PUBLIC CONTROL OVER THE AIR CORPORATIONS IN THE U.K.

GILMOUR, J.H.C.

Public Control Over The Air Corporations

In The United Kingdom

by

James H.C. Gilmour. LL.B. (Edinburgh)

Abstract.

A thesis designed to examine the variety of political, admin--istrative and legal controls which exist over the British Overseas Airways Corporation and the British European Airways Corporation in the United Kingdom. It expounds the nature and characteristics of the two public air corporations and relates the historical factors which led to the nationalisation of the British air transport industry. There has been much discussion on the theory and rôle of the public corporation in the Brit--ish constitutional and economic framework, especially on the relationships that should exist between the public air corp--orations, Government and Parliament. It is with this matter that the dissertation is primarily concerned, in particular, the doctrine of ministerial responsibility, its haphazard dev--elopment, and how it has operated in practice. Apart from scrutinising the means and effect of parliamentary accountab--ility, the paper also illustrates the operational controls that BOAC and BEA are subjected to by the independent Air Transport Licensing Board. A chapter is devoted to the question of judicial review of the air corporations' administrative actions and whether or not the statutory duties of the corpor--ations are legal duties.

The thesis is original not only because it sets out, in concise form, the divers controls exercised over BOAC and BEA but also because it illustrates the irregularities, con--flicts and confusion that exist in the superintendence of the public air corporations.

Institute of Air and Space Law,
McGill University,
Montreal.

July, 1969.

PUBLIC CONTROL OVER THE AIR CORPORATIONS IN THE UNITED KINGDOM

by

James H.C. Gilmour. LL.B. (Edinburgh)

A thesis submitted to the Faculty of Graduate Studies and Research, McGill University, in partial fulfilment of the requirements for the degree of Master of Laws.

Institute of Air and Space Law,
McGill University,
Montreal.

July, 1969.

Table of Contents

Chapter I

Introduction

In the sphere of government institutions the public corporation is, without doubt, the most important innovation of the twentieth century. Of course, public authorities in various forms and enjoying various degrees of autonomy have existed for more than two centuries. (1) However, the public corporation, as it is known today, has peculiar distinguishing characteristics. It was contrived particularly as an organ of public enterprise, the so-called 'chosen instrument'. (2)

The air corporations, British Overseas Airways Corpor--ation and British European Airways Corporation, (3) undertaking air transport services, form part of the public domain. The principal reason for introducing them into the public sector of the economy was to ensure political control by Parliament and the Executive. As organs of public administration they are sub--ject to public policy just as much as a government department but they must still be carefully distinguished from regular departments under the control of Ministers.(4) Indeed, one of the

---

1. The forerunner of the modern public corporation was the Mersey Docks and Harbour Board established in 1857.

2. See Robson, Nationalized Industry and Public Ownership 2nd. ed., (1962) Ch. III.

3. Hereinafter referred to as BOAC and BEA respectively.

4. See post Ch III.

underlying reasons for their introduction was the need for a certain degree of freedom and enterprise in the management of their commercial affairs, a factor considered lacking in gov--ernment departments.

BOAC and BEA are subordinate to Parliament and Govern--ment; they were established by Parliament; their functions, powers, purposes, property and assets were given to them by Par--liament; they cannot unilaterally modify these powers or pur--poses or terminate their undertakings. The air corporations do, however, have a large measure of independence especially in relation to such matters as management, personnel, finance, budgeting and development. Their constitutional status required that, if there was an imposing degree of control by the Treasury over finance and personnel and if there was Parliamentary super--vision over management, this would be a burden on efficiency and initiative in an industry of a commercial character. But BOAC and BEA are not autonomous institutions and were never intended to be so.

The air corporations are subjected to both public control and public accountability. They are not the same. Accountability is essentially subservient to public control although it may be a weapon of public control. The basic objective of accountability is to inform Parliament, the Government and the general public that the air corporations are being efficiently managed and are not in a state of stagnation. It also serves as a safeguard against exploitation of the customer by means of improper use of

the monopolistic position enjoyed by BOAC and BEA.(5) Another function of accountability is to shed light on the policies and activities of BOAC and BEA, the information received indicating whether objectives are being successfully pursued.

Information arrives by several routes. There are the annual reports of the corporations; there was the Air Transport Advisory Council. (6) Information is also obtained by the Board of Trade in the course of its everyday relations with BOAC and BEA. There is the information which Members of Parliament get from direct correspondence with the air corporations and also the information received from the President of the Board of Trade (7) in reply to Parliamentary questions. Members of Parl--iament are also kept informed by means of Select Committees of the House of Commons and any other departmental or independent committees of inquiry.

Public accountability is not merely the giving of infor--mation but should be assessed in terms of its effect on the air corporations who are called upon to account through these various channels. Accountability, in effect, breeds a sense of responsibility in BOAC and BEA and no one can doubt the high

---

5. The idea of monopoly has diminished, particularly since 1961. The topic is discussed in later chapters.

6. Superseded by the Air Transport Licensing Board under the Civil Aviation (Licensing) Act 1960.

7. The President of the Board of Trade is the so-called 'spon--soring Minister' of BOAC and BEA, but will be generally referred to throughout as the Minister.

sense of responsibility shown by the members of the boards of the air corporations who direct their administration. This, therefore, is perhaps the most important feature and the most valuable characteristic of accountability.

While accountability is imposed on the air corporations without them being subject to ministerial control in respect of routine matters and administrative decisions, or liable to severe Parliamentary scrutiny of their day-to-day management, public control assumes that major policy matters must be distinguished from administration. The theory of the modern corporation demands a desirable division and, at the same time, a successful comb--ination of political control and managerial freedom. Certain powers in matters of major political importance or affecting the public interest are reserved to the Minister who is answerable to Parliament while all other matters are left to the air cor--porations acting under their statute of incorporation. Further, emphasising the authority of the Government, there are powers of direction and appointment to the boards of the air corporations.

What is less obvious but equally important is the potent influence which the Minister can impose on the activities of BOAC and BEA if he feels so inclined. If it occurs, the result is the near destruction of the distinction between management and policy and the blurring of responsibility in their spheres of activity. One of the essential features of the modern public corporation is that there should be no ministerial responsibility to Parliament for the day-to-day management of the air corporations.

If the Minister meddles in the routine activities of BOAC and BEA, a vacuum exists. As the position is not clearly defined, it is necessary that there should be a clear and recognised alloc--ation of their respective spheres.

As political, social and economic conditions change, the allocation of power and responsibility can change. If the Minister exerts non-statutory powers on the air corporations, the situation can become somewhat confused. It is with these thoughts in mind that this dissertation attempts to discuss the topic of Parliamen--tary and Ministerial control over the air corporations and how it has operated in the last three decades. To give a fuller apprec--iation of the constitutional position, it is proposed also to recall the history of BOAC and BEA since their inception and to describe their nature and special characteristics.

Another problem inherent in any discussion of organs of public enterprise is the relationship between the air corporations and the customer. It was recognised that there was a need to safe--guard the interests of the individual especially as the air corporations enjoyed a position of monopoly. This rôle was under--taken by the independent Air Transport Advisory Council. (8) It was thus an instrument of public control over BOAC and BEA but of much greater importance was its work in the licensing field for

---

8. Established under the Civil Aviation (Air Transport Advisory Council) Order, 1947 (No. 1224) made by virtue of the Civil Aviat--ion Act, 1946, s.36, subsequently replaced by the Civil Aviation Act, 1949, s.12.

the operation of air services until it was abolished in 1960 and the Air Transport Licensing Board established as a bona fide licensing authority. (9) It is therefore the intention in this paper to trace the development of the Air Transport Advisory Council and the Air Transport Licensing Board and to indicate how the latter body, in particular, became an instrument of control over BOAC and BEA.

A chapter will also be devoted to the relationship between the air corporations and the courts for, in any discussion of the rule of law, the scope and availability of actions by individuals against public corporations inevitably arises. The place of the courts in the framework of the state can only be assessed after a consideration of such matters. What follows in this introduction will be concerned with general principles in relation to what protection the courts can offer to private individuals against the air corporations.

The insistence upon the ordinary law and the ordinary courts has, it is believed, had a limiting effect upon the operation of the courts, since rules which work equitably between individuals, do not necessarily do so between an individual and a public author--ity. Further, remedies may not always be appropriate. (10) It would appear at first glance that the ordinary law can be applied

---

9. Civil Aviation (Licensing) Act, 1960, s.9 (b) and s.1 (1).

10. Consider, e.g., the consequences of a refusal to consider the purposive element in a statute in Western Heritable Investment Co. v Glasgow Corporation, 1956 S.C. (H.L.) 64.

to actions against public corporations but this is not so. Rules akin to prerogative rules seem to emerge. Therefore liability in reparation may be affected by the public nature of their resp--onsibilities and by the fact that they are performing statutory duties and functions. (11) The character of public authorities in general in the United Kingdom does affect the substantive law as it is applicable to them in ways similar in principle if not in phraseology to the rules applicable to the Crown. In the same way, the remedies available to the individual are affected. For example, the rules giving a title to sue are not clearly defined with the result that the courts carefully avoid being placed in the position of controlling services, preferring, rather, to control excesses. (12)

The entire question of government and government control cannot be transferred to the courts by means of actions which intend to invite courts to enforce generally phrased statutory duties and it is fear of such a consequence which has induced judicial reticence.(13) In a modern society studded with state activity, the denial of public law as a distinct body of law, except for teaching purposes, and the consequent departures from

---

11. See Keogh v Edinburgh Corporation 1926 S.C. 814, where it was held that in a matter of administration such as the lighting of lamps, the standard of performance could not be absolute but must be relative to the best available means of achieving performance.

12. Watt v Kesteven C.C. 1955 1. Q.B. 408.

13. British Oxygen Co. Ltd. v South of Scotland Electricity Board 1959 S.C. (H.L.) 17.

the rules of private law are regarded as exceptions, and so little or no attempt is made to systematise them. If, therefore, there is an inadequate development of concepts and rules in the courts, the critical concept of a title to sue remains undeveloped (14) as do others such as the operation of the ultra vires rule.(15)

With specific regard to BOAC and BEA, judicial control must exist but its scope is affected by the nature of these corporations.The Air Corporations Act 1967 s. 3 (1) gives power to BOAC and BEA to provide air transport services and further states that:

> " it shall be the duty of each of the corporations to exer--cise those powers so as to secure that the air services which they may provide are developed to the best advantage, and,in particular, to exercise those powers so as to secure that the services provided by the corporation are provided at reasonable charges"

Such a formulation, which is not untypical, gives legal power but leaves its scope largely undefined unless the courts are to assume the capacity to judge what is practicable.However, the expertise of courts lies in law not what is "to the best advan--tage" or what are"reasonable charges". But where a particular individual or group of individuals is particularly affected as a consequence of a failure to observe some general principle, there may be a remedy in the courts. (16) What interest will suffice

---

14. D.&J. Nicol v Dundee Harbour Trustees 1915 S.C. (H.L.) 7. There, however, a fiduciary element existed.

15. On the difficulties of challenge to public authorities, see generally, Ganz, "A voyage of discovery into administrative action" 1963 Public Law 76.

16.Adams v S. of S. for Scotland 1958 S.C. 279. An action of dec--larator and interdict was involved but there was a special

is generally not clear. In effect, any dispute between the air corporations and an individual is concerned with the scope of the actio popularis, in particular, the definition of sufficient prop--rietary interest. However, in the more direct matters of contrac--tual and delictual liability, the courts are free to intervene. (17)

The advent of the air corporations solved a number of problems which were largely economic in nature but it has also created several new perplexities varying in degrees of difficulty. Those problems which have caused most difficulty and confusion concern the relations of BOAC and BEA with the Government and Parliament. It is with this situation and the interests of the general public that the present author is primarily concerned. With the passage of time there is one thing of which there can be no doubt. The operation of air transport services by the public air corporation in the United Kingdom is here to stay.

---

endowment interest.

17. Mersey Docks and Harbour Board v Gibbs (1866) L.R. 1. H.L. 93.

Chapter II

The Historical Background

The public airline corporation arrived in the United Kingdom with the passing of the British Overseas Airways Act in 1939. (18) The Bill was introduced, sponsored and negotiated through Parliament by a Conservative government which, from the point of view of political philosophy, was opposed to nationalisation and public ownership. There were convincing arguments to persuade supporters of private enterprise that airline nationalisation was the wisest course. The main reason, then and before, was financial.

British air services had, in fact, been bedevilled by economic factors from the time a few pioneer airlines began developing commercial operations immediately after the First World War. They suffered financially from the fierce competition among themselves and, more particularly, from foreign operators who were able to undercut the fares of the British airlines because they received subsidies from their respective governments. (19) At this time, however, the British Government was quite unmoved by the various requests from the airlines for financial assistance. (20) In the

---

18. 2 & 3 Geo. 6, c.61.

19. For accounts of the inter-war period see Higham, Britain's Imperial Air Routes, 1918-1939. (1961) and Davies, A History of The World's Airlines. (1964)

20. The attitude of the Government was summed up by Winston Churchill, then Secretary of State, who declared: "Civil Aviation must fly by itself; the Government cannot possibly hold it up in the air." 126 HC Deb., col.1622 (March 11, 1920).

following year, however, there was a change in Government policy and subsidy schemes were introduced in 1921 and 1922. The revised scheme of 1922 contemplated the elimination of competition among the air services receiving state support and the extension of services further into Europe. (21)

In 1923, the Hambling Committee presented its report on the financial future of civil aviation and the whole question of gov--ernment subsidies. (22) It recommended the creation of a private company to "run entirely on business lines with a privileged posit--ion with regard to air transport subsidies, " but to be free from government control. The recommendations of the Hambling Committee were in large part implemented with the establishment of the Imper--ial Air Transport Company. (Imperial Airways) The new company, by agreement, took over the assets of the existing airline compan--ies and was guaranteed a subsidy of £ 1,000,000 over a period of ten years. It remained a private corporation, however,free from direct government control although the Government could appoint two members of the board of directors. Imperial Airways received a monopoly of government subsidies and was encouraged to develop the Empire and European routes.

In the 1930's there was a considerable increase in the number of independent companies undertaking domestic services

---

21. See The Report of the Air Ministry on the Progress of Civil Aviation, 1922-3, Cmd. 1900 (1923).

22. Report on Financial Assistance to Civil Air Transport Companies, Cmd. 1811 (1923).

which could not be regarded as profitable propositions, One result of this uneconomic situation was the formation of British Airways Ltd. in October 1935 by the amalgamation of United Airways Ltd., Hillman's Airways Ltd., and Spartan Air Lines. In the following year British Continental Airways Ltd., was merged with British Airways. The situation, therefore, was that there were two large private operators, one of which was receiving a subsidy, competing in a limited market.

In 1936, however, the Air Ministry released itself from the agreement it had made in 1924 with Imperial Airways not to subsi--dise any other organisation for heavier-than-air services operated in Britain and continental Europe by providing a government subsidy to British Airways for certain European routes , The next year the Maybury Report (23) recommended the establishment of a scheme for licensing all internal airlines for the purpose of ensuring effect--ive service and the avoidance of wasteful duplication. (24) Although this proposal was implemented for a short period, it was a case of " closing the stable door after the horses had bolted," for, notwithstanding the fact that there was a degree of governmental control or influence over the routes and services of the subsidised airlines, there was ruinous competition for a limited amount of traffic and neglect of routes particularly by Imperial Airways.

---

23. Report of the Committee to consider the Development of Civil Aviation in the United Kingdom, Cmd. 5351 (1937).

24. See further, post Ch. V.

Perhaps the most profound anomaly was the fact that shareholders in Imperial Airways and British Airways were prepared to invest capital for new equipment only if the Government could guarantee the airline's profits in advance. Regarded as the two British 'chosen instruments', British Airways and Imperial Airways were charged with paying dividends to their shareholders from Treasury subsidies. These and other trenchant criticisms led the Secretary of State for Air to appoint a Committee of Inquiry in November 1937 to study the situation.

The Cadman Committee (its chairman was Lord Cadman) presented its report in March 1938. (25) It largely endorsed the operational and financial criticisms which had been directed at Imperial Airways and British Airways. The Committee concluded, inter alia, that British external air transport should be concen--trated in a small number of well-founded and substantial organ--isations; that the same external route should not be operated by more than one British company, so as to avoid indiscriminate competition; that Imperial Airways should be concerned primarily with the development of the Empire air services and certain other long distance services but that its right to be associated with "short-haul" services to France and Italy, should be recog--nized; that British Airways, suitably organised, should develop the other air services in Europe and that there should be close

---

25. Report of the Committee of Inquiry into Civil Aviation, Cmd. 5685 (1938).

working liaison between Imperial Airways and British Airways.

While the subsidised airlines continued their perilous division of the spoils, the Government considered the Cadman Report. It accepted in principle the recommendation that Imperial Airways and British Airways should work in separate spheres. But when cons--ideration was given to the manner of implementation, it was dec--ided to go further and amalgamate the two companies in a single statutory corporation. The Conservative Government considered it necessary to take steps to ensure that the large additional capital needed for development would be raised on terms which would not be unduly expensive to the Exchequer. Further , the expected rapid expansion of overseas routes called for a pooling of resources and the accumulation of all available technical and administrative experience. With existing and projected responsibilities, a private corporation with limited liability was thought to be at a disadvan--tage as it would be concerned primarily with the interests of share--holders and would have to be certain of subsidies and contracts before embarking on long-term development programmes. Thus the need to provide financial aid from public funds for several years to come undoubtedly played the major part in the decision to entrust the operation of air services to a public corporation. It has been suggested (26) that another related reason for nation--alisation was Sir John Reith's acceptance of the chairmanship of Imperial Airways in 1938. It is here contended that, although

---

26. See Corbett, Politics and the Airlines, p.99.

the Government wanted him to improve the relations between Imp--erial Airways and the Air Ministry and even though he had his own ideas about the constitution of civil aviation, (27) his appointment as such could hardly be regarded as having any parti--cular bearing on the major political decision which the Conserv--ative Government took. Indeed, the concessions to Socialist ideals, which caused a strong element of dissent among the Con--servative rank and file, could not be considered in any way as having been tailored to suit the cloth of one man. It was an historical accident; "cometh the hour cometh the man."

It was consequently announced in November 1938 that the Government had decided to merge Imperial Airways and British Airways into a single public air corporation and to obtain the necessary capital by the issue of fixed-interest stock guaranteed by the Treasury. The British Overseas Airways Corporation was established formally in November 1939 (28) and on April 1, 1940 officially took over Imperial Airways and British Airways who, on the outbreak of war, under their subsidy agreements, had placed their aircraft and equipment at the disposal of the Secretary of State for Air.

The duty of BOAC was:

"to secure the fullest development, consistent with economy, of efficient overseas air transport services to be operated by the Corporation and to secure that such services are operated at

---

27. See Reith, Into the Wind (1949) p.332.

28. The British Overseas Airways Bill had received the Royal Assent in August 1939.

reasonable charges" (29)

The Act gave BOAC a very comprehensive grant of power

" power .... to do anything which is calculated to facil--itate the discharge of the functions conferred ...."

to enable it to carry out its duty. However, although the Corpor--ation's powers were apparently extensive, (there were fifteen specific heads of power) BOAC was the object of a considerable amount of Ministerial control.

The Secretary of State for Air was responsible for the appointment, dismissal and determination of salaries of the chair--man, deputy-chairman and members of the Corporation. Term of office was also a matter of discretion on the part of the Secret--ary of State as the 1939 Act did not specify any length of term. The permission of the Minister was required if BOAC wished to purchase aircraft "designed or manufactured outside His Majesty's dominions" Further, authorization was necessary before BOAC could undertake certain air services or operations. Futhermore, although the Corporation had power, inter alia, to manufacture aircraft equipment, to enter into pooling agreements with other airlines, to acquire other air transport companies and finance them, BOAC was unable to exercise any of these powers without the prior authority of the Secretary of State.

Apart from the specific powers conferred on the Minister by the 1939 Act, the Secretary of State for Air also had an extensive

---

29. British Overseas Airways Act, 1939, s.2.

and extremely potent power to issue directives to BOAC. (30) It is an all-prevading legacy which remains today and, in this respect, it is of significant importance. The power was regarded as just--ified in view of the Corporation's dependence on public funds but in the post-war period and later, when the air corporations were no longer dependent on subsidies, the power of the Minister to issue directived became a permanent feature in relations between the public air corporations and the Government. (31)

BOAC had also to keep accounts, and prepare annual rep--orts as the Secretary of State might direct. Further, in rel--ation to its financial affairs, the Secretary of State could demand any information he thought desirable. For example, if the Corporation wished to operate an uneconomic air service (i.e. where it was estimated that revenue would not cover cost) it made application to the Minister for a subsidy. The Secretary of State, after examining the accounts of BOAC, could provide the grant when he was satisfied with their proposal.

