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DEPARTMENT OF TRANSPORT
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15 November, 1984

The Rt Hon Sir Geoffrey Howe, QC, MP,
Secretary of State for Foreign & Commonwealth Affairs,
Whitehall,
S.W.1

Dear Geoffrey

AVIATION AND US ANTITRUST: THE "LAKER" ISSUE

My private secretary sent to yours on 13 November a copy of the report on the last round of talks with the Americans, which included (Annex B to Mr Knighton's minute of 12 November 1984) the outline of a possible settlement on the future working of the Bermuda 2 agreement. She indicated that I would be giving my views on the latter, after receiving those of the Civil Aviation Authority and our airlines, so that our delegation can be briefed for what may be a final round of discussion starting on Monday 19 November.

The Civil Aviation Authority would support a settlement on the lines indicated, as would British Airways and British Caledonian. My officials will be consulting the management of Virgin Atlantic today or tomorrow on the proposals for the liberalisation of the arrangements for establishing fares; I have no reason to expect them to be opposed to these.

I considered carefully whether we should be prepared to give an undertaking that it would not be our policy to use the PTI Act to hinder the seeking by the United States authorities of information from the United Kingdom, required for the investigation of possible infringements of the requirements forming part of the proposed agreement. We envisage that there should be no secret inter airline discussions relating to fares, capacity or scheduling. Since these requirements would be imposed by both Governments in agreement, it would in principle be logical that we should give such an assurance. I am advised, however, that we should, consistent with the position which we took in discussions earlier this year with the United States on antitrust, seek certain safeguards if we are to acquiesce in the use of the United States discovery procedures which are more extensive than those normally permitted under our law. We might therefore seek -

(a) arrangements for notification and consultation between the United States and our own authorities based on, but rather more extensive than, those to which both sides have already agreed under OECD arrangements.

(b) that consultations should cover such matters as the narrowing of sub poenas, so that matters extraneous to the investigation in question would not be sought

(c) assurances from the US side that information obtained from UK sources for the purpose of an aviation antitrust investigation would not be used for other purposes (eg the United States tax or regulatory investigations, civil actions in the United States etc).

Subject to such safeguards officials consider that it would be appropriate to give an assurance that it would not be our policy to use the PTI Act to impede US investigations into matters arising under Bermuda 2. I think this is right; and I hope that my colleagues, particularly Norman Tebbit and Michael Havers, also agree.

I believe that a package relating to future arrangements on the lines now contemplated would be very worthwhile as part of an overall settlement of this troublesome dispute. It would be a real prize to get rid of the private treble damage action from the aviation field; the Laker and related actions have given the signal for this action to be used increasingly in the aviation field unless something is done to stop it. My colleagues will know that in the United States it has become a weapon of commercial strife which goes well beyond a sound part of competition policy. To secure this we should be altering our own policy about what is permitted and what is not permitted in the behaviour of airlines. But as we move to reduce aviation regulation it is appropriate that we should look for more transparent arrangements for inter-airline discussions of the kind contained in the package and should be prepared to enforce these. The third component of the package, liberalisation of the arrangements for establishing tariffs, whilst not in strict logic an essential part of settling the antitrust dispute, is consistent with our general policy and appropriate in the already highly competitive market of the North Atlantic. The arrangements envisaged hold the balance we need between freer trade and ensuring fair trade (the latter still very necessary on the North Atlantic where our airlines face, as they have always done, very heavy competition from American airlines, who can draw on their own home market in a way that is denied to ours).

I propose that our delegation should be instructed to seek agreement with the US on these lines next week. Such an agreement would be ad referendum to Governments. We would defer our formal decision whether to accept it until we know the US decision on indictments; and (if they did not indict) until we had then explored what US help on the Laker civil suits might then be forthcoming. May I take it, in the absence of adverse comments by close of play tomorrow, that my colleagues agree.

Copies go to the Prime Minister, the Chancellor of the Exchequer, the Secretary of State for Trade & Industry, the Attorney General and Sir Robert Armstrong.

NICHOLAS RIDLEY

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