



Order 98-12-6

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC**

SERVED December 9, 1998

Issued by the Department of Transportation
on the 7th day of December, 1998

Applications of

American Airlines, Inc.

**American Airlines, Inc. and Iberia Lineas
Aereas de Espana, S.A.**

Delta Air Lines, Inc.

Iberia Lineas Aereas de Espana, S.A.

Northwest Airlines, Inc.

**Northwest Airlines, Inc. and
Continental Airlines, Inc.**

Polar Air Cargo, Inc.

Dockets OST-97-2965

Undocketed*

OST-98-4355

OST-98-3626

OST-98-4557

OST-98-4364*

OST-98-3652

for exemptions or authorities under 49 U.S.C.
section 40109 and the orders and regulations of the
Department of Transportation

*The referenced Notice has been revised to incorporate new standard conditions applicable to code-share operations. To the extent that, following the issuance of a confirmation order, parties or other persons need to rely on the content of a Notice of Action Taken, they should regard the language in the Notice attached to the order, rather than the language of the original Notice, as the language that the Department is in fact confirming.

ORDER

The captioned U.S. air carriers and foreign carriers have applied for various forms of authority or relief from Title 49 of the U.S. Code or regulations or orders of the Department in order to perform the air transportation activities shown in the attached Notices of Action Taken. Except as noted, no answers were filed to these requests.

Because of the imminence of these operations, we approved them by telephone, subject to adherence, by each applicant, to the conditions set forth in its certificate(s) of public convenience and necessity, foreign air carrier permit, and/or conditions attached.

We carefully considered the information set forth in each application described in the attached Notices of Action Taken, and we found that each of the proposed operations was consistent with the public interest and was consistent with an applicable bilateral aviation agreement and/or the aviation relationship between the United States and the foreign country involved, that each applicant was qualified to perform its proposed operations, and that each application should be approved.

Under authority assigned by the Department in its Regulations, 14 CFR Part 385, we found that for each operation (1) immediate action was required and was consistent with Department policy; (2) grant of the exemption or authority was consistent with the public interest; and (3) grant of this authority would not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975.¹

ACCORDINGLY,

1. We confirm the actions described in the attached Notices of Action Taken, which granted the referenced U.S. and foreign air carriers (1) exemptions from the provisions of Section 41101 and 41301, where necessary 41504 or as noted in the attached notices, other sections of Title 49 U.S.C.; or (2) relief or authorizations as provided for under regulations or orders of the Department, to the applicants to perform the operations described in the attached Notices of Action Taken;
2. In the conduct of the service, each applicant was to adhere to the conditions set forth in the Appendices, and to any other conditions as noted in the attached Notices of Action Taken;

¹ On the basis of data officially noticeable, we found that each U.S. and foreign air carrier applicant for an operating exemption is qualified to provide the services authorized.

3. To the extent not granted, or explicitly deferred as noted in the attached Notices of Action Taken, these applications are denied; and
4. We may amend, modify, or revoke this order at any time without hearing.

Persons entitled to petition the Department for review of this order under the Department's Regulations, 14 CFR 385.30, may file their petitions within ten (10) days after the date of service of this order. The filing of a petition for review of a particular action shall affect this order only as it concerns that action.

These actions were effective when taken, and the filing of a petition for review will not alter their effectiveness.

By:

PAUL L. GRETCH
Director
Office of International Aviation

(SEAL)

APPENDIX A

U.S. Carrier Standard Exemption Conditions

In the conduct of operations authorized, the applicant(s) shall:

- (1) Hold at all times effective operating authority from the government of each country served;
- (2) Comply with applicable requirements concerning oversales contained in 14 CFR (for scheduled operations, if authorized);
- (3) Comply with the requirements for reporting data contained in 14 CFR 241;
- (4) Comply with requirements for minimum insurance coverage, and for certifying that coverage to the Department, contained in 14 CFR 205;
- (5) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (6) Comply with the applicable requirements of the Federal Aviation Administration Regulations; and
- (7) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department of Transportation, with all applicable orders and regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

The authority granted shall be effective only during the period when the holder is in compliance with the conditions imposed above.

FOREIGN AIR CARRIER 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) Except as specifically exempted or otherwise provided for in a Department Order, 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 (except as otherwise provided in the applicable bilateral agreement) with the Department's rules governing charters (including 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).

NEW



U.S. Department of
Transportation
Office of the Secretary
of Transportation

NOTICE OF ACTION TAKEN

April 30, 1998

This serves as interim notice to the public of the action described below, taken orally by the Department official indicated; the confirming order or other decision document will be issued as soon as possible.

Application of AMERICAN AIRLINES, INC. filed 10/2/97 in Docket OST-97-2965 for:

XX Exemption under 49 U.S.C. 40109 to provide the following service:

(a) Scheduled foreign air transportation of persons, property and mail between (1) New York, Chicago, and San Juan, on the one hand, and Madrid, Spain, on the other; (2) points in the United States, via Madrid, and Alicante, Bilbao, Jerez de La Frontera, La Coruna, Las Palmas, Sevilla, Valencia, and Vigo, Spain; (3) points in the United States, via Madrid, and Marseilles, France and Porto, Portugal. American plans to operate this service under a code-share arrangement with Iberia Lineas Aereas de Espana (Iberia).

