

Order 97-9-9
SERVED: September 5, 1997

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

Issued by the Department of Transportation
on the September 5, 1997

Joint Application of

**AIR CANADA and
SCANDINAVIAN AIRLINES SYSTEM**

for statements of authorization under
14 CFR 212 of the Department's Regulations or a
disclaimer of jurisdiction

Undocketed

ORDER

Summary

In this order we are deferring action on the request of Air Canada and Scandinavian Airlines System for statements of authorization under 14 CFR 212 of our rules to conduct code-sharing services between Canada and Scandinavia via specified points in the United States.

Application

On July 3, 1997, Air Canada and Scandinavian Airlines System (SAS) filed a joint application requesting a statement of authorization under Part 212 of the Department's regulations, or in the alternative a disclaimer of jurisdiction, to permit them to hold out code-sharing services between Canada and Scandinavia via specified points in the United States.¹ Under the

¹ The applicants state that a disclaimer of Department jurisdiction is warranted because the code-share arrangement at issue does not involve foreign air transportation, as no local U.S.-Canada or U.S.-Scandinavia traffic would be carried. They further state that, by filing this application, they do not waive their right to contest the Department's claimed jurisdiction over this and similar code-sharing arrangements.

proposed arrangement, SAS's airline designator code would be displayed on certain Air Canada transborder flights that would connect with SAS transatlantic flights at SAS's Newark and Seattle gateways. In addition, the Air Canada code would be displayed on certain SAS U.S.-Scandinavia flights that connect with Air Canada's transborder services at Newark and Seattle. The applicants state that all Air Canada-SAS code-share passengers would have a Canada-Scandinavia or Scandinavia-Canada routing, and that none of those passengers would originate in or be destined for the United States.

In support of their application, Air Canada and SAS state that each carrier holds appropriate underlying economic authority to serve the points in question,² and that grant of their request is provided for in the Open-Skies Agreements between the United States and Denmark, Norway and Sweden. They also state that, while the proposed service is not covered by the U.S.-Canada Air Transport Agreement, it is supported by the excellent overall bilateral aviation relationship between the United States and Canada, and the Department's authorization of similar services in the past. Specifically, they cite the Department's approval, since 1991, of code-share operations by Qantas Airways and Canadian Airlines International (CAI) over a Vancouver/Toronto-Honolulu-Sydney routing.

Answers

Delta Air Lines, Inc., filed an answer on July 15, 1997, urging the Department to defer action pending: (1) written assurances from the Government of Canada that Delta and other U.S. carriers may operate reciprocal third-country code-share services with their alliance partners, and (2) consideration of the public interest and competitive issues relating to the proposed Star Alliance, in which Air Canada and SAS are participants. On July 24, 1997, Northwest Airlines, Inc., submitted an answer "contingently" objecting to approval unless and until the Government of Canada provides firm written assurance that it will grant U.S. carriers similar operating rights between the United States and third countries via Canada. Both Delta and Northwest state that since the U.S.-Canada Agreement does not provide for third-country code-sharing, the requested extrabilateral authority can only be approved upon a demonstration of sufficient comity and reciprocity. They state that the applicants have made no showing that reciprocity with Canada is adequate to support approval of their request.³

² Air Canada holds exemption authority to, *inter alia*, provide service between any point in Canada and any point in the United States (*see* Order 95-4-30; the authority remains in effect under the provisions of 14 CFR Part 377 and 5 U.S.C. 558(c)), and may, under the terms of the U.S.-Canada Air Service Agreement, hold out services beyond points in the United States to points in third countries. SAS holds authority in its foreign air carrier permit, issued by Order 96-6-45, to provide service between any point in Denmark/Norway/Sweden, via intermediate points, to any point in the United States and beyond.

³ Northwest states that, while the United States expressly sought third-country code-share rights during the negotiations leading up the U.S.-Canada Agreement, the Canadian Government refused to include such rights. Delta states that the joint applicants' citation of the Qantas/CAI

Replies

Air Canada and SAS filed responsive pleadings on July 23 and 29, 1997, asserting that Delta and Northwest have presented no reason to question Canada's willingness to approve a code share between a U.S. carrier and a European carrier via a point in Canada, nor are they aware of any refusal by Canada to approve such a request.⁴ They state that the Department's approval of the extra-bilateral Qantas/CAI code-sharing arrangement established reciprocity on the part of Canada and compels an identical finding in this proceeding. They emphasize that, under the U.S.-Scandinavia Open-Skies Agreements, the proposed code share is a bilateral right and Department approval is required. They further state that the code share is limited in scope and distinct from the Star Alliance, and that linkage to resolution of the United-Air Canada antitrust immunity case would be inappropriate and in violation of the U.S.-Scandinavian Open-Skies Agreements.

Decision

We have decided to defer action, at this time, on the joint application of Air Canada and SAS for statements of authorization. We find that our action is in the public interest.

As an initial matter, we do not concur with the view of the joint applicants that we should disclaim jurisdiction over their proposed operations. While it is true that the traffic to be carried would be traveling solely between two foreign points, that fact alone is not sufficient to support a finding that the operations would not be in foreign air transportation. Under the code-sharing arrangement proposed by the joint applicants, each carrier would be operating its aircraft between its homeland and the United States, and would be receiving compensation from the other for the carriage of the other's passengers on those flights. Operations for compensation or hire between a foreign point and the United States clearly constitute foreign air transportation for the carrier involved, and thus the proposed operations require, under our rules, the statements of authorization which the joint applicants have also requested in this proceeding.

