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DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB

01-212 3434

1. CF to note
I suggest we wait for X
before making PM.
2. CF

AT 13/11

L V Appleyard Esq
Private Secretary to
the Rt Hon Sir Geoffrey Howe QC MP
Secretary of State for Foreign and Commonwealth Affairs
Foreign and Commonwealth Office
Downing Street
LONDON
SW1

13th November 1984

Dear Len,

AVIATION AND US ANTITRUST: THE "LAKER" ISSUE

My Secretary of State has asked me to circulate for information the attached report by Mr Knighton on the third round of discussions on the Laker problem held last week in Washington.

Mr Ridley has asked me to draw attention to paragraphs 8 and 9 of the report which show that the delegation's brief will need to be reviewed in advance of what may be the final round on this part of the matter next week. Mr Ridley has, of course, kept in close touch with the discussions which have resulted in the outline described at Annex B. However, before commending this to his colleagues he wishes to have the further views of the airlines and the Civil Aviation Authority, which will not be available until later in the week. He does not think that it will be necessary to trouble the Foreign Secretary to take another meeting at this stage. But he is likely to be seeking colleagues' views by letter at fairly short notice, so he thought that they would like to have this forewarning in case there are any matters on which they may wish to take advice before giving their views on the delegates' brief.

I am copying this to Andrew Turnbull (No.10), David Peretz (Treasury), Callum McCarthy (Trade and Industry), Richard Gardiner (Attorney General), and Richard Hatfield (Cabinet Office).

Yours,

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MISS D A NICHOLS

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from: W M KNIGHTON
12 November, 1984

SECRETARY OF STATE

cc PUSS Mr Spicer
Mr Lazarus
Mr Holmes
Mr Stevens
Mr Blanks
Mr Clarke
Mr Fortnam
Mr Oates
Mrs Ramsay

Mr Colegate CAA
Mr Roberts DTI
Mr Ayling DTI
Mr Healey DTI
Mr O'Neill FCO
Mr Gray FCO
Mr Aust FCO
Mr Gardiner Law
 Offs Dept
Mr Burgner Treasury

BE Washington
Sir O Wright
Mr Maynard

AVIATION AND US ANTITRUST: THE 'LAKER' ISSUE

In our third round of discussions with the US about future arrangements we made further progress (see Washington telno 3355 at Annex A). It may be possible in the next round on 19-21 November to complete a package which in itself could be commended to Ministers. On the prospect for indictments there are contradictory signals.

2 At the outset of the discussions we said you were concerned that the US side were trying to expand the outline package to cover a substantial renegotiation of Bermuda 2, which was inappropriate and for which in any case there was no time. Your message to Mrs Dole, which HM Ambassador arranged to deliver on Thursday, backed this up. The US side made a brief stand on the proposition that they needed capacity and market entry liberalisation, as well as fare liberalisation, in order to sell the removal of treble damages to the Congress. But when we resisted this they quickly resumed discussions on the basis of fare liberalisation alone.

3 We got the US side to engage in a practical discussion of the problems they have seen in the 'sum of sector' policy which the CAA apply to fares to and from points behind the gateways, and which we regard as necessary to provide for fair competition with US airlines, and also providing a fare set by competitive market forces. They seemed as a result to understand it better and while they have not yet committed themselves, they may now be readier to accept it. In a bizarre closing discussion, after consulting their airlines, the US side - or at least the aviation experts - seemed to be drawing back and hinting that they might wish for less liberalisation than they had pressed for throughout the earlier discussion.

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4 On the arrangements for requiring transparency of airline discussions on tariffs we concentrated on developing arrangements for consultation on enforcement. Our reasoning is that if the US side feel we are prepared to commit ourselves wholeheartedly to this change of policy, they may be more ready to give weight to this as a factor against indictments; and that consultation arrangements could give us some influence to use against over-harsh enforcement by the US. Mr Seiden (DoJ) to our surprise volunteered that he would also consider as part of the package an 'amnesty' for any past conduct of the airlines (we understood this as not including the Laker issues); we should not yet regard this as a firm proposal, but it was symptomatic of the apparent wish to secure these arrangements.

5 At the finish the US side were talking of completing negotiations and drafting on a future arrangements package by 21 November.

6 On the other hand, in respect of indictments against individuals, the noises from the DoJ are as minatory as ever, though difficult to interpret since the Washington counsel for the individuals seems to have appalling personal relations with the DoJ enforcement staff (see Washington telno 3361, not annexed).

Comment

7 Next week may be an important time in Washington. The US will have to sort out a position, taking account of airline unease about too much tariff liberalisation and Administration hawks on antitrust (eg the Deputy Secretary for Transportation) who may not want to see abolition of treble damages at all.

