TOWARDS A UNITED STATES - AUSTRALIAN INTERNATIONAL AIR SERVICES AGREEMENT 1935-1942: PRELUDE TO THE 1946 BILATERAL

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ABSTRACT

This dissertation examines a critical period in the development of international air services agreements during which time the issue of reciprocity or reciprocal landing privileges between states, assumed a position of major political, economic and military importance for the respective government.

In an incomplete and still evolving legal and regulatory framework for the conduct and negotiation of such agreements, the United States Government adopted a policy which essentially relegated and entrusted to a private corporation the responsibility of concluding such agreements, primarily to avoid confronting the issue or reciprocity.

The opposition to such a practice is reflected in the course of negotiations conducted between five sovereign states, who were attempting ostensibly to secure the inauguration and establishment of a trans Pacific air service.

To place this study in perspective, the initial chapters are concerned with describing the international aviation policy adopted by the two principal governments involved in this analysis and the significant legislative and judicial events and decisions which determined and shaped that policy.

Specific details of the negotiations conducted between 1935 and 1942 are then examined with one chapter devoted to an

analysis of private international contracts and in particular the agreement entered into between Pan American and the Government of New Zealand.

Finally, the preceding events are considered in the broader context of then contemporary issues with specific reference to the events in the southern Pacific as part of the wider Anglo-American conflict whereby both parties were attempting to arrest economic control of international commercial aviation. This conflict or rivalry is evidenced by the conduct of both parties during the course of the north Atlantic negotiations, the stated position of delegates in Chicago in 1944 and ultimately in the compromise reached in Bermuda in 1946 - the definitive precedent for all subsequent international air service agreements.

RESUME

Ce mémoire se penche sur une période critique du développement des accords de transport aérien international au cours de laquelle la question de réciprocité ou d'attribution de droits réciproques d'atterrissage entre états devient un élément-clé tant au point de vue politique, économique que militaire auprès des gouvernements respectifs.

Aux termes d'un cadre juridique et réglementaire incomplet et en pleine évolution, pour la conduite et la négociation de tels accords, le gouvernement des Etats-Unis, à ce moment, adopte une politique, relégant et confiant à une compagnie privée, la responsabilité de la conclusion de tels accords pour éviter de prendre position sur la question de réciprocité.

L'opposition à une telle pratique s'exprima ostensiblement lors des négociations, impliquant cinq états, pour l'aquisition de droits de transport aérien international en vue de l'inauguration et la mise en place d'une service aérien trans-pacifique.

Pour placer cette étude dans son contexte approprié, les premiers chapitres traiteront descriptivement de la politique en matière de transport aérien international, adoptée par les deux principaux gouvernements impliqués, aux termes de notre analyse et des événements législatifs et juridiques ayant mené et influencé une telle politique.

Certains détails des négociations menées entre 1935 et 1942 entre le gouvernement de la Nouvelle-Zélande et la compagnie

Pan American seront soulignés au sein d'un chapitre consacré à une analyse de contrats internationaux de droit privé.

Finalement les événements précédant cette polémique seront analysés à la lumière du contexte, contemporain, à cette question de réciprocité, se référant spécialement à la situation du Sud Pacifique, lors du conflit anglo-américan où les deux parties tentèrent de s'accaparer respectivement le contrôle économique du transport aérien commercial. Cette rivalité est particulièrement démontrable lors des négociations entre ces mêmes parties au niveau de l'Atlantique Nord, lors de leurs déclarations respectives, à titre de délégués, à la convention de Chicago de 1944 et finalement lors du compromis obtenu aux Bermudes en 1946, lequel est définitivement de modèle à suivre pour la conclusion d'accords subséquents en matière de transport aérien international.

I have never been able to find in any mans's book or any man's talk anything convincing enough to stand up for a moment against my deep-seated sense of fatality governing this man-inhabited world.... The only remedy... for us is the change of hearts. But looking at the history of the last 2,000 years there is not much reason to expect that thing, even if man has taken to flying.... Man doesn't fly like an eagle, he flies like a beetle.

- Joseph Conrad
23rd October 1922

The Pacific Ocean, its shores, its islands, and the vast regions beyond will become the chief theater of events in the worlds great hereafter.

- William Henry Seward,
1852
United States Secretary
of State 1861-1869

ABBREVIATIONS

AA - CRS	Australian Archives - Commonwealth Record Series
NA - RG	United States National Archives - Record Group
PAA 00.00.00	Pan American World Airways, Inc. - History Project, File Index, New York

EXPLANATION

Commonwealth (Australia)	refers to the Commonwealth of Australia as opposed to the British Commonwealth of Nations which is written as 'Commonwealth' only.

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INTRODUCTION

Air travel before the Second World War connotes an image of a leisurely, romantic and highly elitist form of travel. From a passenger's perspective that may indeed have been an accurate description. From the standpoint of a carrier or government, nothing belies the truth more effectively.

International civil aviation was and still is a forum of widely and at other times subtle, divergent, political and economical idealogies. Such a divergence accounts for the events centered in the southern Pacific during the period between the two world wars, in particular between the years 1935 and 1942.

Five independent and autonomous governments became embroiled in a conflict that ostensibly should have been the exclusive domain of two governments alone; the United States and Australia.

The involvement of the other three governments, Britain, Canada, and New Zealand, was prompted by the determination of the Commonwealth coalition to meet the challenge of any attempt by American interests, personified by Pan American, to secure domination of the world's aerial routes:

> «The answer of the Governments of the British Commonwealth to any scheme of world domination can be the establishment of a trunk route right around the world with arterial and subsidiary services radiating right around the world.»[1]

An important link in the «All Red Route» as the globe circling network was euphemistically described, was the trans Pacific sector - Australia to Canada via New Zealand. Such a route necessitated for either technical or economic reasons, stops in Hawaii and the United States West Coast.

In the arena of international civil aviation during this period, the regulatory framework whereby landing concessions or rights were negotiated and conceded, was in a state of transition, particularly where a concession was sought by a government to operate into the United States its territories or possessions.

While Commonwealth and European governments insisted upon conducting negotiations at a government or diplomatic level, the United States Government pursued a policy in certain regions of the world, designed expressly to permit or indeed encourage Pan American, a private corporation, to conduct and conclude agreements on its own behalf, thereby avoiding the singulary most contentious issue facing the United States Government-reciprocity.

The manner in which the United States Government attempted to employ this policy with respect to the inauguration of a southern Pacific air service and the attempts by the Commonwealth coalition governments and in particular Australia, to counter the application of such a discriminatory policy, is the subject of this thesis, testimony to an era when the international legal regulatory framework for the conduct and negotiation of air service agreements was still in its formative stage.

The conflict that ensued between the two major blocs and one which was being enacted simultaneously in other parts of the world, most notably over North Atlantic, prompted one American diplomat to ask «why so little co-operation (should exist) between a similar people who are their closest friends?»[2].

The following description of that conflict may hopefully provide answers to that question.

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1. W.D. McIntyre, The Commonwealth of Nations - Origins and Impact 1869-1971, Minneopolis, The University of Minnesota Press 1977 at p. 327, citing Resolution of the delegates attending the London Imperial Conference of 1937.

2. F.X. Holbrook, United States National Defence and Trans-Political Commerical Air Routes 1933-1941, Fordham University Doctoral Dissertation, 1969, p. 151, citing PAA 37 13th of November 1935, American Consul, Wellington to the Secretary of State.

CHAPTER I

UNITED STATES INTERNATIONAL AVIATION POLICY 1903-1941: A SYNOPSIS

For a nation that is credited for the invention of the first power-driven, heavier-than-air machine, the aeroplane,[1] the United States procrastinated for an inordinately long period of time before commercially exploiting that revolutionary idea.

Indeed, it is to the Europeans that credit must be given, accolades bestowed, for grasping the potential of such a technical achievement. The development and utilisation of the aircraft by the Europeans was encouraged by a combination of unique factors; the geographical fabric of the European continent, the acquisition and control of geographically diverse colonies and possessions and the realisation of the potential, destructive or otherwise of the aircraft exhibited over the skies of Europe during the First World War.[2]

The destructive capability of the aircraft and its inherent mobility, intensified the necessity for the establishment and creation of an international legal order for aviation.

Although actively considered prior to the War, the principle of international law that each state was vested with sovereignty and jurisdiction over the airspace above its territory and adjacent territorial waters, was firmly entrenched and enunciated in the Paris Convention of 1919.[3] Thirty four

states ultimately adhered to the Convention, the most notable abstention being the United States.[4]

The decision not to ratify the Convention was a purely political one.[5] The period following the cessation of hostilities in Europe marked the beginning of what is popularly known as the isolationist period in American history.[6]

Historians attribute this cynicism of attitude by Americans towards involvement in world affairs to a variety of reasons most significantly the rise and growth of internal group antagonism within the United States, which in turn necessitated economic nationalism and political isolation.[7]

This cynicism was exemplified by the actions of the United States Senate who refused, despite efforts by the President, to ratify the Paris Convention.[8]

Aviation was still, however, very much in its infancy in the United States and during the immediate post war period was largely confined to barnstorming and the carriage of mail, initially by the United States Post Office.[9]

Technical development and refinement accelerated with the consequence that by the early 1920s, aviation groups were actively lobbying for federal government regulation.[10] The government responded with two pieces of legislation; the Air Mail Act of 1925,[11] and the Air Commerce Act of 1926.[12]

The former was the first attempt by Congress to regulate the economic and commercial activities of the industry by

forcing competition on the industry. This was accomplished by requiring that all contracts for the carriage of mail be let through public bidding and by refusing to restrict in any way the right to establish new air services.[13]

This policy was adopted and employed by Congress until 1938 where competition was preserved but preserved only where it was found to be in the public interest.[14]

The Air Commerce Act of 1926 was primarily directed and accentuated towards the regulation of the operational, navigational and technical aspects of flight.[15]

Thus from the outset, American commercial aviation and the means whereby the federal government intended to control it, were intrinsically aligned to the payment of air mail subsidies, a practice that was to continue through to the next decade.

While the above two pieces of legislation intended to provide scheduled air transportation on a commercial basis within the United States, they made no provision for service to foreign countries:

> «The obstacles in the way loomed so large that extension of the service to foreign countries seemed at the time to be a matter for the future.»[16]

Technically, operations to international destinations were possible but given the large supplies of gasoline and oil that such a flight required not commercially feasible.[17]

The success of the first trans continental air mail route in the United States and the completion of the solo flight by Lindberg non-stop to Paris the previous year, generated so much confidence in long distance flying that by 1928, it was considered quite viable to extend air mail service to destinations outside the continental United States.[18]

In that year, Congress enacted the Foreign Air Mail Act of 1928 which authorised the Postmaster-General to award contracts to carry mail between the United States and its possessions and foreign countries to the lowest bidder.[19]

The most logical destination to inaugurate international operations was Latin America. Technically, the area presented the fewest difficulties and consequently the greatest opportunity for success. It involved less travel across water than to any other region, and being essentially over land could be provided more readily with navigation facilities and with landing facilities. The frequency of landing fields by reducing the length of uninterrupted flights, cut down the amount of fuel to be carried and consequently increased the payload.[20]

Commercially, private investment by American individuals and corporations totalled some $5,000,000,000 in the region, making Latin America economically speaking a «dominion of the United States».[21]

This commercial hegemony was, however, threatened by the gradual encroachment of European commercial interests. This

caused concern amongst leaders of American industry and particularly within the American Government.[22]

Germany had been expecially active in investing in the region, an area which has always been and still is politically sensitive for the United States Government. Obtaining financial concessions and interests in Latin American airlines, the presence of Germany was seen as a threat to the sacrosanct Monroe Doctrine, now referred to as the 'Good Neighbour Policy'.[23]

Thus the impetus existed for the development of commercial aviation in the region; to ensure the entrenchment of American political and commercial interests.

This was successfully achieved through the initiative of Pan American Airways in association with active assistance of the U.S. State Department.

The relationship between the two organisations has been a constant source of intrigue and interest to both historians and American politicians.[24]

This relationship would be considered quite unremarkable from the standpoint of any government who retains a financial interest in its national carrier, but for a government that prided itself as the «citadel of private enterprise»,[25] with the attendent non-interventionist connotations, it does appear out of character. However, given the revisionist school of thought which now appears to be coming increasingly popular amongst historians, concerning the interventionist activities

of the Republican Administrations of the 1920s, especially under Herbert Hoover,[26] the association may not appear as inconguous as it is portrayed.

Indeed, Pan American expansion was so rapid and thorough throughout this region and during this period that Hoover seriously contemplated and advocated the official designation of Pan American as the chosen instrument of United States international aviation.[27]

O.J. Lissitzyn writing in 1942, categorised contemporary bipartite air transport agreements into three main groups: (1) agreements dealing with the general conditions of air navigation between two countries, one or both of whom are usually not parties to the Paris Convention of 1919; (2) agreements dealing with technical and other special problems of air navigation; (3) agreements dealing with the establishment and operation of regular international air transport services.[28]

The first category generally related to matters covered by the Paris Convention. The United States which was not a party to the Convention, did enter into inter-governmental agreements, however, which were largely based on similar principles, for example, the Canadian-American Agreement of 1938.[29]

In the conclusion of such agreements between Latin American states, the United States relied upon the Habana Convention adopted on the 20th of February 1928.[30]

The agreements were all in the form of executive agreements, rather than treaties, some of which were expressly of a temporary nature, pending the conclusion of conventions between the parties on the same subject.[31]

The second category was essentially an adjunct of the first an example of which was an agreement concluded between the United States and Canada on the 18th of February 1938. The agreement provided for the standardisation of radio facilities of both countries used for civil aeronautical services, replacing prior «informal undertakings» on the same subject. This agreement, the first of its kind formally concluded by the United States, was cited as «an indication of the interdependence of the two countries in air transport».[32]

Authorization to establish and operate regular international air services, the third category, were either granted directly by a government to a foreign airline company or were preceded by an agreement to the effect between the grantor government and the government of the company's country, i.e. a contemporary bilateral treaty.[32]

Most European governments insisted that all applications for air transport rights be made through them directly through diplomatic channels rather than by the foreign operators directly. «This policy is especially favored by the great powers, who are in a position to throw their weight into the balance against a small state.»[33]

The United States adopted a hybrid policy on this specific issue which despite protestations at various times by the U.S. State Department, proved most effective in securing operating rights and privileges for the United States or more particularly Pan American.[34]

Following the enactment of the Foreign Air Mail Act of 1928, United States international and domestic aviation largely followed different paths.[35]

The difference was due originally to the duration of the air mail contract awarded. Pursuant to the Foreign Air Mail Act, contracts were granted for a period of ten years, whereas domestic contracts expired after four. This prevented, according to the domestic carriers, any incentive to expend large sums of money in developing the facilities associated with improvement of air services. Domestic carriers were simply afraid they would lose the contracts when they were relet.[36]

In response Congress provided that contracts for domestic carriage could be converted into route certificates which extended their life for ten years from the date when they were let.[37] This legislation not only extended the life of domestic contracts but also provided that the rates under them should thereafter be determined through regulation rather than through competition. Thus, while the rates in the foreign system continued as they had been fixed in the contracts, the rates in the domestic system came to be increasingly determined by regulation.[38]

The differences between the two systems were further widened, when with the indefinite extension of the domestic contracts in 1934 and the prohibition in 1935 against air mail carrier's establishing off-line services in the vicinity of other carriers, competition was increasingly eliminated from domestic air transportation.[39]

The difference between the two systems was again exaggerated with the decision of President Roosevelt in 1934, not to cancel any foreign air mail contracts, in contrast to domestic contracts, as such a cancellation would not be considered to be in the public's best interests, or more specifically:

> «such action would probably disrupt American air service to the Latin American countries and might result in great harm to our trade relations with these countries.»[40]

Most significant was the revelation disclosed before the Black Committee Hearings and during the course of testimony delivered by former Postmaster General Walter F. Brown, of the acknowledged and accepted policy of the Post Office Department in giving a preference to Pan American over all other companies in the granting and letting of air mail contracts for international services.

While Brown refused to categorise the practice as 'policy', he conceded, during the course of testimony, that it was «the practice we certainly followed on several occasions».[41]

Most incriminating was the production of a letter from Thomas B. Doe of Eastern Air Transport to Brown and the reply thereto. Doe, resentful of the preeminent position Pan American had acquired in Cuba, sought the comments of the Postmaster General who in response maintained that «the Department ought not to be drawn into controversies that are wholly outside our jurisdiction».[42]

However, Brown added that «it did not seem the part of wisdom to invade each other's territory with competitive services and that I did not believe that money paid for postal service should be used to set up services to injure competitors. In pursuance of this policy I suggested the abandonment by the Pan American Co. of the domestic field in the United States... Consistently with the policy outlined, it would seem improper for any of our domestic air mail operators to use mail pay to invade the peculiar field of the Pan American Co.»[43]

The preeminent position Pan American maintained throughout the 1930s has already been referred to above and will be discussed in greater detail below and in subsequent chapters. However, as a consequence of this position, Pan American and in particular Juan Trippe created enemies both within the industry and amongst several prominent Washington politicians.

One of the most outspoken opponents of Trippe's was Joseph P. Kennedy which according to one biographer was attributable to a meeting in 1938, when Trippe refused to testify

in favour of legislation promoting the segregation of American international aviation and its subsequent intergration within the ambit of the Maritime Commission. Thereafter, Kennedy who was chairman of the Commission, launched a series of attacks on the activities of the airline.[44]

Following the Black investigations and the attendent cancellations, Congress decided to reconsider its entire policy and position towards commercial aviation, both domestic and foreign.

An important issue to be decided initially was whether the foreign system should be permitted to continue to operate in a manner separate from that of the domestic system.

There were two distinct schools of thought on the matter. One felt that international transportation differed so markedly from that of domestic transport that it should be more appropriately segregated. These advocating that position argued for placing international services under the jurisdiction of the Maritime Commission, based on the theory that it possessed more in common with the maritime industry - particularly that part which was engaged in foreign transportation - than it did with the domestic air transportation industry.[45]

The other school of thought believed that air transportation possessed characteristics which differentiated it from all other forms of transportation, and that it had problems that

it had to meet which were uniquely its own. Since this was true of foreign air transportation, as well as domestic, advocates argued that it would be best to subject them both to the jurisdiction of the same regulatory authority and to the same standards of economic regulation - except in those specific instances which called for special treatment.[46]

Ultimately, the latter view prevailed with the enactment of the Civil Aeronautics Act in 1938, but only after protracted and lengthy discussions as to the manner in which this would be most effectively accomplished.

In response to the Black Committe findings, Congress, through the Air Mail Act of 1934,[47] vested within the Interstate Commerce Commission the responsibility of fixing fair and reasonable rates of air mail subsidies within the upper limits prescribed by the Act, which linked rates to aircraft miles with a sliding scale of increases based on loads.[48]

More importantly, the Act provided for the appointment by the President of a commission to report on «a broad policy covering all phases of aviation and the relation of the U.S. thereto».[49]

The Commission was chaired Clark Howell of Atlanta with four associates (three of whom were experts in aviation): the Secretary was a member of the Bureau of Air Commerce; and the Commission retained two legal advisors versed in aviation law. The Committee spent two months in a 13,000 mile tour of

the United States, the Chairman visited four European countries, some 200 witnesses were heard with a report being transmitted to Congress on the 31st of January 1935.[50]

In respect of international aviation the Commission recommended the adoption of a national policy, «the stimulating of air transportation should be extended to the promotion of American flag lines serving major American trade routes to foreign countries».[51]

In addition the Commission recommended that governmental administration of foreign air transport should «as far as possible be kept similar to that of the domestic air line system, but with such modifications as may be clearly necessitated by a fundamentally different political legal and operating status».[52]

The Commission added:

> «The status of American air transport in foreign fields competing with foreign owned airlines should in general not be one of competition between American airlines, but of carefully-controlled regional monopolies.»[53]

Any policy recommending the creation of regional monopolies or 'zoning' was, of course, a direct challenge to Pan American's position, and one which President Roosevelt endorsed and President Truman subsequently implemented across the Atlantic following the conclusion of the Second World War.[54]

Of particular interest, particularly in light of the recent Laker litigation,[55] was the recommendation that there

should be «provided by legislation authority for American airlines outside the continental United States to have the same opportunity now given by the Shipping Act to American steamship lines to enter into trade and traffic agreements with their competitors».[56]

To regulate and approve such agreements, amongst other responsibilities, the Commission proposed the establishment of a body known as the Air Commerce Commission with members appointed by the President by and with the consent of the Senate for long terms. Apart from examining such trade and traffic agreements concluded with foreign competitors, the Air Commerce Commission should have «broad supervisory and regulatory powers over civil aeronautics and particularly over domestic and foreign air transport, «independent of the Executive».[57]

> «It should have all power necessary to the attainment of its general supervisory and regulatory purposes, including the power to hold hearings and conduct investigations upon any subject pertaining to civil aeronautics. It should be subject to merger by executive order at any time with any other body of a similar nature having similar functions.»[58]

Herein lies the genesis of the Civil Aeronautics Board but the actual creation of the new agency met with initially strenuous opposition from President Roosevelt.[58]

> «If the President had clearly enunciated one point in his pronouncements on transportation, it was that transportation policy should be

> co-ordinated and integrated. Establishing an independent aviation board, far from serving this end, would further splinter an already badly splintered policy making apparatus. Roosevelt did not like the idea on another count. The President believed that the Federal bureaucracy was running out of control, primarily because of the proliferating number of independent agencies functioning outside the Presidential authority.»[59]

Indeed, in transmitting the Commission's report to Congress, Roosevelt gave it no support, «In this recommendation I am unable to concur».[60]

However, the creation of a co-ordinating authority though not necessarily independent was also supported and advocated by members of Roosevelt's own administration. In a confidential report addressed to the President dated the 1st of August 1935, prepared by an officer of the Commerce Department, the author stressed that given the importance of foreign aviation to governments, all work, with one exception,[61] should be centralized under an authority responsible for the control of civil aeronautics. The author suggested, however, that in lieu of the creation of an independent agency this centralization process could be achieved successfully under the direction of the Secretary of Commerce.[62]

Should the control of civil aeronautics be removed from the authority of the Department of Commerce, however, «it is believed that the demands for centralized and specialized attention to foreign aeronautics would require that the activities

now charged to the Bureau of Foreign and Domestic Commerce should be charged by law to the authority in general control of civil aeronautics».

Thus the creation of the body which would be charged with the responsibility of developing United State's international aviation policy, was from the outset, beleagured with problems.

In 1934, the importance of regulating air transportation was clearly recognized, but the mechanism whereby this would be achieved could not, however, be agreed upon.

Bills originating in both Houses were introduced subsequent to the release of the Commission's report but not until the first Congressional Session of 1937. During the interim period, the airline industry «still in a state of shock from the contract cancellations», bestirred themselves and decided to form their own trade association. It was not until January 1937 under the auspicies of the Association's president, Colonel Edgar S. Gorell, that the industry achieved any general consensus of opinion amongst its members as to the type of legislative reform needed.[63]

Gorell advocated that carrier legislation, rather than mere mail contract legislation, was required by the airlines, an opinion Representative Clarence Lea of California also shared. In order to avoid or circumvent President Roosevelt's opposition to the creation of a new agency for aviation, Lea concluded that if there were to be legislation for comprehensive regulation by the airline industry, it would have to be accomplished

by maintaining the Interstate Commerce Commission (ICC) rather than through the creation of a new agency.

This could be achieved by merely adding to the Interstate Commerce Act a new title similar to the Act's Title II, which in 1935 had been adopted for motor carriers.[64]

When the bill was introduced into the House on the 2nd of March 1937, it provided for the investure of economic control in the ICC, while the supervision of safety standards was to remain under the auspices of the Department of Commerce.

In the Senate, Senator Pat McCarran of Nevada introduced similar legislation but confined economic regulation to domestic carriers only, although this was subsequently amended to include United States airlines engaged in foreign commerce.[65]

In both the Senate and House hearings, strong opposition was encountered from the Post Office Department and the Department of Commerce. The former department's control of aviation was to be substantially curtailed under the bills.[66]

From the airlines perspective there was a special urgency attached to legislation. Domestic airlines were facing potential financial ruin following the reintroduction of competitive bidding where in order to secure contracts, ridiculously low bids were being proposed and accepted in reply to tenders.[67]

For Pan American and other «spur line»[68] foreign carriers, foreign air mail contracts, most of whom had been awarded for ten years in 1928, were due to expire in late 1938 and existing

legislation did not provide for their extension. Thus overseas carriers were threatened with the possibility that their routes would be subject to a new round of competitive bidding.[69]

The President was noticably silent throughout 1937 on the issue, but that year coincided with the release of the Brownlow Report, which in substance called for the «drastic overhaul of independent agencies in a way that would have brought them within the framework of the executive departments, leaving them independent only in respect to certain quasi-judicial functions».[70]

The timing of the release of the report coupled with the continual opposition of the Post Office and Commerce Departments resulted in the indefinite stagnation of passage of legislation by the close of the 1937 Congressional session.

Impetus for legislative reform was thereafter stimulated as a result of the creation of the Interdepartmental Committee on Civil Aviation which, according to Secretary of the Commerce Department, Roper, was instigated at the direction of the President.[71]

The Committee proceeded in confidential sessions, attempting to reconcile inter-departmental differences. The result was the formulation of a confidential bill which was submitted to Represenative Lea for introduction into the House. Despite Lea's attempt to minimize the differences from the bills of the previous session, the new bill was in substance quite different.[72]

Previously the Lea-McCarran bills had been limited strictly to economic regulation of the airlines under ICC administration. «Here was proposed a complete overhaul of regulation promotion, and government administration for the whole gamut of civil aviation.»[73]

Specifically, the Inter-departmental Committee proposed the establishment of a three member board which would exercise all of the functions involved in regulating aviation, both economic and technical.

Lea assessing the unlikelihood of the confidential bill being adopted, worked on another in co-operation with Gorrell and Clinton Hester, the latter being a Treasury Department attorney and spokesman for the Committee. The result was the introduction of H.R. 9738 into the House on the 4th of March 1938.[74]

Within a few days of the bills introduction, hearings commenced before the Committee on Interstate and Foreign Commerce, of which Lea was chairman.

The hearings were characterised by hostile probings by various minority members of the Committee, notably by the ranking minority member, Representative Mapes of Michigan.[75]

President Roosevelt had already relented on the independent agency issue, and the minority wanted to know the reason for this about face. Discussion of the constitutional prerogatives of the Executive followed and in particular the President's

role in supervising the new agency. However, an impasse was averted following a proposal by Representative Alfred L. Bulwinkle of North Carolina, that there be created within the agency a person to handle specified executive functions, who would in turn be directly subject to the will of the President.[76]

This had the effect of appeasing the minority who were concerned at the vague provision in the bill which would have given the Executive «general direction» respecting all matters «not subject to review by the courts of law».[77]

In the Senate, meanwhile, Senator McCarran, on the 7th of January 1938, produced the first number of amendments in the nature of substitutes for his earlier bill introduced in the first session of Congress of 1937.[78]

The first amended bill provided for regulation by a new commission returning to the concept of a new agency or commission. While it was in many respects similar in principle to the House bill, in form and language it was quite different.

The Senate Committee on Commerce thereafter issued reports, the third recommending that an independent agency be created by «the immediate enactment of a compromise measure embracing all non-controversial points» in McCarren's bill and Lea's H.R. 9738.[79]

On the same day the Committee's third report was issued, Senator Copeland introduced what was intended as a compromise measure. Copeland's bill was, however, virtually identical to

the original H.R. 9738, except for one significant difference; it did not contain a provision calling permitting «general direction» by the President on matters not subject to review in court, as had appeared in the original House bill.[80]

Senator Truman simultaneously introduced a measure into the Senate which constituted an amendment in the nature of a substitute for Senator McCarren's bill. It was now considered essential to pass a Senate bill which was comparable to the House bill thereby providing an opportunity for compromise in a conference committee.[81]

Truman secured Copeland's support and then set about to avoid any confrontation with McCarren, a feat which was ultimately achieved but not until after resolution of various disagreements relating again, to the power of the President in relation to the Authority.[82]

A bill finally passed the Senate with the Senate bill sufficiently close enough to the House bill, that agreement in conference would pose no problems.

Indeed it was due to the teamwork between Senators Truman and Copeland that passage of the Senate bill preceded action by the House. Thus the Senate bill came before the House, with the House substituting the bill worked out by the House Committee, and under the Senate number the bill went to conference, where agreement was easily reached.[83]

The conference agreement was accepted by both Houses and on the 23rd of June 1938, the President signed the measure thus ending the long struggle for carrier legislation for the airlines.[84]

Almost simultaneously with the convening of the Interstate and Foreign Commerce Committee's hearings, were those being instituted by the Committee on Merchant Marine and Fisheries.[85]

These hearings which produced a most provocative and incisive analysis of the state of American international aviation were conducted under the chairmanship of Senator Schuyler Otis Bland of Virginia.

The Maritime Commission in reliance upon section 211(g) of the Merchant Marine Act, recommended the segregation and separate regulation of all aircraft in overseas trade between the United States and its Territories and foreign countries with the grant of attendent subsidies to the industry.

The proposal was strenuously opposed by Gorrell on behalf of the Air Transportation Association of America, specifically because it would have the effect of attempting to divide what was in fact indivisible -

> «the fact is...air transportation is not susceptible of division...it was recognition of this same fact that representatives of the various departments concerned with aviation have unanimously approved of the Lea bill, which vests in the Civil Aeronautics Authority control of all aspects, not only commercial air transportation but of private flying as well.»[87]

Gorrell reminded the Committee that when the Maritime Commission made its report advocating segregation of air transport services, bills then pending in Congress, advocated the regulation of foreign air services by the ICC. The Maritime Commission's recommendation that it be granted control of aircraft in overseas trade «did not take into account the possibility that a new agency might be created to supervise all transportation», Gorrell maintained:

> «Quite a different situation is presented when the alternative to placing our air lines operating abroad under the Maritime Commission is to assign them to regulation not by the ICC, but by the new Civil Aeronautics Authority, which is being created for the express purpose of assuming charge of all phases of aviation.»[88]

As to the subsidy scheme which was to be extended to foreign air services operated by American airlines, Gorrell emphasized the difference between shipping and airlines arising out of the different international legal regime under which the two operated:

> «In shipping because of the rule of the 'freedom of the seas', we cannot in any way control this competition. The situation in air transportation is utterly different. Since foreign aircraft are not permitted to enter the United States or its territories except where reciprocal permits are granted, the direct foreign-flay competition with our industry to and from this country would be limited.»[89]

While the airlines opposed the Maritime Commission's recommendations, the aircraft manufacturers did not. Glenn L.

Martin, manufacturer of the M-130, China Clipper flying boats, still embittered with Pan American's failure to order further aircraft from his company, strongly endorsed, together with Consolidated Aircraft, Co., any enactment which sought to internally segregate the industry.[90]

Pan American was a natural target for criticism, particularly in view of the monopolistic position that airline continued to assume in 1938. When questioned as to the extent of competition between American carriers operating internationally, Gorrell replied that «almost every line envisions the day when it may take a competitive crack at Pan American».[91]

One member of the Committee, Senator Jack Nichols of Oklahoma, was, however, prepared to defend the airline's standing maintaining that if Pan American has acquired that position, it is only because «they were the only group of men in the United States who were willing to take their money and experience with it and take the hazardous chances of developing foreign travel by air».[92]

Pan American was represented in its own capacity by Robert G. Thack, Vice President and General Attorney for the airline. Thack used the opportunity to criticise the activities of a potential rival American Export Line, the first serious challenge to Pan American's position and one which would be vigourously defended during the ensuing three years.[93]

In reply to the charges that Pan American was a monopoly, Thack maintained that the word 'monopoly' was used by opponents because the word avoided the necessity of clear description:

> «Pan American certainly has no monopoly in the usual sense of freedom from competition. It is exposed, at many points to vigorous and effective competition on the part of one or several of the great European international transport systems.»[94]

Thack was, of course, considering the activities of Pan American in relation to the competition emanating from foreign carriers alone, although he did concede that the description of 'monopoly' might apply to the routes where there was no competitive American air service.

> «Pan American has, therefore, only that kind of 'monopoly' on such routes as, for example, Miami to Brazil and the Argentine, as Eastern Air Lines, has on the route from New York to Miami - with the importance difference that a large portion of Pan American's route from the United States to the Argentine is paralled by a highly competitive European subsidized service.»[95]

Pan American throughout the following decade in an attempt to legitimize their position via legislation designed to create an American chosen instrument of international aviation,[96] continuously emphasized the threat to American aviation interests emanating from heavily subsidized foreign government carriers. This was an attempt to avoid the stigma of being associated with being described as a monopoly, a most distasteful notion amongst American politicians and the general public.

Trippe, in a statement read by Thach to the Committee, again wrote of the serious threat the United States faced from foreign competition. Writing in almost demagogic terms, he referred to Imperial Airways as one whose sponsor, the British Government, had «ruled the seven seas for centuries», while Germany's Deutsche Lufthansa was «already a veritable right arm of the Reich...commissioned to spread a network of Nazi aerial trade routes across the seven seas».[97]

As Trippe, who at the time was one of the few within the United States conversant with the intricacies of international aviation, asserted:

> «America does not face small, independent air line companies. Our competitors are great national air transport systems with the power and prestige of their governments behind them, organised to advance the commercial political, and strategic interest of their respective nations throughout the world.»[98]

Justification for Pan American's activities, Trippe maintained, albeit much criticised of late, could also be found in the airline's ability and effectiveness in building up United States foreign trade:

> «We all know it is no mere coincidence that the major nations of the world today are those nations that have build up their national economy and their international prestige through aggressive foreign trade promotion. And we all know that the chief weapon in their drive for foreign trade was the maintenance of adequate transportation and communication facilities on their world trade routes.»[99]

Appealing to the financial 'bottom line' was an effective tactic, particularly when the airline was able to draw comparisons between heavily subsidised foreign carriers. Trippe stated that the cost of Pan American to the American Government in net annual subsidies was approximately one half of those received by equivalent foreign carriers. In addition, Pan American's capital structure was financied entirely by private investment, with investors earning a mere 2 per cent return on capital, an almost philanthropic gesture on their part to bolster America's international aviation system.[100]

Maintaining that aviation regulation was a national issue, one which the Government to date had 'passed by', Trippe approved and supported the pending Lea bill and accordingly opposed any segregation of the industry.[101]

The hearings were in reality a frantic attempt on the part of prominent United States shipping interests and certain American politicians to arrest the inevitable; that aircraft were ultimately to supercede shipping as the major form or vehicle of international transportation.

While Joseph Kennedy now an implaccable enemy of Trippe, urged on by a member of Pan American's own board of directors, Grover Loening, endeavoured to secure passage of the bill segregating the industry,[102] the amendment was destined to failure even before the commencement of the hearings; Roosevelt's recantation on the independent agency issue had ensured its redundancy.

With the United States now possessing extensive and comprehensive Federal legislation, the American aviation industry was now in a strengthened position to enter and tackle the international aviation arena.

CHAPTER I - FOOTNOTES

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28. Supra, note 25, p. 373.

29. State Department, Executive Agreement Series, No. 129.

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31. Ibid., p. 374.

32. Ibid., p. 378.

33. Ibid., p. 381.

34. Ibid., p. 386, note 35.

35. Supra, note 16, p. 82.

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37. Specifically through the enactment of the Air Mail Act of 1928, 45 Stat. L. 594.

38. Supra, note 16, p. 82.

39. Ibid.

40. Letter from the Post Office Department Re-Investigation of Foreign Air Mail Contracts, Report on Foreign Air Mail Contracts, Pan American Airways, Inc., and Pan American - Grace Airways, Inc., 10th of January 1935, p. 718.

41. Testimony of Walter F. Brown, before U.S. Senate Special Committee on Investigation of Air Mail and Ocean Mail Contracts, 73rd Congress, 2nd Session, 1934, p. 2461.

42. Ibid., pp. 2459-2460.

43. Ibid.

44. R. Daley, An American Saga, New York, Random House, 1980, p. 221.

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46. Ibid.

47. 48 Stat. L. 933.

48. Supra, note 13, p. 173.

49. Earlier Federal Committees had been established to report to Congress on aviation policy, the first being the Crowell Commission which published its findings in 1919. Subsequent Committees included the Morrow Board (1925), the Breckinridge Committee (1935), and the Baker Committee (1934); ibid., p. 173.

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51. R. Kingsley, The Report of the Federal Aviation Commission: A Commentary, 6 Journal of Air Law 177 (1935), para. (21).

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54. C. Solberg, Conquest of the Skies, Boston, Little, Brown & Company, 1979, p. 290.

55. Which raised the issue of the extra territorial application of United States anti-trust laws.

56. Supra, note 51, para. (27).

57. Ibid., Part XII, para. (102).

58. Supra, note 10, p. 349.

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67. Supra, note 13, p. 170.

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79. Ibid., p. 347, citing S. Rep. No. 185, 75th Cong. 3rd Sess., part 2 (1938), at 1-2.

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83. Ibid., p. 352.

84. Ibid., p. 353.

85. Hearings before the U.S. Congress Committee on Merchant Marine and Fisheries, House of Representatives, 75th Congress, 3rd Session on s. 4 of H.R. 9710, 22nd and 23rd March 1938.

86. This could be accomplished by enlarging the definition of 'vessel' in the Merchant Marine Act, to include oceangoing aircraft; supra, note 71, p. 274.

87. Testimony of Colonel Edgar S. Gorell, President Air Transport Association of America, supra, note 85, p. 22.

88. Ibid., p. 24.

89. Ibid., p. 25.

90. Ibid., p. 26.

91. Ibid., p. 27.

92. Ibid., p. 33.

93. Refer to Appendex IV.

94. Testimony of Robert G. Thach, Vice President and General Attorney, Pan American Airways Co., supra, note 85, p. 56.

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96. For example Senate Bill S. 326, a Bill to create the All-American Flag Line, Incorporated.

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CHAPTER II

AUSTRALIAN INTERNATIONAL AVIATION POLICY 1909-1942: A SYNOPSIS

Australians were the first to fly the Pacific in its entire width; Oakland, California to Brisbane via Honolulu and Fiji between the 31st of May and the 8th of June 1928.[1]

The Australian pilot accredited with this outstanding accomplishment, Sir Charles Kingsford Smith, and his subsequent vain attempts to establish commercial domestic and international operations, exemplify the inherent problems and difficulties experienced and encountered by an aviator turned entrepreneur in Australia throughout the two decades preceeding the Second World War.

The first aeroplane flight in Australia, indeed in the southern hemisphere, occured at the Victoria Park Racecourse, Sydney in 1909.[2]

Scepticism of this new invention gave way to widespread curiosity and interest amongst the Australian public following the use of the aircraft in the First World War, and the period immediately thereafter when the Australian Government sent former war pilots and aircraft on tour around the continent to advertise the floatation of «Peace Loans», which were available for subscription by the public.[3]

Stimulation of interest was further occassioned with the announcement by the Australian Prime Minister in March, 1919 of the Government's decision to offer «£10,000 for the first successful flight to Great Britain from Australia on a machine manned by Australians».[4]

This announcement was significant in two respects: firstly, that the Australian Government even at this early stage was conscious of the benefits associated with the development of long range air services; and secondly and more importantly, that such services should be operated exclusively by Australian interests.

The historic flight of Sir Ross and Sir Keith Smith are considered an indelible part of Australian history and the completion of the flight raised the real possibility amongst Australians of establishing a commercially organised air service between England and Australia.

Ironically one of the entrants in the above competition was Sir Charles Kingsford Smith, who was subsequently refused permission to compete on the grounds that he lacked sufficient experience and knowledge of navigation. As a consequence, Kingsford Smith moved to the United States for a brief period before returning to Australia in 1921 where he piloted for Western Australia Airways Limited.[5]

The above airline was in 1920, one of sixteen airlines flying within Australia, completely unregulated, a situation that had created great concern for both the Federal Government and the operators; a situation not unlike that of the United States.

However, unlike the United States Federal Government, which appeared to have procrastinated for six more years on

the issue, the Australian Federal Government passed the Air Navigation Act on the 11th of November, 1920,[6] coming into force on the 28th of March 1921.[7]

This legislation was to form the basis of two of the most significant constitutional decisions of the High Court of Australia.[8]

The Air Navigation Act and the attendant Regulations had been passed to give effect to the Paris Convention[9] and were thus concerned with air safety precautions and navigational procedures.

In addition, the Act confirmed adoption and adherence by the Australian Government to the international principle of law, which vested a State full and absolute sovereignty and jurisdiction in the airspace above that State's territory and territorial waters.[10]

Administration of the Act was vested in the Civil Aviation Authority/Administration, described as a separate branch of the Defence Department.[11]

The Authority was headed by an independent Controller of Civil Aviation whose duty was to «administer the traffic regulations and advise on matters affecting the organisation of airlines and schemes for the encouragement and growth of civil aviation».[12]

The first challenge directed towards the constitutionality of the legislation arose with the High Court decision in The King v. Burgess, ex parte Henry.[13]

Section 4 of the Act purported to empower the Governor-General to make regulations for two purposes:

> « (i) for the purpose of carrying out and giving effect to the Paris Convention and the provision of any amendment to the Convention made under Article 34 thereof;
>
> (ii) for the purpose of providing for the control of air navigation in the Commonwealth and territories.»

Control of aviation had been raised at an earlier Premier's Conference in 1920; a resolution having been initiated and subsequently passed by the Premiers recommending that each State should refer to the Federal Government, pursuant to Section 51(xxxvii) of the Constitution,[14] the matter of the control of air navigation but reserve to the States, the right to own and use aircraft for the purpose of governmental departments and the police powers of the States. The Commonwealth subsequently passed the Air Navigation Act but the complimentary State legislation, with the exception of Tasmania, was not forthcoming.[15]

The constitutionality of the Act remained unchallenged until 1936 when the appellant sought an order to prohibit further proceedings for a conviction under the Regulations pursuant to the Act for making an intra-state flight without the requisite pilots licence.

The High Court held that while Section 4 of the Act, which empowered the Governor-General to make regulations for carrying out and giving effect to the Convention, was a valid

exercise of the external affairs power, the Regulations were not.[16]

The Regulations, although largely following the Convention, did not embody all its provisions and in some respects differed from them, and therefore, the Court maintained could not be sustained on the basis that they carried out and gave effect to the Convention.[17]

The Court did, however, affirm that Federal legislation may be enacted in so far as legislation was necessary to give effect to duly concluded international agreements provided the obligations concerned were legitimate subjects for international co-operation and agreement.[18]

The Court applied the test that the «regulations must be in substance, regulations for carrying out and giving effect to the Convention»[19] and «that there must be a faithful pursuit of the purpose, namely a carrying out of the external obligation» and that «the regulations must be sufficiently stamped with the purpose of carrying out the terms of the Convention».[20]

As the Court was unable to sustain the Regulations under the external affairs power, the Court was then required to examine a second head of power upon which the Regulations may derive their authority, Section 51(i) inter-state trade and commerce.[21]

The High Court maintained that the Federal Government could control air navigation in so far as it was part of inter-state trade and commerce, but that it had no general

power to control all air navigation, and that the section purporting to assume such power was inseverable, and therefore, invalid.[22]

The Chief Justice, Sir John Latham, expressly rejected[23] the application of the 'commingling theory' as adopted by the United States Supreme Court in interpreting the scope of the commerce power under the United States Constitution. That court had held[24] that the power to regulate inter-state commerce authorised Federal legislation applying Federal safety standards and devices applicable to trains operating inter-state; to trains operating on the same railroads but on exclusively intra-state sectors.

By way of contrast to the Australian legislation and the series of constitutional challenges that followed its enactment, the United States equivalent found in the Civil Aeronautics Act 1938 was not subject to the same constitutional scrutiny by the courts. This is due to the development of a sophisticated technique by American legislators for establishing facts which underlie the constitutionality of statutes. Where the constitutionality of legislation may depend on such facts, the enactment is usually preceded by a detailed legislative fact finding procedure.[25]

The United States Civil Aeronautics Board followed this technique before pre-empting the air safety field by making a specific finding after protracted technical hearings that all aircraft in the United States may «directly affect or

endanger safety in air commerce». The Courts may review this finding but are less likely to reach an adverse finding if it were clear that Congress had acted in accordance with the finding of a body of technical experts.[26]

In addition, unlike the Australian draftsman, the United States counterpart had dissected the totality of air navigation into a series of classes of operations so as to high-light the interrelation between each class thus affording an easy and simple application of severability tests if the Act were considered in excess of any federal power in relation to any one class.[27]

The Civil Aeronautics Act of 1938 defines air commerce as «inter-state, overseas or foreign commerce...or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in inter-state, overseas or foreign commerce». Regulations issued pursuant to this Act in 1941 required federal pilot licences and aircraft certificates for all pilots and aircraft operating in the airspace overlying the United States. The validity of the regulations imposing this requirement was upheld subsequently in the United States v. Drum.[28] It is interesting to note that in 1956 the Australian Air Navigation Regulations, specifically regulation 6(e), was amended to apply, inter alia, in relation to -

> «(e) air navigation in controlled airspace which directly affects or which may endanger the safety of persons or aircraft engaged in a class of air navigation specified in paragraphs (a), (b), or (d) of this sub-regulation.»[29]

The influence of the United States is apparent although unlike the equivalent United States legislation, it is limited to controlled airspace; a federal power later upheld by the High Court in the second Airlines of New South Wales Case.[30]

The Air Navigation Act and the attendant Regulations were again challenged by Goya Henry,[31] following amendment by the Federal Government which now authorised regulations for the purpose of giving effect to the Paris Convention and for the purpose of providing for the control of air navigation -

> «(a) in relation to trade and commerce with other countries and among the States; and
>
> (b) within any territory of the Commonwealth.»

Thus the Regulations no longer purported to extend to the regulation of intra-state air navigation except to the limited extent necessary to give effect to the Paris Convention.[32]

The majority of the High Court upheld the conviction, maintaining that it was valid pursuant to the external affairs power, despite the fact that it deviated in some respects from the corresponding Paris Convention.[33]

Endeavouring to clarify the position permanently, the Federal Government attempted to amend the Constitution such that the Government was now vested with the power to make laws with respect to «air navigation and aircraft». The amendment was not adopted following its failure to obtain a majority of a majority of states, although the majority of the voters approved the amendment.[34]

In response, the Federal Government convened an aviation conference attended by both Federal and State Ministers to evaluate means whereby uniformity of air navigation rules could be made possible.

As a consequence, all States agreed to enact uniform State Air Navigation Acts, which would essentially adopt the Federal Air Navigations as State[35] law. This scheme of legal control continued without change until 1963 at which time the High Court ruled that Federal Parliament could now regulate intra-state air navigation by virtue of the obligations assumed by Australia in becoming a party to the Chicago Convention of 1944; i.e. by relying upon the external affairs power.[36]

Following the original passage of the Air Navigation Act in 1920, tenders were immediately called for the establishment and operation of air services «with safe and suitable aeroplanes» throughout Australia;[37] the emphasis of government policy being directed towards the promotion and operation of services over sparcely populated areas. The rationale

being that apart from its practical usefulness, development in these regions would encourage private enterprise to launch similar services in localities where rail communications were impracticable.[38]

It is of significance to note that of the numerous companies incorporated and subsequently operated throughout the 1920s, only three became firmly established and survived the decade.[39] Of the three, the two most successful companies operated not to the populous southern cities but to the small and isolated towns and stations of Queensland and Western Australia; one of those being Queensland and Northern Territory Aerial Service,[40] the forerunner of Australia's singulary designated international airline.

The growth of civil aviation throughout the 1920s was in common with its United States counterpart greatly dependent upon government subsidies; and while growth was constant, if not unremarkable, it is possible to conclude that a general tendency arose amongst both the government and private sectors to use aircraft particularly where distances were great and other transport facilities non-existent.

Therein lies an important distinction between the United States and Australia. Unlike the United States, Australia did not possess an extensive internal railway system.

This alternative form of travel not available in most areas of the country, resulted in the stimulation and growth of the air transport industry, such that Australia was by 1938

carrying more passengers per capita than any other country in the world.[41]

However, like the United States, the growth of civil aviation during the 1920s was confined to domestic operations; the inmaturity of technology and geographic constraints prevented its expansion abroad until the next decade.

