AIR CONFERENCE AT CHICAGO

By

Edward Warner

The representatives of fifty-four nations--all the world except the enemy states and the Argentine Republic, which were not invited, and the Soviet Union and Saudi Arabia, which did not accept--gathered in the Stevens Hotel in Chicago on November 1st. They dispersed on December 7th, with some of the problems of international flying well advanced towards solution, and with others more clearly defined than previously and with the difficulties that still lie in the way of complete solution better understood. They had to their credit, also, some additions to the collective store of experience with attempts at international organization for common purposes and with the limitations to which such attempts appear to be subject in the present temper of national governments.

I

It is pleasantest to speak first of accomplishment. There were several. The most important, in its effect upon the legal status of international air transportation, came by surprise and within a few days of the end of the conference. The transit agreement, colloquially known as the "two-freedoms agreement", was formally proposed by the senior Dutch representative--very appropriately, in view of the Netherlands' record of unremitting struggle for a greater measure of freedom in the air for more than twenty years past--and vigorously supported by the French. Its introduction followed a dramatic plea by Mayor LaGuardia and an indication by Lord Swinton, for the United Kingdom, that his government would view a transit agreement with sympathy--all at a time when other papers were already being hastened into final form in preparation for adjournment. The transit agreement was thereupon made a conference

document, open to separate signature at Chicago or thereafter. Thirty (?) nations had signed by February 1st, including all of the great colonial empires except the Portuguese and all of the other leading aeronautical states and states of such large geographical extent as to make the right of transiting their territories a matter of large practical importance except Canada, Australia, China, Brazil, and the Soviet Union--which, as previously noted, did not participate in the work of the conference. Certain of these abstainers have given private intimation of a strong probability of their signing at a somewhat later date. While the signatures have been attached ad referendum, and have been confirmed by formal acceptance in only a few cases--not, as yet, including the United States itself--an expectation of widespread acceptance seems clearly justified.

The transit agreement does two things. It gives, as among the accepting states, a free and unlimited right of passage for the aircraft of every state through the air-space of every other. It gives a similarly unlimited right to interrupt such passages for the purpose of refuelling or of mechanical attention.

To realize how great a landmark in aeronautical history this is, one really needs to have lived with the subject during the years between the wars and to have been a first-hand observer of the firmness with which overwhelming majorities of states repulsed any attempt to release international transport from the cocoon of multiple national restrictions, enveloping it at every step along a route. Now, for the first time, nations in substantial numbers are mutually undertaking to take no purely obstructive position with respect to one another's

air commerce. Now, for the first time, nations which wish to trade with one another through the air can agree to do so, feeling assured--if the acceptance of the transit agreement becomes still more nearly universal--that they will be physically able to reach each other's territories without having to meet the separately-imposed terms of every state that happens to lie along the way between. They are even assured of being able to make refuelling stops at the economically desirable intervals--subject only to the demands of non-stop crossings of the oceans--without having to carry fuel for flights long enough to evade the territories of the states with which no satisfactory deal could be made. The transit agreement is an undertaking of the participants to abstain from the role of feudal baron, levying private tribute on all the commerce that might pass along the high-roads within his grasp.

Some nations will gain more than they give by this. Others will give more than they gain; but the drive towards freedom of transit as a goal has had its vigorous sponsors in countries of both groups. Their eagerness has been fired by the conviction that the continued maintenance of barriers to international commerce by parties having no direct share in that commerce and no relation to it except the accidental relation of geographical location along its route would be an intolerable retrogression to a closed world and an inexcusable abandonment of the homes of a hundred years.1/ Aviation has not yet, by any means, produced the new enlightenment that optimists find latent there; but at least, since the Chicago conference, it may escape the stigma of leading the world's concepts of reasonable freedom of commerce into a new retreat.

1/ Cf., inter alia, "Freedom of Passage For International Air Services", by L. H. Slotemaker - Leiden, 1932; Report of the Independent Committee on Civil Aviation (parph.), London, 1943; "Common Sense in Aviation Thinking", by L. Welch Pogue, an unpublished address before the Greater Twin Cities Chapter of the National Aeronautic Association at Minneapolis-St. Paul, Minnesota, April 9, 1943; "Airways for Peace", by Edward Warner, Foreign [illegible], October 1943.

The second of the more notable consequences of the conference was the establishment of a plan for an international organization of much larger and more varied function than any of its aeronautical predecessors.

The International Convention for Air Navigation (Paris, 1919) had established an international commission, including a member from each of the participating states[2]; but it usually met only semi-annually, and briefly, and was concerned almost solely with technical problems. The conference of Lima (1937) proposed a similar body for the Americas, but it has never been formally constituted. Wartime experience with the organization of global air transport, and the discussions at Chicago and the earlier diplomatic talks, have left no doubt that international collaboration will henceforth be needed for more purposes than in the primarily European sphere of the pre-war Commission, or that the expanded purposes will involve economic as well as purely technical considerations.

Under the Chicago plan, international organization will have two successive phases. There will be a provisional organization, to become active as soon as 26 states have accepted the comparatively compact and simple Interim Agreement.[3] It will give way to a permanent organization, similar although not identical in internal structure, when 26 states have formally ratified the much bulkier permanent Convention.

The Interim Council, through committees and through a secretariat which it is to employ and direct, and which like the secretariat of the League is expected to center all its loyalties in the international entity, will have such primarily investigative and mediative functions as to "observe, correlate, and continuously report upon the facts concerning the origin and volume of

---

2/ Ultimately 33 in number.

