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PUBLIC AFFAIRS PAMPHLETS

FREEDOM OF THE AIR

BY KEITH HUTCHISON

Are we prepared to open our skyways to other nations?

Can a mad scramble for the postwar air lanes be avoided?

Is an international air police force desirable?

PUBLIC AFFAIRS PAMPHLETS
No. 93 1944

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FREEDOM OF THE AIR

No. 93

By KEITH HUTCHISON

The Closed Sky

"Free as the air" is a phrase which dates back to days when only birds flew. Today, when man has conquered the air, when he can travel through it at more than four hundred miles per hour, the air is no longer free. As soon as the airplane had developed sufficiently to become a real means of communication, nations began to add a new dimension to their frontiers, extending them upward into the blue.

The famous "Air Map" of the world prepared by American Airlines is shown on page 2. All you will see is a white circle with the North Pole at its center. Marked on it are the leading cities and aerial ports of call of the world. No other geographical features are shown—no mountains, rivers, seas, or political divisions. "Air," said the accompanying explanation, "is not divided into many

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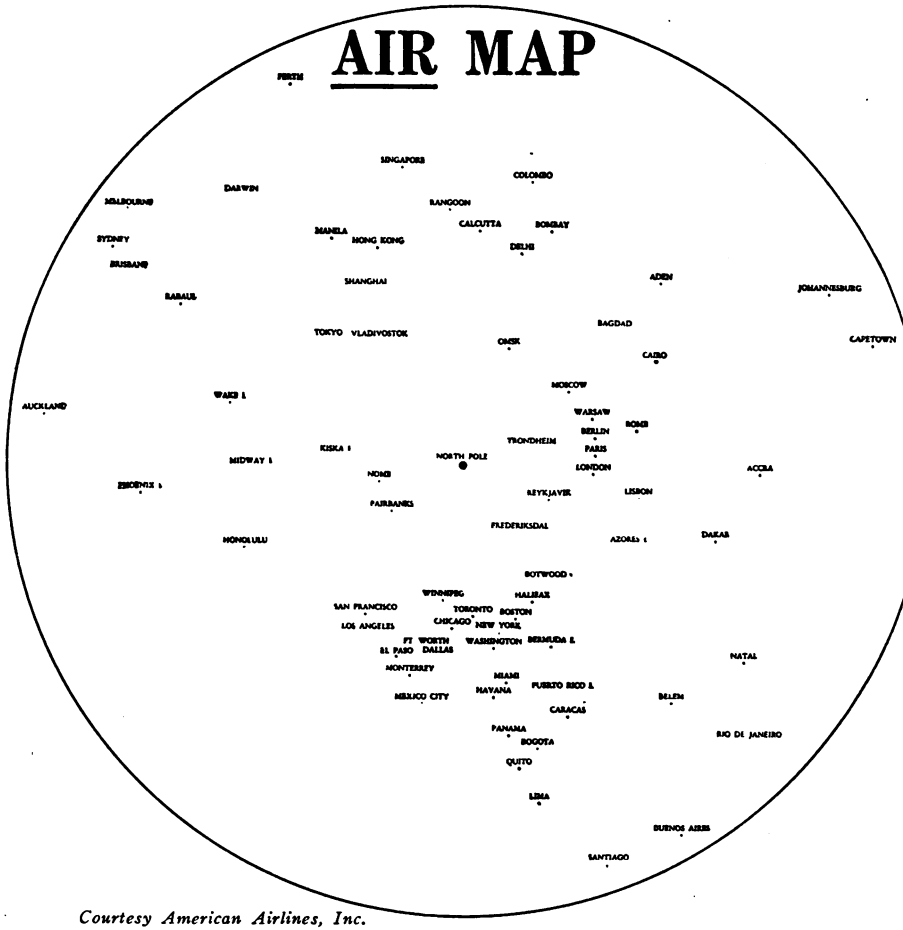

Courtesy American Airlines, Inc.

different parts as are continents and oceans. Air is one unit, boundaryless and universal."

