

Order 98-5-20

Served: May 18, 1998



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

Issued by the Department of Transportation
on the 8th day of April, 1998

Applications of

**AIR TINDI LTD.
WESTJET AIRLINES LTD.**

for foreign air carrier permits under 49 U.S.C. § 41301

OST-96-1855
OST-97-2495

ORDER ISSUING FOREIGN AIR CARRIER PERMITS

The captioned applicants seek foreign air carrier permits under section 41301 of Title 49 of the U.S. Code in the indicated dockets. The applications are fully described in attachments to this order. Because the public interest bases for granting these applications are clear, the applicants' fitness is established by evidence of record and unchallenged, and there are no significant ownership and control questions, it is appropriate to use this simplified, Subpart Q procedure to grant the requested authority.¹

Each applicant has filed and perfected its application as required by 14 CFR Part 211 and served it as required by 14 CFR 302.1705. Each application was summarized in the Federal Register, as cited in its descriptive attachment, and in the Department's published weekly list of applications filed. These notices described the authority sought and gave interested persons an opportunity to submit evidence and objections to the award of the authority. No answers to these applications were filed.

Public Interest

¹ 14 CFR 302.1701 et seq. Under Rule 29(b), we may, in our discretion, omit a tentative decision in proceedings under Subpart Q and proceed directly to a final decision.

We find, for the reasons set forth in each attachment, that grant or renewal of these foreign air carrier permits is in the public interest and that each applicant is qualified and designated by its government under the 1995 U.S.-Canada Air Transport Agreement. In each case where charter authority is conferred, that authority is consistent with our foreign carrier charter rule, 14 CFR Part 212.²

Operational and Financial Fitness

Each carrier has demonstrated that it is financially, managerially, and operationally fit to perform the foreign air transportation proposed. The applicants already have operated successfully to this country under previously issued authority. They have furnished financial information which indicates that they can operate without jeopardizing passenger or shipper funds.

We have reviewed each applicant's evidence of managerial/operational fitness, and have consulted the Federal Aviation Administration with respect to each. Each applicant has shown by its evidence, its history of operations to this country, and/or other officially noticeable information, that it has competent management and can operate safely. Each holds effective authority from the Government of Canada for the operations proposed and states that it has had no safety or tariff violations in the preceding five years. The FAA has advised us that each applicant conducts its operations to this country in accordance with Part 129 of the Federal Aviation Regulations.³

Ownership and Control

Each applicant has submitted evidence to establish that it is substantially owned and effectively controlled by nationals of Canada.

² Under Part 212, unless otherwise ordered by the Department (or, previously, by the CAB), any foreign air carrier whose permit authorizes charters may perform Third and Fourth Freedom charters without limitation or specific prior approval, and may perform Fifth Freedom charters upon obtaining a specific statement of authorization from the Department.

³ Copies of the FAA's March 24, 1998, memoranda have been placed in Dockets OST-96-1855 (Air Tindi) and OST-97-2495 (Westjet Airlines).

Terms, Conditions and Limitations

Each foreign air carrier permit is subject to the standard terms, conditions and limitations we consistently impose in the public interest.

The duration of each permit is determined on the basis of our public interest findings. Where the authority is provided for in a bilateral agreement, the permit is made coextensive with that agreement.

Pendente Lite Exemptions

For those carriers operating under current exemptions, those exemptions will expire by their own terms 90 days after we submit this order for review under § 41307 of Title 49 of the U.S. Code.

Findings and Conclusions

In view of the foregoing, and all the facts of record, we find and conclude that:

1. It is in the public interest to issue a foreign air carrier permit to each applicant in the form attached;
2. Each applicant is qualified and designated by its government under the U.S.-Canada Agreement;
3. Each applicant is fit, willing and able to perform properly the foreign air transportation described in its attached permit, and to conform to the provisions of the Act and to the Department's rules, regulations, and requirements;
4. The public interest requires that the exercise of the privileges granted by the attached permits be subject to the terms, conditions and limitations contained in and attached to those permits and to such others required by the public interest as the Department may prescribe;
5. Each applicant is substantially owned and effectively controlled by nationals of Canada;
6. The issuance of these permits does not constitute a "major regulatory action" under the

Energy Policy and Conservation Act of 1975, as defined in subsection 313.4(a)(1) of the Department's Regulations;⁴ and

7. The public interest does not require an oral evidentiary hearing on any of these applications.

ACCORDINGLY,

1. We issue, in the form attached, a foreign air carrier permit to each applicant;
2. We grant all motions and requests to file documents out of time, to submit additional or supplementary materials, to withdraw pleadings, and to withhold financial statements from public disclosure;
3. To the extent not granted, the applications and all motions and other requests in these dockets are denied;

⁴ Our finding is based on the fact that each permit issued will not result in a near-term increase in annual fuel consumption by the applicant in excess of 10 million gallons.

