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Order 2001-4-24



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

Issued by the Department of Transportation
on the 18th of April, 2001

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U.S.-Israel Third-Country Code-Sharing
Opportunities

Docket OST-2001-8726 - 16

ORDER TO SHOW CAUSE

SUMMARY

By this order we have tentatively decided to select American Airlines to operate third-country code-share service via Zurich with Swissair, and United Air Lines to operate third-country code-share service via Munich/Frankfurt with Lufthansa, in the U.S.-Israel market effective upon the issue date of a final order in this proceeding. In addition, for U.S.-Israel third-country code-share services that will become available April 1, 2002, we have tentatively decided to select Northwest Airlines to operate service in conjunction with KLM.

BACKGROUND

Under a Memorandum of Consultations (MOC) signed January 10, 2001, representatives of the United States and Israel reached an *ad referendum* agreement on the text of a Protocol amending the 1950 U.S.-Israel Air Transport Agreement, as amended. Under the terms of the Protocol, the U.S. may authorize, on a phased-in basis, up to four code-share arrangements between U.S. and third-country airlines for service between the U.S. and Israel.¹ Authorized U.S.-third-country code-share arrangements may provide services in the U.S.-Israel market in phases as follows: Phase 1 – Up to two arrangements until March 31, 2002; Phase 2 – Up to three arrangements from April 1, 2002, through March 31, 2003; **and** Phase 3 – Up to four arrangements from April 1, 2003, through March 31, 2004.²

The MOC also provides that the code-share opportunity under Phase 2 may be exercised in advance of April 1, 2002, by mutual agreement of both parties. The Protocol provides that, until March 31, 2004,

¹The limitations on the number of third-country code-share arrangements will not apply to any code-share arrangement in which airlines of the United States, Israel, and a third country are all participants. A code-share arrangement between a U.S. carrier and a third-country carrier that entails code-share services on more than one route would be counted as one arrangement. A code-share arrangement between two U.S. carriers and a third-country carrier would be counted as two arrangements.

²The Protocol provides that the frequency of such code-share operations shall be limited only by the number of frequencies that the operating airline is entitled to use on the relevant segments, consistent with relevant bilateral agreements.

designated U.S. airlines may serve Tel Aviv, plus seven additional points to be selected by the United States on a code-share basis only, without local traffic rights between third-country points and points in Israel when the U.S. airline is not the operating carrier.³

By Notice dated January 17, 2001, we requested that all U.S. air carriers interested in making use of the Phase 1 and Phase 2 third-country code-share opportunities described above file applications with the Department.

APPLICATIONS

Three carriers -- American Airlines, Northwest Airlines, and United Air Lines -- applied for the opportunities to serve Israel under code-share arrangements with Swissair, KLM, and Lufthansa, respectively. Each applicant already holds the underlying authority necessary to operate its proposed code-share services.⁴

Key features of the proposals are set forth in the attached Appendix.

RESPONSIVE PLEADINGS

Each applicant filed an answer and reply to the other applications in support of its own application and in opposition to the other applications to the extent that the other applications would preclude approval of its own proposal. The Port of Seattle and the Memphis-Shelby County Airport Authority ("Memphis Civic Parties") filed in support of Northwest's application. The City of Houston and the Greater Houston Partnership ("Houston Civic Parties") filed in support of the applications filed by Northwest and United. Sun Country Airlines filed in opposition to the application of Northwest.

Each applicant requests allocation of one of the two third-country code-share authorizations that are available immediately.⁵

United claims it would serve more than one intermediate point in Europe and would serve more U.S. gateways to Israel, with more frequencies, faster elapsed times, and greater seat capacity than any other applicant in this case. United points out that neither American nor Northwest even attempts to rebut United's claim that it has submitted the strongest proposal. Rather, United maintains that American and Northwest focus on which of their proposals should be selected in addition to United for the first

³Selection of points to be served on a code-share basis only may be made or changed with 30 days notice to the Government of Israel.

⁴American, Northwest, and United each hold certificate authority to serve between the U.S. and Tel Aviv, Israel (*See* Order 96-5-9 for American; Order 83-7-68 for Northwest; and Order 83-3-77 for United). American/Swissair, Northwest/KLM, and United/Lufthansa each hold blanket statements of authorization to code share (*See* NOAT dated November 2, 1999, in Docket OST-99-5944 for American/Swissair, Notice of Action Taken (NOAT) dated January 5, 2000, in Docket OST-99-6501 for Northwest/KLM; and Order 98-4-8, undocketed, for United/Lufthansa). Each authorization was approved subject to 30-day notice requirement prior to the commencement of service in new markets, and completion of any necessary carrier selection procedures. American/Swissair filed the required notice in Docket OST-99-5944 on January 31, 2001. Northwest/KLM filed the required notice in Docket OST-99-6501 on November 22, 2000. United filed the required notice in this Docket on January 29, 2001.