Unfortunately, this is only part of the truth. Although there are no physical obstacles to hinder flyers from traveling around the globe, other obstacles do exist. The view that each nation owns the airspace above it, adopted by all countries, has created solid, if invisible, barriers across the major air lanes of the world. Can these barriers be

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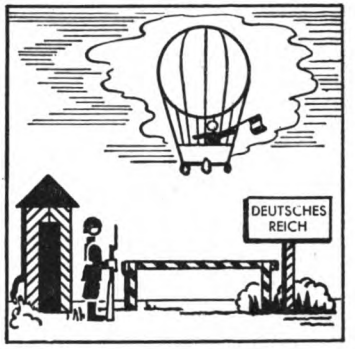
removed at the end of the present war? Or are great technical advances in air transport to be checked by national jealousies and fears? This is one of the major problems of the day. It is also one about which people argue heatedly. Before discussing it, let us glance at the historical background.

WHO OWNS THE AIR?

QUITE a number of years before the Wright Brothers made their famous flight at Kittyhawk, lawyers began to debate the legal problems of travel through the air. In those days the only navigators of the air were balloonists. But ballooning was becoming a popular sport, and certain questions were being raised. What, for instance, was the responsibility of a balloon pilot toward his passengers? What were the rights of a farmer whose crops were injured by a descending balloon? What law should apply to the salvaging of an aerial wreck? The use of balloons in the Franco-German War of 1870 had posed the problem of the treatment of captured aviators. Had they the rights of prisoners of war, or was Bismarck correct when he said they should be shot as spies?



Since balloons drifted with the winds across political boundaries, these questions had to be answered in terms of international as well as domestic law. This led to arguments about who owned the air. Was it international and open to all, like the sea beyond the three-mile limit? Or did the sovereign rights of a nation include the sky above

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its territories? A famous French jurist, Paul Fauchille, ventured this opinion in 1902:

> The air is free. The states have no authority over it in time of peace or in time of war other than that which is necessary for their own preservation.



This view was accepted widely during the next few years. But by then the airplane had begun to try out its wings. In 1909, Bleriot made the first crossing of the English Channel. In the following year, an international conference, attended by representatives from eighteen European governments, met in Paris to discuss this new and dangerous invention.

Agreement was easy on such matters as nationality and registration of aircraft, customs and tariffs, and rules for safety. These latter included an order that airplanes flying in fog should sound a horn continuously. But the question of who owned the air above national territory proved a stumbling block. The French delegation, with German support, insisted on Fauchille's principle of complete freedom of the air. But the British supported the right of a country to close its airspace to others. This attitude was based on military considerations. The following year the British Parliament passed an act giving the Home Secretary power to exclude foreign aircraft.

The Paris Convention of 1919

At the outbreak of World War I in 1914, aviation was little more than a dangerous sport with military possibilities. By the time the armistice was signed, it had become a powerful weapon with possible commercial appli-

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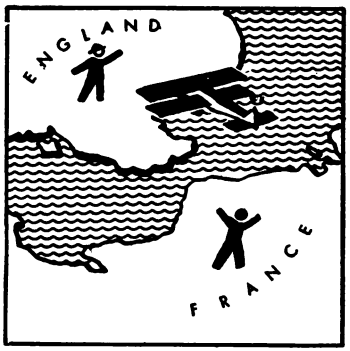
cations. Clearly, it was up to the statesmen who met in Versailles at the end of 1918 in order to draft the Peace Treaty to provide some kind of code to regulate international flying. At an early stage, therefore, a commission was set up and ordered to draft a convention governing international aviation under peacetime conditions. Neither France nor any other power was anxious to press for freedom of the air. And there was no difficulty in reaching agreement on the first clause of the convention, which read:



> The high contracting parties recognize that every power has complete and exclusive sovereignty over the airspace above its territory.

Having firmly established this principle, the authors of the convention then tried to provide for some measure of international air travel. Each state undertook to allow "freedom of innocent passage" to the aircraft of all other states signing the convention. This meant that foreign planes had the same rights as domestic planes to fly over a country, provided they obeyed the laws of the country and did not engage in espionage. It was agreed that public airports should be open to the aircraft of all contracting nations at the same cost. Another clause provided that each country had a right to set up prohibited zones for military reasons. Such bans were to apply equally to domestic and foreign aircraft. Thus, a state could not use this clause to close unreasonably large areas of sky to flyers of other nations without at the same time penalizing its own flyers.