The Treasury found itself with express control over the new air corporation for it had to give its approval before BOAC could borrow capital by the issue of stock or by overdraft.

---

30. "So long as the power of the Secretary of State to make any grant to the Corporation under the Act is, or may become, exer--cisable, or any guarantee given by the Treasury under this Act is in force.... the Secretary of State may direct the Corporation to undertake any air transport service or other activity which they have power to undertake, to discontinue or make any change in any air transport service or other activity which they are operating or carrying on; or not to undertake any activity which they are proposing to undertake" 1939,Act, s.6.

31. See Corbett, Politics and the Airlines, p.250 and post Ch. IV.

Further, when the Treasury guaranteed any stock of the Corpor--ation or lent any capital to it, BOAC was required to declare the amount before Parliament. (32)

During the Second World War, BOAC provided the skeleton civil air transport services which were an essential part of the total war effort, for, from its very foundation, it was an instrument of defence policy. Towards the end of the war, in January 1944, British Latin American Airlines was established by a group of shipping companies to stake a claim on the South American routes. (There was no legal obstacle to prevent them doing so) (33) It became British South American Airways in September, 1945, when the stock was purchased by BOAC, following the decision of the new Labour Government to nationalise the whole British airline industry.

Earlier, in May 1945, the Coalition Government examined the problem of post-war civil aviation policy. The Swinton Plan, (34) agreed by the Coalition Government, envisaged three British airlines with specific spheres of operation, whose ownership

---

32. For an annotated description of the British Overseas Airways Act, 1939, see Shawcross and Beaumont on Air Law, 1st ed., (1945) Ch. XXVIII. A comprehensive study of BOAC and its forerunners since 1919 is given in Pudney, The Seven Skies (1959).

33. The British Overseas Airways Act, 1939, had ruled out inter--national operations by private airlines, except to Latin America.

34. Named after Lord Swinton, first Minister of the new Ministry of Civil Aviation. See below, p.26.

would be a mixture of public and private capital. (35) Travel agencies, private railway and shipping companies were to be invited to participate. The Conservatives could not accept the idea of public ownership in toto and wished to have a considerable measure of private enterprise in British aviation, although it was recog--nised that there would be an initial post-war period in which the state would have to subsidise the development of air services. However, when the Labour Government came to power in the summer of 1945, they immediately abandoned the earlier proposals in favour of wholesale public ownership of the airlines. The view was that national ownership and control would "make it possible as costs of operation are progressively reduced for the taxpayer to receive some benefit in return for the assistance he is required to prov--ide during the initial period of state aided operation." (36)

The Civil Aviation Act, 1946, (37) established two new airways corporations, British European Airways Corporation (BEA) and British South American Airways Corporation (BSAAC) and reorg--anised BOAC. (38) These three corporations (replacing BOAC as a single unit) had exclusive rights to operate scheduled airline services within the United Kingdom and on international routes. The intention of the 1946 Act was quite clearly that a publicly owned monopoly should exist, the operation and development of regular

---

35. See Longhurst, Nationalisation in Practice (1949) p.75 et seq.

36. White Paper - British Air Services, December 1945. Cmd. 6712.

37. 9 & 10 Geo.6, c.70.

38. 1946 Act, s.1.

air services being the exclusive responsibility of the air corpor--ations. (39) BOAC was to operate the Commonwealth, Far East and North Atlantic routes; BEA's sphere of activity was the domestic and European routes while BSAAC was to fly the South Atlantic route. It may be that the decision of the Labour Government to form three State airlines with the same spheres of operations as those prop--osed earlier by the Coalition Government, may have been influenced by a desire to deviate as little as possible from the plans previous--ly agreed to.

The Minister of Civil Aviation was to establish the new corporations, re-establish BOAC and be responsible for the appointment, dismissal and determination of salaries of the chair--men, deputy-chairmen and members of the corporations. The corpor--ations were granted powers similar in terms to the British Over--seas Airways Act of 1939 but the concept of ministerial control was firmly entrenched in the Act:

> "The Minister may, by an order relating to any of the three corporations, limit the power of the corporation, to such an extent as he thinks desirable in the public interest, by providing that any power of the corporation specified in the order shall not be exercisable except in accordance with a general or special authority given by him." (40)

Further, the Minister of Civil Aviation was given power to issue 'directions of a general character' to the three corporations in

---

39. The Labour Government later modified this policy but, never--theless, BOAC and BEA were and remain the primary instruments of British aviation policy. See Wheatcroft, Air Transport Policy. (1964) p.25.

40. Civil Aviation Act, 1946, s.2 (5) and schedule one.

relation to the performance of functions which he considered as affecting the national interest. The corporations also had certain duties in relation to the submission of annual reports and were subject to a degree of Treasury and/or Ministerial control with regard to accounts and financial matters. Any notion of complete autonomy for the public air corporation disappeared with the passing of the Civil Aviaition Act, 1946.

In the immediate post-war years, private operators had a lean time. The Government had bought out the existing privately-owned airlines operating scheduled services and the only activity of real significance available to private enterprise was the operation of charter flights. However, the first deviation from the rigid doctrine of monopoly rights in favour of the State corporations was made in 1948 when the Minister of Civil Aviation appointed a committee, under the chairmanship of Lord Douglas of Kirtleside, (41) to consider the possibilities of permitting private enterprise to operate scheduled air services complementary to, those undertaken by the three air corporations. It was recommended that such services ought to be allowed. Thereafter, the Minister requested the Air Transport Advisory Council, essentially a consumer council, to advise on the services which should be established. Consequently, a number of so-called "associate agreements" were concluded.

The charters of the air corporations were amended by the Airways Corporations Act, 1949. (42) It amalgamated British South

---

41. This was before he became chairman of BEA.

42. 12, 13 & 14 Geo.6, c.57.

American Airways Corporation with BOAC. (43) Apart from reducing the number of air corporations to two and increasing the possible number of members of the corporations, there were no appreciable changes, for the Act did not change the powers of the corporations nor did it alter the relations of BOAC and BEA with the Minister. Further, the statutory power of the sponsoring Minister to issue general directives to BOAC and BEA remained undisturbed. The Air Corporations Act, also in 1949, (44) consolidated the provisions relating to the air corporations which were previously contained in the British Overseas Airways Act, 1939, the Civil Aviation Act, 1946, and the Airways Corporations Act, 1949.

Provision was made in the Act (45) for "associates" to share with the Corporations the task of developing an efficient system of air transport. The term "associate" was defined by section 15 (3) of the Air Corporations Act, 1949, as:

> ".... any subsidiary of the Corporation or any undertaking which (a) is constituted for the purpose of providing air trans--port services or of engaging in any other activities of a kind which the Corporations have power to carry on; and (b) is assoc--iated with the Corporations under the terms of any arrangement for the time being approved by the Minister as being an arrangement calculated to further the efficient discharge of the functions of the Corporations."

The essence of associate status was that it could be obtained only by way of agreement between BOAC or BEA and the independent airline concerned. Ministerial consent was necessary to validate

---

43. BSAAC was dissolved on July 1, 1952 by the BSAA (Dissolution) Order, 1952 (No.1138). In practice, its services had been performed by BOAC for some time prior to this date.

44. 12, 13 & 14 Geo. 6, c.91.

45. Air Corporations Act, 1949, s.24 (1).

any agreements but the practice was that the Air Transport Advisory Council considered the applications of private concerns for associate status on behalf of the Minister. The criterion on which the Council based their decisions was the need to protect BOAC and BEA against competition and duplication of services. (46)

There was a significant change in Government policy on civil aviation after the Conservative Party came to power in 1951. This was a change in favour of private commercial operators and against the public air corporations for the new Government was intent on giving greater opportunities to the private airlines. Mr. Lennox Boyd, then Minister of Civil Aviation, announced that the Government's policy was to give 'more scope and security' to independent companies operating for profit. The policy was designed to confine the activities of BOAC and BEA so far as possible to their existing routes and services, but no attempt was made to denationalise the public air corporations. The private airlines could apply for permission to operate any routes, except those specifically reserved for the corporations. Further, the private operators were to be authorised to operate domestic services on a long-term basis in addition to those provided by BEA with the condition that there was to be no "material diversion" of traffic from BEA.

To implement their policy, the Conservative Government issued new terms of reference (47) to the Air Transport Advisory Council in 1952. It was the responsibility of the Council to

---

46. See Sundberg, Air Charter, p.89.

47. Printed in 22 Journal of Air Law and Commerce (1955) pp.203-208.

scrutinise the applications of the private operators and to recommend their acceptance or refusal to the Minister. In practice, the Minister invariably accepted the recommendations of the Council which, in effect, assumed the functions of a licensing authority at the request of suc--cessive Ministers. Under the chairmanship of Lord Terrington, the Air Transport Advisory Council had the unenviable and thankless task of interpreting unsatisfactory legislation for it would seem impossible to deduce that any route could be operated without " material diversion" from the internal services of BEA who possessed a monopoly over domes--tic routes. Thus the policy of the Conservative Government had trans--formed the so-called "associate agreements" into a means of circum--venting the statutory monopoly of the air corporations, the "agreement" of BOAC and BEA being purely nominal.

This state of affairs existed until the Civil Aviation (Licen--sing) Act became law in 1960. (48) This brought about radical changes in the British air transport industry. The Act abolished the monopoly powers of the public air corporations and established machinery for the regulation of competition between BOAC and BEA, on the one hand, and the private commercial airlines on the other. (49) The Civil Aviation (Lic--ensing) Act created greater opportunities for the private operators than they had previously been allowed under the 1951 policy. The new Act abolished the quasi-licensing system operated by the Air Transport Advisory Council and established an unadulterated system of air transport

---

48. 8 &9 Eliz. 2, c.38.

49. See post Ch V.

licensing by creating the Air Transport Licensing Board. (50) Henceforth, the air corporations were subjected to a further degree of superintendence in the form of the Air Transport Licensing Board for, inter alia, BOAC and BEA became ordinary applicants for air service licenses before the new Board. (51)

The Air Corporations Act, 1967, (52) sponsored by the Labour Government, consolidated, with certain exceptions, the pro--visions of the Air Corporations Acts 1949 to 1966, for there had been, since 1949, several statutes concerning BOAC and BEA. These pieces of legislation (53) introduced successive amendments to the borrowing powers of the corporations but did not alter their consti--tution or functions. The law, therefore, as pertaining to the public air corporations, is now almost completely contained in the Air Corporations Act, 1967. (54)

An account of the historical background of BOAC and BEA would be quite incomplete without reference to the sponsoring dep--artments of the air corporations. When BOAC was established in 1939, Governmental responsibility for civil and military aviation rested almost entirely with the Air Ministry which had been founded

---

50. Civil Aviation (Licensing) Act, 1960, s.1 (1).

51. The exercise of control by the Air Transport Licensing Board is discussed post Ch V.

52. 1967 c.33.

53. The Air Corporations Act, 1953, 2 & 3 Eliz.2. c.7; The Air Corporations Act, 1962, 11 & 12 Eliz.2, c.5; The Air Corporations Act, 1966, 1966 c.11. There had been other Air Corporations Acts in 1956, 1960 and 1964.

54. See post Ch. III.

by the Air Force (Constitution) Act, 1917. (55) The Secretary of State for Air had been made directly responsible for civil aviation functions, however, by the Air Navigation Act, 1936, section 23. (56)

In 1945, Parliament passed the Ministry of Civil Aviation Act (57) setting up an independent Ministry of Civil Aviation. This small government department exercised practically all the functions and powers previously vested in and exercised by the Air Ministry. Civil aviation functions were transferred to the Ministry of Transport by the Transfer of Functions (Ministry of Civil Aviation) Order 1953, which changed the name of the Ministry of Transport to Ministry of Transport and Civil Aviation. (58) The new Ministry was responsible for the regulation of air safety which included air traffic control. In conjunction with the Foreign Office, it negotiated traffic rights with foreign states; it also exercised government control over BOAC and BEA.

Responsibility for civil aviation moved once more in 1959; this time the transfer was to the Ministry of Supply, (59) a government department which had originally been created in 1939 for war procurement purposes. (60) The Ministry of Supply became

---

55. 7 & 8 Geo. 5, c.51. The Air Council was, in substance, the governing body of the Air Ministry. The Secretary of State for Air was President of the Air Council.

56. 26 Geo. 5 & 1 Edw. 8, c.44.

57. 8 & 9 Geo. 6, c.21.

58. Statutory Instrument. 1953. No.1204

59. By the Ministry of Aviation Order, Stat. Instr. 1959, No.1768.

60. Ministry of Supply Act, 1939. (2 & 3 Geo. 6, c.38)

the Ministry of Aviation by the Order which effected the transfer of civil aviation functions. (61) The position remained undisturbed until the summer of 1966 when the Labour Government, in an attempt at fuller co-ordination of the transport systems, transferred the civil aviation functions of the Ministry of Aviation to the Board of Trade. (62) (The President of the Board of Trade is a member of the inner Cabinet of Ministers.)

Thus, since the advent of the public air corporation in 1939, responsibility for civil aviation has rested with five government departments. This would seem indicative of the importance successive Governments have attached to their control and working relations with BOAC and BEA. (63)

---

61. For a comprehensive account of this part of history, see Kean, A Transport Colossus: The British Experience, 33 Journal of Air Law and Commerce (1967) p.234.

62. The Transfer of Functions (Civil Aviation) Order, Stat. Instr. 1966, No.741. The Board of Trade is responsible for the shipping industry. The belief, which is here doubted, was that problems of civil aviation were akin to those of merchant shipping.

63. For a brief but illuminating account of the history and organisation of air transport in the United Kingdom, see Kahn-Freund, The Law of Carriage by Inland Transport, 4th. ed., (1965) Ch. 30.

Chapter III

The Nature and Characteristics of the Air Corporations

The modern public corporation is an instrument for oper--ating state-owned undertakings, and is, in effect, a compromise between nationalisation and private enterprise. But"nationalis--ation" is a comprehensive term and from the legal point of view has several meanings. Postal services in the United Kingdom, for example, have been nationalised for some years; they were trans--formed into a branch of the Central Government, (64) the Post--master-General, as the sponsoring Minister, being a Minister of the Crown. However, with regard to the public air corporations operating the public sector of the air transport industry, their members, although appointed by the President of the Board of Trade, (the sponsoring Minister) are servants of the particular corp--oration (BOAC or BEA) and not servants of the state, nor are the air corporations themselves. (65) BOAC and BEA were established, essentially, as instruments for administering air transport oper--ations in the public interest.

> "It is important that, from the beginning, the public corporation should be regarded by all, and should regard itself, as a public concern. Its first business is the competent conduct of the undertaking committed to its charge in the public interest. It must feel that it is responsible to the

---

64. Post Office Act, 1953, ss.5, 46. (1 & 2 Eliz. 2, c.36) The Post Office was re-organised by the Post Office Act, 1961, (9 & 10 Eliz. 2, c.15) but the members remained civil servants.

65. See post p.31; also see Kahn-Freund, The Law of Carriage by Inland Transport, p.6.

nation accordingly, and that it cannot be the instrument of this or that private or sectional interest." (66)

It was Herbert Morrison (later Lord Morrison of Lambeth) who was primarily responsible for identifying the essential elements of the public corporation and for securing a relatively stable doctrine which was applied to the public corporations created by the nationalisation statutes in the immediate post-war period. He saw the public corporation as a

"combination of public ownership, public accountability, and business management for public ends." (67)

However, although the modern public corporation has existed since 1908, (The Port of London Authority) and politicians and academics alike have expounded theories, no court of law or nationalisation statute has attempted to define the expression 'public corporation'. To appreciate the constitutional status of the air corporations, it is desirable that a description should, at least, be attempted.

BOAC and BEA, as public corporations, (68) enjoy a constitutional position which, in many ways, is similar to that of the British Transport Commission before 1962 and the Railways Board at present. The status of the British Transport Commission was discussed in Tamlin v Hannaford (69) and, in principle, is of equal application to the air corporations. The dictum of Denning L.J.

---

66. Morrison, Socialization and Transport: (1933) p.156.

67. Ibid., p.149.

68. Air Corporations Act, 1967, s.1 (1)

69. 1950 1. K.B. 18.

describing the Commission is such that it merits quotation almost in its entirety. He declared:

"The Transport Act, 1947, brings into being the British Transport Commission, which is a statutory corporation of a kind comparatively new to English law. It has many of the qualities which belong to corporations of other kinds to which we have been accustomed. It has, for instance, defined powers which it cannot exceed; and it is directed by a group of men whose duty is to see that those powers are properly used. It may own property, carry on business, borrow and lend money, just as any other corporation may do, so long as it keeps within the bounds which Parliament has set. But the significant difference in this corporation is that there are no shareholders to subscribe the capital or to have any voice in its affairs. The money which the corporation needs is not raised by the issue of shares but by borrowing; and its borrowing is not secured by debentures, but is guaranteed by the Treasury. If it cannot repay, the loss falls on the Consolidated Fund of the United Kingdom; that is to say, on the taxpayer. There are no shareholders to elect the directors or to fix their remuneration. There are no profits to be distributed. If it should make losses and be unable to pay its debts, its property is liable to execution, but it is not liable to be wound up at the suit of any creditor. The taxpayer would be expected to come to its rescue before the creditors stepped in. Indeed the taxpayer is the universal guarantor of the corporation. But for him, it could not have acquired its business at all, nor could it continue it. It is his guarantee which has rendered shares, deb--entures and the like all unnecessary. He is clearly entitled to have is interest protected against extravagance or mis-management.

But there are other persons who have also a vital interest in its affairs. All those who use the services which it provides and all whose supplies depend on it, in short everyone in the land, is concerned in seeing that it is properly run. The protec--tion of the interests of all these - taxpayer, user and beneficiary is entrusted by Parliament to the Minister of Transport. He is given powers over this corporation which are as great as those possessed by a man who holds all the shares in a private company, subject, however, as such a man is not, to a duty to account to Parliament for his stewardship. It is the Minister who appoints the directors and fixes their remuneration. They must give him any information he wants; and, lest they should not prove amenable to his suggestions as to the policy they should adopt, he is given power to give them directions of a general nature, in matters which appear to him to affect the national interest, as to which he is the sole judge, and they are then bound to obey. These are great powers but still we cannot regard the corporation as being his agent, any more than a company is the agent of the shareholders or even a sole shareholder. In the eye of the law, the corporation is its own master and is answerable as fully as

any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government." (70)

Therefore BOAC and BEA, it is submitted, are not agents of the Crown. They have their own assets and can exercise rights and incur liabilities in a way similar to that of a private corp--oration. Although established by Act of Parliament, they are not directly responsible to Parliament. In the administration of their day-to-day affairs, they are regarded as autonomous enterprises. However, this theoretical remark is subject to qualification. The traditional theory of the autonomous public corporation, as expounded by Herbert Morrison, (71) envisaged complete freedom of management...

"... the Board (London Transport Passenger Board) must have autonomy and freedom of business management. It must not only be allowed to enjoy responsibility: it must even have responsibility thrust down its throat." (72)

He further added:

"With the exception of the limited duties legally imposed upon him, the Minister will have no right to interfere with the work of the Board." (73)

Morrison's theory of autonomy gained wide acceptance even among

---

70. Ibid., p.22 et seq.

71. Socialization and Transport: (1933)

72. Ibid., p.170.

73. Ibid., p.171.

scholars, (74) but,in the fulness of time, the notion of auto--nomy has been seriously undermined; independence has diminished while the power of ministerial superintendence has increased. Detailed Ministerial control, exercised by means of mandatory and discretionary powers, has emerged, it seems, not for doctrinal reasons but for reasons of practicability. One might conclude, therefore, that BOAC and BEA are examples of the new model of the public corporation, removed from the traditional theory of auto--nomy, being subjected to extensive Ministerial power.

