Prime Minister (2)

To note. There are advantages in making Laker and Beckman choose between a certain $8 million and possibly more / possibly nothing.

AF 3/7

BA: LAKER LITIGATION

You will recall that MISC 112 agreed that BA should attempt to reach a settlement of the Laker liquidator's action, on behalf of all the defendants, which included payments of $8m each to Freddie Laker and Mr Beckman, who is counsel to the liquidator, and also to Laker, and also to Lonrho. In return Laker would be expected to drop all further claims, since unless he did, the liquidator might not be prepared to settle. The threat of further actions would continue to hold up BA privatisation.

BA have met a last minute problem in completing the settlement because Laker/Lonrho's and Beckman's demands have become progressively more extravagant, and while the US judge has shown sympathy for BA's efforts he cannot compel Laker/Lonrho and Beckman to compromise. The risk is that he may conclude that an out of court settlement is unattainable and allow the case and the discovery process to continue, with all that would entail.

BA have now worked out a possible way round the problem which might either bring Laker to settle, or at least isolate him. It appears that the liquidator may now be prepared to agree to a settlement leaving Laker out and inhibiting Beckman from acting for him or others in related suits. Whether or not Beckman is removed from the scene, the main risk of leaving Laker out is that he may continue to seek satisfaction of his claims by litigation, perhaps aided financially by Lonrho, rather than recognising the value of the $8m offer made to him. The preliminary legal advice is that he would probably not be able to prevent the

liquidation being settled and that he would find it extremely difficult to mount or maintain a case after that. I am seeking further advice on how long it would take to see the end of any further litigation in these circumstances.

Settling the case in this way is less certain than a firm assurance that further claims will be dropped. But it is in my view greatly preferable to watching the case drag on to an uncertain conclusion. The risk of delaying privatisation if Laker is left out remains with us while the case is unresolved. To settle the liquidator's action would remove one major cause of difficulty. I have therefore concluded that we should agree to BA seeking to settle without Laker. The offer would remain open to him if he dropped all further claims, at least for a limited time.

Such a course of action is subject to the following conditions:-

(a) the liquidator and the other defendants are willing to settle on this basis;

(b) confirmation by our legal advisers that Laker would have little prospect of making a fresh law suit run;

(c) endorsement by the BA Board that such a settlement would be in the Company's commercial interests.

I have asked for the legal position to be investigated more closely. There is likely to be a further hearing before Judge Greene on 8 July, and I thought that you and colleagues would wish to be kept informed that a settlement on these terms might be concluded.

I am copying this minute to the members of MISC 112 and to Sir Robert Armstrong.

NICHOLAS RIDLEY
3 July 1985

Reference No: P01563

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PRIME MINISTER

MISC 112
British Airways: US Litigation and Privatisation

BACKGROUND

Flag A — MISC 112 on 6 March authorised continued negotiations to reach an out of court settlement of the Laker liquidator's case against British Airways (BA) and other airlines. You and other Ministerial colleagues subsequently approved the main elements of the settlement proposed in
Flag B the Secretary of State for Transport's minute to you of 3 May. These involved total costs of $65 to $70 million, of which BA would pay about half. Of the total amount $8 million, would go to Sir Freddie Laker himself, and $8 million to the liquidator's US lawyer.
Flag C. Mr Ridley's further minute of 4 June reported that there was a fair prospect also of settling the so called class actions brought by lawyers on behalf of aggrieved transatlantic travellers at a more modest cost than had been feared.

2. Ministers had hoped that once these two cases had been settled, the main obstacle to the privatisation of BA would have been removed. Nevertheless it has always been recognised that there was still a risk of further anti-trust litigation against BA in the US, on grounds not directly connected with the Laker bankruptcy. BA's US lawyers have now reviewed the evidence which might be used to support such litigation, and have advised that there could be difficulty in going ahead with privatisation until three years had elapsed after the settlement of the current cases.

3. The next hearing of the Laker case is scheduled for tomorrow, 27 June. The outstanding issues are the payment to be made to the liquidator's US lawyer, and the further claim which Lonrho are now

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threatening to make. In view of the possibility of delay in privatising BA, which would not be entirely straightforward to explain, Mr Ridley has asked for this meeting of MISC 112 to reconsider whether BA should continue to pursue out of court settlements of the two current cases. If Ministers decided that the cases should instead be fought, some further obstacles could then be placed in the way of the proposed settlement of the Laker case at tomorrow's hearing in Washington (3 pm Washington, 8 pm London time).