1930 saw within Australia, the inauguration of the first unsubsidised air transport undertaking of major importance. Its founder and co-director, Sir Charles Kingsford Smith, initiated a daily service in each direction between Sydney and Brisbane, later extended to Melbourne.[42]

However, the company Australian National Airways met with a series of reversals commencing with the disappearance of one of their aircraft the «Southern Cloud», followed by the diminution of passenger traffic compounded by the economic depression. Forced to discontinue operations in 1931, the airline might have been the airline responsible for the inauguration of several international services.

Kingsford Smith had following the completion of his second trans Pacific crossing, expressed the intention to operate commercial services along this route while his plans for a regular trans Tasman service were well advanced prior to his disappearance in 1935.[43]

However, the distinction of operating the first Australian international air service is attributable to QANTAS.[44]

Any consideration of the development of Australia's international aviation policy throughout the latter half of the 1920s and in particular the 1930s would be incomplete without reference to the development of inter Empire air services, in which both QANTAS and the Australian Government played such key and decisive roles.[45]

More importantly, the development of inter Empire air services accounted for the emphasis and direction, both politically and geographically, of Australia's pre-war international aviation policy.

The decision to concentrate upon the development and promotion of inter Empire aerial communications is attributable in part to the decision of delegates attending the 1926 Imperial Conference in London.[46]

The British Secretary for Air, Sir Samual Hoare, in addressing the conference, emphasized the need for the development of Empire air services, «whether by aeroplane or airship, it being a vital factor in the problem of Empire defence».[47]

As a case in point, Hoare cited the travelling time of the Australian and New Zealand Prime Ministers, who were required to spend 60 days in transit and maintained that:

> «unless a sustained effort is now made to introduce new methods and to apply the results of invention and discovery, they (the Prime Ministers) are likely to continue to take over 60 days for many Conferences to come....»[48]

Hoare's plan, (and emphasis of direction) with its strong affiliation with the development of Empire defences and communications made the proposal extremely attractive for the Australian Government.

In addition, strong political, economic and cultural ties with the «mother country»,[49] and the means whereby these ties may have been strengthened through a considerable reduction in travelling time, were strong incentives for the Australian Government to participate.

The recently incorporated Imperial Airways, the first British 'chosen instrument' of the air was, however, intent upon exercising exclusive control of the Empire air routes.[50]

The Australian Government, however, was less than conciliatory on this issue and after protracted and lengthy negotiations, which one British historian considered to be the hallmark of provincialism on the part of the Australians, arrived at an acceptable compromise in 1934.[51]

The agreement resulted in the designation of a new airline,[52] QANTAS Empire Airways, jointly owned by QANTAS and Imperial Airways, to operate exclusively the eastern sector of the England to Australia route.

Australia's tenacity in insisting upon the British Government's acceptance of exclusive carriage over certain sectors had a remarkable effect, albeit temporarily, in accelerating the political maturity and consequent development of an independent aviation policy.

Unfortunately this independent stance was subsequently interrupted and indeed regressed following adherence to a British Commonwealth inspired coalition and participation policy. This policy was adopted and emphasied at various times in the course of negotiations with the United States Government and Pan American Airways; a policy it is contended that possessed the attributes of being potentially, if not actually, detrimental to the furtherance of Australia's national interests.

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8. R. v. Burgess, ex parte Henry (1936), 55 C.L.R. 608; R. v. Poole, ex parte Henry (No. 2) (1939), 61 C.L.R. 634, discussed below.

9. Convention on the Regulation of Air Navigation (1919).

10. Ibid., Aritlce 1.

11. Supra, note 2, p. 16.

12. Comments of Senator Pearce, Minister for Defence to the House, 17th September 1920; ibid., p. 16.

13. (1936) 55 C.L.R. 608.

14. Under Section 51 (XXXVII), the Parliament may legislate on any matter referred to it by a State Parliament. «Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to states by whose Parliaments the matter is referred, or which afterwards adopt the law.»

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21. Ibid.

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23. Supra, note 13, p. 629.

24. Southern Railways Co. v. United States (1911) 222 US 20, 32 S.Ct. 2.

25. Supra, note 7, p. 32.

26. Ibid.

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28. (1944) 55 Fed. Supp. 151.

29. Supra, note 7, p. 32.

30. Airlines of New South Wales Pty. Ltd. v. New South Wales (No. 2) (1964) 113 C.L.R. 54.

31. R. v. Poole, ex parte Henry (No. 2) (1939) 61 C.L.R. 634.

32. Supra, note 7, p. 33.

33. Ibid.

34. Supra, note 5, p. 24.

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36. Airlines of New South Wales Pty. Ltd. v. New South Wales (No. 2), supra, note 30.

37. Supra, note 2, p. 16.

38. Ibid.

39. Supra, note 5, p. 19.

40. Commonly referred to as QANTAS.

41. Aircraft April 1939, p. 45.

42. Supra, note 2, p. 17.

43. Canberra Times, 30th of October 1935; In 1934, the New Zealand Government had refused an application by Kingsford Smith and Charles Ulm to operate a trans Pacific service linking Australia, New Zealand and the United States. Subsequently, Kingsfor-Smith's proposal for his Trans-Tasman Development company flying American Sikorsky S42 flying boats between Australia-New Zealand-Fiji-Hawaii to link with the Manila-San Francisco route of Pan American was also declined; I.H. Driscoll, Flightpath South Pacific, Christchurch, Whitcombe and Tombs, 1972.

44. Specifically on the 10th of December 1934.

45. QANTAS was selected by the Australian Government over Western Australian Airways and Australian National Airways on the 19th of April 1934, following that airline's earlier decision to form a partnership with Imperial Airways in 1933 to operate the Australian sector of the London service; supra, note 43, p. 42.

46. O.J. Lissitzyn, International Air Transport and National Policy, New York Council on Foreign Relations, 142, p. 65.

47. Ibid.

48. Ibid.

49. Great Britain.

50. Incorporated 1924 following the amalgamation of four pioneering companies. Essentially a privately owned company the airline had the exclusive support of the British Government; supra, note 5, p. 28.

51. R. Higham, Britain's Imperial Air Routes 1918-1939, Hamden, Connecticut, The Shoe String Press, 1960, p. 229.

52. 19th of April 1934.

CHAPTER III

1934-1935 Mid Pacific Route Development

In May 1934, Juan Trippe, President and Chief Executive Officer of Pan American Airways, announced to the Airline's Board of Directors, his intention to operate trans Pacific services.[1]

The decision to concentrate upon the development of Pacific as opposed to Atlantic services was one born of business and political necessity. Trippe was unable, despite nearly six years of protracted negotiations with the relevant governments, to secure the necessary landing rights which would permit an Atlantic operation.[2]

Stymied by the intricacies of international politics, Trippe was forced to consider alternative routes for the deployment of newly purchased aircraft originally earmarked for the Atlantic, which it was alleged Trippe had ordered without consulting the Airline's Board of Directors.[3]

At the same time as Pan American was developing and formulating plans for the inauguration of Pacific services, preparations were also being made simultaneously for the «construction of landing facilities for commercial operations between the Pacific Coast and Honolulu, continuing one line to the Philippines and another to American Samoa, connecting with a contemplated British line from Australia and New Zealand».[4]

The company responsible for this undertaking was known as the South Seas Commercial Company. The company's intentions and ambitions were disclosed following the receipt of letters by the United States Navy on the 22nd of September, 1934. In these letters, the company outlined its proposals and requested Navy co-operation, co-operation it was suggested that would be beneficial to the Navy:

> «...on account of the importance to the Navy Department of having adequate landing facilities available throughout the Pacific for their own use when needed for peacetime or wartime operations which facilities will be developed at no cost to the Navy Department or to the Government.»[5]

The letters were signed on behalf of the company by Harold Gatty. Gatty born in Australia, later adopting U.S. citizenship, had acquired prominence both within Australia and the United States as an aerial navigator, most notably for accompanying Wiley Post in that pilots epic round-the-world flight in 1931. Subsequently, he was employed by the United States Army and Navy as a technical advisor on air navigation methods, equipment and instruction.[6]

During 1934, Gatty became actively involved in the formulation of plans for the establishment of trans Pacific airlines. Citing the military and political value of such a venture,[7] he succeeded in capturing the interest of Donald Douglas, the legendary aircraft manufacturer.[8]

Subsequently, the South Seas Commercial Company was incorporated with Gatty being employed as general agent of the corporation, commissioned specifically «to proceed immediately to Honolulu and there to attempt to acquire leases, concessions and options on properties suitable for the use of an air transportation line or lines, for or on behalf of this corporation».[9]

Gatty, in an outline submitted to Donald Douglas in June 1934, put forward the justification for the establishment of such a service, with some interesting and pertinent comments.

Gatty noted that international airlines as opposed to domestic could in the future expect greater Government support evidenced by the recent air mail cancellations where Pan American remained totally unaffected.[10]

Unlike Trippe, who had emphasized the importance of developing the Atlantic route, Gatty could see no appreciable advantage in terms of speed, of aircraft over steamships then operating the Atlantic service:

> «Fast steamers make the crossing in four and a half days. Any deviation by an airline by way of Bermuda and the Azores could not lessen the steamer's time by more than a day. The same thing applies if the route to Greenland is chosen.»[11]

Of greater relevance are Gatty's comments concerning the then contemporary United States trade and foreign policies.

The United States, he maintained, would have less to do with Europe and would bend its efforts «towards the greater avenue of trade in the Far East and Pacific countries».[12] An astute and accurately phrophetic comment.

Technically, Gatty considered, conditions were ideal for the establishment of a trans Pacific service. Though the distances were greater between continents, conveniently located islands made it practical to carry reasonable payloads with present equipment. In addition, «no icing conditions exist anywhere along the route and fog will only be encountered in the vicinity of San Francisco and, to a lesser degree around Sydney. No fog whatsoever will be found anywhere else along the route».[13]

Gatty in pre-empting arguments that were to be latter advocated by United States merchant marine,[14] considered it desirable to secure steamship companies financial participation in any proposed company. The advantages were numerous; use of emergency facilities, communication facilities, continuous floating weather services, terminal facilities and ticket offices, customs and clerks already available along the route. «The use of their agents would reduce the costs of maintaining personnel along the route who would only be necessary at intervals when a plane is arriving and departing.»[15]

An important distinction existed, however, between the Pan American proposal and the submission of the South Seas

Commercial Company. While the former intended to operate both the facilities and the attendant airline operations between those facilities, the latter planned to operate and manage the facilities only; «the construction of landing facilities...such facilities kept available for any United States airline or airlines who wish to use these places...».[16]

Although Gatty originally called for the establishment of a trans Pacific airline, the proposal as submitted in its final form to the Navy in September 1934 was confined to facilities management only.

The Air Mail Act of 1934 also known as the Black-McKellar Act passed by Congress on the 12th of June 1934, prohibited after the 31st of December of the same year, the retention or acquisition by aviation enterprises of any financial interests in an airline operator. This effectively precluded vertical financial intergration of aircraft manufacturers and operators. An exception was, however, provided for the acquisition and ownership by an operator of 'landing grounds and appurtences thereto'.[17]

Thus Douglas was precluded from directly investing in an airline destignated to operate a trans Pacific service.

Out of these newly instated financial restrictions, arose a scheme or syndicate conceived by Gatty. The syndicate called for the South Seas Commercial Company to carry out the survey of the Pacific islands and pay all costs associated with the survey, with the understanding that for the loan of a

DC-2 by TWA,[18] they (TWA) would be given an option of taking over the work of the survey on completion, at cost, plus a profit commensurate with the initial risks and outlay incurred by South Seas Commercial. The syndicate would insure the aircraft against all loss so that TWA would be clear of all risks.[19]

The creation of this syndicate accounts for the various media reports of a 'mystery plane' that was being used and tested over the American West Coast, under the supervision of Eugene Vidal, the Chief of the Bureau of Air Commerce. The mystery plane was, it was later revealed, the DC-1, which the media disclosed, TWA were preparing to use for over water flights.[20]

Thus such a coalition between South Seas, Douglas and TWA would have been successfully circumvented the recent restrictions; Douglas, would participate in a company which would develop a series of major international air routes and simultaneously develop an aircraft suitable for the operation of such routes. Aircraft production would follow with sales to TWA which would in turn operate into airport facilities owned by all three interests.

Pan American was unaware of the existence of a potential rival in South Seas Commercial (and never of TWA) until informed by the United States Navy, two days subsequent to that airline's request for similar Naval authorisations to operate out of several mid Pacific islands.[21]

The interest expressed by two commercial enterprises in the development of Pacific islands for civilian aviation was opportune for the United States Navy. The United States Government succumbing to diplomatic pressure exerted by the Japanese, found in commercial aviation a legitimate pretext to develop a strategically important network of islands without the attendant furor.[22]

The Secretary for the Navy, Claude Swanson, originally favoured the Gatty/Douglas proposal, although as Trippe was quick to respond, South Seas Commercial intention to confine their operations exclusively to facilities management was inefficient.[23]

Trippe maintained that Pan American had in the past been successful in its operations because facilities and operations were combined in the one company, and this in turn enabled that company to develop routes and the equipment necessary for those routes.[24]

Swanson compromised and by the end of 1934 had devised a policy which favoured Pan American along the mid Pacific route to the Philippines, and South Seas Commercial along the south-western Pacific route.[25]

This partial retraction by Swanson from formerly favouring South Seas Commercial exclusively was due to the absence as perceived by Swanson, of any prior experience by the company in this type of operation. Pan American, on the other hand,

had acquired such experience and demonstrated its capabilities in establishing air routes in Latin American since 1927.[26]

On the 7th of January, Swanson wrote to President Roosevelt reporting to the President that the Navy intended to grant Pan American leases at Midway, Wake and Guam, necessary for the operation of a mid Pacific route while it also intended to grant temporary permits to South Seas Commercial, to build landing fields on the same islands for the use of any American commercial airline. This decision permitted Pan American to launch its route to the Philippines.[27]

Pan American was not, however, without other rivals, most importantly those with established business interests in Hawaii. The most prominent in the transportation business being the Matson Navigation Company. Not only did this conglomerate control most of the Hawaiian-United States Mainland passenger and cargo steamship traffic, it also owned and operated a complete infrastructure of affiliated industries within the islands.[28]

Most important was the wholly owned subsidiary The Oceanic Steamship Company which operated ships throughout the South Pacific region, including Australia. In addition the parent company held interests in Inter-Island Airways, forerunner of Hawaiian Airlines in conjunction with Stanley C. Kennedy, a prominent island business identity.[29]

Following Pan American's public announcement that it intended to operate a trans Pacific service, Kennedy and Wallace Alexander, Chairman of Matson, agreed upon the formation of an airline designed to compete with Pan American.[30]

In 1935 Trippe set about eliminating his rivals. He successfully defeated the countermove by established Hawaiian interests, exactly as he had done with W.R. Grace in South America by securing an agreement with them.[31] The agreement called for the possible creation of a second airline to operate from the American west coast to Hawaii and ultimately to Australia. Pan American would own 50 per cent of the stock with the other two concerns retaining 25 per cent each. During the interim period, Inter-Island Airways would operate as agent for Pan American in Hawaii, while Matson would in addition to furnishing weather information to the Airline, act as agent and provide surface connections from all important Pacific ports served by that company, in particular Sydney and Melbourne.[32]

The tripartite agreement was subsequently terminated following application to the Civil Aeronautics Board for approval in 1941. The CAB adjudged the agreement to be anti-competitive.[33]

In addition Trippe placed Matson Chairman Alexander on the Pan American Board of Directors, and offered to both

Matson and Kennedy $500,000 of Pan American stock. Specifically this came to 13,750 shares at $37 each, the approximate market value that day. Both interests exercising their options the following year netted substantial profits, for by that time Pan American stock was selling in the mid 50's.[34]

South Seas Commercial met with a similar fate; Douglas was appointed to the Pan American Board[35] while Gatty was employed by Pan American and designated as that airline's representative to Australia and New Zealand.[36] The latter appointment was an important move on Trippe's part as Gatty was to play a decisive role in the development of south western Pacific airline operations for the company.

The elimination of any American opposition by Trippe in 1935 permitted Pan American to concentrate its efforts upon competing with foreign government and commercial interests in the Pacific. The monopolisation of American interests, although always advocated by Trippe, also received tacit support from President Roosevelt's son, Elliot. Gatty had as early as September 1934, in a letter to Douglas, mentioned that with respect to the trans Pacific facilities venture, «Elliot was all steamed up over the project and apparently has got his father the same way».[37] Elliot Roosevelt according to Gatty would take up to Hyde Park, the President's private residence, all the history, descriptions, photos and charts relating to the schemes. Roosevelt's son was convinced that

the authorisations for the use of the islands would be forthcoming and suggested «calling together Pan American, Kennedy, Matson and Dollar Line and make them combine to form one company to operate the line, instead of having a race across there».[38]

Gatty, commenting upon Elliot Roosevelt's suggestion, doubted whether Pan American would be very enthusiastic about any joint participation. Elliot Roosevelt maintained, however, that he could «force them to it» if required.[39]

Ultimately Roosevelt, neither father or son, forced Trippe, as he had succeeded on his own account and on his own initiative.

Although the Philippines had not attained independence from the United States in 1934, the issue was both prominent and sensitive in Washington and Manila. As early as 1917 during the Wilson Administration, eventual independence for the islands had been discussed, and these discussions materialized in the Hare-Hawes-Cutting Act which prescribed a ten year period of transition to self government. The Bill, however, allowed for the retention of United States military and naval bases. This feature was considered most objectionable by prominent Filipino leaders. President Roosevelt sympathizing with the Filipino objections ordered a new legislative package, the Tydings-McDuffie Bill which withdrew all military installations from the archipelago, but left naval facilities to

further negotiation. This was passed by Congress and approved by the President in March 1934.[40]

In the midst of such a crucial period in Filipino history, Trippe was endeavouring to secure the necessary landing rights for the Pan American service. Pan American's presence, however, was linked to the sensitive issue of the United States' retention of its naval base and coupled with an election to determine the first President of the Commonwealth of the Philippines, the decision by the insular legislature was deferred until September of 1935.[41]

Finally on the 16th of October 1935, the necessary concession was granted to the airline which permitted Pan American to concentrate on the extension to China.[42]

The Nationalist Government of China, however, had adopted a policy of refusing to permit aircraft not registered in China to operate into that country, ostensibly to avoid creating a precedent which they feared would be exercised by Japan.[43]

Trippe to counteract this problem purchased stock in an established Chinese carrier[44] which he intended would connect at Hong Kong for points within China.

Trippe selected the British Crown Colony for Pan American's eastern terminus with assurances from Imperial Airways Managing Director, George E. Woods Humphery, that Imperial Airways would exercise its influence with the Home and Hong Kong colonial government. In return Woods Humphery expected Trippe

to pry from the Chinese, permission for Imperial to fly across South China between Hong Kong and Hanoi, and between Hong Kong and Shanghai.[45]

However, both Trippe and his representative in China, Harold M. Bixby, soon realized that in addition the British expected reciprocal rights in the Philippines, in the event that Pan American were granted operating rights into Hong Kong.[46]

The British Government and in particular the Air Ministry in London quickly seized upon the strategic importance of Hong Kong, a practice that was to continue for several decades thereafter. The British saw in Hong Kong a «chess pawn in the battle for supremacy over the Atlantic air lanes and as such, too valuable to be surrendered without intergovernmental negotiation».[47]

Trippe realized that in addition to the impossibility of obtaining on behalf of Imperial rights into Shanghai from the Chinese, it was equally impossible to secure reciprocal rights for the British in the Philippines.

The latter conclusion was reached by Trippe following his earlier unsuccessful efforts to conclude or arrange for the conclusion of a reciprocal agreement between the United States Government and the Dutch Government for a service between the Philippines and the Dutch East Indies.[48]

The above matter had been referred by the U.S. State Department to the War and Navy Departments for comment. Both

unequivocably opposed any such negotiations on defence policy grounds. They considered there to be three strategic areas from which foreign aviation should be excluded: the Panama Cannal zone, the Hawaiian Islands and the Philippines.

> «The real danger of the present proposal lies in the not improbable request of other nations for similar concessions with probable future requests for extension to other islands. If we enter into reciprocal agreements for the Philippines while the present government of those islands remain unchanged, the next logical request will be for the extension of the agreement to the Hawaiian Islands. The War Department feels that any action which could even remotely be used as a precedent for granting the right to foreign aviation to land in the Hawaiian Islands should be avoided....»[49]

Both departments abided by this principle emphatically throughout the ensuing decade. Thus stymied by policies of both the British and American Governments in attempting to secure landing rights in Hong Kong, Trippe employed what later became described as a flanking tactic.

Trippe instructed Bixby to commence secret overtures with the Portuguese colonial government concerning the use of the adjoining colony of Macao, a mere 40 miles west of Hong Kong. Having been eclipsed commercially in the past by the British Crown Colony, the Portuguese co-operated with «alacrity and enthusiasm» with Pan American, and a five year contract was signed giving the airline exclusive rights to carry mail between Macao and Manila.[50]

The business community in Hong Kong were most concerned, fearful of being excluded from an important commercial link with the United States. Exerting substantial pressure on the British Air Ministry, both the colonial government and the substantial commercial interests of the colony, succeeded in securing the necessary landing rights for Pan American and its Chinese subsidiary C.N.A.C. without the attendant reciprocity.[51]

CHAPTER III - FOOTNOTES

1. One source states that the announcement was made in December 1934 but this was two months after it appeared in the New York Times on the 21st of October 1934.

2. F.X. Holbrook, United States National Defense and Trans-Pacific Commercial Air Routes 1933-1941, Fordham University Doctoral Dissertation 1969, p. 55.

3. Ibid., p. 56. Based on a conversation between the above author and William A. Van Dusen, former Director of Public Relations for Pan American during this period.

4. Ibid., p. 57. NA, RG 80, A 21-5 citing undated letter received by the Navy Department on the 22nd September, 1934, Harold Gatty to the Secretary of the Navy.

5. Ibid., p. 58.

6. PAA 50.07.01, 27 February 1935 Letter, Harold Gatty to Juan Trippe.

7. PAA 50.07.01 26 June 1934, Memorandum from Harold Gatty on Trans Pacific Airline Proposal.

8. PAA 50.07.01 24 July 1934, Letter Harold Gatty to Donald Douglas.

9. PAA 50.07.01 6 August 1934, Extract from the Minutes of the First Meeting of Organizers and Subscribers to Stock of South Seas Commercial Company.

10. Supra, footnote 7.

11. Ibid.

12. Ibid.

13. Ibid.

14. The CAB in American Export Lines, Control-Amer. Export Air, 3 CAB 619 (1942), expressed the opinion that the legal restrictions contained in section 408(b) of the Act prohibited the direct participation of surface carriers in air transportation. This was subsequently re-examined and affirmed in American President Lines Ltd., et al., Petition 7 CAB 799 (1947); Refer to Appendix IV.

15. Supra, note 7.

16. Supra, note 4.

17. Air Mail Act of 1934, Ch. 466, ss. 7(a), (b), (c), 48 Stat. 936.

18. Transcontinental and Western Air, renamed Trans World Airlines on the 17th May 1950.

19. Supra, note 7.

20. Supra, note 2, p. 157.

21. Supra, note 2, p. 62; NA, RG 80, A21-5, 5 October 1934, Letter Chief of Naval Operations to the Secretary of the Navy.

22. PAA 50.07.01, 1 September 1934, Letter Harold Gatty to Donald Douglas.

23. Supra, note 2, p. 79, NA, RG 80, A21-5, 5 December 1934, Letter Juan Trippe to the Secretary of the Navy.

24. Ibid.

25. Ibid., p. 90.

26. Ibid.

27. Supra, note 2, p. 95; FDR Library, A21-5, 7 January 1935, Secretary of the Navy Claude Swanson to the President.

28. F.A. Strndt, Matson's Century of Ships, Modesto, California, Private Publication, 1982.

29. R. Daley, An American Saga - Juan Trippe and his Pan Am Empire, New York Random House, 1980, p. 160.

30. Supra, note 2, p. 98, quoting the New York Times, 15 March 1935, 3:2.

31. The agreement was concluded on the 20th of June 1935.

32. PAA 50.13.02, also supra, note 2, p. 108.

33. Supra, note 28, p. 130; Matson subsequently sold its Pan American stock and commenced initiatives of its own to provide West Coast-Hawaiian service.

34. Supra, note 29, p. 161.

35. M. Bender and S. Altschul, The Chosen Instrument, New York, Simon and Schuster, 1982, p. 233.

36. PAA 50.07.01, 1 May 1935, Letter J.C. Cooper, Jr. to Harold Gatty.

37. Supra, note 22.

38. Ibid.

39. Ibid.

40. Supra, note 35, pp. 229-230.

41. Ibid., p. 247.

42. Ibid.

43. W.H. Wager, American Policy in the Negotiation of International Air Landing Rights, Harvard Law School Thesis reproduced in some selected readings in International Air Transportation, Edited by W.H. Wager, gift of the Editor to the Library of Congress, 25 July 1949, p. 31.

44. China National Aviation Corporation (C.N.A.C.). Pan American acquired 45 percent of the stock, the majority interest being reserved for the Chinese Government, supra, note 35, p. 205.

45. With respect to the latter route Trippe was less than optimistic, ibid., p. 254.

46. Ibid.

47. Ibid.

48. Supra, note 2, p. 84

49. Ibid., p. 84, NA, RG 80, A21-5; Letter, 17 December 1934, Secretary of War, to the Secretary of State.

50. Supra, note 35, p. 255.

51. Ibid.

CHAPTER IV

1934-1935 South West Pacific Route Development

The route following the south west Pacific to Australia and New Zealand had throughout the early and mid 1930s been of great interest to the United States Navy. The south western route was regarded as an alternative route to the Phillipines in the event that Guam was lost to the Japanese. The route was also perceived as an effective means of countering any move from Japan directed specifically against Hawaii or the Panama Canal. The Navy was vested not only with the responsibility of planning for offensive movements but were also required to defend Hawaii and the continental United States. The route to the south west would according to military strategists accomplish both tasks.[1]

Thus, at the beginning of 1935 the United States Navy indicated a strong interest in the establishment of trans Pacific commercial airline services, in particular a route directed towards Australia.[2]

Trippe had commissioned studies of the region termed popularly by the Americans as Australasia as early as 1932.[3] His decision to operate such a service may have resulted in part from a favourable review of these reports but again it is contended that the protracted delays associated with the commencement of an Atlantic service ultimately accounted for his decision to inaugurate a second Pacific service.[4]

The Australian Government as described in Chapter II was beginning to assume a more independent stance in relation to policy concerning the development of international air services.

This was exemplified by the negotiations conducted between the British Government concerning the extension of the Imperial Airways service to Australia. The British increasingly frustrated with the protectionist attitude adopted by the Australians, threatened to fly onto New Zealand thereby precluding any Australian financial participation in the venture.[5]

The New Zealand Government intervened, however, and convinced the Australian Government to temper its «uncompromising» position. It was, therefore, according to one writer only through the intervention of New Zealand that Australia eventually «acquiesced to (participation) in the Empire Mail Scheme».[6]

It was in the midst of this environment that Trippe decided during the course of 1934-35 not to approach the Australian Government directly for landing rights.

The exact date of that decision is not known but reference to Harold Gatty's contract of employment which was dated the 1st of May 1935, and specifically refers to the award of a bonus in the event that Gatty successfully secured operating permits from the New Zealand Government and the Fiji Islands only indicates that the decision was made prior to that date; Gatty was appointed as the airline's Australasian representative.[7]

A memorandum written by Gatty in January 1936 maintains that the reason why Pan American declined to approach the Australian Government was as a consequence of a statement issued by the Australian Controller of Civil Aviation, who maintained that the Government «would not allow business to be detracted from the Tasman Sea».[8]

The Australian Government specifically the Department of Civil Aviation, in a memorandum dated June, 1939 maintained that as far as it was aware no formal application had ever been received from an American carrier, seeking authorisation to fly into Australia.[9]

Trippe and Gatty gauging that the environment was not conducive to submitting a formal request, decided upon employing a more full-proof and successfully proven method[10] in an attempt to achieve their objective, specifically to employ a «flanking tactic»; operate services to a geographically proximate destination which in turn placed pressure upon the government to grant the concession for fear of permanent exclusion and the consequent economic disadvantages of being denied direct aeronautical access.

Pan American's most logical choice in implementing this strategy was New Zealand.

New Zealand, relatively proximate to Australia and ever conscious of its geographical isolation,[11] this consciousness recently compounded by the decision to terminate the Empire Air

Mail Service in Sydney,[12] was perceived to be more receptive and responsive to the idea that a direct air service be established between the United States.

Gatty under instructions from Trippe made the initial approach to the New Zealand Government, probably in August 1937, before departing on an expedition throughout the Pacific looking for suitable landing facilities for the service.[13]

Upon his return, Gatty submitted to the Government a set of proposals which called for the inauguration of a weekly air mail and passenger service from San Francisco to Auckland via Honolulu, Kingman Reef and Pago Pago.[14]

The New Zealand Government's initial response to the proposals was delayed pending consultation with the British Government who in turn advised the New Zealand Government that they «saw no objection to giving the United States rights to fly to New Zealand, provided such rights were granted on the basis of complete reciprocity».[15] This was insisted upon in order for the British to establish a trans Pacific service which would permit the completion of a proposed «All Red Route» or British route around the world.[16]

The British Government suggested that the New Zealand Government in delivering its reply to Pan American, qualify its approval by requesting that further correspondence relating to the Pan American service be directed «through ordinary diplomatic channels».[17]

The British Government reminded the New Zealand Government that it intended to commence negotiations with the United States Government shortly concerning North Atlantic air rights, intimating that in order to achieve success, it was imperative to convey the impression for the benefit of the Americans that a united front existed amongst all members of the British Commonwealth of nations, one which was not prepared to accede to any American requests without obtaining the attendant reciprocal privileges.[18]

New Zealand in response to that advice assured the British Government that safeguards would be inserted into any agreement with Pan American vis-a-vis reciprocity.[19]

As to the recommendation that negotiations be conducted through diplomatic channels, the New Zealand Government succumbed, however, to the pressure exerted by Pan American's representative and chief negotiator Harold Gatty, who informed the New Zealand Government that the airline would not approach the United States Government «owing to interminable discussions (which would follow) and the lack of interest on the part of that government».[20]

Gatty's concern at any delay which might have arisen if the United States Government participated in the negotiations was prompted by commercial considerations. Any delay could jeopardize the award of a valuable United States Post Office subsidy, all estimates were required to be submitted by the first week of October.[21]

Gatty reinforced his position on this matter by declaring that if the present application was refused in its present form then the Company would «employ alternative plans which would serve their purpose but would exclude New Zealand».[22] What those alternative plans were was not disclosed, leading one to speculate that Gatty was bluffing, especially in view of Australia's hostility to an American service and the absence of any alternative and remotely economically viable terminus in the southwestern Pacific.[23]

The New Zealand Government's acquiescence, indeed capitulation on this issue, although in reality probably necessary, was in retrospect a fundamental error of judgment and one which affected not only the New Zealand Government but other Commonwealth governments who were subsequently required to contend with and minimize that government's mistake.

On the 9th of November 1935, the U.S. State Department received an official communication from Pan American concerning its negotiations with the New Zealand Government. The Company maintained that «it is obvious that the development of the proposed route would further advance both the commercial and national defence interests of the United States».[24]

The cable set out the main features and terms of the agreement, reached between the two parties, the most important and subsequently controversial being Article 12[24a] - the reciprocity clause.

The Australian Government was first informed of the impending agreement on the 28th of September, pursuant to a cablegram from the New Zealand Prime Minister's Office. The cablegram emphasized that the Company (Pan American) was not interested in Australian or Trans Tasman services and agreed to «respect Imperial Airways services» and any possible extension that carrier may wish to make.[25]

That New Zealand was extremely eager to receive the Pan American service is evident, by constant reference through out the cablegram to the «desirability» of such a service, a description which is employed on more than one occasion. Indeed the New Zealand Government regarded the matter as «one of the very first importance to this Dominion», and one which required «very early and final views».[26]

Australia did not share New Zealand's view as to the urgency of the matter given that a further cablegram from the New Zealand Prime Minister was necessary in order to prompt a reply. The reply from the Australian Prime Minister's Office when finally sent on the 1st of November 1935 simply read that the «Commonwealth of Australia have no comments to offer upon the intention of His Majesty's Government in New Zealand to grant the necessary permission»,[27] an overly succint answer given the enormity of problems this agreement was to create for the Australian Government during the ensuing six years.

Britain's advice to New Zealand was reported in the Australian press on the 9th of November 1935. Two separate articles[28] noted that Britain did not view with enthusiasm the proposed service but having offered «fatherly advice to New Zealand», was satisfied that New Zealand had «adequately safeguarded herself regarding reciprocal use of America's Pacific Islands».[29]

The British press exhibited a more paternal attitude, no doubt consistent with its governments practice of providing «fatherly advice». «The British are certain», one aeronautical journal wrote, «that the New Zealand Government is not in the least likely to make any concessions which would sacrifice or even jeopardize any rights or prospects of a British firm in the future»; it being «contrary to all history for New Zealand to snatch immediate advantage for herself if by doing so she compromised wider British interests». «There is no part of the Empire more Imperially-minded that the island Dominion in the South, which is often described as a beautiful counterpart of Great Britain».[30]

Such appeals to sentiment did not go entirely unheeded but the British under-estimated the determination of the New Zealand Government to implement the service.

It is no mere coincidence that the first public announcement of the negotiations occured in a political election manifesto.[31] The impending national elections in New Zealand in

December 1935 added a certain impetus and importance to the issue. The New Zealand Government had consistently advocated the importance strategically of the American service which assumed tremendous importance to a nation so geographically isolated «(it) would provide a valuable addition to the Dominion's limited means of communication».[32] Obviously, any government which could substantially reduce and alleviate this isolation would stand to fare better electorally.

The issue was not, however, one of decisive political importance given that the incumbent government was not returned to office. The new Labour Government led by Michael Joseph Savage initiated a «transformation of the country's foreign policy which resulted in a refreshing willingness to take the initiative».[33] Inauguration of a direct airline service to the United States would have provided an important adjunct to that «new willingness» and this new maturity, exhibited by the new Government in matters of foreign affars, was reflected by that government's decision to abide by the Pan American agreement, entered into by the previous National Government.

It is also of interest to note the composition of the New Zealand Labour Ministry, which consisted of no less than six ex-Australians one more in number than native born New Zealanders.[35] The more competitive attitude of expatriates may have contributed to the desire on behalf of the government to preempt

Australia as a terminal point for southwestern Pacific operations. Sentiments of nationalism between two traditionally strong rival British Dominions undoubtedly contributed in part to the New Zealand decision.

The agreement also attracted the attention of Australian politicians where in the Senate enquiries were made as to the affect such service would have on Australia's communications with the United States, to which the Leader of the Senate replied:

> «Any air service between New Zealand and America, irrespective of whether an aerial link is provided between Australia and New Zealand must appreciably reduce the time of transit between Australia and continental American as well as intermediate Pacific Islands and so it cannot be said that the proposed service will not affect Australia.»[36]

CHAPTER IV – FOOTNOTES

1. F.X. Holbrook, United States National Defense and Trans-Pacific Commercial Air Routes 1933-1941, Fordham University, Doctoral Dissertation, 1969, p. 91.

2. Ibid.

3. Pan American Airways Inc. History of the Trans-Pacific Air Services to and Through Hawaii - Exhibit PA-2, CAB Docket Nos. 851 et al., p. 23.

4. Trippe officially maintained that Pan American decided to inaugurate a second Pacific service because he believed that any economic or geographic advantage the United States may have possessed with either Australia or New Zealand, would have been lost if a «European air service» was extended «into the area», ibid.

5. R. Higham, Britain's Imperial Air Routes 1918 to 1939, Hamden Connecticut Shoe String Press, 1960, p. 232.

6. Ibid., p. 236.

7. PAA 50.07.01 Harold Gatty, 1st May 1935, Letter from J.C. Cooper Jr., Vice President Pan American Airways to Harold Gatty.

8. PAA 10.10.01 Pacific Division, 13th of January 1936, Memorandum written by Harold Gatty «Australasion Service via New Caledonia».

9. Lending credence to the theory that Trippe and Gatty merely appraised the situation at this time; AA - CRS A 1606 T 411, 7th of June 1939, Memorandum from Director-General of Civil Aviation to Prime Minister's Department.

10. The results of which could be identified in Pan American's successful bid for landing rights into Hong Kong.

11. M. Bender and S. Altschul, The Chosen Instrument, New York, Simon and Schuster, 1982, p. 271.

12. Supra, note 5, p. 232.

13. Supra, note 1, p. 147.

14. Ibid.

15. AA - CRS A 461 I 314/1/4, p. 1, 27th of September 1935 Cable from Prime Minister of New Zealand to Prime Minister of Australia. Details of British response contained in the above cable.

16. Supra, note 1, p. 148, citing NA, RG 59, File 811 79690 PAA/113, 30th of September 1935, Press report from American Embassy, England on British papers of 26th of September 1935.

17. Supra, note 15.

18. Ibid.

19. Ibid.

20. Ibid.

21. Ibid.

22. Ibid.

23. Gatty may, however, have been considering designating New Caledonia as an alternative terminus. Refer to page 120.

24. Supra, note 1, p. 149.

24a. Refer to page 92.

25. Supra, note 15.

26. Ibid.

27. AA - CRS A 461 I 314/1/4, p. 1, 1st of November 1935, Cable from Prime Minister of Australia to Prime Minister of New Zealand.

28. The Melbourne Star, 9th of November 1935, and The Melbourne Argus, 9th of November 1935.

29. The Melbourne Star, 9th of November 1935, a curious remark in The Melbourne Argus dated the 11th of November 1935 attributed Britain's concern over the arrangement to «the experience with the Matson steamships on the Australian run».

30. Flight Magazine, 21st of November 1935, p. 521, «An American Bid».

31. «Rather remarkably» commented Aircraft Magazine, 2nd of December 1935, p. 14.

32. Supra, note 15.

33. K. Sinclair, A History of New Zealand, New York, Penguin, 1980, p. 277.

34. Ibid., p. 269.

35. Hansard Proof, The Senate Thursday, 31st of October 1935.

CHAPTER V

THE 1935 AGREEMENT WITH NEW ZEALAND - A PRIVATE INTERNATIONAL CONTRACT

The agreement entered into between the New Zealand Government and Pan American Airways Inc., was signed by on behalf of the New Zealand Government by Joseph Coates, the Minister of Transport on the 25th of November 1935. Lisle Alderton, a New Zealand solicitor, was vested with a substituted power of attorney in Gatty's absence to sign the agreement on behalf of Pan American.[1]

The agreement was to run for ten years from the day service was first inaugurated,[2] subject to the provision that the Company was to commence the service no latter than the 31st of December 1936.[3] However, in the event of «unforeseen difficulties», the time for commencement was, with the consent of the Minister of Transport, to be extended to the 31st of December 1937.[4]

A minimal frequency was determined as, at least two aircraft in every calender month, despatched from each terminus of the route, and not more than two aircraft in any one week.[5]

The route was designated with terminus' in Auckland and San Francisco and intermediate alighting stops at Honolulu, Kingman Reef and Pago Pago.[6]

The Company was, however, required upon the receipt of three days prior notice by the New Zealand Government to operate

services via Apia in Western Samoa, then a New Zealand mandated territory.[7]

A priority system of carriage was determined, the order of preference requiring the carriage of mail over passengers and cargo. Passenger priority was decided according to destination, with passengers destined for or originating from the New Zealand mainland receiving preference over passengers travelling to or from any mandated territory or dependency of New Zealand. Passengers travelling to destinations other than the above were afforded the lowest standing.[8]

The New Zealand Air Navigation Regulations of 1933 prohibited the pilotage of any aircraft in New Zealand unless that aircraft possessed the nationality of a state, party to the Paris Convention of 1919. This effectively precluded the use of American registered aircraft operating into New Zealand. However, an exemption was provided where a special convention relating to air navigation was entered into by the New Zealand Government. This Agreement provided that the Minister of Transport would use his good offices with the Minister of Defence, at such time the Company applied for exemption from the operation of the Air Navigation Regulations. The exemption was to be granted, however, only in so far as it extended to the prohibition against non-contracting state aircraft flying over New Zealand and its territories.[9]

Cabotage was prohibited pursuant to Article 9 qualified by Articles 6 and 7, which referred to the carriage and priority of traffic between New Zealand and its dependencies and mandated territories, specifically Western Samoa.

The Company was, in addition, restricted to the use of one designated terminal in New Zealand.[10]

A substantial proportion of the agreement was devoted towards the consideration of various technical and operational aspects of the service, in particular, the establishement by the Company of a private commercial radio station, licensed for the private correspondence of the Company to serve as a radio aid to navigation.[11]

Such provisions attest to the infancy of the state of art of international airline operations during this period.

The proper law of the agreement was specified to be that of Zew Zealand[12] with jurisdiction vested in the New Zealand Supreme Court.[13]

Of particular importance was Article 18 where contracts of carriage whether of passengers, mail or cargo and wherever entered into, were deemed to be subject to and in conformity with, the laws of New Zealand. This raises some interesting jurisdictional issues in private international law.

Article 18 is deemed to apply to «all contracts of carriage ...by aircraft used in conducting the said service».

Read in conjunction with Articles 1 and 5 which define the service, this article raises the possibility that a United States court would be required to construe the contract and assess damages in accordance with the law of New Zealand where a passenger sustains injury over a purely domestic American sector of the service such as between San Francisco and Honolulu or Kingman Reef and Pago Pago, even if the passenger on board the Auckland bound aircraft intended to alight and was contracted to alight at a destination other than Auckland.[14]

It is contended to be most unlikely and improbable that an American court would have entertained such a notion in accordance with its own conflict of law rules in those circumstances.

Undoubtedly the most important and subsequently controversial article of the agreement was Article 12, the reciprocity article.

Essentially that article provided that where a person being a British subject or corporate body incorporated under the laws of any jurisdiction within the British Commonwealth, applied for landing rights in the United States or any of its territories or possessions, and where the application was refused by the American authorities within three months of the application being made, then the New Zealand Government was entitled to cancel Pan American's permit on twelve months notice.

The decision not to conduct the negotiations and conclude the agreement on a governmental level, apart from eliminating

protracted and lengthy negotiations which Pan American was so anxious to avoid,[15] averted for the United States Government at least temporarily, the problem of having to consider recriprocal privileges.

Both the United States War and Navy Departments had since 1934 opposed the use by foreign carriers of any facilities in Hawaii.[16]

Any concession to the British would, it was rationalized, establish a precedent which could not be refused to the Japanese.

Pan American was fully cognizant with this position and therefore considered that a governmental bilateral between New Zealand and the United States could not be concluded, as the New Zealand Government would insist upon reciprocal privileges.

The U.S. State Department when informed of the impending agreement, expressed their concern and reservations at the insertion of the reciprocity clause, which contained the words «these presents are entered into upon the faith of reciprocity between New Zealand and the United States of America».[17]

The New Zealand Government had insisted of Pan American than the United States Government be informed of the reciprocity clause and that the U.S. Government indicate it did not object to the Company entering the agreement with such a reservation.[18]

On the 12th of November 1935, thirteen days before the agreement was executed by both parties, the State Department

cabled the American Consul at Wellington advising him to inform the New Zealand Government, that the United States Government had noted the conditions placed upon Pan American's permit, "the acceptance of which is a matter that concerns Pan American Airways".[19]

The American Consul in Wellington, George A. Bucklin, in a confidential report to the State Department, emphasized the fact that he had informed the New Zealand authorities throughout the Pan American negotiations that it was a purely private commercial project and had no connection with the United States Government.[20]

In spite of these disclaimers by the United States Government, the New Zealand Government still proceeded to sign the contract, thereby precluding any assertion on their behalf that they were not aware of the ineffectiveness of the article.

In fact the New Zealand Government had informed the Pan American representatives prior to execution that according to its sources, no British sponsored airline was at the time in any position to apply for reciprocal landing privileges into the United States,[21] implying that the New Zealand Government attached little importance to the article themselves.

John Cobb Cooper, Pan American's Senior Legal Advisor, related this piece of intelligence to a concerned Secretary of State, Cordell Hull, adding that the New Zealand Government had

only insisted upon its inclusion in order to appease the British Government.[22] Hull was not satisfied with the explanation which accounts for his instructions that Bucklin inform the New Zealand Government that the United States would not be bound by an agreement entered into by a private American company.

Cooper was, despite his assurances to Hull, also sceptical of the New Zealand Government's explanation and position on this matter. He really believed that the New Zealand Government was not only trying to avoid criticism directed by the British Government, but also by the American Government in the event that the New Zealand Government decided to revoke the agreement.[23]

There is no doubt, however, that the New Zealand Government was extremely anxious to ensure that the service was inaugurated and acquiesced on the reciprocity issue, an admission that was not forthcoming from the New Zealand Government for another six years.[24]

Although the U.S. State Department had co-operated fully with Pan American during the course of the New Zealand negotiations, the Department was by 1935 not enamoured with the airline's practice of negotiating their agreements; a practice which they now felt ought to be the responsibility of the government alone.[25]

As discussed in Chapter I, Pan American had successfully developed an extensive network throughout Latin America, as a result of negotiating directly with the governments concerned.

Indeed, Juan Trippe had originally been able to arrest substantial financial participation and control in Pan American from two other rival financial factions, when in 1928, Trippe secured personally from the President of Cuba an exclusive operating franchise into that country.

This forced the other competing financial groups,[26] one of which had already secured the U.S. air mail contracts for the Key West-Havana route,[27] to reach a compromise with Trippe and his sponsors, subsequently, entering into a merger of the three competing groups in 1928, out of which the Aviation Corporation of the America's was incorporated, holding company of Pan American.[28]

> "Trippe never forgot the success of these tactics, and his subsequent long-term planning was to be characterized by this foresight in securing foreign footholds."[29]

Thereafter, Trippe now in effective control of the airline dispatched overseas representatives throughout Central America and the Caribbean, seeking landing rights necessary for that airline's expansion throughout the region.[30]

Pan American thereafter perfected its negotiating skills such that by 1935 the airline was operating some 30,000 miles of routes throughout Latin America.[31]

The techniques employed to attain this position were varied. In Mexico, for example, the Mexican Government prohibited carriage of Mexican mail by a foreign carrier, which Pan

American circumvented by purchasing stock in a locally incorporated carrier, Compania Mexicana de Aviacion (C.M.A.).[32]

What appeared, however, to permeate any negotiations with Latin American governments was a distrust of the American negotiators; a legacy of having dealt with the exploitative United Fruit Company,[33] «colonizer of the banana republics and pioneer for over forty years in monopolistic concessions».[34]

This legacy and reported association with United Fruit Company earned for Pan American a dubious reputation and inflamed Latin American sensitivities, an association Pan American attempted to disavow.[35]

For example, following the execution of an air services agreement with the Government of Honduras in 1928, the opposition to its ratification was so great amongst members of the Honduran National Congress that when the legislative committee, considering the agreement reported upon it unfavourably and the President in response sought to withdraw the legislation pending further modification, the Congress ignored the President's action and voted unanimiously to abide by the committee's strictures on the action.[36]

Similar opposition was encountered in Costa Rica and Guatemala, while opposition in Chile was so great to granting Pan American a concession that the U.S. State Department advised the company against submitting similar proposals to the Government in the Argentine Republic.[37]

The State Department had originally adopted a policy of maintaining a «strictly impartial position»[38] in regard to competion between American overseas carriers but with Pan American's gradual elimination of its rivals, the Department in the cause of promoting American interests in the region regularly provided diplomatic assistance to the carrier in its efforts to secure landing permits and concessions from the various governmental authorities; «we gave them all the help we could».[39]

However, in other parts of the world, the State Department was not prepared to merely assist in such negotiations but rather intended to assume responsibility for their execution.