1. Constitution of the Air Corporations

The members of the boards of BOAC and BEA are appointed by the President of the Board of Trade. (the Minister) (75) The total number of members of each corporation must be between five and eleven, the exact number being a discretionary matter for the Minister. (76) The chairmen and the deputy-chairmen of the corp--orations are selected by the Minister from among the members and provision is made for the appointment of two deputy-chairmen of BOAC. (77) The salaries of the members are determined by the Minister with the consent of the Treasury. (78) Term of office

---

74. See Robson, Public Enterprise: (1937).

75. Air Corporations Act, 1967, s.2. (2).

76. Ibid., s.2. (1) (a).

77. Ibid., s.2. (1) (b).

78. Ibid., Sched. 1. (7) A statement of these salaries need not be laid before Parliament. The situation is different in relation to pensions, see Sched. 1. (8) (2).

and capacity of service (i.e. full-time or part-time) are left to the discretion of the Minister when appointing the members, including the chairmen and the deputy-chairmen. (79) However, no members of BOAC or BEA can be members of the House of Commons, (80) a provision designed to prevent the exertion of political influence within the corporations. A member may resign at any time by giving written notice to the Minister. (81) A member may be dismissed by the Minister on grounds of prolonged absence from corporation meetings without the permission of the corporation; bankruptcy; physical or mental incapacity or general inability or unfitness to discharge the functions of a member. (82)

The members are responsible for the conduct of BOAC and BEA in a collective capacity. As individuals they are generally appointed to represent some particular interest but this interest tends to disappear after appointment to the board of the corp--oration. The chairmen of BOAC and BEA are the formal channels of communication between their respective corporations and the Minister. Thus, it may be assumed that the chairmen can exert influence on the Minister (and, indeed, vice-versa) albeit subject to strength of character and varying personalities. The chairmen, as a result, dominate their respective boards, but it is important to note that,

---

79. Ibid., Sched. 1(1). Term of office is generally three years.

80. House of Commons Disqualification Act, 1957, s.1(1)(f) and Sched. I, Part II.

81. Air Corporations Act, 1967, Sched. 1(1)(b).

82. Ibid., Sched., 1(4).

in reaching decisions, they must have the support of the majority of members. Finally, as neither BOAC nor BEA are agents of the Crown and since their members, acting in a collective capacity, are the corporation, it follows that the members are in no sense civil servants.

2. Functions

BOAC and BEA are given the power to provide air transport services and execute all other forms of aerial work in any part of the world. (83) No statute or other formal instrument defines their spheres of activity, the division being inferred from the titles of the corporations. Each of the air corporations is also empowered to do anything which is calculated to facilitate the discharge of their functions. (84) Outwardly these powers seem extensive but the Act provides that the Board of Trade (in effect, the Minister) (85) may, by order, define the powers conferred on BOAC and BEA if it is considered desirable to do so in order to inform the general public as to the scope and nature of the act--ivities in which the air corporations may engage. (86) BOAC and BEA are expressly prohibited from manufacturing air-frames, aero--engines or airscrews (propellers) except as may be provided by

---

83. Ibid., s.3 (1).

84. Ibid., s.3 (2).

85. Ibid., s.32.

86. Ibid., s.3 (3). However, the Minister may not prejudice the generality of the powers conferred on the corporations. No ministerial order has ever been issued under this section.

ministerial order. (87)

The air corporations have also power, inter alia, to acquire air transport undertakings, to have a financial interest in any such undertaking, or create subsidiaries. (88) Any subsidiaries, however, are established under the Companies Acts 1948 to 1967. (89) Whether such subsidiaries (90) can legally be empowered to manu--facture, for example air-frames, which the air corporation cannot do without a ministerial order to that effect, is a matter of con--siderable debate. The Minister may limit, by an order, the powers of the corporation to the extent he considers desirable in the public interest (91) but, in fact, he has never done so. Notwith--standing their powers, the Minister may, after consulting with BOAC or BEA, issue general directions to the corporation as to the exercise and performance of functions which, the Minister believes affect the national interest. (92) The air corporation concerned is obliged to obey but, in practice, this Ministerial power has never been effectively used. Control has been through informal directions

---

87. Ibid., s.3 (3).

88. Ibid., s.3 (4) (a), (b), (c).

89. 11 & 12 Geo. 6, c.38 and 1967 c.81.

90. A subsidiary was defined by the Air Corporations Act 1967, s.35 (1) as " any undertaking more than one half of the issued share capital whereof is held directly or through a nominee by the cor--poration, and any undertaking in relation to which the corporation have power directly or indirectly to appoint the majority of the directors. "

91. Ibid., s.3 (5).

92. Ibid., s.4.

which have no legal validity. In fact, the Minister's control is not precisely legal but financial. A subtle example of this appears in relation to the purchase of aircraft. If the Minister wished that a certain aircraft be purchased by either of the corporations, it is contended that a specific direction to that effect would be required and not a general direction which is possible under section 4 of the Air Corporations Act, 1967. However, the issue is resolved by section 13 of the Act which gives the Minister power of app--roval where either of the corporations proposes to sustain sub--stantial capital expenditure.

Illustrative of their constitutional status, neither BOAC nor BEA are exempt from liability for the payment of tax, duty, rate or any other levy whether it be of local or general applic--ability. (93) Further, in exercising their powers and duties, the corporations are subject to the ordinary law of the land. (94) Prior to the Law Reform (Limitation of Actions) Act, 1954, there was a limitation of three years for the period in which an action in contract or tort could be commenced against the air corporations. Now the same periods apply to all legal persons. Even so, the relationship between the air corporations and the courts is not well-defined. (95).

---

93. Ibid., s.6 (1). However,the Act makes express provision to the effect that transfers of stock issued by the corporations and guaranteed by the Treasury are to be free of stamp duty: (s.11)

94. Ibid., s.6 (2). See also, Robson, Nationalized Industry and Public Ownership, p. 69.

95. See supra pp. 6-9 and post Ch. VI.

3. General Duties.

BOAC and BEA, in exercising their above-mentioned powers, have the duty to secure that the air transport services (96) which they may provide are developed 'to the best advantage' and, parti--cularly, that they are provided ' at reasonable charges'. (97) This duty to develop air services to the best advantage is not, it is submitted, a duty to provide air services. The duty only appears to arise if the service is provided. Further, the duty of 'reasonable charges' obviously exists only if a service is provided. However, as section 3 is phrased in such a general fashion, the effectiveness of the provision is seriously doubted. (98) Indeed, the difficulties that the air corporations encountered in the 1950's and early 1960's can perhaps be traced by this so-called statutory duty, for the duty, at least, can be regarded as a guideline to operations. If the duty is regarded as vague consequently BOAC and BEA suffer from the lack of general commercial direction. (99) There have been divergent opinions among the chairmen of BOAC, for example, as to the policy they should pursue. In 1952, Sir Miles Thomas repeatedly emphasised that BOAC was a "commercial undertaking"

---

96. An "air transport service" is defined by s.38 of the Air Cor--porations Act, 1967 as "a service for the carriage by air of pas--sengers, mails or other freight"

97. Ibid., s.3 (1). See supra p.8.

98. For the legal discussion, see post Ch. VI.

99. Under the British Overseas Airways Act, 1939, the duty of BOAC was to secure the fullest development of overseas air services consistent with economy and efficiency.

concerned with paying its way as well as providing a public service. Illustrating the confusion over commercial policy and the inter--ference of successive Ministers, Sir Matthew Slattery (prior to his resignation in November 1963) complained of the lack of policy for BOAC. He had suggested that BOAC work on a commercial basis but with a duty to buy British aircraft. By 1964, however, the Minister had directed the board of BOAC to act in accordance with its commercial judgement departing from commercial practice only at the request of the Minister. (1)

On the question of 'reasonable charges', domestic fares are the responsibility of the Air Transport Licensing Board, (2) while international fares are the responsibility of the Minister. However, international fares are, in effect, determined by the air--lines themselves through their trade association the International Air Transport Association (IATA). Thus, Ministerial control is indirect, indeed nominal, as the Board of Trade has neither the resources nor the commercial data to adopt a strong policy init--iative. Therefore the duty of 'reasonable charges' is of little effect for, in relation to internal services, approval of tariff lies with the Air Transport Licensing Board while international fares are the responsibility of IATA.

Each of the corporations has a duty to keep proper accounts and records in respect of each financial year and are obliged to

---

1. For the objectives established for the air corporations, see post under financial duties.

2.For a fuller account see post Ch. V.

present to the Minister an annual statement of their audited accounts. (3) The Minister must lay a copy of every such statement before each House of Parliament. (4) BOAC and BEA are also under a duty, after the end of each financial year, to make a report, dealing with their operations, to the Minister who must lay a copy before Parliament. (5)

The air corporations must also, at the request of the Minister, submit reports from time to time on the programmes of air transport services they intend to undertake including estimates of receipts and expenditures likely to be incurred. (6) Governments rarely comment on these programmes for the simple reason that there is no one to study them. Where BOAC and BEA provide information relating to property, financial position, activities or proposed activities, (7) it is submitted that, although the Minister is permitted to inspect the accounts and records of the corporations, (8) it is of little value unless the Board of Trade is fully aware of what it means. But, as indicated, they do not have the personnel

---

3. Air Corporations Act, 1967, s.25.

4. Ibid., s. 25 (5).

5. Ibid., s. 26. (1) and (2). The report should set out any Min-isterial directions given to the corporations unless the Minister believes it is against the national interest to do so. (s. 26 (3)) One sees here the possibility of abuse and the blurring of res-ponsibility between Minister and corporation.

6. Ibid., s. 27.

7. Ibid., s. 27 (2).

8. Ibid., s. 27 (3).

to scrutinise the information. (9)

4. Financial Powers and Duties.

In order to execute their functions, BOAC and BEA are emp--owered to raise capital in various ways. They may borrow from the public by the issue of stock, obtain financial aid from the Board of Trade by means of loans and advances and defray capital expenditure by borrowing foreign currency. However, at the outset, it must be stated that the borrowing powers of BOAC and BEA are subject to the consent of the Minister and the approval of the Treasury or vice-versa. Further, the Air Corporations Act, 1967, limited the amount the corporations may have on loan at any one time. (10) The ceiling for BOAC became £90 million but power exists to increase this amount by Order-in-Council to £120 million. The ult--imate limit for BEA was £125 million but is now £210 million " or such greater sum, not exceeding £240 million". (11) It must be noted that to increase these sums, an Act of Parliament would be necessary.

The corporations may borrow on a temporary basis by means of overdraft giving them day-to-day working capital but it is limited

---

9. The provision indicates the Government's desire to oversee any long-term projects, envisaged by the corporations but which might land them in financial difficulties.

10. Air Corporations Act, 1967, ss. 16 and 22.

11. Air Corporations Act, 1968, s.1. (1968, c.30). It raises limits imposed by s. 22 of the 1967 Act for the purpose of financing def--icits on revenue accounts and to repay sums borrowed for that purpose.

by Treasury agreement. (12) They may also borrow for specific purposes by means of long-term loans from the Board of Trade or by the issue of stock to the public. (13) These purposes include, inter alia, the provision of working capital, the promotion or acquisition of other undertakings, the redemption of any stock and any other proper capital expenditure. In 1966, there was a change in policy permitting BOAC and BEA to borrow foreign currency subject to Treasury and Board of Trade approval. This policy is now incorp-orated in section 7 (3) of the 1967 Act but it does not envisage the issue of stock as security for loans.

The Board of Trade may also advance to the corporations any sums which they have power to borrow. (14) These Exchequer loans are not guaranteed by stock, are normally for a period of seven years and the interest rate is fixed at the date of the loan. The Minister is required to prepare in respect of each financial year an account of such sums issued to the corporations and to submit it to the Comptroller and Auditor-General who lays it, together with his report, before Parliament. (15) The Treasury may, in such manner and on such conditions as they think fit, guarantee any loans raised by either BOAC or BEA. (16) Each of the corporations must have a reserve fund, the management and application of which

---

12. Air Corporations Act, 1967, s.7 (1).

13. Ibid., s.7 (2). The purposes are enumerated therein.

14. Ibid., s.8.

15. Ibid., s.8 (6).

16. Ibid., s.10.

is a matter for the corporation but with a proviso that BOAC and BEA must apply any Board of Trade direction thereto, even if it is of a specific character. (17)

Both BOAC and BEA have distinct statutory financial duties with the result that a coherent commercial policy can be adopted. (18) In 1961, the Conservative Government introduced a White Paper on the "Financial and Economic Obligations of the Nationalised Industries" (Cmd. 1337) laying down procedure for setting 'target' returns on the net assets of the various industries. BEA's commercial objective, established in 1963, was a return of 6 o/o on its net assets employed on business whilst BOAC's target return, negotiated after the passing of the Air Corporations Act, 1966, was set at 12.5 o/o. (19) The target set for BOAC is considerably greater than that of BEA but BEA works in the short-haul field which is more difficult to operate on a profitable basis because, by comparison with long-haul activity, the carriage of passengers and goods over short distances restricts aircraft and crew utilisation and increases expenditure on ground facilities and landing fees disproportionally. Further, the 1967 Act empowers Exchequer investment, otherwise than by way of loan, in BOAC. (20) Thus BOAC

---

17. Ibid., s.12.

18. Ibid., ss.17,20.

19. Over the five year period to March 31, 1968, BEA achieved a return of 5.7 o/o on net assets employed. See BEA Report and Accounts HC Paper No.362, 1967/8, p.12.

20. Air Corporations Act, 1967, s.14.

has the benefit of equity capital which is similar to share capital in that fixed interest rates are not payable. It is decided annually what 'dividend' BOAC will pay on its equity capital. (21) However, section 14 can be regarded as experimental because, unless it is renewed by Order-in-Council, it will expire on March 31, 1971. (22)

It is notable that, as the capital structures of the air corporations differ, they enjoy differing degrees of independence. BOAC, for example, is less independent than BEA for the Board of Trade has power to direct the payment, to the Government, of any sum which appears to the Board to be surplus to the requirements of BOAC. (23) This then prevents BOAC from becoming financially independent by accumulating reserve funds.

It is apparent from this discussion of the financial powers and duties of the air corporations that several fundamental elements exist. There is, first and foremost, complete control over borrow--ing powers by the Treasury and/or the Board of Trade. Secondly, there exists a relative flexibility in the raising of capital which includes BEA possessing an advantage as regards borrowing limits while BOAC has the benefit of equity capital. Lastly, the financial

---

21. BEA has been critical of the present arrangement by which the two air corporations operate under different capital structures. BEA regards it as unfair to its staff and inexplicable to the general public. See BEA Report and Accounts, op cit., p.15.

22. Air Corporations Act, 1967, s.19.

23. Ibid., s.18.

provisions in the Air Corporations Act, 1967, both general and specific, represent a series of measures designed to ensure that BOAC and BEA do not become too financially autonomous.

In conclusion it is possible to give a synopsis of the characteristics of the air corporations. Established by statute, they have separate corporate personalities and are capable of suing and being sued in their own name. They are entrusted with a range of functions regarded as public purposes. In the management of day-to-day affairs, there is freedom from parliamentary inquiry. BOAC and BEA are not, however, in any sense, immune from political interference since they are subjected to a considerable degree of ministerial control. This involves responsibility to Parliament by the Minister for at least those matters on which he can control the corporations. In their operations, they are expected to pay their way although there must be a different atmosphere at the board table than at a shareholders' meeting. (24) With no shareholders, the equity is owned by the nation. In the event of surplus,('profit' appears to be inappropriate) it will be ploughed back into the business, placed on reserve or returned to the Exchequer.

Members of BOAC and BEA are appointed for a fixed term of years; they do not enjoy the permanent tenure of established civil servants nor are they subject to the vicissitudes attaching to Ministerial office. Posts on the boards of the air corporations are

---

24. "The public corporation has no shares and no shareholders, either private or public." Friedmann, 'The New Public Corporations and the Law,' 10 Modern Law Review (1947) p.235.

non-political in the sense that they are not vacated on the fall of the government or when a new government assumes office. The personnel of BOAC and BEA is not part of the Civil Service. (applies to all staff) Parliament, the Treasury and the Civil Service Commission have no control over conditions of service or remuner--ation. (25) Both BOAC and BEA have self-contained finance in that it is divorced from the national budget although there is a degree of Treasury control.

The air corporations exemplify the tendency in the modern public corporation to remove the so-called public utility functions from the ordinary activities of government but the public service motive remains to the fore. (26)

---

25. For conditions relating to staff, wages and pensions, see the Air Corporations Act, 1967, ss.23,24. It is the Board of Trade's responsibility, however, to oversee the application in the air transport industry of the Government's incomes policy.

26. For a commentary on the leading principles of the public corp--oration, see Robson, Nationalized Industry and Public Ownership, 2nd. ed., pp.64-69.

Chapter IV

Control by Parliament and Government.

Although there has been much debate in the course of the last thirty years about the nature, purpose, proper extent and methods of Parliamentary and Ministerial control particularly by such figures as Lord Morrison of Lambeth, Lord Reith, Sir Ronald Edwards and Professor Robson, there was never a coherent picture of how the system operated in practice. (27) Ministerial control is something which has emerged in a somewhat haphazard fashion. It varies, for example, from industry to industry and has been dis--torted by the difficulties of individual industries. It certainly has not been planned by foresight, prescribed with clarity or applied with consistency even within the air transport industry. The flexibility and imprecision of Ministerial control tend to reflect current and changing needs. Therefore one is left wondering whether it is advisable, for pragmatic reasons, to define the Minister's powers and ensure they are adhered to. It is with this question that the present discussion is concerned.

Further, the sponsoring Minister - and to some extent the Treasury - are accountable to Parliament for their exercise of control over BOAC and BEA. They have the duty to explain and defend

---

27. The first systematic inquiry was the First Report from the Select Committee on Nationalised Industries: (Ministerial Control of the Nationalised Industries) 1968, HC Paper No.371 vols. I, II and III. However, the Report of the Committee of Inquiry into the Electricity Supply Industry, Cmd. 9672. 1956, (Herbert Committee) did have some fundamental observations to make on the topic.

in Parliament the policies, decisions and actions of the corpor--ations, including matters over which the Minister has no direct control. It is, therefore the intention in this chapter to consider also the means and effect of Parliamentary accountability for Members of Parliament represent both the taxpayer and the consumer. Thus they are interested in financial performance, contribution to furthering the public interest, efficiency, prices and quality of service. Parliament, therefore, by the means available to it, prov--ides a reminder to the sponsoring Minister of his responsibilities for the air corporations and for the public interest.

1. Ministerial Control.

The formal powers of the President of the Board of Trade to control BOAC and BEA are laid down in the civil aviation stat--utes. Apart from the consolidating Air Corporations Act, 1967, as amended in 1968, the Board of Trade has other statutory powers and responsibilities over the air corporations, for example , the Civil Aviation Act, 1949. (28) largely concerned with air safety, and the Civil Aviation (Licensing) Act, 1960, (29) largely concerned with air transport services and domestic tariffs. The Board of Trade also has responsibilities in connection with aerodromes, air traffic control, the negotiation of international traffic rights for British airlines, and the approval of international tariffs. (30) The Board also has an interest in, inter alia, the types of aircraft

---

28. 12, 13 & 14 Geo. 6 , c.67.

29. 8 & 9 Eliz. 2, c.38.

30. For a discussion on the latter, see post Ch. V.

which BOAC and BEA seek to purchase, foreign exchange earnings of the corporations and their contribution to the nation's economic development. The Board also has general responsibilities under the law relating to prices and incomes. The formal powers which the Minister possesses can be regarded as fundamental because the more informal, non-statutory powers of the Minister are derived eventually from the statutory control he possesses.

Under the Air Corporations Act, 1967, apart from the appointment of board members and an interest in development and research, control by the Minister is predominantly concerned with economic and financial matters, especially investment plans, financial objectives, surpluses and deficits. (31) But Ministerial control is not confined within these specific boundaries. With varying degree, the Minister has come to exercise authority and influence over such matters as policy, broad and narrow, tariffs, salaries and wages. (32) In short, the Minister's concern for BOAC and BEA is directed at those matters where money is immediately involved.

When BOAC was established in 1939, the British Overseas Airways Act followed the earlier practice of not giving the Minister - then the Secretary of State for Air - any general power of

---

31. It is not intended to enumerate the powers of the Minister under the Air Corporations Act, 1967, as, in large part, it would be a duplication of what has appeared in chapter III. For a complete list of the statutory powers and duties of the Minister, see the Report of the Select Committee on Nationalised Industries, 1968, supra note 27, vol III, Appendix 21, Annex I.

