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Order 99-3-29



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

Issued by the Department of Transportation
on the 31st day of March, 1999

Served: April 2, 1999

U.S.-ROMANIA THIRD-COUNTRY
CODE-SHARE OPPORTUNITIES

Docket OST-99-5096

FINAL ORDER

SUMMARY

By this order, we make final our tentative decision to (1) select Delta Air Lines, Inc., Northwest Airlines, Inc., and United Air Lines, Inc., to serve Bucharest, Romania, under code-share arrangements with third-country carriers beginning April 1, 1999, and (2) select Continental Airlines, Inc., to serve Bucharest, Romania, under code-share arrangements with third-country carriers beginning November 1, 1999.

BACKGROUND

Under Annex IV of the 1998 U.S.-Romania aviation agreement, the United States, effective April 1, 1999, may designate three U.S. carriers to serve Romania under code-share arrangements with third-country carriers. ¹ An additional carrier may be authorized effective November 1, 1999.

By Order to Show Cause 99-2-9, February 9, 1999, the Department tentatively decided to select (1) Delta, Northwest, and United, to serve Bucharest, Romania, under code-share arrangements with third-country carriers beginning April 1, 1999, and (2) Continental to serve Bucharest, Romania, under code-share arrangements with third-country carriers beginning November 1, 1999. ²

Since we had not originally proposed to award the fourth code-share opportunity when we issued our September 19, 1998, Notice inviting proposals for the U.S.-Romania code-share

¹ Under Route A, the designated U.S. carriers may operate from points behind the United States via the United States and intermediate points to a point or points in Romania and beyond.

² Delta will code share with Swissair and operate service in the U.S.-Romania market via Zurich. Northwest will code share with KLM Royal Dutch Airlines and operate service via Amsterdam. United will code share with Lufthansa and operate service via Frankfurt and Munich. Continental will code share with Air France and Czech Airlines (CSA) and operate via Paris and Prague, respectively.

opportunities, we served a copy of our show-cause order on all certificated carriers operating large aircraft in order to allow them an opportunity to respond to our tentative decision to award the November 1, 1999, third-country code-share opportunity now and to file competing applications for the fourth opportunity.

RESPONSES TO THE SHOW-CAUSE ORDER

Only Continental filed an objection to the tentative decision. Delta and United filed answers to the objection. No party objected to the award of the November 1, 1999, code-share opportunity to Continental and no other carrier filed an application to use that opportunity.

Continental objects to the award to Delta, Northwest, and United of the three U.S. carrier code-share opportunities available April 1, 1999. Continental argues that awarding limited U.S.-Romania code-share authority available April 1 to the airlines offering the maximum number of U.S. gateways, as proposed in this proceeding, would perpetuate the dominance of the largest airlines and the largest alliances and inhibit the immediate entry of a new competitor (Continental) between the U.S. and Eastern Europe. Continental urges the Department to reverse its tentative decision and award Continental one of the three U.S.-Romania third-country code-share opportunities available on April 1, 1999.

Delta and United argue that Continental has neither raised any new issues nor presented any new bases for the Department to reverse its tentative decisions. In addition, United argues that Continental has offered no analysis as to why service to Romania is essential to Continental's establishment of a code-share network in the U. S.-Eastern Europe market, where Continental already offers code-share service to the Czech Republic and is eligible to do so to Poland and Hungary. Finally, United urges the Department to issue immediately a separate order making final the award of U.S.-Romania code-share authority to Delta, Northwest, and United so that the carriers may begin marketing and sales of their U.S.-Romania code-share services. In this regard, United states that because Delta, Northwest, and United already have the necessary underlying route authority to serve the U.S.-Romania market, it will not be necessary for the Department to issue them new authority in the form of certificates of public convenience and necessity. In contrast, authority for Continental will require the Department to issue Continental a new certificate of public convenience and necessity, a procedural step that will require Presidential review and could delay the effective date of a final order in this case, adversely affecting the ability of those carriers selected for the April 1 opportunities to start services in a timely manner.

DECISION

We have decided to make final our tentative decision to (1) select Delta, Northwest, and United to serve Romania under their respective third-country code-share arrangements beginning April 1, 1999, and (2) select Continental to serve Romania under its third-country code-share arrangements beginning November 1, 1999. As discussed below, we will issue Continental a new certificate awarding it authority for its U.S.-Romania service by separate order.

This case is about authorizing service in a market that does not now receive U.S. carrier service. As a result of the 1998 U.S.-Romania aviation agreement, new opportunities for U.S. carriers to serve the market became available, including the ability to provide service under code-share

arrangements with third-country carriers. It is in this context that we considered the proposals of Delta, Northwest, United, and Continental and tentatively concluded that all four carriers should be authorized to serve Romania. Because the proposals of Delta, Northwest, and United offered the greatest number of frequencies in the market and would provide service from the most U.S. cities, we tentatively concluded that these carriers should be authorized to serve using the first three opportunities, thereby providing the public with the broadest range of competitive services in this now unserved market. We also tentatively concluded that Continental's proposal would provide important service options to the public and thus, that Continental should be authorized to use the opportunity available in November.

Continental presented no new arguments or evidence that warrant changing our tentative decision. Nor has Continental refuted our finding that the other carriers would provide a greater level and range of services in this case.³ Rather, it has reiterated arguments made in its application that it should be authorized to use one of the April 1 opportunities because it would inject a new competitive network into the U.S.-Eastern Europe market in competition with the existing code-share services of the other three carriers. We fully considered and addressed Continental's arguments, including its argument specifically going to the matter of competition, in our tentative decision. Indeed, we tentatively found that Continental's proposal presented positive features that warranted the award to Continental of third-country code-share authority for Romania. However, we further tentatively found, taking into account the needs of the market at this time for new service, that the positive aspects of Continental's proposal did not outweigh those presented by the proposals of the other three applicants.