Turning now to those requests for statements of authorization, 14 CFR Part 212 provides that we will grant such authority if we find that the operations proposed meet the requirements of that Part and are in the public interest. In determining the public interest, we consider a number of factors, including the extent to which the authority sought is covered by and consistent with a bilateral agreement to which the United States is a party or, in the absence of

code-share arrangement does not establish that U.S. carriers would enjoy reciprocal treatment from Canada.

⁴ Air Canada and SAS state that, since Northwest did not seek leave to file its answer out of time or explain why its response was not timely, the Department should not accept Northwest's comments. In order that we may have a complete record in this case, however, we will accept all pleadings that have been filed.

an agreement covering the proposed services, the extent to which the authority sought is supported by reciprocity on the part of the homeland government of the foreign air carrier involved.

The United States-Scandinavia Open-Skies Agreements provide, in Article 11 of each Agreement, that designated carriers, such as SAS, may conduct third-country code shares “provided that such third country authorizes or allows comparable arrangements between the airlines of the other Contracting Party and other airlines on services to, from and via such third country.”⁵ Therefore, any entitlement of SAS under these Agreements to conduct the services proposed in this proceeding is dependent upon our aviation relationship with Canada with respect to third-country code shares.

Our aviation relationship with Canada is governed by the 1995 U.S.-Canada Air Transport Agreement. The authority sought by Air Canada is not an entitlement under that Agreement.⁶ Significantly, during the negotiation of that Agreement, the United States delegation sought the inclusion of provisions according U.S. and Canadian carriers the bilateral right to conduct third-country code shares. However, the Canadians resisted, and consistently maintained that Canada was not interested in such provisions. Since that time, the issue of including third-country code shares has been informally raised with officials from Canada on several occasions, to no avail.⁷

Under these circumstances, we have decided to defer action on the joint applicants’ request, while we pursue further discussions with the Government of Canada on the subject of the operation of third-country code shares. We find that this decision is warranted in the public interest, and is not contrary to the terms of either the U.S.-Scandinavia or the U.S.-Canada Agreements.

Finally, contrary to the applicants’ assertions, our authorization of the Qantas/CAI code share does not in any way establish currently effective Canadian reciprocity such as would lead us to approve their application at this time. We first granted Qantas and CAI authority to conduct their code-share operation in 1991, by Order 91-3-62, and have consistently renewed that authority. Our initial 1991 action, of course, predated our negotiation with Canada of the 1995 U.S.-Canada Agreement, and thus Canada’s consistent refusal to include provisions in that Agreement covering such operations. While we have not found that our current aviation relations with Canada require that we take the serious step of terminating the authority of CAI and its partner Qantas to conduct their code shares, by the same token we do not believe that a

⁵ Article 11(g), paragraph B) of the Air Transport Services Agreements between the United States and Denmark, Norway and Sweden, as amended.

⁶ Article 10, paragraph 6(b) of the Agreement provides that approval of third-country code sharing is at the discretion of the authorities of each country.

⁷ In addition, we are not aware of any U.S.-third-country code-sharing arrangement involving service to Canada that the Canadian Government has approved notwithstanding its previously expressed position.

further expansion of valuable extrabilateral third-country code-share authority to Canadian carriers is warranted at this time.

In view of the above, we find that deferring action on the joint applicants' request for statements of authorization would be in the public interest and consistent with Department policy.

ACCORDINGLY,

1. We defer action on the joint application of Air Canada and Scandinavian Airlines System filed July 3, 1997, requesting statements of authorization under Part 212 of the Department's regulations to permit the carriers to conduct code-sharing services between Canada and Scandinavia via specified points in the United States;
2. We deny the request of Air Canada and Scandinavian Airlines System for a disclaimer of jurisdiction concerning the operations described above;
3. We accept all pleadings that have been filed in this case; and
4. We will serve a copy of this order on Air Canada, Scandinavian Airlines System, Delta Air Lines, Inc., Northwest Airlines, Inc., the Ambassadors of Canada, Denmark, Norway, and Sweden in Washington, D.C., the Department of State (Office of Aviation), and the Federal Aviation Administration (AFS-200).

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

Memorandum

Subject: Undocketed--Application of Air Canada and
Scandinavian Airlines System for statements of
authorization or a disclaimer of jurisdiction

Date:

From: Paul L. Gretch, Director
Office of International Aviation, X-40

Reply to Barbara Schools
Attn. of: x62401

To: Charles A. Hunnicutt
Assistant Secretary for Aviation
and International Affairs

The attached draft order defers action on the request of Air Canada and SAS for statements of authorization to conduct code-sharing services between Canada and Scandinavia via specified points in the United States.

Attachment



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

Memorandum

Subject: Undocketed--Application of Air Canada and
Scandinavian Airlines System for statements of
authorization or a disclaimer of jurisdiction

Date:

From: Charles A. Hunnicutt
Assistant Secretary for Aviation
and International Affairs

Reply to
Attn. of:

To: Paulette V. Twine, Chief
Documentary Services/TASC, SVC121.30

Please process the attached order. X-45 will serve the order by fax.

Attachment