32. The latter is a direct result of the Labour Government's prices and incomes policy.

direction. However, in case of war or national emergency, the Secretary of State could require that the total enterprise should be placed at his disposal. BOAC were prohibited from undertaking certain activities except with the authority of a ministerial order. The Secretary of State had specific power to direct the corporation, during any period in which a subsidy was payable, to undertake any air transport service which they had power to under--take; or to discontinue or modify any service being operated; or to forbid them to undertake any operation in which they were prop--osing to engage. (33) These specific powers were far reaching at that time. Indeed, they were abnormal, but they could be explained by the subsidy which BOAC was due to receive from public funds, and was expected to receive for some length of time.

However, although the Act stipulated that these powers were to last until the end of 1953, and notwithstanding the fact that BOAC and BEA ceased to receive subsidies in 1952 and 1955 respect--ively, Ministerial control, formal and informal, became a perm--anent feature of the relations between the air corporations and the Government. In 1955, the Minister of Transport and Civil Aviation informed the Select Committee on Nationalised Industries (34) that, so far as the affairs of BOAC and BEA were concerned, he had either decided or been involved in a responsible capacity in relation to

---

33. See e.g. The British Overseas Airways Act, 1939, s.6.

34. See the Special Report from the Select Committee on National--ised Industries, HC Paper No.120, 1955/6, p.11.

such matters of current policy and practice as the purchases of aircraft; the hiring of foreign aircraft; investment in associated companies overseas; charter policy; routes operated; approval of fares on scheduled services; the Air Transport Advisory Council and the transfer of BEA's maintenance base from Renfrew to London. In his involvement with some of these matters, the Minister could have invoked his formal statutory powers but it proved unnecessary - or politically inexpedient - for him to do so. This evidence, therefore, would tend to indicate that the Minister interfered with BOAC and BEA more than compelled to do by statute. The situation might champion the plea that the Government's powers of intervention should be specific and formulated in an unambiguous manner, for Governments are naturally inclined to attempt to have their view adopted or implemented without wanting to be held publicly resp--onsible for the results which they would be if they were exer--cising control by means of formal directives.

There are varied interpretations of what the responsibilities of the public corporation should be and also to what extent the Minister's statutory powers justify extra-statutory control. (35) The concern is, in effect, the demarcation line between efficient management, public accountability and the public interest. At one extreme there is the view that the Minister should consider

" every
single problem, not only of national interest but on every conceivable

---

35. See the Select Committee Report on the Nationalised Industries, 1968, supra note 27, vol. I, pp.12-14.

detail concerning that Corporation" (36)

This philosophy would seem to favour complete government control. Thus the air corporations would be run as government departments, like the Post Office. Such a view has never commanded widespread support and has never been accepted by any government for it would render the theory and purpose of the public corporation meaning--less. It has also been suggested that the sponsoring Minister become chairman of the board thus concentrating, it is contended, control of policy in the hands of the Minister where it rightfully belongs. However, it would, of course, make the Minister answer--able in Parliament for every activity of the corporation.

At the other extreme there is the report of the Herbert Committee (37) which advocated autonomy for the public corporation and minimal power to the sponsoring Minister. It projected public enterprise as a profit-motived commercial undertaking as it was assumed to exist in the nineteenth century. The Committee declared that the industry should not be

" too much concerned with inter--preting what the national interest requires." (38)

The report also expressed the view that any deviation from strict commercial policy should be undertaken only on precise ministerial instructions.

" The line between the Government and the industry

---

36. Evidence given by Mr. George Strauss, M.P. before the Select Committee on Nationalised Industries, 1955/6, supra note 34, Q.14.

37. See supra note 27.

38. Ibid., para.367.

should be a clear one for all to see." (39)

The orthodox view of the respective responsibilities of the Minister and the public corporation is represented in the opinions of the late Lord Morrison of Lambeth who could be regarded as the principal architect of the public corporation. (40) He indicated that public corporations had been established to run socialized industries on business lines on behalf of the community and Ministers were not responsible for their day-to-day manage--ment.

" A large degree of independence for the boards in matters of current administration is vital to their efficiency as commercial undertakings." (41)

Morrison viewed the public corporation as being able to combine modern business management and efficiency with a proper degree of public accountability. (42)

" The public corporation must be no mere capitalist business, the be-all and end-all of which is profits and dividends..... its board and its officers must regard themselves as the high custodians of the public interest." (43)

The problem is to what extent the Minister should be involved in questions of policy and the public interest. Both BOAC and BEA have

---

39. Ibid., para. 507.

40. A lucid understanding of the relative positions of the Ministers and the corporations appears in two of his writings: Socialization and Transport (1933) and Government and Parliament (1954)

41. 445 HC Deb. 5s., col.566 (December 4, 1947)

42. See Report of the Select Committee on Nationalised Industries, 1968, supra note 27, vol. II, p.524.

43. Morrison, Socialization and Transport, p.156.

found in the past that they had to consider the wider public int--erest as well as commercial interests particularly in relation to the purchase of aircraft. Further, there is the inherent problem of how Ministerial control should be exercised, namely whether the Minister should influence policy through inducement and persuasion exerted in clandestine fashion, and for which he is not held res--ponsible, or exercise control by means of formal directives for which he is answerable to Parliament and the public.

The Board of Trade appears to think highly of its relationship with the air corporations. They admit that, in practice, relations are closer than are required in pursuance of specific statutory powers and duties. (44) As the Permanent Secretary to the Ministry of Civil Aviation, Sir Richard Way, stated:

"We think that what one might call the non-statutory relat--ionship is almost more important than what we are legally entitled to do in our relations with the Corporation". (45)

Truer words perhaps never emanated from the depths of the Ministry. The Board of Trade advocates the closest co-operation between the Minister and the chairmen of BOAC and BEA especially on the more important subjects. This is understandable in view of the Minister's ultimate responsibilities but the statutes which have dealt with the air corporations have given them full authority to determine policy except in respect of those matters where the Minister's approval is required, or in regard to which the Minister has given

---

44. See the Report of the Select Committee on Nationalised Industries, 1968, op cit., Appendix 21, Annex I, para. 10.

45. Said in evidence before the Select Committee on Nationalised Industries, (BOAC) January 15, 1964.

a general or specific direction, (46) in the belief that it is necessary in the national interest.

To suggest that policy is to be decided by the Minister and the chairmem of BOAC and BEA represents gross interference in the managerial freedom of the air corporations. Further, it is uncom--plimentary, to say the least, to the status of the other board members. If the chairmen find themselves in the position of depart--mental officials, then they must be held largely responsible for casting away much of the independence of the corporations. Lord Morrison gave the following opinion of the relationship that should subsist between the Minister and the board:

> "Clearly it is desirable that the Minister should keep him--self familiar with the general work of the Board or Boards with which he is concerned. It is wise for him with his parliamentary secretary and principal officers concerned from time to time to meet the chairman and, indeed, the members of the Board, to discuss matters of mutual interest either formally or informally. On such occasions both the Board and the Minister will be conscious of their legal rights: the legal right of the Minister to give general dir--ections or to withold approvals, and the legal rights of the Board within the field of day-to-day management; but it is also desirable that such discussion should be free, frank, forthcoming, and co-op--erative" (47)

Therefore, there are two dangers to be avoided. One is that "the high-powered" chairmen become Emperors of Industry, resentful of ministerial and public criticism. The other is that the chairmen become "puppets" of the sponsoring Minister and his department. (48)

---

46. Ministerial powers of direction have only once been used. In 1947, the Minister gave a direction under section 4 of the Civil Aviation Act, 1946, on the transfer of certain European routes from BOAC to BEA. Its purpose was merely to facilitate the transfer of certain property in France from BOAC to BEA.

47. Morrison, Government and Parliament, p.264.

48. Ibid., p. 272.

Whether or not co-operation between the Minister and the boards should be informal or conducted at arm's length is a matter for conjecture but history has conclusively proved that successive Min--isters responsible for the air corporations have had very short arms.

Over the years, there have been divergent opinions among the chairmen of BOAC as to the rôle and responsibilities of the corpor--ation. When BOAC was established in 1939, its specific duties were to use only British aircraft and to develop routes around the world. At the end of the war, a Government Paper (49) laid down that commer--cial profitability was not the sole criterion. Sir Miles Thomas (Chairman of BOAC from 1949 to 1956) regarded BOAC as a commercial undertaking. (50) But both Sir Miles Thomas and the subsequent chair--man, Sir Gerard d'Erlanger (Chairman from 1956 to 1960) took dec--isions with national considerations in mind which were not strictly commercial. In fact, d'Erlanger regarded BOAC's responsibility as one to support the British aircraft industry and develop global routes, not to make profits. Sir Matthew Slattery (Chairman 1960 to 1963) was given no terms of reference when he was appointed but he was in no doubt that BOAC should run on a commercial basis with a responsibility to buy British aircraft whenever it was reasonable to do so. (51) When Sir Giles Guthrie was appointed chairman in January, 1964, the Minister forwarded a letter to Guthrie setting

---

49. Command Paper on British Air Transport, Cmd. 6605, March 1945.

50. See BOAC Report and Accounts, 1951-2, para. 14.

51. See Report of the Select Committee on Nationalised Industries, (BOAC) vol.II, Q.1173.

out a formal definition of BOAC's responsibility. (52) The immediate task of the corporation was to break even after meeting interest and depreciation. The corporation was to act "in accordance with their commercial judgement". BOAC were now formally aware of their duty to act in a commercial manner.

Although the major part of Ministerial control over BOAC and BEA has been concerned with aircraft policy, it seems highly probable that, from time to time, they have been pursuaded to accept other obligations for, though much has been made public, there is little doubt that more has gone on 'behind the scenes'. Routes operated have been influenced in this way. Political factors have been allowed to override commercial considerations. (53) What is necessary, therefore, is that there should be a clear recognition that such non-commercial decisions follow from political requirements and that responsibility for them should rest with the Government. However, in recent years, BOAC has not been expected to operate any services which the corporation consider economically unjustifiable. BOAC has withdrawn from all routes and associations which it does not consider commercial propositions and there has been no question recently of any investment for other than commercial reasons. Guthrie has expressed the view that he would require a directive either to order an aircraft not of his own choosing or to fly a route for diplomatic or strategic reasons. (54)

---

52. Ibid., vol. II, Appendix 30.

53. E.g. BOAC's agreement to manage the affairs of Kuwait Airways.

54. See the Report of the Select Committee on Nationalised Industries, (BOAC) vol. II, Q 1296, 1320.

In the case of BEA, they operate some domestic air services which are unremunerative, namely those in the Scottish Highlands and Islands and those between Penzance and the Scilly Islands. These areas are sparsely populated, the income level is not high and there is no prospect of the air services ever being able to earn their costs. Nevertheless, these services are considered desire-able in the public interest and there would be great clamour if such services were discontinued particularly among Scottish Members of Parliament. These unremunerative routes are, in fact, social services and there have been repeated requests for a special subsidy to be paid to BEA for undertaking these operations, (55) for they bring no commercial advantages to BEA.

However, the President of the Board of Trade has no statutory power to pay a subsidy to reimburse BEA for its losses on these domestic routes. The question of subsidy, and the statutory power to provide it, has existed since 1956, but a negative conclusion has always been reached. BEA contend that they fly to the Highlands and Islands because the Government wishes them to do so. The Board of Trade simply indicate that BEA "has long been prepared to operate (them) at a loss". (56) There has never been any need for a formal directive. The Government's view is that BEA receive a certain amount of protection, (in the financial and licensing field) and in return are expected to operate some uneconomic

---

55. See, e.g. the Report of the Select Committee on Nationalised Industries (Report and Accounts) The Air Corporations, 1959, H C Paper No. 213.

56. The Select Committee on Nationalised Industries, 1968, op.cit., Appendix 21, Annex II, para. 12.

routes for the public good. This protection enables BEA, it is contended by the Government, to provide unremunerative services which will be paid for out of the profits on the more lucrative routes. It means, in effect, that the users of the remunerative services are subsidizing the uneconomic routes. The 1959 Select Committee (57) recommended that BEA should insist on formal dir--ection from the Minister in order to indicate that the respons--ibility for these operations is his, and suggested that a subsidy be paid to vindicate the losses.

Such a proposal accords with the orthodox view that the air corporations should operate on commercial principles. Any consideration of the national interest, public convenience or social need should rest with the Minister and should be undertaken only after a Ministerial direction to that effect. (58) Thus, it is submitted that policy, such as the provision of unremunerative services and the duty to secure that the air services are provided 'at reasonable charges' and developed 'to the best advantage' cannot be entrusted to BEA because social and political questions are involved in the decisions. Therefore, they should be left to the Minister and defended by him in Parliament. This might lead one to contend that the Air Corporations Act, 1967, blurs the pos--sible conflict between the social criteria of 'development to the best advantage' and 'reasonable charges', on the one hand and the

---

57. Supra,note 55.

58. For a fuller discussion, see the Report of the Select Committee on Nationalised Industries, 1959, op. cit, paras. 107 - 110.

air corporations paying their way, on the other.

The national interest obviously plays the major part in the decision to provide unremunerative services and it is true that the Minister is a better judge of the national interest than the board of either BOAC or BEA. Further, only with the respons--ibility resting on the Minister can it rest in Parliament. But if one takes into account such matters as considerations of electoral advantage and political motives, the elusive concept of the "nat--ional interest" may appear to have been the subject of much abuse and may point in a different direction from that indicated by the needs of BEA considered in isolation. BEA, operating in the North of Scotland, has a monopoly, The fares, therefore are managed rather than market tariffs. They do not enjoy freedom and respons--ibility to achieve the best results. Apart from market consider--ations, it is a matter for conjecture whether they could raise tariffs even if they wished to because ultimate approval in rel--ation to domestic tariffs may rest with the Minister. (59) BEA, (and indeed BOAC) cannot fix their own fares. Thus, one of the most essential attributes of management is missing. This is aggravated where BEA has to operate services at a loss because the Minister believes it is in the public interest that BEA should maintain these services. Hence, where the Minister can override the board

---

59. The more important changes in domestic tariffs often fall to be finally determined by the Board of Trade under the procedure of appeals for the decisions of the Air Transport Licensing Board. The Government also have a degree of control exercisable through the National Board for Prices and Incomes.

of BEA in the national interest, there should be a clear and unmistakable demarcation of responsibility. The Minister's deter--mination should take the form of a direction. If there is no direct--ion the assumption should be that BEA had an unfettered discretion in the matter. When the Minister does interfere, he should declare in his directive the underlying reasons for his decision. (60)

It would be quite impossible in a paper such as this to relate all incidents where there has been a considerable degree of Ministerial superintendence over the activities of the air cor--porations, but the discussion would be quite incomplete without reference to Ministerial control over aircraft policy which rep--resents the greatest part of Ministerial supervision. Perhaps the most famous or infamous (depending on affiliations) series of events was BOAC's procurement policy in the late 1950's and the early 1960's - the so-called "V.C. 10 affair". It raised the fundamental question of BOAC's ability and freedom to take action when their expansionist policy failed to measure up to expectations; it indicated the element of rigidity in aircraft procurement policy and it demonstrated the conflict that can arise between the Minis--ter's sacred national interest and the corporation's commercial judgement.

The tale of the procurement of the V.C. 10 falls into four parts: BOAC's initial inquiry in 1956 for an aircraft to fly the Eastern and Southern routes; secondly, the orders for the

---

60. On the question of the national interest, see Robson, Nation--alized Industry and Public Ownership, pp. 157 - 159.

V.C.10 in January, 1958; thirdly,the re-negotiation of the order in 1960; and lastly, the cancellation of the order and the re-organisation of the capital of BOAC.

Early in 1956, BOAC discussed with Vickers the outline of a requirement for a jet aircraft which would be suitable for the Southern and Eastern routes. (BOAC believed that the American Boeing 707 would be unsuitable for these routes.) However, in the autumn of 1956 these studies were suspended at the request of the Government who informed BOAC that the finan--cing of new British aircraft would only be agreed to if they were purchased from de Havillands. This ultimatum was, however, subject to two conditions, namely that the specification was to be satisfactory to BOAC and that BOAC were not obliged to order a specific number of aircraft. But de Havillands indicated that they would not proceed with the project unless and until orders for at least 50 aircraft had been received. Thereafter, the Government released BOAC from their obligation to deal solely with de Havillands.

In the meantime, the Government gave permission to BOAC to purchase 15 Boeing 707 airliners (BOAC wanted 17) to "bridge the gap until a new British type is produced". (61) BOAC believed this permission was conditional on their agreeing to buy 20 British aircraft.

In 1957, BOAC began negotiations with Vickers for the V.C.10 in the knowledge that the Government were not prepared

---

61. See 558 H C Deb 5 s. col. 38 (October 24, 1956).

to contribute in any way towards the project. BOAC were interested in 25 aircraft with an option for 10 more. Vickers, on the other hand, were not prepared to begin the V.C.10 project without a definite order for 35 aircraft at a higher price. It was an un--enviable situation - the sole supplier confronting the sole buyer. On April 30, 1957, BOAC agreed to place an order for 35 aircraft with an option for 20 more. The corporation believed they would require 35 aircraft and the purpose of the option order was to protect their long-term commercial interests. However, in the view of Sir Matthew Slattery, who was not a member of the board of BOAC at that time, it was not commercially right to be committed so far ahead. (62) When the corporation and Vickers came to bargaining about number and price of these aircraft, BOAC may have been influenced by the condition imposed by the Minister that future purchases of aircraft had to be from British sources. They did not approach the Minister and request a contribution towards develop--ment costs.

In January 1958, Vickers and BOAC discussed changes in the V.C.10 design, BOAC wanting an aircraft with the ability to serve all routes while Vickers desired an aircraft which would appeal to the general market. But as the projected V.C.10 became larger and more powerful, BOAC began to have doubts about its specified economic capability. They had also modified their view about the Boeing 707 and subsequently a comparison took place. Thereafter,

---

62. See the Report of the Select Committee on Nationalised Indust--ries, 1964,(BOAC) vol.II, Q.1250. BOAC planned to bring the V.C.10 into service in the mid-1960's.

BOAC accepted the assessment of the Royal Aircraft Establishment of the V.C.10 (overruling their own Engineering Department) and signed the order for 35 V.C.10's on Vickers' terms. Sir Basil Smallpeice, then Managing Director of BOAC, described the order for 35 aircraft some seven years ahead of delivery as "against any commercial judgment" (63)

The next phase in the V.C.10 saga began when Vickers ran into financial troubles at the end of 1959. They felt they would be able to continue production if BOAC ordered 10 more V.C.10's, bringing the total to 45 aircraft. The 10 extra aircraft would be known as the Super V.C.10,(a "stretched" version of the standard V.C.10) and would form part of the original option order for 20 aircraft. However, BOAC felt they should maintain their right not to decide to implement any part of the optional order until August, 1962. But when Vickers appeared to be in dire financial straits in January, 1960, BOAC feared that production on the 35 V.C.10's would cease and they would be without aircraft in the mid-1960's. Government policy for the aircraft industry was also involved. The Minister of Aviation declared that, although it would help the aircraft industry, he would not pressure BOAC to buy the Super V.C.10. He also indicated that the prosperity of the aircraft industry and the air corporations were of equal concern. (64) But when the decision was made to merge Vickers with other

---

63. Ibid., Q. 1244.

64. Ibid., Q. 1492n.

companies to form the British Aircraft Corporation, BOAC were under great Ministerial pressure to order these additional aircraft for it was part of the Minister's plans for the formation of the British Aircraft Corporation. (65)

The order for the 10 Super V.C.10's was placed in June, 1960, one month before Slattery became chairman of BOAC. At his instig--ation, a modified version of the Super V.C.10 was developed and the order for 35 Standard and 10 Super V.C.10's altered to 15 Stan--dard and 30 Super. Lastly, the order for 15 Standard V.C.10's was reduced to 12 in order that the total cost fell within the Treasury's capital authority and BOAC had to pay approximately £600,000 in cancellation charges. The corporation had thus deviated from their intention to promote their own commercial advantage for they had been persuaded to move away from their original plan, decided in November, 1959, not to order any more than 35 aircraft. Quite obviously they had the Minister's promotion of the British Aircraft Corporation in mind. BOAC allowed national interests to override their commercial judgement but this is the responsibility of the Minister and he should have issued a directive to BOAC. By 1963, however, realizing that BOAC had been over-optimistic about the rate of expected traffic growth and that they were committed to a large fleet of jet aircraft, the board formally approached the Ministry of Aviation about the possibility of reducing the planned size of the fleet. (66)

---

65. Ibid., Q. 1185.

66. Ibid., Q. 1749n.

Meanwhile, back at the Ministry of Aviation, the new Minister (Julian Amery) had instituted an independent investigation into the facts and issues surrounding the huge loss of approximately £50 million which BOAC reported in 1961-2 and which had caused a political storm. It was not until November, 1962, (five months after taking office) that Mr. Amery announced that the inquiry was under way and he further indicated that he intended to keep the report confidential. Neither Parliament nor the board of BOAC were to see it. The Corbett Report (undertaken by a Mr. John Corbett) was completed in May, 1963 and the Minister ordered the publication of a White Paper on the 'Financial Problems of BOAC' (67) in November of that year. Prior to publication, however, both the chairman and the managing director of BOAC resigned. Although the principal reason for the resignations of Slattery and Smallpeice may have been to protest against the Minister's methods, in any event, rel--ations between the Minister and the chairman were, to say the least, strained. Indeed, Sir Matthew Slattery had gone so far as to declare to the Press that the financial system under which his corporation had to operate was 'bloody crazy'. The appointment of the new chairman, Sir Giles Guthrie, a leading merchant banker, was announ--ced on the same day as the resignations.

