



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 20th day of March, 1997

SERVED: March 20, 1997

Application of

ALITALIA-LINEE AEREE ITALIANE-S.p.A.

for an exemption from 49 U.S.C. section 41301
(Rome/Milan-Newark/Atlanta)

Docket OST-97-2113

Application of

CONTINENTAL AIRLINES, INC.

for a statement of authorization under Part 207 of the
Department's regulations (Newark-
Atlanta)

Undocketed

ORDER GRANTING EXEMPTION AND STATEMENT OF AUTHORIZATION

Summary

By this order we grant the applications of Alitalia-Linee Aeree Italiane-S.p.A. and Continental Airlines, Inc., for the necessary regulatory authorities to engage in code-sharing operations in the Atlanta-Rome/Milan market.

Application

By application filed February 4, 1997, Alitalia and Continental filed a joint application, (1) for exemption authority from 49 U.S.C. section 41301 in order to permit Alitalia to engage in scheduled foreign air transportation of persons, property, and mail between Rome/Milan and the coterminal points Newark/Atlanta, and (2) a statement of authorization under Part 207 of the Department's regulations to permit Continental to place Alitalia's designator code on Continental flights between Newark and Atlanta. The joint applicants propose to commence these services on March 30.

In support of their application, the joint applicants state that the authority sought is fully consistent with the U.S.-Italy Bilateral Air Transport Agreement, as amended by the 1990

Memorandum of Understanding (MOU); that the Atlanta code share will expand the competitive services options available to passengers in the southeastern U.S. and will produce important economic benefits for Continental; and that their proposed operations will be operated consistent with the frequency limitations set forth in the 1990 MOU. The joint applicants request that the authority be granted immediately and remain in effect until November 22, 1998, the expiration date of the existing Alitalia/Continental joint operating authorities.

Responsive Pleadings

Answers to the joint application were filed by American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., United Air Lines, Inc., and Wayne County and Detroit Metropolitan Wayne County Airport (Wayne County). Alitalia and Continental filed a joint reply. United filed a response to Continental/Alitalia's reply.¹

American and United oppose the joint application to the extent that the applicants propose to display more than a total of seven weekly Atlanta-Rome/Milan weekly frequencies. They argue that under the 1990 MOU Alitalia's service to Atlanta is limited to seven weekly flights and, therefore, that Alitalia/Continental cannot hold out service from Atlanta (via Newark) to both Rome and Milan, unless they intend to do so on a less than daily basis for each Italian city. They maintain that the Department should strictly enforce the frequency limitation since the Government of Italy imposes restrictions on U.S. carrier services severely limiting the routes and frequencies needed to mount effective competitive operations. United specifically notes its desire to code share with Lufthansa on flights between Frankfurt and Rome for Washington-Rome traffic.² United argues that the 1990 MOU provides for third-country code sharing, and that code-share operations with Lufthansa over Frankfurt would not increase the number of frequencies operated between the U.S. and Italy and, thus, would not violate the frequency limitations of the MOU. Even if the United/Lufthansa operations were deemed to involve extrabilateral frequencies under the MOU, United argues the Alitalia/Continental frequencies would also be extrabilateral assuming connections are offered on both the daily services to Milan and Rome from Newark. In such circumstances, United argues that Alitalia should not be permitted to operate code-share frequencies in excess of those permitted by the 1990 MOU if United and Lufthansa are prohibited from doing so.

Delta and Northwest oppose the proposed application, and urge that it be denied. While the carriers acknowledge that Alitalia has a right to serve Atlanta, subject to frequency limitations as set forth in the 1990 MOU, they argue that authorization of this service under a code share is discretionary, requiring a finding of reciprocity and that the service is in the public interest. Given the highly restrictive bilateral regime and lack of progress by Italy on liberalization, Delta and Northwest argue that Alitalia should not receive extrabilateral code-share access to additional U.S. cities when U.S. carriers are precluded under the bilateral from providing additional U.S.-Italy nonstop service. In this regard, Delta cites its own interest in serving the

¹ United's filing was accompanied by a motion for leave to file. We will grant the motion.

² United states that it would not carry local traffic on the Frankfurt-Rome sector.

Atlanta-Italy market. Northwest urges the Department to conduct bilateral negotiations with Italy before granting the requested authority, and to make its first priority in those negotiations authority for Northwest to serve the Detroit-Italy market and to introduce code-share service between the U.S. and Italy in conjunction with KLM.

Wayne County does not oppose in principle the expanded authorities sought by Alitalia and Continental, but urges that such authority not be granted while Italy blocks services by other U.S. carriers.

Alitalia and Continental filed a joint reply, arguing that Delta and Northwest have erroneously characterized the joint application as extrabilateral. They maintain that the 1990 MOU specifically provides for the selection of an additional gateway point for Alitalia and the right to serve that point on a code-share basis, and that failure of the Department to grant the application would violate the provisions of the 1990 MOU. They further argue that rather than seeking reciprocity from Italy, the opposing carriers, in fact, seek major new operating rights--rights that can be achieved only by new negotiations between the United States and Italy.