Application of IBERIA LINEAS AEREAS DE ESPANA, S.A. filed 3/13/98 in Docket OST-98-3626 for:

XX Exemption under 49 U.S.C. 40109 to provide the following service:

Scheduled foreign air transportation of persons, property and mail between Spain and Atlanta, Cleveland, Dallas/Ft. Worth, Denver, Detroit, Las Vegas, Minneapolis, New Orleans, Orlando, Philadelphia, Pittsburgh, Phoenix, San Diego, San Francisco, Seattle, St. Louis, Tampa, and Washington, DC (through Reagan Washington National Airport). Iberia stated that it would operate these services via its existing U.S. gateways of Miami, New York, and Chicago under a code-share arrangement with American Airlines.

Joint Application of AMERICAN AIRLINES, INC. and IBERIA LINEAS AEREAS DE ESPANA, S. A filed 10/2/97 Undocketed for:

XX Statement of Authorization for American Airlines (and its regional affiliates Executive Airlines, Flagship Airlines, Simmons Airlines and Wings West Airlines) under Part 207 of the Department's regulations in order to:

Display Iberia's "IB" airline designator code on American's and/or American Eagle's flights in the following markets:

| | | |
|---------------------------|-----------------------------------|-----------------|
| Miami-Madrid | Miami-Dallas/Ft. Worth Houston | Chicago-Atlanta |
| Boston | Orlando | |
| Cleveland | | |
| Dallas/Ft. Worth | | |
| Miami-Cancun, Mexico | New York-Boston | Denver |
| Guatemala City, Guatemala | Los Angeles | Detroit |

Managua, Nicaragua
Panama City, Panama

Philadelphia
Pittsburgh
(See Reverse Side)

Houston
Las Vegas

| | | |
|--|--|--|
| Miami-San Jose., Costa Rica (cont.) San Pedro Sula, Honduras Minneapolis/ San Salvador, El Salvador | New York-San Francisco (cont.) Washington (Ronald Reagan Washington National) | Chicago-Los Angeles (cont.) St. Paul New Orleans Orlando San Diego St. Louis |
| Chicago-Philadelphia (cont.) San Francisco Tampa | Chicago-Phoenix Seattle Washington (Ronald Reagan Washington National) | |

The applicants stated that services operated beyond the U.S. gateways to points within the United States and Central America would be without local traffic rights for Iberia.

XX Statement of Authorization for Iberia and its regional affiliates under Part 212 of the Department's regulations to:

Display American's Airlines' "AA" designator code on Iberia's (and its regional affiliates Aviacion y Comercio and Air Nostrum Lineas Aereas del Mediterraneo) flights in the following markets:

| | | |
|---|--|--|
| Madrid-New York Chicago Miami San Juan | Madrid-Alicante, Spain Barcelona, Spain Bilbao, Spain Jerez de La Frontera, Spain La Coruna, Spain Las Palmas, Spain Malaga, Spain Palma de Mallorca, Spain Sevilla, Spain Valencia, Spain Vigo, Spain | Madrid-Geneva, Switzerland Lisbon, Portugal Marseille, France Nice, France Porto, Portugal Rome, Italy Vienna, Austria |
| Barcelona-New York Miami | | |

The joint applicants stated that services operated within Spain and beyond Spain would be without local traffic rights for American.

Continental Airlines, Inc., Delta Air Lines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., Air Europa, and the Government of Puerto Rico filed various pleadings to the applications for exemption and/or statements of authorization.¹ All of the responding U.S. carriers argued that the Department should deny or defer the requests to operate code-share services in the U.S.-Central America market or, alternatively should consolidate the applications into the American/TACA case (Docket OST-97-1700) because they raise competitive concerns related to those at issue in the American/TACA case. They also raised concerns regarding American's proposed equity investment in Iberia and urged that this request be considered in a single proceeding with other requests of American involving alliance/investment arrangements such as the American/British Airways case. In addition, all of the responding U.S. carriers, except TWA, opposed award of any extrabilateral authority involved in the code shares on the basis that there is insufficient reciprocity on the part of Spain to support such awards. In this regard, United and Delta both cite denials by Spain of third-country code-share services proposed by the carriers.

¹ We have not considered the pleading stricken from the record by Order 98-1-18.

(See Next Page)

-3-

American and Iberia replied that the majority of their code-share application was consistent with the aviation agreement and that given the modest size of the extrabilateral authority at issue, there was a sufficient basis to grant the applications. They further argued that their relationship was not an alliance, but rather a standard code-share arrangement; that they would continue to be competitors in both U.S.-Spain and U.S.-Central America markets; and that American's potential investment in Iberia would be minor and not controlling. In these circumstances, the joint applicants argued that there is no basis to consolidate the American/Iberia code-share request into any other proceedings pending before the Department involving American's relationships with other foreign carriers.