Although Juan Trippe had personally initiated negotiations with various European governments as early as 1928,[40] the State Department had after 1935 assumed greater responsibility for the negotiations of North Atlantic operating rights, culminating in the decision in 1939 «that the question of obtaining transatlantic rights for American air transport companies should be a matter of negotiations between the government of the United States and the foreign governments concerned».[41]

The reasons for this decision were never made public, but it was speculated at the time that it was as a result of the insistence of various European governments, who demanded that all applications be directed through the government of the foreign operators. This was to ensure that those European

nations conceding landing rights to an American operator were assured of being granted reciprocal operating privileges in the United States.[42]

O.J. Lissitzyn writing in 1942 maintained that the future policy of the United States in other parts of the world «cannot still be considered as settled».[43] Samuel E. Gates, however, writing in 1939, asserted that since the adoption of the Civil Aeronautics Act of 1938, the United States Government «has favoured, with few exceptions, a policy of having arrangements with any new international air service dealt with in agreements concluded with between governments rather than between a foreign government and a private company».[44]

The State Department's re-assessment of its position is evidenced by its reservations concerning the New Zealand negotiations and in particular the inclusion of the reciprocity clause into the agreement.[45]

Reciprocity was the most contentious issue that the United States Government was able to successfully avoid, where operating rights were secured by a private international contract as opposed to a government bilateral.

The concept of reciprocity was recognised at an early stage by the United States Government when authorisation pursuant to the Air Commerce Act for the navigation of foreign aircraft in the United States, was to be granted only «if a foreign nation grants a similar privilege in respect of aircraft of the United States».[46]

The term «a similar privilege» was interpreted as meaning some privilege, specific or general, granted by the other party and deemed by the competent United States authority to be a substantial equivalent for the privilege requested of the United States. It did not mean that in each case the reciprocal privileges must be identical in all respects.[47]

Despite the United States Government's earlier policy of promoting greater freedom for international airlines,[48] in practice the government considered that it could not afford such liberality on a unilateral basis or indeed on a bilateral basis.[49]

The use of private international contracts, therefore, provided an appreciable advantage for the government, where the concession of reciprocal rights, for example, involved access to a strategically sensitive American region such as Hawaii.

This gave rise throughout the 1930s to a policy adopted by the United States of discriminating between governments according to the location and the services involved.

> «Thus it permitted Pan American to negotiate for its own privileges in Latin America, which enabled the airline to compete successfully with European companies employing the methods inadvisable for American government officials to imitate.»[50]

The State Department, while increasingly desirous throughout this period of retaining for themselves exclusive jurisdiction in such negotiations, appeared to have succumbed during the New Zealand negotiations, to pressure exerted from other

quarters within the government, most notably from the War and Navy Departments who opposed reciprocity ostensibly to protect and secure the military interests of the United States in the Pacific.

This policy or amalgamation of sectional policies was described by Lissitzyn as «wisely flexible», avoiding diplomatic negotiations which were likely to become entangled with considerations of political and other extraneous matters.

The promotion of private international contracts as opposed to governmental bilaterals was also advocated by Pan American and other potential American international carriers.

Pan American believed that in order to effectively counter British aerial domination, the use of astute commercial tactics would be more than adequate to meet the challenge. This was convincingly demonstrated in the instance of Hong Kong where as a result of initiatives by Pan American alone, the airline was able to succeed in securing landing rights without the attendant grant of reciprocal rights. This acted as a mutually beneficial arrangement for both the airline and the United States Government:

> «...if a private operator can make such an arrangement...with a country like Mexico and Guatemala and San Salvador and Nicaragua and Costa Rica, and on through the entire list of South American republics, there is no question of Government prestige involved - in other words in dealing with Pan American - none of these countries have any reciprocal rights, because Pan American has no power to speak for this Government at all.»[51]

Referring to the exchange and concession of international air rights as approaching that of «horse trading»,[52] Colonel Edgar S. Gorell, President of the Air Transportation Association of America in 1938, reiterated the sentiments of Pan American by adding:

> «The moral system of making private contracts is a wise one. As long as we keep our Government out of the transaction, the pride of the other nation does not make it (necessary) for the same rights to be granted in return.
>
> If the United States should negotiate such rights in every instance, you would have the national pride of the 24 (Latin American) countries - and their pride is just as great as ours - prompting them to ask for the same rights in this country. And, once they get those rights, even though they have none of their own nationals engaged in flying aircraft, they may permit the right to be used by some national, financed by a foreign country - Germany or Italy for example. Then we will be getting into the same distress that freedom of the seas has brought upon our merchant marine, by virtue of which all of the ships that so desire may come into this country.»[53]

Gorell maintained that as long as the United States controlled access, which would be possible through the continued use of private international contracts, then not only would a slight on the prestige of other governments be avoided but in addition the volume of traffic for U.S. carriers would stand at «100 percent American flag».[54]

> «If one other country comes in and the volume of commerce is divided into two parts, then it is 50 percent American and 50 percent the other government. But, if we may control the number of aircraft flags coming into our shores, we

> shall then control the percentage of business carried on American aircraft. Thus, in my opinion, we may keep this industry out of the permanent subsidy class.»[55]

This economic argument, essentially advocating a total monopoly for American carriers, was an important consideration for the United States Government, but undoubtedly assumed an even greater importance for the carriers.

This was particularly apparent when one considers the almost total domination, the Europeans retained over the north Atlantic passenger steamship market at the time.

By 1940 Pan American had negotiated and concluded in excess of sixty agreements with various sovereign states, their dominions and colonies.[56]

This considerable accomplishment involved the employment of several negotiating techniques and tactics, the principal features of which were:

(i) Persuasion by offering air travel and mail services to countries who were anxious for links to the United States. This worked most effectively with Latin American governments.

(ii) Acquisition or formation of local nationally incorporated airlines. For example, CMA in Mexico, CNAC in China.

(iii) Use of local airlines to exert pressure on local governments, for example, DNL in Norway, Misr in Egypt.

(iv) Use of the good will, influence and diplomatic channels of the U.S. State Department as was used effectively in acquiring permits from the Guatemala, Great Britain and French Governments.

(v) Pressure via the employment of flanking tactics, which compelled a concession since it became apparent that further resistence would be pointless. This was effective in the Hong Kong and British arrangements. It failed, however, to impress the Australian Government, as will be considered later, when Pan American designated the south western Pacific terminus in New Zealand.

(vi) Direct purchase of landing rights for cash, as occurred in the Iceland franchise.

(vii) Unification with another carrier, either a land or sea carrier, which possessed extensive local influence and facilities. For example, formation of an airline with the Grace Line in western South America and sale of stock to the Matson Line, influential in Hawaii and the Pacific.

(viii) Other miscellaneous devices, as yet still undisclosed. Pan American, however, always refuted and contested any allegations of bribery.[57]

The agreements were often criticized on several grounds. It was frequently charged that such agreements were kept unduly secret, an accusation that Pan American adamantly denied, maintaining that the airline had since 1935 advised members of the Interdepartmental Committee on Civil Aviation, of the contents of such agreements. This Committee consisted of representatives of the State, Commerce, Treasury and Post Office Departments, who at no time appeared to have raised any objection as to their contents.[58]

Many of the agreements featured articles, which in a contemporary context would be considered as anti-competitive, and which granted to Pan American exclusive franchises; some

excluding all other carriers except Pan American and a single designated carrier of the host government:

> «The Government agrees that during the subsistence of these presents, and as long as the Company shall continue to include Dutch Guiana in its scheduled international air mail services and to maintain a service of a frequency of at least once a week, the Government will not grant to any other person, company, or organization of nationality other than Dutch the right to conduct scheduled transport service to and from Dutch Guiana. Provided, however, that the rights of the Company under this article shall not be effected if the Company's service is interrupted for causes attributable to force majeure, weather conditions, accidents, strikes, fires, labor difficulties, acts of God, acts of the public enemy, riots, revolutions, interference by civil or military authorities or in general, any controlling emergencies not imputable to the Company.»[59]

Other agreements featured clauses which prohibited competition from other American carriers, for example, the following article inserted into Pan American's agreement with the Jamaican Government, concluded in 1934:[60]

> «The Government agrees that during the subsistence of these presents and so long as the Company shall continue to include the City of Kingston in its scheduled international services and to maintain a service of a frequency of at least once a week the Government will not grant to any other person, company, or organization of United States nationality, or controlled by persons of that nationality the right to establish or conduct regular air transport services to and from the territory or territorial waters of the Island of Jamaica.»[61]

This type of exclusion paragraph was buttressed by other clauses prohibiting potential rivals from carrying air mail, thereby reinforcing the agreement with a strong economic barrier.

> «A supplemental deed shall hereafter be executed between the Government and the Company to cover transportation of air mail to and from the Island of Jamaica whereby the Company under the terms and conditions and at the rates to be set out therein shall have the exclusive right to transport air mail from the Island of Jamaica as against all persons, organization, or companies of United States nationality. Nothing herein contained however shall be construed or understood as restricting or preventing the United States Post Office whenever it may so desire from collecting directly from the Colonial Post Office Department air mail transportation charges accruing to it by reason of the transportation of air mail on the Company's planes from Jamaica to the territory of the United States and/or its possessions.»[62]

Some agreements contained the stipulation that any operating rights could not be transferred or assigned to a government corporation and that Pan American in the event of any disagreement or dispute would refrain from seeking a settlement through diplomatic channels.

This type of clause was inserted at the insistence of various Latin American governments, who feared the effects of the United States employing diplomatic pressure. The provision also protected Pan American from federal appropriation or interference and served to protect the host government from penetration by any American governmental entity or carrier.

It also provided the host government with a legitimate excuse to refuse access to other nationally owned and controlled carriers such as Lufthansa and Imperial Airways.[62(a)]

Other agreements featured covenants which prevented the host government from authorising the use of Pan American's

radio and airport facilities to other carriers, evidenced, for example, in the agreement concluded with the Government of Panama in 1929:

> «In view of the nature of this contract, the first of its kind which is executed by the Republic of Panama, and of the heavy expenses which will be incurred by the Company in the establishment and maintenance of the service, the Government agrees not to grant permits or execute contracts of concession which will hinder the proper operations of its services, or which may jeopardize the lives or properties of the Company's clients in Panama, as for example to obligate the Company to share the use of its own radios, telegraphs, airdromes and other facilities, with other companies, corporations or individuals who intend to engage in commercial experimental or recreational aviation in the Republic of Panama; and that with regard to the airdromes and other facilities that the Government may obtain, its regulations shall facilitate, as far as may be possible, the operation of the Company's aircraft, provided that the said Company may have rendered efficient service to the Government and the public, and that it is disposed to carry out the extensions and technical improvements that may be possible and economically justifiable.»[63]

The most important article, however, from the standpoint of the United States Government, was that granting or rather referring to reciprocity.

In an agreement concluded with the Belgian Government conceding operating rights to the Belgian Congo, one article provided that the agreement would become invalid if the United States refused to grant reciprocal rights upon application by a carrier of the signatory state. The article stipulated cancellation of the operating permit within six months of the refusal:

> «The term of this contract is ten years, commencing on the date upon which execution of this contract is completed. Unless either party of this contract gives written notice to the other of its desire to terminate this contract or any extension thereof on or before two years prior to its termination, this contract or any extension thereof, shall be extended for an additional period of ten years. It is agreed that this contract may be cancelled by THE GOVERNMENT if the air transportation service contemplated herein is not inaugurated by THE COMPANY on or before eigth months from the date thereof. Should an accredited air transportation enterprise of Belgian nationality and ownership formally apply to the United States Government for authority to operate a reciprocal scheduled air service for the carriage of mail, passengers and property between the Belgian Congo Colony and/or Ruanda-Urundi and the continental United States, and should the appropriate permission not have been granted within a period of one year, then THE GOVERNMENT in its discretion may terminate this agreement on six months notice to THE COMPANY.»[64]

Other type of reciprocal clauses stipulated that in the event of the American authorities failing to award such reciprocal rights, then the franchise granted to Pan American would be automatically cancelled, there being no question of discretion left to the host government as to the cancellation. This type of arrangement appeared in the 1941 agreement concluded with the Republic of Ireland:

> «this AUTHORIZATION shall be valid only when, and so long as, an Authorization, granted by the United States Government for reciprocal trans-Atlantic air transport service of the like frequency and scope and entitled to use the same airports as the American Company's reciprocal trans-Atlantic services, is held by either the British Overseas Airways Corporation, England, or the Operating Company.»[65]

Some of the agreements have been viewed as embodying a «promise», whereby Pan American agreed to assist the signatory or host government in securing reciprocal rights from the United States. Article 12 of the 1935 Agreement with New Zealand was regarded as falling into this category.[66]

Private international contracts occupy a special position in law. Essentially such contracts or agreements endeavour to create the legal framework for private transactions presenting an international character, or they constitute the legal basis for direct relations between a state and a foreign national.[67]

Corporations of municipal law engaging in economic activity in one or more states other than the state under the law of which they were incorporated, have grown considerably in number, especially since the 1920s.[68]

The resources available to these individual corporations have some instances been greater than those of smaller states and such corporations have been frequently engaged in the execution of agreements with foreign governments.[69]

This has prompted jurists to argue that relations between states and foreign corporations should be treated on an international plane and not as an aspect of the normal rules governing the position of aliens and their assets on the territory of a state:

> «We can argue ad infinitum whether a transaction between a government and a private corporation is (subject to the rules) of public international law or not. I would definitely say yes...because

> these transactions are not directed to a purely commercial purpose, but to a public purpose, namely the development of resources of the host country.»[71]

Agreements relating to the exploitation of natural resources, such as petroleum and raw materials have been the subject of such agreements and subsequently the centre of international arbitration where the merits of arguments for and against such a proposition have been considered.[72]

Whether it is possible to extend[73] the definition of «natural resource» to include the establishment, operation and consequently carriage by air of persons including nationals of the host country or state by a foreign corporation, is a questionable contention but one not without merit.

The extraction of minerals from the ground should not, it is contended, be viewed or considered in any way differently from that of the carriage of persons or cargo from a host nation. In accordance with the reasons advanced by Friedmann above who advocates that such agreements fall within the ambit of international law, such carriage accomplishes not merely a purely commercial purpose but in the absence of a host state possessing its own carrier, a legitimate «public purpose» as well.

Indeed the exchange and carriage of third, fourth and fifth freedom rights pursuant to contemporary bilateral treaties, is considered a commodity of great and significant commercial value to contracting governments.

Assuming that private corporations such as Pan American may be accorded public international legal status and assuming that the agreements entered into by that private corporation (Pan American) are deemed to be subject to the rules of public international law, then consideration of the reciprocity issue assumes a new level of importance.

Article 38 of the Statute of the International Court of Justice, generally regarded as the most complete statement of the sources of international law, considers international conventions (whether general or particular), international custom and the general principles of law recognized by civilized nations, as three of the four of the primary sources of international law.[74]

The several thousand bilateral aviation treaties which have been concluded (since 1945-46) would certainly lend credence to the proposition that as a principle of international law the grant of access by one state requires a reciprocal grant of access by the other contracting state..

International custom, evidenced by the conclusion of the above bilateral, would also attest to the legitimacy of that proposition.

It is conceded, however, that the majority of government bilaterals were executed subsequent to the period in which the New Zealand Agreement was negotiated. In addition, the principle of international law guaranteeing such reciprocity applies by its definition to 'states'.

In response, it is contended that a precedent did in fact exist in 1935 where the United States Government had pursuant to a bilateral previously guaranteed reciprocal rights to another government; the Kellogg-Olaya Pact concluded between the United States and Colombia in 1929[75] and the negotiations conducted with the British and Canadian Governments in 1935.[76] All are cited as examples of the recognition by the United States Government of this principle.

More importantly, the United States Government's substitution of Pan American as a contracting party, fully cognizant of the legal ramifications of such a practice, was, it is contended, contrary to the basic constitutional doctrine of the law of nations, upon which the principles of international law are founded - the equality of states.[77]

Such equality was seriously denigrated by the adherence to a policy which the United States Government adopted in relation to aviation matters conducted with various Pacific states.

Secretary of State, Cordell Hull's edict that Pan American communicate to the New Zealand Government the United States' disclaimer of participation or association in the agreement and in particular Article 12, may be adduced as evidence that the Government was fully aware of the ramifications of using a private agreement as opposed to a government bilateral, and the consequent derigration of the above principle of international law.

It is interesting to consider the comments of Adolphe A. Berle, Assistant Secretary of State, who during the

course of delivering testimony before a Subcommittee, considered various reciprocity clauses which Pan American had entered into with foreign governments, and specifically Article 12 of the New Zealand Agreement.[78]

Berle described the Article as involving «the United States in obligations». Asked whether this «obligated the Civil Aeronautics Board...to give a certificate to a New Zealand company», Berle replied «to the extent they would use their best efforts».[79]

Whether such an «obligation» can be described as a binding legal obligation in either public or private international law, is a moot point but it does raise the contention that the U.S. Government was conscious of the morality or otherwise of the Government's adherence to a discriminatory practice.

CHAPTER V - FOOTNOTES

1. Refer Appendix I for a complete text of the agreement.
2. Article 3.
3. Article 2.
4. Ibid.
5. Article 4.
6. Aritcle 5.
7. Article 6.
8. Article 7.
9. Article 8.
10. Article 11.
11. Articles 15 and 16.
12. Article 17.
13. Article 19.
14. Indeed Pan American by virtue of Article 19 was expressly prohibited from pleading lack of jurisdiction of the New Zealand Supreme Court.
15. Refer to page 80.
16. Refer to page 70.
17. Article 12.

18. F.X. Holbrook, United States National Defense and Trans-Pacific Commercial Air Routes 1933-41, Fordham University Doctoral Dissertation, 1969, p. 149.

19. Ibid., p. 150 citing NA, RG 59, File 811 79690 PAA/32 9th November 1935, John C. Cooper, Vice President of Pan American Airways to Scretary of State

20. Ibid., p. 151, citing PAA/37, 13th November 1935, American Consul, Wellington to Secretary of State.

21. Supra, note 19.

22. M. Bender and S. Altschol, The Chosen Instrument, New York, Simon and Shuster, 1982, p. 270.

23. Supra, note 18, p. 150.

24. Refer to page 256.

25. Refer to page 95.

26. J.K. Montgomery's, Pan American, and R.F. Moyt's, Florida Airways; Trippe represented New York Airways.

27. Montgomery's Pan American won the contract on the 1st of July 1927.

28. R.E.G. Davies, Airlines of the United States since 1974, London, Putman, 1972, pp. 212-213.

29. Ibid., p. 214.

30. W.H. Wager, American Policy in the Negotiation of International Air Landing Rights, Harvard Law School Thesis, 1945, reproduced in some selected readings in International Air Transportation, edited by W.H. Wager, Gift to Editor to the Library of Congress, 25th July 1949, p. 29.

31. W.A.M. Burden, The Struggle for Airways in Latin America, New York, Council on Foreign Relations, 1943, Table G, p. 33.

32. M. Josephson, Empire of the Air, New York, Harcourt, Brace, 1944, p. 50.

33. Supra, note 30, p. 29.

34. Supra, note 32, p. 128.

35. Ibid.

36. U.S. Senate Special Committee on Investigation of Air Mail and Ocean Mail Contracts, 73rd Congress, 2d Session, 1934, Remarks of the Chairman, Senator Hugo Black, p. 2464.

37. Ibid.

38. Remarks of Secretary of State, Henry L. Stimson to President Herbert Hoever, 1929, cited in M. Bender & S. Altschul, The Chosen Instrument, supra, note 22, p. 134.

39. Testimony of A.A. Berle, Jr., Assistant Secretary of State, before U.S. Congress Sub-Committee on Merchant Marine in Overseas Aviation, of the U.S. Congress House Committee on the Merchant Marine & Fisheries, 78th Congress, 2nd Session, p. 85.

40. R. Daley, An American Saga, New York, Random House, 1980, p. 105.

41. Letter of R. Walten Moore, Counselor of the Department of States to Wm. H. Coverdale, President of American Export Lines, Inc., 23rd January 1939 (C.A.A., Docket No. 238, Exhibit 19,34).

42. O.J. Lissitzyn, International Air Transport and National Policy, New York, Council on Foreign Relations, 1942 p. 386.

43. Ibid., p. 387.

44. S.E. Gates, International Control of Aviation in Time of Peace, The Journal of Air Law and Commerce Volume 10, October 1939, p. 441.

45. Refer to page 93.

46. Section 6(c) Air Commerce Ace of 1926, U.S. Code Title 49, sec. 176 as amended by Section 1107(i) of the Civil Aeronautics Act of 1938.

47. Supra, note 42, p. 383-4.

48. Adopted by the United States at the meeting of the International Commission in 1929, supra, note 42, p. 382.

49. Ibid.

50. Ibid., p. 385.

51. Testimony of R.G. Thach, Vice President and General Attorney, Pan American Airways Co. before U.S. Congress House Committee on Merchant Marine and Fisheries, 75th Congress, 3rd Session, 'Transoceanic Aircraft Studies', 1938, p. 76.

52. Testimony of Colonel E.S. Gorell, President of the Air Transportation of America, ibid., p. 27.

53. Ibid., p. 30.

54. Ibid., p. 31.

55. Ibid.

56. This compares to Germany which possessed landing rights in 33 countries, Britain in 31, the Netherlands 27, and France 22; Supra, note 30, p. 29.

57. Ibid., pp. 34-35.

58. Supra, note 51, p. 77.

59. Agreement between Pan American and Dutch Guiana (Surinam), supra, note 30, p. 35.

60. Supra, note 30, p. 35.

61. Ibid., p. 36.

62. Ibid., p. 35.

62(a) Ibid.

63. Ibid., pp. 37-38.

64. Ibid.

65. Ibid.

66. Ibid.

67. G. Kojanec, The Legal Nature of Agreements Concluded by Private Entities with Foreign States, Hague Colloque Colloquium 1968, Chapitre III, Section 2, p. 299.

68. Remarks of Mr. Schwarzenberger, ibid., p. 342.

69. Ibid.

70. I. Brownlie, Principles of Public International Law, Oxford, Clarendon, 1979, p. 69.

71. Remarks of W. Friedmann, supra, note 67, p. 361; see also the comments of Mr. Sucharitkul at p. 366 «all such agreements have a public purpose and they are in their nature international and international law must be squarely extended to them». However, for an opposing view, refer to the comments of the International Law Commission who expressly rejected the notion that foreign concessions or contracts be considered to be governed by the law of «treaties» or of «international agreements»; Waldock, Yearbook International Law Commission (I.L.C.) 1962, ii 32.

72. See for example the Anglo-Iranian Oil Case, I.C.J. Reports (1952) pp. 112-12, which rejected the contention that a concessionary contract was a treaty or convention within the meaning of the Iranian Declaration, accepting the compulsory jurisdiction of the Court under its Statute. The International Court of Justice appears to have regarded the concessionary «convention» between Iran and the foreign company as something fundamentally different from a treaty or international government.

73. In light of the above controversy.

74. Supra, note 70, p. 3.

75. PAA 30.05.07 Bilateral Air Agreement-General; Bender and Altschul write that the agreement was almost word for word based upon a memorandum Trippe had drafted, supra, note 22, p. 143;

76. Supra, note 42, p. 388.

77. Supra, note 70, p. 287.

78. Merchant Marine in Overseas Aviation, supra, note 39, p. 85.

79. Ibid.

CHAPTER VI

1936 - COMMONWEALTH RECONSIDERATION: THE COALITION DETERMINES ITS GUIDELINES

On the 13th of January 1936, Harold Gatty completed a memorandum entitled «Australian Service Via New Caledonia.»[1]

The memorandum advocated the reconsideration of New Zealand as a terminus for the south western Pacific operations, thereby avoiding the reciprocity issue altogether with the New Zealand Government:

> «France can make no demands for reciprocity in the Pacific for her only territories are too far apart and insufficiently populated to warrant a service on their own behalf.»[2]

Gatty maintained that an American airline «would be most welcome to New Caledonia» while similar sentiments would greet the commencement of an Australian airline «bringing as it does, New Caledonia into one of the main routes of the world».[3]

The conclusion of an agreement with the New Zealand Government would be of a distinct advantage to Pan American vis-a-vis the French; Gatty argued «it is logical to assume that a very lengthy agreement under the most satisfactory terms could be obtained from the French Government».[4]

Gatty predicted opposition from the British Government in any request for the use of Fiji enroute between Pago Pago and Auckland, as «the feeling is very strong against U.S. craft running between two British possessions. However, if a line is run from Pago Pago to Noumea, it is felt sure that an invitation

will be extended to call at Suva. The route from Pago Pago to Noumea passes within 15 miles of Suva so it will seem logical to everyone that P.A.A. (Pan American Airways) should call there».[5]

Gatty, who just completed the negotiations with the New Zealand Government, a mere two months previously, maintained that any agreement made with New Zealand must be considered of a temporary nature «as the expansion of British air lines will tend towards the extension of their lines northward in the Pacific». However, «any agreement made with the French regarding New Caledonia can be considered of a much more permanent nature, as New Caledonia has everything to gain and nothing to lose by the continuation of such a service».[6]

In addition, «having the terminus in French territory will give the British no excuse for insisting that the U.S. line should be terminated at Pago Pago, whereas if Suva (Fiji) and Auckland (New Zealand) are used, it is but a question of time before the extreme nationalism of the British insist on British aircraft going further north».[7]

In forecasting or predicting the Australian Government's response to such a scheme, Gatty foresaw no opposition by that government as the designation of New Caledonia would not detract from trans Tasman traffic; the cited reason for the Australian Government's refusal to grant Pan American an extension from New Zealand to Australia:

> «It will be seen by the routes that a U.S. line to New Caledonia will assist and not detract from the Australia-New Zealand route, and I feel confident of the Australian approval of this. This plan, from the Australian end, will bring New Zealand into the route.»[8]

Apart from absence of French demands regarding reciprocity, Gatty was conscious of New Caledonia's geographical proximity, a mere 800 miles from the Australian mainland. This consideration of proximity was to be of major importance in the implementation of a «pressure tactic» in 1940 where opposition to Pan American's entry into Australia still ran unabated.[9]

Of indirect importance or consequence in the development of an Australian - United States air service was the inauguration in 1936[10] of passenger services between San Francisco and Manila, the vaunted «China Clipper» service.

The service did not have the impact of diverting Australian bound steamship passengers via the more circuitous mid Pacific route, indeed the first Australian passenger to fly the service and the 45th passenger to book passage decided to utilize the service only out of necessity - a shipping strike in San Francisco prevented direct steamship passage.[11]

The route followed by a passenger endeavouring to use the «China Clipper» service involved a transfer in Manila to a steamship bound for Sourabaya where a connection was made with QANTAS to Brisbane.[12]

Given the payload constraints of the Martin M-130 flying boats between San Francisco and Honolulu, which frequently

prevented passage confirmation,[13] together with the relatively high cost of the ticket[14] vis-a-vis steamship transportation, the mid Pacific route was hardly a viable proposition for the Australian bound traveller.

Despite these constraints, the possibility of scheduling interline connections was vetted with the proposal to operate a Manila-Australia-New Zealand service.

The proposal was first mooted by a F.V. Blair, reputedly owner, curiously enough of the Grand Central Airport in St. Petersburg, Florida. Blair was reported to be representing Spanish interests based in Manila and in the course of promoting the scheme visited Auckland, Sydney, Singapore and Manila to conduct discussions with various government officials.[15]

Nothing was ever publically reported of the proposal following its brief mention in the British aeronautical press;[16] it being safe to assume that its demise as a viable proposition was rapid, not surprising given the extraordinarily diversified background of the participants.

Pursuant to the terms of the New Zealand Agreement, specifically Article 2, Pan American was required to commence operations to New Zealand no later than the 31st of December 1936.[17]

However, the Company appeared to be plagued by an equipment shortage and more importantly it was rumored dissatisfied with the terms of the agreement, as evidenced by the remarks of Gatty in his memorandum advocating the redesignation of New Caledonia as the south western terminus.[18]

In response Pan American endeavoured to re-negotiate the agreement, a formidable task now that the New Zealand Government had time to ponder and reconsider the effects or rather the ineffectiveness of the reciprocity clause:

> «The most difficult points of reconciliation have been those regarding reciprocity in landing rights in British and American territories. As the negotiations proceeded the original proposals of the Company in this regard were amended and extended to accord with the desires of the New Zealand Government until the agreement was reached as embodied in the agreement signed between the Minister of Transport and the Company's attorney. The Company seeks no amendment of such provisions favourable to itself and asks that the New Zealand Government will not on its part seek amendment of the clauses previously agreed upon as defining a fair and reasonable balance of reciprocity in landing rights.»[19]

Gatty's definition of a «fair and reasonable balance of reciprocity» was not matched by that of the New Zealand Government, who were now determined to make the re-negotiation an issue with both the Company and the United States Government.

The reciprocity issue took on a new importance with the British Government's stated intention as reported in the Baltimore Sun on the 7th of May 1936 of investigating Howland, Baker and Jarvis islands, presumably for the operation of a British trans Pacific air service.[20]

This report set off a frantic race between the two major powers in an attempt to claim sovereignty over the hitherto isolated and unimportant Pacific islands.

An emergency expedition was immediately mounted by the United States Government following hasty inter-departmental discussions during the midst of which further information from the American Consul in Wellington was received detailing a planned British expedition led by two New Zealand naval vessels. The expedition according to Harold Gatty[22] intended to sail to the Equatorial, Christmas and Fanning Islands, ostensibly to conduct aeronautical surveys of the region. It was also rumored that the expedition might land on the Equatorial Islands to claim effective occupation.[24]

This information was in turn relayed by the State Department to Juan Trippe who claimed that he was already aware of the contemplated expedition, and had, in fact, convinced Imperial Airways not to participate in the venture.[25]

Both the American and British/New Zealand expeditions did proceed to their respective destinations, the former American expedition arriving «in plenty of time to beat the British».[26]

The hasty almost frantic response demonstrated by the American Government illustrates the importance the trans Pacific route was beginning to assume for all concerned parties, an importance the Australian Government was beginning to share:

> «These islands (Jarvis, Baker and Howland) are of definite value in the establishment of any future trans Pacific seaplane service, and (we) suggest that, if possible, steps be taken to clarify ownership and (to) secure some or all of them for the U.K.»[27]

It is also of interest to note the attitudes of prominent Australian individuals and organizations in relation to the annexation and sovereignty issue; the most notable of whom included P.G. Taylor who on the 11th of March 1936 telegrammed the Australian Prime Minister and declared that:

> «...certain islands not yet claimed by the United States and observed from the air during the course of our 1934 Pacific flight, absolutely vital for British Pacific air service. (Therefore) consider urgent action should be taken immediately (to) claim these islands and establish bases for Pacific defence and air service. (I) would be glad (to) confer and if necessary proceed (to) Canberra. (I) consider (the) position extremely urgent as (I) observed islands may be claimed by United States at any time....»[28]

Also of interest are the comments of the Federal Executive of Returned Sailors and Soldiers Imperial League of Australia, who in a telegram addressed to the Prime Minister dated the 9th of June 1936 referred to a resolution passed at the 20th Annual Congress which viewed «with apprehension any suggestion that the Imperial Government might weaken its hold on any island it possesses in the Pacific».[29]

Unfortunately for Pan American, the American Government's colonizing and expeditionary activities created bad press for the airline in New Zealand and consequently seriously jeopardized the Company's chances of securing a new agreement with the New Zealand Government.[30]

Information collected from the so called «winter cruise» as the British/New Zealand naval expedition in the Pacific was referred to by the Americans, was considered at an Air Conference convened in Washington in late September of 1936, attended by representatives of the New Zealand, Australian and British Governments.

The Americans had speculated and quite accurately it was to be later established, that the conference had considered three principal subjects: (i) the Pan American negotiations; (ii) the extension of the London-Sydney air service to New Zealand; and (iii) plans for the ultimate completion of the «All Red Route» from New Zealand via the Pacific islands to Canada.[31]

The Americans surmised that due to the difficulty Pan American was experiencing in re-negotiating its agreement with the New Zealand Government, that the British viewpoint of insisting upon a more satisfactory reciprocity arrangement with the United States had been accepted by all the delegates.[32]

While this summation was in part accurate, records of the conference and subsequent events would tend to implicate New Zealand as the government who at varying times also exerted pressure on the other two Commonwealth governments in relation to this issue.

In a report tabled by the Australian Minister for Defence, Sir Archdale Parkhill, a delegate attending the Conference addressed to the Australian Prime Minister, it was noted that in respect of the British trans Pacific issue, six resolutions were carried. These were:

1. That Pan American Airways be advised that the New Zealand Government cannot agree to any modifications of the 1935 Agreement.

2. It is understood that in the event of the failure of Pan American Airways to carry out the Agreement with the New Zealand Government for the provision of a Trans-Pacific Service, the Government of Australia will not provide alternative landing facilities in Australia.

3. That in the event of Pan American Airways deciding to carry out the 1935 Agreement with the New Zealand Government, steps be initiated through the Governments of the United Kingdom, the Dominion of Canada, the Commonwealth of Australia and the Dominion of New Zealand with a view to considering the early establishment of a service in line with the reciprocal rights referred to in Clause 12 of the Agreement.

4. That in any case steps be taken at once to initiate discussions between the Governments of the United Kingdom, Canada, Australia and New Zealand, with a view to the full consideration of the establishment of an air service across the Pacific at the earliest possible date.

5. Following the discussions between the Governments of the United Kingdom, Canada, Australia and New Zealand, negotiations be opened with the Government of the United States of America with a view to exploring the possibilities of the establishment of the best and most efficient services on a completely reciprocal basis.

6. The New Zealand Government will take the initiative in promoting the discussions mentioned in (3), (4) and (5).

The resolutions which were subject[33] to ratification by each of the participating Governments were considered by the Australian Cabinet which approved them, subject, however, to

one alteration. The alteration required the addition of the following words to Resolution 2 - «without full consultation with the United Kingdom and New Zealand».[34]

Thus the revised Resolution as proposed by the Australian Government now read in its entirety:

> «2. It is understood that in the event of the failure of Pan American Airways to carry out the Agreement with the New Zealand Government for the provision of a Trans-Pacific service, the Government of Australia will not provide alternative landing facilities in Australia without full consultation with the United Kingdom and New Zealand.»[35]

The revision was proposed specifically at the request of the Australian Department of Defence, who were reluctant to bind the Australian Government to a series of inter-governmental consultations in the event that a national emergency arose which required the immediate establishment of a trans Pacific service, a contingency which the Department foresaw as highly probable -

> «...the Commonwealth (Australian) Government suggested the addition of these words in order not to commit itself for an indefinite period to a course of action which might not be sound, having regard to all the circumstances at some distant date.»[36]

New Zealand, however, in response to the Australian Government's proposed amendment replied that they found «themselves unable to agree (to the proposed addition) as they are of the opinion that this would involve the danger of New

Zealand's position as a terminal point being sacrificed without any advantage to British Commonwealth aviation».[37]

Further the Government argued, «Resolutions 1 and 2 as they stand are inter-dependant and any modification to Resolution 2 in the direction suggested would immediately involve the cancellation of Resolution 1, thus practically compelling New Zealand to consent to the inauguration of the service by Pan American Airways, possibly to the detriment of British Commonwealth aviation».[38] The New Zealand Government «is anxious that the Resolution as agreed upon at the Conference shall remain unaltered so that in the event of the New Zealand Government advising the Pan American Airways in the sense of Resolution 1, Resolution 2 will be given effect to in its present form».[39]

Australia in reply assured New Zealand that it was not that government's intention to depart from the principle underlying the Wellington discussion on the subject, i.e. Australia should support the endeavours of the New Zealand Government in their negotiations with Pan American to secure full reciprocal rights for a British carrier.

However, the Australian Government candidly stated that addition of the words would -

> «leave the way open to the Commonwealth (Australian) Government to deal with any application which might be made in the future for an American air service to Australia. Such an application might have nothing to do with the dispute between Pan American Airways and the New Zealand Government and might

> conceivably apply to a service entering Australia from the North. For these reasons it might be stated that the Commonwealth would prefer to leave the way open for any such application to be considered and dealt with in accordance with the circumstances - prevailing at the time - in full consultation with the New Zealand and United Kingdom Governments.»40

The «dispute» referred to in the above statement by the Australian Government, referred to the re-negotiation of the agreement between the New Zealand Government and Pan American, specifically regarding the inauguration date of the service, which the airline was now endeavouring to postpone for a further year.

Although the New Zealand Government had initially refused to vary the agreement, it found it «difficult to resist granting an extension of time in view of the fact that the possibility of an extension owing to unforeseen circumstances was specifically provided for in the original agreement».41

While the New Zealand Government had announced its intention in Wellington the previous September to use the extension issue as a lever to exert pressure on Pan American, and hence the United States Government to obtain a more satisfactory position vis-a-vis reciprocal landing privileges for the Commonwealth coalition, the Government was also conscious of the innumerable benefits the American service would bring to the hitherto isolated nation.

Thus at the beginning of 1937 the New Zealand Government faced a conflict of interests. On the one hand, the Government was anxious for the inauguration of the service, an opportunity to secure a position as the southern Pacific termins thereby usurping Australia's pre-eminent position.

Alternatively, the New Zealand Government was also conscious of its responsibility pledged at the Wellington Conference to extract reciprocal landing rights from the Americans.

The New Zealand Government, in an attempt to reconcile that dilemma, alternated between the two objectives over the course of the ensuing five years, although it is contended as the subsequent course of events will reveal that government ultimately succumbed to more egocentric motives despite protestations to the contrary.

Both Pan American and the United States Government appeared to be mindful of the problem New Zealand faced but laboured under the partial misapprehension that it was the British Government alone who was pressing the reciprocity issue. Indeed, both Gatty and the U.S. Consul in Wellington, George A. Bucklin, considered the re-negotiations during the latter part of 1936 as on the verge of collapse.[42]

Both parties, however, under-estimated the determination of the New Zealand Government to ensure the implementation of the service.

The New Zealand Government's determination is evidenced by the manner in which that government handled the Australian Government's proposal to amend Resolution 2.

Such an amendment, despite assurances from the Australian Government to the contrary, represented a serious rift in the Commonwealth coalition and raised the distinct possibility in the mind of the New Zealand Government that in the last hour Australia would grant landing rights to Pan American, thereby confirming and realizing New Zealand's worst fears - elimination altogether from the trans Pacific service; a possibility that government had only recently been confronted with during discussions pertaining to the England and Australia route.

Whatever the real motive of the New Zealand Government in attempting to preserve the Commonwealth coalition, the role of the Australian Government was critical and hung like a sword over New Zealand.

Apart from the reasons already advanced concerning New Zealand's interest in ensuring that Auckland remained the terminus for the trans Pacific service, another more financially expedient reason emerged as a result of the conference convened in Wellington during the previous September.

As correctly surmised by the U.S. Consul in Wellington, a further topic on the agenda appeared for discussion between the three participating governments; the establishment of a trans Tasman air service, essentially an extension of the Empire Mail Service between London and Sydney.[43]

The 1936 Wellington Conference thus gave birth to the formation of Tasman Empire Airways Limited, more commonly known by its abbreviation T.E.A.L. This airline was the first of two Commonwealth ventures, specifically established to operate Pacific and Tasman services. Unlike its subsequent counterpart, British Commonwealth Pacific Airlines (B.C.P.A.), T.E.A.L., despite the administrative problems,[44] survived later to become Air New Zealand; New Zealand's sole international and largest domestic carrier.[45]

The airline as originally envisaged was established with the government's participating in the ratio of Australia 23 per cent, Britian 38 per cent, and New Zealand 39 per cent.[46] Thus even at its inception, New Zealand held the largest financial stake in the company and consequently wished to ensure that all trans Pacific services terminated in New Zealand, thereby providing for T.E.A.L. a guaranteed monopoly of traffic over at least one sector of the Australia-United States market; a lucrative financial proposition for the infant airline.

The financial fortunes of T.E.A.L. was to be used on numerous occassions by the New Zealand Government as indeed the Australian Government had previously[47] to justify that government's stance in opposing the extension of the Pan American service to Australia.

The Australian Government, for its part, appeared to be adopting a more cautious stand in relation to the reciprocity issue in the period immediately following the Wellington Conference.

While Australia «expressed complete agreement with the action proposed by the New Zealand Government»,[48] it is to be noted that in March 1937 Australia saw the proposed American service as «one that concerns primarilly the New Zealand and United Kingdom Governments»,[49] and indication that Australia had adopted the attitude, albeit briefly, that New Zealand should respect Australia's prerogative in deciding for itself the terms and conditions under which Pan American could secure landing rights into Australia.

This attitude is clearly prevelent throughout the series of memoranda which emanated from the Department of Defence in March of 1937.[50] The independent stance of Australia in part originiated from the belief shared by both the Australians and Americans that unlike New Zealand, Australia as a southwestern Pacific terminus could provide Pan American with a more economically viable operation. This is confirmed by Australia's action in almost distancing itself from New Zealand and its embarassing predicament, i.e., that Government had entered into an agreement which at least as far as the reciprocity article was concerned, the United States Government had no intention of honouring.

The Australian Government was also beginning to appreciate the strategic importance of a trans Pacific service and in adopting this more independent attitude, although briefly at this juncture, appeared to be less concerned than were the

British and New Zealand Governments with the nationality of the carrier who operated the service.

The British Government saw the agreement and the re-negotiation as an opportunity to demonstrate to the United States the collective strength of the Commonwealth coalition in the negotiation of aerial traffic rights, and were, no doubt, following the events closely, the outcome of which could have had determined the possibility of opening a mid Pacific route and the terms and conditions of a north Atlantic route, then the subject of simultaneous negotiations.

As a postscript to the events of 1936, a curious article appeared in the Honolulu Advertiser dated the 27th of November 1936.[51] The article entitled «U.S., British, Australian Air Alliance Urged for Pacific», detailed an interview conducted in San Francisco with a Captain C.E. Toovey, described only as «of the Bank of Australia» and a «former chief technical officer to the Handley-Page firm of British airplane manufacturer».[52]

Toovey, enroute back to Australia after a year of consultation in Britain with officials of the British War Office, declared that «World peace depends on peace in the Pacific»,[53] a tautology:

> «It is absolutely necessary that air communications be established between the United States, Australia, and New Zealand. The future of the Pacific is in the hands of these nations, and it is time they got together for further defence of the Pacific.»[54]

These prophetic remarks were supplemented by details of a proposed British air service which were described as running from Honolulu to Brisbane via Christmas, Penrhyn, Samoa and the Fiji Islands, while an American line would operate from Honolulu either by way of Howland and Baker Islands or Jarvis, Palmyra and Tutilla Islands to New Zealand. The last sector of this service, trans Tasman, «would probably be in the hands of an Australian company».[55]

> «These Pacific airways constitute the first step in the building of an adequate aerial defense in the Pacific. After that must come an agreement between the English speaking nations of the Pacific area and finally a strengthening of all their aerial defenses.»

For a brief period it appeared that the Australian Government intended to heed these words but in the space of one year, that government pursued a policy contrary to this eminently sensible and informed opinion.

An important adjunct to the development of Australia's international and domestic aviation policy was the Federal Government decisions in 1936 to abolish the trade embargo on the importation of aircraft constructed in the United States.[56]

Previously, the Federal Government had prohibited by customs declaration the importation of any aircraft which had not been granted a certificate of airworthiness by a country which was a party to the Paris Convention. The United States and

Germany were not parties to the convention and consequently aircraft operators within Australia were in practice compelled to use British aircraft.

With operators and the Australian media extolling the virtues of American built aircraft, the Federal Government finally relented and repealed the offending rule.[57]

The decision was significant. In the short term it permitted Australian airlines to operate aircraft at vastly improved cruising speeds and as a testimony to the superiority of American aircraft at least as far as Australian airlines were concerned, it is interesting to note that since 1946 American built aircraft have been ordered and operated exclusively by QANTAS and have also formed the nucleus of the two major domestic carriers fleet composition.

CHAPTER VI - FOOTNOTES

1. PAA 10.10.01 Pacific Division File, 13th of January 1936, Memorandum from Harold Gatty Australian Service via New Caledonia.
2. Ibid.
3. Ibid.
4. Ibid.
5. Ibid., the route contemplated was Honolulu-Kingman Reef-Pago Pago-Noumea (direct) or Pago Pago-Suva-Noumea. Thus by this plan all the possible sources of traffic in the South Pacific are economically tapped.
6. Ibid., an agreement was later concluded with the French Government on the 22nd December 1938.
7. Ibid.
8. Ibid.
9. Refer to page 246.
10. Specifically the 21st of October, 1936.
11. Pan American Library Files - Australia, containing extract from Walkabout Geographic Magazine, April 1, 1937.
12. Ibid.
13. R. Daley, An American Saga, New York, Random House, 1980, p. 182.
14. US $1,438.20 round trip to Manila; Ibid., p. 181.
15. Flight Magazine (United Kingdom) July 2, 1936 'Another Pacific Service', p. 23.

16. Ibid.

17. Refer to Appendix I

18. Supra, note 1.

19. Memorandum Honolulu-Auckland Air Services, Harold Gatty, PAA 50.07.01.

20. F.X. Holbrook, United States National Defence and Trans-Pacific Commercial Air Routes 1933-1941, Fordham University, Doctoral Dissertation, p. 178.

21. Ibid., p. 180.

22. Who had in turn passed this information onto the U.S. Consul in Wellington.

23. Ibid., p. 182, citing NA, RG 59, File 811.014/466, 11th June 1936, Cable American Consul, Wellington to the State Department.

24. Ibid.

25. Ibid.

26. Ibid.

27. AA - CRS A 461 I 314/1/4, p. 1, 21st of May 1936, cable from Prime Minister's Department to Secretary of State for Dominion Affairs, London.

28. AA - CRS A 461 I 314/1/4, p. 1, 11th of March 1936, Telegram from P.G. Taylor to Prime Minister of Australia.

29. AA - CRS A 461 I 314/1/4, p. 1, 9th June 1936, Letter from Federal Executive of Returned Sailors and Soldiers Imperial League of Australia to Prime Minister of Australia.

30. Supra, note 30, p. 190.

31. Ibid., p. 201, citing PAA/80, 13th of October 1936, dispatch from American Consul, Wellington to the State Department.

32.

33. AA - CRS A 461 I 314/1/4, p. 1, 7th October 1936, Confidential report to the Prime Minister from the Minister for Defence on his visit to New Zealand and the subjects dealt with.

34. AA - CRS 461 I 314/1/4, p. 1, 18th December, 1936 Memorandum from Secretary Department of Defence to Secretary Prime Minister's Department.

35. Ibid.

36. AA - CRS A 461 I 314/1/4, p. 1, 13th of March 1937, Memorandum from Secretary Department of Defence to Secretary Prime Minister's Department.

37. AA - CRS A 461 I 314/1/4, p. 1, 10th of February 1937, Cable from Prime Minister of New Zealand to Prime Minister of Australia.

38. Ibid.

39. Ibid.

40. AA - CRS A 461 I 314/1/4, p. 1, 17th of March 1937, Cable from Prime Minister of Australia to Prime Minister of New Zealand.

41. Specifically found in Article 2; AA - CRS A 461 I 314/1/4, p. 1, 20th of February 1937, Cable from Prime Minister of New Zealand to Prime Minister of Australia.

42. Supra, note 20, p. 199, citing NA, RG 59, File 811, 79690 PAA/79, 13th October 1936, Cable from American Consul, Wellington to the State Department.

43. Supra, note 33.

44. «A tri-party organization, a thing that between governments never works», H. Fysh, QANTAS at War, Sydney, Angus and Robertson, 1968, p. 106.

45. Following substantial financial reorganization in 1961 when the New Zealand Government obtained complete ownership of the airline.

46. Supra, note 33. This was later re-distributed prior to incorporation in April 1940 to Britain 20%, Australia 30%, New Zealand 50%; R.E.G. Davies, A History of the Worlds' Airlines, London, Oxford University, 1964, p. 217.

47. Refer to page 78; and was, ironically enough, to use this argument again in the future.

48. AA - CRS A 461 I 314/1/4, p. 1, 4th of March 1937, Memorandum from Secretary Department of Defence to Secretary Prime Minister's Department.

49. Ibid.

50. Supra, note 36 and 48.

51. The Honolulu Advertiser, 27th of November 1936, pp. 1 and 3.

52. Ibid.

53. Ibid.

54. Ibid.

55. Ibid.

56. Aircraft Magazine, 1st of January 1936, p. 5, 'Foreign Aircraft Embargo Abolished'.

57. Ibid.

CHAPTER VII

1937: IMPERIAL POLITICS DETERMINES COALITION POLICY

While Pan American's representative in New Zealand, Harold Gatty was endeavouring to renegotiate the Company's agreement with the New Zealand Government, senior management of the airline in New York were attempting to secure an air-mail contract for the proposed route.