Since the countries agreed to recognize each other's pilot licenses and certificates of airworthiness, the commission seemed to have laid the basis for freedom of inter-

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national movement. Private aviators were able to fly from country to country without undue inconvenience. But one short sentence in the convention prevented the development of international commercial flying. "The establishment of international airways," it declared, "shall be subject to the consent of the states flown over." Under broad interpretations of this clause, commercial aircraft might have been assured of the right to cross foreign territory and land for refueling. But it was interpreted so narrowly that the launching of an international air route required the hardest kind of bargaining between the countries concerned.



The Havana Convention of 1928

Although representatives of the American Government took part in drafting the Paris Convention, the Senate failed to pass it. The United States did not accept the obligations of any air treaty until 1928, when it signed the Havana Convention, adopted by the Sixth Pan-American Conference. This agreement has been ratified by the United States, Mexico, Chile, Ecuador, and all the Central American states except Salvador.

The Havana agreement started, as did the Paris Convention, with a recognition of national sovereignty over airspace. This principle had already been written into United States domestic law in 1926. An attempt was made, moreover, to clear the way for the development of commercial aviation between the various countries. Article XXI declared:

> The aircraft of a contracting state engaged in international air commerce shall be permitted to discharge passengers and a

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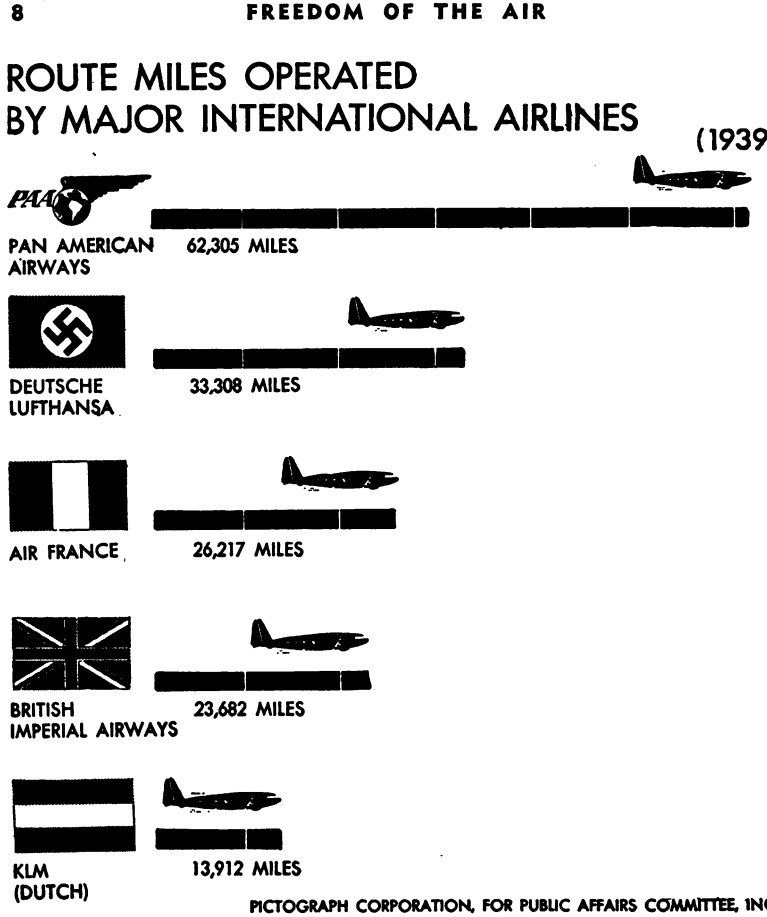

petition from the air over various parts of its far-flung empire. Although it gave the Dutch flying rights over India in return for permission to cross the Dutch East Indies on the way to Australia, it blocked for a time a projected French route to Indo-China. Later it hung up a "No Admittance" sign at Hong Kong and deprived Pan-American Airways of its proposed transpacific terminal; Britain relented only after Pan-American Airways obtained landing rights in the nearby Portuguese colony of Macao.