3/ 38 states having already signed it (to February 1st), but only _____ having confirmed their signatures by formal acceptance.

international air traffic and the relation of such traffic, or the demand therefor, to the facilities actually provided"; to "collect, analyze, and report on information with respect to subsidies, tariffs, and costs of operation"; and to "recommend the adoption, and take all possible steps to secure the application, of minimum requirements and standard procedures with respect to [communications systems, - - - rules of the air - - -, aeronautical maps and charts, airports, etc.]". To make its work possible, the participating states agree to "transmit to the Council copies of all existing and future contracts and agreements relating to routes, services, landing rights, airport facilities, or other international air matters to which any member state or any airline of a member state is a party"; and "to require its international airlines to file with the Council - - - traffic reports, cost statistics, and financial statements - - - showing all receipts and the cost thereof." The permanent Council, which in the light of past experience with similar matters may be expected to displace its interim predecessor sometime during 1946 or 1947, will also be authorized to "conduct research into all aspects of air transport and air navigation which are of international importance"; to "investigate, at the request of any contracting state, any situation which may appear to present avoidable obstacles to the development of air navigation"; and "if the Council is of the opinion that the airports or other air navigation facilities, including radio and meteorological services, of a contracting state are not reasonably adequate for the safe, regular, efficient, and economical operation of international air services, present or contemplated [then to] consult with the state directly concerned, and other states affected, with a view to finding means by which the situation may be remedied," and thereafter "if a contracting state so requests the Council may agree to provide, man, maintain, and administer any or all the airports and other air navigation facilities - - - required in

its territory for the - - - operation of the international air services of the other contracting states, and may specify just and reasonable charges for the use of the facilities provided," and then to "assess the capital funds required for the purposes of this article - - - to the contracting states consenting thereto whose airlines used the facilities." In all this there is the opportunity, if availed of in practice, to go much farther than ever in the past in welding the world's airways into a unit. While there is no assurance of uniformity of practice in economic matters, such as the form given to subsidies, there is a prospect of eliminating some, at least, of those differences of opinion about what existing national practices actually are, and what effects they have, that have been common in the past.

The Council, in both of its phases, will have 21 members, and will be elected by an Assembly in which every state will have an equal vote. In the first election for the Interim Council, held at Chicago, the choices were4/

United States
Other American Republics
Brazil
Mexico
Colombia
Chile
Peru
El Salvador

British Commonwealth
United Kingdom
Canada
Australia
India

Continental Europe
France
Netherlands
Belgium
Norway
Czecho Slovakia

Middle East
Turkey
Egypt
Iraq
China

Canada was chosen as the seat of the interim organization. The precise point is open to designation by the Canadian government, but there was a popular anticipation that it would prove to be Montreal. The Council will choose its own president, a salaried official of the international organization,

---

4/ In the original election Cuba's name stood in place of India's, but the senior Norwegian delegate, protesting the omission of so vast a territory, traversed by so many air routes, spontaneously arose and resigned in India's favor. With equal readiness to sacrifice, the Cuban representative thereupon insisted upon the withdrawal of the Norwegian resignation in order that Cuba might resign instead.

representing no nation and pledged to be influenced by none.

Except on the Council and two of its subordinate organs in the permanent organization, each state is to have a right to participate in the work of any committee or other working body that may be created. Potentially, each committee would have over fifty members. Objection to the unwieldiness of such a membership was countered by assurance--which will probably prove well-founded in some cases, but not in others--that in view of the highly-specialized purposes for which most of the committees would exist only those states which felt a special concern with the subject would take the trouble and assume the expense of sending representatives. The insistence of some of the states that they must have the right to name a representative for every discussion, if they cared to do so, was very firm.

The two exceptions to the rule of all-inclusive membership--in addition to the Council--will be the Committee on Air Transport and the Air Navigation Commission. The former is defined merely as chosen by the Council from its own membership. The Air Navigation Commission, which is to deal with technical matters, is a more radical innovation, for it is to be the only part of the organization in which the principle of selection of individuals, rather than of states, is to apply. The member states will nominate individuals for consideration; and the Council will choose from among those nominated, presumably with regard both to their known individual qualifications and to the desirability of choosing nationals of such states that a proper regional distribution of the members will be attained. The membership will then be personal. Unlike the members of the secretariat, however, the members of the Air Navigation Commission will not lose their national identification but will be representatives of the states by which they were originally nominated. The device of thus compromising personal and national elements of selection is a new one,

and must be regarded as on probation until tried; but on continued consideration at Chicago it attracted enough favor so that a last-minute proposal was made to transform the Air Transport Committee into the same pattern.

Among the powers of the permanent Council will be the adoption or amendment, by a two-thirds vote and upon the advice of the Air Transport Commission, of technical annexes to the Convention. Therein it will continue a task well-established under the Convention of Paris 5/, but with differences.

If international air navigation is to be conducted with proper regularity and safety a certain amount of standardization in rules of the road, communications, the distribution of weather reports, and various other matters is essential. There are other matters, such as the qualifications of flying personnel and the standards of safety of the aircraft used, with respect to which standardization can hardly be regarded as indispensable, but it still remains highly desirable that a large degree of international uniformity be attained. Some international problems also arise in connection with the operation of aircraft which one might not have anticipated without having had the actual experience. It was pointed out in Chicago, for example, that countries which have large areas of forest or jungle may repeatedly be put to great expense in searching for foreign aircraft which disappear in those areas; and that there should be some agreement regarding the equitable apportionment of the cost of such a search. In at least two cases within the past few years such costs had already run to over a quarter of a million dollars.

A variety of such subjects were the subject of the diligent study of eleven subcommittees in Chicago. They concluded their work with preliminary drafts of standards, codes, and specifications. The drafts will be further developed under the auspices of the Provisional Council, following more deliberate study and the submission of further comment and recommendation for amendment by each of the countries which participated at Chicago.