Air Europa does not oppose the applications provided that its similar application to code share with TWA (Dockets OST-97-3069 and 97-3070 and Undocketed) is also granted.

The Government of Puerto Rico supported the American/Iberia code-share arrangement insofar as it would benefit service to San Juan.

Applicant reps: Carl B. Nelson, Jr. (202) 496-5647 (AA) DOT Analyst: Gerald Caolo (202) 366-2406
William Karas (202) 429-6223 (Iberia)

DISPOSITION

XX Granted in part (see attached list), subject to conditions, see below

XX Deferred Statement of Authorization to American with respect to Miami-Central American points, see below

XX Balance Dismissed (extrabilateral authority and France points), see below

The above action with respect to American's exemption request and Iberia's exemption request was effective when taken: April 30, 1998, thru April 30, 1999

The above action approving the statements of authorization was effective when taken: April 30, 1998, and will remain in effect indefinitely, subject to the conditions listed below.

XX Under assigned authority (14 CFR 385) by:

Paul L. Gretch, Director

Office of International Aviation

(Petitions for review may be filed from now until
10 days after the confirming order/letter issues.

Filing of a petition shall not stay the effectiveness of this
action.)

XX Authority granted is consistent with the air transport agreement between the United States and Spain.

Except to the extent exempted or waived, this authority is subject to the terms, conditions, and limitations indicated: **XX Holder's certificate of public convenience and necessity (American)**

XX Holder's foreign air carrier permit (Iberia)

XX Standard Exemption Conditions (attached)

(See Reverse Side)

Conditions: The statements of authorization granted are subject to the following conditions:

(a) The statements of authorization will remain in effect only as long as (i) American and Iberia and their regional affiliates continue to hold the necessary underlying authority to operate the code-share services at issue, and (ii) the code-share agreement providing for the code-share operations remains in effect.

(b) American and/or Iberia must promptly notify the Department (Office of International Aviation) if the code-share agreement providing for the code-share operations is no longer effective or if the carriers decide to cease operating all or a portion of the approved code-share services.¹

(c) The code-share operations conducted under this authority must comply with 14 CFR 399.88 and with any amendments to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in the computer reservation systems and elsewhere; and that the carrier selling such transportation (*i.e.*, the carrier shown on the ticket) accept responsibility for the entirety of the code-share journey for all obligations established in its contract of carriage with the passenger; that the passenger liability of the operating carrier be unaffected; and that the operating carrier shall not permit the code of its U.S. code-sharing partner to be carried on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition.

(d) The authority granted here is specifically conditioned so that neither American nor Iberia shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions.

(e) No more than two points in Spain may be served on any flight. Service beyond Madrid to the authorized European countries is limited to services from U.S. points for which American holds the necessary underlying authority.

(f) We may amend, modify, or revoke the authority granted at any time without hearing at our discretion.²

The exemption authority granted Iberia is subject to the following condition:

Iberia's authority to serve Atlanta, Cleveland, Denver, Detroit, Las Vegas, Minneapolis, New Orleans, Orlando, Philadelphia, Phoenix, Pittsburgh, San Diego, San Francisco, and Seattle is limited to operations conducted under a code-share arrangement with American Airlines.

Dismissal/Deferral: We dismissed that portion of the exemption applications and the joint application for statements of authorization to the extent that they requested authority for services not provided for under the U.S.-Spain aviation agreement. Taking into account the state of our aviation relationship with Spain, including the absence of meaningful progress in our efforts to achieve an open-skies regime, we determined that it would not be consistent with the public interest to award the requested extrabilateral

¹ We expect this notification to be received with 10 days of such non-effectiveness or of such decision.

² We note that the code-share agreement as submitted did not include provisions regarding exclusive dealings between the code-share parties. Should the parties subsequently decide to amend their code-share agreement to include any provision relating to an exclusive arrangement between the parties, that amended language must first be submitted for consideration by the Department.

(See Next Page)

authority. Accordingly, we did not grant authority to serve the following U.S. points: Tampa and Washington (through Ronald Reagan Washington National Airport);³ or the following Spain points: Alicante, Bilbao, Jerez de La Frontera, La Coruna, Las Palmas, Sevilla, Valencia, and Vigo; or the following points beyond Madrid: Geneva, Porto, and Vienna; or the following gateway-gateway service: Miami-Barcelona.

We also dismissed that portion of the applications to the extent that they sought authority for service beyond Madrid to points in France. Under the April 1998 U.S.-France Memorandum of Consultations and initialed agreement, U.S. carrier opportunities to serve France under third-country code-share arrangements are limited. American does not currently hold authority for those services. Should American subsequently be authorized to conduct these services, the joint applicants would be free to reapply for the Spain-France code-share authorization sought here.

