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Order 99-12-22



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

Issued by the Department of Transportation
on the 22nd day of December, 1999

Served: December 27, 1999

Complaint of

AMERICAN TRANS AIR, INC.

against

**THE GOVERNMENT OF TRINIDAD AND
TOBAGO AND BWIA INTERNATIONAL
AIRWAYS LIMITED**

under 49 U.S.C. Sections 41310 and 41304

Docket OST-99-6515 - 7

ORDER

Summary

By this order, we (1) approve the complaint of American Trans Air, Inc. (ATA), against the Government of Trinidad and Tobago and BWIA International Airways Limited (BWIA), and (2) find that Trinidad and Tobago's restriction of ATA's charter operations between the United States and Port of Spain violates the provisions of the U.S.-Trinidad and Tobago aviation agreement, and (3) propose sanctions against BWIA that would require the carrier to terminate all of its nonstop services in the New York-Port of Spain market to become effective January 20, 2000.

Complaint

On November 17, 1999, ATA filed a complaint under 49 U.S.C. § 41310 and § 41304 against the Government of Trinidad and Tobago and BWIA. ATA alleges that the Civil Aviation Division of the Republic of Trinidad and Tobago imposed certain restrictions on its charter operations between the United States and Port of Spain, forcing ATA's tour operator, Unlimited Travel and Tours (Unlimited Travel), to cancel its charter program with ATA. ATA maintains that the action of the Republic of Trinidad and Tobago constitutes an unjustifiable and unreasonable

discriminatory, predatory, or anti-competitive practice against ATA, in violation of the U.S.-Trinidad and Tobago aviation agreement. ATA urges the Department to take action to enforce the Air Transport Services Agreement (Agreement) and to eliminate the discriminatory and anticompetitive practices of the Government of Trinidad and Tobago.

In support of its complaint, ATA states that on February 15, 1999, ATA entered into an Aircraft Charter Agreement with Unlimited Travel wherein ATA agreed to charter an L1011 aircraft to Unlimited Travel for charter flights between New York's JFK International Airport and Port of Spain, Trinidad, starting on or about June 15, 1999, and concluding on or about April 25, 2000. The charter flights were designed such that 60% of the passengers would originate from Port of Spain during the summer portion of the program, and 50% of the passengers would originate from Port of Spain during the fall and winter portions of the program.

ATA states that it had operated almost 60 flights for Unlimited Travel, from June 15, 1999, through September 28, 1999, but that on September 20, 1999, the Civil Aviation Division of the Republic of Trinidad and Tobago issued Journey Permit No. 174/99 to ATA for flights between New York and Port of Spain for the period October 5 to December 7, 1999. ATA states that this new Journey Permit contained several conditions, including passenger uplift restrictions (Port of Spain-New York passenger lift was restricted to 15% of aircraft capacity), and frequency limitations. ATA states that these restrictions made the charters uneconomical and that Unlimited Travel was forced to cancel its October and November charter flights. ATA further states that although Unlimited Travel appealed for reconsideration to the Trinidad and Tobago Civil Aviation Division, arguing that the cancelled flights would result in stranded passengers, the Civil Aviation Division refused to lift the restrictions imposed on ATA's permit.

ATA maintains that the Journey Permit issued ATA contains conditions that violate both the express terms and spirit of the U.S.-Trinidad and Tobago Agreement. Specifically, ATA contends that Annex II, Section 2 of that Agreement permits ATA to operate its charter program under U.S. charter laws, regulations, and rules. It further states that Article 11 of the Agreement (Fair Competition) prohibits the type of capacity and frequency restrictions contained in the Journey Permit. ATA argues that the actions of the Government of Trinidad and Tobago constitute an unjustifiable and anticompetitive practice against ATA and unreasonably restrict ATA's access to a foreign market, warranting immediate action under the statute and countermeasures against the flag carrier, BWIA.

ATA urges the Department to issue a show-cause order providing that, unless the Government of Trinidad and Tobago issues an unconditional permit to ATA in this matter, BWIA's U.S. authority will be suspended. It further argues that the Department should deny any applications that would benefit BWIA until this matter is resolved satisfactorily.

Section 41310 provides that the Department shall approve, deny, dismiss, or set a complaint for hearing, or institute other procedures proposing remedial action, within 60 days after receipt of the complaint. We may extend the period for taking action up to 90 days from the date of the complaint if we conclude that it is likely that the complaint can be resolved satisfactorily through negotiations. We may further extend the action deadline up to 180 days from receipt of the

complaint, in 30-day increments, if we find that intergovernmental negotiations have progressed to a point that a satisfactory resolution of the complaint appears imminent.

In light of the above, by Order 99-11-18, we invited interested parties to file comments to ATA's complaint.

