

CF/HC



Foreign and Commonwealth Office

London SW1A 2AH

23 June 1983

*MR 24/6
f.a.*

Dear John,

US Anti-Trust Action against British Airlines

MCS?

As you will have seen from Dinah Nichols's letter of 23 June to Jonathan Rees, the Secretary of State for Transport has recommended, in the light of advice from Sir O Wright, that we should not be deflected from issuing an Order and Directions under the PTI Act, but that we should delay action until tomorrow evening. We have therefore prepared a revised brief on the above issue for the Prime Minister's meeting with Mr Bush tomorrow. In the time available it has not been seen by the Secretary of State: a copy is being submitted to him tonight.

Yours ever

John Hales

for

(R B Bone)
Private Secretary

A J Coles Esq
10 Downing Street



DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB

CE N.O.

The Private Secretary to
The Rt Hon Cecil Parkinson MP
Secretary of State for Trade and Industry
Department of Trade and Industry
Ashdown House
123 Victoria Street
LONDON SW1

23 June 1983

Dear Jonathan,

AVIATION ANTI TRUST CASE: USE OF PTI ACT

As you will be aware, Sir Oliver Wright has recommended that we should give the Americans a little more time to digest our decision to use the PTI Act before they have to react to it in public; and in particular that Vice President Bush should if possible not be faced with a fait accompli when he meets the Foreign Secretary and Prime Minister in London tomorrow.

Mr King considers that there can be no question of going back on account of American pressure on the decision which Ministers have taken, and in any event the Order and Directions have been made; but if a short delay in publicising the matter would improve the chances of our action being accepted in the United States, the Secretary of State is willing to agree to a short delay. I understand that now that the Order has been made it must be laid in Parliament before it comes into effect on Monday, 27 June. Since it takes effect immediately after midnight on Sunday it must be laid before Parliament this week; but this can be delayed until as late as possible before the House rises tomorrow.

The Directions must also be published and brought to the attention of the parties within the same timescale.

The parties could be informed late on Friday, and (unless there is any need to deal with a leak) the press release could be held back until late Friday evening or Saturday morning so that the story does not break in public until after the talks with Vice President Bush have taken place.

Unless I hear to the contrary by 10 am tomorrow morning from you or the others to whom this letter is copied, we shall work to this timetable.

I am copying this to the Private Secretaries to the Prime Minister and the Foreign and Commonwealth Secretary, and to the Attorney General's office.

Yours,

Dinah

MISS D A NICHOLS
Private Secretary



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VISIT OF VICE PRESIDENT BUSH: 23/25 JUNE 1983

US Department of Justice Anti-Trust Action Against UK Airlines

Objectives

1. To impress upon Mr. Bush:
 - (a) the serious nature of our current civil aviation dispute;
 - (b) our earnest wish for an amicable settlement and our commitment to the non-paper as a means of achieving it;
 - (c) our readiness still to go to arbitration if all else fails;
 - (d) why we had to use the PTI Act now;
 - (e) that the Order and Directions under the PTI Act had been signed but publication delayed until the end of this week to allow clarification of any American queries.

2. To urge Mr. Bush to see that our position is clearly understood in Washington.

POINTS TO MAKE

General Dispute

1. This is a matter of serious concern to HMG, as it calls into question Bermuda 2 and could adversely affect the future of our airlines. We are naturally bound to defend our broad interests and those of our airlines.

/Non-Paper

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Non-Paper

2. Welcome the London agreement on arrangements for dealing with the dispute (the non-paper) which we see as a major step forward. Convinced that with continued goodwill on both sides these arrangements should lead to a mutually satisfactory settlement.

PTI Act: Why use it?

3. BA and BCal face civil suit in the US brought by Laker liquidator. This could seriously damage both companies (up to \$1 billion in triple damages). In our view US anti-trust law is superseded by Bermuda 2 in matters covered by the latter. By using the PTI Act as proposed we aim to make our position manifest in UK law.

4. There is considerable political hostility in the UK to US claims of jurisdiction in what is seen as essentially a British affair. It would attract criticism in view of the Government's known position if there was any failure on the part of the Government to take the next logical and necessary step of using the PTI Act.

PTI Act: Why now?

5. On 4 July the Court of Appeal is due to hear BA and BCal's application for an injunction restraining the Laker liquidator from pursuing his civil suit in the US courts. Our lawyers believe that we must give all parties to the court hearing at least one week's warning of the PTI Act.