In order to obtain such a contract, procedure dictated that the airline submit a memorandum to the Interdepartmental Committe in International Civil Aviation substantiating its claims that the operation of such a service was warranted or justified.[1]

The Company in the course of the memorandum, acknowledged that it was incurring difficulties renegotiating the agreement but cited the opinion of Gatty, who in a report dated the 22nd of January 1937, maintained that the New Zealand Government would ultimately grant the extension but a delay would be incurred in publicaly announcing its decision pending notification of the British Government.[2]

Gatty had further recommended in his report that «immediate action» be undertaken by the Company to prepare for the service, assuring management that any «objectionable features in the agreement would never be enforced».[3]

Pan American in submitting its application to the Committee, admitted that the Company found itself caught in a dilemma; in order to inaugurate a New Zealand service, the airline would

need an airmail contract estimated at approximately $1,400,00 per annum, but in order to secure such a contract the airline would require a New Zealand Government permit which was still not forthcoming.[4]

Unlike the Chairman of the Committee, R. Walton Moore, who appeared sympathetic to the plight of the airline, the Commerce Department voiced its objection at the inauguration of such a service and in particular expressed its disapproval at the manner in which the whole series of negotiations had been conducted, specifically the terms of the original agreement with New Zealand:

> «Here again a private American enterprise has dealt with a foreign government perhaps to the disadvantage, if not to the detriment of the United States Government, in seeking to commit this Government to a policy before this Government has had the opportunity to deliberate upon the facts or the circumstances involved.»[5]

In commenting upon the memorandum, the Commerce Department also referred to the opposition expressed by the U.S. Post Office Department.[6]

However, as mentioned above, Pan American had secured the support of the Chairman of the Committee who appeared impressed with the reasons advanced by the airline and in a letter addressed to the President advised that:

> «Pan American Airways is the only agency to which we can look to avoid the field being occupied by foreign agencies, and if it is

to go further, new routes must be discussed and of course any new route will involve appropriations for the carrying of mail.»[7]

Amid growing opposition from various quarters within the United States Government to the inauguration of the service, the American Consul in Auckland, J.G. Groeninger, informed the State Department that the New Zealand Government had granted Pan American the extension and hence the authority to land in Auckland. Groeninger, upon information derived from a local Pan American representative, maintained that such permission would have been granted sooner had it not been for the persistence and pressure exerted upon New Zealand by the British concerning the reciprocity issue.[8] Again it seems, the British were being singled out by the Americans as the stalwart.

Formal consent of the New Zealand Government to the extension was communicated to Gatty in a letter dated the 11th of March 1937 from P. Fraser, Minister of Marine, on behalf of the Prime Minister.[9]

The letter detailed the attitude of the New Zealand Government specifically referring to the reciprocity issue which «caused the Government to pause and to hesitate long».[10]

Fraser recognized that Article 12 was not, in respect of the United States Government, legally or even morally enforceable; the result as far as the New Zealand Government was concerned was «most unsatisfactory and regrets that provision for

reciprocity of landing rights has not been established on the only sound basis of acceptance by the American Government itself».[11] These remarks must surely constitute an admission - an admission that the «safeguards» the New Zealand Government had so earnestly maintained existed in the agreement in their cables to the British and Australian Governments in 1935, were far from failsafe, in fact, were totally inadequate.

The letter continued by reminding Pan American that:

> «It is, of course, common ground that your Company had no legal right to such extension; and it is that it is wholly in the discretion of the New Zealand Government either to grant or refuse it.»[12]

Fraser also questioned the reasons advanced by the airline which necessitated an extension, i.e. the «unforeseen circumstances» which Pan American had contended compounded the delay.[13] While not «questioning the sincerity of (the airline's) representations», it was for the Government, Fraser maintained, difficult to understand «why your Company should have allowed more than 12 months to pass before apparently taking any steps to get the services started».[14]

In a condescending tone, the Government reminded the Company that:

> «the terms of the agreement did not entitle your Company to ignore the provision for a time limit contained in it. Time was running against the Company; and the fact that the Company hoped for a new contract did not justify it in disregarding the provisions of the old.»[15]

The New Zealand Government was, Fraser claimed, «not anxious to stand, or to appear to stand, on the letter of the law...and having fully considered the circumstances, has decided to extend the time within your Company may commence operations».[16] There was little doubt that the New Zealand Government would accede to the grant of such an extension.

The New Zealand Government reminded the Company, in no uncertain terms, of its obligation regarding the acquisition of reciprocal rights for a Commonwealth carrier. In fact, the wording was so strongly pronounced that the following extract from the letter was drawn to the personal attention of President Roosevelt some four months later.[17]

The New Zealand Government maintained that in granting the extension:

> «...it trusts, and indeed expects, that your Company will forthwith use its influence with the United States Government in the matter of reciprocity, which is regarded by all His Majesty's Governments having interests in the Pacific as being of paramount importance. The Government of New Zealand trusts that the result of your Company's so taking the matter up with its own Government will be an early intimation by the Government of the United States that reciprocal rights, when applied for, will be granted.»[18]

It was at this point that Fraser on behalf of the New Zealand Government specifically stated the intention of the Crown to rely upon Article 12, whereby a designated company would apply to the United States Government within one year

for permission to make regular alightings, as described in paragraph (i) of Article 12 and that the Crown proposed to approve such application in terms of paragraph (ii): «It is only fair to inform your Company that it should be informed of what is thus proposed.»[19]

The letter concludes by stating that the Government thought it desirable that the views of that Government should be given at such length «so that there may be perfect understanding between your Company and the Government of New Zealand, an understanding that will leave to relations that will be such as to promote the advantage both of the United States of America and New Zealand.»[20]

By way of contrast, the U.S. Consul in Wellington, George A. Bucklin, dispatched a report detailing the decision and a general review of the negotiations to date; an interesting and important document revealing the American perspective.

Bucklin maintained that the amended agreement, in fact the letter of consent written by Fraser, was even «harsher» than the original agreement in relation to the reciprocity issue.[21] Bucklin also mentioned a salient observation of Gatty's; once Pan American's service was established, New Zealand would find it so advantageous that they would not press for reciprocity. Only if the British line could offer the same services would there be trouble for Pan American and Gatty believed that such a service was not possible.[22]

Bucklin believed that the key to air supremacy in the Pacific was Hawaii, and he hoped that the United States would «jealously guard it».[23]

In what must have appeared as heartening and gratifying news amidst growing opposition for Pan American, Bucklin believed that the Company «seems to merit every support that properly can be given by our Government».[24]

As mentioned to above, assurances that the Company would be granted the extension were communicated by Gatty to corporate headquarters in New York as early as the 22nd of January 1937.

The official or public announcement of the Government's decision was pending, according to Gatty, following notification and response from the British Government.

Pursuant to the terms of the Wellington Resolutions, the Australian Government was also required to be notified. It was, this alleged, absence or lack of inter-governmental notification initiated by press reports in Australia that formed the basis for a potentially damaging dispute between the two Tasman Governments; one which New Zealand could ill afford.[25]

Prime Ministerial communiques were hastily cabled over the Tasman. The Australian Prime Minister, J.A. Lyons, assuring his New Zealand counterpart «that no statement of any description had been made to the press concerning any absence of notification relating to the extension issue, as the Commonwealth (Australian) Government's agreement to this extension was of course conveyed to you in my telegram of the 10th of March».[26]

Lyons maintained that no details had been forwarded to his government concerning the operation of an experimental flight between San Francisco and Auckland, and that it was in respect of this flight and this flight alone that he had informed the press of the fact that he had received no communication from the New Zealand Government.[27]

The New Zealand Prime Minister, M.J. Savage, hastily replied that the «extension of time granted to Pan American Airways enables them to inaugurate such a service...the latter is not the subject of any separate or distinct agreement». Savage continued by expressing his regrets that he had not informed the Australian Government sooner of his government's decision to grant the extension.[28]

This incident serves to illustrate the tenuous nature of the relationship between the two governments concerning the broader issue of a trans Pacific air service and also lends credence to the theory that the two governments were from the outset at odds given the conflicting objectives the New Zealand Government was attempting to reconcile.[29]

What is also significant, particularly in view of the remarks of the New Zealand Prime Minister expressing regret at the delay in notifying of the grant of extension, is that New Zealand, contrary to the principles of the Wellington Conference which advocated inter-governmental communication, had, judging by the date of the Gatty memorandum, the 22nd of January, decided

to Pan American several weeks ahead of notifying the Australian Government of its decision.

Within 24 hours of the New Zealand permit being granted to Pan American, a S-42B Clipper left Alameda, California enroute for Auckland via Honolulu, Kingman Reef and Pago Pago. Arriving to a welcome in Auckland on the 29th of March, which was nothing short of being described as euphoric,[30] this occassion lent support to Gatty's theory; that once the service had commenced, New Zealand would not press for reciprocity.

This theory certainly bears examination in light of the no less than coincidental decision of the New Zealand Government, cabled one day after the arrival of the inaugural flight to the Australian Prime Minister, which simply read that the:-

> «New Zealand Government is now disposed to agree to such variation of No. 2 of the September Conference Resolutions as would enable the Australian Government to leave the way open for any future application to it by American companies but think that as the United Kingdom was a party to the Resolutions suggested modification should be communicated to London.»[31]

Given the importance attached by the New Zealand Government to the Australian amendment, dispatched from Australia some three months previously, the 26th of December 1936, it seems nothing short of peculiar that the New Zealand Government should have decided to wait until this late stage to inform the British of the Australian proposal.

The only rational explanation lies in the argument that the New Zealand Government alone was hoping to convince the Australian Government of the inadvisibility of such an amendment.

This incident appears to underscore the contention that it was singulary the British Government which was obstructing the inauguration of the American service.

If such pressure was in fact being exerted, then it seems inconsistent that in the absence of three months the New Zealand Government would not have confided in the British Government at least at an earlier date, the actions of the Australian Government who effectively stood to jeopardize the Commonwealth coalition by proposing such an amendment.

The New Zealand cable to the Australian Prime Minister conceding approval of the amendment did, however, retain one qualification; any future application made to the Australian Government by an American carrier be confined strictly to entry from «the North as distinct from the East».[32]

The Australian Government had in its cable of the 26th of December 1936[33] proposing the amendment, cited as an example the possibility that an American carrier may request landing rights in Australia entering from the north, a distinct possibility in view of the operation of Pan American's mid Pacific «China Clipper» service via the Philippines.

The example was used merely to emphasize the point that in accordance with the unamended resolution, the Australian Government would be precluded from considering such a request, even though entry from the north did not pose a threat to the broader issues contained in a trans Pacific service routed via the South Pacific.

The New Zealand Government now seized upon this remark, postulated merely as an example, as an absolute qualification to any amendment.

The New Zealand Government was clearly intent upon protecting their own position as the southern Pacific terminus and in the process, was, it is contended, essentially manufacturing for the benefit of the Americans the notion that the British Government was dictating the terms and conditions of entry. In fact, it was the New Zealand Government alone who was ultimately deciding the terms and conditions or the lack thereof.

For the Australian public the arrival of the Pan American Clipper in Auckland must have appeared as a major coup for New Zealand and raised questions as to the reason why New Zealand had been designated as the American terminus, as opposed to Australia.

This bewilderment shared by many Australians may have prompted the remarks of the Australian Minister for Customs, and Mr. White, acting Minister of Defence, who in an article which headlines «Suggested that

Clipper Should Fly Here - Would be Welcome - Says Minister', maintained in true political rhetoric that:

> «the sooner regular air services (are) operated across the Pacific the sooner would the United States and Australia understand their mutual problems in trade and other matters.»[34]

More importantly, the article in a brief paragraph mentioned that the acting Minister of Defence would afford the Clipper if it decided to visit Australia «every facility» - leaving little doubt, at least as far as that department was concerned as to the desirability of an extension of the American service.[35]

The Australian press consoled the Australian public by referring to the role Harold Gatty, Australian born, played in the inauguration of the American service.

The press attributed the inauguration of the first Pan American survey flight «to the high diplomatic qualities of Gatty», who they believed «had a right to feel responsible for the service».[36]

Perhaps this is an example of Australian jingoism attempting to deflect the loss felt amongst the Australian aviation community that it was New Zealand and not Australia that was designated the southern Pacific terminus.

The New York Times in its coverage of the inaugural survey flight, no doubt, confirmed many Australians worst fears by writing «that the new aerial trade route hailed the beginning of a new era of transport and trade and the establishment of

Auckland, the dominion's chief port, as the aerial gateway to the world's fourth largest great market area - Australasia»;[37] a position that many amongst the Australian business community believed should have been reserved for either Sydney or Melbourne.

The article continued by maintaining that «the present dominion administration, headed by Prime Minister Michael Savage, readily extended the contract for an additional year»,[38] an overly simplistic account of the preceeding events but in part a telling description of how the Americans guaged the New Zealand Government's position - very receptive and accommodating.

The article also described what was termed «an airway entanglement and an interesting political problem» which had arisen out of the New Zealand service and suggested that the reciprocity issue would «occupy considerable time at the next British Imperial Conference».[39]

The article mentioned the importance the talks would assume for the Australian Government and referred, astutely, to the round of negotiations then in progress between the Australian and Dutch Governments over the extension of the K.L.M./K.N.I.L.M.[40] Amsterdam-Batavia service to Australia.[41]

Concessions to the Dutch, the article maintained would create a precedent and hence an embarrassing predicament for the Australian Government in relation to any request for similar rights from an American carrier.[42]

This was identical somewhat ironically to the argument advocated by the United States Navy and War Departments in relation to the concession of landing rights to foreign airlines into Hawaii.[43]

Perhaps the most incisive remark made by the news media is to be found in the Melbourne Argus of the 13th of March 1937, which maintained that:

> «A Trans-Pacific service is one of the contemplated extensions of the Empire air routes, and it is expected that the policy of the Commonwealth Government will be to conserve Australian traffic for this service.»[44]

Whether this statement was intended as editorial comment directed to the Australian Government, or alternatively as a remark merely speculating the course and direction of Government policy, is not entirely clear from the wording or the context. One thing that it does unambigiously demonstrate, however, is that the Australian Government, at least as far as the Australian press was concerned, had not at this point in time made any firm commitment to oppose or refuse access by an American carrier into Australia.

The respite that the New Zealand Government enjoyed following the arrival of the survey flight must have been indeed momentary for, on the 13th of April 1937, that Government cabled the Australian Government stating that after further consideration, it now felt compelled to adhere to the original terms of

the Resolution Number 2, and suggested that any question of variation be referred to the representatives of the three Commonwealth Governments now meeting in London.[45]

The importance this particular issue was beginning to assume, is evidenced by the fact that the matter was placed before the Australian Cabinet which was asked to decide:

> «(i) Whether the Australian Government still regarded the amendment of Resolution 2 to be of such great importance as to warrant further endeavours to secure its acceptance by New Zealand; or
>
> (ii) whether it was the Government's desire to refer the matter to the Prime Minister in London for discussion with the representatives of the United Kingdom and New Zealand Governments at the Imperial Conference.»[46]

The Cabinet decided on the second alternative and a cable to that effect was dispatched immediately to London.[47]

Questions of general policy relating to civil aviation were also enumerated in the above cable to London, and accordingly, warrant closer examination as its provides a definitive statement of the Australian position in relation to this issue.

The terms of the cable were decided upon following a series of consultations between Captain E.C. Johnston, Controller-General of Civil Aviation and A. Farrands and read as follows:

> «For your assistance during discussions in London upon civil aviation matters, Cabinet had determined the following general policy - Appreciating the many benefits direct and indirect, immediate and potential, to be secured by a country possessing substantial and extensive civil enterprises (Cabinet) favours the development of Australian air transport services, both within and beyond our continental limits. Being equally anxious to see British airlines linking the various parts of the Empire and extending also over other parts of the world to maintain British interests and prestige, the Government is prepared to co-operate wholeheartedly with other units of the British Commonwealth but desires to secure a real measure of local control over services operating within Australia in which Australia is praticulary interested.»[48]

The message is clear and unequivocal that the Australian Government intended to reserve for itself the right to determine its own international aviation policy.

This statement which qualified Australia's participation in any form of Commonwealth co-operation - «Australia desires to secure a real measure of local control over services operating...in parts in which Australia is particularly interested»,[49] is irrefutable evidence of the Government's independent stance and position in this matter. The Australian Government was not prepared to be unduly restrained by the actions of other members of the Commonwealth coalition.

More specifically it did not eliminate the possibility that the Australian Government would be prepared to negotiate with the United States Government over landing rights should such overtures be made by that government.

The Imperial Conference convened in London in April of 1937, considered in addition to the more specific question relating to the amendment of Resolution 2, the more general question pertaining to the establishment of a British trans Pacific service, an issue that the New Zealand Government was now actively promoting, especially in view of their stated intention conveyed to the Americans that they sought to inaugurate a service or at least approach the American authorities within the year.

In a cable forwarded to the Australian Prime Minister's Department dated the 25th of March 1937, the New Zealand Government inquired about the Australian Government's attitude to broaching the subject with British and Canadian Governments, either during or after the Conference.[50]

Australia failed to reply which subsequently caught the Australian Prime Minister and his Defence Minister at the Conference off-guard. This necessitated urgent enquiries to be made of Canberra requesting guidelines necessary for the formulation of an Australian position in this matter.[51] This was duly forwarded the details of which have already been discussed above.[52]

Apart from considering the specific issues relating to the establishment of a trans Pacific air service, delegates to the Imperial Conference agreed upon the following resolutions:

«Empire Co-operation - In promoting arrangements whereby air lines operated by Members of the British Commonwealth of Nations would link together, it was agreed that there should be co-operation with each other to the greatest possible extent.

Foreign Services - It was agreed that applications for air facilities within the British Empire from foreign air services should be the subject of consultations between Governments concerned, that reciprocal rights should be the basis of any concessions, and that such rights should be made available to other members of the British Empire generally.»[53]

The substance and direction of Australia's international aviation policy it appears had suddenly succombed and would thereafter be determined by the exigencies of inter-colonial politics.

Pan American following the completion of its survey flight was actively pursuing the ellusive airmail contract in the face of some considerable «difference of opinion among the Government Departments as to the value of such a route».[54]

The Commerce Department decided to allay their fears by sending an agent to both Australia and New Zealand on an intelligence and fact finding mission.

The appointee, William T. Miller, was commisioned on the 16th of March 1937 to travel to Australia and New Zealand «to supply to the Commerce Department (with) an unbiased view of the economics involved in a proposed new service by Pan American Airways to New Zealand, alleged to involve an expenditure on the part of the Government...of about $1,400,000 per annum».[55]

Commerce, despite its opposition, expressed a concern that any projected expansion of Imperial Airways might cause a diversion of revenue from the American owned Matson steamship line, which had only recently commissioned two new ships for the service. Miller's instructions were to gather as much dependable data as possible but without any unjustified enthusiasm which «would be peculiar either to a champion of aeronautics or to Pan American Airways in particular».[56]

Miller returned to the United States on the 14th of June 1937, reporting favourably on business prospects in the Australasian region and armed with a copy of the Wellington 1936 Resolutions, which he obtained from Honolulu journalist, John Williams, reported that the British were definitely intent on seeking landing rights in Hawaii based upon the 1935 and subsequently amended Agreement, an opinion that was simultaneously confirmed by the U.S. Consul in Sydney.[57]

Miller also recommended the substitution of Suva for Pago Pago which he believed to be operationally safer and more importantly a strategically better location from which to fly onto Australia. For a land plane route, Miller suggested a route from Honolulu to Brisbane via Howland Island and the New Hebrides Islands.[58]

Despite the favourable commercial aspects of the report, Commerce continued to oppose the service and in particular the Agreement which it found «objectionable to this Government» and

insisted that all executive departments be consulted before any reciprocal agreement be concluded.[59]

During July of 1937 the Pacific colonization race and consequently the trans Pacific air services rivalry between the United States and the British Commonwealth intensified as a barren, tiny atoll known as Canton Island, part of the Phoenix Island Group became the setting for an alleged international incident.

As a total eclipse of the sun was scheduled to occur on the 8th of June, a scientific expedition was co-ordinated by the National Geographic Society with the assistance of the United States Navy. The expedition decided on Canton Island from which to observe the eclipse and the Navy instructed the State Department to forward the usual diplomatic notice to the British Government of the proposed visit of a foreign naval vessel to one of their islands. The State Department prepared the note but declined to forward it until it was satisfied that those particular islands were, in fact, owned by the British Government. After examining the records, the Department concluded that the islands had been newly annexed by the British and that, in fact, the United States had in its own right sufficient claim to the islands. It was, therefore, unnecessary for the United States to notify the British Government. The expedition set out on the 6th of May and on the 21st of May the U.S. Consul in Sydney forwarded a copy of an Order in Council

dated the 18th of March 1937, which extended the boundaries of the Gilbert and Elice Islands Colony to include the Phoenix Group.[60]

The State Department was informed on the 5th of June by the Navy that a New Zealand scientific expedition had arrived aboard the H.M.S. Wellington at Canton Island, while the U.S. Avocet was laying anchor there. The Navy reported no incident, in fact, it was written that «all had gone well with both sides participating in a round of social events».[61]

The New Zealand press reported otherwise, maintaining that a clash had occured over a suitable anchorage position. The Wellington Dominion maintained outright that the principal importance of the island was not for scientific observations but rather as a strategically important link in the trans Pacific air service between New Zealand and Honolulu. The paper also carried a statement by the acting Prime Minister that the New Zealand Government was aware of the incident at Canton Island and that New Zealand -

> «is, of course, vitally interested in trans Pacific aviation, and questions concerning British sovereignty in the Pacific have been the subject of representations to the Home authorities.»[62]

Prior to the Canton Island controversy, the U.S. State Department had been able to successfully stave off any discussions with the British Government concerning the concession of reciprocal rights for a Commonwealth carrier entering the United States from the west or Hawaii.

However, the Department was now being pressed by the United States Navy to resolve the sovereignty issue with the British Government or alternatively sanction colonization, as that department had singled out Canton Island as a potential site for a patrol base.[63]

The British Government, therefore, decided upon combining the two issues, much to the chagrin of the State Department.[64]

During the course of his visit to Washington, D.C. in July 1937, the New Zealand Minister of Finance, Walter Nash, delivered a note to the State Department via the British Embassy drawing that Department's attention to the Pan American agreement noting that:

> «In completing the agreement...the New Zealand Government was inspired by the hope that the service when commenced would extend the relations between our countries in every possible way that would be beneficial. To furhter improve these relations it is proposed, as soon as the necessary preliminary arrangements have been completed, to apply for reciprocal rights so that the service may be extended by the operation of a British Company to carry out a like service to that provided under the terms of the agreement by Pan American Airways.»[65]

On the 20th of July 1937, in a memorandum addressed to Mr. H. McIntyre, Secretary to the President, from Mr. D.W. Bell, Acting Director of the Bureau of the Budget, attention was drawn to the controversial letter granting an extension dated the 11th of March 1937 from Nash to Gatty, specifically the expectations held by the New Zealand Government concerning Pan American's obligations to ensure reciprocity.[66]

The memorandum stated that the matter had been studied by the President and suggested that the following course of action be initiated:

> «(1) that the Pan American Airways should answer the letter from the New Zealand Government stating quite frankly that it has no authority whatever to bind the Government of the United States and that the Government of New Zealand cannot expect it in any way to use the Pan American Airways influence to get reciprocity with the United States for the British Government;
>
> (2) that the Department of State should communicate with the New Zealand Government, advising it that a copy of Mr. Fraser's letter of March 11, 1937, addressed to the Pan American Airways had come to its attention and set forth in this reply the definite position of the United States Government in this matter; and
>
> (3) that the language in the appropriation act making the funds available to New Zealand should contain a provision that there is no obligation on the part of the United States Government to carry out any arrangement made between a private company and a foreign government.»[68]

In accordance with the second recommendation, the State Department prepared two replies. The first was specifically directed to Mr. Walter Nash who was reminded that when the general subject was discussed during his visit to Washington:

> «it was thoroughly understood that the agreement between the New Zealand Government and Pan American Airways...does not impose any legal or moral obligation of any character whatever upon the Government of the United States.»

The rebuff continued by the addition of a qualification:

> «Should the Government of New Zealand at some future time desire to make any proposal looking toward a possible agreement concerning air communications in the Pacific area, the Government of the United States will of course consider such a proposal in the light of all the conditions and circumstances than existing.»

The second reply, drafted by Mr. R. Walton Moore, Counselor of the State Department, and subsequently approved by Secretary of State Cordell Hull, reinterated the position with respect to the absence of any moral or legal obligation on behalf of the U.S. Government to grant reciprocity. These replies were, of course, transmitted to all appropriate Commonwealth Governments including Australia.[69]

Concurrently, a British note relating to the erection by the United States of a cement plinth with a stainless steel American flag on Canton Island, was delivered to the State Department on the 22nd of July 1937.[70]

The Canton Island issue was beginning to seriously comlicate and jeopardize the State Department's stand in respect of the reciprocity issue. While the Department had previously been successful in avoiding discussion of the issue with the British, a more compromising and conciliatory approach was now deemed necessary, particularly in view of the aspirations of the United States Navy.

Apart from pressure exerted upon the State Department from the Navy, the Commerce Department was dissatisfied with the reply

the State Department had dispatched to the New Zealand Government. Commerce had advocated that, if the American service was to operate, free of the «objectionable features of the permit, the United States would» be willing to encourage the establishment of the service and to enter into negotiations with the British and Commonwealth Governments for reciprocity».[71]

The State Department, however, deemed it «inadvisable to deviate from the practice of declining to comment on a contract between a private American company and a foreign government for the legal right to do so was questionable». Further, State was concerned that an invitation extended to governments to commence negotiations would create a precedent, one that was inopportune «having in view the serious problem of national defence as well as the general political and economic factors involved».[72]

The Department of State had thus been successful to date in keeping the Government out of the Pan American-New Zealand dispute and had forestalled an attempt by the U.S. Navy to seize Canton Island.

This uneasy truce between the various United States executive departments was matched by the situation between the New Zealand and Australian Governments.

Despite the protestations directed wholly for the benefit of the United States Government, the New Zealand Government aided by the local press, was suddenly becoming increasingly sympathetic towards Pan American. This heightened sentiment was prompted

by reports that the British intended to inaugurate an air route from Canada to Australia via Honolulu, Christmas Island, Hull Island, Suva and New Caledonia, thus effectively by-passing New Zealand.[73]

It was this fear of exclusion, ever haunting the New Zealand Government, that accounted for Pan American's success in establishing a service to New Zealand.

The contrary position appeared to be true in Australia where according to the American Consul in Sydney, the Australian Government were now beginning to express the real fear that Pan American would obtain a monopoly in the South Pacific, if that company established services on a regular basis before the inauguration of a British co-operative venture.[74]

As to Canton Island, the British Government appeared to be adopting a policy of protracted and interminable silence, despite numerous State Department diplomatic notes requesting the convening of discussions designed to resolve the issue: «What Britain thinks, Britain does not say.»[75]

The British Government continued to stall by maintaining that it needed to confer with the New Zealand Government before making any final decision.[76] This procrastination may have been a deliberate ploy by the British to capitalize upon the dilemma faced by the State Department and the opposition it faced with the other executive branches of government. When a reply was finally received it stated that the British Government

was ready to discuss the question of sovereignty over certain islands but it could not agree to include the Phoenix Group in those discussions. Due to a previous Order in Council together with the fact that both Canton and Hull Islands were occupied, the British considered this issue redundant and not the subject for discussion.[77]

This uncompromising attitude on the part of the British prompted the State Department to reassess its policy of conciliation and adopt the Navy proposal, i.e. colonize.[78]

The escalation of the Sino-Japanese war intensified the New Zealanders' desire for the American service, and Pan American responded by announcing that both ground facilities and personnel were en route to Samoa and Auckland in preparation for the inauguration of scheduled services. The S-42B used during the survey flight in March, was redeployed from the Manila-Hong Kong route where it had been operating a shuttle service over a sector of the China mid Pacific route, to Honolulu where under the command of Captain Edwin Musick, it left Hawaii on the 23rd of December 1937, arriving in Auckland just a few days short of the expiration date provided for in the amended agreement.[79]

Pan American pursuant to the provisions of the Air Commerce Act of 1926 applied for the necessary authority to conduct operations over the Kingman Island, Pago Pago route and on the 2nd of December 1937, a temporary authorization for the transportation of property was granted by the Assistant Secretary of Commerce

subject to the restriction that tranportation for hire was expressly prohibited.[80]

Thus, by the conclusion of 1937 Pan American had successfully secured the necessary extension without compromising the position of the United States Government with respect to the reciprocity issue, and launched in addition to a survey flight, a scheduled flight to comply with the terms of the amended agreement.

More important and significant events saw the close of 1937, however, with the sinking of the U.S.S. Panay by the Japanese on the 12th of December.[81] A British naval vessel had been attacked simultaneously and the British Government suggested to the American Government that joint action should be instigated against Japan. In the wake of a threatening crisis in the Pacific, aviation and island bases assumed an even greater importance to the respective parties.

CHAPTER VII - FOOTNOTES

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5. Ibid., p. 233.

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7. PAA 10.10.00 Pacific Division, 2nd February 1937, Letter from Assistant Secretary of State to President of the United States of America.

8. Supra, note 1, p. 234, citing NA, RG 237, CAA File No. 510.00, 16th of March 1937, American Consul, Auckland to the State Department.

9. AA - CRS A 461 I 314/1/4, p. 1, 11th March 1937, Letter from P. Fraser on behalf of the Prime Minister of New Zealand to Harold Gatty, Attorney for Pan American Airways.

10. Ibid.

11. Ibid.

12. Ibid.

13. Pan American cited as a cause for delay a maritime strike in the United States; ibid.

14. Ibid.

15. Ibid.

16. Ibid.

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19. Ibid.

20. Ibid.

21. Supra, note 1, p. 235; citing NA, RG 59, File 811. 79690 PAA/88, 1st April 1937, American Consul, Wellington to the Secretary of State.

22. Ibid.

23. Ibid.

24. Ibid.

25. AA - CRS A 461 I 314/1/4, p. 1, 18th of March 1937, Cable from Prime Minister of Australia to Prime Minister of New Zealand.

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28. AA - CRS A 461 I 314/1/4, p. 1, 19th of March 1937, Cable from Prime Minister of New Zealand to Prime Minister of Australia.

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31. AA - CRS A 461 I 314/1/4, p. 1, 30th of March 1937, Cable from Acting Prime Minister of New Zealand to Prime Minister of Australia.

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34. The Melbourne Herald, 31st of March 1937.

35. Ibid.

36. Aircraft Magazine, 1st January 1938, p. 14.

37. The New York Times, 4th April 1937.

38. Ibid.

39. Ibid.

40. Koninklijke Luchtvaart Maataschappij, voor Nederland an Kolonien, and Koninklijke Nederlandsch - Indische Luchtvaart Maatschappij.

41. Supra, note 37.

42. Ibid.

43. Refer to page 70.

44. Melbourne Argus, 13th of March 1937.

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46. AA - CRS A 461 I 314/1/4, p. 1, Cabinet Agenda undated and not numbered. Wellington Civil Aviation Conference, Resolutions re Trans-Pacific service.

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51. AA - CRS A 461 I 314/1/4, p. 1, 30th of April 1937, Letter from Prime Minister's Department (author unknown) to M.L. Shepherd.

52. Supra, note 48.

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54. Supra, note 1, p. 237.

55. Ibid., citing NA, RG 237, CAA, File No. 510.00, 16th of March 1937, Assistant Secretary of Commerce to William T. Miller.

56. Ibid.

57. Ibid., p. 241, citing NA, RG 59 File 811 79690, PAA/96, 28th of May 1937, American Consul, Sydney to the State Department.

58. Ibid., pp. 242-43.

59. Ibid., citing NA, RG 237, CAA File No. 510.00, 19th June 1937, Assistant Secretary of Commerce to the Secretary of State.

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61. Ibid., p. 245, citing PG/5, 5th of June 1937, Memorandum from Legal Advisor to Mr. Samuel W. Boggs of the Historical Advisor's Office.

62. Ibid.

63. Ibid., p. 252.

64. Ibid.

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66. Supra, note 17.

67. Ibid.

68. Supra, note 65.

69. Supra, note 1, p. 248, citing NA, RG 59 File 811 79690 PAA/107, 20th of July 1937, British Ambassador to the State Department.

70. Pacific Island Monthly, 24th of March 1938, «Friendly Rival Claims for Canton Island».

71. Supra, note 1, p. 260, citing NA, RG, File 811 79690 PAA/108, 6th of August 1937, Assistant Secretary of Commerce to the Secretary of State.

72. Ibid., p. 263, citing NA, RG 59, File 811 79690 PAA/109, 17th of August 1937, Secretary of State to Secretary of Commerce.

73. Ibid., p. 271, citing NA, RG 59, File 811 79690 PAA/112, 3rd of September 1937, Vice Consul George B. Lane to the State Department.

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79. Supra, note 30, p. 215.

80. Pan American Airways Company (Nevada) New Zealand Operations Order No. 552, Docket No. 6-401(E)-2, 1 C.A.J. 273, 1 CAA CLXXXUIII 695, at p. 700.

81. Supra, note 1, p. 290, citing D. Borg, The United States and the Far Eastern Crisis of 1933-1937, Cambridge, Harvard University Press, 1964, pp. 486-518.

CHAPTER VIII

1938: PROCRASTINATION AND AN ALTERNATIVE PROPOSAL CONSIDERED

The year 1938 began for Pan American on a less optomistic note. On the 11th of January, the S-42B Samoan Clipper crashed while on its second scheduled flight to Auckland near Pago Pago with the consequent death of Captain Edwin Musick, a man who had assumed a somewhat venerated status amongst the general populace in New Zealand.[1]

The accident had enormous ramifications for the airline. Firstly, the Company had lost is most senior pilot together with a long range aircraft, which exacerbated Pan American's already critical equipment shortage. This was compounded by the late delivery of the Company's new Boeing 314 aircraft earmarked for the New Zealand service.[2]

Secondly, the Commerce Department, as a result of its enquiries into the conditions of Pago Pago habour before the incident, decided to close the port for the airline, thereby forcing the carrier to seek an alternative transit location. The importance and urgency in securing an alternative stop-over was generated by the belief on the part of Pan American that the British would use the set back as an opportunity to develop their own trans Pacific route via Christmas Island.[3]

Trippe in February informed the State Department that with the inauguration of the new Boeing 314 Clippers, Pan American for commercial and technical reasons would require the use of

two islands both of which the United States had laid a claim to; Christmas and Canton Islands.[4]

Trippe now, however, faced a barrage of adverse publicity and criticism over the accident and more generally the airline's Pacific operations.

Launching the attack, in a strongly worded telegram sent to members of the press in Washington was Grover Loening, ironically a former member of the Pan American board of directors.[5] Loening asserted that the entire New Zealand exercise and the resulting tragedy had convincingly demonstrated the «undesirability of monopoly in our foreign trade» and that the «insatiable ambitions of this company to hastily develop (the) New Zealand route (in order) to forestall competition, (were) absolutely responsible for this tragic blow to American aviation».[6]

The substance of the telegram revealed a growing disenchantment with the privileged position Pan American had assumed in the past with the United States Government and was a portent of earnest and concerted attempts within the year to challenge that venerated position.[7]

The Australian press reacted more sympathetically to the news of the accident maintaining that apart from setting back the science of «ocean crossing aviation», the accident «has impressed Australians and New Zealanders as more tragic than others closer to home in which more lives were lost».[8]

Aircraft Magazine added:

> «great hopes for the new service were held by people in both Australia and New Zealand, who not only looked forward to the benefits it would bring them, but hoped that its success would spur on their Governments to hasten preparations for an airline across the Tasman and perhaps the Pacific.»[9]

In contrast to the sentiments of Grover Loening, the Australian aviation press extolled Pan American's reputation, which took «every possible precaution, (a fact) that was well known to almost everyone, thereby making the company the standard by which all others were judged».[10]

Contrary to the fear Pan American was harbouring that the British would capitalize upon this tragedy, the Australian press maintained that upon the basis of «messages» from America, it was anticipated that «more cooperation between Pan American and Imperial in the Pacific» would follow. These «messages» were interpreted to mean that as the American service has been postponed and the British were speeding up their plans, «the Pacific line may be revived at about the same time as the Tasman service starts - which would be all well if the Australian and New Zealand Governments seemed to be ready for business. Of course, they don't».[10]

The last rather pointed comment was directed at the series of negotiations being conducted simultaneously between the New Zealand and Australian Governments over the inauguration of a trans Tasman service which quite independent of the trans Pacific issue was plagued with its own interminable delays and problems.

While Australian and New Zealand Governments seemed to be embroiled in the trans Tasman fracas, the Americans were moving quickly on the Canton Island issue.

Exasperated by delays in negotiating the issue with the British Government, President Roosevelt settled on a policy of colonization with an American landing scheduled on both Canton and Enderbury Islands. British notification of the American activities was only to be given at such time as when the landings were to take place.[11]

The «occupation» was completed under a veil of secrecy with the New York Times carrying a story on the 5th of March stating that the President had prepared an Executive Order taking over the two islands.[12] Trippe immediately requested from the State and Interior Departments a permit to use Canton Island as a base for the New Zealand route with Interior conceding to that request on the 29th of March 1938.[13]

The British reaction to the American action was one of marked restraint, the British indicating that they were prepared to accept American use of the island but subject to the provisio that administration be exercised jointly and more importantly that landing rights in Hawaii be granted to a British carrier.[14]

Pan American in a desperate search for an alternative transit point had, following the closure of Pago Pago, surveyed in addition parts of Western Samoa; a New Zealand mandated

territory. The New Zealand Government in response to requests from Pan American to further survey the region, adopted the position that their government's attitude would in turn depend upon the American Government's attitude on the wider issue of Canton Island and Hawaii.[15]

On the 1st of April 1938, the Interior Department announced that Pan American had been granted a permit to use Canton Island; an announcement that drew criticism from the British Government on the basis that the British Government had hoped that «equal non-competitive lines, using the same terminal facilities but operating through different stop-overs, could be set up in the Pacific». The British Government felt that the grant to Pan American undermined such a possibility.[16]

Trippe maintained that the British planned to operate a survey flight to Christmas Island within two months and provided specific details to the State Department of the exact details of the proposed course of route.[17]

On the 12th of April 1938, President Roosevelt sent a note to Secretary of State Cordell Hull approving the Secretary's instructions of the 7th of April to the American Ambassador in London, which rejected outright the consideration of the sovereignty of certain Pacific Islands and any discussion relating to reciprocal aviation privileges in Hawaii.[18]

On the same day, the State Department informed Trippe that the British did not want Pan American to use Canton Island

whereupon Trippe retorted that he had already commenced negotiating with the French authorities over the possible use of New Caledonia as an alternative stop-over. The French, Trippe maintained, were eager for Pan American to inaugurate services and more importantly were not seeking reciprocal privileges.[19]

During an Interdepartmental Committee on International Civil Aviation meeting convened on the 14th of April 1938, the U.S. Navy continued to assert its opposition to the granting of landing rights to any foreign carrier in Hawaii on security grounds. Other members of the Committee adopted a more mercantile and commercial attitude, maintaining that possession of Hawaii gave the United States a monopoly on Northern Pacific aviation, which the U.S. should retain until such time as they could be traded for something more substantial.[20]

The State Department was subsequently notified by Pan American that the Company intended to use Canton Island and that plans had been formulated for the occupation of the Island by Company personnel. In pursuance of this notification, Pan American employees landed on the Island in the 26th of May 1938 which prompted a reaction from both the Australian and British Governments; both harboured a real fear that Pan American was about to assume exclusive control of the Island. Australia cabled London insisting that the Empire's right to use the Island be safeguarded by specific reference in any negotiations conducted with the United States.[21]

Pan American allayed those fears by indicating to the State Department on the 21st of June 1938, that it was willing to make its facilities available on Canton Island to a British carrier.[22]

At this point the British abruptly changed their tactics and dropped the Hawaiian reciprocity issue in favour of concentrating upon the difficulties the British would experience in jointly administering the Island if Pan American assumed exclusive control. The British shortly after proposed transfering part of the population of the Gilbert and Ellice Islands to Canton Island obstensibly to relieve the over crowding problem that had developed in those islands. The United States responded with an emphatically negative response to such a suggestion.[23]

The British had also recommended the convening of an aviation conference, but the Americans were determined not to associate the Canton Island sovereignty issue in any way with that of aviation.

By the 4th of August, the British conceded defeat on the above two issues, i.e. colonization and an aviation conference, but they still pressed for cancellation of the exclusive Pan American licence and a re-issue conceding joint control by the two nations.[24]

On the 10th of August 1938, both governments' nations accepted joint administration of Canton Island as the basis on which to resolve the issue, albeit temporarily.[25]

An agreement was subsequently entered into between the United States and Britain establishing for 50 years joint control of the two states over Canton and Enderbury Islands. Specifically the agreement provided:

> «The islands shall be available for communications and for the use as airports for international aviation, but only civil aviation companies incorporated in the United States or in any part of the British Commonwealth of Nations shall be permitted to use them for the purpose of scheduled air services.»[26]

The importance the Canton Island sovereignty issue assumed in Anglo-American relations is evidenced by the fact that the matter prompted comment from President Roosevelt during the course of a state visit to the United States in June 1939 by King George VI where the President remarked:

> «The King and I are aware of a recent episode where two small islands in the centre of the Pacific became of sudden interest to the British Empire and to the United States as stepping stones for commercial airplanes between America and Australia. Both nations had good cases. To have entered into a long drawn out argument could have meant ill will between us and delay in the use of the islands by either nation. It was suggested that the problem be solved by the joint use of both islands by both nations and, a gentleman's agreement to defer the question of ultimate sovereignty until the year 1989. The passage of 50 years will solve many problems.»[27]

Technology and the consequent redundancy of Canton Island as a intermediate stop have ultimately assisted in solving that problem.

During the midst of the Canton Island controversy, a series of articles appeared, described by Harold Gatty as nothing short of 'libelous'. They concerned the development of a trans Pacific air service by various American interests.

The first article entitled «How Washington is Curbing Pan American Airways» appeared in the March edition of Pacific Islands Monthly, a reputable Sydney based and published magazine dealing specifically with issues pertaining to the Pacific region.[28]

The author, John Williams, described as a correspondent residing in Honolulu, asserted that it «was time the record of trans Pacific aviation (was) kept straight by the telling of a story tucked away behind the scenes».[29]

Williams referred to the formulation of the South Seas Commercial Company's scheme or syndicate already described in Chapter IV[30] but erroneously recorded that Donald Douglas was at the time the scheme was initiated a director and shareholder of Pan American. The scheme, according to Williams, was «hatched» as were many other such schemes before the Black Investigations between interlocking aviation interests which were then reputedly «sold out as options to the companies concerned - an old, old capitalist trick».[31]

Particulars of the scheme were disclosed in the article; the aim of which according to Williams «was to be an American invasion of British Colonial air routes, and by getting in first to establish monopolies».[32]

The final draft of the scheme, 26th of June 1934,[33] «fell into the hands of U.S. Federal Agents», where upon the United States Government acted in sending «secretly a U.S. coast guard cutter to Jarvis, Howland and Baker Islands, the equatorial islands which had last been occupied by British interests».[34]

This occupation all occurred without the knowledge of the Douglas syndicate who formed their own expedition which was then to obtain leases of these particular islands, but which Washington emphatically refused to grant.

> «This angle gives the lie to the flaring newspaper stories about American 'racing' Britain in the occupation to the islands. Uncle Sam simply forestalled these U.S. citizens.»[35]

With Pan American's ambitions of flying the Atlantic dashed, Williams maintained that the airline was forced to look elsewhere for the deployment of its new Martin flying boats and having «got wind of the Pacific syndicate's plans and as a result of financial moves behind the scene, the company acquired the syndicate's ideas».[36]

The United States Government according to Williams, refused to sanction the operation of landplanes along the Pacific route and Pan American in compliance now disclaimed any interest in using, either presently or formerly, Jarvis, Baker or Howland Islands.[37]

According to Williams, the whole Douglas syndicate, later acquired by Pan American, was effectively destroyed by the actions and intervention of the United States Government, who opposed the idea of «paid agents of a private enterprise attempting to commit foreign governments like New Zealand to schemes which would create dangerous monopolies and precedents. One result has been that eventually British planes will duplicate the route from America to New Zealand, and this fact has greatly angered the Pan American board, which dreamed of a fat monopoly».[38]

The publication of the article, disclosing the South Seas Commercial scheme and the revelation that Pan American intended over the United States Government's objections to create a Pacific monopoly, was certainly inopportune for the airline.

The article, according to Gatty, was based upon information that was incorrect and erronous, although Gatty declined to reveal the full story of the development of the trans Pacific service as «a company's business, if conducted along proper lines, is its own affair».[39]

As to the allegations that Douglas and other Pan American directors concocted a scheme which was to be taken over by their own company, Gatty maintained that he had «no knowledge of what action (these people) wish to take on this matter, but the charges made...are very serious».[40]

The editor and publisher of the magazine, R.W. Robson, did not regard the comments as libelous and maintained that instead «they deal with a matter of great public interest, and they contain the suggestion that there were manoeuvers on the part of certain corporations to secure an advantage over governments. That charge has been made very strongly and definitely elsewhere».[41]

While some aspects of the Douglas/South Seas Commercial scheme appear accurate, other details of the article appear erroneous or misconstrued. The gist of the article that the United States Government was opposed and curtailed the activities of Pan American, is incorrect. Indeed, evidence already adduced would arrive at a contrary conclusion.

The publication of this damaging article together with the Canton Island controversy prompted Gatty to write in April 1936 to Colonel Clarence M. Young, Pan American's Pacific Division Manager in San Francisco, where Gatty stated that the above two matters were not generating much sympathy for the airline in New Zealand:

> «In any event it has done us no good here and I am very afraid that in the very near future we are going to be asked to live up to our contract or else.»[42]

Gatty, reinterating earlier sentiments about the choice of New Zealand as the Southern Pacific terminus, maintained that «as I have repeatedly stated for the past eighteen months, we

should forget all about New Zealand and run to Noumea for it will be the only way to avoid trouble and duplication of the service from British services».[43]

In spite of Gatty's reservations about New Zealand as a suitable Southern Pacific terminus, the airline filed in October 1938 an application for a certificate of public convenience of necessity pursuant to the newly enacted Civil Aeronautics Act of 1938 for service to that destination, specifically pursuant to section 401(e)(1), the «grandfather clause».

Pan American's application was subsequently denied under this section but issued under section 401(d)(1) of the Act. A full description of the application and the reasoning advanced by the Authority for its denial under section 401(e)(1) appears in Appendix III.[44]

British plans for the inauguration of trans Pacific services had throughout the year 1938 been pursued albeit very slowly and tediously. Pan American's intelligence network had deduced that the British intended to operate a survey flight by June or at the very latest by the end of the year.

Pan American's estimates were, however, overly optimistic and the inevitable delay associated with coordinating the participation of the four Commonwealth governments in establishing a trans Pacific airline service were not fully appreciated by the Company.

Possibly out of this frustration the Australian Government entertained a scheme first proposed in July of 1938 by a

W.H. Kelly in a letter addressed to the former Minister of Defence, Sir Archdale Parkhill.[46]

The proposal which was to form part of a secret file retained by the Prime Minister's Department, envisaged a service from Brisbane to Honolulu via Noumea, Suva, Hull Island and Kingman Reef, employing four engined flying boats.[47]

Emphasis was placed throughout the letter on the wholly and exclusively Australian participation in the venture which the author maintained was justified in view of the fact that Australians alone pioneered both the Pacific and Tasman and therefore «it is only right that Australian enterprises and aviators should now reap the harvest that the heroism of Kingsford Smith and Ulm and Taylor sowed».[48]

This appeal to nationalism was also bolstered by the remark that the author believed that:

> «American public opinion would respond more readily to a 'hands across the sea' gesture from Australia than from Britain herself, owing to the intensive propaganda in America against being wangled by Britain into European complications.»[49]

a remark Kelly supposedly imparted to the British Cabinet himself.