8 Upsets apart, it seems possible that next week a deal on future arrangements on the lines indicated at Annex B may be attainable. A text embodying such a deal might be agreed in essentials, subject to further consideration of detailed drafting, and ad referendum to Governments. We should envisage deferring our decision until the US had decided on indictments, and until we had then explored what US help on the Laker civil suits might be forthcoming (US contacts agree with our own feeling that it would be counter-productive to discuss this before the DoJ has taken decisions on indictments).

9 However, we cannot expect to renegotiate the deal later if it is struck next week, and we must therefore review our brief before then. We shall be meeting the airlines on Wednesday and will advise you of their views (as you know, they were broadly content when we consulted them after the first round). We should also by then know the views of the CAA Board (Mr Colegate took part in the Washington discussions). You will wish to give your colleagues an opportunity to comment; and in particular you will wish to agree with them on the response to the US request that we should agree not to use the PTI Act to hamper their enforcement of contemplated arrangements for enforcing transparency; I shall be discussing this with DTI officials tomorrow.

10 We will submit further advice after the meeting on Wednesday.

W.M.K.

W M KNIGHTON
Deputy Secretary
S.11/04, 2 Marsham St.
212 3109
12 November, 1984

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Annex A

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FROM WASHINGTON 100023Z NOV 84.

TO IMMEDIATE F C O

TELEGRAM NUMBER 3355 OF 9 NOVEMBER.

MR. KNIGHTON.
DEPT OF TRANSPORT.
2. MARSHAM STREET.

LAKER: FUTURE ARRANGEMENTS.

SUMMARY

1. FURTHER PROGRESS IN A THIRD ROUND OF NEGOTIATIONS. A FINAL ROUND IN LONDON 19-21 NOVEMBER.

DETAIL

2. A THIRD ROUND OF CONSULTATIONS ABOUT NEW ARRANGEMENTS FOR MANAGING THE RELATIONSHIP BETWEEN US ANTI-TRUST LAW AND BILATERAL AVIATION MATTERS TOOK PLACE IN WASHINGTON 8-9 NOVEMBER. UK DELEGATION WAS LED BY KNIGHTON (DTP) AND US DELEGATION WAS LED JOINTLY BY SEINDEM (JUSTICE DEPARTMENT) AND WILLIS (STATE DEPARTMENT).

3. KNIGHTON EMPHASISED AT THE START OF THE MEETINGS THAT, BASED ON HIS REPORT ON THE PROGRESS THUS FAR MADE. HIS MINISTER WAS CONCERNED THAT THE NEGOTIATIONS WERE EXPANDING BEYOND THE ORIGINAL FRAMEWORK. THE CORE OF THE NEGOTIATIONS MUST BE A RESOLUTION OF THE ANTI-TRUST ISSUES. THIS INVOLVED SIGNIFICANT CONCESSIONS BY THE UK CONCERNING THE POLICY TOWARD INTER-CARRIER DISCUSSION OF PRICING AND ON THE US SIDE A COMMITMENT TO ABOLISH THE THREAT OF CIVIL ANTI-TRUST LIABILITY FOR UK AIRLINES. HOW THIS WAS PRESENTED TO CONGRESS WAS A MATTER FOR THE US GOVERNMENT. WE HAD AGREED TO CONSIDER SOME LIBERALISATION OF THE TARIFF REGIME IN ORDER TO ASSIST THIS PROCESS BUT IT HAD NOT BEEN ENVISAGED THAT NEGOTIATIONS WOULD INVOLVE CHANGES IN THE CAPACITY AND ROUTE ENTRY REGIME. THE UK WAS IN NO WAY REPUDIATING THE BASIC FRAMEWORK OF THE NEGOTIATIONS AND WAS READY TO ENGAGE IN SERIOUS DISCUSSION OF A LIBERALISED TARIFF REGIME. BUT 'WHOLESALE RENEGOTIATION OF BERMUDA 2 WAS NOT POSSIBLE'.

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4. ALTHOUGH THE US DELEGATION EXPRESSED CONSIDERABLE DISAPPOINTMENT AND OCCASIONALLY PROBED THE FIRMFNESS OF THE UK POSITION, THE SUBSEQUENT NEGOTIATIONS WERE CONFINED TO THE FRAMEWORK SET OUT IN THE OPENING STATEMENT.

5. ON THE ANTI-TRUST REGIME FOR INTER-CARRIER DISCUSSIONS THE NEGOTIATIONS MADE SOLID PROGRESS. PARTICULAR DEVELOPMENTS OF NOTE WERE:-

(A) THE US, CONTINUED TO PRESS FOR UNDERTAKINGS FROM THE UK CONCERNING RESTRAINT IN THE USE OF THE PTI ACT:

(B) THE US RECOGNISED THE UK CONCERN TO AVOID DOCUMENTS OBTAINED UNDER THE PUBLIC ENFORCEMENT MEASURES BEING USED FOR ANY OTHER PURPOSES (EG SEC, IPS):

(C) IT WAS AGREED THAT ONE OF THE FACTORS INFLUENCING A DECISION TO START A PROSECUTION WOULD BE WHETHER THE OTHER PARTY TO THE AGREEMENT WAS CONTEMPLATING OR HAD STARTED A SIMILAR PROSECUTION.