⁵Northwest states that, in the event it is not selected for the first round of third-country code-share authorizations, it would accept an allocation of the authorization that becomes available April 1, 2002.

round of code-share authorizations. United also argues that the possibility of a code-share arrangement between American, El Al, and Swissair calls into question whether or not American actually needs one of the third-country code-share authorizations at issue here.

American's arguments focus on the superiority of its proposal over Northwest's. Specifically, American contends that it would offer more frequencies on the critical Europe-Israel sector, and proposes more effective connections with better elapsed times and, hence, better quality service than Northwest. In this regard, American states that even at three U.S. cities where Northwest would offer single-connecting services and American would not (Houston, Memphis, and Seattle) American would offer double-connecting services for those cities that are faster than the elapsed times of Northwest in those markets. Finally, American states that the Department should reject United's assertion that American may not require a code-share authorization since there is no arrangement between American, El Al, and Swissair.

Northwest states that, by focusing on elapsed times, American's argument excludes such important factors as the number of U.S. gateways to be served by Northwest (14) versus American (10), intergateway competition, the level of transatlantic frequencies and seats, the number of seats per frequency, and the scope and level of service to be provided in the U.S.-Israel market.⁶ On these matters, Northwest argues that it has a stronger proposal than American. Specifically, Northwest argues that by selecting it and United, the Department would ensure that the maximum number of U.S. gateways (18) and hubs (8) receive nonstop-to-nonstop service. Northwest further states that American would not serve a single U.S. gateway not served by the other two applicants, whereas Northwest would be the only carrier to serve Memphis, Minneapolis, and Seattle.

Northwest states that some or most of the third-country code-share services proposed by American and United would be provided in markets that currently receive superior direct service from other carriers.⁷ Northwest also contends that it should receive one of the first two code-share authorizations because of its long-standing, pioneering efforts to institute U.S.-Israel third-country code-share service. Finally, with regard to Europe-Israel frequencies, Northwest states that while KLM is currently limited to eight weekly frequencies under the Netherlands-Israel bilateral agreement, KLM would like to increase its services to 14 weekly flights as soon as further consultations with Israel make such an increase possible. American maintains, however, that any increase in KLM's Amsterdam-Israel service is "speculative" and should not be a relevant factor in this case.

United states that **the Department** should not consider Northwest's argument that it should be selected because of its **long-standing** commitment to serve the U.S.-Israel third-country code-share market. Such an argument is **not responsive** to the objective criteria established by the Department for making decisions in cases of **this type**, according to United. If, however, the Department were to consider

⁶Northwest states that by using a weighted average technique to evaluate elapsed times, American eliminates Northwest's true best elapsed times for roundtrip service. Moreover, Northwest maintains that American focuses solely on total elapsed times. In the westbound direction, Northwest argues that its daily elapsed times are shorter than American and United to three of the nine common gateways (Newark, Washington, and New York (JFK)) and shorter than American in a fourth market (San Francisco).

⁷While American identifies cities such as Chicago, New York (JFK), and Miami where American proposes shorter elapsed times than Northwest, Northwest states that American fails to point out that each of these points currently receives nonstop or direct service to Israel.

Northwest's argument, then United states that it has pursued third-country code-share authority to serve Israel for a length of time equivalent to that of Northwest.

The Port of Seattle states that selecting Northwest's proposal would provide new nonstop-to-nonstop service between Seattle and Israel and, thus, enhance the convenience of traveling between these two important business and leisure markets. Similarly, the Memphis Civic Parties state their support for Northwest's proposal because it alone has proposed nonstop-to-nonstop connecting service between Memphis and Tel Aviv. The Houston Civic Parties contend that the Department should select the proposals of Northwest and United since these proposals would provide service between Israel and Houston. In this connection, the Houston Civic Parties state that Houston has significant economic links with Israel, which would be enhanced by the proposed new service.

Sun Country filed an objection to Northwest's application, stating that the Department should take no action on Northwest's application until Northwest has "ceased and desisted from present and continuing anticompetitive behavior, and pledged to refrain from similar behavior against Sun Country in the future."⁸ In response, Northwest states that Sun Country has failed to show any relevant connection between Northwest's application here and Sun Country's allegations regarding Northwest's actions in the domestic marketplace. Northwest asserts that Sun Country's allegations should be pursued in another more appropriate forum, not here in the context of applications for expanded international authority.

TENTATIVE DECISION

We have tentatively decided to select American to operate third-country code-share service via Zurich with Swissair and United to operate third-country code-share service via Munich/Frankfurt with Lufthansa in the U.S.-Israel market effective upon the issue date of a final order in this proceeding. In addition, we have tentatively decided to select Northwest to operate third-country code-share services in the U.S.-Israel market with KLM, beginning April 1, 2002.