Capitalizing upon the frustration and delays associated with the inauguration of both the Tasman and London services, Kelly referred to Imperial Airway's plans as «vague possibilities of the future», and that the proposed Honolulu-Vancouver sector

is «so impracticable that it must have been put forward to choke off workable trans Pacific projects which might ultimately affect its slow-mail monopoly to Europe via Asia».[50]

In economic terms the wholly Australian airline would create employment and industry as:

> «Contrary to Imperial Airway's plans, the major servicing of the Australian Company's boats would be done in Australia, and eventually its boats would be built here.»[51]

while,

> «in years to come when aviation has become commonplace, it will be very hard to induce suitable young Australians to devote their youth to, unless flying leads to executive and ground organization positions in later life. For this reason, it is desirable that an Australian company should be wholly operated by an Australia executive, an Australian ground organization and Australian air navigation and pilots.»[52]

The author also detailed the operation of the Pan American mail subsidy scheme which he maintained provided a profit for the U.S. Postal authorities, despite the «propaganda about the enormous subsidies paid to that country».[53] Again a comparison was being made between Imperial Airways where he maintained that the shareholders of that airline «should be very grateful to the Governments that guarantee their dividends at such cost».[54]

This admiration for the operations of an airline based upon the principles of free enterprise, i.e. Pan American, prompted the author to recommend that services be operated on a bi-monthly schedule, operated alternatively by the Australian

Company and Pan American in «friendly co-operation, the latter Company's prestige, facilitating the expanding capitalisation of the former, and its experience increasing the economy of servicing and the efficiency of the Australian company».[55] There appears to be no evidence indicating that Pan American promoted or was even aware of the Australian proposal but it is certainly not beyond the realms of possibility that such an association did in fact exist.

The possibility of such an association is substantiated by the number of continuous and flattering references to the benefits directly associated with and derived by the United States Government from the operations of Pan American. This extended even so far as specifically referring to the procedure adopted by that airline in negotiating landing rights in its own capacity with a foreign government, a point which the Australian Government was fully conversant with.[56]

This remark and the author's offer of assistance in securing the necessary landing rights in the United States in a private capacity, expresses either a naivety on the part of the author relating to the events of the past three years or a carefully contrived plan, formulated with the assistance of Pan American; a strategy often employed by that company in breaking a deadlock where landing rights had been denied by a foreign government.

The decision to use Kingman Reef as a stop-over does, however, tend to refute such a liason; Kingman Reef had been eliminated from consideration as a viable transit point earlier in the year by the Company.[57]

Irrespective of any clandestine associations, the proposal and the reasons advocated for its promotion can only be described as avant garde. For example, Kelly, basing his calculation of passenger fares upon the Pan American rate of 6.8 cents per mile, calculated that the fare between Brisbane and Suva would be less than existing steamship rates, lending itself to the possibility of attracting short holiday tourists to Suva and «the vaunted attractions of the Hawaiian Islands».[58]

Preempting an argument that was to be advanced by the Australian Government itself some twenty years later in securing an extension of landing rights in New York, Kelly asserted that the trans Pacific route would be free of «the more serious quarantine problems of existing trans Asian services».[59]

Less futuristic in concept and of far more immediate concern to the Australian Government was the argument advanced by the promoter that such a service would mitigate Australia's isolation and provide a route to London which «recent American action tends to safeguard» and would consequently remain open, despite the presence of war in Asia.[60]

According to the author and promoter, the scheme had through the auspices of Mr. S.M. Bruce, former Australian Prime Minister and now High Commissioner to the United Kingdom,

been presented to the British Cabinet who at the supposed instigation of Kelly realised that Australian-American air co-operation in the South Seas would be added security to British interests in the Pacific and an excellent means of «contracting American public opinion».[61]

Kelly had in January, however, been less successful in convincing the Colonial Office of the wisdom in approaching the United States with a scheme for the mutual air-use of South Pacific islands. The procrastination on the Colonial Office's part, according to Kelly, in making the «beau geste» which he believed would make a responsive cord in American public opinion, resulted in the American's island grabbing activities.[62]

Sir Archdale Parkhill seemed suitably impressed with the proposal and in a letter addressed to the Australian Prime Minister, J.A. Lyons, dated the 28th of July 1938, stated that the proposal «with its extraordinary national advantages...I fell sure...will commend itself to you and your Government».[63]

It is significant that the scheme should receive endorsement from a former Minister of Defence who led the Australian delegation to the Wellington Conference in 1936 and chaired the Air Committee at the London Imperial Conference in 1937, resulting in the formulation of a series of resolutions specifically pertaining relating to negotiation and conduct of international air services agreements.[64]

Indeed so impressed was Parkhill with the scheme that he urged the Australian Government to initiate negotiations immediately with the French and American Governments in order to secure landing rights in Noumea, Kingman Reef and Honolulu respectively.[65]

In a document entitled «Notes Relating to the Proposal to Establish an Air Service Between Brisbane and Honolulu», undated but written by staff of the Post Master General's Department, the entire history of the trans Pacific service was reviewed and detailed with some illuminating comments and criticisms offered by this government department.[66]

Confirming what was generally widespread opinion both within and outside government circles, the government document maintained that firstly, little or no progress had been made in the establishment of a British trans Pacific service.[67]

Secondly, that the New Zealand Government regretted entering into the Pan American Agreement of 1935;[68] the first such written Australian Government confirmation acknowledging the New Zealand Governments's error.

Thirdly, a Honolulu-Brisbane link which would entail cooperation of the American Government would jeopardize the so-called «all Red route» across the Pacific and hence completion of a British route around the world.[69]

Fourthly, that «the promoters of the company ask the Commonwealth (Australian) Government to secure the landing rights

in foreign territory, whereas in the case of Pan American Airways, the United States Government did not appear in any of the negotiations».[70]

What did receive prominence and what was considered an attractive feature of the scheme at least as far as this government department was concerned, was that the proposed company sought no concessions or subsidies:

> «if private enterprise is prepared to establish such a service, as this, almost unaided, it should presumably be looked upon with favor (sic).»[71]

The scheme was also examined by the Department of Defence and placed on the Agenda before Cabinet at the direction of the Minister for Defence, H.V.C. Thorby on the 13th of October 1938.[72]

Emphasizing the wholly Australian content of the company, the Minister regarded the proposal as practical both in terms of the course of the route to be followed and the associated technical requirements such a service would entail.[73]

The 1936 Wellington Resolutions and the 1937 London Imperial Conference Resolutions pertaining to Empire Co-operation did, however, pose as was to be expected the major stumbling block.

> «It would appear necessary to consult the New Zealand Government in regard to the project.»[74]

In respect of securing landing rights in British, American and French territories, however, the Department of Defence

could envisage few problems with either the French or British Governments; it seeming improbable that the latter government «would go to the length of refusing facilities for the service at Fiji and other British possessions even if it did not support the proposal».[75]

The acquisition of rights into Honolulu would, of course, present «considerable difficulties in view of the known objections of the United States Government to granting permission for any foreign air service to call at Hawaii.»[76]

What is perhaps one of the most interesting aspects of the Minister's submission to Cabinet was the suggestion that it might be possible for the Company to negotiate its landing rights directly with the Governments concerned; a most profound departure from established, although admittedly scant practice and precedent. The Minister conceded, however, that such a technique would be unlikely to meet with great success and that ideally negotiations should be conducted through the British Government; it being «necessary to seek any such rights in wide terms to permit their applying to other British services - as was agreed at the Imperial Conference».[77]

Such a concession to Commonwealth Co-operation on the part of the Australian Government appeared to be placing Australia in exactly the same position as New Zealand following the 1936 Wellington Conference but with far less tangible benefits to show for adopting such a compromising attitude.

The Australian Cabinet did, however, adopt the recommendation of the Minister in seeking inter-governmental approval and consultation in accordance with the Wellington and London Resolutions and letters addressed to both the British High Commissioner in Canberra and the New Zealand Prime Minister were dispatched on the 19th of December 1938.[78]

Lyons had six days previously written to Parkhill communicating the decision of Cabinet and the Sub-Committee, maintaining that such consultation was necessary as «certain principles were agreed to at the Imperial Conference in connection with air routes and commitments have since been entered into by the Commonwealth (Australia) regarding the trans Pacific air service via New Zealand».[79]

Parkhill was not impressed with the Prime Minister's reply nor with the reasons cited by the Australian Government for the delay in authorizing the scheme and in an extraordinarily frank manner wrote to Lyons on the 12th of January 1939 expressing his displeasure.[80]

Retirement from public life afforded Parkhill the opportunity and liberty he wrote of «putting my views quite plainly... as I observe the attitude of the Government on public questions from an entirely different angle at present».[81]

This letter is an important document as it expresses candidly the opinion of a former Minister and more importantly senior delegate to both conferences, which produced a series of

resolutions upon which the Government was now attempting to rely and which in turn was to form the basis of Australia's international aviation policy.

In respect of the resolutions agreed to at the 1937 Imperial Conference in London, Parkhill maintained that these resolutions referred exclusively to services within the Empire, which a Government was either operating and controlling or subsidising with finance or other assistance.

> «At no stage in the discussions was it stated, suggested, or implied that such conditions should apply to purely private enterprises, which sought no financial help, but merely desired the use of the usual and only channel of communication between Governments, a right which is conceded in democratic countries almost without exception.»[82]

Parkhill continued by referring to the «considerable reluctance and lack of enthusiasm on the part of one Dominion[83] «in respect of the resolutions, and the actions of another Dominion[84] which he claims were tantamount to openly ignoring the resolutions.[85]

Contrary to the Australian Government's interpretation, such resolutions were «never intended to harass and hamper legitimate local enterprises».[86]

In extolling the virtues of free enterprise and national autonomy, Parkhill maintained that:

> «It is surely absurd to suggest that every new British air service is subjected to the procedure of submitting its proposals to its competitors in other countries for their views

> and information. The resolutions were I submit never intended to prevent consideration of local enterprises in which the Government is not financially involved and a decision made in accordance with the clear and definite policy of the Government concerned, provided of course such policy existed.»[87]

Criticism of the Australian Government's new direction in aviation policy was certainly behind the last statement, and expressed the sentiments of some within the Australian aviation industry, that aviation policy had especially since the Imperial Conference in London assumed a position second in importance to inter-empire politics; a position which the Australian Government at an earlier stage had not subscribed to.

Like Kelly, Parkhill regarded Imperial Airways as one of the worst aspects of Commonwealth co-operation and communication, maintaining that co-operation with the British Government over the Australian proposal would entail consultation with the British Secretary of State for Air, «which would of course mean that Imperial Airways would need to be consulted». The end result being that «approval would need to be obtained before private enterprise in the Commonwealth (Australia) is to be permitted to function».[88]

Parkhill was particularly impressed with the arguments advanced concerning the importance such a service would assume for strengthening Australia's line of defence. Parkhill viewed such an argument as one of national importance and expressed his dismay at the attitude of the Australian Government in not

grasping the importance of such a service on this basis alone; «an aspect which so far does not seem to have been discerned by your government».[89] A significant statement eminating from a former Minister of Defence and a damning indictment on that government in respect of its own appreciation of the then precarious world situation.

Australia, Parkhill continued, would find itself in an anomalous position, if as he speculated, Pan American applied for landing rights just as another foreign carrier had successfully done so (K.L.M./K.N.I.L.M.) and Australia had granted those landing rights but at the same time withheld consent from a «purely Australian enterprise».[90]

It is contended that Parkhill's assessment of the Australian Government's predisposition in conceding Pan American landing rights was in January of 1938, a little premature and thus the «anomalous position» did not arise, but his prediction that the Government would inevitably grant those landing rights to the American carrier because of the national strategic importance that a trans Pacific air service would assume was correct.

In respect of the 1936 Wellington Resolutions, Parkhill was scathingly critical of the actions of the New Zealand Government. Firstly, the resolutions were not binding upon the participants because as he maintained they never fully agreed to by both Governments; no doubt a reference to the proposed amendment of Resolution 2.[91]

Secondly, and more importantly as far as Parkhill was concerned, even if the resolutions had been agreed to by both governments, they were «entirely abrogated by the action of the New Zealand Minister for Finance, Mr. Nash, in his dealings with Pan American Airways in the U.S.A. when returning from the Imperial Conference, the evidence of which is in your aviation departmental records».[92]

Thirdly, judging by the interminable delays associated with the inauguration of the trans Tasman air service, it follows that «the prospects of an air route connecting New Zealand and Canada were shadowy and nebulous».[93]

Fourthly, in respect of the British trans Pacific route «no conference on the subject as proposed at Wellington has been arranged by New Zealand as was agreed should be done».[94]

Fifthly, «in view of the attitude of the Dominion of Canada respecting aviation matters this proposal is unlikely to eventuate for many years».[95]

Finally, the proposed air service according to Parkhill in no way interfered with the objectives of the Wellington Conference resolutions, even if binding on the Commonwealth, rather it was an entirely separate scheme.[96]

Parkhill's comments were it is submitted, an accurate appraisal of the position the Australian Government had assumed in respect of the formulation of its own

international aviation policy, a position in striking contrast to the position that the same government had occupied earlier in the decade.

Perhaps, Parkhill's closing remarks are the most pertinent where the former Minister expressed the desire that the Australian Government «prevent inordinate delay (in this matter) and protect Australian enterprise from subordination to outside and overseas interests».[97]

CHAPTER VIII - FOOTNOTES

1. I.M. Driscoll, Flightpath South Pacific, Christchurch, Whitcombe and Tombs, 1972, p. 70.

2. The New Zealand Herald, 14th of January 1938.

3. F.X. Holbrook, United States National Defense and Trans-Pacific Commercial Air Routes 1933-1941, Fordham University Doctoral Dissertation, 1969, pp. 292-93 citing NA, RG 59, File 811-79690 PAA/128, 14th of January 1938, American Consul/Auckland to the State Department.

4. Ibid., p. 296.

5. Loening from 1937, was an aviation consultant to Joseph P. Kennedy, Chairman of the U.S. Maritime Commission, both publically acknowledged opponents of Trippe.

6. PAA 10.10.00 Pacific Division, 13th of January 1938, Copy of telegram from Grover Leoning to certain members of the press in Washington.

7. In particular the challenge by American Export Airlines, refer to Appendix IV

8. Aircraft Magazine, 1st of February 1938, p. 7 «Pan American Airways' Pacific Disaster».

9. Ibid.

10. Ibid., p. 26.

11. Supra, note 3, p. 297 citing NA, RG 48, 16th of February 1938, Memorandum from Gruening to the Secretary of the Interior.

12. The New York Times, 5th of March 1938.

13. Supra, note 3, p. 301 citing PG/45, 9th of March 1938, Memorandum of conversation between Juan Trippe and the State Department.

14. Ibid., p. 302.

15. Ibid., p. 303, citing NA, RG 59, File 811 0141 PG/60, 30th of March 1938, Telegram from American Embassy, England to the State Department.

16. Ibid., citing PG/66, 6th of April 1938, Memorandum of conversation between the State Department and the British Ambassador.

17. Ibid., pp. 303-304, citing PG/78, 11th of April 1938, Pan American Airways to the State Department.

18. Ibid., pp. 304-305, citing FDR Library, PSF : HULL 12th of April, 1938, Memorandum from the President to the Secretary of State.

19. Ibid., citing NG, RG 59, File 811.0141 PG/72, 12th of April 1938, Memorandum of conversation between the State Department and Pan American Airways.

20. Ibid., p. 306, citing PG/74, 14th of April, 1938, Memorandum on Interdepartmental Meeting on Canton Island.

21. Ibid., p. 308, citing NA, RG 126 Territories, 9-12-21, 3rd of May 1938, Montly Report from Consul General Sydney to the State Department.

22. Ibid., p. 309, citing NA, RG 59 File 811.0141 PG/94, 21st of June 1938, Pan American to the State Department.

23. Ibid., p. 311, citing Foreign Relations, 1938 Vol. II, pp. 102-112.

24. Ibid., p. 312, citing NA, RG 59 File 811.0141 PG/96 5th of August 1938, State Department Memorandum

25. Ibid.

26. State Department, Executive Agreement Series, No. 145, cited in O.J. Lissitzyn, International Air Transport and National Policy, New York, Council on Foreign Relations, 1942, pp. 388-389.

27. The Glasgow Herald, 10th of August 1939.

28. Pacific Islands Monthly, February 1938.

29. Ibid.

30. Refer to page 58.

31. Ibid.

32. Ibid.

33. Which corresponds with the date appearing on a document relied upon to describe the scheme in Chapter IV and consequently retained by Pan American.

34. Supra, note 28.

35. Ibid., emphasis added.

36. Ibid.

37. Ibid.

38. Ibid.

39. Pacific Islands Monthly, March 1938, Letters to the Editor Central Pacific Aviation.

40. Ibid.

41. PAA 10.10.00 Pacific Division, 23rd of March 1938, Letter R.W. Robson, Editor and Publisher Pacific Islands Monthly to Harold Gatty.

42. PAA 10.10.00 Pacific Division, 5th of April 1938, Letter from Harold Gatty to Colonel Clarence M. Young Manager Pacific Division.

43. Ibid.

44. Refer to Appendix III.

45. Supra, note 17.

46. Minister for Defence, 12th of October, 1938 to 20th of November 1937.

47. AA - CRS A 1606 T 411, 22nd July 1938, Letter from W.H. Kelly to Sir Archdale Parkill.

48. Ibid.

49. Ibid.

50. Ibid.

51. Ibid.

52. Ibid.

53. Ibid.

54. Ibid.

55. Ibid.

56. Ibid.

57. Refer to page 177.

58. Supra, note 47.

59. Ibid.

60. Ibid.

61. Ibid.

62. Ibid.

63. AA - CRS A 1606 T 411, 28th of July 1938, Letter from Sir Archdale Parkhill to the Prime Minister of Australia. Parkhill considered that such a route «was inevitable».

64. Refer to page 160.

65. Supra, note 63.

66. AA - CRS A 1606 T 411, Memorandum «Notes Relating to the Proposal to Establish an Air Service Between Brisbane and Honolulu».

67. Ibid.

68. Ibid.

69. Ibid.

70. Ibid.

71. Ibid.

72. AA - CRS A 1606 T 411, 13th of October 1398, Cabinet Agenda No. 463, «Proposed Air Service Brisbane to Honolulu».

73. Ibid.

74. Ibid.

75. Ibid.

76. Ibid.

77. Ibid.

78. AA - CRS A 1606 T 411, 19th of December 1938, Letter from the Prime Minister of Australia to High Commissioner for the United Kingdom, Canberra and Prime Minister of New Zealand.

79. AA - CRS A 1606 T 411, 13th of December 1938, Letter from the Prime Minister of Australia to Sir Archdale Parkhill.

80. AA - CRS A 1606 T 411, 12th of January 1938, Letter from Sir Archdale Parkhill to the Prime Minister of Australia.

81. Ibid.

82. Ibid.

83. Canada.

84. New Zealand.

85. Supra, note 80.

86. Ibid.

87. Ibid.

88. Ibid.

89. Ibid.

90. Ibid.

91. Ibid.

92. Ibid.

93. Ibid.

94. Ibid.

95. Ibid.

96. Ibid.

97. Ibid.

CHAPTER IX

1939: RENEGOTIATION AND CONTINUING REAPPRAISAL

The British and New Zealand Government's reply which was delivered on the 7th of February[1] and the 13th of March 1939[2] respectively, was not unexpectedly favourable to the Kelly-Parkhill proposal.

The British reply dispatched from the Dominions Office considered that such arrangements «would mark a considerable departure from arrangements originally contemplated in the Wellington Resolutions», while that government also foresaw considerable practical difficulties in the operation of the service.[3]

The New Zealand Government regarded the operation of such a service as one which «might conceivably prejudice» the proposal to establish the British service, and «would possibly threaten the prospects of the British Government concerned of obtaining reciprocal landing rights from the United States Government». It further maintained that such a scheme «has potential features of detriment to the full developments of Pacific air routes controlled by Empire Governments».[4]

In the face of such strong opposition, the promoters decided to abandon the project,[5] or at least Parkhill decided to withdraw his support as early as March of 1939; «it is understood following verbal communication to the Prime Minister that Sir Archdale Parkhill does not intend to proceed with the proposal».[6]

Kelly was less reluctant to concede defeat and wrote a letter to the then newly appointed Prime Minister, R.G. Menzies, on the 11th of May 1939.[7]

Endeavouring to capitalize upon a recent address of Menzies in Hawthorn, Victoria which emphasized the necessity for closer relations with the United States, Kelly maintained that as a result of several recent visits to the United States, he had acquired the distinct impression that the United States harboured the belief that Australia was «pledged to keep American aircraft out of Australia».[8] This understanding on the part of the United States Government was nurtured as a direct result according to Kelly, of the activities of the New Zealand Government and Imperial Airways in the United States.

To indicate the importance and the urgency which Kelly attached to supressing this «dangerously mischievously commercial intrigue»,[9] he referred to a recent conversation between himself and a Colonel Johnson described as an Assistant Secretary for War and an influential member of the Roosevelt Administration. According to Kelly, Johnson asked «What is all this nonsense about Australia refusing to have anything to do with American air companies?». «Washington», he continued «has a peculiarly kindly interests in your people's welfare... a peculiarly interest; but if you refuse to play ball with big brother - well, all I can say is that it is...just...to... bad!»[10]

No doubt exaggerating the importance the United States attributed to the matter, (exaggeration to promote Kelly's own objectives), Kelly, however, quite justifiably pointed out to the Australian Prime Minister that such an impression created as a result of the activities of other governments and government instrumentalities could seriously jeopardize the whole spectrum of Australian-American relations. Kelly went further, however, in suggesting that the obstructive behaviour on the part of Australia in relation to this matter, «might influence American opinion against helping us should we ever find ourselves faced with sudden calamity from Asia».

While Kelly and Parkhill had decided to abandon plans for a trans Pacific service, Kelly was not satisfied with the proposed British plans and suggested to Menzies that in the face of incurring adverse American public opinion, the Australian Government should, indeed it would be 'wise', to grant immediately to the United States landing rights in Brisbane without demanding reciprocity, which of course Australia was not yet in a position to utilize. «Later on when the value of trade is demonstrated and world tension has relaxed, we might press for reciprocal rights.»[11]

The suggestion that the Australian Government should grant landing rights immediately to America and presumably Pan American as that airline was the only American carrier in a position to utilize such rights, permits one to speculate

as previously before, that Kelly was in some capacity promoting the cause of, and in cohorts with Pan American, a liaison which Kelly adamantly denied:

> «I can assure you that I have no business of (sic) financial interest, existing or prospective, in any American Company which might benefit from trans-Pacific air communication.»[12]

A particularly interesting observation of Kelly's, however, is to be found in the comment contained in the above letter to the Prime Minister relating to Kelly's own initiatives concerning the acquisition of landing rights into Hawaii by an Australian carrier. Kelly maintained that when he first approached the Civil Aeronautics Authority in Washington in November of 1938, with the Australian scheme, the Authority «seemed very responsive to the idea».[13]

Kelly found, however, that Washington's view had drastically changed within the space of two months; the result, according to Kelly, of Imperial Airway's breach of faith in the North Atlantic agreement and the strengthening of military resistance to the landing of any foreign owned aircraft in Hawaii.

In respect of the second cited reason for the change in attitude by the Americans, this seems implausible, as the military or more particularly the Navy had never at any time throughout 1938 relinquished the pressure it was exerting upon the State Department to refuse foreign carrier access into

Hawaii. Indeed, documentation would simply not substantiate arguments to the contrary, and it seems unlikely that the Civil Aeronautics Authority, albeit newly created, would not be familiar with the stated position of the Navy on this matter.

While not entirely doubting the credibility of Kelly's assessment that the United States would have granted Australia landing rights in November of 1938, it seems that the favourable initial response was simply an overture. Perhaps it was designed by the Americans to advance the cause of Pan American, by giving that company access to Australia which as the Americans knew Australia, alone or in partnership, could not possibly reciprocate in the near future. This gave Pan American a significant time lead which it hoped would lead to a monopoly of the market.

Coupled with Gatty's theory in relation to the inauguration of services to New Zealand,[14] it may be possible to hypothesize that Kelly far from being implicitly involved with Pan American may, in fact, have been unknowingly used by Pan American and certain departments and administrative agencies of the United States Government.

The change in tactics by Kelly from requesting landing rights for an Australian company into the United States to the newly stated position of requesting landing rights for an American company in Australia, generated comment from both the Department of Civil Aviation and the Department of

External Affairs. External Affairs maintained that the Government was bound by the decision of participants in the recent Wellington Defence Conference[15] which clearly amounted to a «decision in principle not to afford facilities for an American service extending to Australia».[16]

However, the Secretary of the Department, W.R. Hodgson, was at a loss to know whether the resolutions had in fact been adopted by the participants, the Department having yet to receive a report of the conference.[17] Consequently, the Department expressed difficulty in providing a definitive comment on the issue which it recognized as being of significance in Australian relations with the United States of America.

The Department of Civil Aviation were less reticent in offering an opinion and prefaced their comments by stating that as far as the Department was concerned «no request has ever been received...for the granting of rights for an American air service to use Australian territory».[18]

Captain E.C. Johnston, on behalf of the Director-General of Civil Aviation, A.B. Corbett, reminded the Prime Minister's Department of the recent agreement reached in Wellington;[19] obviously Johnson did not harbour the same doubts as Hogson as to the status of the resolutions, and noted that in accordance with those and earlier resolutions the respective governments had been notified of the scheme. However,

Johnston claimed that before any finality in the matter had been reached, advice was received that the promoters of the scheme had decided to abandon the project, thus mitigating any necessity on behalf of the Government to consider the matter any further albeit even necessitate any further communication with Kelly.[20]

A second memorandum from the Department of Civil Aviation dated the 16th of June 1939 reiterated the comments regarding the policy adopted at the Wellington Defence Conference and in particular emphasized the total resistance that should be offered by the Australian Government towards any approach by Pan American seeking landing rights in Australian territory.[21]

The above memorandum represents the last piece of correspondence dealing with the matter and such an uncompromising attitude on the part of the Australian Government or at least the Department of Civil Aviation towards approaches initiated by Pan American, appears to have set the tone for the course of negotiations with the airline during the ensuing period.

The British Government was obviously indignant with the rebuff they had received from the United States over the occupation of Canton Island and the refusal of the United States to convene an aviation conference to discuss the reciprocity issue:

> «The United States Government have abstained from accepting repeated invitations to enter into a four-party conference to discuss the settlement of the problem on a practical basis of reciprocal air facilities. Instead they have sought to secure for themselves control over intermediary links in the chain of trans-Pacific aviation by advancing a claim to Pacific islands hitherto regarded as British.»[21a]

In response the issue of a trans Pacific service was placed on the agenda at the Commonwealth Defence Conference[22] convened in Wellington in April 1939.

The same frustration experienced by the Australian Government over the delays associated with the trans Tasman and Pacific service which led to the Govenment to consider the Kelly/Parkhill scheme, albeit briefly, may have been responsible for Australia proposing what it considered a compromise in the face of the United States' refusal to grant landing rights in Hawaii.

In the body of a telegram dispatched simultaneously to the British[23] and New Zealand Governments[24] in March 1939, the Australian Government recommended that discussion of the trans Pacific service scheduled for consideration at Wellington

be deleted from the agenda, and instead be discussed beforehand in London; the rationale being that the matter as far as Australia was concerned was one of such vital importance that it necessitated consideration at a Ministerial level.[25]

In addition the Australian Government proposed that the trans Tasman flying boats service be extended from Auckland to Suva, Fiji and thence to a suitable British island on the equator, allowing an American service to conduct the section from the United States via Honolulu.

Australia maintained that such a service would be eminently practical and feasible in that it would necessitate an increase only in the number of flying boats already designed to meet the operation requirements of the trans Tasman service, as the distances from Auckland to Fiji and beyond to an island in the Equator were less than the distance from Sydney to Auckland.[26]

In view of the fact that the flying boats were already designed, the service could be implemented without undue delay; new boats would be necessary the Government reasoned to complete eventually the long haul to and from Honolulu.

Of course the service would avoid the difficulty associated with securing landing rights into Hawaii and would «retain control in the South Pacific for British interests».[27]

The Australian Government had also considered the possibility of operating a service from Darwin to Portuguese Timor, North Queensland to Papua via Thursday Island and Rabaul to the Solomon Islands.[28]

These and the trans Tasman extension, the Government maintained were part of and should be considered in conjunction with the Empire Defence Plans.[29]

Australia was now clearly emphasizing and justifying the establishment of the trans Pacific air service on defence grounds and less so on commercial or national prestige considerations, upon which both the New Zealand and British Governments seem to have placed more stress.

The British Government was not impressed with the Australian suggestion of deleting the subject from the Wellington Conference. Instead they cited the refusal of the United States Government to negotiate and their seizure of supposedly British islands, as grounds upon which to utilize the forthcoming conference in Wellington as an opportunity to «co-ordinate the available information concerning the use of outlying Pacific islands for (trans Pacific navigation purposes) and of formulating recommendations as to the most practical method of ensuring that the problem of trans Pacific

navigation can be settled with due regards to the various interests involved».[30]

As to the trans Tasman extension proposal, the British foresaw «considerable difficulties in sectionalising the trans Pacific route and that the proposal would not be in accordance with the main policy of open door and complete reciprocity in the Pacific which they (the British Government) desire to see established».

The British Government further declared that the avowed objective of its government in seeking the operation of United States and British Commonwealth services in close co-operation right across the Pacific, a policy the British Government had consistently advocated over the North Atlantic. This co-operation entailed:

> «reciprocal landing rights in the American Continent and New Zealand respectively, open rights at intermediate stopping places, common use of ground organization and mutual consultation regarding timetables and frequency. The Commonwealth's (Australian) Government's scheme would involve abandoning the above principles and sectionalising operations.»[31]

It is of interest if not importance to note that according to the British definition of «co-operation», reciprocity would not include conceding to the United States landing rights in Australia. Whether the British Government had succumbed to New Zealand pressure in ensuring that the future economic viability of the trans Tasman operation be not

jeopardized and that Auckland remain the main terminus for the Australiasian region is not certain but it is contended plausible.

The British Government provided an almost exhaustive list of counter arguments to the Australian trans Tasman extension proposal including the contention that as a «bargain it would be too completely one sided».

> «It would mean, on the one hand, that we surrendered reciprocal rights in United States territory which we are entitled to claim, and, on the other hand, that we grant rights in Christmas and other British islands north of the Equator without compensating advantages. We already possess suitable intermediate air ports in the South Pacific, rights which could be properly exchanged for reciprocal rights in the United States islands, particularly Hawaii.»[32]

Despite the fact that the Australian proposal was intended merely as a short term solution,[33] the British maintained that the implementation of such a scheme would prejudice rather than facilitate a subsequent development along the lines of British defined «co-operation».

To the suggestion Australia had offered in utilizing presently designed flying boats destined for the trans Tasman service, the British Government responded by maintaining that they possessed flying boats designed to fly the North Atlantic mid year which were capable of traversing the longest sector across the Pacific.[34]

With the benefit of hindsight, it is now possible to critically analyse such assertions by the British Government concerning the capability of their aircraft.

The aircraft which the British Government were referring to, the Short S.26 G class and Short S.30 C class flying boats proved totally inadequate for North Atlantic services;[35] one indication that the policies adopted by the British Government in relation to the construction of commercial aircraft and more generally aviation policy, vis-a-vis the United States, were redundant and inept by 1939.

Not satisfied with the response of the British Government to what can only be described as an eminently practical short term solution to the problem, the Australian Minister for Defence, H.V.C. Thorby, wrote to the British High Commissioner on the 23rd of March 1939 emphasising the fact that the Australian proposal was simply intended as a short term solution and not suggested so as to prevent the «wider scheme[36] being undertaken». Rather, the proposal provided an opportunity for Commonwealth Governments to decide when they considered «the time was ripe» to commence negotiating with the American Government over the extension of services to the Northern Pacific.[37]

Thorby some five days later wrote to the Australian Prime Minister J.A. Lyons[38] expressing his concern over the proposed Wellington Defence Conference in so far as his department

were not familiar with the terms of reference «to defence» in relation to the trans Pacific service. Furthermore, the proposed method of discussion was not understood, there having been no consultation with his department on the subject.[39] Thorby expressed the same view following the conclusion of the Conference.[40]

Lyons, in designating Captain E.C. Johnston, Controller-General of Civil Aviation in lieu of the Minister for Defence to represent Australia, advised Johnston that the trans Pacific issue should be considered in connection with the Empire Defence plans and that at a mutually convenient time it should be discussed thereafter with the Minister of Defence.[41]

The Prime Minister was clearly elevating the issue to one that he perceived as being of critical importance in relation to Australia's defence strategy.

Pan American's success in obtaining landing rights from the French Government in Noumea,[42] complicated matters for the Commonwealth coalition. However, during discussions at the Wellington Defence Conference of 1939 and at the suggestion of New Zealand Government, it was decided upon a revised strategy in order to secure the allusive landing rights from the United States Government; to insist upon Pan American using Fiji as a stop over.

While the British Government had only recently been opposed to the Australian Government's sectionalised trans Tasman scheme on the grounds that it would necessitate granting to Pan American the use of a British controlled Equatorial island without reciprocating privileges adding to what the British conceived as an even more inequitable position,[44] they now agreed to the New Zealand suggestion.

For technical and operational reasons, Pan American was not required to use Fiji; as New Caledonia, owing to its proximity to Fiji, was sufficient strategically to permit the American airline to operate a single flight sector directly to Canton Island.

The rationale behind the revised British strategy was elementary. The British were now anxious to commit Pan American to a route traversing yet another British controlled territory, thereby strengthening their bargaining position with the United States Government.[45]

Pan American, however, responded by maintaining that the Company was now committed to the French authorities and was, therefore, not interested in stopping in Fiji.[46]

The British suggested that the New Zealand Government remind Pan American that it was already committed to the New Zealand Government pursuant to the terms of an earlier agreement, specifically to Article 7[48] which required prior approval from that government before the Company instituted any route changes.[48]

The route and course of the British sponsored trans Pacific service was also settled at the Wellington Defence Conference and subject to final surveys was determined to be from New Zealand to Canada via Suva, Nikunono, Fanning Island, Honolulu and San Francisco.[49]

Cost allocation between the participants, which was later to form the basis of a dispute was also discussed, the New Zealand Government declaring that it was prepared to undertake the survey and construction work on the basis that any cost involved be shared in equal proportions by the British, New Zealand and Australian Governments.[50]

The delegates concluded the Conference by deciding that an application should be lodged immediately to the United States Government for a British Company designated as Tasman Empire Airways Limited (T.E.A.L.), in the first instance, to operate the above service and that in forwarding the application -

> «His Majesty's Ambassador should explain that it proposed to develop the necessary ground organisation on various British Pacific islands on the route and the facilities would be available by the United States Government on the basis of complete reciprocity over the whole route from New Zealand to America.»[51]

At least as the delegates rationalised, they by offering reciprocal use of facilities were being as accommodating as possible to the Americans.

The Conference was also responsible for the adoption of the principle enunciated in the earlier Wellington Conference of 1936,[52] that the Australian Government withhold their consent to any application by Pan American Airways for terminal facilities in Australia, thereby maintaining and strengthening the joint bargaining position of the Commonwealt coalition.[53]

The British Government on the 28th of June 1939, following the conclusion of the Conference injected a further complication into the matter by insisting that as a -

> «preliminary to a decision on the nature and extent of participation by the United Kingdom Government financially and otherwise in preparatory work and in the projected service itself, it is essential that steps should be taken to ascertain whether the Canadian Government are prepared to become partners in the enterprise both as regards proposed simultaneous diplomatic representations at Washington applying for facilities at Hawaii and San Francisco and in organisation for an operation of the service itself.»[54]

The Canadians had, however, always expressed their reluctance to participating in plans for a southern Pacific air service, as early as 1937 during the special sub-committee sessions convened during the Imperial Conference in London, prefering instead to inaugurate a northern Pacific route to Hong Kong.[55]

The British Government in their letter of the 28th of June, now maintained that their contribution financial and

otherwise was entirely contingent upon the participation of New Zealand, Australia and Canada.

> «If Canada should not participate the whole position in relation to the projected service would have to be reconsidered by ourselves and presumably also more or less by the other Governments.»[56]

This new position of the British Government is curious. The British were fully conversant with the attitude of the Canadian Government and had been so since the 1937 Imperial Conference. Whether their decision to include Canadian participation as a pre-condition for participation was made as means of deflecting their now real opposition to the scheme is not clear. However, it may be speculated that the British Government was now increasingly conscious of the enormous cost and redirection of critically needed resources that such a scheme would entail; a scheme the British Government admitted would be «primarily a link between Australia, New Zealand and Canada»,[57] despite the fact it would complete a British Commonwealth air route around the world and serve British dependencies in the Pacific at intermediate points. The British Government in June 1939 was undoubtedly confronted with far more immediate and pressing problems closer to home.

As mentioned previously, one matter that did warrant examination during the course of the Wellington Defence Conference was consideration of cost allocation amongst the participating governments.

The New Zealand Government declared that it was prepared to undertake the survey and construction work only on the basis that any cost involved be shared in equal proportions by the British, New Zealand and Australian Governments.[58]

The Australian Government, however, expressed their concern about cost allocation. In a report to the Australian Cabinet by the Minister for Civil Aviation, J.V. Fairbairn, the Minister argued that while it «appears there is no reason why the Government should not agree to the proposal in relation to the survey flights, a different attitude should be adopted in relation to the distribution of costs relating to permanent ground organization costs.»[59] These costs, the Minister maintained, should be distributed in accordance with the principle previously adopted in relation to Empire Air Services; each government should be responsible for the cost of the necessary ground facilities on its own territory.[60]

This policy had been applied to the Empire Air Service and the trans Tasman Air Service with the result that in the case of the Empire Air Service, New Zealand obtained the benefits of the service without any responsibility as regards ground organisation, and in the case of the trans Tasman Air Service, the United Kingdom Government benefited without incurring any responsibility in regard to ground organisation costs though it shared in the subsidy costs.[61]

Cabinet approved the payment of one-third of the cost of the three survey flights proposed and the Australian Government agreed to contribute in the same ratio to the cost of the ground organisation required for the survey flights, provided these ground costs were not considered as «permanent value for the route when operating».[62]

In a telegram dispatched to the New Zealand Prime Minister's Office conceding to the survey flight cost allocation, the Australian Government emphasised, however, that the decision was «not to be construed as inferring that the Commonwealth (Australian) Government accepts any liability for permanent ground organisation».[63] As far as the Australian Government were concerned, their compromising attitude of late,stopped short where financial considerations were involved.

The United States Department meanwhile had received a dispatch from the American Consul in Wellington reporting that Pan American was soon to be granted an amended route approval by the New Zealand Government, and more importantly, that the New Zealand Government, the Consul believed, would not insist upon the granting of rights into Hawaii as that Government was anxious to see the American service inaugurated irrespectively. This eagerness on the part of the New Zealand Government, detected by the Americans, incorrectly allowed the U.S. Consul to surmize that the Australian Government would now approve Pan American's immediate entry into that country.[64]

An interesting observation is to be found in a mid-June dispatch from the American Consul in Wellington where Consul Lindsay had reportedly told J. Pierrepont Moffat[64(a)] that it was New Zealand who was pressuring the British Government in insisting upon reciprocity. Moffat, however, advocated the opposite maintaining that it was the British who were pressuring New Zealand.[65] These observations appear thus in complete contradiction with each other.

It is, however, contended that Consul Moffatt's observation seems at this stage more probable given that the New Zealand Government could not afford to advocate for reciprocity too publically instead preferring to exercise more indirect pressure through the British Government. This was deemed necessary by the New Zealand Government following Pan American's decision to route its services via Noumea, a mere 800 miles from the Australian mainland. Indeed, Pan American's decision to route its services via Noumea caused widespread speculation amongst the Australian press; that the airline at the last insistance intended to continue onto Australia in lieu of New Zealand.[66]

New Zealand's reservations about pursuing the reciprocity issue were also communicated to the British Government simultaneously lending further support to the Moffat view that it was indeed the British Government who was pressing the issue.

However, the New Zealand Government may have been attempting to justify their position to the British Government whom they believed were in a far better position to succeed with the American Government.

The understanding reached in Wellington in 1936 that the New Zealand Government would exert pressure through an American private instrumentality while the British Government would concentrate on direct diplomatic negotiation with the United States appears to have shown signs of collapse by mid 1939. New Zealand was simply not prepared to jeopardise the inauguration of the American service and their activities thereafter bear witness to this contention.

Indeed, if the New Zealand Government was entrusted with the responsibility of exerting pressure on the United States Government through Pan American, then judging by their now conciliatory approach, the likelihood of a British trans Pacific air service being granted reciprocal landing rights in Hawaii would, in June 1939, have seemed remote.

The New Zealand Government was convinced that they would be unable to induce Pan American to substitute Suva for Noumea, and, therefore, decided to fall back upon a contingency plan discussed at the Defence Conference; to obtain the concurrence of the company to the introduction of Suva as an alighting place in addition to Noumea.[69] The most enticing aspect of the recommendation was to be found in the suggestion that Pan

American be permitted to use the facilities established at Suva without cost to that company.

The American Consul in Wellington reported New Zealand's offer in relation to the use of Suva, and Pan American's response that it considered it impractical to stop in Fiji.[70]

The New Zealand Government heeding the advice of the British Government reminded Pan American of their obligations pursuant to their agreement but this made little impression and impact with the company as the Government quickly withdrew the demand.[71]

The Fijian issue was somewhat confusingly reported with the Americans maintaining that Pan American had been refused landing rights when originally requested and that it was only through the shrewd negotiating skill of the airline that such rights were conceded.[72]

The confusion arose from the change in tactics adopted by the Commonwealth coalition at Wellington in 1939 which was now determined to commit the airline to Fiji.

On the 7th of July 1939, the New Zealand Prime Minister's Office cabled both the Australian and British Governments informing them that Pan American had officially requested from the New Zealand Government a route change; Canton Island and Noumea in lieu of Kingman Reef and Pago Pago and that it planned to commence services as early as the end of July.[73]

Pan American also informed the New Zealand Government that if desired it was -

> «definitely prepared to include experimental flights to Suva en route from Canton Island to Noumea and if found practicable from the technical and operational point of view, the Company would be prepared to continue to use Suva as a port of call.»[74]

Pan American qualified their commitment, however, by maintaining that the «whole situation will be open to review should the inclusion of Suva as a regular alighting place prove to be impracticable from the view of the Company».[75]

The New Zealand Government was satisfied, not unexpectedly, with Pan American's non committal answer and proposed to approve of the change of route. In addition the New Zealand Government advised that they were prepared to inform the airline verbally that any costs incurred in constructing the proposed alighting area in Suva would not be the responsibility of the Pan American.[76]

The British Government was not impressed with the New Zealand Government capitulating attitude and stated that the British Government was most anxious for Pan American to call at Suva as -

> «they desire that the colony which lies on the direct air route and is a natural junction for air services in that area, and should reap the advantages of the proposed air service, especially since ground organisation is to be provided there as soon as possible, and since there is no prospect in the immediate future of British trans Pacific air service.»[77]

The latter comment pertaining to the probable delay in inaugurating a British service is a damning indictment on the pitifully slow progress the British scheme.

The contemplated redraft as proposed by the New Zealand Government above would have left to Pan American the decision as to whether or not «skirt Suva, and would leave His Majesty's Government in New Zealand powerless if the company did not wish to do so».[78]

As the British Secretary of State for Dominion Affairs so astutely pointed out to the New Zealand Government, pursuant to the terms of the 1935 Agreement between the Government and Pan American any route changes required the approval of the New Zealand Government:

> «It would appear therefore that it was the responsibility of the Company to ensure approval of the New Zealand Government in any change of route which they may contemplate rather than to face the New Zealand Government with fait accompli and than attempt to force them into acceptance.»[79]

The Secretary went further by offering his opinion as to how how the British Government perceived the activities of Pan American:

> «From our own experience of the tactics of Pan American elsewhere the argument referred to[80] is one of familiar recurrence and need not we suggest be regarded too seriously.»[81]

The New Zealand Government was, however, not consoled by the British Government's words of reassurance; Pan American's

most recent move in securing landing rights from the French in Noumea must have appeared like a sword over the future of the New Zealand-United States air service.

The British Government reminded the New Zealand Government that in order to maintain some semblence of equality in negotiating with the United States, it must persuade Pan American to accept terminal facilities in Fiji on their own terms.

This could be accomplished, the British rationalised, because Pan American had spent considerable sums of money in the preparation of the service, including the purchase of suitable aircraft in addition to the attendant publicity:

> «Pan American is unlikely to foresake those expenditures apart from the loss in prestige, if the company decided to abandon the route solely on the question of whether or not they should call at Suva enroute to Noumea.»[81]

However, in defence of New Zealand's concilitory attitude, it must be said that New Zealand was certainly not in such a strong bargaining position as were the British. For Pan American access to Britain was critical to the success of, and long term viability of any Atlantic operation; the 'blue ribbon' route as termed by Trippe.

New Zealand did not command the same importance, a fact it was always conscious of. Accordingly, it could not afford to be as highhanded and complacent as the British Government in its dealings with Pan American.

The New Zealand Government succumbed to the British Secretary of State's advice and on the 19th of August 1939 cabled both Commonwealth Governments advising them that New Zealand intended to inform Pan American that they «cannot agree to the change of route to include Canton Island and Noumea except on the condition that the whole matter be reviewed if the Company does not utilise Suva».[82]

The Australian Government had remained conspicuously silent on the issues which had arisen during the course of the previous months but on the 21st of August 1939 forwarded cables to both the New Zealand and British Governments expressing their Government's attitude on several matters.[83]

In relation to the Canadian Government's participation, the Australian Government concurred with the British recommendation; once Canada's participation had been secured, then application should be made to Washington for facilities in American territory. The Government did not, however, comment upon the British Government's ultimatum that it be a precondition for Britain's continued participation.[84]

The Australian Government reaffirmed its position in relation to any application by Pan American for terminal facilities landing rights in Australia; if the British (T.E.A.L.) application met with any difficulties then the Australian Government «would not be prepared to entertain any proposal from Pan American Airways unless the United States Government

was willing to include in the agreement an express condition that reciprocity would be granted as regards landing rights in American territory for an eventual trans Pacific service."[85]

Learning by the mistakes of the New Zealand Government, the Australian Government regarded such an express condition as infinitely preferable to any grant of consent with the reservation of a right to cancel the agreement in the event that reciprocal facilities were not forthcoming.[86]

The Government's decision in requiring the insertion of such a proviso in any concession granted to Pan American at first appears ambiguous, especially when considered in light of the preceeding paragraph of the cable where the Government decided not to entertain any request from the Company, if Washington did not consider the T.E.A.L. application favourably.

However, the Australian Government speculated that Pan American would soon, almost immediately, request authority from their government and that the T.E.A.L. application would be delayed pending further agreement between the participating governments. Therefore, it was an eminently opportune moment to press the reciprocity issue.[87] That the Australian Government insisted upon obtaining an express condition of reciprocity from the United States Government is an indication that the Australian Government was still only prepared to negotiate this issue at a governmental level.

The cable also noted that judging by communications between the New Zealand and British Governments, Australia perceived that New Zealand would terminate its existing agreement if reciprocity was not granted by the United States Government, a somewhat misguided understanding of the New Zealand Government's position in this matter.[88]

The Australian Government also concurred with the British Government in its advice regarding the use of Fiji.[89]

CHAPTER IX - FOOTNOTES

1. AA - CRS A 1606 - T 411, 7th February 1939, Cable from United Kingdom Dominions Office to Prime Minister of Australia.

2. AA - CRS A 1606 T 411, 13th March, 1939, Cable from Prime Minister of New Zealand to Prime Minister of Australia.

3. Supra, note 1.

4. Supra, note 2.

5. AA - CRS A 1606 T 411, 27th March 1939, Memorandum from Acting Director of Civil Aviation to the Secretary, Prime Minister's Department.

6. AA - CRS A 1606 T 411, 30th March 1939, Memorandum from Secretary Department of Defence to Secretary Prime Minister's Department.

7. AA - CRS A 1606 T 411, 11th May 1939, Letter from W.H. Kelly to the Prime Minister of Australia.

8. Ibid.

9. Ibid.

10. Ibid.

11. Ibid.

12. Ibid.

13. Ibid.

14. i.e. once the American; refer to page 148.

15. See below.

16. AA - CRS A 1606 T 411, 29th May 1939, Memorandum from Secretary Department of External Affairs to Secretary Prime Minister's Department.

17. Details of the Conference appear below.

18. AA - CRS A 1606 T 411, 7th June 1939, Memorandum from the General of Civil Aviation to Secretary Prime Minister's Department.

