



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

Issued by the Department of Transportation
on the 16th day of January, 2001

Served: January 18, 2001

120846

In the matter of

Aero Continente Chile, S.A.
LADECO, S.A.
Linea Aerea Nacional-Chile Sociedad
Anonima, Lan Chile, S.A.
Air New Zealand Limited
Ansett New Zealand Limited
Singapore Airlines Limited
Royal Brunei Airlines Sdn. Bhd.

foreign air carrier permits and
exemptions under 49 U.S.C. 41301 and 40109

Docket OST -2000-8393 - 2 ✓

FINAL ORDER

Summary

By this order, the Department finds that it is in the public interest to modify the proposals announced in Show-Cause Order 2000-11-25 concerning the reporting requirement on certain foreign air carriers in connection with a new multilateral agreement involving the United States and various APEC members, and to finalize the requirement as modified.

Background

On November 15, 2000, the United States concluded negotiations with Brunei, Chile, New Zealand, and Singapore on the Multilateral Agreement on the Liberalization of International Air Transportation (hereinafter the Agreement). Among other things, the drafters of the Agreement omitted the standard clause in bilateral agreements that a carrier must be both "substantially owned" and "effectively controlled" by the citizens of the designating country. Instead, they inserted only a requirement that an air carrier must be

effectively controlled by the designating Party's citizens, subject to a discretionary right of another Party to reject a designation if substantial ownership of the designated carrier is vested in nationals of the Party receiving the designation.

On November 24, 2000, the Department directed interested parties to show cause why it should not make final its tentative decision requiring the foreign air carriers listed in the Appendix to inform the Department, at least 30 days in advance, of any proposed change in excess of five-percent of the ownership of their voting stock.¹ In response, United Parcel Service Co. (UPS); Federal Express Corporation (FEDEX); Air New Zealand Limited (ANZ); Singapore Airlines Limited (SIA); Royal Brunei Airlines Sdn. Bhd.; Lineas Aerea Nacional-Chile Sociedad Anonima, Lan Chile, S.A. (Lan Chile); United Air Lines, Inc. (UAL); and the City and County of San Francisco filed answers, objections, and/or replies in this Docket (hereinafter the Objectors). The Air Line Pilots Association, International, (ALPA) filed an answer to the objections.

Responsive Pleadings

The Objectors stated two broad themes: first, that the proposed reporting requirement is contrary to the letter and spirit of the Agreement and, second, that it could either jeopardize the entry into force of the Agreement or have a chilling effect on potential accessions. The consensus was that the reporting requirement should be withdrawn or, alternatively, substantially revised. FEDEX, Royal Brunei Airlines, and UAL also expressed a fear that other nations might impose similar reporting requirements on U.S. air carriers in response to the Department's action.

SIA, Royal Brunei Airlines, Lan Chile, and ANZ claimed that the reporting requirement was unnecessary, but offered different reasons for their conclusion. Given the "prevailing world regime," SIA theorized that there is "little short-term risk" that U.S. carriers will easily be able to own carriers whose homelands are signatories to the Agreement. In essence, the standard "substantial ownership and effective control" clause in Singapore's bilateral aviation agreements with third countries will act in the short term to limit the ownership stake of U.S. air carriers in Singaporean air carriers. Royal Brunei Airlines and Lan Chile challenged the necessity of a blanket reporting requirement on the ground that the Department already has sufficient authority to investigate individual air carriers. ANZ questioned the necessity of the requirement on the ground that the Agreement actually reduces the Department's need to monitor ownership vis-à-vis a traditional bilateral aviation agreement because the Department "need only be concerned with the investments of U.S. carriers."

In assessing the specific provisions of the reporting requirement, the Objectors criticized the scope, the five-percent reporting threshold, and the 30-day advance notice clause, all of

¹ Show Cause Order 2000-11-25.

which they deemed to be in contravention of Article 11(4) of the Agreement.² The Objectors argued that the scope of the reporting provision is overbroad because it includes nationals other than those of the U.S. SIA and ANZ suggested that the reporting requirement should only apply to acquisitions by U.S. air carriers and that the duty to report those acquisitions be placed on the U.S. carriers themselves. UAL objected to their suggestion, stating that the Department should not adopt any alternative that puts the duty to report on U.S. carriers, unless the Department can also apply such a requirement to non-air carrier U.S. citizens.

