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Order 2000-12-15



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

Issued by the Department of Transportation
on the 20th day of December, 2000

Served: December 20, 2000

Joint Application of

**BRITISH MIDLAND AIRWAYS LIMITED and
SCANDINAVIAN AIRLINES SYSTEM**

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

Undocketed

ORDER

Summary

By this order we are granting British Midland Airways Limited authority to wet lease aircraft to Scandinavian Airlines System (SAS), beginning May 1, 2001, effective through October 31, 2001.

Application

By application filed January 31, 2000, British Midland and SAS jointly request a statement of authorization pursuant to 14 CFR 212 of the Department's regulations that would permit British Midland to wet lease an Airbus A330-200 aircraft to SAS beginning May 1, 2001, for a one-year period, for use on SAS's new daily, nonstop scheduled service between Copenhagen and Washington (Dulles) (and occasionally on SAS's Newark- or Chicago-Copenhagen/Stockholm routes). SAS states that it has ordered new A330 aircraft, with deliveries expected to begin late

2001, but would like to provide its new service to consumers in the Washington region for the full peak summer season without unnecessary delay, and has therefore asked British Midland to provide an A330 on a wet-lease basis during this transitional period.

In support of their request, the joint applicants state that the proposed wet-lease arrangement is covered by the U.S.-Denmark/Norway/Sweden "open skies" Agreements, and will enable SAS to conduct its bilaterally-agreed services. They also state that their request is supported by comity and reciprocity between the United States and the United Kingdom, and note that U.K. authorities have granted comparable wet-lease arrangements involving U.S. carriers, including several requests from Atlas Air. They further state that British Midland has surplus A330 aircraft it is unable to use since the U.S. and U.K. have been unable to reach agreement on a more liberal aviation regime, a goal which British Midland has worked, and will continue to work, to achieve.

Answers

The Washington Airports Task Force and Metropolitan Washington Airports Authority filed answers in support of the joint application. They state that there is no Washington-Scandinavia nonstop service, and the proposed wet-lease service will enable SAS to begin providing valuable new service to consumers. They also state that the U.S.-Scandinavia open-skies agreement authorizes SAS to wet lease aircraft from a third-country carrier, and the fact that the wet lessor in this instance is a British carrier and the U.S. and U.K. have been unable to conclude a more liberalized bilateral agreement should not be used as an excuse to deny or delay approval. They further state that grant of this limited authority should have no effect on the outcome of ongoing U.S.-U.K. negotiations.

American Airlines, Inc., and Delta Air Lines, Inc., filed answers in opposition. Both carriers note that charter services by U.K. carriers are extrabilateral and assert that there is insufficient U.K. comity and reciprocity to support the requested authority. American argues that the referenced Atlas wet-lease cargo operations are not relevant to the third-country carrier, wet-lease passenger services at issue here. Both carriers also assert that the proposed service would involve excessive reliance by British Midland on fifth-freedom services, since the carrier currently provides no U.S.-U.K. services. In addition, they state that the proposed service does nothing to improve the overall balance of aviation benefits between the U.S. and U.K., and that British Midland should not be awarded the extraordinary authority at issue here given the U.K.'s failure to make any progress toward liberalization of its restrictive policies toward U.S. carriers.

Finally, American asserts that the proposed operations would benefit and strengthen the Star Alliance (in which both British Midland and SAS are participants) to the detriment of American's "oneworld alliance" with British Airways and others, and American argues that the Department should not approve the British Midland/SAS wet lease unless it simultaneously

grants the pending American/British Airways application to conduct bilaterally-authorized code-sharing services.

Reply

British Midland and SAS filed a joint reply.¹ They state that the objectors raise extraneous considerations, including the American/British Airways code share, most of which relate to the unfortunate, but also irrelevant, U.S.-U.K. impasse. They state that British Midland has tried, and continues to try, to find an approach which will lead to liberalization, and should not be penalized because of this impasse. They emphasize that British Midland is not seeking to hold out fifth-freedom services in its own name, that the U.K. has approved and continues to approve long-term fifth-freedom wet leases for U.S. carriers (attaching a schedule of 22 such approvals), and that mirror reciprocity with the U.K. is not required by the U.S.-Scandinavia open-skies agreements, nor have the objectors pointed to any such Department policy.