PTI Act: Why apply to UK located documents?

6. Because Laker liquidator has asked Civil Aviation Authority for documents to use in the US court.

/PTI Act: Why so broad?

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PTI Act: Why so broad?

7. To restrict the action to Laker would have been discriminatory; ^{not} to have mentioned Bermuda 2 would have omitted basic principle of our policy; and to restrict the action to the UK would not have affected Laker's suit in the US civil court.

8. Just as the DOJ have explained their investigation into our airlines was an inevitable consequence of American law and policy, so our resort to the PTI Act is similarly inevitable and equally rooted in our own laws and policy.

PTI Act: Extra-Territoriality in reverse?/Ordering UK firms to violate US law?

9. No. Because we believe that Bermuda 2 excludes the application of US anti-trust to matters regulated under the agreement. NB. The Order and Directions do not apply to US airlines in the US.

PTI Act: Why no notice to the US Government?

10. Department of State and Department of Justice officials were told of our intentions four weeks ago during negotiations of the non-paper. On 16 June British Embassy officials discussed in great detail with US officials our intentions in respect of the PTI Act, i.e. to strengthen the British airlines' position in the civil suits by safeguarding in UK domestic law British rights under Bermuda 2. They were assured that this was not meant to undermine in any way the understandings set out in the non-paper to which we remain firmly committed. Further explanations were given to US officials on 22 June, and copies of the texts handed over.



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11. The Order and Directions were signed early on the morning of 23 June and thereby became law. Nevertheless, in response to your Ambassador's *démarche* yesterday we have delayed publication until this evening. This should have allowed time to answer any questions your officials may have and to convince them that we are not seeking to escalate the situation or to renege on the non-paper but we cannot delay publication beyond this evening if the Order is to go into effect on 27 June.

Conclusion

12. In our mutual interest that this dispute should not escalate out of control, both sides need to continue to manage the dispute with care. Hope Mr. Bush will use his influence to ensure this.

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US Department of Justice Anti-Trust Action Against UK Airlines

Background

1. A one billion dollar civil (treble damage) action has been brought by the Laker liquidator in the US District Court against British and other airlines; and a criminal Grand Jury investigation has been launched by the Department of Justice (DOJ) as a possible preliminary to criminal indictments and proceedings. An adverse result to either of these would almost certainly encourage further civil treble damage suits.
2. HMG have opposed the DOJ action as an unacceptable unilateral exercise of US domestic law (for which there is no equivalent in English law) against activities jointly regulated under our bilateral air services agreement (Bermuda 2).
3. In the face of UK determination to take the dispute to international arbitration the US delegation moderated their stance and agreed to a 'non-paper' setting out procedures which should help defuse the dispute at governmental level by encouraging the Department of Justice to handle the criminal indictments in a relatively benign manner. The UK has suspended its moves to take the dispute to arbitration and the DOJ have modified the scope of their subpoenas requiring the UK airlines to produce documents.
4. During the discussions, American officials were told that in order to strengthen the British airlines' position in the civil suit, HMG would invoke the PTI Act. The Embassy in Washington advised that Congress, the US Courts and public opinion

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might see our action as a challenge to American law and that any resultant row might risk sinking the non-paper arrangements.

5. Ministers concluded however that use of the PTI Act was unavoidable because to take no action would have laid HMG open to the charge that they had neglected to use the one legislative instrument available to protect British airlines against US civil suits and to strengthen HMG's own legal position on Bermuda 2. The Embassy in Washington explained our position in advance to American officials and emphasised that the non-paper should not be affected by this action. Following the strong reaction of DOJ officials, the Embassy advised that the issuing of the Order and Directions be delayed until after Mr. Bush's visit. And on 23 June, the American Ambassador, acting on instructions, asked for a delay in issuing the Order and Directions.

6. In the meantime, however, the Minister of Trade had signed the Order and Directions on 23 June, to take effect on 27 June. Laying before Parliament and notification to interested parties cannot be delayed beyond Friday evening and Saturday morning respectively: but this should go some way to meet the American request for time to give calmer counsels a chance to prevail in Washington.

FOREIGN AND COMMONWEALTH OFFICE

23 June 1983

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Legal Proc,
Mar-83,
Grand Jury Investigation



24 JUN 1983