19. Refer to page 226.

20. Supra, note 18.

21. AA - CRS A 1606 T 411, 16th June 1939, Memorandum from Director-General of Civil Aviation to Secretary Prime Minister's Department.

21a. Ibid.

22. At the insistence of the New Zealand Government.

23. AA - CRS A 461 I 314/1/4, p. 2, 14th March 1939, Cable from Department of External Affairs to Acting High Commissioner London.

24. AA - CRS A 461 I 314/1/4, p. 2, 15th March 1939, Letter from Prime Minister of Australia to Prime Minister of New Zealand confirming Telegram dated 10th March 1939.

25. Ibid.

26. Ibid.

27. Ibid.

28. Ibid.

29. Ibid.

30. AA - CRS A 461 I 314/1/4, p. 2., 20th March 1939, Letter from High Commissioner of the United Kingdom in Australia to the Australian Minister of Civil Aviation.

31. Ibid.

32. Ibid.

33. AA - CRS A 461 I 314/1/4, p. 2, 23rd March 1939, Letter from Minister for Defence to High Commissioner.

34. Supra, note 30.

35. R.E.G. Davies, A Ministry of the World's Airlines, London Oxford, 1964, p. 324.

36. Of a British trans Pacific service.

37. Supra, note 30.

38. J.A. Lyons died in office on the 7th of April 1939 and was succeeded by Sir Earle Page, thereafter by R.G. Menzies on the 26th of April 1939.

39. AA - CRS A 461 I 314/1/4, p. 2, 28th March 1939, Letter from Minister for Defence to Prime Minister of Australia.

40. Refer to page where the Department was still not conversant with the attitudes of the participants at the Conference.

41. AA - CRS A 461 I 314/1/4, p. 2, 1st April 1939, Letter from Prime Minister of Australia to Minister for Civil Aviation.

42. The French authorities granted the concession in December 1938.

43. AA - CRS A 461 I 314/1/4, p. 2, 15th May 1939, Letter from Prime Minister of New Zealand to Prime Minister of Australia.

44. Refer to page 222.

45. Supra, note 43; to a lesser extent the British were also anxious to provide service to hitherto an isolated colony.

46. AA - CRS A 461 I 314/1/4, p. 2, 10th June 1939, Telegram from the Prime Minister of New Zealand to Prime Minister of Australia.

47. Qualified by Article 5.

48. AA - CRS A 461 I 314/1/4 p. 2, 27th June 1939, Cable from Secretary of State for Dominion Affairs to Prime Minister of Australia.

49. AA - CRS A 461 I 314/1/4, p. 2., 28th June 1939, Memorandum from Controller-General of Civil Aviation on behalf of the Director-General to Secretary, Prime Minister's Department.

50. Ibid.

51. Supra, note 43.

52. Refer to page 128.

53. AA - CRS A 461 I 314/1/4, p. 2, 28th June 1939, Telegram from Secretary of State for Dominion Affairs to Prime Minister of Australia.

54. Ibid.

55. Ibid.

56. Supra, note 53.

57. Ibid.

58. Supra, note 49.

59. AA - CRS A 461 I 314/1/4, p. 2, 16th June 1939, Cabinet Agenda No. 77 British Trans Pacific Air Service.

60. Ibid.

61. Ibid.

62. Ibid.

63. Supra, note 49 containing draft.

64. F.X. Holbrook, United States National Defense and Trans' Pacific Commercial Air Routes 1933-1941, Fordham University, Doctoral Dissertation, 1969, pp. 330-331; citing NA, RG 59 File 811 79690, 8th of August 1939, Memorandum of State Department on Wellington Dispatch of 29th of April 1939.

64a. U.S. Consul in Sydney.

65. Ibid.

66. Aircraft Magazine, February 1, 1939, p. 36. Pan American maintained that the use of Noumea permited the airline to reduce the distance between Auckland and Canton Island exactly by half thereby permitting greater payloads, and it was not related to Australian landing rights.

67. Supra, note 46.

68. Ibid.

69. Ibid.

70. Supra, note 55.

71. Ibid.

72. Ibid., p. 332 citing M. Josephson, Empire of the Air New York Harcourt, Brace and Company, 1943, p. 121.

73. AA - CRS A 461 I 314/1/4, p. 2, 7th July 1939, Telegram from Prime Minister of New Zealand to Prime Minister of Australia.

74. Ibid.

75. Ibid.

76. Ibid.

77. AA - CRS A 461 I 314/1/4, p. 2, 16th August 1939, Cable from Secretary of State for Dominion Affairs to New Zealand Govenment repeated to Australian Government.

78. Ibid.

79. Ibid.

80. That Pan American was committed to the French authorities.

81. Supra, note 77.

82. AA - CRS A 461 I 314/1/4, p. 2, 19th of August 1939, Telegram from Prime Minister of New Zealand to Prime Minister of Australia.

83. AA - CRS A 461 I 314/1/4, p. 2, 21st of August 1939, Cablegram from Prime Minister of Australia to Prime Minister of New Zealand and Secretary of State for Dominion Affairs.

84. Ibid.

85. Ibid.

86. Ibid.

87. Ibid.

88. Ibid.

89. Ibid.

CHAPTER X

1940: PAN AMERICAN PURSUES ITS OBJECTIVE

News of Pan American's rebuff by the Australian Government came as a surprise to the U.S. State Department who had reckoned on a more compromising attitude in view of the increasingly precarious series of developments in Europe and the escalation of the conflict in China during the previous year.[1]

Pan American undaunted, adopted a new tactic in its efforts to secure the allusive landing rights into Australia.

On the 14th of June 1940 the Australian Minister in Washington, R.G. Casey, disclosed the existence of plans to the Australian Minister for Civil Aviation, whereby Pan American intended to position a 830 ton yacht in Noumea which would shuttle Sydney passengers from either the Auckland orginating or terminating flights. This would permit a San Francisco-Sydney service of seven days - three days San Francisco-Noumea, and four days Noumea-Sydney.[2] It is a damning indictment on the politicalisation of commercial aviation that the shortest sector, Sydney-Noumea, should take the longest time to complete.

In addition it was announced that Harold Gatty was to take up residency in Sydney, affording him a greater opportunity to lobby more effectively with the Australian Government.[3] This was a shrewd move on the part of the Company considering the popularity Gatty retained amongst members of the Australian press.

This latest ploy by Pan American in positioning a yacht in Noumea amounted essentially to the commercial equivalent of «gun boat diplomacy» and signalled the commencement of concerted efforts and publically disclosed ambitions on the part of the airline to fly into Australia.

In a cable to the Australian Air Minister dated the 20th of June 1940, Casey recounted the details of a telephone conversation conducted between Gatty and himself, where Gatty inquired as to whether Casey was prepared to transmit immediately a request to the Australian Government permitting an extension of operations from Auckland to Sydney.[4]

Casey in reply to Gatty's inquires stated that any such request must be initiated and subsequently negotiated at a governmental level, reiterating an already stated Australian Government position. Consequently, Casey referred Gatty to the U.S. State Department.

The State Department, reflecting the more interventionalist role which it was beginning to assume in such matters, agreed with Casey, maintaining that «this was the procedure they desired».[5]

The Australian Government's rather unaccommodating attitude towards Pan American became increasingly public during the earlier part of 1940. With the impending commencement of scheduled mail services to New Zealand in July 1940, pressure was gradually being exerted upon the Australian Government by various special interest groups to extend an invitation to Pan American or to at least operate a «courtesy visit» to Australia.

When the Australian press reported the Government's opposition to such an invitation, telegrams from organisations and individuals were forwarded to the Australian Prime Minister expressing the opinion that the Government should reconsider its position in view that this «vital time necessitates closer relations between Empire and the United States».[6]

In a memorandum from the Director General of Civil Aviation, A.B. Corbett to the Prime Ministers Department, the Director General stressed the importance of the whole issue, noting that the Pan American request for landing rights was presently under consideration by the Department and that the Minister proposed to submit the matter before the Cabinet for further discussion.[7]

As to the more immediate problem associated with the extension of an invitation for a «courtesy flight», the Director General conceded that any reply to either the press or the various special interest groups should be worded «with care» and «on the lines consistent with the general policy which it is expected the Government will pursue on this matter», i.e. landing rights only to be granted if reciprocal rights were conceded by the United States Government.

In a suggested reply to the various special interest groups, the Director General maintained that despite reports in the Sydney press, «no responsible officer in either the Departments of Air or Civil Aviation had expressed any official view in regard to such a suggested invitation» and further that:

> «I do not consider it appropriate that the Commonwealth (Australia) should issue an invitation to Pan American Airways, a commercial company, to divert its aircraft from an air mail trip which I understand is under contract to the United States Government. The desirability of fostering friendly relationships with the United States Government is fully appreciated and if the United States Government should indicate its desire to extend the Pan American Airways service to Australia, the proposal will receive full consideration.»[10]

Given the contents of the above suggested reply by the Director General, it was certainly not inconceivable that the Australian Government would on the advice of the Department of Civil Aviation entertain an extension of the Pan American service into Australia. However, the Australian Government remained adamant that such any such approach was to be initiated by the United States Government and not by Pan American.

In response to the cable sent from Casey in Washington detailing Gatty's request, the Minister for Air stated that in view of the impending inauguration of trans Tasman services, the Government saw «no necessity for Pan American to continue west of Auckland», a somewhat contradictory statement from that of the Director General of Civil Aviation who maintained that such a request provided it emanated from the United States Government would be accorded «full consideration».[11]

Progress in the commencement of a British sponsored service moved, predictably, very slowly with a survey flight being conducted by the T.E.A.L. flying boat «AOTEAROA» in September 1939 over the Auckland-Suva segment of the proposed trans Pacific service.[12]

Gatty who was returning to Australia via New Zealand, stopped in Fiji to examine the facilities in Suva and not unpredictably expressed reservations as to Pan American's use of Fiji.[13] Pan American was again engaged in employing commercial pressure tactics. Gatty was fully appreciative of the desire on the part of both the British and New Zealand Governments for the American carrier to use Fiji, and contrary to the ambitions of those two governments in making Fiji a bargaining position for the furtherance of their particular aims, Gatty, by exhibiting his indifference towards the matter, was able to extract further concessions from the still anxious New Zealand Government.

The inauguration of Pan American's scheduled mail service to Auckland, although rumoured to commence in mid 1940, was not conveyed to the New Zealand Government until shortly before the actual date of commencement, which by their own words «left the New Zealand Government in the dark» and which caused great anxiety within the Australian Department of Civil Aviation.[14]

The anxiety emanated from purely commercial considerations. On the 30th of April 1940, the long and eagerly awaited inauguration of scheduled trans Tasman services occurred marking the completion of the world's longest single airway, Auckland via Sydney to Poole, 14,277 miles.[15]

This resulted in the creation of a logistics nightmare. The Australian Department of Civil Aviation in association with the Post Master General's Department was saddled with the responsibility of co-ordinating the schedules of Australian air

mail along various sectors of the Empire route; operated by no less than three separate airline companies: Imperial Airways Poole to Singapore, QANTAS Empire Airways, Singapore to Sydney and T.E.A.L., Sydney to Auckland.

With the imminent inauguration of services from Auckland to the United States, the inclusion of yet another airline with which to co-ordinate services required further scheduling. This proved most difficult especially over the trans Tasman sector which was from its inception designed to co-ordinate the carriage of mail between London and Sydney, not Sydney and San Francisco. The stated position of the Australian Government, encouraged by the attitude of the New Zealand Government was that the trans Tasman link should provide adequate service for United States bound passengers and mail. This, therefore, required the efficient utilisation of the trans Tasman services to accommodate and appease the Australian travelling public and diminish any merit in the argument Pan American might promote for through United States Australian service.[16]

To counter such a possibility the difficult task of schedule co-ordination was extended to the Pan American service, an undertaking that was from the outset destined to failure, given the increasingly divergent attitudes that began to emerge between the two Tasman Govenments with in the space of one year.

Pan American from the beginning intended to capitalise upon the inherent difficulties and failed to schedule even its

inaugural flight in such a way that it would connect with the T.E.A.L. service at Auckland.[17]

The Australian Government was also conscious of the ramifications of such inconvenient scheduling, and in a telegram urgently dispatched to the New Zealand Prime Minister's Department on the 13th of July 1940, the Australian Director General of Civil Aviation conceded that without an effective connection at Auckland with Pan American, «pressure will probably result for (an) extension (of) Pan American to Australia».[18] To avoid such pressure, the Australian Government in response proposed to schedule a special flight; the Australian Government being prepared to bear 23 per cent of any associated costs.[19]

The telegram also noted that the Australian Minister in Washington, R.G. Casey, had stressed the desirability of the press passengers aboard the Pan American flight, having the opportunity of visiting Australia via a suitable connection.

The telegram concluded by stating that further and more permanent scheduling operations would need to be considered at a forthcoming Tasman Air Commission meeting, scheduling in keeping with the whole tenor of the trans Tasman agreement.[20]

On the 14th of July 1940, the rather hastily cabled telegram to New Zealand sent the previous day from the Department of Civil Aviation was followed by a memorandum addressed to the

Australian Prime Minister's Department which recommended that a more complete and extensive explanation be forwarded to the New Zealand Government; expanding upon the Australian Government's position in light of recent events, particularly in view of the possibility that Pan American might operate a sea shuttle from Noumea.[21]

The Department of Civil Aviation's concern at the prospect of such a shuttle is clear and undeniable as revealed in the text of this inter-departmental memorandum.

To minimise the value of any yacht connection, the Department proposed to reschedule the trans Tasman services so as to provide for a connection in Auckland with the Pan American service. The Department also decided upon conducting a feasability study into the possibility of conducting their own air service between Australia and Noumea.[22]

The study involved the Department of External Affairs investigating whether the Australian or British Governments already possessed or could possess the necessary rights to operate an Australian service to Noumea. The author of the memorandum, Captain E.C. Johnston, advised the Prime Minister's Department that certain negotiations for reciprocal rights between the Australian and French Governments had commenced at one stage «but it is doubtful whether these negotiations progressed to a stage which would enable us to claim the right to operate to Noumea».[23]

The Department of Civil Aviation also advised the Prime Minister's Department that QANTAS Empire Airways had been requested to fit extra tanks to their Empire class flying boats, thereby permitting regular operations to Noumea «if that becomes necessary».[24]

Johnston also wrote of the necessity of the members of the Tasman Air Commission «exploring alternative means of countering the Pan American move».[25]

It is ironic that the above memorandum concludes by drawing to the Prime Minister's Department's attention, the opportunity of that department availing of itself the use of the scheduled trans Tasman service from Sydney with an air connection from Canberra in order to expedite delivery of any correspondence to the New Zealand Government; the instruments of carriage moving inter-governmental correspondence were playing an important role in their own destiny.

Pan American's latest ploy in the arena of international aviation politics was by mid 1940, at least as far as Australia was concerned, beginning to produce results.

On the Fiji issue, Gatty appeared to be stalling the New Zealand Government by recommending the investigation of alternative alighting areas in and around the Suva area.[26] This was designed no doubt to buy crucial time which would afford the Australian Government an opportunity to consider the ramifications of the Noumea sea shuttle.

As to be expected, news of the shuttle proposal was not received favourably by the New Zealand Government, ever conscious of their large investment in the success of the trans Tasman operation. The New Zealand Prime Minister after personally discussing the issue with the Assistant Director General of Aviation, Captain Johnston, determined that with the revised scheduling of the T.E.A.L. connection, it would, in fact, take a day longer to reach Sydney by way of the sea shuttle, even after allowing for a full days wait in Auckland. The New Zealand Prime Minister dismissed the Pan American proposal by stating that:

> «I should hope therefore that this amended timetable would meet any agitation for a Noumea-Sydney or Brisbane service and should prove an effective counter to the proposal of Pan American Airways.»[27]

It is doubtful if the Australian Government's fears were so easily allayed.

On the more substantive issue of reciprocity, the New Zealand Prime Minister along with other members of the Tasman Air Commission concluded that it was at the present time «inopportune for a conference to be called with the Government of the United States». The Prime Minister continued by adding that «should negotiations for rights to land in Australia be originated by the Government of the United States, a more favourable opportunity to discuss reciprocal rights would thereby be created».[28]

It seems from the above statement that the New Zealand Government following the inauguration of scheduled services several weeks earlier was prepared to admit defeat in their efforts to obtain reciprocal rights, despite the inclusion of an appropriate 'safeguard' in their agreement with Pan American. The above statement served as an admission by the New Zealand Government of their failure through Article 12 to obtain reciprocal landing privileges, an admission that should have been forthcoming several years previously.

In Washington, Pan American continued to exert pressure upon the Australian Minister. Following the departure of Gatty back to Australia, the Chairman of Pan American, Juan Trippe, personally entered the foray and approached Casey directly.[29]

Trippe stated that either he or some other senior official of his airline would fly immediately to Australia if there existed the possibility of the Australian Government agreeing to extend their service from Noumea to Brisbane or Auckland to Sydney. Trippe further suggested that unless the airline was able to secure the necessary landing rights in Australia, the entire Southern Pacific service would be discontinued. Casey was not impressed and remarked that he believed that such a comment was «typical of this company's tactics». Relying on «generally informed opinion», no doubt influenced by British diplomatic opinion in Washington, Casey concluded that while

the company was good «commercially and technically...their methods of achieving their ends are circuitous and notably lacking in frankness and honesty».[30]

Trippe maintained that the airline would be satisfied with a provisional license to be revoked by Australia at any time or in the event that Australian landing rights in Hawaii were refused. However, Trippe under-rated Casey. Despite his disclaimer that he was unfamiliar with the Government viewpoint on the matter Casey was quick to reconcile the Pan American offer with the ineffectiveness of Article 12 in the New Zealand Agreement and was not, therefore, ready to entertain any Pan American proposal along those lines. Trippe's offer to make available to any prospective Australian air company the use of all ground establishments, created by his company also did little to impress Casey who in reply to all Trippe's entreaties maintained that he had no instructions to discuss or negotiate with the airline, but that the details of any proposals would be conveyed to the Australian Government.[31]

However, what ultimately determined Casey's opinion, apart from the persuasive attitude of the British Embassy in Washington who considered Pan American's methods «unsavoury», was the series of conversations that Casey had personally conducted with senior American governmental officials who insisted that the United States would not grant landing rights at Hawaii on account of creating a precent for Japan.[32] Casey was, therefore,

very much appreciative of the hollowness of a reciprocity clause inserted into any agreement concluded with Pan American.

The Australian Prime Minister's Department immediately cabled Casey in Washington upon receipt of the details of the Trippe conversation.[33]

Reinterating the policy of the Australian Government that any negotiations must be conducted at a governmental level, the cable considered the comments of Casey as to the integrity of Pan American and noted that the methods described by Casey were «in line with press propaganda here, probably inspired by (the) company».[34]

One major revelation contained within the cable directed to Casey was the statement that the Australian Government would be prepared to concede landing rights to the United States Government conditional upon the basis that similar rights be granted in Hawaii when requested by the Australian Government. Conceding that a British Pacific service would be unlikely to be established until the expiration of hostilities in Europe, the Australian Government saw the insertion of this option, unlikely to be exercised in the foreseeable future as a means which «might assist» the United States «overcome (the) Japanese difficulty».[35]

The cable also revealed that from a government standpoint there were appreciative advantages in the Pan American service being extended to Sydney[36] but in August 1940 the Government

still adhered to the principle of allegiance and commitment to a British Commonwealth coalition policy which negated any commercial advantages that may accrue from the direct American service.

It is interesting to follow the progression and change in attitude and consequently priorities of the Australian Government within the space of one year, a change brought about by the exigencies of war.

The «press propaganda» to which the Prime Minister's Department wrote so disparagingly of in the cable addressed to Casey appeared to be achieving results for the company; there was increasing support for a reconsideration of government attitude towards the American extension.

Most notable amongst those who joined the movement in advocating for a Pan American extension was the Premier of Queensland who requested that the Federal Government «give favourable consideration to the proposal now submitted before the Queensland Government of extending the American service from Noumea to Brisbane».[37]

Other interested parties, most significantly the Australian Associated Chambers of Business, expressed their opinion by strongly urging that the Government extend an invitation to Pan American for at least an invitation flight to Australia in order to allow «businessmen the opportunity to discuss trade and business matters with officials on board the aircraft».[38]

Other prominent advocates of the extension included Sir Walter Massey Greene who appeared in turn to be lobbying on behalf of W.S. Robinson described by the Minister of Civil Aviation «as a well known Australian identity in the United States, unassociated in any way with Pan American».[39]

Massey Greene not satisfied with the reply he had received from the Minister, J.V. Fairbairn, that «extension of the American service would be to the serious detriment of the British (trans Tasman service) and incidently affect the finances of the three Governments concerned...and further reasons which I can not explain in detail», wrote to the Prime Minister R.G. Menzies on the 21st of August 1940, despite the request of Fairbairn that Sir Walter «not be a party to any public pressure...which would for the reasons indicated would prove very embarrassing to both the Commonwealth (Australian) and New Zealand Government».[40]

Massey Greene while subscribing to the Government position felt compelled, however, to convey to the Prime Minister the contents of a cable recently forwarded to him from Robinson, then currently in the United States.

Robinson made the observation that the reasons advanced at least officially in refusing Pan American entry, were «exactly similar (to) those so disastrously used to hamper creation of (the) aircraft industry in Australia, the effects of which upon national security are well known to you».[41]

Robinson went further in offering the rather novel, or at least not publicly and widely known view, that the British Government would welcome such an extension adding the dire warning that the «Pacific dominions will as well, once they wake up to (the) fact that their very existence depends upon the intimacy of relations and friendship with the United States».[42]

Robinson forsaw no fear of any pressure being exerted upon the Government by Pan American, as that Company was anxious to «act only in strict accordance with Governments policy but that (a) public statement by your government that existing service is welcomed would be very helpful».[43]

The Australian Government was not, however, swayed by Robinson's comments and conceded that «all responsible opinion in Australia realises the desirability of maintaining the best possible relationship with the United States and we appreciate the advantage of having the Pan American service extended to Australia».[44] However:

> «...we are not neglecting the question - rather we are proceeding cautiously in order that we shall not place ourselves in a position inimical to our future interests from which we might find it difficult to withdraw.»[45]

The reciprocity issue still, at least as far as the Australian Government was concerned, precluded the Government from granting Pan American landing rights, such a concession «would prejudice the prospects of establishing a British service

for very many years».[46] Even if, as the Australian Government rationalised, developments in technology did permit the operation of a service from a British equatorial island directly to Canada, such a service would run at «a great commercial disadvantage».[47] Hawaii was thus essential.

The position of the Australian Government so far as they were prepared to negotiate on a governmental basis, appears to have made little impression and evoked little response from the American Government with Casey reporting that the American Government having shown «no inclination to discuss reciprocal air rights in the Pacific and had, in fact, carefully refrained from any such discussions in regard to small islands between Australia and the United States».[48]

This lack of interest on the part of the United States Government exemplifies the inconsistency with the now publicaly expressed government policy concerning the negotiation of foreign air service agreements.

Agreements with the British, French and Portuguese Governments originally concluded as private international contracts, were subsequently re-negotiated by the United States Government in conformity with the expressed objectives, now so clearly enunciated in the Civil Aeronautics Act of 1938, i.e. on a governmental basis.

Thus while the United States Government had successfully re-negotiated their air service agreements with the British, French and Portuguese Governments over North Atlantic traffic rights, they were not prepared to re-examine their position in the Pacific.

The State Department had expressed on numerous occasions its desire to assume responsibility for negotiating all such agreements, but appears to have been stymied in its efforts by policy considerations emanating from the War and Navy Departments, prohibiting the concession of any landing rights in Hawaii.

To those nations bordering the Pacific, the overriding importance of national security permitted the United States Government to rely upon a negotiating technique which that same government has expressly disavowed in other regions of the world.

Australia was not, however, prepared to negotiate on these discriminatory terms.

The prejudicial affect both financially and diplomatically of permitting an American extension directly from Noumea to either Brisbane or Sydney thereby detracting from trans Tasman traffic remained an integral part of Australian Governmental policy, although the Government was prepared to concede that this constituted a «a lesser consideration» and a consideration «not of sufficient importance to outweigh the advantages of having the Pan American service actually extended to Australia on a basis that gives us (Australia) rights for a British service to Australia.»[49]

The Australian Government much to their credit was keenly aware of the detrimental affect a direct service ommitting Auckland would have on the New Zealand Government and despite Australia's financial participation in T.E.A.L., the Government concluded that Australian interests would not be prejudiced by a direct service «but (that) New Zealand would object to the loss of the American service».[50]

A report filed by the Assistant Director-General of Civil Aviation, Captain E.C. Johnston, following his return from a Tasman Air Commission meeting in Wellington in July 1940, reveals some important observations concerning the New Zealand position.

Johnston after assuring the New Zealand delegates that «there was no reason whatsoever to imagine that the Commonwealth (Australian) Government would fail to observe faithfully its undertaking in regard to permission for an American service to Australia»,[51] qualified that assurance by stating candidly his personal view that Pan American was aiming to extend their service to Australia, and that it would not be easy for the Australian Government to ignore strong public pressure for such an extension «if such pressure were engendered by shrewd Pan American propaganda or manoeuvres».[52]

Johnston's candour extended to mentioning to senior members of the New Zealand Government including the Prime Minister, Peter Fraser, that the «embarrassing position which we all found ourselves today, was in no small measure due to New Zealand's actions - firstly in granting permission for the

Pan American service without securing proper rights for a British service to use American territory, and secondly in acquiescing in Noumea being included on the Pan American route, although it had been agreed at the Wellington Conference that such approval would not be given by New Zealand, but that every endeavour should be made to have Fiji included as a stop instead of Noumea».[53]

The above comments which Johnston later admitted he felt justified in mentioning, must appear as the first time such candid and frank views by a senior bureaucrat of the Australian Government were expressed, attributing to the New Zealand Government responsibility for the series of events which had occurred over the previous five years.

The New Zealand Prime Minister in response to Johnston's almost accusatory remarks, attributed responsibility for the 1935 Agreement and in particular Article 12 upon the previous government, a popular political technique which he admitted «had done wrong in granting permission for the Pan American service without securing proper reciprocal rights».[54]

As to the second criticism directed by Johnston, Fraser reiterated Pan American's claim that the company was committed to use Noumea and that New Zealand's concurrence with that explanation was influenced by a desire to maintain cordial relations with the United States «by avoiding any appearance of denying reasonable requests by Pan American Airways».[55]

Johnston countered Fraser's explanation with the no doubt sarcastically intended remark that the Australian Government was also anxious «to maintain the most cordial relations with the United States».[56] Johnston formed the impression that the New Zealand Prime Minister alone appreciated the Australian difficulties unlike some of his Ministers and Officers, who he believed, were inclined to feel that Australia had only to firmly refuse permission for a Pan American service to Australia.[57]

The Australian Prime Minister, R.G. Menzies, immediately allayed any fears that the New Zealand Government may have been harbouring concerning the inauguration of a direct air service to Australia from Noumea, but continued to express concern over the tactics which Pan American appeared to be employing, in particular the use of the sea shuttle, and appeared to be preparing the New Zealand Government for the possibility that the Australian Government might as a result of public pressure find it necessary to eventually concede to Pan American's request.[58]

An article appearing in the Sydney Sun entitled «Pacific Aviation Faces Big Changes» suggested that there was great speculation in the United States that the Canton Island - Honolulu sector may be divided into two shorter sectors, with the inclusion of a stopover at either Christmas or Palmyra Islands.[59]

Acting immediately upon this report, the now acting Director General of Civil Aviation, Captain E.C. Johnston, recommended to

the Prime Minister's Department that an investigation be immediately conducted into determining the sovereignty of each of the islands, in order that either of these islands be used as an additional bargaining platform to secure reciprocal rights.

Contrary to press speculation, the Australian Minister in Washington, R.G. Casey cabled the Australian Department of External Affairs, asserting that Christmas Island while not considered of any interest to Pan American they «may be of definite interest to the United States Navy for defence purposes».[60]

Pan American, as Casey had so correctly assessed, did not demonstrate any interest in either of the islands, no doubt as a result of the adequate operating characteristics of the Boeing 314 aircraft which permitted non-stop service between Noumea and Canton Island.

The fact that the Australian Government was so anxious to act upon mere press speculation serves to illustrate the importance that Government was now attaching to the trans Pacific service, an importance that was beginning to assume levels of urgency by August of 1940.[61]

Pan American continued to exert pressure on the Australian Government, the latest tactic employed being the arrival of certain Pan American Directors in Noumea, who announced their intention of continuing directly onto Australia aboard the recently arrived yacht «Southern Seas», a prospect the Australian Government termed as confirming their «worst fears».[62]

Ultimately the Australian Government was able to avoid this predictament by requesting that the New Zealand Government extend an official invitation to the Pan American party to visit New Zealand, an invitation which was readily accepted.[63] The Pan American delegation in their discussions with senior New Zealand Government officials including the Prime Minister made absolutely no reference to a proposed extension,[64] nor ironically did the delegation raise the issue with any representative of the Australian Government during their subsequent visit to Australia.[65]

The British meanwhile had reassessed their attitude towards Pan American and were now prepared «to meet the wishes of the Company at a time when their goodwill is of great value to us in other spheres».[66]

The above comment was elicited following a request by Pan American to extend to Singapore their mid Pacific service via Manila. The British were particularly concerned about their inability to continue air services from Singapore to Hong Kong, following the withdrawal of landing facilities in French Indo-China, and the lack of suitable aircraft available to complete the long flight sectors involved. Coupled with a suspension of the British service from Bangkok to Hong Kong, the British were extremely «anxious to reduce the isolation of Hong Kong».[67]

The British Government consequently informed the U.S. State Department that as a war time measure only and reserving

the right to reciprocity in principle, that Government would accede to an American extension provided that such a service continued to land at Hong Kong en route to Singapore in every case. Furthermore, the permission was to lapse automatically upon the conclusion of the war, or when the British Government was itself able to re-establish an air service to Hong Kong.[69]

The Australian Government was not overly enthusiastic with the British concession believing that it would weaken the Commonwealth coalition and hence their effective bargaining position with the United States Government.[70]

By the end of 1940, it appeared that Australia's hardline attitude towards an American extension had left it isolated.

The British faced with more immediate and pressing problems closer to their shores and in other parts of the Empire, were prepared to accede to further American requests without obtaining any assurances of immediate reciprocity.

The New Zealand Government consistent with its conciliatory attitude, which led subsequently to the inauguration of scheduled services in July, felt confident that it had avoided at least temporarily, the threat of being excluded from any trans Pacific operation.

The United States Government remained adamant in its opposition of granting access to any foreign carrier into Hawaii, which permitted Pan American to act independently, employing tactics and strategies designed to accomplish its own ambitions;

a situation which the United States Government no longer tolerated in any other sphere of international airline operations.

Australia would be forced within the space of one year to re-evaluate its position; a position which was, with the benefit of hindsight, no longer realistic or tenable.

CHAPTER X - FOOTNOTES

1. F.X. Holbrook, United States National Defence and Trans-Pacific Commercial Air Routes 1933-41, Fordham University Doctoral Dissertation, 1969, p. 359.

2. AA - CRS A 461 I 314/1/4, p. 3, 14th June 1940, Telegram from Australian Legation to Department of External Affairs.

3. Ibid.

4. AA - CRS A 461 I 314/1/4, p. 3, 19th June 1940, Telegram from Australian Legation to Department of External Affairs.

5. Ibid.

6. AA - CRS A 461 I 314/1/4, p. 3, 8th July 1940, Telegram from British American Cooperation Movement to Prime Minister of Australia.

7. AA - CRS A 461 I 314/1/4, p. 3, 11th July 1940, Memorandum from Director-General of Civil Aviation to Secretary, Prime Minister's Department.

8. Ibid.

9. Ibid.

10. Ibid.

11. AA - CRS A 461 I 314/1/4, p. 3, 21st June 1940, Telegram from Minister for Air to Australian Legation.

12. I.H. Driscoll, Flight Path South Pacific, Christchurch, Whitcombe and Tombs, 1972, p. 89.

13. AA - CRS A 461 I 314/1/4, p. 3, 2nd July 1940, Cable from Prime Minister of New Zealand to Prime Minister of Australia.

14. Ibid.

15. Supra, note 12, p. 92.

16. AA - CRS A 461 I 314/1/4, p. 3, 13th July 1940, Teleprinter Message from Director-General of Civil Aviation to Secretary Prime Minister's Department.

17. AA - CRS A 461 I 314/1/4, p. 3, 12th July 1940, Cable from Australian Legation to Prime Minister of Australia.

18. Supra, note 16.

19. Ibid.

20. Ibid.

21. AA - CRS A 461 I 314/1/4, p. 3, 14th July 1940, Director-General of Civil Aviation to Secretary Prime Minister's Department.

22. Ibid.

23. Ibid.

24. Ibid.

25. Ibid.

26. AA - CRS A 461 I 314/1/4, p. 3, 9th August 1940, Letter from Prime Minister of New Zealand to Prime Minister of Australia.

27. Ibid.

28. Ibid.

29. AA - CRS A 461 I 314/1/4, p. 3, 15th August 1940, Telgram from Australian Minister to Minister of Air.

30. Ibid.

31. Ibid.

32. Ibid.

33. AA - CRS A 461 I 314/1/4, p. 3, 23rd August 1940, Director-General of Civil Aviation to Secretary Prime Minister's Department.

34. Ibid.

35. Ibid.

36. Ibid.

37. AA - CRS A 461 I 314/1/4, p. 3, 20th August 1940, Letter from Chief Secretary's Office, Brisbane to Prime Minister of Australia.

38. AA - CRS A 461 I 314/1/4, p. 3, 6th August 1940, Telegram from Associated Chambers of Business to Prime Minister of Australia.

39. AA - CRS A 461 I 314/1/4, p. 3, 26th August 1940, Memorandum from Minister for Air to Director-General of Civil Aviation.

40. AA - CRS A 461 I 314/1/4, p. 3, 13th July 1940, Letter from J.V. Fairbairn, Minister for Air to Sir Walter Massey Greene.

41. AA - CRS A 461 I 314/1/4, p. 3, 21st August 1940, Letter from Sir Walter Massey Greene to Prime Minister of Australia; B.S.B. Stevens, Premier of N.S.W. had suggested to the Federal Government in February 1939 that Lockheed be invited to establish a factory in Australia, supplying Australia, New Zealand and the near East, Aircraft Magazine, February 1939, p. 36.

42. Ibid.

43. Ibid.

44. AA - CRS A 461 I 314/1/4, p. 3, 4th September 1940, Letter from Prime Minister of Australia to Sir Walter Massey Greene.

45. Ibid.

46. Ibid.

47. Ibid.

48. Ibid.

49. Ibid.

50. Ibid.

51. AA - CRS A 461 I 314/1/4, p. 3, 7th August 1940, Internal Memorandum, Air Services in the Pacific, Assistant Director-General of Civil Aviation to Director-General of Civil Aviation.

52. Ibid.

53. Ibid.

54. Ibid.

55. Ibid.

56. Ibid.

57. Ibid.

58. AA - CRS A 461 I 314/1/4, p. 3, 4th September 1940, Letter from Prime Minister of Australia to Prime Minister of New Zealand.

59. AA - CRS A 461 I 314/1/4, p. 3, 5th September 1940, Memorandum from Acting Director-General of Civil Aviation to Secretary, Prime Minister's Department.

60. AA - CRS A 461 I 314/1/4, p. 3, 16th September, 1940, Memorandum from Secretary Prime Minister's Department to Department of External Affairs.

61. Or as referred to by the Australian Prime Minister, the Australian Government expressed 'lively' interest in the matter; supra, note 57.

62. Ibid.

63. Ibid.

64. AA - CRS A 461 I 314/1/4, p. 3, 27th November 1940, Letter from Prime Minister of New Zealand to Prime Minister of Australia.

65. AA - CRS A 461 I 314/1/4, p. 3, 22nd January 1941, Memorandum from Director-General of Civil Aviation to Secretary Prime Minister's Department.

66. AA - CRS A 461 I 314/1/4, p. 3, 13th December 1940, Cable from Secretary of State for Dominion Affairs to Commonwealth of Australia.

67. Ibid.

68. Pan American had in fact requested schedules on an alternating basis from Manila; supra, note 1, p. 353.

69. Supra, note 65.

70. To which the British Government replied that 'they appreciate the Commonwealth's (Australian's) point of view; AA - CRS A 461 I 314/1/4, p. 3, 17th December 1940, United Kingdom High Commissioner to Australia to Prime Minister of Australia.

Service was not inaugurated to Singapore until the 2 of May 1941 due primarily to chronic equipment shortages of the Airline; supra, note 1, p. 354.

CHAPTER XI

1941-1942: NECESSITY DICTATES POLICY: THE AUSTRALIAN GOVERNMENT ACCEDES

Re-evaluation and re-assessment of the Australian Government's attitude to their position was attributable to several factors.

Specifically and unquestionably, the most important consideration in that re-evaluation process came as a result of discussions conducted between the British Prime Minister, then Winston Churchill, and the Australian Prime Minister, R.G. Menzies, in London in March 1941, where contrary to assurances provided the previous year that in the event of a Japanese attack the British Navy would be sent to protect Australia; Menzies was now confronted with the revised strategy that any British aid would be delayed, if indeed sent at all to assist Australia.[1]

The Australian Government in response began to look more favourably towards the United States for assistance, exemplified by the enthusiastic reception given a visiting American naval detachment the same month.[2]

Coinciding with Menzies disheartening and unproductive discussion in London, the Australian Minister in Washington, R.G. Casey, cabled Canberra with the report that Australia's continued resistance to conceding Pan American landing rights, was «magnifying the whole question of Australian-U.S. relations, and doing Australia harm in other and more important directions».[3]

Warned Casey:

> «Whilst the subject as such has not been officially raised with me lately, our virtual refusal to re-open the question has been brought into conversation on more important matters by Secretary of State and Sumner Welles and by less senior officials with Watt. Implication has clearly been that whilst we are seeking very whole-hearted co-operation in certain future eventualities at the same time we steadily refuse to grant landing rights in Australia despite their importance from a defence point of view. It is not put as bluntly as this but there is no doubt as to the meaning.»[4]

Casey continued:

> «Compared with the great issues that are at stake I submit that this matter is relatively trivial and I strongly suggest that in the present emergency (that) it would be wise for the Commonwealth (Australian) Government to re-open and give favourable consideration to this matter after necessary consultation with the United Kingdom and the New Zealand Governments.»[5]

Casey went so far as to propose a series of alternative schedules for the American service and recommended that to resolve the reciprocity problem, landing rights be limited to a definite period after the termination of the war,[6] their continuance thereafter being conditional upon the granting of reciprocal landing rights in Hawaii and California. «A generous gesture on our part», wrote Casey, «might in my opinion produce valuable results in other important directions.»[7]

Reciprocity and the ability to use those landing rights in American territory was, as far as the Commonwealth coalition was concerned a moot point in 1941, and, as Casey suggested, if and

when the British emerge successfully from the war, then confined to Europe, the United States would have no scruples in granting Britain and its Commonwealth members landing rights in Hawaii but at the same time denying them to the Japanese.[8]

As evidence of this more co-operative spirit concerning the use of Hawaii, Casey cited the recent ferrying of desperately needed PBY 5 Catalina flying boats ordered for the Royal Australian Air Force, from San Diego, which necessitated a technical stop-over in Pearl Harbour.[9]

For diplomatic reasons, delivery had to be a civil undertaking as the aircraft had been ordered for an air force actively at war, while the United States still maintained its neutrality. One purchasing condition was that each aircraft should be flown to Honolulu under American command, and then only at that point should it be flown by the Australians. The ferrying operation was completed successfully over various phases during 1941, aircraft being flown beyond Honolulu by QANTAS crew.

Ironically the QANTAS crews employed to operate the delivery operations flew to Honolulu via the T.E.A.L. service to Auckland and the Pan American connection thereafter.[10]

Casey's comments were relayed to Menzies in London by the acting Australian Prime Minister A.W. Fadden, who added that for reasons of «high policy» touched upon in Casey's cable, the Australian Cabinet had been considering[11] the «desirability of re-opening the question of an extension to Pan American for a service to Australia».[12]

Re-affirming that the Australian Government had also felt bound by the agreement confirmed at the Wellington Defence Conference in April 1939 for consultation between Britain and New Zealand, Fadden requested that Menzies raise the issue with the appropriate British authorities and explain that «influenced by the consideration set out in Casey's telegram, the Commonwealth (Australian) Government considers that it would be of advantage to intimate of its own accord to the United States Government that it is ready to discuss (an) extension of the Pan American service to Australia».[13]

However Fadden and the Australian Cabinet insisted that any forthcoming offer must preserve the condition that the granting of terminal rights would be conditional on reciprocity being acceded when a future Commonwealth application was submitted. Cabinet did, however, concur with Casey's suggestion that the American Government should be given to understand, that for practical reasons, such a service would not be established for some time. Thus as far as the United States was concerned, the reciprocity issue would remain nominal or dormant for at least the immediate future.[14]

Cabinet felt obliged, however, to state that any approach to the United States Government should not deviate or detract from the Government's consistently held view on the issue of reciprocity and that any proposal, merely represented a change in attitude as to which party should initiate the offer;

hitherto the Australian Government maintained that any proposal should emanate from the United States Government. The modification, Cabinet regarded as «fully justified on present broad political grounds».

Fadden's last statement recounting the Cabinet's view is interesting. Whether «broad political grounds» refers merely to the Australian electorate or rather to the international political arena is not clear, but local public pressure spurred on by Pan American's sympathetic local press and the revelation, that Britain was not in a position to adequately protect Australia, may have prompted the remark.

Menzies did indeed discuss the matter with the British authorities adopting the Fadden/Casey recommendations, except in so far that the initiative should still emanate from the American Government, although at the same time conceding that it might «hardly be possible (to ask) that when next the Australian Minister in Washington was approached on the matter by the State Department, he should ask that a communication...be made to him in writing putting forward a definite proposal».[16]

The Singapore conditional reciprocity clause[17] and other aspects of the revised Australian position were conveyed to the New Zealand Prime Minister on the 2nd of May 1941,[18] with a reply returned to in Australia on the 3rd of June 1941.[19]

New Zealand in favour of the Australian proposal insisted, however, upon adequate protection of trans Tasman interests together with the stipulation that any reciprocal rights obtained from the American Government be obtained conjointly for the British, Australian and New Zealand Governments.[20]

The Australian Government had rather inadvisedly referred in the above cable to New Zealand, to Canada's participation in any ensuing negotiations with the American Government. New Zealand responded by referring to the recommendations of the Wellington Defence Conference in April 1939, whereby Canada's participation, it was decided, should be obtained, in order to strengthen the Commonwealth's coalition's bargaining position with the United States.

Canada as previously mentioned[22] had never expressed much interest in the inauguration of a southern Pacific service, and the addition of yet another and more independently minded Commonwealth nation[23] into the consulative process was counter productive.

Given that Canada's views had not been solicited by either the British or New Zealand Governments following the conclusion of the Wellington Defence Conference some two years previously, the New Zealand Government's insistence upon determining Canada's position was yet another obstacle in a saga already inundated with superfluous considerations.

The Australian Government regarded Canada's participation in the trans Pacific service as raising an issue which was at that point quite premature, but expressed its reluctance to negotiate with the United States without first ascertaining and hopefully securing Canadian participation; a task the Australian High Commissioner in Ottawa was instructed immediately to obtain.[24]

The High Commissioner was informed, however, by the Secretary for the Department of External Affairs in Canberra that he may, at his discretion, inform the Canadian authorities that if it proves impossible to secure a condition of reciprocity then irrespective Australia still proposed to offer the United States Government landing rights in Australia for a period limited to the war and twelve months later. This was on the understanding that Australia and/or New Zealand would terminate the agreement at the end of that time if reciprocal rights were still withheld by the United States Government.[25]

The Australian Government was becoming increasingly anxious of its position, a judging by the frantic tone of the above communique, and the now unsatisfactory nature of the Australia-United Kingdom air service via the Middle East.

The Canadian Government concurred with the Australian Government on the question of reciprocal rights and expressed their willingness to approve of the proposed approach to the American authorities. However, ever realisticly and eminently sensible, that Government emphasied that the establishment of a British trans Pacific service would not be feasible until

the conclusion of hostilities and that only at that point in time would the Canadian Government be prepared to take whatever action was deemed necessary to co-operate with the other Commonwealth Governments in respect of this issue.[26]

This rather aloof attitude was a portent of the same non-committal policy which ultimately led the Canadian Government after the war to operate their own service across the southern Pacific, independent of other British Commonwealth interests.[27]

The New Zealand Government in addition to raising the issue of Canada's participation also introduced as a condition the requirement that before the commencement of any discussions with the United States Government, the course of the route to Australia be determined amongst the Commonwealth Governments.[28]

Casey foreseeing such a stipulation by New Zealand proposed[29] that Pan American operate alternative flights to an Australian and New Zealand terminal.[30]

The current Pan American schedule called for operating a fortnightly service to Auckland. Casey suggested that an alternative fortnightly landing be made at either Sydney or Brisbane direct from Noumea; i.e. interpolate another service between the United States and Australia direct via Noumea.

Casey's New Zealand counterpart in Washington,[31] arrived at two alternative schedules: one weekly service from the United States to Noumea, Auckland, Sydney, Noumea and return; the

next weekly service Noumea, Sydney, Auckland, Noumea and return to the United States, a circuit reversed weekly. Alternatively, retention of the present fortnightly service to Auckland but on each alternative, i.e. monthly, service would continue onto Sydney.[32]

Thus the essential difference between the Australian and New Zealand proposals was that while the former preferred a direct connection, the latter, ever conscious of its precarious position, wanted to ensure that all American services traversed Auckland. Both Governments were, however, unanimous, that the Pan American service should not enter Australia from Singapore; ironic given that Australia had proposed a qualification of Resolution 2 in the Wellington Conference of 1936, based upon the grounds that Australia wished to reserve for itself the option of permitting an American service to enter Australia from the north.[33]

Adopting the popular New Zealand position, the Australian Government opposed the circuitous routing, fearing that Pan American's carriage of fifth freedom traffic over the Tasman would affect seriously the finances of T.E.A.L., which would in turn necessitate «a further increase in Governmental payments to that company».[34]

While both Tasman Governments failed to agree on the proposed routing, the irony was that the Australian Government realized that ultimately both Pan American and the United States Government would make the final decision, as any extension involved the re-evaluation of the American airmail subsidy payments.[35]

On the 14th of August 1941, the acting Prime Minister of New Zealand, W. Nash, cabled the Australian Prime Minister advising that his Government was prepared to commence discussions with Pan American specifically to secure a variation of Article 4 of the amended Agreement of 1935, so as to provide an alteration which would enable the service to be extended to Australia.[36]

The New Zealand Government had decided to add to their general policy an extension of services to Australia, subject to the stipulation that Pan American continue to call at Auckland and land in Fiji en route.[37]

In addition, the Prime Minister suggested the establishment and promotion of an inter-governmental organisation representing the British, Australian, Canadian and New Zealand Governments, responsible for negotiating and concluding air services agreements between its participating members.[38]

Two days later the Australian Government replied[39] stating its opposition to the double crossing and circuitous route plan, citing unwarranted trans Tasman competition with T.E.A.L. and in the case of the double crossing proposal, a full days transit delay in each direction compared to the reduced transit time required with a direct Noumea-Sydney stage.[40]

Regarding the inter-governmental proposal, Australia considered the matter, at least for the present time as inappropriate; «little purpose would be served by further discussion amongst the governments regarding the inter-governmental organisation required».[41]

On the 26th of August 1941, the Australian Government again appealed to the New Zealand Government to accept the direct routing policy plan; the message ending with the words that if the war forced the discontinuance of the trans Tasman service, then the Commonwealth (Australia) must endeavour to maintain an air service to America by any available means.[42]

This closing remark is ambiguous. It can be interpreted to mean that the Australian Government would accept the New Zealand Government's circuitous routing plan or that the Australian Government intended to force upon the New Zealand Government their direct routing plan.