Furthermore, taking into consideration all of the circumstances of this case, including the related responsive pleadings, we determined that the public interest was best served if we deferred action on American's request insofar as it requested authority to engage in code-share services between Miami and points in Central America.

Finally, we determined that the concerns raised by the objecting carriers regarding other alliances involving American did not, in the circumstances presented, warrant our undertaking the review proposed or otherwise delaying award of the requested authority to the extent granted here.

Remarks: With respect to Air Europa's comments, we contemporaneously issued a notice granting those portions of the TWA and Air Europa applications to engage in code-share services in the U.S.-Spain market provided for in the current aviation agreement. We also contemporaneously issued Iberia's regional affiliates, Aviacion y Comercio and Air Nostrom Lineas Aeras de Mediterraneo the necessary underlying authority to conduct the authorized code-share services with American (Docket OST-98-3640).

³ The aviation agreement between the United States and Spain provides that a Spanish carrier may serve only one airport in the Washington/Baltimore area, and the Government of Spain has selected Dulles International Airport.

AUTHORITIES GRANTED AMERICAN/AMERICAN EAGLE

A. Exemption authority under 49 U.S.C. 40109 to engage in scheduled foreign air transportation in the following markets:

New York-Madrid, Chicago-Madrid, San Juan-Madrid

B. Statement of Authorization under 14 CFR Part 207 to place Iberia’s designator code on American/American Eagle flights in the following markets:

| | | |
|-----------------|------------------------|----------------------------------|
| Miami-Madrid | Miami-Dallas/Ft. Worth | Chicago-Minneapolis/ St. Paul |
| | Orlando | New Orleans |
| | Houston | |
| New York-Boston | Chicago-Atlanta | |
| Orlando | | |
| Los Angeles | Boston | Philadelphia |
| Philadelphia | Cleveland | Phoenix |
| Pittsburgh | Dallas/Ft. Worth | San Diego |
| San Francisco | Denver | San Francisco |
| | Detroit | Seattle |
| | Houston | St. Louis |
| | Las Vegas | |
| | Los Angeles | |

AUTHORITIES GRANTED IBERIA/REGIONAL AFFILIATES

A. Exemption authority for Iberia under 49 U.S.C. 40109 to engage in scheduled foreign air transportation in the following markets:

Between Spain and Atlanta, Cleveland, Dallas/Ft. Worth, Denver, Detroit, Las Vegas, Minneapolis, New Orleans, Orlando, Philadelphia, Pittsburgh, Phoenix, San Diego, San Francisco, Seattle, and St. Louis.

B. Statement of Authorization under 14 CFR Part 212 to place American’s “AA” designator code on Iberia’s and its regional affiliates’ flights in the following markets:

| | | |
|-----------------|-------------------|-------------------------|
| Madrid-New York | Madrid-Barcelona | Madrid-Lisbon, Portugal |
| Chicago | Malaga | Rome, Italy |
| Miami | Palma de Mallorca | |
| San Juan | | |

Barcelona-New York



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

NEW

NOTICE OF ACTION TAKEN

August 6, 1998

This serves as interim notice to the public of the action described below, taken orally by the Department official indicated; the confirming order or other decision document will be issued as soon as possible.

Joint Application of AMERICAN AIRLINES, INC. and IBERIA LINEAS AEREAS DE ESPANA, S. A filed 10/2/97 in Docket Undocketed for:

XX Statement of Authorization for American Airlines (and its regional affiliates American Eagle Airlines and Executive Airlines)¹, under Part 207 of the Department's regulations to display Iberia Airlines' "IB" airline designator code on a blind-sector basis on flights operated by American in the following markets:

Miami-Guatemala City, Guatemala
Managua, Nicaragua
Panama City, Panama

Miami-San Jose, Costa Rica
San Pedro Sula, Honduras
San Salvador, El Salvador
Cancun, Mexico

Applicant reps: Carl B. Nelson, JR. (202) 496-5647 (AA) DOT Analyst: Gerald Caolo (202) 366-2406

William Karas (202) 429-6223 (Iberia Airlines)

DISPOSITION

XX **Granted, subject to conditions (see below)**

The above action was effective when taken: August 6, 1998, and will remain in effect indefinitely, subject to the conditions listed below.

XX Under assigned authority (14 CFR 385) by:

Paul L. Gretch, Director
Office of International Aviation
(Petitions for review may be filed from now until
10 days after the confirming order/letter issues.
Filing of a petition shall not stay the effectiveness of this
action.)

XX **Authority granted is consistent with the aviation agreement between the United States and Spain.**

(See Reverse Side)

¹ Subsequent to this application, the Department reissued and transferred the certificate of Simmons Airlines d/b/a American Eagle to American Eagle Airlines and Executive Airlines and the operations of Flagship Airlines and Wings West Airlines were merged into American Eagle. This reissued authority is reflected here. See Order 98-5-12.

