying the later press announcement, it was emphasised that the action did not represent an escalation of the dispute nor did it mean that consultations with the US Government had broken down.

The Foreign Secretary and the Secretary of State for Transport agreed that a team of officials should travel to Washington for talks on Monday 27 June aimed at defusing the American reactions.

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Extent of Warning to the US about Possible Use of the PTI Act

23/24 May

The US negotiators were told during the negotiations on the "non-paper" that we might need to use the PTI Act as part of our response to the US private treble-damage action. They took this calmly and acknowledged that they had no influence over the US Court action.

12 June

Stevens (D/Transport) again warned Scocozza (State Department negotiator) that we would need to use the PTI Act. Scocozza was not surprised or concerned.

15 June

Seiden (Justice) raised the question of possible use of an Order under the PTI Act and sought and received an assurance that HMG did not intend to use a PTI Order inconsistently with commitments in the non-paper.

16 June

The British Embassy, Washington, warned Seiden (Justice) and Small (State) that the PTI Act would have to be used and explained in some detail what this would entail. Seiden said that he did not want to be drawn into negotiations about the texts (which he was not shown) but warned that any instructions to airlines which interfered with anti-trust processes in the US would be regarded as most provocative in Congress; repercussions might lead to the non-paper being revealed.

22 June

The Embassy called again on Seiden and Scocozza, on instructions, to hand over final texts and explain that the Order had to be made on 23 June (the timing being dictated by the approach of the Court of Appeal hearing in the UK). Seiden and Scocozza reacted much as before. In a separate telephone call Burt (State) said it was particularly unfortunate that we should act on the eve of Vice President Bush's visit to London and requested that we delay announcement of our action.

DEPARTMENT OF TRANSPORT

26 June 1983