The second construction is advanced on the basis of a telegram sent simultaneously to Casey in Washington. The contents of the two cables were identical except for the insertion of two additional paragraphs, the most important being the penultinate which directed the Minister to consult Pan American for their views on the Australian alternative route plan and «also the possibility that Sydney be a terminal instead of Auckland as a counter to New Zealand's present view, if this should become necessary. We do not, however, desire this if reasonable alternatives become necessary».[43]

Clearly Australia's patience had begun to wear thin following New Zealand's seemingly inexhaustible list of conditions and stipulations; Australia was now ready to seriously negotiate with both Pan American and the United States Government.

A most revealing insight into the revised attitude of the Australian Government is to be found in a memorandum prepared by the Director-General of Civil Aviation addressed to the Minister of Civil Aviation where the former, saw the principal issue as one of deciding whether the Australian Government should concede landing rights to Pan American without insisting upon reciprocity.[44]

Corbett felt Australia's position to be weak on this point and to counter any criticism forthcoming from the New Zealand Governement he was prepared to counter that criticism by stating that New Zealand appeared perfectly willing to allow Australia to protect the Empire's interests at the expense of its own.

> "Probably New Zealand and the United Kingdom will propose this (Australia forgoing reciprocal rights) but New Zealand did do the same thing in order to obtain Pan American service when her need was less than the Commonwealth's (Australia's) present need."[45]

The Director General suggested that the Australian Government re-examine its present policy and "if Australian landing rights are no longer a valuable bargaining point, Australia was depriving itself of a needed war time communication and not helping herself for the future".[46]

Casey, who was one of the early protaganists of the Australian Government re-examining its position cabled the Department of External Affairs in Canberra on the 29th of September 1941, reporting on the series of private discussions he had completed with the State Department.[47]

Emphasising the preservation of trans Tasman interests, and the position of New Zealand in his discussions, the State Department replied that two additional aircraft would need to be requisitioned for Pan American, together with an increase in an air mail subsidy in order to operate such a service.

The State Department did not consider this to be an impossibility, and appeared sympathetic to the plight of the Australian Government. In return, however, Casey considered it to be inappropriate, to insist upon even theoretical commercial landing rights in Hawaii or California "under the present conditions", but recommended instead, the two governments endeavour to reach agreement for a period of the war plus six or twelve months thereafter.[48]

The State Department unofficially suggested a routing plan which would either alternate between Noumea-Brisbane-Sydney-Brisbane-Noumea or Noumea-Brisbane-Sydney and return by the same route, with either T.E.A.L. or Pan American operating a Auckland-Noumea service.

Casey was not prepared to concede Australian cabotage rights (Sydney-Brisbane), but was receptive to the idea that T.E.A.L. operate the Auckland-Noumea sector to connect with the direct service from Australia.[48]

While not discussing the possibility of including Suva, Fiji, as an additional Pan American stopping place, Casey, did consider this British Colony to be eminently more suitable than Noumea as a possible air junction for the Auckland connection.[49]

The State Department suggested that the Australian Government submit a definite proposal for an American service following consultations with the New Zealand Government, to which Casey agreed, but Casey advised the Australian Government that in view of the opposition to be expected from the United States Post Office, Treasury and Navy in obtaining additional aircraft, crew and subsidies, the Australian Government should be as generous as possible in granting landing right privileges "in the first instance".[50]

On the 15th of October the Australian Cabinet,[51] approved that a series of recommendations on the trans Pacific air service be presented to the New Zealand Government for discussion, including the proposal that the two countries indicate to the United States Government that "subject to agreement as to route",[52] Pan American would be granted landing rights in Sydney. Pan American would be allowed to use air radio facilities and existing harbour facilities for flying boats free of charge and the company was permitted to fly between Sydney and Brisbane. The recommendations also stated that "reciprocal rights were not to be required of the United States or (to) be raised at this stage".[53] If the New Zealand Government failed to agree to these recommendations, Australia would consider making a separate approach to the American Government.[54]

The Australian Cabinet had in fact been even more generous and accommodating than Casey had envisaged.

An inter-governmental route conference between Australia and New Zealand was conveyed on the 23rd of October 1941, in Melbourne and Canberra, with an agreement reached that the two governments should through their respective Ministers in Washington, initiate a joint approach to the United States Government.[55]

The Australian and New Zealand Governments settled on the circuitous routing with one modification from the earlier New Zealand proposal; the circuit would commence and terminate at Suva, the proposed circuit from Suva and return being only about 77 miles longer than the presently operated Suva-Noumea-Auckland-Suva route.[56]

Fundamental to the agreement was that Pan American operate the service on a weekly basis and that no question of reciprocal rights be raised by the Australian Government during the course of these negotiations.

The New Zealand Prime Minister noted the last qualification and cabled his Australian counterpart in an attempt to clarify this restriction, noting that his government was prepared to assume that this arrangement was confined to the duration of the war only and "that they and the other British Governments interested in the establishment of a British trans Pacific service will be fully entitled to raise this question with the United States Government at an appropriate time".[57]

The Australian Government fearing that New Zealand could still jeopardize the American negotiations, quickly responded by stating that a limitation «to the war period only was not included in the agreement and was not our understanding of (the) position».[58]

> «Doubtless this question will arise in negotiations with the U.S.A. or Pan American, and the Commonwealth (Australian) Government desires freedom to make the best possible terms including if possible revision of agreement twelve months after war ends. (We) agree that all Governments interested in establishing of British trans Pacific service should be fully entitled to raise this question at an appropriate time.»[59]

It appears that the New Zealand, unlike the Australian Government during the latter part of 1941, seem to have been less appreciative of the precarious world situation and consequently the inappropriate timing of pressing the reciprocity issue. Indeed, if the New Zealand Government had held such strong convictions on the reciprocity issue, they possessed adequate opportunities in the past to express their opinion; the ultimate expression being the repudiation of the amended 1936 Agreement.

The New Zealand Government thereafter set about sabotaging Australia's negotiations with the United States; firstly, by refusing pursuant to the terms of the Melbourne October Agreement to instruct their Minister in Washington to proceed with negotiations in the company of the Australian Minister «until formal concurrence of the British Government had been received».[60]

Furthermore, on the 2nd of November 1941, the American Consul at Wellington reported that New Zealand was now proposing a weekly Pan American service terminating on an alternative basis in Australia and New Zealand, again contrary to the terms of agreement decided in Melbourne.[61] The New Zealand Government was, intent upon jeopardizing the Australian-United States negotiations.

Following the Japanese attack on Pearl Harbour on the 7th of December, a Pan American aircraft positioned in Auckland was unable to return directly to the United States as a consequence of which, the aircraft was forced to fly back to New York via Australia, the Middle East, Africa and South America.[62] Pan American had, even if only as a result of force majeure, succeeded in landing one of its aircraft in Australian waters.

On the 11th of December, 1941 the Australian Government forwarded cables to both the New Zealand Government[63] and the Australian Minister in Washington,[64] the latter cable containing the same text as that forwarded to New Zealand except for the statement that the Australian Government considered the matter one of extreme urgency and instructed Casey to proceed with preliminary arrangements with the United States Government, while the New Zealand Government considered, the Australian message.

Both cables stated that following recent reports that Pan American was not in a position to provide a weekly service to Australia as discussed in the recent Melbourne October Conference,

and that in view of "the present grave emergency, the Commonwealth (Australian) Government was proposing to negotiate some temporary arrangement with the United States Government and Pan American, which will ensure that continuous communication of Australia and the United States shall be maintained."[65]

These conditions "impelled" the Australian Government "to offer landing rights in Australia to the United States Government for the duration of the War".[66]

> "It appears that over 80 per cent of Pan American traffic is with Australia, and therefore, the most efficient way to handle (the) very limited facilities available would be to provide for Commonwealth (Australian) terminus of service, while of course maintaining trans Tasman service. This may involve (the) possibility (of) temporary removal by Pan American of Auckland base equipment to Australia."[67]

The New Zealand Government was furious. The next day that Government replied stating that they "were unable to concur in proposals which they would regard as a breach of the agreement reached and confirmed in your telegrams 439[69] and 492[70] and which would be very unfair to this Dominion."[71]

On the same day as New Zealand replied, Casey forwarded a report detailing the United State's position, following several consultations with the State Department on the matter.[72] Casey informed the Australian Department of External Affairs that the Suva circuitious route proposal was owing to the scarcity of American aircraft, unacceptable. The United States Government was now considering asking both Tasman Governments for permission for Pan American to omit Auckland and fly

direct Noumea-Sydney or even Noumea-Brisbane, thence via QANTAS to Singapore.[72]

The American proposal was contingent upon the establishment of the security of the Pacific stopping places and the proposal was based on the "urgent American necessity to maintain air contact in the Far East".[73]

Casey emphasised that the above proposal emanated from the American authorities alone and was not the result of any proposal suggested by the Australian Government.[74]

Thus it was the United States and not the Australian Government who ultimately decided whether New Zealand was to be either included or omitted from the Pan American emergency service.

The Australian Government in conveying their position to the New Zealand Government, attempted to rationalise their decision by maintaining that "in view of the urgent military position we will have no alternative but to agree to the United States suggestion".[75]

In response to the accusation that Australia was in breach of the Melbourne and subsequent agreements, the Australian Government maintained that "in consequence of the Pacific war, such a service has become quite impossible. In these circumstances to speak of breach of agreement is wrong for the basis of the agreement cannot be complied with".[76]

The New Zealand Government was dissatisfied with the Australian explanation and on the 9th of January 1942, remarked that they found the severance of New Zealand from the trans Pacific service perplexing and disappointing in view of the Melbourne discussions and subsequent agreements reached.[77] Discontinuation of the service that Government maintained, constituted a breach of the amended 1935 Agreement; "We apparently are compelled to submit to the breach of both agreements."[78]

In a tone, nothing short of being bitter and outraged, the New Zealand Prime Minister added:

> "Were the decisions exclusively determined by the demands of war we would be willing to accept, but the gain to the Commonwealth (Australia) (is) accompanied by (a) serious loss and war disadvantage to us. We now are to have no air connection with the United States of America after we had assisted in pioneering the service and made it possible. It was our representations and enterprise that made Fiji possible as a port of call, and for the defence of which we spend millions of pounds and supplied two brigades of soldiers.
>
> The connection with the Commonwealth (Australia) could have (been) reached by agreement but the proposal (that) cuts the Dominion's air connection with the United States of America during the war after five years of pioneering work comes as a complete surprise. I regret that the present dangerous position of our Dominion and our consternation that our sister Dominion, Australia, should be a party to the cutting of an essential war time service with the United States and an absolutely necessary link with our Defence force in Fiji, compels me to plead the matter before you as we see it in plain language, in the hope that we can arrange a readjustment which will be acceptable and of service to both countries in this critical time when the fate of both Australia and New Zealand is at stake."[79]

The New Zealand Government's sense of indignation was certainly unjustified. The New Zealand Government had for more than six years either actively or through omission defeated any extension of an American service to Australia. Now even in the face of world war, the Government refused to desist.

The British High Commission in Canberra adopted on behalf of their Government, a more compromising and realistic attitude. The Official Secretary informed the Australian Government that the British Government appreciated the change in the situation brought about by the entry of the United States into the war and the suspension of the Pan American service, and therefore, did "not wish to press their views upon the Commonwealth (Australian) Government at this stage".[80]

The British High Commissioner did, however, express his concern that in the event any concessions are granted to Pan American; they be limited to the duration of the war. "This had has been the policy which the United Kingdom Government have pursued in many parts of the world where a similar position has arisen."[81]

The last word on this matter, at least as far as the Australian Government was concerned, was contained in a cable from the Australian Prime Minister directed to the New Zealand Government on the 9th of January 1942 which read:

> "It is unfortunate that the war has altered existing arrangements but I am at a loss to understand why you should regard this as a gain to the Commonwealth (Australia) or why you think my Government has broken any agreement."[82]

In what surely must have written with stronly intended sarcastic overtones, the Australian Prime Minister concluded:

> "I should be most happy to assist you in rearranging a Pacific service if you can suggest how it is to be done."[83]

Casey had in the interim period been in active communication with the United States Naval and Air authorities, the former having assumed responsibility for the operation of Pan American's Pacific operations and activities.[84]

Initially, Pan American was commissioned to operate to Australia, via the southern Atlantic across Africa to Khartoum, later extended towards Singapore, with Darwin as the eventual terminus.

These plans were, however, revised with the Americans preferring instead to organise the construction of landing strips on Canton Island (with Christmas and Palmyra Islands as alternatives), Suva and Noumea.[85]

The exigencies of war resulted in the rapid construction of facilities at the above intermediary points and formed the basis for the war time ferrying service[86] and subsequently the first Pan American commercial service to Australia, inaugurated in March 1947.[87]

CHAPTER XI - FOOTNOTES

1. F.X. Holbrook, United States National Defense and Trans Pacific Commercial Air Routes 1933-41, Fordham University Doctoral Dissertation, 1969, p. 380-381.

2. Ibid., p. 381.

3. AA - CRS A 461 I 314/1/4, p. 3, 11th March 1941, cable from Australian Minister to Department of External Affars.

4. Ibid.

5. Ibid.

6. For example, in the Singapore concession recently granted by the British Government.

7. Supra, note 3.

8. Ibid.

9. Ibid. The first convoy arriving in Honolulu on the 26th of January 1941.

10. W.J. Horvat, Above the Pacific Fallbrook, California Aero Publishers 1966, p. 176; Sir Hudson Fysh, Managing Director of QANTAS, later attributed to these delivery flights the opportunity for the airline to conduct feasibility studies which were to form the basis of the famous Indian Ocean service operated later in the war. Also of interest was the fact that the arrival of the first Catalina marked only the third time an aircraft had flown directly from the United States to Australia, the previous two flights having been completed by Sir Charles Kinsford Smith nearly ten years before. The Catalina's trip also marked the first arrival in Sydney by an aircraft directly from a foreign port. Sir Hudson Fysh, QANTAS at War, Sydney, Angus and Robertson, 1968, p. 111.

11. On the 21st of March 1941.

12. AA - CRS A 461 I 314/1/4, p. 3, 26th of March, 1941, cable from Acting Prime Minister of Australia to Prime Minister of Australia, London.

13. Ibid.

14. Ibid.

15. Ibid., sentiments also expressed by the Minister for External Affairs in a letter addressed to the Acting Australian Prime Minister.

16. AA - CRS A 461 I 314/1/4, p. 3, 25th April 1941, cable from the Prime Minister of Australia, London to Acting Prime Minister of Australia.

17. Refer to page 268.

18. AA - CRS A 461 I 314/1/4, p. 3, 2nd of May 1941, letter from the Acting Prime Minister of Australia to the Prime Minister of New Zealand.

19. AA - CRS A 461 I 314/1/4, p. 3, 3rd June 1941, letter from the Acting Prime Minister of New Zealand to the Acting Prime Minister of New Zealand.

20. Ibid.

21. In particular Part III of the recommendation of the Conference.

22. Refer to page 227.

23. Traditionally independent of participation in Commonwealth aviation ventures.

24. AA - CRS A 461 I 314/1/4, p. 3, 2nd July 1941, cable from Secretary Department of External Affairs to Australian High Commissioner, Ottawa.

25. Ibid.

26. AA - CRS A 461 I 314/1/4, p. 3, 26th July 1941, cable from Australian High Commissioner, Ottawa to Minister for External Affairs.

27. A service that even the Canadian Government owned carrier was reluctant to undertake. The service was subsequently operated by Canadian Pacific Airlines. G.R. McGregor, The Adolescence of an Airline, Montreal Air Canada, 1970, 29-30.

    The issue had been raised in the Canadian House of Commons as early as June 1938. Prime Minister MacKenzie King in reply to a question asking why the Canadian Government was not negotiating with any of the other British Dominions for a Pacific service, maintained that such negotiations were being conducted but between Britain, Australia, New Zealand and the United States specifically over the ownership of certain islands in the Phoenix group. The inference was Canada had little interest in such negotitions at this time. Aero Digest, June 1938, p. 29.

28. Supra, note 19.

29. A proposal that was also endorsed by the Australian Prime Minister, R.G. Menzies, supra, note 16.

30. Supra, note 3.

31. J.G. Coates, temporarily in Washington.

32. AA - CRS A 461 I 314/1/4, p. 3, 27th June 1941, cable from Australian Minister, Washington to Minister for External Affairs.

33. Refer to page 128.

34. AA - CRS A 461 I 314/1/4, p. 3, 7th July 1941, cable from Acting Prime Minister of Australia to Acting Prime Minister of New Zealand.

35. Supra, note 1, p. 385.

36. AA - CRS A 461 I 314/1/4, p. 3, 14th August 1941, cable from Acting Prime Minister of New Zealand to Prime Minister of Australia.

37. Ibid.

38. Ibid.

39. By way of contrast to the several weeks or months, that same government had once taken to respond to inter-governmental communiques concerning this matter. See, for example, page 82.

40. AA - CRS A 461 I 314/1/4, p. 3, 16th August 1941, cable from Prime Minister of Australia to Acting Prime Minister of New Zealand.

41. Ibid.

42. AA - CRS A 461 I 314/1/4, p. 3, 26th August 1941, draft telegram from the Prime Minister of Australia to the Prime Minister of New Zealand, Washington.

43. Supra, note 1, at p. 385.

44. AA - CRS A 461 I 314/1/4, p. 3, 10th October 1941, Memorandum from Director-General of Civil Aviation to the Minister for Civil Aviation.

45. Ibid.

46. Ibid.

47. AA - CRS A 461 I 314/1/4, p. 3, 29th September 1941, cable from the Australian Minister, Washington, to Department of External Affairs.

48. Ibid.

49. Ibid.

50. Ibid.

51. Supra, note 1, p. 388, citing Australian War Cabinet Minute Agendum No. 338/1941, Trans-Pacific Air Service.

52. AA - CRS A 461 I 314/1/4, p. 3, 31st October 1941, cable from the Prime Minister's Department to the Australian Minister, Washington.

53. Ibid.

54. Ibid.

55. Supra, note 1 at 389.

56. Supra, note 52.

57. AA - CRS A 461 I 314/1/4, p. 3, 13th November 1941, cable from the Prime Minister of New Zealand to the Prime Minister of Australia.

58. AA - CRS A 461 I 314/1/4, p. 3, 25th November 1941, cable from the Prime Minister of Australia to the Prime Minister of New Zealand.

59. Ibid.

60. AA - CRS A 461 I 314/1/4, p. 3, 9th November 1941, cable to the Australian Minister to the Department of External Affairs.

61. Supra, note 1, p. 389; citing NA, RG 59 File 811.79690 PAA/346, 2nd November 1941, American Consul, Wellington to State Department.

62. The first circumnavigation of the globe by a commercial aircraft; A Bender & S. Altschul, The Chosen Instrument, New York, Simon & Shuster, p. 356.

63. AA - CRS A 461 I 314/1/4, p. 3, 11th December 1941, cable from the Prime Minister of Australia to the Prime Minister of New Zealand.

64. AA - CRS A 461 I 314/1/4, p. 3, 11th December 1941, cable from the Minister for External Affairs to Australian Minister, Washington.

65. Ibid.

66. Ibid.

67. Ibid.

68. Ibid.

69. Cable #419, 31st Ocober 1941, supra, note 52, repeated to Wellington.

70. Cable #492, 25th November 1941, supra, note 58.

71. AA - CRS A 461 I 314/1/4, p. 3, 12th December 1941, cable from the Prime Minister of New Zealand to Prime Minister of Australia.

72. AA - CRS A 461 I 314/1/4, p. 3, 12th December 1941, cable from the Australian Minister, Washington to the Department of External Affairs.

73. Ibid.

74. Ibid.

75. AA - CRS A 461 I 314/1/4, p. 3, 15th December 1941, cable from the Prime Minister of Australia to the Prime Minister of New Zealand.

76. Ibid.

77. AA - CRS A 461 I 314/1/4, p. 3., 9th January 1942, cable from the Prime Minister of New Zealand to the Prime Minister of Australia.

78. Ibid.

79. Ibid.

80. AA - CRS A 461 I 314/1/4, p. 3, 2nd January 1942, letter from the Official Secretary, Office of the High Commissioner for the United Kingdom Canberra to Secretary, Prime Minister's Department.

81. Ibid., for example Singapore.

82. AA - CRS A 461 I 314/1/4, p. 3, 10th January, 1981 cable from the Prime Minister of Australia to the Prime Minister of New Zealand.

83. Ibid.

84. AA - CRS A 461 I 314/1/4, p. 3, 18th Dcember 1941, cable from the Australian Minister, Washington to the Secretary, Department of External Affairs.

85. AA - CRS A 461 I 314/1/4, p. 3, 27th December 1941, cable from the Australian Minister, Washington to the Secretary, Department of External Affairs.

86. Pan American commenced service to Australia under military contract in August, 1942, supra, note 1, p. 389; United Air Lines commenced service under military contract in September 1942. Corporate and Legal History of United Air Lines, Inc. and its subsidiaries, 1946-1955, Elk Grove, Illinois, United Air Lines, 1965, p. 420.

87. Survey flight completed in November 1946, PAA Exhibit No. PA-201, Docket No. 851, Hawaiian Airlines et al, Hawaiian case 7 CAB 83.

CONCLUSION

To consider and analysise aviation in isolation as distinct from the domestic and external policies of nation is an untenable proposition.

Writing in a confidential memorandum to the United States, President F.D. Roosevelt in 1934, a senior bureaucrat of that administration wrote that «all governments attach such importance to civil aeronautics that foreign aeronautics work is largely political and military in nature».[1] The validity of this statement is confirmed by the events described in the preceeding eleven chapters.

The politics of aviation is a manifestation of a nations economic, social and political ideology. The differences sometimes subtle account for the divergence and conflict reflected in the international aviation arena.

To substantiate this contention, it is necessary to consider the wider or broader issued confronted by the five participating governments in this senerio.

For the two Tasman governments, time period (1908-1941) represented the evolution of an independent foreign policy.

The Balfour Declaration of 1926, which declared that the Dominions were by common consent declared to be «autonomous communities»[2] and therefore, in no way subordinate one to another, marked the commencement of this transition and the transformation

of British Empire into Commonwealth of Nations.[3] It also coincided with the beginnings and developments of intercontinental air travel.

Reference has already been made to the origins of New Zealand's foreign policy, where the newly elected Labour Government in 1935, declared «a new willingness to take the initiative» in matters of external affairs or as one historian wrote, the year 1935 «marked the parting of the ways in New Zealand's external policy».[4]

The Fraser Government embarked upon a policy that was both internationalist and yet imperialist, seemingly inconsistent objectives.[5] New Zealand was, for example, an ardent supporter of the League of Nations, «not merely for reasons of expediency but also on moral grounds, it advocated.»[6]

This in turn created differences of opinion with the British Government and necessitated the Prime Minister Micheal Savage in 1938 to state that, although New Zealand had disagreed with certain phases of British policy «we have not allowed those differences of opinion to divide the British Commonwealth of Nations».[7]

New Zealand's adherence to the principles of Commonwealth unity, is attested to again in the words of Savage upon the declaration of war against Germany in 1939, where the Prime Minister announced «wherever she (Britain) goes we go; where she stands we stand».[8]

This prompted one British writer to comment that these «spurious loyalties (to Britain) not in any way culturally significant or fruitful, prevent New Zealand from facing her destiny».[9]

The New Zealand Government's actions during the course of events concerning the inauguration of a trans Pacific service, bear witness to this duality in matters of foreign policy.[10]

On the one hand, the New Zealand Government maintained they would promote the interests of the Commonwealth, when during the course of any negotiations with representatives of Pan American and later the United States Government and as agreed at Wellington in 1936, the Government would stand fast on the reciprocity issue, thereby guaranteeing for all interested Commonwealth governments, reciprocal privileges in the United States.

The New Zealand Government was thereafter afforded numerous opportunities to demonstrate their stated position but capitulated in every instance; New Zealand conceded to the extension of the inaugural date in 1937, agreed to a change of route in 1939, failed to insist upon the inclusion of Fiji as a transit point en route and committed their most fundamental error in 1935 by negotiating an agreement with Pan American as opposed to the United States Government.

The New Zealand Government's concilitory attitude and actions bear credence to the contention, that in attempting to reconcile its conflicting objectives, that government opted

for the promotion of their own interests. Indeed retention of New Zealand as the sole terminus and hub for all southern Pacific operations, would certainly have satisfied and enhanced that government's «internationalist» aspirations, an important adjunct to the nation's newly defined role in the world's political arena.

However, adherence to one set of principles while ostensibly promoting several other ideals in international affairs, exacts a price. New Zealand's continuing devotion to ensure the implementation of the Pan American service, seriously weakened the solidarity of the Commonwealth coalition in extracting from the United States Government reciprocal privileges. More importantly, the New Zealand Government's actions in disregarding the resolutions reached in Melbourne in October 1941, stood to seriously jeopardize Australia's primary line of defence communication with the only ally who was in any position after 1941 to assist either Tasman Government.

New Zealand's indignation at Australia's decision to abide by an American proposal calling for the immediate establishment of a trans Pacific in the aftermath of Pearl Harbour, is, therefore, unjustified and exemplifies the rigidity that had the beset the New Zealand Government in relation to the operation of the southern Pacific service.

The New Zealand Government's attitude, at this time, indeed naive attitude, was found on the steadfast belief that the

British Government would ensure the security of the region, a belief that was abruptly shaken with the fall of Singapore and the sinking of the Prince of Wales and the Repulse, «substitutes and not envoys for the great fictitious Pacific fleet».[11] New Zealand now looked to the United States as the ultimate guarantor of its security.[12]

The inter war years also marked a significant period in the development of an external policy for the Australian Government, in turn a reflection upon a period of turbulence in domestic Australian politics.

After a display of assertiveness at the Paris Peace Conference in 1919,[13] external Australian policy was described thereafter as entering a «post Versailles lull», a situation that continued for a further sixteen years.[14]

However, the years 1935 to 1941,[15] marked the end of that «lull», when the country was compelled to come to decisions on issues posed by the combined threats from Germany, Italy and Japan, «the impossibility of isolating herself in the hands of the U.K. Government was increasingly apparent».[16]

Indeed the years 1935 to 1941 coincide precisely with the period during which the Australian Government devoted serious consideration towards the establishment of a trans Pacific air service, an issue that assumed greater importance as the likelihood of a world conflict increased.

Specifically, Australia's foreign policy during this period was based upon the following considerations - imperial devotion, fear of Japanese economic expansion and a deep resentment of United States policies, both economic and political.[17]

Each of these considerations is reflected in and permeates the attitude exhibited by the Australian Government towards the trans Pacific issue, each consideration assuming a different level of importance at various times.

For example, the Australian Government's adherence to the concept of Commonwealth unity, specifically at Britain's insistence to defeat the encroachment of American aviation interests, appears to have exerted a strong influence on the Government's attitude and policies subsequent to the Imperial Conference in London in 1937 where the guidelines for Australia's international aviation policy for the next three years appear to have been formulated.

Prior to this date the Australian Government tended to exhibit a far more independent stance in matters concerning aviation, although singularly more protectionist in nature.

The accession to the Prime Ministership by R.G. Menzies in 1939 may have confirmed the Americans worst fears pertaining to the likelihood of the establishment of a trans Pacific service into Australia by an American carrier, as Menzies was widely regarded as maintaining a veneration «indeed, almost superstitious respect» for the ideals of the Commonwealth and British civilization in general.[18]

When asked whether a Dominion should formulate a foreign policy and announce it whether or not it was in line with Great Britain's, he replied that to adopt such a line of conduct would be suicidal, «not only for us, but also for the British Empire as a whole....I have always believed...that the British Empire exercises its greatest influence in the world when it speaks out with one concerted voice».[19]

This adherence to the principles of Commonwealth unity is reflected and figures prominently in the course of consideration by the Menzies Government of whether to concede landing rights to Pan American. However, while Menzies was described as the «theoretician of Commonwealth relationships», he was also increasingly conscious of the value and importance of a United States alliance.

In Menzies' first message to the Australian people as Prime Minister on the 26th of April 1939, Menzies addressed the basic issue of international affairs as seen from an Australian prospective:

> «In the Pacific we have primarily responsibilities and primary risks. Close as our consultation with Great Britain is, and must be, in relation to European affairs, it is still true to say that we must, to a large extent, be guided by her knowledge and affected by her decisions. The problems of the Pacific are different. What Great Britain calls the Far East is to us the near north. I have become convinced that in the Pacific, Australia must regard herself as a principal player providing herself with her own information and maintaining her own diplomatic contacts with foreign powers.»[20]

In furtherance of this objective Menzies appointed R.G. Casey as Australia's first diplomatic appointment, who as previously described, exerted a considerable influence in the conduct and course of negotiations with both the United States Government and representatives of Pan American from 1940 onwards.[21]

Indeed so much importance was attached to the appointment to Washington, that Menzies considered resigning his Prime Ministership and assuming the position himself.[22] Ironically some political commentators consider the appointment of Casey, then Minister of Supply and Development, as the first in a series of events which led ultimately to the defeat of the Menzies Government - Casey's resignation necessitated the convening of a by-election which the United Australia Party ultimately lost.[23]

The accession to office of the Labour Government led by John Curtin on the 7th of October 1941, was accompanied by the following statement by the Prime Minister:

> «Without any inhibitions of any kind, I make it quite clear that Australia looks to America, free of any pangs as to our traditional links or kinship to the United Kingdom....»[24]

This government's more independent stance[25] or at least less inhibited and more publicly stated position, concerning the direction and future of Australia's external policy is reflected in the accelerated re-appraisal and review by the Government of the Pan American landing right and reciprocity

issues. The Australian Government was simply no longer able to press for reciprocity given the circumstances, and being less altruistic in such matters than their New Zealand counterparts, acceded to the demands or proposal of the United States Government; a «fatal necessity».

In the absence of world war, it is interesting to speculate whether a redirection in emphasis of Australian external policy would have occured, at least as rapidly, with the consequent concession by the Australian Government to the United States in allowing Pan American to enter, before any assurances of reciprocity were guaranteed in a bi-lateral treaty.

Hypothetical considerations aside, it was the logic of events which ultimately forced the Australian Government to reconsider its position, both in respect of its general external policy and more specifically, the reciprocity issue.

Beginning in 1940, it was simply no longer tenable for the Australian Government to rely upon the such nebulous concepts as Commonwealth co-operation, particularly when two of the chief proponents of the principle were acting in a manner contrary to their stated position.

It appears that from 1937 onwards, the Australian Government alone appeared to be adhering to the principles contained within the Imperial Conference resolutions, a position that seriously complicated and jeopardized that government's relationship with the only world power that was in any position to assist and ensure Australia's ultimate survival.

The warnings first by Kelly and Parkhill and later by Robinson bear testimony to the fact that Australia's uncompromising position or stance on the reciprocity issue had up until 1940 when an abrupt revision and re-appraisal occurred stood to seriously affect Australia's relations with the United States.

It was only with Casey's dire warnings coupled with the realisation following Menzies conversations in London in 1941 that the issue of reciprocity was reassessed and placed in proper perspective.

The British Government who had so strenuously advocated Commonwealth unity, which it declared was necessary to meet the challenge posed by the Americans, was for very practical reasons, also compelled to reassess its position but at an earlier date. This accounts for that government's decision to grant Pan American landing rights into Singapore without any assurance of immediate reciprocity being conceded to by the United States Government.

The precarious situation in Europe also compelled the British Government to reassess its position regarding their participation in the trans Pacific service which it admitted «only served as a link between Australia, New Zealand and Canada».

Thus the grandiose plans and schemes initiated by the British Government which envisaged the establishment of an all red route», were placed in abeyance, until the problems closer to its own shores were resolved.

The Canadian Government viewing from a distance the activities of the four other governments regarded the matter as are of no vital or pressing urgency and consequently assumed an attitude akin to that of informed disengagement. Canada was simply far more concerned with the problems of the northern hemisphere.

However, problems between governments of the northern hemisphere were and are directly related to and responsible for the problems of the southern.

Specifically Anglo-American relations which throughout the inter war period were described as tense, were transplanted and reemerged disguised as adopted policies of the two Antipodean Commonwealth Governments. This, for example, accounts for the hostility some prominent members of the Australian Government expressed to U.S. economic and political policies, especially during the earlier half of the 1930s decade.[26]

Many of the Anglo-American problems emanated from the imposition by the United States of highly protectionist tariff barriers, culminating in the enactment of the Hawley-Smoot tariff schedules in 1930. These tariffs instead of contributing to a stimulation of the American economy, added to both domestic and international decline.[27]

However, despite attempts by the more flexible and internationalist Roosevelt Administration, that government was unable to reverse the American tariff policy in any significant manner

as the general mood of the American people appeared to be bent on a protectionist mentality.[28]

Opposition to economic isolationism after 1932 was championed by Secretary of State, Cordell Hull, described as a «fervent economic internationalist».[29] This may account for Hull's reservations concerning the practice of Pan American entering into its own negotiations, the benefits of such a practice regarding reciprocity or the non commitment thereof being well known to certain Executive Departments of the American Government.

Hull's opposition was insufficient and inadequate to redress that practice, particularly where the economic interests of the carriers were concerned - «maintain traffic to and from the United States as 100 per cent American flag»[30] - and more importantly where the Navy and War Departments considered access to strategically sensitive American territories, undesirable.

The Hawaiian access issue may indeed be regarded as the cornerstone of American Pacific aviation policy. All agreements permitting access by Pan American to nations bordering the Pacific were conducted and concluded by that airline, specifically to avoid addressing the issue of reciprocity and hence access into Hawaii.

Ironically, in an interview conducted almost exactly 50 years after the adoption of that policy with Welch L. Pogue former general counsel and Chairman of the Civil Aeronautics Board, the merit of such a policy was questioned.[31]

What the Japanese hoped or could have achieved in terms of gathering data and information on a regular commercial flight, which they were not able to gather or indeed did gather through other means, leads one to question the value and effectiveness in adopting and promoting such a policy.

The practice of the United States Government in discriminating between various governments, through the use of private international contracts as opposed to government bi-laterals and specifically to avoid addressing the reciprocity issue for either military of economic reasons, supports the Australian Government's position in refusing to negotiate and concluded an agreement on such a basis.

Australia was simply not prepared to succumb to such discrimination. The intervention of the Second World War permitted a total reassessment of American international aviation policy, although judging by events within the United States prior to 1941, the impetus for change had already been set in motion.

With the first serious and successful challenge to the venerated position assumed by Pan American[32] and the acceptance of aviation as a viable means of international and domestic travel and transporation, largely as a result of the war, the stage was set for the commencement of a new era in American international policy.

Consolidating its position, the United States and the British Commonwealth coalition met again in confrontation at Chicago in 1944.

The Commonwealth bloc, although exhibiting differences amongst themselves, envisaged and advocated the adoption of a different international legal order , one which entailed economic control by an international intergovernmental body.[33]

This was opposed by the United States, who while conceding to the necessity of the establishment of a world organization to supervise technical and safety problems, advocated that each nation should be left with wide and uncontrolled economic and competitive powers.[34]

A compromise between the two rival factions was reached, not at Chicago but at Bermuda on the 11th of February, 1946. Ironically, the principles on which that agreement were concluded were not those on which either Britain or the United States contended so bitterly at the Chicago Conference.[35]

The unified opposition by the Commonwealth Governments and the arguments proposed which were contrary to the position assumed by the United States, were in principle if not reality, the basis of the dispute centered in the southern Pacific, the previous decade.

Economic regulation by an impartial, internationally represented central authority would ensure equality between states, denied previously, for example, where the United States refused to grant reciprocal rights thereby creating the potential for an American monopoly.

Reciprocity is still a contentious issue between certain governments and was for many years between the United States and Australia. However, itsterms of reference have since Bermuda been much narrower.

There is no contention, as was submitted in Chapter V, that as a principle of international law a state conceding operating rights be accorded reciprocal operating privileges in the grantee state. The difficulty arises, however, in deciding how frequently that right should be exercised so as to attain some degree of equality between the contracting states, or more specifically how the words «fair and equal opportunity» should be interpreted.

O.J. Lissitzyn, writing in 1942, remarked that «national interest in the commercial aspects of aviation was overshadowed by the importance of air transport as an instrument of national policy - economic, diplomatic, and military.»[36]

This analysis is certainly correct and would undoubtedly apply to the events described in this thesis. However, consideration and application of Lissitzyn's remark to a contempory international aviation environment requires some additional comment.

Certainly, economic, diplomatic and military policies are important considerations in the formulation of any nation's international aviation policy. However, a government's interest in the economic viability of a carrier's operations reflected in that carrier's financial statements, are today of almost paramount importance to a government. This is more so where a

government retains a financial interest in that carrier. Even the United States Government in the aftermath of the implementation of its «liberalized» international aviation policy, is now intent upon promoting the economic interests of of American incorporated carriers.

It is of significance to note that prior to the Second World War, the technology of the industry did not permit the widespread operation of economically viable operations.

Hence, the emphasis of governments during that period was upon policies designed to enhance, for example, the national prestige of a nation. This is evident in the formulation of the Commonwealth trans Pacific air service, which was designed to complete the «All Red» or British route around the world «in the days when red was a respectible colour».[37]

The British alone ultimately operated a southern Pacific route but not until 1969[38] and following several years of operation the service was dropped, primarily on economic grounds, testimony to the partial inaccuracy of the Lissityns remark as applied to a contemporary environment.

As an epilogue to this thesis, it is of interest to note the present negotiations being conducted between Pan American and United Air Lines, the former carrier reportedly intending to sell its Pacific operations to United.[39]

Both airlines have experience in the operation of services to Australia, United having flown under a United States military

contract for the duration of the Second World War but subsequently and alone amongst other American carriers, expressed no interest in operating scheduled international services thereafter.[40]

Pan American's withdrawal marks the passing of an era and considering the difficulties that carrier experienced initially in attempting to secure and operate services to the souther Pacific, a major decision.

During the course of the introduction to this thesis, reference was made to a rhetorical question posed by the American Consul in Wellington, George A. Bucklin, who in light of the difficulties the New Zealand Government was expressing as to the terms of the agreement about to be concluded with Pan American, asked why «so little co-operation (should exist) between a similar people who are their closest friends?».[41]

One answer may be found in the comments of former Australian Prime Minister R.G. Menzies, who when writing of Australian-American relations remarked:

> «friendly sentiments, though they unquestionably exist and flourish, can occasionally change.... sometimes for the most superficial reasons.»[42]

CONCLUSION - FOOTNOTES

1. PAA 30.05.00 U.S. Civil Aviation Policy and Regulation, 8th of January 1935, Confidential Report to the President of the United States; Re: Our Foreign Aeronautic Interests, Foreign Aeronautics and Associated Activities of the Government.

2. R. Kennaway, New Zealand Foreign Policy 1951-1971, Wellington, Hicks Smith and Sons, 1972, p. 17.

3. The Balfour Declaration has also been referred to as the declaration that «slew the extinct dragon».

4. N. Mansergh, Survey of British Commonwealth Affairs - Problems of External Policy 1931-39, London, Oxford University Press, 1952, p. 192.

5. Ibid., pp. 200-203.

6. Ibid., p. 193.

7. Ibid., p. 195, citing The Times (London), 14th April 1938.

8. K. Sinclair, A History of New Zealand, New York, Pelican, 1980, p. 278.

9. Ibid., p. 282, citing J.N. Findlay, The Imperial Factor in New Zealand, Tomorrow Magazine complete citation unavailable.

10. One historian attempts to reconcile the inherent conflict by asserting that while the New Zealand Government continued to favour a common imperial policy, it adhered to the belief that it should exert its right to influence that policy; supra, note 2, p. 18.

11. K. Sinclair, Walter Nash Auckland, Auckland University Press, 1976, p. 213.

12. Supra, note 8, p. 283.

13. R.C. Snelling, Preacemaking 1919: Australia, New Zealand and the British Empire Delegation at Versailles, The Journal of Imperial and Commonwealth History, Vol. IV, October 1975, No. 1, p. 15.

14. P.G. Edwards, Prime Ministers and Diplomats, The Making of Australian Foreign Policy 1901-1949, Melbourne, Oxford University Press, 1983, p. 98.

15. Sir Alan Watt chose these years to mark the beginning of the evolution of Australian foreign policy; A.S. Watt, The Evolution of Australian Foreign Policy 1938-1965, Cambridge, 1968, pp. vii-viii.

16. Supra, note 14, p. 98.

17. Ibid., p. 100.

18. Manning Clark, A Short History of Australia, New York, Mentor, 1980, p. 235.

19. Supra, note 15, p. 20.

20. Ibid., p. 24.

21. Casey was referred to ironically as the 'flying diplomat' because he possessed a pilot's licence.

22. Supra, note 11, citing M.R. Megaw, 'Undiplomatic Channels: Australian Representation in the United States 1918-1939, Historical Studies, 15, 60, 1973, p. 629.

23. Supra, note 14, p. 121.

24. Supra, note 18, p. 241.

25. Curtin alleged that Menzies never had a foreign policy of his own. Supra, note 15, p. 19.

26. Supra, note 17.

27. R. Dallek, The American Style of Foreign Policy - Cultural Politics and Foreign Affairs, New York, Mentor, 1983, p. 106.

28. Ibid., p. 107.

29. Ibid.

30. Testimony of Colonel Edgar S. Gorell, President Air Transport Association of America before hearings of the U.S. Congress. Committee on Merchant Marine and Fisheries, 75th Congress, 3rd Session on s. 4 of M.R. 9710 Transoceanic Aircraft Subsidies, p. 31.

31. Interview conducted with Welch L. Pogue, General Counsel C.A.A./C.A.B. 1938 to 1942, Chairman of the C.A.B. 1942 to 1946, Washington, D.C., 20th of December 1984.

32. The American Export Airlines Litigation, Refer to Appendix IV.

33. New Zealand and Australia advocated the total internationalization of air transportation while Britain and Canada urged for international control of civil aviation by an authority which was to be vested with broad economic powers but without authority actually to operate international air services.

34. Indeed, the spirit and letter of the Civil Aeronautics Act of 1938 commits the United States to a national policy directly opposed to the fundamental theories of internationalization; J.C. Cooper, 'Internationalization of Air Transport', Explorations in Aerospace Law, selected Essay by John Cobb Cooper, edited by Ivan A. Vlasic, 396 at 399.

35. Ibid., «The Bermuda Plan - World Pattern for Air Transport» 382.

36. O.J. Lissitzyn, International Air Transport and National Policy, New York Council on Foreign Relations, 1942, p. 96.

37. C. Hazelhurst, Menzies Observed, Sydney, George Allen and Unwin 1979, p. 187.

38. I.H. Driscoll, Flightpath South Pacific, Christchurch, Whitecombe and Tombs, 1972, p. 178.

39. 'Pan Am, United Pacific Pact to Test Transportation Dept. Policies', Aviation Week and Space Technology, April 29, 1985, p. 48.

40. Corporate and Legal History of United Air Lines, Inc. and its subsidiary 1946-1955, Elk Grove, Illinois United Air Lines, Inc., 1965, p. 420.

41. F.X. Holbrook, United States National Defense and Trans-Pacific Commercial Air Routes 1933-1941, Fordham University Doctoral Dissertation, 1969, p. 151, citing PAA/37 13th of November 1935, American Consul, Wellington to Secretary of State.

42. R.G. Menzies, Afternoon Light: Some Memories of Men and Events, Melbourne Cassell, 1967, p. 259.

AGREEMENT CONCLUDED BETWEEN PAN AMERICAN AIRWAYS INC. AND THE NEW ZEALAND GOVERNMENT NOVEMBER 1935

ARTICLES OF AGREEMENT made this 25th day of November, One thousand nine hundred and thirty-five, BETWEEN HIS MAJESTY THE KING (hereinafter referred to as "the Crown") acting by and through the Right Honourable Joseph Gordon Coates, the Minister of Transport of the one part, and PAN AMERICAN AIRWAYS, INCORPORATED, a body politic and corporate incorporated in the State of New York in the United States of America and carrying on or proposing to carry on in New Zealand the business of air transport (hereinafter referred to as "the Company") which expression shall include its successors and assigns where the context so requires or admits of the other part WHEREBY it is mutually agreed and declared between and by the parties hereto in manner following that is to say:

1. Subject to these presents the Crown will to the extent hereinafter appearing grant to the Company facilities for conducting an air service for passengers and mails and other cargo between such aerodrome or aerodromes in New Zealand as the Crown may from time to time designate and such airport or airports on the Pacific Coast of the mainland of the United States of America as the Crown may from time to time approve and vice versa by way of the Hawaiian Islands or any other practicable route from time to time approved by the Crown.

2 The Company will commence the said service not later than the thirty-first day of December, One thousand nine hundred and thirty-six, *Provided Always*, That if by reason of unforeseen difficulties the Company shall be unable to commence the said service by the last-mentioned date, the time for commencement may with the consent of the Minister of Transport be extended to the thirty-first day of December, One thousand nine hundred and thirty-seven

3 The Company will maintain the said service continuously for a period of ten years from the date of commencement with the frequency hereinafter specified and the mutual obligations of these presents shall continue during such period of ten years and no longer subject to prior determination by the Crown as hereinafter provided.

4 The Company will maintain the said service during the said term of ten years by the despatch from each terminus of the route of at least two aircraft in every calendar month during the said term and not more than two aircraft in every week during the said term such aircraft to be despatched substantially at equal intervals of time and to complete the journey without undue delay en route:

Provided always, That it shall not be necessary that the whole of any trip be conducted by means of the same aircraft but different aircraft may be used for various sections of the route subject to the avoidance of undue delay in transshipment:

Provided also, That the Company shall not be liable for any breach of this clause due to accident stress of weather, or other causes beyond the reasonable control of the Company, financial difficulties not to be deemed causes beyond the control of the Company for the purposes of this article

5 For the purposes of Article 1 hereof the Crown—

(i) designates the aerodrome at Auckland as the New Zealand terminus of the route,

(ii) approves of San Francisco as the United States terminus of the route;

(iii) approves of Honolulu Kingman Reef and Pago Pago as the regular alighting places en route and as places defining an approved route.

6 So long as the route defined in the last preceding article hereof shall be approved by the Crown every aircraft used in the said service shall (unless prevented by accident stress or weather, shortage of fuel, or other inevitable cause) if so required by the Crown and upon receiving three previous days' notice of such request alight at Apia for the purpose of embarking or disembarking a passenger or passengers or taking up or delivering mails, and any such aircraft alighting at Apia pursuant to such a request may take up or deliver any cargo other than passengers or mails consigned to or receivable at Apia, but no aircraft shall be required to alight at Apia solely for the purpose of taking up or delivering cargo other than passengers or mails. Apia is accordingly approved by the Crown as an alighting place for the purposes of Article 1 hereof.

7. The Company shall maintain the said service by means of aircraft the minimum pay load of which shall be approved by the Minister of Transport and in the event of being unable at any time to carry all the transport offering by means of the service for the time being maintained in accordance with Article 4 hereof shall accept such transport in the following order of preference:

(i) Mails handed to the Company by the Post and Telegraph Department;

(ii) passengers to or from the mainland of New Zealand in order of their application for transport and their personal luggage up to a reasonable weight per passenger required by the Minister of Transport;

(iii) passengers to or from any dependency or mandated territory of New Zealand in order of application and their personal luggage as aforesaid;
(iv) passengers other than as aforesaid;
(v) cargo other than mails.

8. WHEREAS by the Air Navigation Regulations 1933 provision is made to the effect that no person shall fly an aircraft within New Zealand unless the aircraft possesses the nationality of a contracting state, that is to say, a State which is for the time being a party to the International Convention for the Regulation of Aerial Navigation signed at Paris on the thirteenth day of October, One thousand nine hundred and nineteen, but that the said provision shall not apply in certain events to the aircraft of a State with which a special convention relating to air navigation entered into by or on behalf of the Government of New Zealand is for the time being in force, AND WHEREAS the Government of the United States of America is not a party to the International Convention above referred to nor is there any special convention existing between the Governments of the Unted States of America and the Dominion of New Zealand relating to air navigation, NOW THEREFORE it is mutually understood and agreed by and between the parties hereto that the Minister of Transport will use his good offices with the Minister of Defence that the Company may upon application obtain an exemption from the operation of the Air Navigation Regulations 1933 insofar only as such regulations preclude aircraft other than such as possess a nationality of either a contracting party to the said International Convention or a party to a special convention as above-described from flying over the Dominion of New Zealand or its dependencies or mandated territories or its territorial waters

9 Except with the special permission of the Crown and under such arrangements as may hereafter be made between the Crown and the Company the Company shall not carry passengers or mail or other cargo between any place in New Zealand its dependencies and mandated territories and any other place in New Zealand, its dependencies and mandated territories nor permit any person to use any aircraft belonging to the Company so to carry any passengers or mail or other cargo

10 The Company shall not without the prior written consent of the Crown (which it shall be in the uncontrolled discretion of the Crown to grant or withhold) assign, transfer, delegate, sublet, or otherwise part with the powers rights or benefits conferred by these presents whether wholly or in part

Provided always That this stipulation shall not apply to an assignment transfer delegation subletting or other parting with such powers, rights, or benefits or any of them in favour of any corporate body the majority of the capital stock of which is owned directly or indirectly by the Company

11. In the normal conduct of the said service the Company shall be entitled to use only one designated aerodrome or alighting place (together with the necessary facilities appurtenant thereto) in New Zealand but in the event of accident, stress of weather, shortage of fuel, or, other emergency the aircraft of the Company shall be entitled to alight at any place within the Territories and territorial waters of New Zealand its dependencies and mandated territories subject always to compliance with all statutes and regulations and bylaws thereunder relating to the alighting of aircraft at any such respective place.

