Specific Problems Solved by the Negotiation of Bilateral Air Agreements

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Three of the main problems which come up for discussion during negotiations are:

1. The "Agreed Services" on "Specified Routes";
2. The problems of Capacity and Frequencies.
3. The Fares and Rates.

1. *EQUITABLE EXCHANGE OF ROUTES.* — Each of the parties to an agreement tries to obtain routes and traffic rights which are equivalent to the ones he is giving away in return. The traffic rights on these routes are known as *"Freedoms" of the Air.*

On February 10, 1945, Canada signed and accepted the International Air Services Agreement concluded at Chicago. This Agreement provided *inter alia* that each Contracting State grants to the other Contracting State what are known as the First and Second Freedoms of the Air:

(i) the privilege to fly across the territory without landing;

(ii) the privilege to land for non-traffic purposes.

Subject to certain rules for safety, security and military purposes, the granting of these privileges does not present any difficulty between States who are signatories of the Convention. But the real disputes begin with the three other Freedoms of the Air which do not only constitute privileges but traffic *rights* subject to an exchange

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* Chief, International Relations Division, Air Transport Board. Mr. Azzie, in his lectures, centered upon the bilateral air agreement as the pragmatic and popular means of negotiating aviation treaties. The Chicago Convention of 1944 convened with the hope of recognizing the principle of freedom of air commerce, but the majority of interested states, to the exclusion of the powerful United States, favored protectionalism. The death knell sounded for those who desired multilateral conventions to regulate air commerce: the door was opened for bilateral arrangements, the majority of which were patterned after the famous Bermuda Agreement between the U.K. and U.S. in 1946. This latter agreement represents a compromise in opposite attitudes: liberalism on the American side and protectionalism on the British. The reasonable precepts and sound economics of the Bermuda Agreement have greatly influenced Canadian bilaterals. The following is an excerpt from Mr. Azzie's lectutres, treating of some problems encountered in negotiating bilaterals.

through bargaining. These freedoms or traffic rights are the following:

(iii) *Third Freedom* — the right to *put down* on the territory of the other Contracting State passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses:

(iv) *Fourth Freedom* — the right to *take on* in the territory of the other contracting State passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses.

(v) *Fifth Freedom* — the right to put down or to take on in the territory of the other contracting State passengers, mail and cargo coming from or destined to points in a third country, or other countries.

The Third and Fourth Freedoms are essential to the development of any international air service and they are still considered as constituting the primary objective of a service. In other words, the main object of a bilateral air agreement is to regulate and stimulate the direct flow of traffic between the two contracting States. Any Fifth Freedom Air Agreement automatically has the Third and Fourth Freedom clauses. At present sixteen out of the twenty-one bilateral air agreements concluded by Canada provide for the exchange of the five freedoms. This type of agreement (providing for the five freedoms) is particularly important for this simple economic reason: with the introduction of jet aircraft which fly at much higher speeds, at a greater range and with a greater capacity, it becomes imperative for the international airlines to get as many points as possible where they can exercise traffic rights. However this is one paradox with which negotiators are confronted: Fifth Freedom traffic rights are more and more difficult to get because of the excessive competition between the major international airlines and most especially along the lucrative North Atlantic Route. Because of this competition, airlines are apt to put some pressure on their aeronautical authorities with a view to adopting a protectionist policy, or at least to exchange Fifth Freedom rights on a strict *"quid pro quo"* basis which is never easy to achieve. However, in this horse-trading business one has to give in order to get something in return: *e.g.*, Montreal — Chicago has been given to Air France, Alitalia and Lufthansa in return for concessions from the three respective nations where these airlines have their origin.

Another reason why Fifth Freedom traffic rights are difficult to obtain is one which is caused by the proliferation of new international carriers for "National Prestige" reasons. In his study on American Bilateral Air Transport Agreements, Albert Stoffel has properly stated the problem as follows:

> In many cases, small countries... are conducting farflung operations in air transportation which have little or no relationship to the size of their countries, their populations or their economies. In addition, it has become a point of national honour for almost every independent country to show its flag in the air as widely as possible. Some of these countries have discovered that this may be an expensive proposition, perhaps more expensive than they can afford. Nevertheless, they have the right and the desire, and they present a problem which must be considered.

Or, to quote Lord Swinton, Chairman of the U.K. Delegation to the Chicago Conference: "Every nation which aspires to be in the air will wish to have, and indeed will insist on it, in addition to its own international traffic, a fair share of its external air traffic as well."

When an agreement on an equitable exchange of traffic rights has been reached between two States, only one problem has been solved. For instance, in the exchange of Fifth Freedom traffic rights, there is always a third party involved. Here is a typical example of what may happen: in the Canada-France Agreement, Canada was given the right to operate beyond Paris to Rome or Vienna, but the Italians would not authorize a Paris-Rome service by a second Canadian carrier without new negotiations. Therefore, in the Canada-France Agreement, Canada has been given traffic rights between Paris and Rome which cannot be *automatically* put into operation. In the same way the Austrians have not agreed to authorize a Canadian carrier to exercise traffic rights between Paris and Vienna; therefore, Canada cannot use the Fifth Freedom traffic rights conceded by the French.