Having reviewed the record in light of Continental's objections, we continue to reach the same conclusion. Each of the other applicants proposes service from three times the number of U.S. cities as does Continental. Moreover, each of these carriers would be a new entrant in the U.S.-Romania market and, thus, would also promote competition in the market, and offer the added benefit of competitive service from U.S. cities, including the cities encompassed by Continental's proposal. In these circumstances, while Continental's proposal would also offer a competitive service option, we do not find that that benefit warrants use of one of the three earlier opportunities to offer third-country code-share service in the U.S.-Romania market when compared to the overall service and competitive benefits offered by the other carriers' proposals.

At the same time, we note that no party has objected to our tentative decision to award the November 1 opportunity to Continental and no carrier has filed a competing application for the November 1 third-country code-share opportunity. Therefore, we will make final our tentative decision to select Continental for that opportunity.

ECONOMIC AUTHORITY

As discussed in our show-cause order, Delta, Northwest, and United already hold the necessary underlying authority to conduct their proposed services and, thus, additional underlying authority for these carriers is not necessary. With respect to statements of authorization for the proposed code-share services, Lufthansa and Swissair have blanket statements of authorization for their code-share services with United and Delta, respectively, and no additional authority is needed.⁴ KLM filed a timely renewal of its application for a statement of authorization to code-share with

³ Continental's Objection at 1-2.

⁴ The blanket statements of authorization require the carriers to provide a 30-day notice to the Department of their intent to provide code-share services in new markets. Delta and United provided such notice in their applications in this docket.

Northwest in the U.S.-Romania market via Amsterdam and we will renew its authority.⁵ Delta, Northwest, and United may, therefore, commence marketing and sales of their code-share services in the U.S.-Romania market upon the effective date of a final order here.

Continental has applied for a new certificate for its proposed services. As proposed in our show-cause order and finalized here, we will issue Continental the requested certificate authority for that service. However, since this certificate award is subject to Presidential review and the code-share opportunity for which Continental is selected does not become available until November 1, we will issue that certificate by separate order, thereby ensuring that the awards to all carriers are issued in time for them to commence service when the route rights become available.

ACCORDINGLY,

1. We select Delta Air Lines, Inc., Northwest Airlines, Inc., and United Air Lines, Inc., to provide scheduled foreign air transportation of persons, property, and mail in the U.S.-Romania market under their code-share arrangements with Swissair, Swiss Air Transport Company, Ltd. (via Zurich), KLM Royal Dutch Airlines (via Amsterdam), and Lufthansa German Airlines (via Frankfurt and Munich), respectively, beginning April 1, 1999;
2. We select Continental Airlines, Inc., to provide scheduled foreign air transportation of persons, property, and mail in the U.S.-Romania market under its code-share arrangements with Air France (via Paris) and Czech Airlines (CSA) (via Prague) beginning November 1, 1999;
3. We grant KLM Royal Dutch Airlines a statement of authorization permitting it to place the "NW" designator code of Northwest Airlines, Inc., on flights KLM operates between Amsterdam, The Netherlands, and Bucharest, Romania, for the carriage of Northwest's traffic between the United States and Romania;
4. The statement of authorization for KLM will remain in effect only as long as (i) Northwest Airlines, Inc., and KLM Royal Dutch Airlines continue to hold the necessary underlying authority to operate the code-share services at issue, and (ii) the code-share and/or alliance agreement for the code-share operations remains in effect;
5. Delta and/or Swissair, Northwest and/or KLM, and United and/or Lufthansa must notify the Department immediately if the respective code-share and /or alliance agreement under which these code-share services are operated is no longer in effect, or if the carriers decide to cease operating all or a portion of the code-share services under the alliance;⁶ (Such notices should be filed in Docket OST-99-5096.)
6. All operations conducted under the authorizations in ordering paragraph 1, above, must comply with the terms, conditions, and limitations of Order 96-6-33 (Delta/Swissair antitrust immunity order), Order 93-1-11 (Northwest/KLM antitrust immunity order), and Order 96-5-27 (United/Lufthansa antitrust immunity order) and any subsequent order(s) of the Department regarding the respective alliance(s);

⁵ KLM applied for consolidation and renewal of statements of authorization to code share in the U.S.-Amsterdam-Jordan/Luxembourg/Netherlands/Norway/Romania markets. In this order we will renew its statement of authorization only for the Romania code-share services. The renewal of statements of authorization for services in the other markets remains under review.

⁶ We expect this notification to be received within 10 days of such non-effectiveness or of such decision.

7. The code-sharing 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.⁷ Notwithstanding any provisions in the contract between the respective carriers, our approval here is expressly conditioned upon the requirement that the subject foreign air transportation be sold in the name of the carrier holding out such service in computer reservation systems and elsewhere; 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. Further, the operating carrier shall not permit the code of its U.S. air carrier code-sharing partner to be carried on any flight that enters, depart, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition;

8. The authority granted here is specifically conditioned so that neither Delta nor Swissair, neither Northwest nor KLM, and neither United nor Lufthansa shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions;

9. We may amend, modify, or revoke the authority granted by this order at any time at our discretion without hearing; and

10. We will serve this order on Continental Airlines, Inc.; Delta Air Lines, Inc.; Northwest Airlines, Inc.; United Air Lines, Inc.; the Ambassador of Romania in Washington, D.C.; the U.S. Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration (AFS-220).

By:

PATRICK V. MURPHY
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp*

⁷ On March 15, 1999, the Department issued a new regulation, 14 CFR Part 257, governing code-share operations. That regulation will become effective July 13, 1999.