"The Minister has spent six months reading Corbett and writing the White Paper.... Then, without showing Sir Matthew and Sir Basil the White Paper, let alone the Corbett report, he devises their resignation, puts in a new man with no experience of airline management and tells him to produce yet another plan within twelve

---

67. H.C. Paper No.5, 1963-4.

months. The BOAC leaders are cast aside on the basis of evidence which, since it is known to the Minister alone, they cannot ans--wer. Some may feel that it is a most disagreeable political act." (68)

The White Paper accused BOAC, inter alia, of ineffective financial control, ("financial control has not been accorded sufficient importance",) (69) unduly optimistic traffic forecasts and unsatisfactory management of its relations with associated companies. However, BOAC had had success in gradually reducing operating costs; most of the major airlines erred in their traffic forecasts when converting to jet airliners; and lastly BOAC's rel--ations with their associates were largely the consequences of government policy towards former colonies. Further, a great part of the losses sustained by BOAC were due to the pursuit of policies which rightly or wrongly, the corporation believed to be in the public interest. The White Paper gave no indication whether or not BOAC had the Minister's support in pursuing these policies (e.g. support for the British aircraft industry, assistance to associates and continued operation of certain uneconomic services particularly to South America) It gave no indication of what principles BOAC were to follow in the future but it did declare that:

"the Government think it necessary to reaffirm that the Corporation must operate as a commercial undertaking."

Sir Giles Guthrie, adhering faithfully to this printed reference, announced BOAC's intention to cancel the order for 30

---

68. Flight International, vol.84, November 28, 1963, p.851.

69. H.C. Paper No.5, 1963 - 4, para 33.

Super V.C.10's. (70) This shrewd decision descended on the Ministry of Aviation with overwhelming impact. The board of BOAC were conscious of the fact that, in the last resort, the Minister could issue a directive forcing BOAC to accept these aircraft but Parliament, Government, BOAC and the interested public were also aware that BOAC had been already well "white-washed"; therefore some advantage was to be gained from adopting this attitude. The result was the capital reconstruction of the corporation. Whether it is termed financial inducement, bribery or barter, BOAC's liabilities to the Exchequer of £110 million out of a total of £176 million at March 31,1965 were to be cancelled. Of the balance of £66 million as from April 1, 1965, £31 million was to remain as Exchequer advances bearing fixed interest charges while £35 million was to take the form of equity capital, BOAC paying an annual "dividend" at an approved rate. (71) In return, BOAC were prepared to accept 17 Super V.C.10's and 10 Standard V.C.10's. In short, BOAC were to be in the position of virtually starting afresh in exchange for the acceptance of 27 aircraft out of an original order of 45. (72)

The crux of the whole matter appears to be the confusion

---

70. It is to be remembered that, at last count, the order stood at 30 Super V.C.10's and 12 Standard V.C.10's .

71. This capital reconstruction was effected by the Air Corpor-ations Act, 1966, largely superseded by the 1967 Act.

72.For a more comprehensive account of the "V.C.10 incident" see the Report of the Select Committee on Nationalised Indus-tries, 1964, (BOAC) vol.I, paras. 33 - 64.

over the relative responsibilities of the Minister and the air corporations. There should be a clear cut division of respons--ibility between the chairman and his board on the one hand, and the Minister and his department on the other. BOAC and BEA have a special rôle in the national economy. They are part of the country's essential economic infrastructure. (73) But when the Minister wishes to override the board on a commercial question for reasons of the national interest, he should do so by means of a published directive. In past years, the main preoccupation of successive Ministers has been to exercise power and influence while avoiding responsibility in public for a particular policy which has turned out badly. On the other hand, one cannot only blame the Minister for blurring the lines of responsibility and exercising a greater degree of power over the air corporations than authorised by Parliament. Both BOAC and BEA seem generally to have accepted, with little or no protest, Ministerial inter--ference with their commercial judgement, even when he was acting without legal authority, although they were free, in such circum--stances, to refuse to accept his ruling. (74) Perhaps the board members of BOAC and BEA should have been more prepared to with--stand Ministerial pressures. The threat of collective resig--nation is a challenge the Minister might not be willing to confront

---

73. See Wheatcroft, Air Transport Policy, (1964) p.120.

74. See e.g. the Report of the Select Committee on Nationalised Industries, (Reports and Accounts) The Air Corporations, HC Paper No.213, 1959, para.92 and also para.34 in relation to BEA and their DH121 (Trident) project.

if he is dealing with the corporations in a clandestine manner.

Whatever the reasons may be for this state of affairs, the tendency of the Minister to rely on pressure or influence in his relations with the air corporations rather than formal directions is out of place. Certainly, Government control plays the central part in the overall administration of the nationalised air transport industry in which the general public have high stakes and the formal powers of control which the Government possess in a regul--ated economy are proper in principle. But they are designed to give the sponsoring Minister ultimate authority, in case of necess--ity, in all major questions of policy, whether relating to finance, operations or anything else. The Minister must be willing to meas--ure up to these assumed responsibilities. He should not be allowed to lurk in the so-called 'twilight zone' (75) without divulging, to Parliament or the public at large, the full extent of his super--intendence and intervention. It is not the way to secure equil--ibrium between Ministerial control and freedom of management.

2. Parliamentary Accountability.

Parliament has the undisputed right to perform the legis--lative function creating a nationalised industry and establishing the appropriate instrument for the purpose. The Air Corporations Acts successively laid down the structure within which both BOAC and BEA are required to operate. In enacting such legislation, Parliament displays a permanent influence over the air corporations

---

75. See Robson, Nationalized Industry and Public Ownership, pp. 161-2.

for it provides an opportunity for effective criticism and debate. Further, the Air Corporations Acts dealing with the borrowing powers of BOAC and BEA (76) also gave Members of Parliament an opportunity to discuss the corporations. Where the Bill before the House is not of limited content, debate may range over the whole administration of the corporation from questions of policy to unpunctual services.

Statutory instruments are also part of Parliament's legis--lative function. These are regulations made by the Minister under powers delegated to him by statute. Some require an affirmative resolution by both Houses of Parliament in order to bring them into force while the less important ones come into force automatically after being laid before Parliament unless a negative resolution is prayed against them. The debate on statutory instruments is str--ictly limited to the clauses contained therein. (77)

The extent to which sponsoring Ministers are or should be answerable in Parliament for the public corporation, and the right of Members to put down questions, has long been a matter of dis--cussion. The situation is not entirely clear but it has been rec--ognised for some time that Parliament has the right to discuss matters of major policy while the day-to-day activity of the public corporation should be immune from parliamentary scrutiny. (78)

---

76. E.g. the Air Corporations Acts 1953 to 1964.

77. See 552 HC Deb. 5s., cols. 2337 - 2368, (May 17, 1956) The deb--ate can cover questions of major policy if the regulation deals with a large topic such as the transfer of ministerial responsibility

78. This principle was first expressed by the Broadcasting Committee - - Report of the Broadcasting Committee, 1925, HMSO, Cmd. 2599/1926, p.13.

Although recognised as an authority on the theory of the public corporation, Mr. Herbert Morrison was also respected for his ideas on the relations between Parliament and Government. In 1947, as Lord President of the Council and Leader of the House of Commons, he had this to say:

> "A Minister is responsible to Parliament for action which he may take in relation to a board, or action coming within his statutory powers which he has not taken. This is the principle that determines generally the matters on which a question may be put down for answer by a Minister in the House of Commons. Thus the Minister would be answerable for any directions he gave in the national interest, and for the action which he took on proposals which a board was required by Statute to lay before him.
> 'It would be contrary to this principle, and to the clearly expressed intention of Parliament in the governing legislation, if Ministers were to give, in replies in Parliament or in letters, information about day-to-day matters. Undue intervention by the Minister would tend to impair the board's commercial freedom of action. The boards of socialized industries are under an obligation to submit annual reports and accounts which are to be laid before Parliament. In the Government's view, it is right that Parliament should from time to time review the work of the boards, on the basis of the reports and accounts presented to Parliament." (79)

General ministerial responsibility is indicated by the fact that the annual reports and accounts of both BOAC and BEA come before Parliament through the Minister. Further, the Minister will have a duty to answer questions about the manner in which he has or has failed to exercise his statutory powers. In addition, the Minister should answer questions about general administration while there should be no parliamentary inquisition into daily management. However, this nice distinction may only be one of degree. For example, if one of the air corporations adopted a stringent policy of over-booking, then it might be reflected as being against the public interest and hence come under the heading of general

---

79. 445 HC Deb. 5s., col.566 (December 4, 1947)

administration. If however, few passengers are turned away, and then only very infrequently, this would be a matter of day-to-day management. (80) One could apply the same distinction to punctuality of services.

Whether or not any question is admissible is a matter for the Speaker of the House of Commons to decide. Much depends on the rules of procedure prevailing at a particular time. It is contended that the Minister should exercise his discretion whether to answer a question put down on the order paper. But it is doubted if this is wholly advisable, for while there has been an increase in super--intendence and intervention on the part of the Minister, as illus--trated above, there has not been an increasing willingness to reply to a wider range of questions. However, the rules of the House seem to indicate that if the Minister is asked by a Member to take action under his statutory powers or issue a general dir--ection, he is compelled to answer. (81) Questions on the fares charged by the air corporations will be refused because, in practice, they are not fixed by the Minister and, in any case, particular tariffs are matters of day-to-day management. Therefore, it would appear that Parliament cannot inquire into the air corporations' duty to provide services 'at reasonable charges'.

On the methods by which the House of Commons is informed

---

80. See BEA Report and Accounts HC Paper No.362, 1967/8, p.18.

81. See the Report of the Select Committee on Nationalised Indus--tries, HC Paper No.332, vol. I, 1951/2, para.4.

of the affairs of the public corporation, Mr. Morrison had this opinion in 1952. He was quite blunt in indicating that Parliament could not have the benefit both ways. If it wanted complete freedom in questioning Ministers then the nationalised industries should be entrusted to government departments. But if it establishes a public corporation 'in which the principle of public ownership is embodied but in which there is business management of a largely independent character, at any rate as regards day-to-day matters', then Parl--iament should accept the consequences. (82)

Although limited in scope, the parliamentary question is a powerful instrument of control and accountability. It provides Members of Parliament representing the consumer and the taxpayer with an opportunity to inquire into the efficiency and success of the nationalised industry. With total freedom of inquiry, the ad--vantages of having a public corporation would be substantially reduced but nevertheless, Members of the House of Commons may not have taken full advantage of the opportunities that are open to them by the rules of procedure in that they have not shown their usual skill in framing questions that would be in order. (83)

Another method of inquiry by Parliament is the short ad--journment debate at the end of each day's business. It provides one of the best opportunities for raising matters in some detail although admissibility of the subject is the responsibility of the Speaker. Any aspect of the affairs of BOAC and BEA can be raised.

---

82. Ibid., Q. 778, 792.

83. Morrison, Government and Parliament, p.261.

The result is that the Minister may have to explain and perhaps defend the actions of the corporations though he is not directly responsible for these matters. (84)

Debates on Motions provide another opportunity for parl--iamentary scrutiny. In this way, a substantive matter of urgent public importance can be discussed. This would arise, for example, where the Minister forced the chairman of one of the corporations to resign. Motions of a general nature can be debated in the gov--ernment's time or during the time normally set aside for private members' business. 'Supply days' can also be used to discuss the air corporations. (85) Annually, there are 20 and the Opposition in the House of Commons has the indisputable right to choose the topic of discussion. Indicating the flexibility of this right, Supply days have been used to discuss civil aviation with special reference to the Government's policy giving more freedom to indep--endent operators, (86) and to debate the annual reports and accounts of the air corporations. (87)

The reports and accounts of BOAC and BEA are potentially of greatest importance. On the one hand, they provide to the cor--porations an opportunity to explain and justify their policies

---

84. These debates have included in the past such topics as the use of flying boats and service conditions for airline pilots. See Robson, Nationalized Industry and Public Ownership, p. 178.

85. 'Supply days' are days on which the Government seeks the approval of Parliament for its estimates of public expenditure.

86. 524 HC Deb. 5s., cols 1741 - 1870 (March 8, 1954).

87. 505 HC Deb. 5s., cols 1935 - 2060 (October 29, 1952).

and show the results of their administration. On the other hand, the reports form the main source of public information on which parliamentary debates can take place for, inter alia the report will contain any direction which the Minister has given to the board du--ring the year. (88) Debates on the annual reports take place in Government time, which is important, (89) and the practice is that three days each year are allocated to such debates which are inten--ded to be of general character discussing the state of the industry The Opposition have the privilege of choosing which industries are to be debated, BOAC and BEA being normally discussed with the fuel and power industries. (90)

The last and latest opportunity for Parliament to consider the affairs of the air corporations is through the work of the Select Committee on Nationalised Industries. The advent of the Sel--ect Committee increased the scope of methods of parliamentary scru--tiny of all the nationalised industries. The terms of reference of the so-called Standing Committee are to examine the Reports and Accounts of the Nationalised Industries established by Statute whose controlling Boards are appointed by Ministers of the Crown and whose annual receipts are not wholly or mainly derived from moneys provided by Parliament or advanced from the Exchequer.

The idea that the House of Commons should appoint a Select

---

88. Air Corporations Act, 1967, s. 26 (3). However, there is the proviso therein making it possible to keep secret a directive at the instigation of the Minister.

89. As indicated, the Opposition have used a Supply day.

90. See Robson, op cit., p. 180.

Committee on the public corporations originated in 1949. Hugh Molson, M.P., remarked that general debate often lacked any continuity. He believed that the House could best operate if it was debating a lim--ited number of matters which had already been ear-marked for dis--cussion. He also argued that as the Select Committee on Estimates and Public Accounts was of great value scrutinising public expendit--ure, a Select Committee could be used to elucidate the salient issues relating to nationalised industries. (91)

The Labour Government could not accept this proposal but when the Conservatives came to power in 1951 they appointed a committee "to consider the present methods by which the House of Commons is informed of the affairs of the nationalised industries and to report what changes, having regard to the provisions laid down by Parliament in the relevant statutes, may be desirable in these methods." (92) Mr Herbert Morrison was among those who opposed the proposal. He argued that such a permanent committee would be contrary to the spirit and intention of the legislation and the British constitutional trad--ition. He believed Parliament should not be permitted to meddle in details of management of a public enterprise because then the demarc--ation line of responsibility would tend to become blurred. (93) The committee reported in favour of a Standing Committee to serve as

---

91. See Molson,'Nationalised Industries', The Times, September 8, 1949.

92. 494 HC Deb. 5s., cols. 2355 - 6 (December 4, 1951).

93. See the Report of the Select Committee on Nationalised Industries, HC Paper No. 235, 1952 - 3, paras. 9 - 13.

'guardian of the public interest' (94) with power 'to send for persons, papers and records, power to set up sub-committees, and to report from time to time' on the nationalised industries. The object of the Committee would not be to control the work of the corporat--ions. It was recommended that the Committee should have as staff an officer of high status like the Comptroller and Auditor-General.

The Conservative Government accepted the recommendation to establish a Standing Committee but proposed substantial changes in the terms of reference and the composition of the committee. The committees were to examine current policy instead of general policy and were to be prohibited from inquiring into matters which have been decided by the sponsoring Minister or which engage his responsibility The committee would have the services of Treasury and departmental officials but would not have the assistance of an officer comparable in status to the Comptroller and Auditor-General.

The House of Commons set up a Select Committee on National--ised Industries in 1955 but after a few meetings they reported in November that it was impossible for them to do any relevant work of importance to the House as, inter alia there were so many matters specified by government departments as having been finally decided by Ministers or engaging or likely to engage his responsib--ility. (95) Thereafter, the Government decided to establish a new committee with wider terms of reference. The scope of inquiries would be left to the discretion of the committee but it would not

---

94. Ibid., para 15.

95. The Special Report from the Select Committee on Nationalised Industries, HC Paper No. 120, 1955 - 6.

be expected to examine matters of day-to-day management or, at the other extreme, matters of policy which are the responsibility of the sponsoring Ministers. They could report, however, on financial results, the efficiency of the enterprise, relations with the gen--eral public and the public corporations' so-called social services. (96)

The /Select Committee have dealt with BOAC and BEA on three occasions - once together and each separately (There was also a brief Special Report on BOAC in December 1965) - and have also examined the problem of Ministerial control. These reports have discussed various topics including fares, routes and the operations of the air corporations, the supply of new aircraft and also the relations between the Minister and the corporations. These inquiries direct attention to problems and important aspects of business providing a solution to the difficulty of public accountability. BOAC and BEA follow the earlier practice adopted by government dep--artments in relation to the reports of the Public Accounts Committee of the House of Commons (97) by replying to comments made about them by the Select Committee. These replies indicate that the air corporations will take full cognisance of the Committee's recom--mendations and attempt, if possible , to carry them out. Yet, although the Select Committee have provided useful information to Parliament, they cannot be an authoritative body unless or

---

96. 561 HC Deb. 5s., cols. 395 - 603 (November 29, 1956).

97. The Public Accounts Committee scrutinises the expenditure of government departments, Thus, when BOAC and BEA received subsidies, they were discussed on the Ministry of Civil Aviation Account.

until they have first-class economic and technical advice and are supplied with the services of a highly qualified staff.

The rôle of Parliament is, in the last resort, to protect the public at large. Parliament should not debate the merits of nationalisation but should criticise and discuss the information it has before it making the consumer and taxpayer aware that some--thing is being done for him. Adequate opportunities exist to enable Members of Parliament to receive much of the information concerning the air corporations although a notable hiatus may exist as regards Ministerial intervention and superintendence. Parliament has plenty of opportunity to comment on, discuss or criticise the activities of BOAC and BEA. But Parliament has no positive powers. In theory, it can change the law, but from the practical point of view it can only pass, modify or reject Bills which have been introduced by the Government. Yet one cannot go so far as to suggest that parliament--ary criticism has no substantial influence on the sponsoring Minister, who has extensive powers of influence and control, in his dealings with the two corporations. Further, it would be quite wrong to assume that views expressed in Parliament, whether they be crit--ical or laudable, have no effect on the air corporations merely because there is little sanction behind them. (98)

---

98. For a comprehensive account of Parliamentary accounatability, see Robson, op.cit., Ch.VII and VIII, pp. 163 - 211.

Chapter V

The Air Transport Advisory Council and the Air Transport Licensing Board.