5/ Variously known as ICAN or CINA, depending on whether the English or the French order of the words of the title is adopted.

In some cases a remarkable degree of agreement has already been unreservedly expressed upon matters on which national practices had long been widely variant. In the subcommittee on maps, for example, full agreement was reached upon the conventions to be used for denoting airports of various classes and railways and other features of the terrain, and upon the tints to be used on the map for indicating various altitude ranges--agreement of immense practical value to pilots in the quick interpretation of foreign maps, especially if published in an unfamiliar language.

The attachment of such technical standards to an international agreement creates some interesting legal problems. The permanent Convention will have the form of a treaty. It will have to be ratified in this country by the Senate, and in other countries according to their varying constitutional requirements. A ratifying body can scarcely be expected to act on a document of which the full content is not clearly established, or which might be subject to important change thereafter without renewed reference to the ratifying authority. At the same time it is indispensable that in arts developing as rapidly as those of aircraft design and air navigation the technical standards must be kept highly flexible, and subject to prompt and easy change to meet the requirements of a changing technology. If the standards were to be incorporated into the Convention itself, and to require ratification by all the participating governments whenever a change was to be made, all hope of keeping them up to date would disappear. The expedient finally adopted was to give the permanent Council full power to adopt, amend, or annul technical annexes to the Convention at any time by a two-thirds vote; but to endow those annexes with no compulsive force. Therein lies a major difference from the Paris Convention, in which the number and general subjects of the annexes were specifically determined at the initiation and enumerated in the text. In the Paris Convention, too, the contracting states gave a firm undertaking to adopt

national practices in strict compliance with the terms of certain of the annexes. Under the Chicago Convention, on the other hand, there would not be any binding obligation to keep to an international standard even in the matters in which universal standardization is most obviously to everyone's advantage. A constitutional difficulty is thereby escaped. There has been some fear that an actual diversity of practice might result which would put a grave operational difficulty in place of the constitutional one; but I believe that in fact one may feel very confident that when the Council has actually agreed upon and adopted a standard practice of any sort the individual states will be very slow, in their own interest, to depart from it in any important degree. Standardization in many of these matters is too obviously in the interest of all concerned for the responsibility of breaking the circle of uniform action to be lightly accepted.

In another respect the Chicago Convention breaks new ground in escaping the rule of unanimity, with its consequence of the ability of a single reluctant or merely dilatory state to hold up urgently-needed action. The terms of the Convention itself will be subject to amendment by a two-thirds vote in the Assembly. To avoid a constitutional difficulty like that which might have arisen over the amendment of the technical annexes, had they been formally integrated into the Convention and given compulsive force, it is provided that the obligations and privileges arising out of an amendment to the Convention shall affect only such states as have accepted it; but the Assembly will have the power, in its discretion, of cancelling the membership in the world organization of any state that may fail to accept an amendment of such importance as to justify so drastic an action.

There are other provisions among the permanent Convention's 99 articles that will smooth the way of international air navigation, whether commercial or private. One that may be mentioned exempts aircraft in passage from claims

against the owner on account of patents issued in countries through which he flies. Infringement claims will arise only under patents valid in the country of the aircraft's manufacture or in that of its permanent registry.

Last among the noteworthy items on the Chicago record is the air transport, or five-freedoms agreement. As among the states accepting the transport agreement, virtually full freedom of the air will exist. They will have unlimited rights to pick up and set down passengers and goods in each other's territory, save only for the right of each nation to reserve its own internal traffic, or cabotage, for its own nationals, and further subject only to a specification that each nation's airlines must start in its own "homeland", or metropolitan territory, and proceed therefrom to their most remote terminus with reasonable directness. Routes that wander and wind in search of local traffic are tabu. Within those limits, the nature and the volume of the operations allowed would be unlimited.

The full five freedoms, thus embodied, represented American air policy as advanced at the conference. After much discussion of possible controls over air transport's character and capacity had finally proved inconclusive, the transport agreement was put forward as the expression of what the American delegation would really like to see adopted. It was manifest that some nations, including some of the leading air powers, would not accept it; but others have signed, and their formal acceptance may be expected. As of February 1st the signers without reservation numbered 17, including Sweden, China, Afghanistan and Lebanon, together with Mexico and 8 other states of Latin America. Turkey and two others signed with a reservation restricting the privileges extended.

The five-freedoms agreement represented one concrete proposal for the reference of all questions to a single general principle. A proposal of even

more far-reaching character came from New Zealand, supported by Australia. It was the suggestion of a complete internationalization of control and operation of major international routes, as long advocated by the British Labor Party.

Mr. D. G. Sullivan, New Zealand's Minister of Industries, Commerce, Supply, and Munitions, and senior delegate at Chicago, presented his case with all the conviction and sincerity that earlier international gatherings have learned to expect from his illustrious fellow-countrymen Messrs. Fraser and Nash. He gained but little following, however, for few governments show any sign of being willing to surrender the hope of running long-distance airlines under the national flag; while even among those who most respected Mr. Sullivan's aims and most admired his presentation of them there was doubt of the present possibility of operating such an organization on genuinely international lines, employing the personnel and selecting the equipment without reference to national origins. Like some of the other possibilities for international action that were considered, the successful internationalization of airlines would seem to demand a degree of suppression of national feeling, or at least of national prejudice, that is by no means easy to find.