Answers/Replies

BWIA and the Metropolitan Washington Airports Authority (the Washington Airports Authority) filed answers to ATA's complaint. ATA filed a reply to BWIA's answer.

BWIA urges the Department to deny the relief ATA requests. BWIA argues that, even if some immediate relief were justified under the circumstances, ATA's suggestion to suspend BWIA's authority is excessive and inconsistent with the interests of the traveling and shipping public. BWIA states that any sanctions that reduce or eliminate BWIA service for travelers and shippers would cause substantial and disproportionate economic disruption almost immediately. Specifically, BWIA states that it provides the only nonstop, combination service between Port of Spain and New York; and that it recently instituted new direct service between Washington, D.C., and Port of Spain, and serves Miami with multiple daily roundtrip combination and freighter services. BWIA maintains that, in addition to Trinidad and Tobago, several other Caribbean countries depend on BWIA service to and from the United States,¹ and that the imposition of sanctions to reduce or eliminate BWIA's services could expand the dispute to include other nations. Under these circumstances BWIA states that, rather than impose immediate sanctions, intergovernmental consultations should be given the opportunity to resolve the matter. In this regard, BWIA states that it is aware that the United States has contacted Trinidad and Tobago concerning the charter "journey permit" issued to ATA, and that BWIA has met with officials of its government on the matter. BWIA states, further, that it has been advised that Trinidad and Tobago will request consultations for the purpose of discussing the issues so as to reach an amicable resolution.

The Washington Airports Authority states that it takes no position on the merits of the complaint except to state that, if ATA's allegations are borne out, the Department should act to remedy the situation. It further states, however, that the suspension of all of BWIA's U.S. authority in retaliation for actions taken by the Government of Trinidad and Tobago against ATA is not in the public interest. It points out that BWIA inaugurated new service at Dulles Airport on November 4, 1999, and is operating the only non-stop service from Dulles Airport to Barbados and Antigua, and the only direct scheduled service to Antigua, Trinidad and Tobago, from the Washington area. The Washington Airports Authority urges the Department to consider the imposition of less severe remedies that better serve the public interest in light of the significant Caribbean service provided to the Washington area by BWIA.

In its reply, ATA argues that the actions of Trinidad and Tobago in this matter constitute a blatant and undeniable breach of the U.S.-Trinidad and Tobago aviation agreement, warranting

¹ BWIA serves Antigua, Barbados, and St. Lucia as intermediate points on various U.S. flights.

immediate restrictions on BWIA's services. ATA states that the bilateral explicitly prohibits the capacity and frequency restrictions imposed on ATA's Journey Permit. ATA argues further that the breach by Trinidad and Tobago is exacerbated by the fact that it took such action in the middle of ATA's charter program, resulting in passenger inconvenience and substantial economic harm to ATA.

ATA states that, in the face of ongoing harm, and the precedential effect that would result from relegating the dispute solely to the consultative process, the Department should promptly impose proportionate countermeasures. ATA suggests that, as an initial measure, the Department should focus on BWIA's operations at New York, where ATA was forced to terminate service, while the Department also makes a good faith effort through the diplomatic consultative process to find a long-term resolution.

U.S. Diplomatic Initiatives

We have viewed ATA's problems in Trinidad and Tobago with great concern for the past several months and have actively pursued the matter through diplomatic channels to seek a resolution. As early as September 1999, the United States initiated diplomatic efforts to resolve the concerns regarding Trinidad and Tobago's restrictions on ATA's charter program. Specifically, the United States objected to the authorities of Trinidad and Tobago regarding their grant of only short-term authorizations for the subject charters, their request that the airline change the days and arrival/departure times of flights, and their uplift capacity restrictions and frequency limitations on ATA's flights. The United States made clear in these intergovernmental communications that such limitations were unjustified restrictions on rights of the U.S. carrier under the bilateral aviation agreement and that any further delay in the grant of the requested unrestricted authorizations was unacceptable. Unfortunately, these efforts were not successful and the Government of Trinidad and Tobago has failed to grant ATA an unrestricted authorization for its charter program.

Decision

After careful consideration of all of the pleadings and issues in this case, we have decided to approve ATA's complaint. We have also decided to propose certain sanctions against BWIA in this matter. Specifically, we propose to require BWIA to terminate its nonstop services between New York and Port of Spain effective January 20, 2000.