The recent agreement with Israel provides valuable opportunities for U.S. carriers to operate service between the U.S. and Israel on a bilateral code-share basis and with third-country carriers. Currently, one U.S. carrier, Continental Airlines, serves the market with its own aircraft with nonstop services between New York and Tel Aviv. In addition, Delta and El Al have applied to operate bilateral code-share services in the market under the new agreement.⁹ Thus, implementation of the third-country code-share rights here constitutes an important opportunity to maximize the number of carriers serving Israel and the level of competitive services offered travelers and shippers.

⁸Sun Country answer at 1.

⁹In Docket OST-2001-8772, Delta and El Al jointly applied for statements of authorization to display El Al's code on flights operated by Delta between New York (JFK) and twelve interior U.S. points, and to display Delta's code on flights operated by El Al between New York (JFK and Newark) and Tel Aviv. In addition, Delta stated that it would use its existing certificate authority to initiate nonstop service between New York (JFK) and Tel Aviv using its own aircraft and display El Al's code on those flights. By Notice of Action Taken dated March 2, 2001, the Department approved Delta's request for a statement of authorization and deferred on El Al's request for a statement of authorization, pending advice from the Federal Aviation Administration.

All three carriers would offer important services in the market, increasing the price and service options available to consumers. None of the carriers now serves Israel and each would offer at least daily connecting services to numerous cities throughout the U.S. to/from Israel. As there are a total of three opportunities available (two immediately and one April 1, 2002) and three applicants, we tentatively conclude that all three should be authorized to operate their proposed services.

All three, however, have sought the two service opportunities that are available now. Therefore, we must decide which carriers should receive the first two authorizations and which carrier should receive the third authorization available next year.

Given the limited number of U.S. carrier services operated in the market, we have tentatively decided that the public interest is best served by using the first two opportunities to increase the level of competition and services in the U.S.-Israel market. Based on a review of the proposals, we tentatively find that the proposals of United and American best meet this objective.

United and American offer the most frequencies on the critical segment between Europe and Israel. American/Swissair would operate 14 weekly flights and United/Lufthansa 17 weekly flights. On the other hand, Northwest/KLM would offer only eight weekly flights. In addition, overall, United and American offer the best elapsed flight times, providing the most convenient connections between the U.S. and Israel. For example, in the nine city-pair markets proposed by all three applicants (Atlanta, Boston, Chicago, Los Angeles, Miami, Newark, New York (JFK), San Francisco, and Washington DC), United would offer the fastest roundtrip elapsed time in five of the nine common markets while American would offer the fastest roundtrip elapsed time in the remaining four markets. Northwest would not offer the fastest roundtrip elapsed time in any of the nine common city-pair markets.

Under our proposed allocation, American and United would offer double-daily or better service between 15 geographically dispersed U.S. cities and Israel with each carrier offering comparable elapsed flight times in most common city-pair markets. We tentatively conclude that this outcome provides the greatest overall service and competitive benefits in this case. In light of these facts, and given our goal of increasing the level of competitive service in the market, we have tentatively concluded that the proposals of American and United would provide greater public benefits than Northwest and should be awarded the two third-country authorizations that are available now.

In reaching this tentative decision, we have fully considered Northwest's arguments that it should be awarded one of the two currently available code-share opportunities based on the large number of geographically dispersed U.S. gateways (14) it would serve, including three not served by the other applicants, and the high level of transatlantic frequencies it provides. However, as mentioned above, we note that Northwest's total daily elapsed flight times would be less competitive and convenient than those offered by American and United. Moreover, Northwest would offer far fewer Europe-Israel frequencies (8) than American (14) and United (17), meaning that Northwest would be able to offer significantly less capacity and fewer practical connecting options. Against this background, we have tentatively concluded that the public benefits offered by Northwest's proposal do not outweigh the service and competitive benefits offered by the proposals of American and United for award of one of

the first two authorizations for third-country code-share service.¹⁰

That said, we tentatively conclude that Northwest's proposal would offer an additional service option for travelers and shippers and that Northwest should be awarded the service opportunity available in April 1, 2002. Even if KLM does not secure a capacity increase, Northwest would still offer eight weekly flights with KLM between Amsterdam and Tel Aviv with nonstop-to-nonstop connections to cities throughout the United States. Moreover, as noted earlier, since Northwest does not now serve Israel, its service would provide consumers further choice for service in the market. We, therefore, conclude that the benefits of Northwest's proposal warrant its selection for the service opportunity available April 1, 2002.

As to the domestic competition issues raised by Sun Country with respect to Northwest, we will not address them in this proceeding. The Department is currently considering the allegations raised by Sun Country in an informal investigation, and they are more appropriately considered in that forum.