4. Unless disapproved by the President of the United States under § 41307 of Title 49 of the U.S. Code, this order and the attached permits shall become effective on the 61st day after their submission for § 41307 review, or upon the date of receipt of advice from the President or his designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove the Department's order under that section, whichever occurs earlier;⁵ and

5. We will serve this order on Air Tindi Ltd.; Westjet Airlines Ltd.; the Ambassador from Canada in Washington, D.C.; the Department of State (Office of Aviation Negotiations) and the Federal Aviation Administration.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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

⁵ This order was submitted for § 41307 review on April 8, 1998. On May 12, 1998, we received notification that the President's designee, under Executive Order 12597 and implementing regulations, did not intend to disapprove the Department's order.

SUMMARY

FOREIGN AIR CARRIER PERMIT APPLICATION Docket OST-96-1855

Air Tindi Ltd.

Flag: Canada

Federal Register Notice: 61 FR (54697-98), October 21, 1996

Filing Date: October 9, 1996

Authority Sought: Initial foreign air carrier permit to provide charter foreign air transportation of persons, property and mail between Canada and the United States consistent with the bilateral aviation undertakings of the United States and Canada.

Pleadings: No answers were filed in response to Air Tindi's application.

Public Interest: The authority requested is encompassed in the 1995 Air Transport Agreement between the United States and Canada.

Fitness: Air Tindi was founded in 1988 and operates a fleet of eighteen aircraft. Air Tindi holds an Operating Certificate (#4436) issued by Canada's Department of Transport. Air Tindi holds Department exemption authority to conduct the charter services at issue here. See Order 98-2-7.

Air Tindi has experienced management and has had no safety violations, fatal accidents or tariff violations in the last five years. Air Tindi has been designated by its government (Diplomatic Note #070, dated August 22, 1996) and holds effective authority from its homeland to conduct the proposed operations. By Memorandum dated March 24, 1998, the FAA advised us that Air Tindi conducts its operations to this country in accordance with Part 129 of the Federal Aviation Regulations.

Financial Indicators: Air Tindi has provided financial information which indicates that it can conduct the proposed services without jeopardizing passenger or shipper funds.^{1/}

DOT verifies compliance with 14 CFR Parts 203 (Warsaw liability waiver), 205 (Insurance requirements) and 129 (FAA Operations Specifications).

Ownership and Control: Air Tindi is incorporated under the laws of Canada and is privately owned by five (5) Canadian nationals. All of Air Tindi's officers, directors and key management personnel are Canadian citizens.

^{1/} Air Tindi's application was accompanied by a motion under Rule 39 (14 CFR § 302.39 to withhold certain financial information from public disclosure. In support of its motion, Air Tindi states that its financial summaries contain proprietary information on its traffic sources, expenses and revenues in conjunction with its current services. Air Tindi further states that disclosure of such information could harm its position in the North American travel market.

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

PERMIT TO FOREIGN AIR CARRIER

Air Tindi Ltd.

A Flag Carrier of Canada

is authorized, subject to the following provisions, the provisions of Title 49 of the U.S. Code and the orders, rules, and regulations of the Department of Transportation, to engage in:

Charter foreign air transportation of persons, property and mail between any point or points in Canada and any point in the United States.

In the conduct of charter operations authorized above, the holder may, without prior Department approval, carry charter traffic between the United States and a third country provided that such charter traffic is carried on a flight that serves Canada for purposes of carrying traffic between the United States and Canada.

The holder shall also be authorized to engage in other charter trips in foreign air transportation, subject to the terms, conditions, and limitations of the Department's regulations governing charters.

This permit and the exercise of the privileges granted in it shall be subject to the terms, conditions and limitations in both the order issuing this permit and the attachment to this order, and to all applicable provisions of any treaty, convention or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the holder's homeland are or shall become parties.

This permit shall be effective on May 12, 1998. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention or agreement, this permit shall terminate (1) upon the dissolution or liquidation of the holder to whom it was issued; (2) upon the effective date of any treaty, convention, or agreement or

amendment, which shall have the effect of eliminating the bilateral right for the service authorized by this permit from the service which may be operated by airlines designated by the Government of Canada (or, if the right is partially eliminated, then the authority of this permit shall terminate in like part); (3) upon the effective date of any permit granted by the Department to any other carrier designated by the Government of Canada in lieu of the holder; or (4) upon the termination or expiration of the applicable air services agreement between the United States and Canada. However, clause (4) of this paragraph shall not apply if prior to such termination or expiration, the foreign air transportation authorized herein becomes the subject of another treaty, convention or agreement to which the United States and Canada become parties.

The Department of Transportation has executed this permit and affixed its seal on May 12, 1998.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

CONDITIONS OF AUTHORITY

In the conduct of the operations authorized, the holder shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are:
 - (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or
 - (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States.

In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;

- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
- (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- (10) If charter operations are authorized, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code (formerly the Federal Aviation Act of 1958, as amended).(41301/40109) 12/96

SUMMARY

FOREIGN AIR CARRIER PERMIT APPLICATION Docket OST-95-907

Westjet Airlines Ltd.