II

The second main heading of discussion concerns the unfinished business. The main unfinished business concerned the rights of carrying on trade. The transit agreement, if generally accepted, will make it possible to go wherever trade is to be found; but actually to engage in the trade, picking up passengers and goods for transport and discharging them on arrival, requires an authority beyond any that was secured at Chicago except as among the limited number of signers of the five-freedoms agreement. The authority will have to be attained either through resuming the discussions abandoned at Chicago, and finding a formula for the general agreement that has so far been unattainable, or through the making of bilateral and trilateral and quadrilateral pacts among the nations concerned with commercial rights on particular routes. The latter alternative--that of a multiplicity of special agreements--is currently being followed. Agreements between the United States and Spain, Sweden, and Denmark have recently been announced, and no doubt there will be more.

To have to negotiate many agreements in place of a single one that will meet all contingencies is disappointing; but at least it represents no setback by the standard of past practice, nor by that of general informed expectation in the United States prior to the Chicago gathering. Bilateral agreement, complicated by the necessity of including in the negotiation all the countries over which the proposed route was to pass--even though no commercial rights were sought in some of them--was the common pre-war rule except where commercial airlines secured permits directly from foreign governments in their own names. Such exceptions were common in Pan American Airways' operations in the western hemisphere, but rare elsewhere. It had been generally accepted in this country that bilateral agreement on commercial rights would continue to prevail, whether the actual agreements might be arrived at through subsidiary discussions in

Chicago, taking advantage of the convenience of the assembling in one spot of so many officials charged with responsibility for civil air policy in their several countries, or through separate meetings elsewhere. The anticipation of such an outcome arose from no lack of sympathy with the quest for a broader base and a more inclusive agreement, but from a lack of optimism about the possibility of finding an actual formula that would gain general acceptance. Unfortunately the lack of optimism proved justified, for the American proposal of the virtually unqualified "five freedoms" was acceptable to only a minor part of the nations present, while plans that some of the others brought forward were as unacceptable to the American delegation.

One feature of the five-freedoms proposal, to be sure, seemed to have unanimous support. No exception was taken to the concept that every state should have a recognized natural right to run its own airlines from its own homeland, at its own discretion, to any other part of the world and to engage in commerce where it would. There was an initial difference of view over whether the privilege thus universally recognized should extend to the acceptance and discharge of cargo at all the points touched along the way, or whether it should cover only the carriage of traffic which had either its origin or its destination in the airline's own national territory 6/; but even that difference was fleeting, and the broader version was agreed to. Difficulty arose, however, over the attendant conditions that were to apply to the conduct of operations over the routes thus universally authorized. Specifically, the insuperable obstacle proved to be the determination of the type and amount of limitation if any--that should apply to the

---

6/ The latter alternative being popularly called four-freedoms operation--the "fifth freedom" being the right to handle traffic which is both picked up and dropped at points outside the airline's national territory.

capacity 7/ operated by the carriers of each nation upon each of its routes.

Limitations on capacity operated in international air transport do not raise an unfamiliar question. Although by no means universal in the past, they were common; and usually took the form of a definite maximum limit on the number of schedules to be operated by each party to a long-term bilateral agreement, the effect of variations in the size of the aircraft being ignored. In the agreement between the United States and the United Kingdom under which transatlantic commercial flying was started in May 1939, for example, each party was allowed a maximum of two round trips a week between its territory and that of the other state.

As we look to the postwar period, however, with a hope for a less restricted sky, this is one of the items to be re-examined. It is an item in respect of which there are five general alternatives, all but one of which have had earnest examination at Chicago or before, and all of which may be reviewed here.

They are:

(1) No limitation (capacity operated to be determined solely at the discretion of the airline or its own government).

(2) Fixed limitation through the terms of a route agreement--common in the past, as noted above.

(3) Flexible limitation through the terms of a route agreement--as, for example, through a provision that the operating capacities initially established may be reconsidered at any time at the request of either of the parties, and that revisions will be made as necessary to fulfill an initially agreed set of principles, purposes, or standards.

(4) Limitation by reference to the continuing jurisdiction of an agreed tribunal, giving it power to determine and re-determine capacity either in accordance with previously agreed general standards and principles or in the light of such principles as the tribunal itself may develop and find good.

7/ "Capacity," in this sense, is the total volume of capacity to transport commercial load that is operated over the route in some convenient unit of time; and may be expressed, for example, as the product of the number of schedules operated per week by the average commercial carrying capacity of one of the aircraft of the type used.

(5) Limitation by formula--sufficiently complete and specific in its terms to be automatically applicable to each case that may arise, leaving no room for reasonable doubt as to interpretation.

The first three can be passed over lightly. I have already indicated the preference of the American delegation at Chicago for the first, with complete freedom to expand the volume of operation at will, as allowed by the five-freedoms agreement, and the unwillingness of some of the other states--for reasons upon which I shall comment later--to concur. The second has the obvious defects of rigidity. Almost any figure that might be fixed upon to define a reasonable operating capacity in initiating a new route, in the present state of rapid development, would be likely to look absurd within a couple of years thereafter. It has the further effect of reducing the influence of competition and the freedom of the customer's choice among competing services, since there is a natural tendency for each party to such an agreement to resist any modification of its terms to allow an increase of capacity to the other party until such time as its own airplanes are running full. If the preference of patrons filled the airplanes of one country while leaving those of the other still largely empty, the less favored state, lacking any established undertaking to cover the point, would scarcely welcome a revision of the agreement to authorize its rival to make an increase of service which might result in a still further diversion of its own traffic, already scanty.

The third alternative, designed to escape the rigidity of the second, is untried. I believe that it has possibilities to justify its exploration and reduction to specific form, but I shall not attempt the exploration here.

The other possibilities, of control by an accepted tribunal and control by a self-operating formula, have played large parts in the discussions of recent months. Both raise large questions, of principle and practice.