Except to the extent exempted or waived, this authority is subject to the terms, conditions, and limitations indicated: **XX Holder's certificate of public convenience and necessity (American)**

Conditions:

The authority granted is subject to the following conditions:

- (a) The statements of authorization will remain in effect only as long as (i) American Airlines and Iberia Airlines continue to hold the necessary underlying authority to operate the code-share services at issue, and (ii) the code-share agreement providing for the code-share operations remains in effect.
- (b) American Airlines and/or Iberia Airlines must promptly notify the Department (Office of International Aviation) if the code-share agreement providing for the code-share operations is no longer effective or if the carriers decide to cease operating all or any portion of the approved code-share services.²
- (c) The code-share operations conducted under this authority must comply with 14 CFR 399.88 and with any amendments to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in the computer reservation systems and elsewhere; and that the carrier selling such transportation (*i.e.*, the carrier shown on the ticket) accept responsibility for the entirety of the code-share journey for all obligations established in its contract of carriage with the passenger; and that the passenger liability of the operating carrier be unaffected.
- (d) The authority granted here is specifically conditioned so that neither American nor Iberia shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions.
- (e) We may amend, modify, or revoke the authority granted at any time without hearing at our discretion.³

Remarks: The Department previously granted authority to American and Iberia to provide code-share service in numerous markets between the United States and Spain and beyond to the extent that extrabilateral authority and French points were not involved.⁴ We deferred action on the code-share services at issue here in light of comments raised by interested parties regarding U.S.-Central America competition. The issue of competition was at that time being considered in the American/TACA Group Case, Docket OST-96-1700. See Notice of Action Taken, dated April 30, 1998, Docket OST-98-2965.⁵

² We expect this notification to be received within 10 days of such non-effectiveness or of such decision.

³ We note that the code-share agreement as submitted did not include provisions regarding exclusive dealings between the code-share parties. Should the parties subsequently decide to amend their code-share agreement to include any provision relating to an exclusive arrangement between the parties, that amended language must first be submitted for consideration by the Department.

⁴ On May 20, 1998, United Air Lines, Inc. filed a petition for review of staff action regarding approval of code-share services by American and Iberia and its regional affiliates in the Madrid-Rome market. We will address that petition separately.

⁵ The pleadings relating to this portion of the American/Iberia application were fully described in the April 30, 1998 Notice.

The Department now has approved the American/TACA code share and imposed conditions on that relationship to address the competition issue. (See Order 98-5-26). In these circumstances, we found that it was in the public interest to proceed with the carriers' request to operate these bilaterally authorized services.

NEW



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

NOTICE OF ACTION TAKEN

October 23, 1998

This serves as interim notice to the public of the action described below, taken orally by the Department official indicated; the confirming order or other decision document will be issued as soon as possible.

Application of **Delta Air Lines, Inc.** filed **8/21/98** in Docket **OST-98-4355** for:

XX Exemption under 49 U.S.C. 40109 to provide the following service:

Scheduled foreign air transportation of persons, property, and mail between any point or points in the United States and any point or points in Japan pursuant to code-share arrangements with a carrier or carriers of a third country or countries on a blind sector basis. Initially, Delta intends to operate service between the United States and Fukuoka, Nagoya, Osaka, Tokyo, and Sapporo pursuant to a code-share arrangement with Korean Air Lines Co. Ltd. (KAL). Delta also seeks to integrate this authority with its existing exemption and certificate authority.

Northwest Airlines, Inc. filed an answer to Delta's application; and Delta filed a reply.

Northwest does not oppose Delta's request, but stated that the broad scope of the request raised policy issues that the Department should consider. Northwest specifically noted that, under the U.S.-Japan Memorandum of Understanding, a U.S. carrier's right to operate third-country code-share services is not absolute. Rather, it is dependent on the status of the code-share relationship between the United States and the third country and on whether the third country affords comparable code-share rights to Japanese carriers. If the Department grants Delta's request, Northwest stated that the Department should make clear that the authority is for code-share services only and is subject to applicable bilateral restrictions and the Department's normal regulatory requirements. Finally, Northwest stated that the Northwest/Continental application for additional code-share frequencies on all eligible U.S.-Japan routes should be granted before Delta's application.

Delta asserted in its reply that Delta's request is fully consistent with the U.S.-Japan Memorandum of Understanding and is comparable to authority already granted to Northwest and to United to operate code-share services with their third-country code-share partners. In these circumstances, Delta argued that there was no basis to award unlimited third-country code-share authority to Northwest and United while restricting Delta's authority. Delta further argued that the fact that third-country code-share rights are subject to reciprocity with the qualifying country provides no basis to limit Delta's authority. Finally, Delta maintained that there was no basis to impose additional conditions on Delta's authority as Part 212 of the Department's regulations requires that the operating airline obtain a statement of authorization for the code-share operations.