The Objectors argued that the five-percent threshold discriminates against air carriers designated under the Agreement relative to U.S. air carriers, which are subject to a 10-percent reporting threshold for substantial changes in their ownership.³ Furthermore, SIA, among others, contended that the five-percent threshold is unduly burdensome because it is “*de minimis*.” ANZ called a five-percent ownership stake “scarcely substantial” and opined that the Department’s authority to reject a designation under Article 3(3) of the Agreement arises only after “there is an acquisition of ‘substantial ownership’ by a party’s nationals.”⁴

Regarding the 30-day advance notice provision, the Objectors were unanimous in their opinion that it is unworkable. The Objectors noted that publicly traded companies have no way of knowing one day in advance to whom their shares will be traded, let alone 30 days in advance. Thus, they argued that compliance with this provision is impossible for any publicly traded air carrier. Moreover, SIA asserted that this provision would “impede the free flow of capital” by scaring away potential investors who do not want their intentions revealed prospectively.

In addition to the issues detailed above, ANZ and SIA also questioned the appropriateness of requiring a foreign air carrier to notify the Department directly when its country begins to apply the terms of the Agreement in relation to the United States. They argued that it would be inappropriate to place such an obligation on a private business when diplomatic channels have customarily been the conduits for notification of the application of international air service agreements.

ALPA’s answer strongly supported the reporting requirement, but advocated that the scope of the requirement be narrowed, that the *ex ante* notice provision be changed to an *ex post*

² Article 11(4) states that “[i]f a Party... requires filings for information purposes, it shall minimize the administrative burdens of filing requirements and procedures... on designated airlines of the other Parties.”

³ 14 C.F.R. 204.2 (l)(3) defines substantial change in ownership with regard to U.S. air carriers as “The acquisition by a new shareholder or the accumulation by an existing shareholder of beneficial control of 10 percent or more of the outstanding voting stock in the corporation.”

⁴ Article 3(3) states that “a Party need not grant authorizations and permissions to an airline designated by another Party if the Party receiving the designation determines that substantial ownership is vested in its nationals.”

notice provision, and that the five-percent threshold be raised to 10 percent. ALPA emphasized that the reporting requirement was not a “new restriction,” but simply an attempt by the Department to gather information in a manner consistent with the Agreement in order to enforce the rights of the United States under the Agreement. As to the necessity of the reporting requirement, ALPA stated that:

One cannot predict what new investments may occur under this newly liberalized regime, [however] there is ... a greatly increased possibility that some U.S. airlines or other investors may wish to take advantage of this new agreement by seeking to acquire substantial ownership of airlines designated by other APEC parties.

Thus, in order to guard against this possibility, ALPA believes that it is imperative that the Department has a tool that will enable it to monitor changes in the ownership of U.S. nationals in foreign air carriers.

Decision

We agree with the view that our new aviation agreement with Brunei, Chile, New Zealand and Singapore is an historic agreement. It replaces the traditional bilateral approach to establishing aviation services with a new multilateral approach. The new approach offers potential for invaluable public benefits, including new opportunities for service, travel, business activity, investment, and a new model framework for increasing those benefits around the world.

The new agreement was the result of a strong interest by all parties to provide those public benefits and to resolve difficult issues that had previously hampered progress. It took intense negotiations to resolve these issues and to achieve the consensus needed to permit our citizens to enjoy all of the benefits provided for in the accord.

It is in this context that the parties reached closure on the “ownership” provisions of the multilateral agreement. The new provision provides new opportunities for investment in the airlines covered by the agreement. It also grants each Party a right to review, and if necessary, to reject a designation if substantial ownership of the designated carrier is vested in that Party’s nationals.

The purpose of our show-cause order was to provide a fair and effective vehicle for allowing us to exercise that right. Therefore, we tentatively found that it was in the public interest for the Department to be informed of specified changes in the ownership of the voting stock of the foreign air carriers covered by the agreement, and that those foreign air carriers should provide the necessary information.

