Presidents and International Aviation

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LAST JANUARY President Carter's decision to give Braniff, rather than Pan American, the right to fly between Dallas/Fort Worth and London revived nagging doubts about the desirability of the President's having final authority on most international aviation matters. Two months later, however, the ability of his negotiators to resolve the major issues in our aviation relationship with the United Kingdom demonstrated why the President should retain that authority.

Section 801 of the Federal Aviation Act makes decisions by the Civil Aeronautics Board on international air routes subject to the approval of the President. Section 801 also authorizes the President to disapprove orders by the CAB rejecting or suspending international fares. This latter power is available only when presidential "disapproval is required for reasons of the national defense or the foreign policy of the United States." But the broader power to approve, modify, or disapprove board decisions on which airline may fly where is not limited in terms of the grounds on which the President may act. In any event the courts have refused to review the President's actions in these cases on the ground that doing so would be an interference with the President's prerogatives in foreign policy.

For thirty years U.S. Presidents have used this authority to modify CAB decisions in international route cases. President Carter's substitution of Braniff for Pan American is only the most recent example. Invariably such actions produce accusations of playing domestic politics with international aviation, and even the most vigorous defender of presidential prerogatives must agree that the record is poor. Consequently, Section 801 is periodically attacked in Congress, and the American Bar Association has urged its repeal or amendment.

The airline regulatory reform bill approved by the House Aviation Subcommittee just before the Easter recess, for example, would expressly prohibit the President from interfering with CAB route decisions "upon the basis of economic or carrier selection consideration." If this bill should become law and if the President should then change a CAB order, presumably the courts would be asked to decide whether he had acted "solely upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction." The "reasons for the disapproval," which the President would be required to state in a public document, might or might not be accepted at face value. Whatever labels the President used, the courts would be invited to find that "economic" rather than "foreign relations" considerations were the basis for his decision. And international aviation decisions are not readily divisible into "economic" and "foreign relations" pigeonholes.

Given the President's traditional and proper (albeit statutorily vague) authority to negotiate the basic bilateral air transport agreements with foreign governments, the story of the March negotiations shows how shortsighted it would be to exclude economic considerations from the President's jurisdiction. The CAB was able to provoke a confrontation on Texas-London service, but ultimately someone had to negotiate the several issues with the British government, and that someone had to have the final say on the U.S. side if the negotiations were to be fruitful.

A brief review of what happened: One of the most glaring shortcomings of Bermuda II, the bilateral air services agreement signed by the United States and the United Kingdom last July, was its failure to cover nonscheduled—charter—service (see my "Carter Administration Stumbles at Bermuda" in *Regulation*'s January/February issue). The two countries did agree to further negotiations on charters, and an interim memorandum of understanding was kept in effect until the end of March

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1978. But otherwise the charter operators were left out in the cold. And in the United Kingdom, the reception for U.S. charter operators—both the scheduled carriers that also provide charter service and the "supplementals" that offer charters only—was chilly indeed. Little wonder, then, that the promised negotiations went nowhere except back and forth between London and Washington for six months.

Meanwhile the British rejected proposals from Pan American and TWA to initiate certain low fares on scheduled service to London from a dozen American cities *other* than New York (where Mr. Laker's Skytrain has already triggered a basket of bargain fares). President Carter had overruled the CAB's rejection of those fares, but the British government rejected the lower fares nevertheless.

At that point, the Texas-London situation finally exploded. The CAB had awarded the Dallas/Fort Worth-to-London route to Pan American. (Whichever U.S. airline won the route would have a three-year monopoly—balanced in theory by a British airline's having a three-year headstart for nonstop Houston-London service.) President Carter disapproved the award to Pan American and substituted Braniff on the ground, among others, that it is desirable to introduce to the international routes a number of regional carriers that will offer innovative low fares. Braniff promptly proposed a low-fare package which the board approved, but again the British refused.

Back at the ranch, British Caledonian, a nongovernmental airline, had already started to provide Houston-London service at traditional fares approved by both governments. When Braniff's low fares were rejected by the British, the CAB found that action to be in violation of the letter and the spirit of Bermuda II's low-fare language: "individual airlines should be encouraged to initiate innovative, cost-based tariffs." So it suspended British Caledonian's higher fares, authorized British Caledonian to offer Braniff's lower fares, but suspended its right to operate Houston-London at all as long as the British prevented Braniff from offering low fares from Dallas.

British Caledonian announced it would continue flying at the traditional fares and prepared to attack the board's order in court.

Since the British government's delegation had just arrived in Washington to resume the charter negotiations, President Carter wisely asked the CAB to withdraw its sanctions against British Caledonian in the hope that agreement could be reached on all outstanding issues. The fact that he had authority under Section 801 either to disapprove the board's order or to let it go into effect meant that his negotiators were in a position to resolve all the issues on the U.S. side.

The British negotiators were confronted with the following situation: the CAB had said that the U.K.'s decision on Braniff and the other low fares violated Bermuda II; the President had agreed that rejection of the Braniff fares was "inconsistent" with Bermuda II and had stated that unilateral U.S. action would be considered if a satisfactory resolution consistent with Bermuda II was not reached in the negotiations; and there were rumblings in Congress and elsewhere to the effect that the United States should renounce Bermuda II if the British did not show themselves more responsive to our interest in establishing a more liberal charter regime. The British were also confronted by the fact that we had just negotiated with the Dutch a new bilateral agreement containing liberal charter provisions.

Under these pressures the British (1) withdrew their objections to Braniff's and the other transatlantic carriers' low fares and (2) signed an agreement on charters that goes a long way toward establishing liberal conditions for charter operations. Thus, the charter gap in Bermuda II was closed (except for cargo charters, which were settled in April) and the "innovative, cost-based tariffs" language of Bermuda II was invoked.

The President's final authority on routes and rates was essential in achieving this result. It would be hard to establish that his actions on the Braniff rates and British Caledonian sanctions were taken solely for reasons of "foreign relations" as distinguished from "economic or carrier selection considerations" (to quote the House bill). If the CAB had had the final authority, it is difficult to see how the impasse could have been resolved except in the courts—and then only after lengthy litigation. Surely it must be evident that the power and ability of the President to control all aspects of U.S. policy were critical to the satisfactory and amicable result, achieved with a minimum of disruption in air service. ■