Applicant rep: **Robert E. Cohn 202-663-8060** DOT analyst: **Terri Bingham 202-366-2390**

(See Reverse Side)

DISPOSITION

XX Granted (subject to conditions, see below)

The above action was effective when taken: **October 23, 1998,** through **October 23, 2000**

Action taken by: Paul L. Gretch, Director

Office of International Aviation

(Petitions for review may be filed from now until 10 days after the confirming order/letter issues. Filing of a petition shall not stay the effectiveness of this action)

XX Exemption Authority granted is consistent with the April 20, 1998 U. S.-Japan Memorandum of Understanding

Except to the extent exempted or waived, this authority is subject to the terms, conditions, and limitations indicated: **XX Holder's certificate of public convenience and necessity**

XX Standard Exemption Conditions (attached)

XX U.S.-Japan Memorandum of Understanding effective April 20, 1998

XX Statement of Authorization for Delta/KAL code-share operations dated August 6, 1998, and conditions therein

Conditions: The route integration authority requested is granted subject to the condition that any service provided under this exemption shall be consistent with all applicable agreements between the United States and the foreign countries involved. Furthermore, (a) nothing in the award of the route integration authority requested should be construed as conferring upon Delta rights (including fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless Delta notifies us of its intent to serve such a market and unless and until the Department has completed any necessary selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use the limited-entry route rights that are included in Delta's authority by virtue of the route integration exemption granted here, but that are not then being used by Delta, the holding of such authority by route integration will not be considered as providing any preference for Delta in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

The authority granted to serve intermediate and beyond points in conjunction with Japan service is limited to countries with which the United States has signed open-skies agreements and/or countries for which the carrier holds authority to serve under certificates or exemptions issued by the Department, and for which it holds route integration authority by virtue of this action or other action of the Department, and all conditions attached to that authority.

The exemption authority granted is subject to the condition that all operations provided under the authority are operated on a code-share basis with an authorized third-country code-share carrier.

(See Next Page)

Remarks: Except to the extent of the conditions included in this notice, we found no basis to impose additional conditions on the underlying operating authority granted to Delta for U.S.-Japan third-country code-share services. The operations proposed are fully consistent with the U.S.-Japan Memorandum of Understanding. Furthermore, to the extent that Delta plans services with other third-country code-share partners, such third-country carriers must first obtain the necessary authorization from the Department.

Should there be any reciprocity or other public interest concerns with respect to such partners, these concerns can be considered at that time.

With respect to Northwest's concern about its joint application with Continental, we note that we have contemporaneously granted that application. See Notice of Action Taken, Docket OST-98-4364.



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

NEW

NOTICE OF ACTION TAKEN

October 23, 1998

This serves as interim notice to the public of the action described below, taken by the Department official indicated; the confirming order or other decisional document will be issued as soon as possible.

Application of Northwest Airlines, Inc. filed 10/8/98 in Docket OST-98-4557 for:

XX Allocation of three U.S.-Philippine combination frequencies to provide the following service:

Scheduled foreign air transportation of persons, property, and mail between Detroit, Michigan, and Manila, the Philippines, via Nagoya, Japan.

United Air Lines filed an answer to Northwest's application stating that it did not object to the allocation of three additional frequencies, but urges that the allocation be made on a temporary basis for a period of one year so as not to put Northwest in a permanent U.S. carrier monopoly position to operate North Pacific combination services to Manila. United further urges the Department to make the allocation subject to the condition that there will not be the usual presumption of renewability so long as the holder continues to operate services, thereby enabling the Department to review the market to determine if the frequencies should be reallocated to another carrier that would offer an additional pattern of competitive service. Northwest filed a reply, objecting to United's proposed conditions, but stating that it would accept an allocation for a period of one year so long as the normal presumptions as to renewability and the continued effectiveness of the Administrative Procedure Act apply.

Applicant rep: Megan Rae Poldy (202) 842-3193 DOT Analyst: Sylvia Moore (202) 366-6519

DISPOSITION

XX **Granted** (subject to conditions, see below)

The above action was effective when taken: October 23, 1998, through October 23, 1999

Action taken by: Paul L. Gretch, Director

Office of International Aviation

(Petitions for review may be filed from now until 10 days after the confirming order/letter issues. Filing of a petition shall not stay the effectiveness of this action)

XX **The authority granted is consistent with the aviation agreements between the United States and the Philippines and the 1998 U.S.-Japan Memorandum of Understanding**

(See Reverse Side)

Except to the extent exempted or waived, this authority is subject to the terms, conditions, and limitations indicated:

XX Holder's certificate of public convenience and necessity

Conditions: Consistent with our standard practice, the frequency allocation granted is subject to the condition that it will expire automatically and the frequencies will revert to the Department for reallocation if they are not used for a period of 90 days.

Remarks: We found that approval of Northwest's application was consistent with the public interest. Northwest's service will provide new service options to passengers in the U.S.-Philippines market. Furthermore, it will help ensure that valuable operating rights available under our agreement with the Philippines are used effectively. Regarding United's concerns, with the exception of the limitation on duration, to which Northwest agreed, we saw no persuasive basis to attach any conditions to Northwest's authority other than those that we would routinely attach to awards of this type. We note that five Route 2 frequencies remain available and an additional two frequencies will become available in October 1999, thereby facilitating competitive service by another carrier.

