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

Issued by the Department of Transportation on August 27, 2001

NOTICE OF ACTION TAKEN -- DOCKETS OST 2001-9978 & 9985

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Applicant (in Docket OST 2001-9978): BRITISH MIDLAND AIRWAYS LIMITED Date Filed: June 21, 2001

Joint Applicants (in Docket OST 2001-9985): BRITISH MIDLAND AIRWAYS LIMITED and COMPANIA MEXICANA de AVIACION Date Filed: June 21, 2001

Relief requested in Docket OST 2001-9978: British Midland requests an exemption from 49 USC section 41301, for a period of two years, to permit it to engage in the scheduled foreign air transportation of persons, property and mail –

1. between Manchester, England, and the 25 U.S. coterminal points Albany, NY; Wilkes-Barre/Scranton, PA; Hartford, CT; Nashville, TN; Buffalo, NY; Columbia, SC; Akron/Canton, OH; Charleston, SC; Cedar Rapids, IA; Charlotte, NC; Charleston, WV; Fargo, ND; Sioux Falls, IA; Greenville/Spartanburg, SC; Jacksonville, FL; Saginaw, MI; Kansas City, MO; Memphis, TN; Mobile, AL; Omaha, NE; Peoria, IL; Roanoke, VA; Savannah, GA; Springfield, MO; and Tulsa, OK; via the gateway Chicago, IL; and

2. between Manchester, England, and the 42 U.S. coterminal points Allentown/Bethlehem, PA; Albany, NY; Binghamton, NY; Nashville, TN; Burlington, VT; Buffalo, NY; Baltimore, MD; Columbia, SC; Cleveland, OH; Columbus, OH; Charleston, WV; Dayton, OH; Detroit, MI; Greensboro/High Point, NC; Greenville/Spartanburg, SC; Westchester, NY; Indianapolis, IN; Jacksonville, FL; New York (Kennedy, LaGuardia & Newark, NJ), NY; Lynchburg, TN; Harrisburg, PA; Mobile, AL; Norfolk, VA; Newport News, VA; Philadelphia, PA; Pittsburgh, PA; Providence, RI; Portland, ME; Raleigh/Durham, NC; Richmond, VA; Roanoke, VA; Rochester, NY; Savannah, GA; State College, PA; Louisville, KY; Staunton, VA; Newburgh, NY; Syracuse, NY; and Knoxville, TN; via the gateway Washington, D.C.

British Midland proposes to operate between the U.S. gateways and U.S. interior points by placing its code on flights operated by Atlantic Coast Airlines, and that carrier has filed an application for that authority in Docket OST 2001-9979. We will act on Atlantic Coast Airlines' code-share application on the same date as the instant applications in Dockets OST 2001-9978 & 9985.

Relief requested in Docket OST 2001-9985: The joint applicants, British Midland and Mexicana, each request a Statement of Authorization, under 14 CFR Part 212, for an indefinite period, to permit Mexicana to place its code on flights operated by British Midland between Chicago, Illinois, and Manchester, England, and to permit British Midland to place its code on flights operated by Mexicana between Chicago, Illinois, and Mexico City, Mexico. (British Midland and Mexicana would be carrying these code-share passengers only between Mexico and England on the flights.)

If renewal, date and citation of last action: New authority.

Applicant representative(s): Robert D. Papkin, Marshall S. Sinick and Charles F. Donley II, 202-626-6601

Responsive pleadings: On June 28, 2001, American Airlines filed an answer (in both Dockets), claiming that Mexicana, British Midland and Atlantic Coast Airlines are all members of the Star Alliance; that this Alliance also includes United Air Lines; that Atlantic Coast Airlines operates exclusively under United's code at both British Midland gateways Washington, D.C., and Chicago; and that British Midland and United are preparing to seek antitrust immunity from U.S. and European authorities. In this connection, American, a member of oneworld, urges the Department not to give the Star Alliance an undue competitive advantage over oneworld by favorable action on these Star Alliance requests, pending the conclusion of a liberalized aviation agreement with the United Kingdom, or

the grant of the pending American/British Airways application (in Docket OST-99-6507) to conduct certain bilaterally authorized U.S.-U.K. code-sharing services. On July 3, 2001, Atlantic Coast Airlines filed a reply and British Midland and Mexicana filed a consolidated reply to American's answer, all urging the Department to reject American's arguments.