12. WHEREAS these presents are entered into upon the faith of reciprocity between New Zealand and the United States of America as regards alighting facilities and international services, NOW THEREFORE it is hereby declared that—

(i) should any person being a British subject (including a corporate body incorporated under the laws of any jurisdiction within the British Commonwealth of Nations), at any time during the continuance of these presents for the purpose of inaugurating a regular air service between any place in the Dominion of New Zealand any British possession in the Pacific Ocean or on the Pacific Coast of the Continent of North America, apply to the Government of the United States of America for permission to make regular alightings and emergency alightings respectively substantially to the like extent as is set out in Article 11 of these presents at any place chosen by the applicant, being a place regularly open to commercial aircraft of the United States of America, in any territory being part of or administered or occupied by the United States of America; and

(ii) should the prior approval of the Crown have been given to such application and notice thereof have been communicated to Pan-American Airways, Incorporated, its successors or assigns or

(iii) should such permission not be granted to the satisfaction of the Crown within three calendar months after such application has been made to the

Government of the United States or having been granted be thereafter withdrawn or modified or in the opinion of the Crown by any means direct or indirect be impeded or wholly or partially nullified in effect, then, and in such case it shall be lawful for the Crown immediately or at any time thereafter to give to the Company notice terminating these presents at the expiration of twelve months from the date when such notice is given and upon the expiration of such period of twelve months these presents and all powers rights and benefits hereby conferred shall immediately cease and determine and no claim for compensation or damage or otherwise howsoever in consequence of such determination shall be made or preferred by the Company against the Crown or the Government of New Zealand or any officer of the Government whether by legal proceedings or in any other manner without prejudice to the liability of the Company in respect of any antecedent breach nonobservance or nonperformance of any provision contained in these presents.

13. The Company shall enjoy all the rights in respect of real and personal property in New Zealand and all the contractual rights and right to benefit of public services which are from time to time available to alien friends pursuant to the British Nationality and Status of Aliens (in New Zealand) Act 1928 and shall in respect of its operations and its real and personal property be subject to the same taxation and entitled to the same immunities from taxation as all other companies incorporated abroad and carrying on business in New Zealand.

14 The Minister of Transport will use his good offices with the Minister of Telegraphs that the Company may on due application in that behalf obtain a license for the establishment of a private commercial station under Part V of the Radio Regulations 1932 to be licensed for the private correspondence of the owner to the intent that such station shall serve as a radio aid to navigation and operation of aircraft employed in the said service

Provided always, That the Company shall make the use of such station available for the benefit of other aircraft than those employed in the said service upon such terms and conditions as may be agreed upon between the Company and the owner of such other aircraft or failing such agreement upon such terms and conditions as the Minister of Telegraphs may decide to be fair and reasonable

Provided also, That such license may be subject to the following conditions

(i) The license may be cancelled upon six calendar months' notice, provided that another suitable beacon service is made available, cancellation to confer no right to compensation or obligation upon the Crown to take over the plant.

(ii) The Company shall submit to the Minister of Telegraphs for approval particulars of the wave-lengths on which it is desired to operate power polar diagram of radiation, and full technical details of the equipment proposed to be installed and method of operation.

(iii) The emissions from the beacon shall be such as not to interfere with other beacon or radio services.

15. The Minister of Transport will also use his good offices with the Minister of Telegraphs that the Company may, on due application in that behalf, obtain licenses (if desired) for the establishment of mobile stations under Part III of the Radio Regulations, 1932, to be established on aircraft employed in the said service and for the establishment of a private commercial station under Part V of the Radio Regulations 1932, the latter to be licensed for general public correspondence and for the private correspondence of the owner subject as regards the last-mentioned station to the following conditions.

(i) The station to be used only for communicating with (i) aircraft employed in the said service when flying between New Zealand and Samoa, and (ii) the nearest regular overseas alighting-place, i. e., Pago Pago.

(ii) All messages to be in plain language and to relate only to the operation of the service between Pago Pago and New Zealand no message to be forwarded to Pago Pago for retransmission to destinations beyond that place.

(iii) All public correspondence connected with the service to be handled by stations under the control of the New Zealand Post and Telegraph Department.

(iv) The wave length to be used from time to time to be in accordance with the Regulations attached to the International Telecommunication Convention. It will be open to the Company to submit the wave length considered to be the most suitable but the final decision to rest with the Minister of Telegraphs.

(v) The transmissions from the station not to interfere with other radio services operating to, from, or within New Zealand.

(vi) The Minister of Telegraphs to have the power to cancel the license if it be found that a coordination of radio facilities is desirable in the interests of aircraft generally. Such cancellation to confer no right to compensation or any obligation upon the Crown to take over the plant.

(vii) Technical particulars to be supplied as may be required by the Minister of Telegraphs.

16. In the conduct of any aircraft used in carrying on the said service the Company shall at all times comply and cause compliance to be had with the Air Navigation Act 1931, the Customs Act 1913, the Health Act 1920, the Land and Income Tax Act 1923, and the Post and Telegraph Act 1928 and all regulations in force thereunder; and generally comply and cause compliance to be had with the laws of New Zealand and its dependencies and mandated territories

17. These presents shall be deemed to be entered into under the law of New Zealand and any questions arising out of the interpretation and enforcement thereof shall be decided according to the law of New Zealand.

18. All contracts of carriage whether of passengers, mails, or other cargo by aircraft used in conducting the said service shall be deemed (wherever entered into) to be made under, and shall in all respects be subject to and conform with, the law of New Zealand.

19. The Company submits to the jurisdiction of the Supreme Court in respect of these presents and in respect of any such contract of carriage as aforesaid and will not in the Courts of any country plead lack of jurisdiction in the Supreme Court but will, in any place where it is sought to enforce a judgment of the Supreme Court, acknowledge that such judgment is binding upon and valid against the Company.

20. Any designation, request, consent, approval, or notification to be made or given by the Crown under these presents shall be sufficient if given in writing signed by the Minister of Transport for the time being or by any member of the Executive Council acting on his behalf or by the Commissioner of Transport or any other officer of the Public Service thereto authorized by the said Minister or any member of the Executive Council acting on his behalf and shall be sufficient, if delivered to the attorney of the Company in New Zealand for the time being or delivered at the office or principal place of business of the Company in New Zealand during ordinary office hours, to any person appearing for the time being to have the control of such office or place of business.

21. If, at any time, the Company shall fail to observe or comply with any of the provisions of these presents, the Crown may by notice to the Company require the Company to remedy such failure and, if such failure be not remedied to the satisfaction of the Crown within three calendar months or such further time as the Crown may consider to be reasonable, then the Crown may by further notice to the Company terminate the agreement contained in these presents and thereupon these presents and all powers, rights, and benefits hereby conferred shall immediately cease and determine and no claim for compensation or damages or otherwise howsoever in consequence of such determination shall be made or preferred by the Company against the Crown or the Government of New Zealand or any officer of the Government, whether by legal proceedings or in any other manner, without prejudice to the liability of the Company in respect of any antecedent breach nonobservance or nonperformance of any provision contained in these presents.

22. All references in these presents to any statute or any regulations thereunder shall be deemed to import a reference, as the case may require, to every statute amending or replacing such statute or to any regulations thereunder from time to time for the time being in force.

IN WITNESS whereof these presents have been executed the day and year first above written.

J. G. COATES.

Signed by the Right Honourable Joseph Gordon Coates, the Minister of Transport, in the presence of:

T. R. AICKIN,
Private Secretary, Wellington.

PAN AMERICAN AIRWAYS, INCORPORATED
By LISLE ALDERTON (Its attorney)

Signed by Pan American Airways, Incorporated, by its attorney, Lisle Alderton, in the presence of:
H. Belshaw,

Professor of Economics, Auckland.

In the matter of the Justice of the Peace Act 1927 and the Property Law Act 1908

I, Lisle Alderton, Of Auckland, solicitor, do solemnly and sincerely declare as follows:

1. That I am a substituted attorney of the above-named Pan American Airways, Incorporated, by virtue of the following instruments, namely, first deed, poll, or power of attorney given by Pan American Airways, Incorporated, in favour of one Harold C. Gatty therein named bearing date the 10th day of June 1935, and secondly, deed, poll, or instrument of substitution given by the said Harold C. Gatty in favour of me this declarant and one Bryan Hislop Kingston therein named jointly and severally and bearing date the 21st day of September 1935.

2. That I have executed the foregoing articles under the authority conferred upon me by the instruments hereinbefore mentioned.

3. That I have not received any notification of the revocation of the said instruments or either of them whether by the winding up or dissolution of the said Pan American Airways, Incorporated, or the death of the said Harold C. Gatty, or otherwise howsoever, but each of them is still in full force and effect.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the Justices of the Peace Act 1927.

Lisle Alderton.

Declared at Auckland this 25th day of November 1935 before me:
A. K. North,

A solicitor of the Supreme Court of New Zealand.

THE 1939 AMENDMENT

DOMINION OF NEW ZEALAND,
OFFICE OF THE MINISTER OF DEFENCE,
Wellington, C. 1, 7th July 1939.

HAROLD GATTY, Esq.,
Pan-American Airways Company,
P. O. Box 1557, Auckland, C 1

DEAR SIR: I have to acknowledge the receipt of your letter of the 22d June I am happy to note that your Company expects to be in a position to resume its service to New Zealand about the end of July and I have received with satisfaction the Company's undertaking to make experimetal flights to Suva and to continue to use that place as a port of call should it be found practicable from the technical and operational point of view

For the purpose of these experimental flights, and on the understanding that the whole situation will be open to review should the inclusion of Suva as a regular alighting place prove to be impracticable from the point of view of your Company, the New Zealand Government approves of the necessary change in route to include Canton Island and Noumea in lieu of Kingman Reef and Pago Pago

It is contemplated that in the near future full facilities will be provided at Suva by the British authorities concerned and these facilities will be available to your Company on the same terms and conditions as would be applicable to any British service that may be inaugurated

Yours faithfully,

F JONES
Minister of Defence.

APPENDIX III

PAN AMERICAN AIRWAYS CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY - NEW ZEALAND OPERATIONS APPLICATION

In October 1940, hearings were conducted before the Civil Aeronautics Authority pursuant to an application filed in October 1938 by Pan American for a certificate of public convenience and necessity authorizing the carriage of persons, property and mail between the terminal points of San Francisco and Auckland via Los Angeles, Honolulu, Canton Island and Noumea.[1]

Specifically the application was filed before the C.A.A.[2] pursuant to Section 401(e)(1) of the Civil Aeronautics Act of 1938, more commonly referred to as the grandfather clause,[3] which required that a certificate of public convenience and necessity should only be issued upon proof that during the so-called 'grandfather period',[4] the applicant was an air carrier, continuously operating as such (except as to interruptions of service over which it had no control), unless the service it rendered for such period was inadequate and inefficient.

Broad questions of public convenience and necessity were thus precluded by the statute from coming before the Authority for determination, since the principal issues were confined to the citizenship of the applicant, the scope and continuity

of its operation, the extent of its authorisation by the Postmaster General, and the adequacy and efficiency of its service.[5]

It is of interest to note, however, that unlike previous grandfather clauses, inserted into Federal legislation, the Act did not specify bona fide operation during the grandfather period.[6]

During the course of debates and hearings leading to the 1938 Act, Congress spent more time in the consideration of this clause than it did of any other provision of the Act. The rationale behind insertion of the clause as disclosed in the transcipts of the Congressional hearings, was to provide a preferential place to those who had expended money, energy and initiative in pioneering an airline,[7] an argument that Pan American and in particular its President, Juan Trippe, advanced with great veracity during the course of the following decade in order to secure its position as the United States' preeminent international carrier.

To require an established carrier to prove convenience and necessity before it was permitted to continue its service would, in effect, it was argued, penalize that carrier for having pioneered a service, while the existence of an already established service, should be a sufficient guarantee of public convenience and necessity to warrant its continuance.[8]

More importantly, it was considered by the proponents of the bill that in the absence of such a clause, bidders might acquire rights that were not warranted, and create a mad scramble to establish routes and secure airmail contracts that would destroy the industry a situation deemed contrary to the avowed purpose and intent of the legislation which was to import primarily a degree of financial stability to a still fledging and infant industry.[9]

The importance of s. 401(1)(3) with respect to domestic carriers is undeniable with the frequently cited result that it consolidated the position of the 'Big Four' - American, United, TWA and Eastern - a position retained for a further thirty years.[10]

Internationally, Pan American had successfully relied upon section 401(e)(1) in the course of its application before the Authority for certificates for services along the mid Pacific route, San Francisco to Hong Kong,[11] and for services throughout Latin America,[12] specifically three components of Pan American's Latin American network which provided for the operation of seven routes which touched or terminated in Argentina, Brazil, Colombia, the Guianas, Venezuela, Mexico, the Canal Zone, all the Central American republics and many of the Caribbean Islands.

In respect of the airline's New Zealand application, however, the application was denied and accordingly provides an opportunity to analyse a decision of the Authority which alone amongst applications based upon this section was denied.

An earlier public hearing conducted before an Examiner of the Authority in February 1940, subsequently filed and served as the examiner's report, had recommended that the Authority find that the applicant did not continuously operate between San Francisco and Auckland from May 18, 1938 to August 22, 1938 and therefore was not entitled to a grandfather certificate. The report did recommend, however, that the Authority find that public convenience and necessity require the air transportation of persons, property and mail between San Francisco and Auckland and that the applicant was fit-willing and able to properly perform such transportation and to conform in all other respects to the provisions of the Act.[13]

The Examiner further recommended that since the applicant presently held a certificate authorizing operations between San Francisco and Hong Kong via Honolulu, the certificate as issued should be for the route between the terminal points Honolulu and Auckland only, thereby recommending in effect that no provision be made for a stop at Los Angeles as an intermediate point.[14]

The designation of Los Angeles as an intermediate point was considered by Pam American to be of great importance, no doubt reflecting upon the enormous rate of growth already

sustained in the Los Angeles area and in particular the potential for growth of the air transportation industry. In addition, the airline was, it is contended, laying the ground work for the operation of a domestic network and the resulting penetration of an increasingly lucrative domestic market, an ambition that was not to be realized for a further 40 years.[15]

Pan American in response filed its exceptions to the proposed findings and report of the Examiner, the principal exception being the omission of Los Angeles as an intermediate point, based upon the airlines' contention that the facts of the record were considered sufficient to justify such a designation.[16]

Pan American also argued that the issuance of a certificate designating Honolulu instead of San Francisco as a terminal point was contrary not only to the evidence of record but also to the provisions of sections 401(d) and 401(f). Seven other exceptions were taken to matters of detail included in the findings of fact in the examiner's report.[17]

Counsel for the Authority also filed its exception to the Examiner's report, excepting to the recommendation that the Authority find that public convenience and necessity require air transportation of persons, property and mail between San Francisco and Auckland.[18]

The Authority in examining the application adopted the following approach.

Firstly, the Authority felt obliged to ask whether the applicant was entitled to a certificate pursuant to s. 401(l)(e). If the applicant was deemed not so entitled to a certificate pursuant to this section, then the Authority was obliged to consider whether public convenience and necessity required air transportation between San Francisco and Auckland, i.e. pursuant to section 401(d)(1).[19]

Finally, if it was determined that public convenience and necessity did require such air transportation, then the Authority were obliged to consider whether the applicant was fit, willing and able to perform such transportation properly.[20]

In respect of the first question, the Authority citing its previous decision in the Trans Pacific Operations case,[21] determined that the principal issues in any case decided under section 401(e)(1) to be citizenship of the applicant, scope and continuity of operation (or in the alternative the scope of its authorization from the Postmaster General to transport mail) and the question of the adequacy and efficiency of the applicant's service during the so-called 'grandfather period'.[22]

The Authority then proceeded to review the evidence and facts pertaining to Pan American operations to New Zealand; the completion of feasability studies commencing in 1932, the conclusion of the 1935 Agreement with the New Zealand Government, the completion of a survey flight in March/April 1937 followed by the inauguration of the first scheduled mail service

authorized pursuant to the provisions of the Air Commerce Act of 1926 in December 1937 and the partial completion of the ill-fated second scheduled mail flight in January 1938.[23]

Pan American argued that beginning in January 1938, the carrier had scheduled a fortnighty service between Honolulu and Auckland, despite the fact that the applicant's schedule did not contain an announcement of the service. In addition, Pan American argued that the Company's San Francisco mail office sent out 1,700 aerograms (a form of direct mail advertising) announcing the inauguration of a fortnightly express service to New Zealand to commence on the 5th of January 1938.[24]

The loss of the S-42 Samoan Clipper on the 11th of January 1938 during the course of its second scheduled mail flight with the consequent shortage of suitable aircraft, prevented the applicant from operating a further service until August 1939. Therefore, according to the facts of record, the Authority maintained, no operations were conducted during the 'grandfather period'. Hence the contention of the applicant, the Authority decided, amounted to the proposition that regular flights having been scheduled prior to the 'grandfather period' coupled with the cessation of operations following the loss of the 'Samoan Clipper' constituted 'merely an interruption of service over which the applicant had no control' - a statutory permissible exemption.[25]

The Authority maintained that in order for the applicant to be successful it must establish continuous operation as an «air carrier» between such terminal points and that it was not sufficient that the applicant should have enjoyed the status of an air carrier alone with respect to the points in question - under the definition of air carrier set forth in section 1(2) of the Act, nor was the Authority prepared to explore separately the question of whether or not that status in fact existed.[26]

The criterion established by s. 401(1)(e) the Authority asserted was continuous operation, defined to include «all elements of undertaking to engage in air transportation» and since nothing less than continuous operation would satisfy the requirement of section 401(e)(1), it was «idle» to speculate upon the applicant's status as an air carrier.[27]

The Authority, accordingly found that there was an absence of continuous operation between San Francisco and Auckland and Honolulu and Auckland and that under those circumstances, the only showing upon which the applicant might conceivably be entitled to a certificate under s. 401(1)(e) would have been to establish that the carrier had at one time or another conducted a continuous operation between the points involved but such operation was suspended throughout the 'grandfather period' by interruptions of service over which the applicant had no control.[28]

The Authority decided that only one round trip «having any commercial characteristics» had been performed and without passing upon the question of whether the applicant ever undertook to engage as a common carrier, decided that following the loss of the Samoan Clipper there was a complete cessation as distinct from an interruption of service.[29]

Therefore, denying entitlement pursuant to s. 401(l)(e), the Authority turned to consideration of the application under section 401(d)(1) of the Act.[30]

The Authority construed the above section as setting up as tests in any «new route» case two factors: (1) the public convenience and necessity; and (2) the fitness, willingness and ability of the applicant property to perform the service.[31]

As to the first «factor», the Authority conceded that such a phrase, as discussed in previous cases, was not susceptible of reduction to a fixed and rigid definition, but rather its meaning «must be determined in the light of the context and objective of the statute wherein it was used».[32]

The Authority determined that public convenience and necessity were not restricted to the interests of a particular community but were national in scope; to an even greater extent where foreign vis-a-vis domestic transportation was concerned.[33]

The Declaration of Policy set forth in Section 2, set out the broad standards which the Authority was bound to apply in

determining public convenience and necessity and it was clear according to the Authority that section 2 contemplated the expansion of air transportation facilities of the United States in accordance with «a sound and constructive policy».[34]

Specifically, the Authority maintained that in determining the interest of the public in the granting of a new route certificate and hence acting in accordance with sound and constructive policy, evidence may be introduced as to the cost such a service initiates to the Government, more particularly the cost to the Government in the form of mail compensation.[35]

This «cost trade off» approach was largely a legacy it is contended of the immediately preceeding decade wherein most if not all United States air services both domestic and international had depended almost exclusively upon Federal Government assistance in the form of mail subsidy payments, a situation which (The Watres Act) attempted to rectify in 1930 much to the arguably unjustifiable «chagrin» of the subsequent Roosevelt administration.

By 1940, however, the domestic industry was experiencing a transition from a mail subsidy dependence mentality, but international operations were still heavily reliant upon air mail subsidies and in the wake of the Black Committee investigations of 1933/34 which scandalized the public and consequently

stigmatized the industry, the Authority felt extremely conscious during its early career to justify the allocation of route awards on a commercially and politically sound basis.

The Authority adopted the approach, clearly ennunciated in this decision, of considering the commercial revenue to be derived from the proposed operation as against the wider interests of the government, specifically, the needs of domestic and foreign commerce of the United States, the Postal Service and national defence.

Thus, in any one particular case the Authority argued, substantial governmental expenditures for the operation of a new route might be justified while in another case expenditures of a much smaller amount would not be warranted.[36]

The Authority then in conformity with this criteria proceeded to examine the proposed New Zealand service. In examining the needs of foreign commerce of the United States, the Authority regarded it as material to consider those needs in terms of volume, either existing or immediately in prospect, the amount of traffic which the applicant could reasonably be expected to transport following inauguration of the service, and the possible stimulation of foreign trade which would flow as a direct consequence of this service.[37]

The Authority examined the various statistics presented evidencing existing trade flows between the United States and

Australiasia, noting that exports from Australia to the United States constituted 3-1/2 per cent of total exports from that economy, while imports totalled 17 per cent over the period 1930-38. During 1936 the United States ranked fifth in imports and second in exports among the nations of the world exporting to and importing from Australia while in 1937 and 1938, the United States' position was second as to both exports and imports.[38]

The Authority noted the composition of exports and decided that trade between the two regions was complimentary in character - Australiasia exporting raw materials, and importing from the U.S. manufactured goods and machinery, thus the Authority concluded, the proposed route was «not simply a line of communication between San Francisco and Auckland but a means of commercial contact between the North American continent and the entire Australiasian section of the world».[39]

An examination of present transportation and communication facilities was also conducted, noting that the inadequacy of the existing facilities contributed to the failure of American business of realizing the full trade potential of this region. Regular scheduled ships of the American Matson Line took 17 days to Auckland and 24 days to Melbourne with each service being operated on the basis of one round trip per month. In addition there was no direct cable service between the United

States and Australasia, the only service being that provided by a British cable from Vancouver, which charged nearly double the rates for cables sent from Canada, the increased cost resulting from the prohibition on code messages following the commencement of hostilities in Europe.[40]

The testimony established that in 1940 the fastest mail service between San Francisco and Auckland was 17 days and between San Francisco and Sydney 20 days, compared with an 11 day air service between London and Sydney. In contrast the applicant's schedules would have required only 4-1/2 days from the United States to New Zealand.[41]

As to the effect on public convenience and necessity from the still politically sensitive perspective of the postal service, witnesses on behalf of the Post Office Department, produced extensive evidence and exhibits which contrary to the earlier stance of the Post Office Department which opposed the service, endeavoured to establish that public convenience and necessity would be indeed served by the inauguration of an air mail route to Australiasia.[42]

It is interesting to note that the United States Post Office regarded the establishment of an air mail route between San Francisco and Auckland as opening up a service to all of Australiasia whether or not air mail service was inaugurated across the Tasman between Auckland and Sydney.[43]

The Authority concluded albeit briefly and understating a very important consideration, that the needs of national defense, necessitated such an operation.[44]

In considering the operating costs of such a service, the Authority asserted that a proportionate part of the operating expenses of the existing San Francisco-Hong Kong service could be allocated to the New Zealand service; specifically the applicant estimated the cost of the New Zealand service at US$1,773,167 for the first year, with a transfer from the San Francisco-Hong Kong service of $313,667, out of costs now borne entirely by that service.[45]

Revenues estimated at $442,836 during the first year of operation were conceded by the applicant to be derived almost exclusively of United States mail pay - foreign mail revenue was estimated at $264,816 over for the same service - with the airline projecting that upon commencement of passenger services, the company would capture 5 per cent of first class passenger steamship traffic along the route.[46]

The inclusion of Los Angeles as an intermediary point which had been the basis of several objections to the Examiners Report both by the applicant and Los Angeles County was considered at length with the Authority conceding as to the importance of the Australiasian region as a market for southern Californian industries and the enormous growth industrially and financially in the Los Angeles region.[47]

The arguments used by the applicant and the intervening parties were to be a portent of similar arguments advanced during the course of the landmark but protracted Hawaiian case decided initially in 1946.[48]

Interestingly enough, the Authority was most singularly impressed with the contention that Los Angeles should be designated not only in view of the «national interest» but more importantly in view of the national defense ramifications.[49]

Determining that public convenience and necessity did require such a service, the Authority was then obliged to consider the fitness, willingness and ability of the applicant to perform the proposed service; a task simplified by the already successful acquisition of the applicant's certificate in the Trans Pacific Operations Case,[50] and the applicant's affilitate in the Trans Atlantic Operations Case.[51]

Specifically the Authority determined that fitness, willingness and ability involved consideration of the applicant's competency to operate the proposed service and its financial capacity to do so.[52]

Examining the applicant and applicant's affiliates'[53] operations across the mid Pacific, Caribbean and trans Atlantic routes, the Authority conceded that the applicant had the benefit of much experience in the operation of trans oceanic services with the result that it had developed the «technique necessary to the successful performance of such a service and a trained personnel experienced in such operations».[54]

Examining weather conditions, proposed equipment and financial intergation of the applicant with the Pan American Airways Organization as a whole, the Authority rather effortlessly found the applicant to be fit, willing and able, particularly in view of the substantial period of time during which the applicant had successfully engaged in trans Pacific air transportation.[55]

Thus, on the basis of the entire record the Authority authorized the applicant to engage in air transportation pursuant to section 401(d) between San Francisco and Auckland via the intermediate points and Los Angeles, Honolulu, Canton Island and Noumea subject to the explicit provision that the carrier not engage in local transportation between points in the continental United States, i.e. between San Francisco and Los Angeles,[56] thus forestalling the possibility of the applicant engaging in purely continental operations, an ambition that was not to be realized for a further 4 decades.[57]

APPENDIX III - FOOTNOTES

1. Pan American Airways Company (Nevada) New Zealand Operations Order No. 552, Docket No. 6-401 (E)-2 and 305, 1 C.A.J. 273, 1 C.A.A. CLXXXVIII (Decision rendered June 7, 1940).

2. A confusion in terminolgy was apparent in the Civil Aeronautics Act as enacted in 1938 and was remedied by Reorganization Plan No. IV, Sec. 7, effective on the 30th of June, 1940, 5 Fed. Reg. 2421-2423 (1940). Since that date the word 'Authority' referred to the Administrater and the five-manbody, while the latter was termed the Civil Aeronautics Board. For the purposes of this application, the world Authority is taken to mean the five-man board until the reorganization. That body was called the 'Board' in dealing with cases decided after the 30th of June 1940.

3. The phrase 'grandfather clause' stems from the practice of many southern states of letting citizens vote without passing the literacy tests provided their grandfathers had the right to vote. Originally these states, to prevent blacks from voting, passed laws which made passing literacy test a qualification of voting. These tests did prevent most blacks from voting - but they also disenfranchised many whites. To return the voting privilege to the latter many states passed laws enabling citizens to vote even though they failed the literacy tests provided their grandfathers had the right to vote; G. Goldman, Government Policy Toward Commercial Aviation, New York, King's Crown, 1944, p 83, footnote 21.

4. From May 14, 1938 to August 22, 1938.

5. N.G. Melone, Controlled Competition: Three Years of the Civil Aeronautics Act, Journal of Air Law and Commerce, Vol. XII, 1941, 318, p. 322.

6. Ibid.

7. Ibid.

8. Ibid.

9. Ibid., p. 323.

10. R.E.G. Davies, Airlines of the United States Since 1914, London Putman 1972, 495.

11. Pan American Airways Company (Nevada) Trans-Pacific Operations, Order No. 78, Docket No. 6-401 (E)-1 (June 27, 1939), 1 C.A.A. 214.

12. Pan American Airways, Inc., Latin American Grandfather Certificate, Order No. 592, Docket No. 14-401 (E)-1, 2 C.A.B. 111, (July 22, 1940).

13. Supra, note 1, p. 696.

14. Ibid., p. 697.

15. With the Acquisition of the smaller domestic trunk carrier National Airlines in 1979.

16. Supra, note 1, p. 697.

17. Ibid.

18. Ibid.

19. Ibid., p. 698.

20. Ibid.

21. Supra, note 11.

22. Supra, note 1, p. 699.

23. Ibid., p. 700.

24. Ibid., pp. 700-701.

25. Ibid.

26. Ibid., p. 702.

27. Ibid.

28. Ibid.

29. Ibid.

30. Ibid., p. 703.

31. Ibid.

32. Ibid., citing Northwest Airlines, Inc., certificate of public convenience and necessity (Duluth-Twin Cities Operation) Docket No. 131.

33. Ibid., citing American Airlines, Inc., et al., certificate of public convenience and necessity (North Beach operation) Docket No. 287.

34. Ibid., p. 704.

35. Ibid.

36. Ibid.

37. Ibid.

38. Ibid., p. 705.

39. Ibid.

40. Ibid., pp. 706-707.

41. Ibid., p. 707.

42. Ibid.

43. Ibid., pp. 707-708.

44. Ibid., p. 708.

45. Ibid.

46. Ibid., pp. 708-709.

47. Ibid., p. 711.

48. Hawaiian Airlines, Ltd. Et Al., Hawaiian Case Docket No. 851, 7 C.A.B. 83 (Decided May 17, 1946).
Earlier arguments were also advanced by Senator G. McAdoo of California, Chairman on the Senate Committee on Patents, who in a letter to Juan Trippe in 1934 advocated for the inclusion of Los Angeles as either a terminus or intermediate point along any Pacific service. Remarked McAddo «California's eyes have long been turned to the west. We know that Asia and the great Pacific arena offer a vast opportunity for those who have the vision, the courage and the enterprise to explore it.» PAA 10.10.00 Pacific Division, 31st July 1934, Letter from Senator William McAdoo to Juan Trippe.

49. Supra, note 1, p. 711.

50. Supra, note 11.

51. Pan American Airways Company (Delaware) Trans Atlantic Operations Order No. 55, Docket No. 163 (May 17, 1939).

52. Supra, note 1, p. 711.

53. Pan American was broken up into several operating subsidiaries in order to avoid the imposition of any tax levied by a government other than the United States, specifically to avoid the levy of a capital tax upon the assets of the entire conglomerate.

54. Supra, note 1, p. 712.

55. Ibid.

56. Ibid., p. 713.

57. Supra, note 15.

APPENDIX IV

THE AMERICAN EXPORT AIRLINES LITIGATION

1939 was to herald for Pan American the commencement of the first serious challenge to that airlines hegemony, a challenge that was to continue for ten years at both a legislative and judicial level. Despite the undercurrents of opposition that had existed within government since the Black Committee Investigations and the tacit recognition by the United States of the importance of the airline Company in the successful implementation of American foreign policy, the meteoric rise of the airline in the space of ten years into what was becoming universally acknowledged as singularly the most important airline in the world, was not occassioned without incurring criticism both within and outside the government.

Consequently, when American Export Airlines sought authorization from the Civil Aeronautics Authority on the 9th of May 1939 to operate services across the North Atlantic in competition with Pan American, the opponents of Pan American rallied in unison to promote the cause of the so-called usurper, or as it has been so ingloriously referred to as the "scrappy little champion".[1]

While having no direct and immediate bearing on the activities of Pan American in its strategy to commence services in the southern Pacific region, the American Export challenge does warrant consideration as it signals the evolution of a profound

change in American international aviation policy, one from of the unofficial endorsement of a monopoly or chosen instrument doctrine to that of an official government policy promoting multiple designation of American carriers on international services emanating from the United States.

Although the mutiple designation policy required considerable refinement to reach the position it has attained today as an intergral part of American international aviation policy, the origins and roots of the transformation were clearly enunciated during 1939 and active debate continued for the better part of ten years, accelerated in part according to some critics by the intervention of the Second World War and the opportunity this afforded previously domestic American carriers to operate international services.[2]

Whatever the specific reasons attributed to this change or transformation were, it became patently obvious by 1946 that Pan American was not to retain its unqualified position of eminence it had, according to some critics, so ruthlessly attained.

The irony is, of course, that the Australian Government decided upon a reverse course, advocating the adoption of a single international carrier, except for the brief B.C.P.A.[3] experiment from 1946 to 1954, which essentially zoned Autralia's international services, although it may be argued that the Australian

Government regarded the operation of B.C.P.A. as a mere prelude to operation by an Australian carrier over the Pacific at a subsequent date.

The irony is, of course, related to the fact that this divergence of government policy over single and multiple designation of international carriers, originating from this period, later formed the basis of a series of protracted disputes between the Australian and American Governments for at least two decades.[4]

American Export Airlines more commonly referred to as Amex, was the brainchild of John E. Slater, a director of American Export Lines, a shipping company which had undergone a remarkable financial rejuvenation, attributable in part to the acquisition of a new and capable management team and the enactment of the Merchant Marine Act of 1936 which through a series of government subsidies, essentially pumped healthy profits into emanciated American steamship companies.[5]

American Export in capitalizing upon the American Government's initiative in attempting to stave off the threat of foreign subsidized shipping lines, had developed as a consequence, a profitable freight trade and exclusive U.S. mail contracts centered in the Mediterrean area.

As early as 1936 the company had conducted feasability studies in order to determine the most successful means of competing effectively against European subsidized ships and

determined that the most satisfactory answer was to be found in the utilization of aircraft and accordingly incorporated in the airline subsidiary in April of 1937.[6]

As the parent company was a steamship line, requisite authority was sought and immediately obtained from the United States Maritime Commission.[7]

A financial programme was thereafter established by the airline which required the expenditure of some $200,000 on flight surveys and $700,000 on equipment. Such an expense had as Pan American had previously advocated, necessitated the acquisition of an air mail contract. However, in order to secure such an award the airline was required to apply on the 9th of May 1939[8] to the Civil Aeronautics Authority for a certificate of convenience which in turn necessitated establishing the justification for a route certificate, a process which challenged the Government's hereto chosen instrument doctrine.

Pan American immediately rallied and sought support from various government departments and agencies, the most important of which it considered to be the Post Office Department which the Company believed it had secured. Judging by the remarks of the Assistant Postmaster General that was not an unjustifiable conclusion, who in the course of the application hearings calculated that on the basis of 100 per cent performance by two carriers, it would cost the Post Office Department about $1,388,400 more annually to maintain a second carrier than to

increase Pan American's flight frequencies.[9] However, the support Pan American believed it had obtained was illusionary, as the Post Office witness who was responsible for those remarks, J.M. Donaldson, later wrote to the Civil Aeronautics Authority in January 1940, advocating the adoption of a competitive airline policy but refused to name the second carrier which it regarded as suitable for the route.[10]

Other agencies also declared themselves on the monopoly-competition issue. As early as 1935 the President's Interdepartmental Committee had issued a statement after a conference with foreign airline executives which read ironically enough in relation to the trans Pacific issue, that all agreements with the United States were to be made upon the basis of reciprocity, and «it is not the intention that any route shall be developed for the exclusive use of any one airline».[11]

The United States Navy, traditionally a staunch supporter of Pan American particularly in the airline's Pacific activities, appeared also to be desserting its former ally Pan American. The Navy now advocated competition in international air transportation, based upon the notion that two or more airline companies would provide twice the trained personnel that was needed in time of war. Indeed, the Navy was so convinced of the advantages associated with a competitive airline policy that it loaned to AMEX, pilots to assist that airline with survey flights when the company was experiencing crew shortages.[12]

One of the most frequently cited arguments used by the opponents of Pan American was based upon the Civil Aeronautics Act, specifically the preamble which provided for «competition to the extent necessary to assure the sound development of an air transportation properly adapted to the needs of foreign and domestic commerce».[13]

Senator Patrick A. McCarren later a principle advocate of industry concentration and an architect of the 1938 Act, declared that competitive qualifications for international operations would be met by the rivalry of foreign airlines. That, he maintained, was understood at the time the legislation was drafted but opponents of that interpretation maintained that foreign competition had nothing to do with American domestic policy and thus could not be used to prevent competition amongst American carriers.[14]

Harllee Branch, former post office official in charge of air mail and subsequently a member of the Civil Aeronautics Authority, asserted in an often repeated and quoted remark before a Senate Committee:

> «I feel first of all that this is an opportune time to get any service we have well entrenched before the Europeans settle down and inaugurate competitive services. I feel that if this company (AMEX) is thrown out with a resultant loss of somewhere between two and three million dollars, it will be a long time before another company will come in and invest (that much).... on the chance of being authorised to operate a service, and it will probably close the door to any additional service across the Atlantic.»[15]

Slater of AMEX also pursued this line of argument and maintained that a government policy of fostering a single airline was understandable in the pioneering era, but he added that era had in 1939 been eclipsed. Slater cited the high rates of passenger and mail charged by Pan American and the fact that Pan American had always been granted by the Post Office, the maximum subsidy rate. The mere fact that Pan American offered to increase its frequency across the Atlantic, disclosed during the course of the AMEX hearing was, only as a direct result of a challenge being offered by a competitor. In addition Pan American's offer to carry mail across the Atlantic at the ridiculous rate of 1/1000 of a cent a pound amounting to a loss of $20,000 per month (c.f. the rate proposed to New Zealand of $2 per pound) was of a strictly short term duration «competition is cheaper in the long run because a second carrier would provide the yardstick of efficiency».[16]

Glenn L. Martin who harboured a deep resentment towards Pan American over its decision to order from Boeing, aircraft as its replacement for the first generation of long range flying boats, produced by his company the M-130 was as to be expected critical of the single destination policy, maintaining that the ramifications for the industry were devestating. Martin had been left with a huge inventory and redundant infrastructure following the Pan American decision.[17]

Trippe responded to Slater's challenge by arguing that the successful application of an airline which was the wholly owned subsidiary of a steamship line had the potential of creating a vertical monopoly of ocean traffic, which could be accomplished by a means of cross subsidization from other components of the transportation conglomerate and thereby defraying losses which would be inevitably incurred in the operation of international air services, at least in the initial stages.[18]

Trippe then proceeded to elaborate upon the enormous infrastructure an airline such as Pan American required, which to his credit, he had so successfully established, though not as singularly as Trippe would have liked everyone to believe.

The intervention of the Second World War in Europe with the consequent reduction in foreign government receipts from return mail cargos produced in addition according to Trippe, an essentially inequitable situation as far as Pan American was concerned. Finally the proclammation by President Roosevelt in November 1939 declaring the area around France and Great Britain as a Combat Zone, prevented Pan American flying to either Southampton or Marsailles and later Italy, thereby forcing both carriers to serve exactly the same terminal point, Lisbon.[19]

Judging by the length of the testimony, 4,030 typewritten pages and oral hearings that lasted 37 days, the AMEX application was one of the most important decisions of the administrative agency:

> «The argument up to this time had been more than a clash between two jealous private companies. It was the beginning of the struggle for postwar airways. It was the beginning of a new era in air transportation. And it was the test case as to America's future policy regarding world air commerce.»[20]

The newly reorganized and renamed Civil Aeronautics Board rendered its decision on the 12th of July 1940 and it appeared a victory for AMEX. The airline was granted a temporary certificate to operate from the United States to Europe, although terminal points were not specified because of the «fluid situation during the war».[21]

The Board's decision warrants examination because as the Board itself remarked, «the issue thus presented involved the entire underlying policy of the Civil Aeronautics Act of 1938».[22]

The Board had found itself in a rather embarassing predictament. The old Authority had announced immediately following the passage of the Civil Aeronautics Act in 1938, that it was opposed to «uneconomic, restrictive competition and wasteful duplication of services». This statement was made ostensibly to appease an apprehensive industry, «still groggy from the effects of the air mail contract cancellations».[23] Thus the question arose as to how the decision of the Board could be reconciled with the Authority's previous stated position.

The Board drew upon a precedent initially established by the Interstate Commerce Commission concerning the application of a railroad carrier against carriers whose traffic would be

diluted if the applicant were granted the operating certificate. The application was denied in that instance but the Board differentiated the decision on the basis that in this case the two airlines were to operate parallel services only for the duration of the war, i.e. a temporary duplication. The Board was more fortunate, however, in having the more recent ICC decision handed down in on the 15th of February 1940, which held that «an additional service may be required in the public interest even though the existing operator is supplying...what appears to be sufficient service, where there is lacking any worthy competitor...and where available business is ample to support another operation».[24]

Relying upon this precedent, the Board stated its specific reasons for breaking the Pan American monopoly.

Firstly, the inauguration of services by a competing American carrier, would it was held stimulate and accelerate technical advances in the whole industry. This competition would not be supplied to the same degree and with the same beneficial effects by foreign flag carriers. In fact at the time the decision was delivered, there was no competition from foreign flag carriers.[25]

The Board also noted that overseas and foreign flag carriers, like Pan American and American Export, were not subjust to such comprehensive regulation under Title IV of the Act as were domestic carriers. Thus, there was no duty to provide

adequate services, equipment and facilities; the stimulus the Board decided, must be supplied by United States competitors. The Board was unable to regulate fares, rates and charges; competition it concluded must thus be the medium through which control is exercised:

> «We are unable to find that the continued maintenance of an exclusive monopoly of trans Atlantic American flag air transportation is in the public interest, particularly since there is no such public or express rate to be charged or over the standards of service to be rendered as is customarily provided in the case of a publically protected monopoly.»[26]

Secondly, national defence would benefit from such competition since the research and development by foreign competitors would not be available to the national defence of the United States, it was reasoned.[27]

The Board next observed that the additional cost to the government in subsidizing American Export's service should not have controlling significance in the case; it also declared that the alleged superiority of Pan American's equipment was not decisive of the issue and that it was a matter for decision by the travelling public.[28]

Accordingly, the Board granted a temporary certificate to American Export but the Board's action «precipitated the issue into the national spotlight».[29]

Pan American immediately moved to secure a certification of the record for review by the Circuit Court of Appeals for

the Second Circuit. The Board responded by seeking to have the petition dismissed on the ground that the court was without jurisdiction to review the order.[30]

The court in granting the Board's motion, held that section 1006(a) of the Act did not authorize review of an order which was subject to approval or disapproval by the President who was the ultimate arbiter; the authority vested in him would render such judicial review futile.[31]

> «It seems incredible that in enacting Section 1006(a), Congress intended to permit a review of the action of the Board in cases where the constitutional authority of the President to negotiate with foreign nations and to proceed upon confidential and other information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates and even of the denial of them, would necessarily render our review futile.»[32]

One issue that arose out of the original Board decision and the subsequent Court of Appeals decision was the question of common carrier participation in air carriers, specifically section 408(a)(5) of the Act, which provided that «It shall be unlawful...for any carrier...to acquire control of any air carrier in any manner whatsoever.»[33]

The Board with one exception,[34] construed the word «acquire» to mean that a surface carrier was restricted from taking over an existing air line. This accordingly did not prevent a steamship company from establishing a new air service, the majority insisted.

> «Section 408(a)(5) applies to cases involving the control of air carriers only where the acquisition of control of a corporate entity occurs at a time when the entity is already an air carrier.»[35]

The Court of Appeal considered such an interpretation as «unduly liberal» and held that «to acquire control» is «to take all steps involved in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources, with a certificate authorizing operation».[36]

The above decision had enormous repercussions for shipping interests and initiated a series of Board hearings and a House Sub-Committee investigation hearing[37] in an attempt to resolve the issue but ultimately to no avail for the merchant marine industry.

American Export Airlines was as a consequence forced to reorganize its corporte structure and create the airline as a separate company and not merely as a subsidiary.

The new airline was, however, faced with new financial problems which necessitated the award of a new mail contract. Accordingly, a request of $1,200,000 in mail pay from the Senate Appropriations Committee was submitted.

Pan American seized the opportunity to thwart the «usurper's» ambitions and was able to convince the Committee not to appropriate the necessary funds, a decision that drew strong criticism of Pan American - a matter of great significance in later years.[38]

The House Committee also repudiated the CAB decision, which prompted the remark:

> «the actions of the committees shows that the Board must write opinions which will not only survive the courts but will also withstand Congressional criticism; for Congress, in holding the purse strings, can effectively veto the policy-determination of the agency which it has created.»[39]

American Export, however, specifically through the intervention of the war, was able to secure a contract with the Naval Air Transport Service to operate a wartime trans Atlantic route.[40]

This was subsequently followed by the award of a temporary certificate to fly between New York and Foynes in Ireland on the 10th of February 1942, almost five years after the carrier's first application to the Authority.[41]

Pan American did not relinquish its ambition to retain its position as the single American international carrier and throughout the decade endeavoured to realize that objective.[42] However, the majority of opinion was now clearly against such a proposition; American carriers were now destined to compete with one another, internationally.

FOOTNOTES - APPENDIX IV

1. H.L. Smith, Airways Abroad, Madison, The University of Wisconsin Press, 1950, p. 46.

2. C. Solberg, Conquest of the Skies, Boston, Little, Brown and Company, 1979, p. 262.

3. British Commonwealth Pacific Airlines.

4. Specifically over the additional designation of American and later Continental Airlines as authorized United States carriers.

5. Supra, note 1, p. 47.

6. Ibid., p. 46.

7. Ibid., p. 47.

8. Civil Aeronautics Authority, Docket No. 238, Orders Serial Number 581, pp. 2-4, 2 C.A.B. 16 (July 12, 1940).

9. Supra, note 1, p. 49.

10. Ibid.

11. Ibid., pp. 49-50.

12. Ibid., p. 50.

13. U.S. Statutes at Large, 52:977; US Code Title 49, Chapter 9.

14. Supra, note 1, p. 50.

15. Ibid., pp. 50-51, citing statement of Harllee Branch, before the Treasury and Post Office Department Appropriation Bill, 1942, Hearings on H.R. 3205, pp. 225-27.

16. Ibid., p. 51.

17. Ibid., p. 52.

18. Ibid.

19. Ibid., p. 55.

20. Ibid.

21. Supra, note 8.

22. Ibid., p. 29.

23. Supra, note 1, p. 56.

24. Ibid., p. 57, citing United States Law Week, Vol. 8, p. 431.

25. N.G. Melone, «Controlled Competition: Three Years of the Civil Aeronautics Act», The Journal of Air Law and Commerce, Volume XII, 1941, 318 at p. 340.

26. Supra, note 8, p. 34.

27. Indeed before the House Appropriation, Hearings, a member of the Board testified that the «national defense interests primarily tipped the scales in American Export's favour, and he regarded them as overwhelming the economic facts»; supra, note 25, p. 341, footnote 131 citing Hearings before Subcommittee of Committee on Appropriations on H.R. 10,539, 76th Cong. 3rd Sess., (1940) 194-216 at p. 236.

28. Supra, note 25, p. 341.

29. Ibid.

30. Pan American Airways Co. v. Civil Aeronautics Board, 121 F. (2d) - 10 US Law Week 2074 (C.C.A. 2nd 1941).

31. Ibid.

32. Ibid., at p. 2080.

33. Section 408(a) provided that «It shall be unlawful, unless approved by order of the Authority, as provided in this section

> (5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever.»

34. Member Oswald Ryan.

35. Supra, note 8.

36. Supra, note 30.

37. Specifically Hearings before the Subcommittee on Merchant Marine in Overseas Aviation of the US Congress House Committee on the Merchant Marine and Fisheries, House of Representatives, 78th 2nd Sess. on H. Res. 52.

38. Supra, note 1, p. 59.

39. Supra, note 25, p. 243.

40. R.E.G. Davies, Airlines of the United States Since 1914, London Putman 1972, page 362.

41. Ibid.

42. Specifically through the creation of the All-American Flag Line through Congress.

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