A problem which arose with the advent of the public corpor--ation was the relationship between the public enterprise and the general public. The need to safeguard the interests of the consumer or user was more acute where the industry enjoyed a monopolistic position as did the air corporations prior to 1960. Ministers and their departments do not seem to have been sufficiently aware of the consumers' interests to provide the necessary safeguards. In fact, Ministers are more disposed towards the industry than towards the user for this is part of the phenomena of modern government. The Minister's so-called public interest is not the ultimate user's interest. The former is general in nature while the latter is comp--letely specific. Members of Parliament who could perhaps alter this ministerial tendency are, in any case, more preoccupied with the local interests of their own constituents. (99)

The courts can often provide the man in the street with a remedy against the public corporation. (1) Therefore, where breach of contract,negligence, nuisance and other tortious acts are comp--lained of, the courts will entertain the consumer's plea. But where tariffs, adequancy of services and basic policy matters are involved

---

99. See Robson, op. cit,, p.243.

1. See post Ch. VI.

the courts will tend to be reticent. To remedy the relatively weak position of the consumer and user, a series of organs were set up after the Second World War. One of these organs was the Air Transport Advisory Council whose duty, inter alia, was to safeguard the interests of the user of the publicly owned air transport ser--vices. (2)

1. The Air Transport Advisory Council.

It must be stated at the outset that, although the Council had the duty to inquire into complaints about air services provided by BOAC and BEA, they differed from other consumers' councils. The Council examined complaints but,in no sense, did they represent consumer interests. (3) The Lord Chancellor of England was respon--sible for appointing the chairman of the Council who had to be a barrister or solicitor of not less than seven years standing. The other members (not less than two or more than four) were appointed by the Minister responsible for the nationalised airlines. One member was required to have experience in the operation of air services while another was to have knowledge of other forms of transportation. (4) No member or employee of BOAC or BEA was elig--ible to sit on the Council. They could appoint experts to assist

---

2. Established under the Civil Aviation (Air Transport Advisory Council) Order, 1947 (No.1224) This order was made by virtue of the Civil Aviation Act, 1946, s.36, subsequently replaced by the Civil Aviation Act, 1949, s.12. The Order was continued by s.70 (2) of the 1949 Act.

3. See Robson, op. cit., p.251.

4. There was no requirement that the user of air services be rep--resented.

them in professional or technical matters but ministerial approval was necessary.

It was the duty of the Air Transport Advisory Council to consider any representation from any person with respect to the adequacy of the facilities provided by either BOAC or BEA, or with respect to the charges for any such facilities. The Council were not required to consider any representation if, in their opinion, it was frivolous or vexatious or if it concerned a matter governed by international agreement to which the Government was a party.

The Council were also to consider any question referred to them by the Minister relating to facilities for air transport in any part of the world or charges for such facilities or a question concerning the improvement of air services. After consid--ering any representation the Council had the duty to report their conclusions to the Minister and could suggest recommendations.

To assist the Council in carrying out their task, the Min--ister provided accomodation and staff to the Council. The salaries of members and staff were determined and paid by the Minister with the approval of the Treasury. It was also the responsibility of the Minister to provide the Council with assistance and any information which he thought necessary for carrying out their functions. BOAC and BEA were obliged to inform the Council of all services provided or which they intended to provide, and of the charges which they made or proposed to make for those services. (5)

---

5. The composition, powers and duties of the Air Transport Advisory Council were contained in s.12 of the Civil Aviation Act, 1949 and appear in the Final Report of the Air Transport Advisory Council 1960/1 HC Paper No. 259, Appendices "A" and "B".

The Air Transport Advisory Council was established on June 11, 1947. One of the most striking features of the Council's history was the small use made by the general public of this channel for complaints even although the Council was also required to consider any representations concerning services operated by the independent airlines under associate agreements. This may have been due to the unfamiliarity of the public with the machinery available to inquire into customers' grievances with the result that many people were seeking redress through the Press or by writing to their Members of Parliament. The number of representations received annually fell from an average of eight in the early years to only two in 1960-1. (6) The total number dealt with was 59 in 13/2 years, so the Council were not exactly over-worked.

The complaints related to such matters as booking arrange--ments; delays in BEA's services between London and Edinburgh; the effect of the closure of Renfrew maintenance base on the Highland air services;(7) the adequacy of various services provided by BOAC, BEA and the independents and the absence of a BEA coach service between Guernsey Airport and St. Peter Port. It appears that only once have the Council made a recommendation to the Minister, namely, on the question of setting down passengers at points between the airports and terminals on BEA and BOAC 'bus services.

The little use made of the Air Transport Advisory Council for ventilating grievances may have been, in the early years, because

---

6. Ibid., p.10.

7. The Scottish Covenant Association used this as an item in their nationalist campaign. See, Robson, op. cit., p.252.

of ignorance of their existence but it is reasonable to suggest that, latterly, the decline in the number of complaints indicated that the public, in general, was satisfied with the services provided by the air corporations and their associates and that the operators themselves dealt satisfactorily with any complaints as they arose.

Of much greater importance was the work done by the Air Transport Advisory Council considering and advising the Minister on applications for air services of various types. The Council's responsibilities in this connection originated with a Ministerial direction in January, 1949, which provided limited opportunities for the independent operators to provide services which did not compete with the existing or planned services of BOAC and BEA. A revised directive in 1950 adopted the same basic policy but allowed approvals of services to be granted for five years instead of two. When the Conservatives came to power in 1951, they were eager to enlarge the sphere of activity of the commercial companies. They issued new terms of reference to the Air Transport Advisory Council in July, 1952. (8) The independents were thereafter allowed to develop new routes and types of service on equal terms with the air corporations provided that these did not seriously conflict with the corporations established networks.

The Council's work thus developed in a manner which was not foreseen at first but it was possible because of the general statutory duties given to the Council at its inception. This

---

8. The terms of reference can be found in 22 Journal of Air Law and Commerce (1955) pp. 203 - 208, see supra note 47.

flexibility allowed the Air Transport Advisory Council to cater for changing circumstances without the need for major overhaul. The gradual change from a consumers' council to a de facto lic--ensing authority expedited by means of two directives and the new terms of reference, encouraged the independent companies to contribute to the development of new types of services, new classes of traffic and new markets while discouraging direct competition between BOAC, BEA and the commercial operators. (9)

During the 1950's the scope of services operated by the independent airlines developed from seasonal holiday services on domestic routes to a considerable network of internal and inter--national services covering a wide area of Europe and Africa. In the latter years, there was a great increase in the number of app--lications to the Council for inclusive tour services though this type of operation was highly seasonal. The operation of trooping services was the exclusive province of the private operators for the sponsoring Minister, in 1951, had extracted an undertaking from BOAC and BEA not to retain aircraft specifically for charter work. Their charter work was to be totally secondary to their work of scheduled services. (10) During this period, there was no relentless battle between the public and private sectors of the air transport industry. There was widespread agreement that, although public

---

9. For a brief review of the Council's history, see the Final Report of the Air Transport Advisory Council, op. cit., paras. 27-32.

10. See the Report of the Select Committee on Nationalised Industries, 1959, op. cit., p.11. This was one of the examples the Committee gave of extra-statutory intervention by the Minister in the affairs of the air corporations.

enterprise was perhaps desirable, the private operators should still be permitted to make a certain contribution to the development of the industry. (11)

The Civil Aviation (Licensing) Act, 1960, created much greater opportunities for the private airlines than they had been allowed even under the 1951 policy. The Act brought an end to the arrangement whereby the licensing of new scheduled services had been authorised by an advisory body. It ended the legal farce (12) of associate agreements and created a genuine licensing system under the Air Transport Licensing Board, However, this is not intended as a criticism of the Air Transport Advisory Council which did, in fact, do sterling work as a quasi-licensing body for 13 years under the chairmanship of Lord Terrington.

The Civil Aviation (Licensing) Act also terminated the monopoly position enjoyed by BOAC and BEA on scheduled services. (13) It could be argued that the associate agreements had ended the exclusive rights of the air corporations but, in fact, there were lists of reserved routes appended to the terms of reference of the Air Transport Advisory Council which were the exclusive preserve of BOAC and BEA. With the creation of the Air Transport Licensing Board (A.T.L.B.) the air corporations became ordinary applicants for licenses to operate air services. The private airlines could now obtain a licence to operate a service in parallel with that

---

11. See Wyatt, 'British Independent Aviation - Past and Future', Journal of the Institute of Transport, May, 1963.

12. See, Wheatcroft, op. cit., p.38.

13. s.9 (a) repealing s.24 of the Air Corporations Act, 1949.

of BOAC or BEA on any of their routes. The air corporations were thus confronted with another instrument of control.

2. The Air Transport Licensing Board.

The Board can be regarded as a commission which controls entry into the air transport industry. (14) It is an administrative tribunal making administrative decisions but its procedure is judicial. (15) The Board has the general duty to exercise its func--tions so as to further the development of British civil aviation. (16) The Board consists of between six and ten members who are appointed by the Minister. He also chooses the chairman and deputy chairman from among the members. (17) Each member holds and vacates office in accordance with the terms of the instrument appointing him and any remuneration received is determined by the Minister with Treasury approval. (18) The Act does not provide any guideline as to qualifications for membership but certain persons are dis--qualified from holding office. No person may be a member who has an interest in an air transport undertaking or airport operations unless such interest has been declared to the Minister and the

---

14. See Kahn-Freund, op. cit., p. 668.

15. The Board comes under the supervision of the Council on Tribun--als and Inquiries (Air Transport Licensing Board) Order, 1960,(No. 1335) made under powers contained in the Tribunals and Inquiries Act, 1958, s.10.

16. Civil Aviation (Licensing) Act, 1960, s.1 (1).

17. Ibid., Sched., para.1. At present there are 7 members on the Air Transport Licensing Board.

18. Ibid., paras. 2 and 3.

Board. (19) Membership of the Board disqualifies a person from membership of the House of Commons. (20)

The sponsoring Minister (President of the Board of Trade) also has the power of dismissal of the members. This may occur where a member has been continually absent without permission for a period exceeding six months, is bankrupt or is unable or unfit to act as a Board member through illness or any other cause. (21) The Board may still exercise its functions notwithstanding the fact that there is a vacancy in the membership thereof. (22) The A.T.L.B. has a duty to furnish the Minister with accounts and any other information which he may from time to time require and the Board must make annual reports to the Minister as to the exercise and performance of functions. The Minister must present a copy of every such report to Parliament. (23)

The Civil Aviation (Licensing) Act, 1960, section 4, gives the Board the 'consumers' council' functions formerly entrusted to the Air Transport Advisory Council. The Board has the duty to con--sider any representation from any person relating to, or to facil--ities in connection with, air transport services by means of air--craft registered in the United Kingdom, or with respect to the tariff or other charges in respect of any such service or facilities.

---

19. Ibid., para. 7.

20. Ibid., para. 4.

21. Ibid., para. 6.

22. Ibid., para. 8.

23. Civil Aviation(Licensing)Act, 1960, s.8.

The Board need not consider any representation which has been sufficiently dealt with in a related matter or which they consider frivolous but the Board must report its conclusions and any rec--ommendations.

The advisory functions of the A.T.L.B. are relatively unim--portant although they may encourage the airline to pacify the complainant. In the year 1967 - 8, for example, the Board rec--eived four representations from members of the public (another was outstanding from the previous year). All were concerned with scheduled services,referring to delays or cancellations of flights, alleged lack of attention from staff, or discomfort in aircraft. In three cases, the complainants seemed satisfied after receiving an explanation from the airlines concerned while in the other two cases the Board reported, without recommendation, to the Board of Trade. (24)

The 1960 Act revolutionised the whole field of civil aviation in the United Kingdom for, with the establishment of the A.T.L.B., it created an entirely new basis for the economic regulation of air transport. (25) Apart from the need of a carrier by air to hold an Air Operator's Certificate, it became necessary to apply to the A.T.L.B. for the purpose of obtaining an Air Service Licence to operate any service. With a few exceptions, the

---

24. See the Eighth Report of the A.T.L.B., 1967/8, p. 28.

25. The Act also instituted new technical rules intended to increase air safety. It was necessary to obtain an air operator's certificate, issued by the Director of Aviation Safety,before an aircraft could be operated for reward or in connection with any trade or business - s.1 (2) It applies equally to BOAC, BEA, and the independent operators.

licence is a prerequisite for all scheduled and charter services by aircraft registered in the United Kingdom. (26) Certain oper--ations, however, such as aerial photography, crop spraying and rescue work are exempted from this requirement. (27)

In refusing or granting any application for a licence, the A.T.L.B. has the duty to act "in such a manner as to further the development of British civil aviation". (28) Thus the Board has a very general and flexible duty for nowhere in the 1960 Act is a specific policy direction enunciated. As the Act does not provide any positive guidance on policy for the Board to follow, it can be assumed that it was the intention of Parliament to give the A.T.L.B. an unfettered discretion as regards general policies. In the absence of a declared policy, the Board has followed the practice of explaining fully the reasons for its decisions. (29) However, although the Act is silent on policy objectives, it does list a number of particular items which the Board shall take into consideration in exercising its functions.

One of these factors is the fitness of the applicant to undertake air transport operations. (30) This includes the ability to provide satisfactory equipment, organisation and staff and also whether the applicant is financially sound to undertake the service.

---

26. Civil Aviation (Licensing) Act, 1960, s.1 (4).

27. For the list, see, Civil Aviation (Licensing) Regulations, 1964, (No. 1116) reg. 3.

28. Civil Aviation (Licensing)Act, s.1 (1).

29. See, e.g. Third Report of the A.T.L.B., 1962/3, p.6.

30. Civil Aviation (Licensing) Act, 1960, s.2 (2) (a).

Although the A.T.L.B. has recognised the importance of such a matter as financial resources, (31) it is of little relevance to BOAC or BEA because, if they were unable to satisfy the Board of their fin--ancial strength, it is doubtful if any other operator would be able to do so. (32)

Another element for consideration is the provision against liability. (33) This is related to insurance of a satisfactory stan--dard, but it is not essential for an operator to insure against damage to passengers or goods if his own resources are adequate. In any case, the position of the air corporations and the independ--ent operators will normally be governed by statutory limits unless the passenger or shipper has entered into a special contract with the carrier. Further, the grant of a licence does not ensure that full compensation will be received by a person suffering injury or loss. (34) Another item to be taken into account is terms and con--ditions of employment. (35) As far as BOAC and BEA are concerned, matters relating to staff, wages, pensions and conditions of employ--ment are governed by the Air Corporations Act, 1967, sections 23 and 24 which provide, inter alia, that the air corporations have a duty to consult with any organisation representative of their

---

31. Second Report of the A.T.L.B., 1961/2, paras. 9 - 17.

32. The taxpayer is the air corporations' guarantor.

33. Civil Aviation (Licensing) Act, 1960, s.2 (2) (b).

34. The Civil Aviation (Licensing) Regulations, 1964 (No. 1116) reg. 6 (2) strengthens the Board's power to suspend a licence if there is inadequate insurance cover.

35. Civil Aviation (Licensing) Act, 1960, s.2 (2) (c).

employees about these matters. From 1946, the independent operators were required to offer their employees not less favourable terms and conditions of employment than those observed by the nationalised airlines. (36) But, if there is to be competition, it must be gen--uine and it was not fair at that time because BOAC and BEA received substantial subsidies from the State. This requirement, however, does not mean that every operator has to pay, for example, pilots the same salaries as are paid by the air corporations to their pilots What it does ensure is the maintenance of consultative machinery so that employees can bargain with their employers.

Further, factors for consideration by the A.T.L.B. in con--sidering an application for a licence include such questions as potential need or demand, material diversion and wasteful duplic--ation.(37) These factors are considered together because they are very much inter-related. The Act does not indicate the relative imp--ortance of the above-mentioned items but it is true to say that the adequacy of an airline to operate a service or any provisions which it has made to guard against liability in respect of loss or injury would seem relatively easy to judge in comparison with the task of anticipating whether or not a new operator would have a detrimenta impact upon pre-existing services. The decisions of the A.T.L.B. on questions of material diversion and wasteful duplication are of vital importance to the development of civil aviation in the United

---

36. Civil Aviation Act, 1946; the provision is now contained in the Civil Aviation Act, 1949, s.15 (1).

37. Civil Aviation (Licensing) Act, 1960, s.2 (2) (d) (e) and (f).

Kingdom, particularly to BOAC and BEA. If the Board adopts an ill--iberal view of material diversion or wasteful duplication, it could endanger the considerable resources which BOAC and BEA, as existing operators, have invested in their numerous services. (38) The grant or refusal of a licence can have a profound effect on whether an existing service will be operated or discontinued and, in the last resort, the loss may be felt by the public at large.

The concept of material diversion is variable for different airlines will reach varying conclusions as to what constitutes diversion. However, the concept involves the idea of a second op--erator. The A.T.L.B. has indicated that diversion may result in a decrease in the volume of traffic which is being carried on an existing service while, on the other hand, it may only retard the estimated rate of traffic growth on the service. (39) The Board attaches great importance to the notion of material diversion and is justified in believing that there is no benefit to British civil aviation or to the travelling public in merely diverting traffic from one carrier to another especially where the carrier has in--curred substantial capital expenditure developing a route. The A.T.L.B., however, does not regard material diversion as an insur--mountable obstacle to the granting of a licence. If it did so, there would be no duplication of services. BEA, who, for all prac--tical purposes, were the sole operators of scheduled domestic services before 1960, and thus the so-called incumbents, have had

---

38. See Kahn-Freund, op. cit. p.681.

39. Second Report of the A.T.L.B., 1961/2, para. 8.

the difficulty of satisfying the Board that direct competition will constitute material diversion of traffic. Further, BEA are faced with the obligation of maintaining social services which are subsidised by profits from other routes. But when considering app--lications from the independents to operate the profitable domestic routes, the A.T.L.B. has not been greatly impressed by BEA's plea of cross-subsidisation. The Board is aware of BEA's predicament in that they cannot ever expect to cover operating costs on these social services but the Board also emphasises repeatedly that BEA is not under a legal duty to provide these services and should re--ceive a government subsidy to continue them. (40) Therefore if the A.T.L.B. pursues a narrow policy on 'material diversion', allowing vigourous competition on the more lucrative trunk routes, then BEA will have difficulty in operating as a commercial undertaking.

Material diversion warrants consideration in relation to "any air transport service which is being, or is about to be, pro--vided under any air service licence already granted." (41) Thus, the concept will be inapplicable to a contemplated service and will not be limited to "the diversion of business from any established operator" as the air corporations have argued. (42) Merely because an existing operator can expect a decrease in revenue if certain licence applications are granted does not necessarily create mat--erial diversion or, indeed, wasteful duplication.

---

40. Eighth Report of the A.T.L.B., 1967/8, para. 35.

41. Civil Aviation (Licensing) Act, 1960, s.2(2)(f).

42. Second Report of the A.T.L.B., 1961/2, para. 8.

The A.T.L.B., early in its existence, stated its opinion on 'wasteful duplication'. (43) It declared:

" (1) that duplication is not objectionable per se - only when it is wasteful;
(2) that it is wasteful if it results in any operator con--cerned devoting to a particular route resources which are in excess of demand or which could be better used elsewhere;
(3) that there is no general presumption that duplication will always be wasteful if it is provided by anyone except the ex--isting operators, but will not be wasteful if they provide it them--selves;
(4) that the mere fact that the existing operator will not get so much revenue in the future if certain applications are granted as he would if they were refused may be worthy of consideration under sub-paragraphs (g) or (h) of section 2(2) of the Act but does not automatically bring the application within sub-paragraph (f); (44)
(5) accordingly, that long-term aircraft procurement prog--rammes of themselves have rather less importance in the context of section 2(2)(f) than is sometimes argued."

These principles, as enunciated by the Board, dispelled any illusion that BOAC and BEA enjoyed a privileged position in the development of air services or that their existing services were any more sacro--sanct than those of the independent airlines.

Wasteful duplication would appear to exist where aircraft capacity is increased without a corresponding amount of extra traffic being generated, because then the relative costs increase and latter--ly the public suffers through higher tariffs. However, this definit--ion does not take into account the fact that duplication, unlike diversion, can be anticipated without introducing a second operator for an increase in the number of flights by the incumbent airline can be regarded just as wasteful as the introduction of a new oper--ator. But, in the former case, there is less likelihood of wasteful

---

43. Ibid.,

44. s.2(2)(g) and (h) refer to capital expenditure and objection respectively.

duplication because the existing operator is unlikely to increase capacity unless he believes that the traffic warrants such a move. Such a safeguard does not exist where a potential competitor applies for a licence. It would appear that, in order to protect the inter--ests of the existing operators, particularly the air corporations, the onus of proving that duplication is not wasteful should rest with the applicant not the objector.

The A.T.L.B. must also take into account any capital invest--ment, any expenditure or any financial commitment or commercial agreement reasonably entered into by the applicant or by the holder of any air service licence which has already been granted. (45) This is of particular importance to BOAC and BEA who have been responsible for bearing the burden of influencing the design of, and the cost of introducing new aircraft types. They have sustained heavy capital expenditure in the promotion, purchasing and running into service of these aircraft. The Corporations thus make a major contribution to the development of British civil aviation on a broad front. But, as previously stated, (46) the Board proposes to attach less importance to long-term aircraft procurement programmes than is sometimes argued. Therefore, if an application or objection is to be successful under this heading, much will depend on the extent of a commitment. Mere plans for a future service may not be sufficient,The difficult position of the air corporations is illustrated by the fact that they are obliged to enter into

---

45. Civil Aviation (Licensing) Act, 1960, s.2 (2) (g).

46. See, supra p.95.

agreements for the purchase of new aircraft several years before they are due to come into service. (47) The number of aircraft is gauged to traffic forecasts. BOAC and BEA are thus committed to the purchase of aircraft before they apply for licences. There is a dilemma if the estimates of traffic growth are over-optimistic, they fail in their applications for licences to operate particular routes and yet still have obligations to meet under their sales agreements.