Early last spring, both the British and the Canadian governments declared themselves in favor of a general reference of the problems of operating rights in international air transport to an international board. The board assumed concrete form in the Canadian draft Convention, laid on the table of the Canadian House of Commons in Ottawa on March 17, 1944. It appeared there as a group of twelve men who would be individually elected by the international assembly, subject only to the condition that the Board should "include at least one national of each of the eight member states of chief importance in international air transport." Even in these cases, however, the members would have been elected by the Council.

In the British White Paper of October 1944[1] it was proposed that there should be created an international air authority which would "give effect to the provisions of the Convention for the determination and distribution of frequencies and for the fixing of rates of carriage".

The American Government has consistently refused to accept the proposal of compulsory jurisdiction for an international authority. The American position has been widely criticized as inconsistent, in view of the extent of the governmental regulation to which air transport is subject within the United States. It has been common to suggest that it is very odd that the United States, which has devised the Civil Aeronautics Board and made good use of it,[2] with results which have attracted wide attention, should feel any reluctance to extend a system of such proven value into the international field, with a tribunal of international character supplementing the purely national agencies. Even the London Times, which has presented the position of all parties in these debates with scrupulous balance and with exceptional understanding, has said:

1/ "International Air Transport" - Cmd. 6561.

2/ The flattering comments on the American Board are a paraphrase of the remarks of many foreign observers--not the author's own praise of an agency of which he is, for the time being, a member.

"Their [United States' delegates] opposition to the international extension of a system which has served them so well wears an air of paradox."10/ An American ought to explain why the criticism seems ill-founded.

As seen from the United States, it fails on the score of imperfect analogy. The question of making an international application of regulation similar to that of the Civil Aeronautics Board has not in fact arisen. There has been no serious proposal that an international tribunal of the character of the Civil Aeronautics Board should be created.

Americans have presented two major objections to regulation by an international authority, aside from the general objection that is urged against any regulation or limitation at all, by whatever means. It has been objected that no set of principles has been proposed for the hypothetical authority's guidance, and that in the absence of agreed principles its decisions would be as uncertain as the decisions of a judge with no law to guide him. It has been objected that there would be no assurance that the members of an international air board would approach their task with the judicial impartiality that its proper execution would require, but every reason to fear the contrary. The first objection might be overcome. It would be difficult, but it ought not to be impossible, to agree upon a set of principles relating to the development of international air transport that would furnish as specific a guide to regulatory action as the Civil Aeronautics Board receives from the prefatory declaration of principles and purposes in the Civil Aeronautics Act. The second objection is more serious, and it is in that connection that the suggested analogy with the Civil Aeronautics Board is especially to be examined.

The members of the Civil Aeronautics Board, like those of other specialized tribunals in Washington, are appointed by the President. They are chosen as individuals. They are responsible to no interest except a national one.

10/ November 23, 1944.

The present members happen to come from five widely-separated parts of the United States, but in their official capacity they are associated in pursuit of a common purpose, with a common responsibility. They often disagree; but their disagreements are those of individuals who arrive at different conclusions from the same set of facts, not of the partisan advocates of conflicting interests.

In contrast, the only type of international board that has been seriously considered is one for which the designations of memberships are in the names of states, rather than of individuals, and in which the state has unlimited power of appointment and replacement of its own representative. Inevitably, members so appointed will have their primary loyalty for the states that sent them, rather than for any collective interest. They can be, and no doubt the great majority of those designated to serve on the Council created at Chicago will prove to be, men of the highest character, deeply concerned for the welfare of all mankind and for the most general sharing of the benefits of air transportation; but it would be a hollow sham to suppose that their primary responsibility could be elsewhere than for the interests of their respective states. They would be in the position in which the members of the Civil Aeronautics Board would find themselves if, instead of being appointed by the President, they were chosen and removable at will by the governors of the five states of which they are residents; and it hardly need be said that an agency created in that fashion would work very differently from the one that actually exists. The members, in short, would be advocates; and while there is nothing unrighteous about advocacy, which has its indispensable role, there is a vast difference between the processes of advocacy and those of adjudication. For many purposes, an international agency composed of representatives of states would be the only type that could be suggested; but no agency so constituted

can be expected to bring judicial detachment to the judgment of particular cases in which large national interests are involved.

I have laid great stress upon a difference which some may feel to be of minor importance. It is in fact of vast and decisive importance--as no one with any personal experience in the field of administrative adjudication could possibly doubt.

Having said so much, however, I must go on to say that there has been not the slightest indication that the present state of opinion on the creation of organs of international government, dissociated from direct national participation or control, is such as to encourage any expectation that an international tribunal of genuinely judicial character could receive any large measure of acceptance. There have been enthusiasts in many countries who have dreamed of possible means of electing individual members to specialized tribunals, for air transport and for a variety of other matters, by devices designed to assure the choice of men whose competence, integrity, and judicial temper are internationally recognized, without regard to their nationality. The advocates of such plans have had little encouragement, and no government has sponsored their proposals. The members of the World Court are so chosen, and Professor Jesup has called attention10/ to the number of instances in which members of that bench have cast votes in particular cases against the countries of which they were citizens; but the World Court is an isolated example of the sort.

Even the slightest inclination in the direction of individual membership on an international board has been unsympathetically received. The Canadian government, as previously noted, had included in its original draft

---

12/ " " by Philip C. Jesup; FOREIGN AFFAIRS, January,1945
Page .

of an international convention a proposal that the members of the international board should be individually elected. In a revision which they produced at the opening of the Chicago conference, after the original draft had been subjected to seven months of study and comment, the original position had been abandoned and it was provided that the members of the board "shall in all cases be appointed by the governments concerned." Similarly, the draft Convention introduced at Chicago by the American delegation proposed that six of the fifteen members of an international council should be individually elected, each to represent a geographical region comprising a number of states. That, too, had a poor reception in discussion, and disappeared. In private discussions, representatives of a number of countries agreed that they could name citizens of neighboring states into whose hands, as individuals of known character, they would feel it quite safe to entrust their national interests; but as representatives of governments they were ready for no such break with tradition.