DISPOSITION

Action taken in Docket OST 2001-9978: Approved, August 27, 2001.

Action taken in Docket OST 2001-9985: Approved in part, August 27, 2001; balance dismissed (indefinite authority, see remarks below).

Effective dates of authority granted: British Midland's exemption authority granted in Docket OST 2001-9978 is effective August 27, 2001, through August 27, 2003. The Statements of Authorization granted to British Midland and Mexicana in Docket OST 2001-9985 both are effective August 27, 2001, through August 27, 2003.

Remarks: In taking our favorable action on the British Midland request for authority to conduct the subject U.S.-U.K. scheduled services, which will be operated within the United States by codesharing with Atlantic Coast, and to code-share with Mexicana for Mexico City-Manchester service over Chicago, we found that these proposed operations are consistent with the terms of the Air Services Agreement between the United States and the United Kingdom of Great Britain and Northern Ireland and the 1995 U.S.-U.K. Memorandum of Consultations. Further, we found that adequate reciprocity with Mexicana's homeland also warrants favorable action on the British Midland/Mexicana code-share request.

With respect to American's objection, we note that American has raised these same arguments in prior cases. In those earlier cases we have stated (*see, e.g.*, Order 2000-7-27 at 4, Order 2000-12-15 at 4, and Notice of Action Taken dated January 26, 2001, in Dockets OST-2000-6954 and OST-2000-6842) that the subject American/British Airways application is under consideration on its own merits in Docket OST-99-6507, that we did not see a public interest basis to withhold the authority then being requested until we reached a decision in the American/British Airways case, and that we did not believe that competitive considerations justified linking the case then before us to the pending American/British Airways code-share application. We also note that on August 10, 2001, American and British Airways filed a request for antitrust immunity and a new code-share application. We find nothing in the record of this case that would lead us to reach a different conclusion on American's position from that which we have stated previously.

British Midland and Mexicana requested that their code-share authority be effective for an indefinite duration. Taking into account our bilateral arrangements with the United Kingdom and our practice on requests of this type involving U.K. carriers, we found that approval for a two-year duration was consistent with the public interest. We accordingly dismissed that portion of the joint applicants' request for authority beyond two years (*i.e.*, for an indefinite duration), without prejudice to their filing for continuation of this authority under Part 212.

Conditions: In the conduct of the operations under the above exemption authority, British Midland shall adhere to the terms limitations and conditions of our standard exemption conditions. The code-share authority that we granted to British Midland and Mexicana in Docket OST-2001-9985 is subject to the following conditions: 1) This Statement of Authorization will remain in effect only as long as British Midland and Mexicana continue to hold the necessary underlying authority to operate the code-share services at issue and their code-share agreement providing for these operations remains in effect. 2) British Midland and/or Mexicana must promptly notify the Department (Office of International Aviation) if the subject agreement providing for these operations is no longer effective or the carriers decide to cease operating any or all of the approved services. (We expect this notice to be received within ten days of such noneffectiveness or of such decision and filed in Docket 2001-9177.). 3) The code-share operations conducted under this authority must comply with 14 CFR Part 257 and with any amendments to the Department's regulations concerning code-share arrangements that may be adopted. 4) Notwithstanding any provisions in the contract between the subject carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out the service in computer reservation systems and elsewhere; that the carrier selling such transportation (that is, 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. 5) The operating carrier shall not permit the code of its U.S. code-share partner to be carried on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition. 6) The code-share authority granted here is specifically conditioned so that neither carrier shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions.

**Action taken by: Paul L. Gretch, Director
Office of International Aviation**

Under authority assigned by the Department in its regulations, 14 CFR Part 385, we found that (1) our action was consistent with Department policy; (2) British Midland was qualified to perform the proposed operations; (3) grant of the authority was consistent with the public interest; and (4) grant of the authority would not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975. To the extent not granted/deferred/dismissed, we denied all requests in the referenced Docket. We may amend, modify, or revoke the authority granted in this Notice at any time without hearing at our discretion.

Persons entitled to petition the Department for review of the action set forth in this Notice under the Department's regulations, 14 CFR §385.30, may file their petitions within ten (10) days after the date of issuance of this Notice. This action was effective when taken, and the filing of a petition for review will not alter such effectiveness.

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