With regard to any application for the grant of a licence, (or a proposal of the Board to vary, suspend or revoke an existing licence) any person may make a representation or lodge an objection in writing, and, provided it is done in accordance with the relev--ant regulations, the A.T.L.B. is under a duty to consider any such representation or objection. (48) Certain categories of persons, including the holder of an Air Service Licence; the holder of an aerodrome licence; the holder of an A or B road transport licence; a person with an interest in rail or sea transport and a government department or Minister of the Crown, have a further right to be heard by the Board. It is important to note, however, that the Pre--sident of the Board of Trade does not have this right. (49) Although surface carriers have the right to be heard, the A.T.L.B. has

---

47. See, e.g. BOAC and the V.C.10, supra Ch. IV.

48. Civil Aviation (Licensing) Act, 1960, s.2 (2) (h); Civil Aviation (Licensing) Regulations, 1964, reg.7.

49. Ibid., reg. 10 (2) However, the Board may, at its own discretion hear any other person - reg. 10 (5).

indicated (50) that its responsibility is to further the development of civil aviation and not to protect the interests of surface carriers who are pleading wasteful duplication and material diversion. Surface transport may not be a suitable alternative if an air ser--vice is discontinued but there are cases where sea transportation has a genuine interest. (51)

The A.T.L.B., when considering the grant or variation of an air service licence, has broad powers to impose certain condit--ions. The Board may prescribe the places of departure and destin--ation of any flights under the licence and it can determine the season and frequency of the service. The Board may restrict the type of service to tourist class even although the applicant airline believes there will be a demand for first class seats. Conditions may be attached to the grant of a licence limiting the weight of cargo and the number of passengers to be carried on any service and it may also define the places where passengers can disembark or be taken up. (52)

When granting a licence for domestic services, the A.T.L.B. is under a statutory duty to fix the tariff. (53) 'Tariff' includes the fare or freight charges and any conditions upon which these

---

50. Second Report of the A.T.L.B., 1961/2, para. 8(c).

51. See, e.g. the decision of January 4, 1963 relating to services between Liverpool and Belfast.

52. The complete list of conditions which the Board may impose is contained in the Civil Aviation (Licensing) Regulations, 1964, reg.12.

53. Civil Aviation (Licensing) Act, 1960, s.2(5); Civil Aviation (Licensing) Regulations, 1964, reg.13 as amended by the Civil Avia--tion (Licensing)(Amendment) Regulations, 1966 No.55 reg.3.

fares or freight rates depend. (54) Since 1961, however, the Board has, in accordance with Statutory Regulations and the consent of the Minister, dispensed with laying down tariff provisions for the domestic carriage of freight. (55) By 1963, the A.T.L.B. had promul--gated basic principles to govern its domestic tariff policy. (56) Efficient operators were to enjoy a tariff that enabled them to cover costs and make a reasonable profit; where profits were being earned, the public was to be protected by means of the Board ens--uring that tariffs were not fixed at a level designed solely to maximise profits; where profits could not be earned, losses were to be minimised by charging a tariff that the traffic could sus--tain; later the Board added the principle that where an airline provides a service which is never likely to be profitable and is, in effect, a social need, it should not have to bear any substantial loss. The A.T.L.B. believed that by basing policy on these princi--ples they could reconcile the duty of furthering 'the develop--ment of British civil aviation' with the protection of the cons--umer. (the Board had the particular duty under the 1960 Act of prescribing in licenses the tariff to be charged.)

It could be argued that it is in the public interest to have price competition instead of tariff regulation on the lines indicated above but it is to be remembered that the A.T.L.B. is obliged to "set out" a tariff for domestic services which thus

---

54. Civil Aviation (Licensing) Act, 1960, s.10.

55. See the Second Report of the A.T.L.B., 1961/2, paras. 26 - 31.

56. Third Report of the A.T.L.B., 1962/3, para 29 et seq.

precludes a policy of price competition. If there was free price competition, it is submitted that both the public and the private sectors of the industry would suffer. Such a policy could lead to deliberate undercutting which would eventually put the small car-rier, who is providing a valuable service, out of business. It could affect standards of maintenance, operation and safety and also lead to reduced overall revenue because, although there was an increase in traffic, it might not be sufficient to justify a price reduction. (57)

The Civil Aviation (Licensing) Regulations, 1964, allowed the A.T.L.B. to deviate from its statutory duty to set out the tariff in each domestic air service licence. Thereafter, the tariff was to be determined by reference to fare schedules compiled and published by the Board. These schedules, known as the United King-dom Domestic Air Tariff, took effect on November 1, 1965. In essence, this Tariff was a codification of existing fares and rates and the procedure laid down for the variation of this Tariff en-sures that the judgement of the airlines will be taken into acc-ount in the determination of airline fares.

Since 1965, however, the Labour Government's prices and incomes policy has had a considerable effect on the Board's tariff-fixing function. The A.T.L.B. was obliged to take into account the Government's White Paper on prices and incomes policy (58)

---

57. See the Eighth Report of the A.T.L.B., 1967/8, paras. 38-39.

58. Preliminary Estimates of National Income and Balance of Payments 1959 to 1964, Cmd.2629, 1965.

which related the justification for price increases to a "norm" for increases in salaries and wages. The Board, however, did not believe that it would be in the national interest to adopt a tariff policy that might put some independent airlines out of business and also make it impossible for BEA to achieve their financial target. (59) In the summer of 1966 when there was a prices "stand--still", the A.T.L.B. was forced to refuse applications for in--creases in domestic tariffs because no other course was open to it. The Labour Government's economic policy, entrenched in the Prices and Incomes Act, 1966, (60) had the effect of imposing duties on the A.T.L.B. with respect to domestic air fares that would otherwise be within the province of the National Board for Prices and Incomes. The A.T.L.B., however, cannot be regarded as a willing servant because, even in a time of national economic difficulty, it believed its first concern was the financial stability of British domestic air transport. (61)

In January, 1967, the prices "standstill" gave way to a period of so-called "severe restraint". The airlines, thereafter, made fresh applications for domestic fare increases. These includ--ed a proposal from BEA for a considerably higher tariff on the Highlands and Islands services. As the proposal was designed merely to maximise revenue on these routes, the A.T.L.B. decided that the variation must be approved, although, in relation to social

---

59. Eighth Report of the A.T.L.B., 1967/8, paras. 43-45.

60. 1966, c.33.

61. Eighth Report of the A.T.L.B., 1967/8, para. 47.

needs, these new fares would be too high. But if BEA's application had been refused a further £173,000 per annum would have had to be found from other routes. (62)

If any party to a case before the A.T.L.B., whether it be an applicant, a licence holder or any other person entitled to be heard, is aggrieved by the Board's decision, he may appeal in writ--ing to the President of the Board of Trade. (63) Appeals are heard by a Commissioner, appointed by the Minister, who holds public hear--ings unless he decides otherwise. Any party to an appeal may pro--duce new evidence provided he gives the Board and any other parties ten days' notice. The Commissioner sends a report together with his recommendations to the Minister who can make such an order as he thinks fit. He has the power to direct the A.T.L.B. to re-hear the whole or part of a case and he may reject the Commissioner's recommendations but is under a duty to give reasons for so doing.(64) The A.T.L.B. is bound by a decision of the Minister and is, in this respect, an executive organ, but it is important to note that the Board is not bound by a policy which the Minister may lay down.

Before concluding this chapter it is beneficial to consider the practical rôle played by the A.T.L.B. in controlling the air transport industry and the conflicts and deficiencies that seem to

---

62. Ibid., para. 37.

63. Civil Aviation (Licensing) Regulations, 1964, regs.10(4) and 14. The functions of the Minister of Aviation under the 1960 Act were transferred to the President of the Board of Trade in August, 1966 (S.I. 1966 Nos. 741 and 1015) See supra note 62, p.27.

64. The appeal procedure is set out in reg.14 of the 1964 Regulations.

exist. One of the reasons for air transport regulation is to en--sure that certain objectives of public policy are achieved. How--ever, an efficient system must be reasonably precise about the objectives being pursued. One of the weaknesses of the British regulatory system is that there is a certain amount of confusion as to who makes and controls policy. As indicated, (65) the Board regarded itself as having an unfettered discretion with respect to general policy. It can be argued that the A.T.L.B. should not have such a discretionary power and that policy decisions on air transport should be made by the Minister who is accountable to Parliament. (66)

It is true that the Minister, particularly in the field of bilateral agreements, retains control over policy and has stat--utory powers to direct the Board that certain licence applications must be refused because it is inexpedient for the Government to negotiate traffic rights. (67) Moreover, the Minister can exercise ultimate control over policy by means of the appeal procedure but it cannot be said that the Board is bound by the precedents est--ablished in decisions on appeal. After 1960, the A.T.L.B. was inundated with applications from the private airlines to operate routes in parallel with BOAC and BEA. The Board granted a licence to Cunard-Eagle to fly the Atlantic routes in competition with BOAC but the Minister, on appeal by BOAC, reversed the Board's

---

65. Supra, p.90.

66. See, Wheatcroft, op. cit., p.158.

67. Civil Aviation (Licensing) Act, 1960, s.2(3).

decision. Later in 1961, Cunard-Eagle and British United Airways applied to the A.T.L.B. for licences to operate in parallel with BEA over more than fifty of BEA's routes. The Board refused most of these applications but did grant some of them. Thereafter, BEA appealed to the Minister who, however, generally supported the decisions of the Board and endorsed the granting of parallel lic--ences to the privately-owned airlines. These examples would seem to imply an apparent contradiction. There has been much criticism of the appeal procedure, particularly because it can amount to no more than a re-hearing of the whole case and is of little benefit in clarifying policy. It has been suggested that the Minister should issue policy directives to the Board and that appeals should be allowed only where there is a dispute over policy. (68) In this way, it was contended, the Minister would be recognised as the policy-making authority. This suggestion, it is here submitted, would make the A.T.L.B. an executive branch of the Government. How--ever, the Minister's ultimate reserve power to hear appeals was designed to protect the two air corporations not undermine the authority and independence of the A.T.L.B. As the Board's task is the economic regulation of the air transport industry, it should have all the power and authority necessary to permit it to do this efficiently and effectively. Yet, it cannot be denied that the greatest single weakness of the present system in the United King--dom is the blurring of responsibility for licensing between a

---

68. Wheatcroft, op. cit., pp. 159-161.

Government department and an administrative tribunal. (69)

A particular trait of British civil aviation is the divers--ification of authority which exists throughout the regulatory system. Only in the domestic field does the A.T.L.B. really have effective authority. In the international sphere, the control and powers of the Board depend upon whether the Board of Trade regards itself as the instrument for implementing decisions of the A.T.L.B. or the policy-making authority. Confusion reigns as a result of the fact that, although the A.T.L.B. is empowered to grant licences for international services, these licences are of no use unless or until the Board of Trade secures the necessary traffic rights by means of negotiation with the foreign governments concerned. The authority of the A.T.L.B. thus depends on the rôle and success of the Board of Trade. Legally, the Minister has complete control because of the power of direction he possesses under section 2 (3) of the Civil Aviation (Licensing) Act, 1960, but the Minister has rarely used his power. (70) There is a proviso in the Act (71) des--igned to alleviate any conflict in respect of the granting of any international licences but one wonders why when a decision of the A.T.L.B. may be subject to an appeal to the Minister in any case. Perhaps it was intended to prevent unnecessary appeals and the

---

69. For a comment on the British air transport industry, past and future, see Ramsden, The Edwards Report? Flight International, September 28, 1967, pp. 520 - 526.

70. The Minister, for example, ordered the Board to refuse an application by BEA to operate a service from Manchester to Genoa.

71. s.2 (3).

wasting of time; if this was the purpose of consultation, it has prevented neither.

A further point to note is that the A.T.L.B. has virtually no say in the determination of international fares. Nominal tariff control on international routes rests with the Minister. In prac--tice, international tariffs are agreed upon by the airlines them--selves and approved by means of IATA Traffic Conference Agreements. With Ministerial control permissive and the Board's control non--existent, such a situation cannot be conducive to the growth and efficiency of British civil aviation.

Having discussed the powers, controls and authority exer--cised by the A.T.L.B. over the public and private sectors of the air transport industry and briefly examined the Board's position in relation to the Board of Trade, it is possible to conclude on a brighter and less tangible theme. It is contended that the very existence of the A.T.L.B. in the sphere of civil aviation licensing has assisted the air corporations in asserting themselves in their relations with the sponsoring Minister because, inter alia, the hearings of the Board are in public. (72) BOAC and BEA thus have the opportunity to put their views before the Board and the public whether or not these views accord with those of the sponsoring Minister. In this way, the air corporations can demonstrate their independence. Even although the decisions of the A.T.L.B. are pre--dominantly unfavourable to BOAC and BEA, as they are the incumbents, the Board is still a useful "buffer" between the nationalised

---

72. There are exceptions, e.g. where accounts are being revealed to the Board. This is of less importance since the Companies Act, 1967.

airlines and the Board of Trade. (73) Nevertheless, after examining the controlling functions of the A.T.L.B. and the confusion, conflicts and diversification of authority that exist in the British regulatory system, the concluding impression is that the time for change has long since come. (74)

---

73. See, Corbett, op. cit., p.258.

74. The Report of the Committee of Inquiry into Civil Air Transport; (The Edwards Report) British Air Transport in the Seventies, Cmd. 4018, (May, 1969) recommends a number of fundamental changes. Unfortunately, this report is not yet generally available.

Chapter VI

Judicial Control.

The ordinary means of judicial control over the activities of any government agency would seem to apply equally, at least in theory, to the public air corporations. Indeed, the jurisdiction of the courts over BOAC and BEA is the same as it is over any pri-vate or public company, except that the powers of the air corpor-ations depend on the terms of their statute of incorporation while the powers of a company will depend on the terms of its memorandum of association. (75) It is dangerous, however, to assimilate the public air corporations with ordinary public or private companies. It is true that the commercial air corporations are not Crown ser-vants and thus not entitled to claim Crown immunity. (76) As cor-porate personalities, they can sue and be sued on such matters as negligence and breach of contract. But where powers and duties are imposed on BOAC and BEA by statute, these are so vaguely drawn that it is difficult to visualise circumstances in which the courts would entertain an action for damages by an individual for breach of statutory duty. Further it would seem impracticable for an indiv-idual to obtain a mandamus against the air corporations for fail-ure to execute statutory duties or secure an injunction because BOAC or BEA were acting ultra vires . In effect, the problem revolves

---

75. Smith v London Transport Executive 1951 1 All. E.R. 667. See also Garner, Administrative Law, (1963) p. 260 et seq.

76. Tamlin v Hannaford 1950 1 K.B. 18. See supra pp. 29 - 31.

around the question of sufficient proprietary interest.

The powers and duties of the air corporations are set out in section 3 of the Air Corporations Act, 1967. They have power, inter alia,

> "to do anything which is calculated to facilitate the dis--charge of their functions .... or is incidental or conducive to the discharge of any such functions."

An objectionable feature of legislation creating public corporations is that powers are often formulated in subjective terms. (77) How--ever, the powers of the air corporations are not formulated sub--jectively and therefore the question arises whether this is a matter into which the courts can inquire.

An interesting problem would arise if, for example, BEA decided to promote a holiday resort in North Africa, providing not only hotels which they are entitled to do, but also all other am--enities including travel. This, they maintain, is to ensure that they achieve their target return out of profits derived from spon--soring a holiday camp. The question is put whether a travel agent or a hotelier can claim an injunction (78) against BEA for acting ultra vires.

An injunction may be sought against a public authority by any individual who can prove that he will suffer special damage as a result of the contemplated action which he believes is illegal or who shows that he has sustained such damage as a result of the

---

77. See, e.g. The Coal Industry Nationalisation Act, 1946, s.1 (3) which gives the National Coal Board power to do anything which, in their opinion, is calculated to facilitate the proper discharge of their functions.

78. The equivalent in Scotland is an interdict prohibiting the action undertaken or contemplated.

action which is not too late to restrain. (79) An injunction can be obtained by the Attorney-General in England, (Lord Advocate in Scotland) either at his own instance or at the instance of a relator (informant) who need have no special interest in the claim except as a member of the public. But where the individual complaining can show no special damage the Attorney-General must be joined as a party. This latter situation arises where it is believed that the act done or contemplated tends to injure the public.

The question involved in the illustration however, is whether the hotelier or the travel agent has sufficient interest (locus standi) to justify the court's intervention. The powers of BEA are formulated in such broad terms that it is doubtful whether there are sufficient legal grounds for seeking a decision of the court. Membership of a special section of the community may entitle a travel agent or hotelier to seek relief by reason of membership of that community but, although the definition of a person "aggrieved" appears to have been widened since Smith v London Transport Executive , (80) the courts may still regard the hotelier's and the travel agent's interest as being too slight. Much would therefore depend on the extent of the claimants' interest and the extent of BEA's activities. However, injunctions seem to be more appropriate remedies in the field of administrative law to the actions of public authorities in the strict sense. In any case the courts may decline to interfere as a consequence of the fact that the

---

79. See, Wade and Phillips, Constitutional Law, 7th Ed., p. 676.

80. Supra, note 75.

President of the Board of Trade has a statutory power which enables him to define the scope of activities in which the air corporations may engage. (81) Thus, it is submitted, an injunction or interdict would not be competent in the circumstances illustrated. (82)

Each of the air corporations has the duty to secure that any air services which they may provide are developed to the best advantage and provided at reasonable charges. (83) It would appear that there is no duty to provide air services, the duty only arising after the air services are provided. The duty of the air corporations is a public duty which appears permissive in nature rather than imperative for the Air Corporations Act, 1967 does not provide any penalty for failure, on the part of BOAC and BEA, to execute their statutory duty. As the statute provides no legal sanction, the question arises whether an individual can invoke mandamus, a discretionary remedy, against a public air corporation.

Mandamus is a peremptory order, issuing out of the Queen's Bench Division of the High Court, commanding a body, or person, to do that which it is its, or his, duty to do. (84) Mandamus lies to secure the performance of a public duty, in the performance of which the applicant has a sufficient legal interest. The order is not issued as of right but is a matter for the discretion of the

---

81. Air Corporations Act, 1967, s.3 (3).

82. On the question of title to sue, see Yardley, 73 Law Quarterly Review (1957) p. 534.

83. Air Corporations Act, 1967, s.3 (1). See supra p.8.

84. Wade and Phillips, op. cit., p.664. Mandamus is not available in Scotland.

court which

"will render as far as it can the supplementary means of substantial justice in every case where there is no other specific legal remedy for a legal right; and will provide as effectually as it can that others exercise their duty wherever the subject matter is properly within its control" (85)

Bowen L.J. in The Queen v Commissioners of Inland Revenue, Re Nathan, (86) viewed the writ of mandamus as being

"invented for the purpose of supplying defects of justice .... If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done."

Before an order of mandamus may be granted, the applicant must have demanded performance of the public duty and been refused. Further, as mandamus is a residuary remedy, where there is some other remedy in a domestic tribunal, mandamus will not lie. (87) So if, for example, BEA decided for commercial reasons to discontinue their Highlands and Islands services, which would certainly not be devel--oping them 'to the best advantage', it is doubted whether an appli--cant, who is wholly dependent on these services, could succeed in persuading a court to grant an order of mandamus to enforce the exec--ution of these services. Apart from considering the question of the applicant's legal interest (title to sue) a court would not make the order as another remedy is available under section 4 of the Civil Aviation (Licensing) Act, 1960 which imposes a duty on the A.T.L.B. "to consider any representation from any person relating to .... air transport services ...." Further, mandamus is a dis--cretionary remedy designed to protect a legal right and the courts

---

85. Lord Ellenborough, C.J., in The King v Archbishop of Canterbury (1812) 15 East 117, 136.

86. (1884) 12. Q.B.D. 461 at 478.