NEW



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

NOTICE OF ACTION TAKEN

October 23, 1998

This serves as interim notice to the public of the action described below, taken orally by the Department official indicated; the confirming order or other decision document will be issued as soon as possible.

Joint Application of Northwest Airlines, Inc. and Continental Airlines, Inc. filed 8/25/98 in Docket OST-98-4364 for:

XX Allocation of 14 weekly same-country code-share frequencies to provide the following service:

Scheduled combination air services between any point in the United States and any point in Japan consistent with the provisions of the U.S.-Japan Memorandum of Understanding entered into force on April 20, 1998.

Application of Continental Airlines, Inc. filed 8/25/98 in Docket OST-98-4364 for:

XX Exemption under 49 U.S.C. § 40109 to provide the following service:

Scheduled foreign air transportation of persons, property, and mail between any point or points in the United States, and any point or points in Japan under a code-share arrangement with Northwest Airlines, Inc., consistent with the provisions of the U.S.-Japan Memorandum of Understanding entered into force on April 20, 1998.

American Airlines, Inc. filed an answer to the application; the City of Chicago and Continental and Northwest (jointly) filed replies. American urges the Department to defer action on the application, stating that American has begun negotiations with potential U.S. carrier partners and hopes to be in a position to file a competing application soon. American also stated that Northwest and Continental did not file a complete application since they did not indicate what markets they would operate their proposed code-share services. Chicago filed in support of American's position.

Northwest and Continental asserted in their reply that other carriers, including American, have had a sufficient opportunity to present competing proposals; that none has been filed, and, thus, that there is no reason to delay action on the Northwest/Continental application. They further argued that their application is not procedurally deficient since they clearly stated in the application that they intended to use the frequencies in all markets eligible under the U.S.-Japan MOU.

Applicant reps: Megan Rae Poldy (202) 842-3193 (Northwest) DOT Analyst: Terri Bingham (202) 366-2390

R. Bruce Keiner (202) 624-2615 (Continental)

DISPOSITION

XX Granted, subject to conditions (see below)

(See Reverse Side)

The above action with respect to Continental's exemption authority was effective when taken: **October 23, 1998,** through **October 23, 2000.** The above action with respect to the joint frequency award was effective when taken **October 23, 1998,** and will remain in effect indefinitely provided that the carriers continue to hold the underlying authority for the authorized services, subject to the conditions noted below.

Action taken by: Paul L. Gretch, Director
Office of International Aviation
(Petitions for review may be filed from now until 10 days after the confirming order/letter issues. Filing of a petition shall not stay the effectiveness of this action)

XX The authority granted is consistent with the April 20, 1998 Memorandum of Understanding between the United States and Japan.

Except to the extent exempted or waived, this authority is subject to the terms, conditions, and limitations indicated: **XX Holders' certificates of public convenience and necessity**

XX Standard Exemption Conditions (attached)

XX The U.S.-Japan Memorandum of Understanding effective April 20, 1998

Conditions: The authority granted was made subject to the following conditions:

(a) The exemption authority granted to Continental is subject to the condition that all operations provided under the authority are operated on a code-share basis with Northwest and that all operations are conducted within the level of services authorized Northwest and Continental for U.S.-Japan same-country code-share services.

(b) The frequency allocation granted is subject to the condition that the allocation will expire automatically and the frequencies will revert to the Department if they are not used for a period of 90 days.

(c) The code-share operations conducted under this authority must comply with 14 CFR 399.88 and with any amendments to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in the computer reservation systems and elsewhere; and that the carrier selling such transportation (*i.e.*, the carrier shown on the ticket) accept responsibility for the entirety of the code-share journey for all obligations established in its contract of carriage with the passenger; and that the passenger liability of the operating carrier be unaffected.

(d) The authority granted here is specifically conditioned so that neither Northwest nor Continental shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions.

(e) We may amend, modify, or revoke the authority granted at any time without hearing at our discretion.

(See Next Page)

Remarks: It is the Department's policy not to permit valuable limited-entry route rights go unused, particularly when a carrier has presented firm plans to use them. In this case, Northwest and Continental formally applied for and presented plans to use the available frequencies and have stated that they are prepared to begin the proposed services expeditiously (Joint Application at 5). American, on the other hand, has submitted no competing application for the available frequencies. Nor has it presented a firm proposal to use them. In these circumstances, and consistent with our stated policy, we determined that it was not in the public interest to defer action on the Northwest/Continental application as American had requested.

While we have awarded Continental broad U.S.-Japan exemption authority to provide the carriers the maximum flexibility possible in operating their code-share services consistent with the frequency limitations imposed on that service, we note that the provisions of the U.S.-Japan MOU relevant to same-country code-share operations include certain limitations on the markets that may be served. Therefore, to alleviate any confusion as to the scope of Continental's authority, we have specifically subjected the authority awarded to the terms, conditions, and limitations of the MOU.