No agreement having been possible either on an absence of regulatory control or on the reposing of regulatory powers in an international authority, the conference turned to the last alternative--regulation by self-operating formula. The Canadian government, recognizing the unwillingness of the United States to accept the international authority, revised its original proposal to reduce the role of the proposed board to a minimum and to establish an inalienable right to increase the capacity operated by any airline whenever, for a substantial length of time, the proportion of its total currently-available capacity that had actually been occupied by revenue-paying commercial load had averaged in excess of 65 percent; and an obligation, conversely, to decrease the capacity whenever the proportion remained below 40 percent. The British

delegation introduced a proposal somewhat similar in principle, although different in many details, and including rules for determining the capacity with which a new service might be started as well as for establishing the conditions governing changes of capacity thereafter. The British and Canadian suggestions, together with many subsequent alternatives and variants, underwent microscopic examination by a select group of representatives of those governments and of the Government of the United States, through nearly two weeks of steady application. The Canadian delegates labored with special zeal, and were tireless in their efforts to find common ground.

It would be fruitless to review the course of those discussions in detail. Their trend can be summarized. As they progressed, various obstacles were encountered, and differences of opinion developed regarding the meaning of various suggested clauses. As is likely to happen in such cases, obstacles were typically circumvented, and misunderstandings clarified, by adding more language or new statistical devices. While the area of disagreement was progressively narrowed, mathematical and phraseological complexity progressively mounted until a veritable spider-web of intricacy threatened. Superficially simple concepts were shrouded in long paragraphs of legalistic phraseology. While it was all perfectly clear, specific, and logical to statistically-minded experts in air transport operations, it would have been no mean feat to make it clear to a lay audience, or even to the entire membership of a legislative chamber. It seems a good general principle of government that matters in which there is large public interest should not, if it be humanly possible to avoid it, be dealt with by devices which are beyond the possibility of wide public comprehension. That principle alone would make me somewhat doubtful, as I view Chicago in retrospect, that the quest for an automatic formula is capable of leading to a genuinely satisfactory conclusion--even though it might be

carried to the point of agreement among the experts. Administrative difficulties would also have been substantial, and the delegate who described one of the proposals as an "auditor's dream" found many an echo.

There is, however, another reason for doubt. It lies in the wide variety of conditions with which international air transport is confronted in the various parts of the world. Western Europe, the lands of the Caribbean, and coastal Africa are three different problems--presenting as great a variety of economic conditions as of climate and terrain. It seems unlikely that any single scheme of mathematical control can be devised that will really fit them all.

One aspect of the search for a formula should have special attention--less because of its real significance than because so much has been made of it in the press. Much has been said--very critically, in some British journals--of the distinction between "four freedoms" and "five freedoms", and of the sudden broadening of the problem presented to the conference when the "Americans introduced the fifth freedom."

The "introduction of the fifth freedom" was an attempt to include within the area of general agreement what would otherwise have had to be accomplished through bilateral discussions. It complicated the work of the conference to the extent that any attempt to substitute a single multilateral arrangement, covering a wide variety of cases, for a large number of separate and specific bilateral agreements always involves additional complication. The issues raised by the introduction of the fifth freedom into the Chicago conference would, however, very soon have arisen in any event, in one way or another. They would have arisen because without availability of the fifth freedom, at least in some measure, the operation of long airlines extending through a number of successive countries would in most cases be economically impossible. The

fifth freedom, it will be recalled, is the right to handle traffic which neither originates nor terminates in the airline's national territory. If that right were entirely lacking, an aircraft outward-bound from national territory would either have to carry a solid load of passengers and goods for a single destination or, discharging part of its load at its first stop, proceed thereafter to its terminus with that portion of its normal commercial capacity unused. On the homeward trip the process would be reversed, the commercial load undergoing progressive accumulation instead of attrition, but the results would be equally uneconomical. No one would be willing to run an airline on such a basis, unless at government expense; while if the first alternative were chosen, of requiring that each trip be filled up for a single point, with any intermediate stops used solely for refueling, the total loads available for remote points would generally be found so light as to require that the trips be spaced so far apart on the calendar as to make economical operation impossible. To be specific, the records of Pan American Airways as supplied to the Civil Aeronautics Board show[12/] that the average number of passengers departing from the United States for various countries by air each day in 1941 was:

Cuba	76.2
Mexico	20.0
Canal Zone	6.5
Brazil	2.0
Ecuador, Peru, & Bolivia (combined)	2.3
Chile	0.7

Using existing types of transport aircraft and at normal commercial load factors, it would have been possible, without drawing upon "fifth-freedom

---

12/ Overseas Air Service Patterns - Transcaribbean and Offshore Island Areas, 1938-1942; prepared by Research & Analysis Division of Civil Aeronautics Board, 1943.

traffic", to run six schedules daily to Havana, and ten or eleven a week to Mexico; but only one each week to Brazil, the same to the countries of the central west coast of South America; the same to the Argentine, and only about one every third week to Chile. Under those circumstances, since passengers grow impatient with so much waiting, the natural course would have been to terminate the southbound routes in Brazil and in Peru, increasing the number of schedules to those points and requiring that passengers wishing to proceed farther south leave the United States airline and transfer to a local service which would be allowed to carry the short-range international coastal traffic, as well as the transfer traffic coming from the United States, and thus be able to fatten its loads, increase the frequency of its schedules, and improve the economy of its operations. Actually, of course, the U.S.-flag air services to South America are fully authorized to carry traffic between the various South American countries, as well as between the United States and each of them, and they do so.

