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MEMORANDUM

THE WHITE HOUSE
WASHINGTON

November 20, 1981

FOR: RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Civil Aeronautics Board Decision in
New Gateways to Brazil Case

I have reviewed the above-referenced CAB decision and related materials, and have no legal objection to the procedure followed with respect to Presidential review of such decisions under 49 U.S.C. § 1461(a). I also have no legal objection to the OMB recommendation, in which DOJ and the CEA concur, that the President not disapprove this decision, or to the letter from the President to the Chairman of the CAB prepared by OMB. I would note only that the letter's recommendation that the CAB reconsider the necessity of the initial tariff condition if the Brazilians reject the initial tariff filed, although permissible, is merely precatory.

There is department and agency disagreement as to whether the President has the option partially to disapprove the CAB decision, as recommended by DOT and State. The CAB has advised our office that it strongly opposes this approach. Neither the terms of the statute nor the legislative history resolves the question. I believe the better position is that the President may lack such authority. Hence, an attempted partial disapproval could be interpreted as a disapproval of the entire decision.

If the President were to disapprove the decision, he would be required by the statute to articulate his reasons for doing so in a public document (such as his letter to the CAB Chairman). This would enable the CAB to refashion an order that embraces its original routing and carrier decision, but omits the initial tariff stipulation.

The issues involving "partial disapproval" will be avoided, of course, if the President follows the OMB recommendation.

Mr. Fielding did not participate in the review of this matter.

THE WHITE HOUSE

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November 20, 1981

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FROM: RICHARD A. HAUSER *RAH*
DEPUTY COUNSEL TO THE PRESIDENT

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There is department and agency disagreement as to whether the President has the authority to disapprove this CAB decision in part, as recommended by DOT and State. The CAB has advised our office that it strongly opposes this approach. Neither the terms of the statute nor the legislative history resolves the question. We believe the better position is that the President may lack such authority. Hence, an attempted partial disapproval could be interpreted as a disapproval of the entire decision.

If the President were to disapprove the decision, he would be required by the statute to articulate his reasons for doing so in a public document (such as his letter to the CAB Chairman). This would enable the CAB to refashion an order that embraces its original gateway/carrier decision, but omits the initial tariff stipulation.

Accordingly, we favor the OMB recommendation, in which DOJ and the CEA concur, that (1) the President not disapprove this decision and (2) the President urge the CAB to reconsider the necessity of the tariff condition if the Brazilians reject the initial tariff filed. This latter language, of course, is merely precatory. In our view, the OMB approach will avoid the issues involving "partial disapproval."

Mr. Fielding has recused himself from participation in the review of this matter.

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Mr. Fielding did not participate in the review of this matter.


RAH:PJR/JML 11/20/81

cc: RAHauser Subject
 PJRusthoven Chron.
 JMLuttig

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

November 20, 1981

FOR: RICHARD A. HAUSER
FROM: PETER J. RUSTHOVEN 
J. MICHAEL LUTTIG
SUBJECT: CAB Decision in New Gateways to Brazil Case

The Civil Aeronautics Board proposes to issue a five year certificate to American Airlines, Inc., which would authorize it to transport persons, property and mail between Dallas/Ft. Worth, Texas, and Rio de Janeiro and Sao Paulo, Brazil, and to issue backup certificates for service to Brazil to Capitol International Airway, Inc., and to Eastern Airlines, Inc., respectively. Since the decision grants an international flight route, it was submitted for review by the President, pursuant to section 801(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1461(a). Under section 1461(a), the President may disapprove the Board's action with respect to foreign air carriers or domestic carriers engaging in foreign travel, "solely upon the basis of foreign relations or national defense considerations." If the President wishes to disapprove the CAB action, he must do so within 60 days of its submission to him (in this instance, before November 22).

The decision has been reviewed by the appropriate departments and agencies, in accordance with procedures established by Executive Order No. 11920 (1976). OMB, with the concurrence of the Department of Justice and the Council of Economic Advisors, recommends that the President not disapprove the decision. OMB, Justice and CEA also recommend that the President's letter to the CAB Chairman state the President's desire that, in the event Brazil does not approve the tariff levels proposed during the proceedings and included as one of the conditions of the CAB order, the Board reconsider this aspect of its decision. This language is precatory, but there is no legal objection to its inclusion in the letter.

The Departments of Transportation and State recommend, for various foreign policy and strategy reasons, that the President disapprove the condition that the airlines file initial tariffs at the levels proposed during the proceedings, but permit the

routing decision to take effect by not expressing disapproval -- a bifurcated treatment of the decision. The Department of Defense and the NSC have no objection to the CAB decision and no position on the controversy over the initial tariff stipulation. The General Counsel at CAB advised us this afternoon that the Board strongly objects to bifurcated treatment of the decision.

Clearly, under 49 U.S.C. § 1461(a), the President may approve or disapprove the entire CAB decision. It is not clear, however, that the President has the option to approve in part and disapprove in part, as recommended by DOT and State and presented among the options for the President in the memorandum prepared by OMB. Part of the reason for this uncertainty is that it is difficult to tell whether a specific condition the President may wish to disapprove was a significant factor in the Board's arriving at its overall decision.

The relevant language from section 1461 is as follows:

The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in any certificate authorizing an air carrier to engage in foreign air transportation . . . shall be presented to the President for review. The President shall have the right to disapprove any such Board action concerning such certificates or permits solely upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction.

The legislative history sheds no light on the narrow question of Congressional authorization of partial disapproval.

We discussed this with Ted Olson and Larry Simms. Neither had an opinion on the issue, but they recommended that we talk with Ron Carr in the Antitrust Division, who in turn, spoke with Elliot Seiden, Chief of the Transportation Section of the Antitrust Division, about the matter. Seiden and Carr conclude that sound arguments can be made both that the President does and does not have the authority to issue a partial disapproval, but believe that the most defensible position is that he does not. Among the arguments that support this view are that Congress easily could have said, but did not say, that the President may disapprove in whole or in part a CAB decision; that the President may add to a disapproval whatever precatory language he wishes, thereby

enabling the CAB to fashion a decision that will not be disapproved; and that the statutory phrase "right to disapprove any such Board action" appears to refer to the "issuance, denial, transfer, amendment, cancellation, suspension or revocation" of a certificate, rather than to specific conditions within a particular decision.

We recommend that you advise Richard Darman (a) that you have no legal objection to the draft letter submitted for the President's signature by OMB, stating that he will not disapprove the CAB decision, but (b) that the President's authority partially to disapprove the CAB decision is unclear and that an attempt to do so could be interpreted as a disapproval of the entire decision. We also recommend that you tell Darman that if the President wishes to disapprove the initial tariff stipulation, as recommended by DOT and State, that (a) he will be required, under the statute, to articulate in a public document his reasons for doing so, and (b) that the CAB would thus be able to refashion the decision to embrace its routing decision, but exclude the tariff stipulation, should it choose to do so.

Attached for your review and signature is a memorandum to Darman setting forth these recommendations. Mr. Fielding took no part in the review of this matter.

Attachment

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MEMORANDUM

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FFF:PJR/JML:sd 11/19/81

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JMLuttig
Subject
Chron.


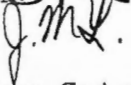
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