A. Approval of the Complaint

The statute (49 U.S.C. section 41310) provides that, upon complaint or on our own initiative, when the Department determines that a foreign government has undertaken unjustifiable or unreasonable discriminatory practices against a U.S. carrier or has imposed unjustifiable or unreasonable restrictions on the access of a U.S. air carrier to foreign markets, we may take such action as we deem to be in the public interest. We find that the actions taken by Trinidad and Tobago restricting ATA's charter operations are in violation of the U.S.-Trinidad and Tobago Air Services Agreement and impose just such an unjustifiable and unreasonable restriction on ATA's access to Trinidad and Tobago, warranting approval of ATA's complaint under the statute.

Article 11 of the U.S.-Trinidad and Tobago aviation agreement prohibits limitations on charter services operated by designated airlines and prohibits a party from requiring the filing of programs for charter flights for other than technical purposes. Article 3 of the Agreement provides that operating authorizations are to be granted with "minimum procedural delay." ATA is a U.S. carrier properly licensed and designated to operate charter services pursuant to the aviation agreement. ATA met all the necessary procedural requirements under the Agreement for its planned charter program. Indeed, ATA was granted approval without restrictions by the Government of Trinidad and Tobago for the first three months of the 10-month charter program. Trinidad and Tobago's subsequent actions restricting the frequency and capacity of ATA's program are in clear violation of the provisions of the bilateral aviation agreement. Moreover, notwithstanding the objections of the United States to Trinidad and Tobago regarding this matter, the Government of Trinidad and Tobago has failed to approve ATA's charter program without the restrictions on capacity and frequency. Therefore, we find that Trinidad and Tobago's actions constitute an unjustifiable and unreasonable discriminatory practice and an unjustifiable and unreasonable restriction of ATA's access to the U.S.-Trinidad and Tobago market that warrants approval of ATA's complaint under 49 U.S.C. 41310.

B. Proposed Sanctions

49 U.S.C. section 41310 authorizes the Department to take such action as it deems to be in the public interest to eliminate, *inter alia*, unjustifiable or unreasonable restrictions on the access of a U.S. carrier to foreign markets. As discussed above, we have found that the failure of the Government of Trinidad and Tobago to approve ATA's charter program without restrictions denies the United States rights to which it is entitled under the aviation agreement. Since our efforts to date to resolve this matter diplomatically have not been successful, we further conclude that the Government of Trinidad and Tobago's actions warrant immediate remedial action under 49 U.S.C. section 41304 against the foreign air carrier permit operations of BWIA. Specifically, we propose that BWIA be required to terminate all of its nonstop service in the New York-Port of Spain market effective January 20, 1999.

The action we are proposing is based on the principle of proportionality. Under that principle, countermeasures must not be clearly disproportionate to the alleged breach in light of (1) the injuries suffered by the company or companies concerned, and (2) the importance of the questions of principle arising from the alleged breach.²

The injury here was substantial. ATA, having initially received unrestricted authority, was then forced to suffer--in mid-program--unilateral restrictions on its operations undermining the viability of its program, and it ultimately was forced to cancel a significant portion of its charter program. The U.S. bargained for the right for its carriers to offer unrestricted charter services. The Government of Trinidad and Tobago has incontrovertibly violated these rights. The violations impact is significant. No U.S. carrier operates scheduled service in the New York-Port

² See, e.g., Complaint of American Airlines, Inc. against Linea Aera Nacional-Chile, S.A., LADECO, S.A., LADECO CARGO, S.A., Fast Air Carrier, S.A., and the Government of Chile, Docket 49191, Order 93-11-22, at 9, and cases cited therein.

of Spain market. Thus, ATA's service represented the only U.S.-flag presence in the market. The Government of Trinidad and Tobago's actions thereby not only have deprived ATA of the opportunity to provide important bilaterally-agreed charter services, but they have directly affected the interest of the traveling public in enjoying the option of competitive service in the New York-Port of Spain market. Furthermore, BWIA, the only carrier offering scheduled service in the New York-Port of Spain market, directly benefited from the ATA cancellation and, indeed, continues to operate scheduled service in this market without restriction.

Weighing all of the factors in this case, we have tentatively concluded that the appropriate and commensurate countermeasure is to require BWIA to terminate all of its nonstop service between New York and Port of Spain.

We also propose to preclude BWIA from increasing the size of aircraft and frequency on any of its other services held out in the New York-Port of Spain market. This will prevent it from circumventing the capacity restrictions. As ATA has been precluded from operating its charter service for several months, we find that it is in the public interest that these sanctions become effective quickly. Therefore, we propose that the termination of service become effective January 20, 2000. We will also require that BWIA confirm to the Department, by letter addressed to the Director, Office of International Aviation, no later than January 24, 2000, that it has suspended its services as required. This letter should be filed in the complaint Docket and served on all parties to this proceeding.