ACCORDINGLY,

1. We tentatively select American Airlines, Inc.; and United Air Lines, Inc. to operate third-country code-share services in the U.S.-Israel market via Zurich and Frankfurt/ Munich, respectively, with Swissair – Swiss Air Transport Company Ltd. and Lufthansa German Airlines, respectively, under the opportunities that are now available;
2. We tentatively select Northwest Airlines, Inc. to operate third-country code-share services in the U.S.-Israel market beginning April 1, 2002, via Amsterdam in conjunction with KLM Royal Dutch Airlines.¹¹
3. We direct all persons to show cause why we should not issue an order making final our tentative findings and conclusions set forth in this order;
4. We direct all interested persons wishing to comment on our findings and conclusions, or objecting to the issuance of the order described above, to file their comments or objections with the Department, Dockets, Docket OST-2000-7194, U.S. Department of Transportation, 400 Seventh Street, SW, Room PL-401, Washington, DC 20590, no later than 10 calendar days from the date of service of this order;

¹⁰We have taken note of Northwest's argument that its foreign code-share carrier (KLM) seeks to increase its Amsterdam-Tel Aviv frequencies and would do so if an agreement for such expanded services can be reached through negotiations between the Netherlands and Israel. However, the rights for two of the opportunities at issue are available now, and in evaluating the proposals before us we must consider this element in weighing their respective public benefits. On this basis, we tentatively see American and United as the preferred choices for the initial two awards. At the same time, our proposal to award Northwest authority for the April 1, 2002 services will provide a meaningful interim period prior to start-up. Should Israel and the Netherlands agree during this period or subsequently to an expansion of KLM's services, Northwest would accordingly be able to increase the services it could eventually provide under our authorization.

¹¹The MOC provides that the code-share opportunity may be exercised in advance of April 1, 2002, by mutual agreement of both parties.

answers thereto shall be filed no later than 5 calendar days thereafter;¹²

5. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action;¹³

6. If no objections are filed to our tentative decision on the award of the three third-country code-sharing opportunities, we will deem all further procedural steps to have been waived, and will proceed to enter a final order; and

7. We will serve a copy of this order on Northwest Airlines, Inc.; American Airlines, Inc.; United Air Lines, Inc.; Swissair-Swiss Air Transport Company, Ltd.; Lufthansa German Airlines; KLM Royal Dutch Airlines; Sun Country Airlines; The Port of Seattle; The Memphis-Shelby County Airport Authority; The City of Houston and the Greater Houston Partnership; the U.S. Department of State (Office of Aviation Negotiations); the Ambassador of Israel in Washington, D.C.; and the Federal Aviation Administration.

By:

SUSAN McDERMOTT
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*

¹²The original **submission is to be unbound and without tabs** an 8.5" x 11" white paper using dark ink (not green) to facilitate use of the **Department's** docket imaging system. In the alternative, filers are encouraged to use the electronic submission capability available through the Dockets/DMS Internet site (<http://dms.dot.gov>) by following the instructions at the web site.

¹³As we are providing for the filing of objections to this tentative decision, we will not entertain petitions for reconsideration of this order.

APPENDIX

U.S.-Israel Third-Country Code-Sharing Applications:

Two Authorizations Available Immediately

One Additional Authorization Available April 1, 2002

Applicants	U.S. Gateways	Code Share	Partner	Europe- Israel		European Intermediate		Europe- Israel		Weekly Europe- Israel R/T Seating Capacity	Israeli Point(s)	Start Date
				Weekly R/T Freqs.	Point(s)	Routing(s)	Aircraft	Seats	Point(s)			
Northwest Airlines	Atlanta, Boston, Chicago, Detroit, Houston, Los Angeles, Newark, Memphis, Miami, Minneapolis, New York (JFK), San Francisco, Seattle, and Washington DC	KLM	8	Amsterdam	U.S. gateways-AMS-TLV	MD-11	B-767	282	226	4,400	Tel Aviv	Upon DOT approval
American Airlines	Atlanta, Boston, Chicago, Dallas, Miami, Los Angeles, New York (JFK), Newark, San Francisco, and Washington, DC	Swissair	14	Zurich	U.S. gateways-ZRH-TLV	A-332		196	5,488	5,488	Tel Aviv	Within 15 days of DOT approval
United Air Lines	Atlanta, Boston, Chicago, Dallas, Denver, Detroit, Houston, Los Angeles, Miami, Newark, New York (JFK), Philadelphia, Phoenix, San Francisco, and Washington DC	Lufthansa	14	Frankfurt	U.S. gateways-FRA/MUC-TLV	A-340		212-235	6,258	6,258	Tel Aviv	Within 30 days of DOT approval

T: round-trip