The opportunity of securing some part of the local traffic along the way, through the exercise of the fifth freedom, is likely to be a real condition of survival for a considerable proportion of the possible through services of intercontinental extent. If an agreement had been reached in Chicago which was otherwise complete, but which made no provision for the fifth freedom--and if the fifth freedom had not thereafter been obtained through bilateral arrangements with at least a substantial proportion of the intermediate countries along the proposed routes--it would probably have been necessary that all U.S.-flag services to Europe and Africa be limited to operation as far as the major capitals of western Europe, with transfer to local lines there for further distribution. Similarly the states of western Europe would probably have found it impracticable to extend their east-bound routes beyond India--

unless with the aid of heavy subsidy--or to render commercial service to more than one or two points intermediate between western Europe and an Indian terminus.

It must be said, to give a fair survey of the positions taken on this question, that some European opinion regards the suggested effect on the possibility of operating United States airlines across Europe and Asia with some approval. The argument is sometimes made that since European transatlantic airlines would not in any case be allowed to pick traffic up in New York for interior points in the United States, thus replacing what might be discharged at the first American point of call after the Atlantic crossing, American lines ought not to expect to pick traffic up in Europe for points interior to that continent or beyond. Naturally, in view of the different political organization of the two continents, the suggested analogy is not widely acceptable to American opinion--which generally defends very strongly the equitable right to have access to all of the independent states of the world by air, and under conditions which would permit reasonably economical operation, and which would therefore necessarily include at least a substantial measure of fifth-freedom rights.

As among those who discussed the matter formally at Chicago, the impracticability of operating long lines with no fifth-freedom traffic at all came to be generally conceded; but there remained a clear difference of opinion over whether both types of traffic, that which originated or terminated in the airline's home territory and that which did not, but which was carried between other points along the route, should be considered on an equal footing, or whether some distinction should be made between them. It was the position of the American delegation that no such distinction should be made, but that an

airline should be free to secure whatever traffic it could at any point that it touched, in accordance with the long-established custom of the sea. The British view was that the primary purpose of an airline should be to carry its own country's traffic, originating or terminating in the national territory, and that other traffic should be incidental to the operation. Some progress was made, with concessions on both sides, but not enough to effect an agreement.

III

All this may have seemed completely nihilistic--an analysis of each of the available alternatives to the point of complete destruction. I do not think so. I have every confidence that we shall all reach further agreements, and that all the important routes of the world will be covered. In approaching the subject of regulation, I listed five general alternatives. No one of the five is a finally closed door. All present possibilities for further investigation; but all present obstacles, and the nature of the obstacles must be plainly seen before their removal can be seriously undertaken. Much of the discussion of the subject since the Chicago conference has been less likely to contribute to ultimate agreement than to arouse mutual suspicion and distrust.

This is not the first reminder that black becomes white, or vice versa, with a change in the point of view. A British position which its sponsors present as a seeking of decent order in the air, and the avoidance of cut-throat competition, has been subjected elsewhere to the unflattering epithet of "cartelism." Conversely, proposals which seem to their American advocates to insure the best of air transportation for the whole world, and the greatest assurance that the service will develop in accordance with the needs of the customers, appear in some comment across the Atlantic under the short and ugly title of "economic imperialism." There is little to be gained by exchanges on that level. It is not through mutual recrimination that ultimate agreement

is to be found, but in honest and continued effort to understand one another's positions and problems and to discover new solutions that will reasonably approach all parties' requirements.

American and British views on air transport do not exist in isolation. They are particular manifestations of positions that cover the whole post-war economy. Britain's inexorable need to export goods and to perform international services for others to cover the cost of her indispensable imports, and Britain's handicaps in returning swiftly to peaceful production after six years of suspension of peacetime habits and destruction of peacetime plants by obsolescence, deterioration, and enemy action are omnipresent considerations. Omnipresent, too, is the fact of America's realization of her own productive strength, newly revealed in its full dimensions by wartime demands, and the widespread American conviction that the conclusion of the war can introduce a period of material progress beyond any precedent. The problem of air transport is a part of the broader problem of whether national participations in international trade shall be determined exclusively by competition for the favor of customers or whether the full effects of competition shall be limited by international agreement--either permanently or during a period of postwar transition.

In specifically aeronautical applications, there is a widespread British conviction that free and unrestricted international competition in international air transport would produce airline operations of a very extravagant character, each of the competitors being backed by its national treasury through subsidy, and that the resultant subsidy race would cause ill feeling that would handicap common action of the governments for other purposes. Thought of civil aviation is constantly intermingled with consideration of

security. To Britons who have seen one-third of their homes blasted from the sky in the past five years, as to the other peoples of Europe, the airplane has appeared more often as a curse than as a boon; and they are as a whole, more concerned with attaining security against the recurrence of present aerial perils than with realizing new vistas of opportunity brought by air transport. It has been taken as almost axiomatic in British discussion that in Europe, at least, a large measure of control of civil operations is indispensable. The London Times,13/ in summing up the Chicago conference, concluded: "The international control of civil flying through the world may as yet be unattainable; but it is an urgent and patent necessity in Europe where security is an overriding consideration."

