



Order 98-12-8

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

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

Served: December 7, 1998

Application of

KOREAN AIR LINES, LTD.

for a statement of authorization under 14 CFR
Part 212 of the Department's Regulations

Undocketed

ORDER ON REVIEW

Summary

By this order we are (1) granting the petition filed by Trans World Airlines, Inc. (TWA) for review of staff action granting Korean Air Lines Co., Ltd. (KAL) a statement of authorization to conduct certain code-share operations pursuant to a code-share agreement with Northwest Airlines, Inc., and (2) upon review affirming the staff's action.

Background

By application filed June 24, 1998, KAL requested a statement of authorization under 14 CFR 212 of the Department's regulations to permit it to display Northwest's airline designator code on certain flights operated by KAL for the purpose of the transportation of U.S. mail by Northwest under its designator code on KAL flights.¹ In support of its application, KAL stated that the proposed operations are provided for in the air services agreement between the United States and the Republic of Korea, that they would facilitate the transportation of U.S. mail in the U.S.-Korea

¹ The flights involved are: San Francisco-Seoul-San Francisco; Chicago-Seoul-Chicago; and Los Angeles-Seoul.

market, and that both carriers hold underlying economic authority to operate these services. KAL also enclosed a copy of the KAL-NW Bilateral Prorate Agreement for these services. On June 26, KAL informed us that it had polled the parties served with its application and that none objected to our acting in advance of the normal answer date (July 6) or to the merits of the application itself.²

On June 26, 1998, acting, under assigned authority, we approved KAL's application. We found that our action was in the public interest, covered by the U.S.-Korea Agreement, and consistent with the Department's international aviation policies.

Petition and Responsive Pleading

On July 9, 1998, TWA filed a petition for review of staff action, requesting the Department to review and reverse the staff's approval of KAL's application. In support of its petition, TWA states that it does not serve the U.S.-Korea market, but has concerns over the precedent set by our June 26 action. TWA states that the staff's action allows a foreign carrier to move mail that would otherwise move on U.S. carriers, and puts U.S. carriers at risk of losing a substantial portion of U.S. mail in the future. It further states that under the provisions of the "Fly America" Act (49 U.S.C. 40118) the mail at issue in this proceeding should in fact move on US carriers. TWA also states that the KAL/Northwest agreement, while providing for the carriage of Northwest's mail traffic, does not provide for placement of Northwest's code on the KAL flights, or promotion of the code share, meaning, in TWA's view, that the arrangement is not a "full" code share arrangement. TWA urges that the Department carefully examine the agreement in determining whether to allow this expansion of the concept of code shares.

On July 17, KAL filed an answer to TWA's petition. KAL states that Northwest has entered into a contract with the United States Postal Service (USPS) to carry mail between certain U.S. points and Seoul; that Northwest holds requisite certificate authority to conduct this service; and that it has entered into a code-share arrangement with KAL under which this mail will be carried under Northwest's code. KAL states that the U.S.-Korea "Open Skies" agreement provides for designated airlines to enter into cooperative marketing arrangements such as that at issue here. It states that the transportation of mail by U.S. carriers is governed by USPS rules, and that the USPS has stated that U.S. carriers may transport mail in foreign air transportation on a foreign carrier aircraft under a code-share arrangement. It states that the Comptroller General has stated that a U.S. carrier's use of a foreign carrier aircraft under a code-share arrangement is considered to be U.S. carrier service under the Fly America Act; that the Department has approved other code shares involving the carriage of mail; and that the specific form of the code-share agreement is a commercial matter between the carriers.

Decision

² TWA was served with the application.

We have decided to grant TWA's petition for review, and, on review, to affirm the staff's action. We find that the staff acted properly in its June 26, 1998 decision granting KAL authority to conduct the code-share operations at issue here.

In determining whether to grant a statement of authorization, a critical factor we examine is the extent to which the proposed operations are covered by and consistent with any applicable bilateral aviation agreements (*see* 14 CFR §212.11(b)(1)). We find that the operations proposed by KAL and Northwest are encompassed by Article 8 of the U.S.-Korea "Open Skies" agreement, which provides for the operation of cooperative marketing arrangements, including the type at issue here.

TWA has raised several specific points, which we have considered in our public interest determination. While some aspects of the KAL-Northwest code-share arrangement specifically apply to the carriage of mail and thus may, as TWA notes, differ from those normally applicable to passenger code shares, we see nothing in the arrangement that we would regard as inconsistent with our code-share policy. We have examined the intercarrier agreement submitted with the application and find that, while it is styled as a "prorate agreement," it provides, as would a typical code-share agreement, for KAL to make available space to Northwest on its flights in specified markets, to enable Northwest to comply with its contractual obligations to the USPS. The USPS contracts under its statutes and regulations for the carriage of mail, thereby complying with applicable provisions for use of U.S. carriers.³ In addition, the USPS bases its decisions on the availability of flights on schedules provided by the carriers to public publications, such as the *Official Airline Guide*, or directly to the USPS. Thus, on viewing the record before us, we are persuaded that the authority for the carriers to implement the arrangement should not be withheld on public interest grounds.

Based on the above, we find that the staff's action granting KAL the authority at issue here was proper and should be affirmed.

ACCORDINGLY,

1. We grant the petition for review of Trans World Airlines, Inc.;
2. We affirm the action of the Director, Office of International Aviation, granting Korean Air Lines Co., Ltd., the statement of authorization described in this order;
3. We will grant all motions for leave to file; and

³ Section 40118 of Title 49 U.S.C. applies only to carriage of passengers and property. Code-share arrangements involving foreign carriers carrying U.S. carrier passenger and property traffic have, however, previously been found to be consistent with the provisions of 49 U.S.C. 40118, and the KAL-Northwest arrangement likewise appears, if operated in the manner described, to be consistent with those interpretations.

4. We will serve a copy of this order on Trans World Airlines, Inc., Korean Air Lines Co., Ltd., the Ambassador of Korea in Washington, D.C., the Department of State (Office of Aviation), and the U.S. Postal Service.

This constitutes a final action by the Department with the meaning of 5 U.S.C. 551(6). We will not entertain petitions for reconsideration of this decision. *See* 14 CFR 385.54(b).

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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