87. R. v Dunsheath, ex parte Meredith 1950 2 All. E.R. 741.

may be of the opinion that it was the intention of Parliament to impose statutory duties of imperfect obligation only on the air corporations and to leave enforcement to Government and Parliament. One can look at the problem from another angle and regard the illus--tration as an example of the distinction between matters of policy, the concern of politicians, and the questions of law which are the exclusive concern of the courts. (88) As far as is known, no lit--igant has been bold enough to ask for an order of mandamus against any public corporation, and it is doubtful whether much would be achieved by doing so.

There are numerous statutory duties, particularly those imposed upon public authorities and private individuals alike, which create rights in other individuals. For example, where a factory employee is injured through his employer's breach of statutory duty under the Factories Act, 1961, the remedy will be an action in dam--ages. But there are many other statutory duties, especially those laid upon public authorities which cannot easily be discussed in terms of their enforceability in a court of law.Therefore, it is a question of interpretation whether or not an individual who has sustained damage or loss may pursue an action for damages for bre--ach by one of the air corporations of section 3 of the Air Cor--porations Act, 1967. The matter is dependent, primarily, on the true construction of the Act.

"The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act, and

---

88. See, Garner, op. cit., p. 252.

the circumstances, including the pre-existing law, in which it was enacted." (89)

An individual may sue BOAC or BEA if he is injured by a breach of section 3 unless it can be shown from a consideration of the Act that no right of common law action was intended. One must consider whether the Act imposes a duty owed primarily to the state or prim--arily to the individual or class of individuals and only inciden--tally to the State. (90) If the duty imposed by section 3 is reg--arded as being for the protection of individuals then, prima facie, they can enforce it by action for damages. (91)

Although the air corporations are not Crown servants, (92) the obstacles that would stall any attempt by an individual to sue BOAC or BEA for damages for failure to perform their public duties seem to be almost insurmountable. (93) Duties to secure that air services provided are "developed to the best advantage" and are to be"at reasonable charges" must be construed only as a general form--ulation of the corporations' responsibilities. The major difficulty would be in establishing that Parliament, when it imposed these general duties, intended to confer a private right of action. (94)

89.Lord Simonds in Cutler v Wandsworth Stadium, 1949 A.C. 398 at 407.

90. Read v Croydon Corporation 1938 4 All. E.R. 631, 652. See also Salmond on Torts, 14th. Ed., p.352.

91. Groves v (Lord) Wimborne 1898 2.Q.B. 402, 415.

92. See supra pp.29 - 31.

93. See de Smith, Judicial Review of Administrative Action, 1st ed., p.419 et seq.

94. For a special case, see British Oxygen Co. Ltd., v Sth. of Scot--land Electricity Board 1959 S.C. (H.L.) 17.

Further, it is seriously doubted whether these duties are legal duties at all, for there is no compulsive legal machinery to enforce them. This is a common element where a nationalised industry is a so-called public utility or is providing a social service. (95) Thus, enforcement measures are to be found not in the courts but in the political arena. (96)

There are certain requisites for a right of action for bre--ach of the statutory duty. It must be shown that the loss was of the type envisaged by the Act; that the duty was owed to the pursuer (plaintiff) as well as to the public at large and not to the commu--nity alone; that the statutory duty was not fulfilled and that the damage sustained resulted from the breach of section 3. Absence of any one of these four elements destroys any private right of action. In deciding whether an action exists, assistance may be obtained from consideration of any penalty imposed for breach of the stat--utory duty. As indicated, (97) no legal sanction appears in the Air Corporations Act, 1967, but, in any case, a penalty clause does not necessarily detract from the prima facie right of the persons for whose benefit the statutory enactment was passed to enforce civil liability. (98)

It is necessary to consider the general object of section 3 of the 1967 Act to determine what type of mischief, if any, it was

---

95. Wade, Administrative Law, p.118.

96. See Watt v Kesteven C.C. 1955 1.Q.B. 408. where the duty was one which could be enforced only by the Minister under the Act.

97. Supra, p.111.

98. Black v Fife Coal Co. Ltd., 1912 S.C. (H.L.) 33. Lord Kinnear at p.45.

intended to prevent. It is an argument in favour of an individual's right to sue if the loss he has suffered is exactly what the section was designed to prevent. So it was held in Monk v Warbey, (99) where the statutory duty was not only public but was owed to all third parties, quite apart from the fines exigible as a penalty. On the other hand, where the object of a statute is to prevent one kind of activity and loss arises from another type of 'evil', the ind--ividual damnified by the failure to observe the statutory duty cannot recover. In Gorris v Scott, (1) the defendant was a shipowner and under a statutory duty to provide pens for animals on board ship to lessen the risk of contagious disease among them. When the plain--tiff's sheep were swept overboard as a result of the absence of such pens, he was held not to be entitled to recover damages founded on breach of the statutory duty, as the statutory duty was not imp--posed to protect animals from the perils of the sea, but for another purpose.

So where, for example, a whisky magnate in the North of Scotland depends on BEA's services for purposes of business and, as a consequence of BEA's failure to maintain an adequate service, loses a large export order, it is submitted that he would not have a right of action for any breach of section 3 because he would be unable to establish that this was the type of loss intended to be prevented by section 3. But even if one goes so far as to assert that the loss or damage is of the kind contemplated by the provision in question,

---

99. 1935 1.K.B. 75.

1. (1874) L.R. 9.Ex. 125.

he may have no right to recover damages for the breach if the lan-guage of the section is interpreted as creating a duty owed to the public generally and no liability was intended by Parliament. (2) In Saunders v Holborn District Board of Works, (3) a local sanitary authority was in breach of its statutory duty in failing to remove snow from the streets and it was held that the plaintiff had no remedy for injuries caused by their failure, as the statute was held to disclose no intention to provide a private right of action in such cases. The whisky magnate's remedy may lie, however, under breach of contract.

In cases where legislation has been directed to the protection of a class of the public, the courts have tended to hold that a right of action is conferred independently of any penalty (4) and if no penalty at all is prescribed, (as in the case of section 3 of the 1967 Act) prima facie any person within the ambit of the statute may sue if injured by its breach. (5) However in the latter case, it is fundamental to note that there is no prima facie right of action if the Act is directed to the benefit of the community as a whole rather than any section thereof. (6)

Therefore, returning to the illustration, the whisky tycoon

---

2. Black, supra note 98.

3. 1895 1.Q.B. 64.

4. Black, supra note 98.

5. Groves, supra note 91.

6. Phillips v Britannia Laundry 1923 2.K.B. 832.

would have to indicate that it was the intention of the legis--lature that the duty imposed by section 3 of the Air Corporations Act, 1967, should be owed to him as well as to the community gen--erally, and not to the latter only. It is not a conclusive fact that he should prove that he was one of a special class of the community for whose benefit the provision was included, and to say that, in consequence, the section must have given him a right of action, though this prima facie gives him a right of action. (7) Indeed, every statute is probably intended in some way to protect or benefit the general public or some section thereof in some man--ner. Thus, the Air Corporations Act, 1967, in particular section 3, could be construed as being strictly for the benefit of travellers by air but even if the duty of development 'to the best advantage' is for the benefit of a class of individuals, the duty may still be a public one and nothing more, leaving the person suffering loss to fall back on any common law remedy which is competent in the circumstances. (8)

As it is necessary for the damage to have been caused by the nonfulfilment of the statutory duty, the alleged breach of sec--tion 3 must be the predominant cause of the loss incurred but the precise nature and standard of that duty depend on interpretation. If damage is not sustained as a direct consequence of the breach no action will lie. Consequently, it is difficult to envisage the whisky magnate establishing a sufficient causal connection between

---

7. East Suffolk Catchment Board v Kent and Another 1940 4. All. E.R. 257.

8. Phillips, supra note 6.

his loss of an export order, which might be mere speculation, and BEA's failure to maintain its service adequately.

In England, a distinction is made between situations where a statutory duty is inadequately performed by a local authority, called misfeasance, and cases where the duty is not performed at all, called non-feasance. This distinction is not recognised by the courts in Scotland and a body under a statutory duty is equally liable for carrying out its duty badly and for not carrying it out at all. (9) In England, as a general rule, authorities are not liable for damage resulting from non-performance of their statutory duties but are liable in damages for misfeasance. In East Suffolk Catchment Board v Kent and Another, (10) the respondents were the owners of land which was protected by a wall from flooding by a river. Due to a strong flood tide, the wall collapsed and caused a wide gap which the appellants attempted to repair. They did so by an incorrect method and with an insufficient number of workmen. The Board had the power but not the duty, to repair the breach. The breach was caused by damnum fatale and it was found that the negligent action of the appellants had not caused damage greater than that which would have been caused by nature without any inter-ference from them. On the other hand, the repair work was spread over 164 days whereas, with the exercise of reasonable skill, the gap in the wall could have been closed and the flooding stopped in 14 days. The difference in time caused the marsh pasture to be

---

9. Buchanan v Glasgow Corporation 1923 S.C. 782.

10. Supra note 7.

longer covered by salt water, and thus unusable. The House of Lords decided that, in these circumstances, an action for damages against the Catchment Board failed. Lord Atkin's dissenting judgement is important, not only because of the different approach adopted to the comparative position of public bodies and private individuals in regard to activities which affect the public, but also because of its illuminating exposition of the distinction between statutory and common law duties. He could not

> "imagine this House affording its support to a proposition so opposed to public interests where there are so many public bodies exercising statutory powers and employing public money on it"

This, however, is exactly what the House of Lords did. It exposed an important issue of public policy: whether or not to develop a far-reaching distinction between administrative discretion and private duty.

It is submitted that the statutory duties of development 'to the best advantage' and at 'reasonable charges' are not legal duties at all. 'To the best advantage' can be regarded merely as a general commercial guideline referable to the quality, speed and frequency of a service. 'Reasonable charges' are simply reasonable rates in the circumstances. The Air Transport Licensing Board, which is charged with the task of fixing domestic air tariffs, does not regard BEA as having a legal duty to provide uneconomic services and emphasises that BEA should receive a subsidy to maintain them. (11) The Board does recognise, however, that in relation to social needs, the new Highlands and Islands fares are too high. (12) The

---

11. See supra p.94.

12. Eighth Report of the A.T.L.B., 1967/8, para. 37.

A.T.L.B. is, however, under no specific statutory duty to protect the public from excessive fares but it has indicated that it is under a duty to avoid a high level of tariff calculated solely to enable operators to maximise profits. (13)

A court will be disinclined to entertain a private action for a supposed breach of section 3 of the 1967 Act (e.g. an action of declarator and interdict or action of recompense) where some other remedy is available to the complainant. (14) Further, when a person journeys by air, he is believed to have accepted all con--ditions, including the tariff, attaching thereto. Under the con--tract of carriage, all implications of law give way to the agree--ment of the parties whether or not it is a leonine bargain (15) which may be repugnant to public policy. Moreover, apart from satisfying the requirements for right of action discussed above, an individual can take no comfort from the 19th century railway cases which dealt with reasonable charges and undue discrimination (16) for although railway companies were public utilities, the fundamental difference is that they were not public corporations. In essence, the same principles apply to international tariffs for, although the airlines fix fares through IATA, the so-called cartel, ultimate control, however permissive, rests with the Pres--ident of the Board of Trade. The courts will decline to accept

---

13. Third Report of the A.T.L.B., 1962/3, para.29.

14. E.g. a representation to the A.T.L.B. under s.4 of the Civil Aviation (Licensing) Act, 1960.

15. See Mackay v Scottish Airways 1948 S.C. 254.

16. L. & N.W. Railway Co. v Evershed (1878) 3 App. Cas. 1029, 1039.

actions which purport to invite them to enforce generally phrased statutory duties. The question of government control cannot be transferred to the judiciary.

Some authors (17), however, assert that a private individ--ual would be entitled to bring an action against one of the air corporations to recover any damage which he could prove he had suffered as a consequence of a breach of the duties imposed by section 3 and that a person who could establish that he had been compelled to pay to a corporation charges in excess of a reasonable charge could recover the excess in a private right of action. (18) On the other hand, the problem in question is evaded by some with uncanny facility. (19)

It is here contended that there is no private right of action available against BOAC or BEA for breach of the permissive duties contained in section 3 of the Air Corporations Act, 1967 for these are duties imposed by Parliament which are not enforceable by legal process. This is emphasised by the fact that these duties have no corresponding counterpart in the relations between individuals. However,much courts may strive to assimilate the duties of public authorities to the duties of individuals in private life, there will always be an area where it is impossible to deduce a right of enforcement of a statutory public duty being conferred on a private individual. Nevertheless, this does not mean there is no

---

17. Shawcross and Beaumont on Air Law, 3rd ed., vol.I, p.173.

18. The authors base their submissions on general principles appea--ring in 36 Halsbury's Laws, 3rd. ed., pp. 446 - 461, but the main problems are overlooked.

19. See. e.g. Salmond on Torts, 14th. ed., p. 353.

sanction to the duty. The sanction is political relying on the doctrines of parliamentary accountability and ministerial respon-
-sibility for enforcement. (20)

---

20. See, generally, de Smith, op. cit., pp. 417 - 425.

Bibliography.

Statutes.

Air Force (Constitution) Act, 1917. (7&8 Geo.5, c.51.)

Air Navigation Act, 1936. (26 Geo.5, and 1 Edw.8, c.44.)

Ministry of Supply Act, 1939. (2&3 Geo.6, c.38.)

British Overseas Airways Act, 1939. (2&3 Geo.6, c.61.)

Ministry of Civil Aviation Act, 1945. (8&9 Geo.6, c.21.)

Coal Industry Nationalisation Act, 1946. (9&10 Geo.6, c.59.)

Civil Aviation Act, 1946. (9&10 Geo.6, c.70.)

Companies Act, 1948. (11&12 Geo.6, c.38.)

Airways Corporations Act, 1949. (12,13&14 Geo.6, c.57.)

Civil Aviation Act, 1949. (12,13&14 Geo.6, c.67.)

Air Corporations Act, 1949. (12,13&14 Geo.6, c.91.)

Air Corporations Act, 1953. (2&3 Eliz.2, c.7.)

Post Office Act, 1953. (1&2 Eliz.2, c.36.)

Air Corporations Act, 1956. (5 Eliz.2, c.3.)

House of Commons Disqualification Act, 1957. (5&6 Eliz.2, c.20.)

Tribunals and Inquiries Act, 1958. (6&7 Eliz.2, c.66.)

Air Corporations Act, 1960. (8&9 Eliz.2, c.13.)

Civil Aviation (Licensing) Act, 1960. (8&9 Eliz.2, c.38.)

Post Office Act, 1961. (9&10 Eliz.2, c.15.)

Air Corporations Act, 1962. (11&12 Eliz.2, c.5.)

Air Corporations Act, 1964. (1964 c.2.)

Air Corporations Act, 1966. (1966 c.11.)

Prices and Incomes Act, 1966. (1966 c.33.)

Air Corporations Act, 1967. (1967 c.33.)

Companies Act, 1967. (1967 c.81.)

Air Corporations Act, 1968. (1968 c.30.)

House of Commons Papers.

BEA Annual Reports and Accounts 1948 - 1968.

BOAC Annual Reports and Accounts 1948 - 1968.

Final Report of the Air Transport Advisory Council, 1960/1, HC Paper No.259.

Annual Reports of the Air Transport Licensing Board, 1961 - 1968.

Report of the Select Committee on Nationalised Industries, 1951/2, HC Paper No.332.

Report of the Select Committee on Nationalised Industries, 1952/3, HC Paper No.235.

Special Report from the Select Committee on Nationalised Industries, 1955/6, HC Paper No.120.

Report from the Select Committee on Nationalised Industries, (Report and Accounts) The Air Corporations, 1959, HC Paper No.213.

Report from the Select Committee on Nationalised Industries, 1964, (BOAC) HC Paper No.241 vols. I and II.

Second Report from the Select Committee on Nationalised Industries, 1967, (BEA) HC Paper No.673.

Report from the Select Committee on Nationalised Industries, 1967/8, (Ministerial Control of the Nationalised Industries) HC Paper No. 371, vols I,II and III.

Government Reports or White Papers.

Report on Financial Assistance to Civil Air Transport Companies, Cmd.1811 (1923)

Report of the Air Ministry on the Progress of Civil Aviation, 1922-3, Cmd.1900 (1923)

Report of the Broadcasting Committee, Cmd.2599 (1926)

Report of the Committee to consider the Development of Civil Aviation in the United Kingdom, Cmd.5351 (1937)

Report of the Committee of Inquiry into Civil Aviation, Cmd.5685 (1938)

British Air Transport, Cmd.6605 (March 1945)

British Air Services, Cmd.6712 (December 1945)

Report of the Committee of Inquiry into the Electricity Supply Industry, Cmd.9672 (1956)

Financial Problems of BOAC, HC Paper No.5 (1963/4)

Preliminary Estimates of National Income and Balance of Payments 1959 to 1964, Cmd.2629 (1965)

Parliamentary Debates.

126 HC Deb. 5s., col.1622 (March 11, 1920)

445 HC Deb. 5s., col.566 (December 4, 1947)

494 HC Deb. 5s., cols.2355-6 (December 4, 1951)

505 HC Deb. 5s., cols.1935-2060 (October 29, 1952)

524 HC Deb. 5s., cols.1741-1870 (March 8, 1954)

552 HC Deb. 5s., cols.2337-2368 (May 17, 1956)

558 HC Deb. 5s., col.38 (October 24, 1956)

561 HC Deb. 5s., cols.395-603 (November 29, 1956)

Books, Articles and Pamphlets.

Allen	Law and Orders. 3rd. ed. (1965)
Corbett	Politics and the Airlines. (1965)
Davies	A History of the World's Airlines.(1964)
de Smith	Judicial Review of Administrative Action. 1st. ed. (1959) and 2nd. ed. (1968)
Dunsire	'The Passing of the Ministry of Transport and Civil Aviation', 1961 Public Law p.150.
Flight International	'BOAC and the Minister' Flight International, vol.84, November 28, 1963, p.851.

Friedmann	'The New Public Corporations and the Law', 10 Modern Law Review (1947) p.235.
Friedmann	The Public Corporation. (1954)
Galeotti	The Judicial Control of Public Authorities in England and Wales. (1954)
Ganz	'A voyage of discovery into administrative action', 1963 Public Law p.76.
Garner	Administrative Law. (1963)
Griffith & Street	Principles of Administrative Law. 3rd. ed. (1963)
Halsbury	36 Halsbury's Laws. 3rd. ed. p.446.
Hanson	Parliament and Public Ownership. (1961)
Higham	Britain's Imperial Air Routes 1918-1939. (1961)
J.A.L.C.	Terms of Reference of the Air Transport Advisory Council, 22 Journal of Air Law and Commerce (1955)p.203
Kahn-Freund	The Law of Carriage by Inland Transport. 4th. ed.(1965)
Kean	'A Transport Colossus: The British Experience, 33 Journal of Air Law and Commerce (1967) p.234.
Longhurst	Nationalisation in Practice. (1949)
Mitchell	Constitutional Law. (1964)
Molson	'Nationalised Industries', The Times, September 8, 1949.
Morrison	Socialization and Transport. (1933)
Morrison	Government and Parliament. (1954)
Phillips	Constitutional and Administrative Law. 3rd. ed. (1962)
Pudney	The Seven Skies. (1959)
Ramsden	'The Edwards Report?' Flight International, September 28, 1967, p.520.
Reith	Into the Wind. (1949)
Robson	Public Enterprise. (1937)

Robson	Nationalized Industry and Public Ownership. 2nd. ed. (1962)
Salmond	Salmond on Torts. 14th. ed. (1965)
Shawcross & Beaumont	Shawcross and Beaumont on Air Law. 1st. ed. (1945) 3rd. ed. vol I. (1966)
Smith	A Short Commentary on the Law of Scotland. (1962)
Sundberg	Air Charter. (1961)
Wade	Administrative Law. 2nd. ed. (1967)
Wade & Phillips	Constitutional Law. 7th. ed. (1965)
Walker	The Law of Damages in Scotland. (1955)
Wheatcroft	Air Transport Policy. (1964)
Williams	'The Effect of Penal Legislation in the Law of Tort', (1960) 23 Modern Law Review p.233.
Winfield	Winfield on Torts. 8th. ed. (1967)
Wyatt	'British Independent Aviation - Past and Future', Journal of the Institute of Transport, May, 1963.
Yardley	'Prohibition and Mandamus and the Problem of Locus Standi', 73 Law Quarterly Review (1957) p.534.

Table of Cases.