In addition, they assert that the undue reliance test is irrelevant in this case where SAS has a bilateral right to wet lease aircraft from a third country carrier, and that the Department's standard does not involve a numeric threshold but evaluation of the circumstances of each case. They note that by the time that the proposed wet-lease operations begin, British Midland will be operating twice-daily Manchester-U.S. service to Chicago and Washington, D.C. They finally point out that neither American nor Delta offers single-plane or nonstop service in the Washington-Scandinavia market, that the competitive impact on the U.S. carriers would be nil, and that relevant public interest factors require grant of SAS's new bilaterally-authorized nonstop service.

Decision

We have decided to approve, in part, the joint application by granting British Midland a statement of authorization to permit it to wet lease aircraft to SAS, effective May 1, 2001, through the end of the summer season, i.e., October 31, 2001. We are dismissing that portion of the carriers' application to conduct these operations beyond October 31, 2001.²

The U.S.-Norway/Denmark/Sweden Air Transport Agreements entitle SAS to operate Copenhagen-Washington service. The carrier also holds appropriate Department authority to conduct these operations.³ The British Midland subservice will facilitate SAS's ability to exercise its bilateral rights until SAS receives its own aircraft, and will enhance the quality of service available to travelers and shippers in the Washington metropolitan area.

¹ They accompanied their pleading with a motion for leave to file. We will grant the motion.

² The duration of this authority is for a period of fewer than 180 days and, therefore, is not a license with reference to an activity of a continuing nature within the meaning of 5 USC 558(c) (*see* 14 CFR 377).

³ *See* Order 96-6-45.

We recognize that wet-lease operations are not encompassed in the U.S.-U.K. agreement, and that the record on the issue of U.K. reciprocity for the type of operations at issue here is somewhat mixed. However, the record does support the conclusion that the U.K. Government has granted U.S. carriers authority to conduct certain wet-lease operations, including fifth-freedom services, and the objectors have not persuasively demonstrated that reciprocity would not be forthcoming for the type of services at issue here. Against this background, we find that, as an interim measure in anticipation of SAS acquiring its own aircraft, it would not be in the public interest to withhold from British Midland the authority necessary to enable SAS to initiate its bilaterally-authorized services.

We have carefully considered the objectors' comments in the context of our aviation relationship with the United Kingdom. We stress that our action here should not be construed to indicate any lessening of our concern over our inability to achieve a more liberal aviation regime, and in this regard we fully intend to continue pursuing this goal with the United Kingdom. We are not persuaded that grant of this limited authority conflicts with our objective of achieving liberalization, or that competitive considerations justify linking this case to the pending American/British Airways code-share application. That application is being considered in a separate docket proceeding.

As a final matter, in view of British Midland's plans to institute scheduled operations, we find that the limited, temporary authority we are granting here will not constitute undue reliance by the carrier on fifth-freedom operations.

ACCORDINGLY,

1. We grant British Midland Airways Limited a statement of authorization pursuant to 14 CFR 212 of the Department's regulations to permit it to wet lease aircraft to Scandinavian Airlines System for operations between Copenhagen and Washington (Dulles), and between Copenhagen/Stockholm and Newark/Chicago;
2. The authority is effective May 1, 2001, until October 31, 2001;
3. We grant all motions for leave to file;
4. To the extent not granted, we dismiss all requests for relief;
5. We may amend, modify, or revoke this order at any time and do so without hearing; and
6. We will serve a copy of this order on British Midland Airways Limited, American Airlines, Inc., Delta Air Lines, Inc., the Washington Airports Task Force, Metropolitan Washington Airports Authority, the Ambassador of the United Kingdom of Great Britain and Northern

Ireland in Washington, D.C., the Ambassadors of Denmark, Norway, and Sweden in Washington, D.C., the Department of State (Office of Aviation), and the Federal Aviation Administration (AFS-200).

By:

FRANCISCO J. SANCHEZ
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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