MAIN ISSUE

4. The immediate issue is whether or not an out of court settlement of the two cases should still be pursued. Although the possible postponement of privatisation (which was expected to realise around £1 billion gross in 1985-86) has wider implications for the Government's economic strategy, there is no need for any immediate decision about the term of the postponement or the reasons which might be given for it.

Disadvantages of settlement

5. The argument against continuing to pursue settlement of these cases may be summarised as follows:

(i) the UK does not accept the validity of the claims against BA and other airlines, and it is therefore objectionable that public funds should be paid to claimants like Sir Freddie Laker and Mr Beckman (the liquidator's lawyer);

(ii) if the airlines pay out money on these cases, this will serve to encourage yet further claims against them;

(iii) continuation of the litigation would provide an explanation for the postponement of privatisation.

The counter-arguments

6. Leaving aside privatisation, all the arguments which previously persuaded Ministers to approve the attempt to reach settlements of these cases still apply:

(i) if the litigation continues, documents will inevitably be 'discovered', which will expose BA and British Caledonian (B. Cal) to further civil claims, and might also make it difficult for the US Department of Justice to avoid restarting the criminal proceedings (now also involving B. Cal) which were suspended on President Reagan's instructions last December;

(ii) it is almost inconceivable that the present package negotiated with other airlines and all the various creditors could be reconstructed if the settlement does not go ahead, and any alternative arrangements would almost certainly cost BA more;

(iii) continuing litigation would be extremely expensive in itself, and also absorb a great deal of management effort;

(iv) there would be great difficulty in explaining why BA had changed their attitude to settlement of the outstanding litigation.

7. The Directors of BA remain firmly of the view that the settlement should be pursued. Once this has been achieved, and provided no further litigation is in prospect, the way will be open to BA to dispose of documents in the US which are not strictly required to be retained for the purposes of the continuing business or as evidence in outstanding litigation. In the circumstances, it is unlikely that the Directors of BA would readily accept a Government request not to pursue the settlement; they might argue that such a course would be

inconsistent with their duties under the Companies Act towards BA PLC.

Alternative courses

8. If settlement were not to be pursued, the question would arise how the problem created by the litigation was to be resolved, and more generally how the difficulties arising from the application of US anti-trust law to international airline traffic were to be overcome. Among the possibilities are:-

(i) to seek arbitration under the Bermuda II Agreement, and seek to have the litigation adjourned until the arbitration process had been completed. But the outcome of the arbitration could not be relied on, and there would be no way of ensuring that the litigation was postponed (Bermuda II has never been ratified by the US, and so is not part of US law);

(ii) to put pressure on the US to change the application of anti-trust by withdrawing from the Bermuda II Agreement. But this would be likely to be much resented by the Administration, which considers that it has already given substantial help to the UK by halting the criminal proceedings. Moreover, even if the Administration could be convinced that changes were needed in the application of anti-trust in order to make possible the continuation of normal air services between the US and the UK, it is far from clear that Congress would fall into line.

Altogether no alternative approach appears open to the UK which offers a reasonable prospect of settling the outstanding problems at less cost to the public purse than pressing ahead with the out of court settlements already contemplated by Ministers.

Implications for privatisation

9. The US lawyers' view seems to rule out early privatisation. But it is only preliminary and the Department of Transport have asked them to indicate more precisely who the plaintiffs might be in any further litigation, what circumstances could give rise to complaints, and what damages might be awarded against BA. It may be that the risks will be found, on further examination, to be containable within reasonable limits. The question would arise, if relatively early privatisation were to go ahead, how these could be accommodated; an indemnity from HMG does not appear to be a satisfactory solution, since apart from the contingent cost, explaining it would itself constitute an incitement to litigation. Attempts should therefore continue to find a satisfactory way round this difficulty. Once the present litigation is out of the way, and BA have had an opportunity to take action to reduce potential future problems arising from the discovery of documents, it is possible, though not certain, that legal advice about early privatisation might become more encouraging.

The lawyers have generally been too pessimistic on the costs of settling, if not on the time taken.

HANDLING

10. You will wish to invite the Secretary of State for Transport to explain the circumstances which have led him to ask for the meeting, and to put his recommendation to the Group. The Chancellor of the Exchequer, the Foreign and Commonwealth Secretary, the Secretary of State for Trade and Industry and the Attorney General will all wish to give their views on the best course of action for BA and the UK Government.

CONCLUSIONS

11. You will wish to reach conclusions on:

(i) whether or not BA should continue to pursue out of court settlements of both the Laker liquidator's action and the class actions on the basis that Ministers have already approved;

(ii) if not, what alternative approach should be adopted to resolve the problems created by the litigation and by the application of US anti-trust law to international air traffic.

J B UNWIN

Cabinet Office
26 June 1985