NEW



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

NOTICE OF ACTION TAKEN

September 8, 1998

This serves as interim notice to the public of the action described below, taken orally by the Department official indicated; the confirming order or other decision document will be issued as soon as possible.

Application of **Polar Air Cargo, Inc.**, filed **3/19/98** in Docket **OST-98-3652** for:

XX Exemption for two years under 49 U.S.C. §40109 to provide the following service:

Scheduled foreign air transportation of property and mail between points in the United States, and Jeddah, Saudi Arabia, via Ostend, Belgium, and Shannon, Ireland, and beyond Saudi Arabia to Johannesburg, South Africa; Harare, Zimbabwe; and Nairobi, Kenya. Polar also requests integration of its Saudi Arabia authority with its existing exemption and certificate authority. Polar states that it intends to serve Johannesburg and Nairobi on a blind-sector basis only until such time as service with full traffic rights is permitted under the U.S.-Saudi Arabia aviation agreement.

XX Allocation of two weekly U.S.-Saudi Arabia frequencies to perform the above service.

Federal Express filed an answer stating that the Department should defer action on Polar's application until the Department can determine whether Saudi Arabia will relax the existing frequency restriction of six weekly flights in the bilateral to permit Federal Express and Polar to operate collectively eight weekly flights.¹ Federal Express stated that it has been the only designated carrier for nine years and contends that it holds a de facto "grandfather" allocation, based on its historic and current operations. It stated that it currently does not need a frequency allocation since it is not serving the market with its own aircraft but that it plans to begin such service in the relatively near future, and that if Saudi Arabia is unwilling to permit more frequencies, then the Department should institute a proceeding to allocate the frequencies.

Polar replied that there is no reason to defer action on its application since it has immediate plans to serve the market and that Federal Express wants to control all the available frequencies even though it only serves Saudi Arabia via an interline connection at Dubai with a foreign carrier. While supporting a more liberal frequency regime, Polar maintains that the availability of additional frequencies should not be a prerequisite for granting its application. Finally, Polar states that its application is not mutually exclusive with Federal Express's existing service or any pending application.

Applicant rep: **Jeffrey A. Manley (202) 879-5161** DOT Analyst: **Gerald Caolo (202) 366-2406**

(See Reverse Side)

¹ Federal Express' pleading dated April 20, 1998, was accompanied by a motion for leave to file an otherwise unauthorized document. We granted the motion.

DISPOSITION

XX Granted (subject to conditions, see below)

The above actions were effective when taken: **September 8, 1998**. The exemption authority will remain effective through **September 8, 2000**; the frequency allocation will remain effective indefinitely provided that Polar continues to hold the necessary underlying economic authority to serve the U.S.-Saudi Arabia market.

XX Under assigned authority (14 CFR 385) by:

Paul L. Gretch, Director

Office of International Aviation

(Petitions for review may be filed from now until

10 days after the confirming order/letter issues.

Filing of a petition shall not stay the effectiveness of
t his action.)

XX The authority granted is consistent with the aviation agreements between the United States and Saudi Arabia, the United States and Ireland, the United States and South Africa, and with the overall state of aviation relations between the United States and Zimbabwe, and between the United States and Kenya.

Except to the extent exempted or waived, this authority is subject to the terms, conditions, and limitations indicated: **XX** Holder's certificate of public convenience and necessity

XX Standard Exemption Conditions (attached)

Conditions: Consistent with our standard practice, the frequency allocation awarded for Saudi Arabia service is subject to the condition that it will expire automatically and the frequencies will revert to the Department if they are not used for a period of 90 days.

The route integration authority granted is subject to the condition that any service provided under this exemption shall be consistent with all applicable agreements between the United States and the foreign countries involved. Furthermore, (a) nothing in the award of the route integration authority requested should be construed as conferring upon Polar rights (including fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless Polar notifies us of its intent to serve such a market and unless and until the Department has completed any necessary selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use the limited entry route rights that are included in Polar's authority by virtue of the route integration exemption granted here, but that are not then being used by Polar, the holding of such authority by route integration will not be considered as providing any preference for Polar in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

Remarks: We were not persuaded by Federal Express' comments to withhold approval of Polar's application. The U.S.-Saudi Arabia aviation agreement specifically provides for Polar's proposed operations and Polar has firm plans to use the frequencies requested. Federal Express does not currently hold an allocation of frequencies either explicitly or on a "de facto" basis, and has not provided any recent direct service in the market. Should Federal Express develop firm plans to serve the market and seek a

(See Next Page)

frequency allocation, we will consider its application at that time, including the issue of additional frequencies for its services, if necessary. In the meantime, it is not the Department's policy to let valuable, limited route opportunities go unused when a U.S. carrier has firm plans to use them. Federal Express has not persuaded us to deviate from that policy here. In these circumstances, we concluded that it was in the public interest to approve the bilaterally authorized operations, subject to our standard dormancy condition.