The characteristic American view, proceeding from a different experience, is that measures of security against renewed air attack must concern military aeronautics and aircraft manufacture, with international air transport of negligible significance in that connection; and as a part of the great American dream of a physical world remade after the war there is a conviction that air transport holds a bright promise of more intercontinental travel, better acquaintance and friendlier feelings among the peoples, and higher standards of living, and that such blessings can only be realized in full through the freest possible expansion. Recognizing that particular consequences of competition may be wasteful and destructive, and that every effort should be made to prevent unfair competitive practices, the prevailing American view, growing out of the general ability of contestants for a home market to compete with one another vigorously and still remain on friendly terms and cooperate for mutual advantage, refuses to admit the probability of any such evil consequences from competition in international air transport as many Britons fear.

13/ London Times, December 4, 1944.

National views on general principle are inevitably intermingled with considerations of national interest. Again the effects of the war on the respective economic positions of the nations become important. It seems to be a common belief in Britain that in the long run one or two nations, leaders in aeronautical technology and possessed of well-established aircraft industries and other advantages, would be able to dominate the world's air routes, leaving little opportunity for the rest; while in the short run, immediately after the war, the United States would enter any competition in air transport with so long a lead over the rest of the field as to make the contest an almost hopeless one; together with an occasional intimation that the advantageous American situation is due solely to our good fortune in being far-removed from the battle-fronts or the plunging V-2, and to our production during the war of great numbers of transport aircraft.

It is widely felt in America, on the other hand, that if it should prove true that a predominant position in civil aviation could be attained by a single country in a freely competitive regime that would no more than parallel the historic accomplishment of British shipping, in a field also closely associated with national security; and the analogy is recognized in the recent comment in The Economist[14/] that "In effect it is the United States, not Britain, which, in its bid for a mastery of the air comparable to British mastery of the sea in the past, is running counter to the hopes of all for 'a fair chance to operate international lines.'". Many Americans who are deeply sensible of the magnitude of British losses and sacrifices during the war, of their prospective handicaps, and of the need that they feel for measures of protection of their postwar position, too, still feel it proper to rebut some of the current British comment on air transport position by reminders that so far as the United States now

---

14/ December 2, 1944.

leads in civil aviation it is not merely the result of the war, but a continuation of a situation that had been established some years before 1939; and that American predominance in the production of transport aircraft at the present time is somewhat connected with the fact that the United States already had in full production, as early as 1936, a transport airplane which is still the great mainstay of the United Nations for military air transportation.

All these are factors that must be faced, in preparation for a resumption of such of the tasks undertaken at Chicago as were left uncompleted there. The problem of whether international competition should be left free to work out its own pattern or whether some check should be laid to its effects does not lend itself to dogmatic disposition, for there are few states--if any--that have had a perfectly consistent record in favor either of a perfectly free and unrestricted trade or of a universal application of any particular principle of control. There are drawbacks to limitation on competition. There are drawbacks to the absence of limitation. From the experience gained at Chicago we shall have to go forward pragmatically, in search of a solution which no one will find ideal but which all can accept with reasonable satisfaction, and which certainly will be far better than no solution at all. Collective ingenuity may ultimately discover, and collective goodwill accept, a solution for universal application; or there may be, as seems more likely for the immediate future, a large number of separate solutions, with some features in common but no actual identity, defining the terms of commercial association between particular pairs of nations.

IV

In bringing this paper to a close, I return to the relation of the Chicago experience to general international organization. I have made previous

mention of the general disposition to compose all international bodies of chosen representatives of states, rather than of individuals internationally selected for their personal qualifications. Equally evident, and equally significant, was the extent of the opposition to any constitutional provisions that have given more weight in the councils of the aeronautical organization to large and wealthy states than to their smaller neighbors. As in many international conferences in the past, "juridical equality" was a favored creed. Both the Canadian and the American drafts for international conventions had proposed the assignment of permanent seats on the Council to certain states of leading importance in air transport, with election to the remaining seats on behalf of the remaining nations; and the British position, although less explicitly stated, appeared also to contemplate the recognition of differences in weight. The representatives of a number of the states at Chicago objected vigorously to any such differentiation. They carried their point, and in the convention as adopted all states stand in equal prospect of election, and each casts an equal vote.

The problem of what constitutes international democracy in this matter is a recurrent one. On the one hand it is urged that the nation is the only recognizable unit in international affairs, and that the equality of nations is the strict counterpart of the equality of citizens within the state. On the other hand it is argued that the individual is still the primary element; that large nations speak for the welfare of more persons, and must find employment for more, than small ones; and that the result of equal voting on a national basis is to give the individual Luxenburger fifteen (?) times the representation in international councils that the individual Englishman possesses. Equality of national units is also accused of facilitating the formation of dominant blocs among the smaller states, and of thereby making it difficult to

induce the larger powers to surrender the protection of the rule of unanimity. It would be theoretically possible for an absolute majority in the civil aviation assembly to be composed of a group of states which had, in the aggregate, less than ten percent of the population of the member states as a whole, and which would certainly have less than five percent of the total aeronautical activity or general industrial strength.

A particular example of the possible effects, and also of the restraint with which the smaller states are likely to use the power that equal voting gives them, came up at Chicago in discussion of a proposal that the metric system should be recognized as the basic international standard. Among the 54 states represented there, approximately three-quarters were regular users of the metric system; yet the remaining minority of states, not regularly schooled to metric practice, would probably have represented a substantial majority of the total industrial activity and total technological use of systems of measurement even before the war, and well over two-thirds of the total at the present time. The metric countries would have had the power to require the use of the units with which they were most familiar as the primary standard in all publications of the international organization; but when an amendment was offered to substitute a much milder proposal, calling only for joint use of the metric and English systems and for continued study of the possibility of complete standardization, all of the metric countries except two supported it.

MINNESOTA HISTORICAL SOCIETY

www.mnhs.org