After carefully considering all matters of record, including all of the comments filed in response to our tentative decision, we have decided to affirm our initial determination that

it is in the public interest for the foreign air carriers to provide the information we need to effectively monitor the operation of the agreement provision at issue. We have also determined, however, that it is in the public interest to modify the proposed reporting requirement to meet many of the issues and concerns raised in response to the tentative decision.

In reaching this conclusion, we have carefully weighed and balanced our interests and concerns with those raised by the commenters, and on that basis, we have decided to make the following changes to our proposed reporting requirement.

First, we will only require reporting of transactions in which U.S. nationals are the beneficial shareholders. We agree that this change is consistent with the purpose of filing the information we have requested.

Second, we will only require reporting of two types of transactions: (1) transactions that involve an upward change in the beneficial control by a U.S. national shareholder of 20 percent or more of the foreign air carrier's outstanding stock, and (2) transactions that result in an overall accumulated total holding by a U.S. national shareholder of beneficial control of 40 percent or more of the foreign carrier's outstanding stock.⁵ We appreciate the concerns of SIA and ANZ that a five-percent threshold could place an undue burden on the affected carriers.

Third, instead of advance notification, we will require the foreign air carriers involved to notify the Department no later than 30 days *after* any transaction meeting the above-cited parameters. We agree that the proposed advance notice requirement could have proven difficult to implement and could have had unintended adverse effects. Moreover, to the extent that the reporting carrier is unaware at the time of the transaction of the subject upward change in control by a U.S. national, the 30-day period will run from the date that the carrier either actually became aware of it, or through due diligence should have become aware of it, whichever is earlier.

Fourth, we will not require foreign air carriers to notify the Department when their homelands begin to implement the terms of the Agreement in relation to the United States. We agree that diplomatic channels are available for this purpose.

⁵ This would mean, for example, that reporting would be required when a U.S. national then holding beneficial control of none of the foreign air carrier's stock engaged in a transaction resulting in the acquisition of beneficial control of 20 percent or more of such stock, or when a U.S. national then holding beneficial control of 15 percent of the foreign carrier's stock engaged in a transaction augmenting that holding to 35 percent or more. Reporting would also be required when a U.S. national then holding beneficial control of 39 percent of the carrier's stock engaged in a transaction augmenting that holding to 40 percent or more. However, reporting would not be required if a U.S. national with beneficial control of 20 percent of the foreign air carrier's stock engaged in a transaction augmenting that holding to 39 percent.

ACCORDINGLY,

1. The Department amends the authorities listed in the Appendix to require that the holders file a report with the Director, Office of International Aviation, consistent with the terms of this order;
2. Unless disapproved by the President of the United States under 49 U.S.C. 41307, this order shall become effective on the 61st day after its submission for section 41307 review or upon the date of receipt of advice from the President or his designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove the Department's order under that section, whichever occurs earlier;⁶ and
3. The Department will serve a copy of this order on Aero Continente Chile, S.A.; LADECO, S.A.; Linea Aerea Nacional-Chile Sociedad Anonima, Lan Chile, S.A.; Air New Zealand Limited; Ansett New Zealand Limited; Singapore Airlines Limited; Royal Brunei Airlines Sdn. Bhd.; the Embassies of the homelands of these carriers in Washington, D.C.; United Air Lines, Inc.; Federal Express Corporation; United Parcel Service Co.; the City and County of San Francisco; The Air Line Pilots Association International; and the Department of State.

By:

FRANCISCO J. SANCHEZ
Assistant Secretary for Aviation
and International Affairs

(SEAL)

Appendix

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

⁶ This order was submitted for section 41307 review on January 16, 2001. On January 18, 2001, we received notification that the President's designee under Executive Order 12597 and implementing regulations did not intend to disapprove the Department's order.

APPENDIX**Current Department authority being amended by this order:**

Aero Continente Chile, S.A., Docket 2000-7747 (exemption)

LADECO, S.A.; Dockets 1999-6494, 1998-4682 (exemptions)

Linea Aerea Nacional-Chile Sociedad Anonima, Lan Chile, S.A., Order 87-8-55 (permit)

Air New Zealand Limited, Order 90-10-50 (permit)

Ansett New Zealand Limited, Docket 48591 (exemption)

Singapore Airlines Limited, Docket 1997-3036 (exemption)

Royal Brunei Airlines Sdn. Bhd., Docket 49834 (exemption)