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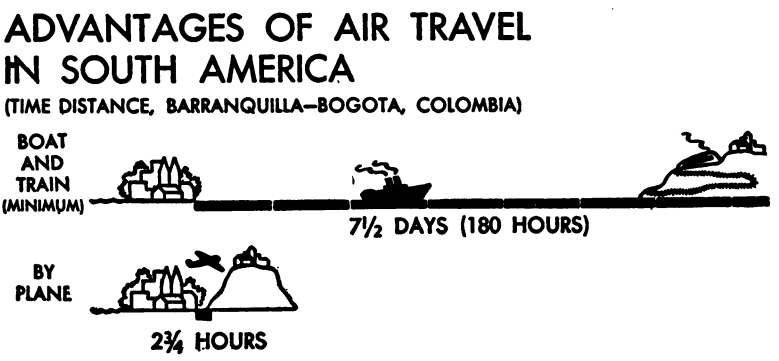
port as a political and economic weapon. One of the fruits of its early entente with Soviet Russia, in the days when both nations were international outcasts, was exclusive flying rights into Russia. This privilege was suspended



after Hitler came to power and began his campaign against "Bolshevism." But following the German-Soviet Non-Aggression Pact of 1939, a new air partnership between the two countries was started. Service was established between Berlin and Moscow which continued until the German invasion of Russia.

This incident provides an interesting study in air politics. Still more important and instructive is the story of German activities in South America. There, vast distances and undeveloped communications made conditions ripe for a revolution in transport; it was possible to move from the pack animal to the airplane in one jump. German nationals and Latin-Americans of German origin who remained true to the Fatherland, even though they found it expedient to acquire a new nationality, organized air lines in Brazil, Colombia, and other countries. They bought their planes and other equipment from German manufacturers and received from the German Government both financial and diplomatic support. When

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DIFFERENT PLANS FOR POSTWAR AVIATION

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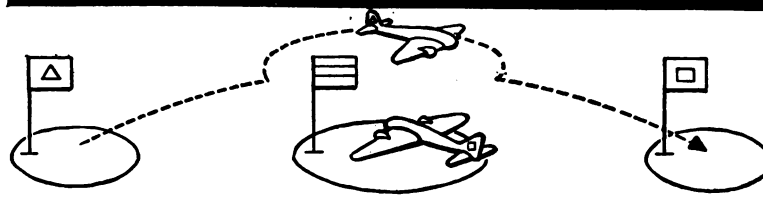
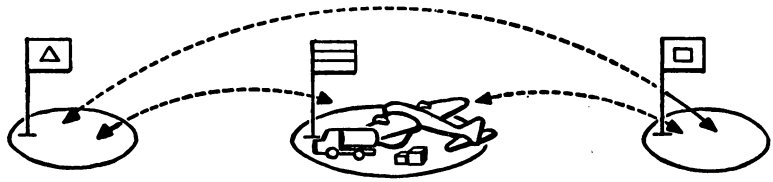


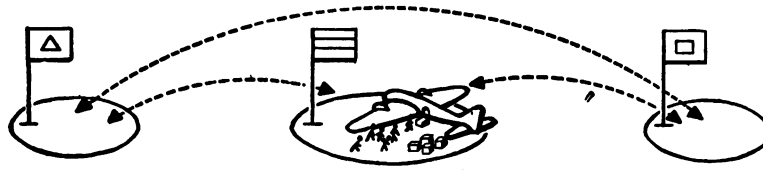
ONLY FRANCHISED AIRLINER MAY LAND
OTHERS MAY NOT

2. FREEDOM OF INNOCENT PASSAGE



ANY AIRLINER MAY PASS OVER, LAND, REFUEL AND REPAIR

3. FREEDOM OF AIR TRADE



ANY AIRLINER MAY LAND,
TAKE ON OR DISCHARGE PASSENGERS & FREIGHT

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thority will command much attention at the peace table. In America and Britain, military and aviation circles seem decidedly hostile to such ideas. Russia has yet to make known its attitude on postwar air questions, but hitherto it has not encouraged the use of its air by other nations.

Smaller countries, some of which fear that under any other conditions the big powers will dominate the air, are

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