6. THE DISCUSSION OF TARIFF LIBERALISATION WAS MORE DIFFICULT. THE US RESISTED STRENUOUSLY THE UK VIEW THAT FOR FARES TO AND FROM 'BEHIND POINTS' A SUM OF SECTOR FARE POLICY WOULD BE ESSENTIAL TO PROVIDE FOR FAIR ANDEQUAL OPPORTUNITY. HOWEVER AFTER A DISCUSSION OF PRACTICAL PROBLEMS THAT HAD ARISEN IN THE PAST, THE US DELEGATION INDICATED THAT WITH SOME IMPROVEMENTS IN THE IMPLEMENTATION OF THE POLICY AND SUBJECT TO CONSULTATION WITH US CARRIERS, THE REGIME MIGHT IN FACT BE ACCEPTABLE.

7. ON FARES BETWEEN GATEWAYS THE UK INDICATED WILLINGNESS TO MOVE TO A DOUBLE DISAPPROVAL REGIME SUBJECT TO AN ADEQUATE SAFEGUARD MECHANISM TO PREVENT MARKET DISRUPTION. RIGHT AT THE END OF THE DISCUSSION, THERE WERE SIGNS THAT US AIRLINES WERE BECOMING APPREHENSIVE THAT THE TARIFF REGIME MIGHT BECOME TOO LIBERAL, AND THAT THIS WAS CAUSING SOME DISAPPY IN THE US DELEGATION.

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2. IT WAS AGREED THAT SUFFICIENT PROGRESS HAD BEEN MADE ON THE SUBSTANCE TO ANTICIPATE THAT THE NEXT ROUND OF NEGOTIATIONS IN LONDON COULD PROVIDE A PACKAGE ON FUTURE ARRANGEMENTS. IT WOULD THEN BE FOR GOVERNMENTS TO DECIDE WHETHER THIS, TAKING INTO ACCOUNT OTHER ELEMENTS (IE FOR THE UK THE POSITION ON THE INDICTMENTS AND ON ANY US HELP IN RELATION TO THE CIVIL SUITS) WOULD PROVIDE THE BASIS FOR OVERALL SETTLEMENT OF THE INTER-GOVERNMENTAL ISSUES.

WRIGHT

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES
LIMITED

MAED
NAD
NEWS D
ERD
LEGAL ADVISERS
PS
PS/LADY YOUNG
PS/MR RENTON
PS/PUS
MR BRAITHWAITE
MR J THOMAS
MR O'NEILL
MR DAVID THOMAS

ADDITIONAL DISTRIBUTION
US ANTI-TRUST ACTION
AGAINST BRITISH AIRLINES

COPIES TO:-
MR CARTLEDGE CABINET OFFICE

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FUTURE ARRANGEMENTS: OUTLINE OF SETTLEMENT

Transparency

- 1 British and US airlines may discuss fares and conclude fares agreements with each other and with airlines of third countries flying between Britain and the US, provided that they give advance notice of discussions so that Government observers can attend and that they provide minutes of meetings.
- 2 Britain and the US will both penalise airline discussions and agreements on fares not conducted according to the arrangements at 1. There will be co-operation over enforcement. The UK would not use the PTI Act to hinder enforcement of the agreed arrangements, subject to satisfactory assurances to prevent or limit any wider use of UK located information⁷. There may be a Department of Justice 'amnesty' in respect of any past inter-airline discussions.
- 3 US antitrust law enforcement will not touch airport scheduling committees as such at UK airports. The position on other airline discussions on capacity/scheduling remains to be clarified⁷.
- 4 Discussions between Governments and their own airlines are unaffected by 1-3.

Removal of civil treble damage liability

- 5 Civil treble damage antitrust actions will not be possible against British airlines in respect of their scheduled operations to and from the US.

Liberalisation of arrangements for establishing fares

- 6 Arrangements for establishing fares will be liberalised -
 - a) For fares between the gateway points, airline proposals will be approved unless the Governments agree that they are unfairly low The mechanism for this is still under discussion⁷ or unless the Government of the airline considers them too high.
 - b) Fares to and from points behind gateways will be dealt with as at (a), if they are not lower than the sum of fares with comparable conditions for the transAtlantic sector between gateways and for the sector between the gateway and the behind point (by whatever routing). Fares which are lower than the sum of sectors fare will be treated as at present (which means that either country can ultimately disapprove them).

Interlinking

- 7 All the above would be inter-related obligations. They would come into force when the US passed the necessary legislation. The US would probably make them specific to their overall aviation relations with us being not less liberal than at present.