Flag: Canada

Federal Register Notice: 62 FR (27106), May 16, 1997

Filing Date: May 9, 1997, as amended

Authority Sought: Initial foreign air carrier permit to provide scheduled and charter foreign air transportation of persons, property and mail between Canada and the United States consistent with the bilateral aviation undertakings of the United States and Canada.

Pleadings: No answers were filed in response to Westjet's application.

Public Interest: The authority requested is encompassed in the 1995 Air Transport Agreement between the United States and Canada.

Fitness: Westjet is organized under the laws of Canada and has held authority to serve the United States since 1997. Westjet holds exemption authority issued by the Department to conduct the services at issue here. See Notice of Action Taken, dated June 5, 1997, Docket OST-97-2496.

Westjet has experienced management and has had no safety violations, fatal accidents or tariff violations in the last five years. Westjet has been designated by its government and holds effective authority from its homeland to conduct the proposed operations. By Memorandum dated March 24, 1998, the FAA advised us that Westjet conducts its operations to this country in accordance with Part 129 of the Federal Aviation Regulations.

Financial Indicators: Westjet has provided financial information which indicates that it can conduct the proposed services without jeopardizing passenger or shipper funds.^{1/}

DOT verifies compliance with 14 CFR Parts 203 (Warsaw liability waiver), 205 (Insurance requirements) and 129 (FAA Operations Specifications).

Ownership and Control: Westjet is a privately held corporation, which is at least 95% Canadian-owned. The remaining shares are sold on the public stock exchange and are widely held. All of Westjet's officers, directors and key management personnel, with the exception of the chief pilot, are Canadian citizens. The chief pilot is a British citizen.

^{1/} Westjet's application was accompanied by a motion under Rule 39 (14 CFR § 302.39) to withhold certain financial information from public disclosure. In support of its motion, Westjet states that its financial summaries contain proprietary information on its traffic sources, expenses and revenues in conjunction with its current services. Westjet further states that disclosure of such information could harm its position in the North American travel market.

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

PERMIT TO FOREIGN AIR CARRIER

Westjet Airlines Ltd.

A Flag Carrier of Canada

is authorized, subject to the following provisions, the provisions of Title 49 of the U.S. Code and the orders, rules, and regulations of the Department of Transportation, to engage in scheduled foreign air transportation as follows:

- A. Of persons, property and mail (combination services);
- (1) Between any point or points in Canada and any point or points in the United States; and
 - (2) Between any point or points in Canada and San Juan, Puerto Rico, and beyond San Juan.
- B. Of property and mail (all-cargo-services);
- Between any point or points in Canada and any point or points in the United States.

Any all-cargo services conducted under this permit shall be subject to the condition that points in the territory of the United States shall not be combined on any same plane scheduled or nonscheduled all-cargo courier service operated with aircraft having a maximum certificated takeoff weight greater than 35,000 pounds.

The holder shall also be authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations of the Department's regulations governing charters.

In the conduct of charter operations authorized above, the holder may, without prior Department approval, carry charter traffic between the United States and a third country point, provided that such charter traffic is carried on a flight that serves Canada for purposes of carrying traffic between the United States and Canada.

In addition to the authority noted above, the holder may also conduct operations beyond points in the United States to points in third countries that it holds authority to serve, without local traffic rights between points in the United States and such other points in third countries (i.e., on a blind sector basis).

This permit and the exercise of the privileges granted in it shall be subject to the terms, conditions and limitations in both the order issuing this permit and the attachment to this order, and to all applicable provisions of any treaty, convention or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the holder's homeland are or shall become parties.

This permit shall be effective on May 12, 1998. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention or agreement, this permit shall terminate (1) upon the dissolution or liquidation of the holder to whom it was issued; (2) upon the effective date of any treaty, convention, or agreement or amendment, which shall have the effect of eliminating the bilateral right for the service authorized by this permit from the service which may be operated by airlines designated by the Government of Canada (or, if the right is partially eliminated, then the authority of this permit shall terminate in like part); (3) upon the effective date of any permit granted by the Department to any other carrier designated by the Government of Canada in lieu of the holder; or (4) upon the termination or expiration of the applicable air services agreement between the United States and Canada. However, clause (4) of this paragraph shall not apply if prior to such termination or expiration, the foreign air transportation authorized herein becomes the subject of another treaty, convention or agreement to which the United States and Canada become parties.

The Department of Transportation has executed this permit and affixed its seal on May 12, 1998.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

CONDITIONS OF AUTHORITY

In the conduct of the operations authorized, the holder shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
 - (2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36;
 - (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
 - (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
 - (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
 - (6) Comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
 - (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are:
 - (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or
 - (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States.
- In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;
- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
 - (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
 - (10) If charter operations are authorized, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
 - (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code (formerly the Federal Aviation Act of 1958, as amended).(41301/40109) 12/96