Alitalia and Continental also reject arguments that either their proposed or existing operations violate the frequency limitations under the 1990 MOU. They argue that all of Alitalia's services to its newest U.S. gateways--Cleveland, Houston, and San Francisco--are conducted via a code share on a single Continental daily flight to each point, and the fact that Alitalia feeds each flight with two separate flight numbers does not violate the capacity restrictions built into the agreement.

In response, United contends that, contrary to Alitalia's and Continental's arguments, the issue under the bilateral is the manner in which Alitalia holds out service between the United States and Italy, and that the U.S.-Italy agreement does not address the issue of how code-share frequencies are to be counted. United states that while it supports maximum flexibility to offer on-line code-share services and, indeed, seeks to do so itself with Lufthansa, such flexibility must be available to all carriers on an equal basis. It argues that until Italy is prepared to permit such extrabilateral services to carriers other than Continental and Alitalia, the Department should not continue to award extrabilateral authority to Continental and Alitalia.³

³ United has also restated its objection to any operations by Continental and Alitalia although it recognizes that the Department has already considered its position with respect to previous requests by these carriers and has granted many of them, finding that such operations are in the public interest. It nonetheless reiterates its position that all operations by Continental and Alitalia are extrabilateral since Continental is not a designated carrier under the U.S.-Italy aviation agreement; and that given Italy's failure to grant U.S. carriers broader access to the Italy market, reciprocity does not support the award of any expanded authority to these carriers. As United notes, we have previously addressed United's arguments against the joint operations of Continental and Alitalia in Orders 94-9-4, 94-10-27 and 95-11-20, and we will not readdress them here.

Joint Motion of United and Lufthansa German Airlines to Consolidate

On February 18, United and Lufthansa jointly filed a motion seeking consolidation of Lufthansa's application for a statement of authorization under Part 212 of the Department's regulations to place United's designator code on Lufthansa's flights between Frankfurt and eleven points in Italy with the Alitalia/Continental application at issue here. United/Lufthansa argue that their application is consistent with the U.S.-Italy aviation agreement and 1990 MOU to the extent that they seek to code share on flights between Frankfurt and Rome and Milan; and that such services would provide an important supplement to United's existing operations. They also argue that the existing and proposed Continental/Alitalia code-share services beyond Newark exceed the frequency limitations in the 1990 MOU since Alitalia holds out service at these gateways to both Rome and Milan. Consequently, they argue that services at Atlanta greater than seven weekly frequencies would be extrabilateral, and that authorization of such extrabilateral services should be withheld while similar authority is being withheld from United and Lufthansa.

Continental/Alitalia oppose the motion, arguing that the third-country code-share authority sought by United and Lufthansa is totally unrelated to this proceeding, which involves implementation of third/fourth-freedom rights specifically provided for in the bilateral agreement, whereas the authority sought by United and Lufthansa is extrabilateral. In these circumstances, they argue that there is no justification for consolidating Lufthansa's application into this proceeding.

Decision

We have decided to grant the joint application of Continental and Alitalia to engage in code-sharing services in the Rome/Milan-Atlanta market. Consistent with our standard practice involving code-share services, we will subject approval of the code-share operations to compliance with the Department's rules and regulations concerning code-share arrangements as well as our standard conditions for code-share operations. In addition, we dismiss the motion of United and Lufthansa for consolidation of Lufthansa's pending code-share application into this proceeding.

49 U.S.C. Section 40109 provides that the Department may grant an exemption, and Part 207 provides that the Department may approve a code-sharing operation, upon a finding that grant of the authority is consistent with the public interest. In determining whether a particular service is in the public interest we consider a number of factors, including whether the services proposed are provided for in the governing bilateral aviation agreement, and the benefits to the public as well as the U.S. carrier from the proposed services. We find that approval of the joint application meets these standards and is in the public interest.

Contrary to the position of the commenting parties, the authority sought is fully consistent with our aviation agreements with Italy. The 1990 MOU specifically provides that effective April 1, 1996, Italy may select one additional gateway city. Italy has selected Atlanta as its

new gateway point, and Alitalia's application reflects its desire to implement that selection. The 1990 MOU further provides that such services may be operated on a code-share basis and permits Alitalia to coterminize operations to any authorized U.S. points where the service is operated under a code share. Thus, Alitalia's proposal to serve Atlanta on a coterminal basis with Newark, and on a code-share basis with Continental in the Newark-Atlanta market, is fully consistent with our aviation understandings with Italy. In fact, Alitalia's right to serve additional gateways, on a code-share basis, was granted in exchange for the right of the U.S. to designate three additional carriers on a phased basis over a five-year period. We have fully exercised those rights under the 1990 MOU. The joint application here reflects Italy's decision to exercise the final phase of rights it gained in that exchange.