One other subject which deserves particular attention in international civil aviation today is: the determination of capacity and control of frequencies.

2. *CAPACITY AND FREQUENCY CONTROL.* Here is a subject that has been and still is the source of many discussions.

There are three schools of thought on this subject. There are the "free enterprisers," those who advocate the "freedom of the air," and usually they possess strong, aggressive and competent airlines. Their argument is that carriers operating on international routes should have full freedom to carry all the traffic that they can develop. The weaker carriers or those not in a position for one reason or another to compete effectively would have to leave the market or curtail their operations.

A second school of thought argues that countries suffering from basic disadvantages in the right for international air passengers must be able to allocate or predetermine the volume of traffic carried

in and out of their countries, in order to protect their national carriers. *e.g.*, Argentina.

A third school maintains that airlines should have reasonable freedom to carry traffic of primary interest (third and fourth freedom traffic) but that there should be sensible rules governing the carriage of secondary traffic (fifth freedom traffic) *e.g.*, Pakistan.

Canada's position on the subject of capacity and frequency is based on the Bermuda Agreement between the U.S. and the U.K. At Bermuda, as at the Chicago Convention in 1944, the two countries had opposite attitudes. The United Kingdom wanted to have predetermination of frequencies to be operated on any route and a division of capacity on a 50-50 basis according to traffic originated, while the United States did not want any limitation of frequencies or division of capacity. Finally they agreed on a compromise that would provide a certain control, an *"ex post facto"* control.

The resolutions adopted at the Bermuda Conference and related to capacity and frequency read as follows:

That the air transport facilities available to the travelling public should bear a close relationship to the requirements of the public for such transport.

That there shall be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories (as defined in the Agreement) covered by the Agreement and its Annex.

That in the operation by the air carriers of either Government of the trunk services described in the Annex to the Agreement, the interest of the air carriers of the other Government shall be taken into consideration so as not to affect unduly the services which the latter provides.

The above resolutions leave much room for interpretation. For example, expressions like "the requirements of the public", "fair and equal opportunity", "shall be taken into consideration", and "not to affect unduly" are rather vague. However, if the two parties are in general agreement as to their meaning it can work satisfactorily.

Canada has adopted the Bermuda principles. In many of her standard bilateral agreements, it is put as follows:

"(1) There shall be fair and equal opportunity for the airlines of both Contracting Parties to operate the agreed services on the specified routes between their respective territories.

(2) In operating the agreed services, the airlines of each Contracting Party shall take into account the interests of the airlines

of the other Contracting Party so as not to affect unduly the services which the latter provides on the whole or part of the same route.

(3) On any specified route the capacity provided by the designated airlines of one Contracting Party together with the capacity provided by the designated airlines of the other Contracting Party shall be maintained in reasonable relationship to the requirements of the public for air transport on that route."

Canada has very seldom questioned the frequency and capacity in its bilateral negotiations. When a bilateral agreement includes a restriction on frequency or capacity, as it is the case with Australia, New Zealand, Mexico and Italy, it has been done on the instigation of the other Party.

3. *FARES AND RATES* — Fares and rates can be a most intricate subject; the facts of the 1963 North Atlantic fares crisis are widely known.

On the subject of fares and rates most airlines feel that their establishment should be left to the competence of the airlines. However, most governments reserve the right to approve or disapprove the published fares and rates.

The airlines do not decide the fares individually but through IATA (International Air Transport Association). IATA has divided the world into three conference areas, and fares and rates are negotiated between airlines serving the area:

1 - North and South America.

2 - Europe, the Middle East and Africa.

3 - The rest of the world.

What are the points taken in consideration in such negotiations? Mr. Gordon Wood of Air Canada in an article entitled "The Complexities of International Fare Fixing" points out that:

> Fare negotiations involve a wide variety of factors. There is not only the cost of providing the service. One must also take into account the cost of selling it; the traditional charges of competitive means of transport; and the commercial risks of promotional pricing. On these factors and many others like them, managements stake their own heads, their shareholder's money and their company existence.

Canada's position is that fares should be, as much as possible, fixed through the IATA machinery, but it reserves the right to approve or not the proposed fares. It is clearly stated in the Canadian Standard Bilateral:

(1) The tariffs on any agreed service shall be established at reasonable levels, due regard being paid to all relevant factors, including cost of operation, reasonable profit, characteristics of service

(such as standards of speed and accommodation) and the tariffs of other airlines for any part of the specified route. These tariffs shall be determined in accordance with the following provisions of this Article.

(2) The tariffs referred to in paragraph (1) of this Article shall, if possible, be agreed in respect of each route between the designated airlines of the Contracting Parties, in consultation with other airlines operating over the whole or part of that route, and such agreement shall, where possible, be reached through the rate-fixing machinery of the International Air Transport Association. The tariffs so agreed shall be subject to the approval of the aeronautical authorities of the Contracting Parties."

Although part of the wording may change in the existing bilaterals the spirit of the Article remains the same. One thing in common in all agreements is that the tariffs shall be subject to the approval of aeronautical authorities.

As the above suggests, the case of tariffs and rates might cause some difficulties if the subject has not been properly explained or agreed to explicitly. Even in such a case any country is likely to change some of its regulations and re-negotiations may become necessary.