We believe that our proposed action against BWIA's New York services is a justified, measured response to the actions of Trinidad and Tobago in this matter. However, we want there to be no doubt that, should the Government of Trinidad and Tobago continue to refuse to authorize ATA's entire charter program to provide unrestricted New York-Port of Spain services, we fully intend promptly to take such steps as are necessary to obtain for ATA the operating authority to serve the subject market as proposed, including the suspension of BWIA's other U.S.-Port of Spain services.

In this connection, we find that, under the present circumstances, and based upon our findings on the complaint, described above, it is in the public interest to exercise, by this order, our authority under Part 213 to require that BWIA file its schedules for all of its combination air services involving the United States (as specifically directed below), so that we may determine whether the operation of such services, or any part thereof, may be contrary to applicable law or may adversely affect the public interest.

Subsequent efforts at diplomatic resolution

On December 8, 1999, the Republic of Trinidad and Tobago requested consultations to resolve the issues raised in ATA's complaint. Intergovernmental consultations are now scheduled for December 28 and 29, 1999, in Washington, D.C.

We hope that the scheduled consultations on this matter will resolve the issues raised and facilitate the immediate resumption of ATA's charter program. We have set the effective date of our proposed sanctions a sufficient time forward to allow for this opportunity and would be fully prepared to vacate our sanction should a resolution be reached. However, given our previous unsuccessful efforts in this regard, we have found that we cannot rely exclusively on diplomacy to redress the treatment suffered by ATA. Contrary to BWIA's arguments, our proposed action is fully consistent with the operative statute. That statute clearly provides for Department action to rectify unjust, unreasonable, and discriminatory treatment by foreign governments and specifies that such action may include amendment, modification, alteration, suspension, or limitation on any foreign air carrier permit or tariff. Our proposed action here ensures that such countermeasures can become effective quickly should intergovernmental consultations not resolve the matter.

ACCORDINGLY,

1. We approve the complaint filed by American Trans Air, Inc., in Docket OST-99-6515;
2. We find that the complaint filed by American Trans Air, Inc., in Docket OST-99-6515 against the Government of Trinidad and Tobago and BWIA International Airways Limited, establishes an unjustifiable and unreasonable discriminatory practice against an air carrier and imposes an unjustifiable and unreasonable restriction on the market access of American Trans Air, Inc., with respect to its New York-Port of Spain charter services, and warrants approval under 49 U.S.C. section 41310;
3. We direct interested persons to show-cause why we should not, subject to review under 49 U.S.C. section 41307, issue an order amending the foreign air carrier permit held by BWIA International Airways Limited to include a condition that, effective January 20, 2000, until further order of the Department, BWIA is prohibited from operating its nonstop New York-Port of Spain services;
4. We direct any interested persons having objections to the issuance of an order finalizing the tentative conclusions described in ordering paragraph 3, above, to file a statement containing all evidence and arguments they wish to submit in support of their objections with the with the Department, Dockets, Department of Transportation, 400 7th Street, SW, Washington, D.C., 20590, in Docket OST-99-6515, and to serve it on the persons listed in ordering paragraph 10, below, within **seven** calendar days of the service date of this order; answers to the objections shall be filed **three** calendar days thereafter;
5. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action;

6. In the event that no objections are filed, we will consider all further procedural steps waived, and will make final the tentative findings and issue the order described in paragraph 3, above;
7. We order BWIA International Airways Limited to file, in Docket OST-99-6515, within five calendar days of the service date of this order, an original and three copies of any and all existing schedules for combination air service, including extra sections, between any point in the United States and any point in Trinidad and Tobago, which shall include:
- a. the type of equipment used or to be used,
 - b. the frequency and day(s) of operation of each flight,
 - c. the routing of each flight if not non-stop,
 - d. the specific airport served at each point, and
 - e. the time of arrival and departure at each point;
8. We order BWIA to file in Docket OST-99-6515, an original and three copies of all proposed schedules for combination air services, including proposed operation of any extra sections, between any points in the United States and any points in Trinidad and Tobago, which shall include the information set forth in ordering paragraph 7, above, as well as the proposed effective date of such schedules if known, at least 30 days prior to inauguration of service;
9. To the extent not otherwise acted upon, we deny all remaining requests for relief in Docket OST-99-6515; and
10. We will serve this order on American Trans Air, Inc.; BWIA International Airways Limited; American Airlines, Inc.; World Airways, Inc.; the Metropolitan Washington Airports Authority; the Ambassador of the Government of Trinidad and Tobago in Washington, D.C.; the U.S. Department of State (Office of Aviation Negotiations); the Assistant U. S. Trade Representative (Office of the United States Trade Representative); the U.S. Department of Commerce (Office of Service Industries); the Air Transport Association; and the National Air Carrier Association.

By:

A. BRADLEY MIMS
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

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