Furthermore, we find that approval of the proposed operations would provide valuable consumer benefits by affording travelers and shippers at Atlanta an additional competitive choice for service in the Italy market, and would benefit Continental by providing additional traffic on its Newark-Atlanta flights. In these circumstances, we find that approval of the joint application is fully consistent with the applicable bilateral aviation understandings with Italy and meets our public interest standards for approval.

We are not persuaded that the public interest supports opposition arguments that Alitalia's services should be disapproved as exceeding the frequency limitations of the 1990 MOU. Rather, we believe that since Alitalia's capacity arriving at and departing Atlanta will reflect the prescribed limit of seven weekly round-trip flights, in this case the public interest warrants construing the restriction so as to approve the code-share operation as proposed.

The opposing parties have suggested that because there are outstanding U.S. carrier route aspirations, there is insufficient reciprocity to warrant approval of the application. However, because the operations sought by Alitalia and Continental constitute rights that are provided for under the 1990 MOU, and for which the United States has already obtained valuable service opportunities, we find that the public interest calls for their approval.⁴

Finally, we will dismiss the United/Lufthansa motion to consolidate Lufthansa's pending application with that filed by Alitalia and Continental. The joint motion maintains that Alitalia/Continental should not be awarded additional "extrabilateral" authority to serve Atlanta as proposed, unless the proposed operations by United and Lufthansa in the Washington-Frankfurt-Rome market are also approved. However, we have concluded that the Continental/Alitalia Atlanta services are not extrabilateral, but instead are fully consistent with the provisions of the 1990 MOU. In these circumstances, we will dismiss the United/Lufthansa motion.

ACCORDINGLY,

⁴ We have amply demonstrated our willingness to take into account the types of reciprocity concerns that the commenting parties have raised here, and to withhold the award of new authority to Alitalia where such authority was extrabilateral and therefore a matter clearly within our discretion. See, e.g., Order 96-11-15.

1. We exempt Alitalia-Linee Aeree Italiane-S.p.A. from the provisions of 49 U.S.C. section 41301 to the extent necessary to engage in scheduled foreign air transportation of persons, property, and mail between the coterminal points, Rome and Milan, Italy, and the coterminal points Newark, New Jersey, and Atlanta, Georgia;
2. We grant Continental Airlines, Inc., a statement of authorization under Part 207 of the Department's regulations, to place Alitalia's airline designator code on up to seven weekly flights operated by Continental between Newark and Atlanta;
3. The authorities granted in ordering paragraphs 1 and 2, above, are effective immediately and shall remain in effect through November 22, 1998;
4. The authorities granted in ordering paragraphs 1 and 2, above, are subject to the frequency limitations set forth in the 1990 MOU, and to the further condition that, upon request, the parties will provide to the Director, Office of International Aviation, a full description of the services operated under the authorities granted to ensure compliance with the provisions of the MOU;
5. In the conduct of the services authorized by this order we expect Continental Airlines, Inc., and Alitalia-Linee Aeree Italiane-S.p.A. to comply with 14 CFR 399.88 of the Department's regulations and any amendments to the Department's regulations concerning code-share arrangements that may be adopted;
6. The code-share operations authorized by this order are subject to the condition that the foreign air transportation be sold in the name of the carrier holding out service in computer reservation systems and elsewhere, that the carrier selling such transportation accept all obligations established in the contract of carriage with the passenger (*i.e.*, the ticket);
7. In the conduct of the services authorized, Alitalia must adhere to the applicable terms, conditions, and limitations of its foreign air carrier permit (Order 71-4-1);
8. The approvals and authorizations granted by this order shall be subject to the conditions that neither Continental nor Alitalia shall give any force or effect to any exclusivity provisions of their arrangements insofar as such provisions restrict Continental from entering into an arrangement with a carrier, other than a carrier based in Italy, except with respect to service between the United States and Italy;
9. We may amend, modify, or revoke the authorities granted by this order at any time at our discretion without notice or hearing;
10. We dismiss the joint motion of United Air Lines, Inc., and Lufthansa German Airlines to consolidate Lufthansa's 1994 undocketed application to engage in code sharing between Frankfurt and Italy into this proceeding;
11. We grant the motion of United Air Lines, Inc., for leave to file an otherwise unauthorized document in this proceeding; and

12. We will serve this order on Alitalia-Linee Aeree Italiane-S.p.A., Continental Airlines, Inc., American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., United Air Lines, Inc., Wayne County and the Detroit Metropolitan Wayne County Airport, the Ambassador of Italy in Washington, D.C., the Department of State (Office of Aviation Negotiations), and the Federal Aviation Administration (AFS-200).

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at
<http://www.dot.gov/general/orders/aviation.html>.*