



Order 2001-6-5

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

132040

SERVED: June 7, 2001

Issued by the Department of Transportation
on the 7th day of June, 2001

Joint Application of

LINEAS AEREAS PRIVADAS ARGENTINAS, S.A.

DELTA AIR LINES, INC.

for an exemption under 49 U.S.C. § 40109 and a statement
of authorization pursuant to 14 CFR Part 212 of the
Department's regulations

Docket OST-2001-9196 - 15

ORDER

Summary

In this order we are granting Delta Air Lines, Inc. (Delta) a statement of authorization under Part 212 to display Lineas Aereas Privadas Argentinas, S.A's. designator code ("MJ") on flights operated by Delta between Atlanta and Buenos Aires, Argentina.

Background

LAPA holds Department authority to engage in scheduled foreign air transportation of persons, property, and mail between Buenos Aires, Argentina, and Atlanta; and authority to conduct charters in accordance with Part 212 of our rules.¹ Delta holds various Department authorities to conduct domestic and foreign air transportation, including a certificate of public convenience and necessity, effective April 1, 2001, to provide service between Atlanta and Buenos Aires, Argentina.²

Application

¹ See Notice of Action Taken, dated July 26, 2000, in Docket OST-99-5848.

² See *1999 U.S.-Argentina Combination Service Case* (Argentina case), Orders 2001-1-14 and 2000-12-13, Docket OST-1999-6210. Order 2000-1-14 allocated Delta seven weekly roundtrip frequencies to perform this service.

By joint application filed March 19, 2001, LAPA and Delta request authority to conduct code-share operations in the U.S.-Argentina market. Specifically, LAPA seeks exemption authority from 49 U.S.C. §41301 to engage in scheduled foreign air transportation of persons, property, and mail from points behind Argentina, via Argentina and intermediate points, to Los Angeles, Miami, Orlando and New York, pursuant to a code-share arrangement with Delta. Delta seeks a statement of authorization under 14 CFR Part 212 to display LAPA's designator code ("MJ") on flights operated by Delta between Atlanta and Buenos Aires, and between Atlanta on the one hand and Los Angeles, Miami, New York and Orlando, on the other hand.

The joint applicants state that the authority requested is fully consistent with the terms of the U.S.-Argentina bilateral aviation agreement, as amended (the Agreement), and that grant of the joint request will improve service and increase competition in the U.S.-Argentina market.³ The joint applicants state that Delta will not be code sharing on flights operated by LAPA.

Responsive Pleadings

Answers to the joint application were filed by the Greater Orlando Aviation Authority (Orlando) and United Air Lines, Inc. LAPA, Delta, and Continental Airlines, Inc. each filed a reply.⁴ Additional responsive pleadings were filed by United; Delta; Alaska Airlines, Inc.; LAPA; and the City of Houston and the Greater Houston Partnership (the Houston Parties).⁵

Orlando supports grant of the joint application and states that the proposed service will improve service options and increase competition in the U.S.-Argentina market.

United states that while it has "no objection in principle to Delta's implementation of its code-share with LAPA,"⁶ we should permit the Delta-LAPA request to proceed only if we review and modify what United believes is a Department practice of disqualifying U.S. carriers from receiving authority to operate new self-operated service in a limited-entry market if they have a pre-existing code-share arrangement in the market. United cites several recent carrier selection cases involving its proposed self-operated services in U.S.-Latin America markets, including the Argentina case, where it believes the Department effectively disqualified United because it was already participating in pre-existing code-share arrangements. United further contends that in the Argentina case it raised "the existence or strong likelihood of a code-share alliance between Delta and LAPA" for Atlanta-Buenos Aires service. It says that now that these plans have been

³ Article VI (7), of the Agreement provides that, effective April 1, 2001, designated airlines of either party are permitted to operate or hold out service on the agreed routes pursuant to cooperative marketing arrangements with other airlines holding appropriate authority. LAPA has been designated by the Government of Argentina to conduct scheduled combination service between Buenos Aires and Atlanta.

⁴ Delta's reply was accompanied by a motion for leave to file an otherwise unauthorized document. We will grant Delta's motion.

⁵ Each of the additional responsive pleadings was accompanied by a motion for leave to file an otherwise unauthorized document. We will grant the motions.

⁶ United Answer at 15.

revealed, if we are not to disturb our earlier decision, we should explain our departure from prior norms and adopt a different policy for future proceedings.

Continental also believes that Delta and LAPA were considering a code-share arrangement at the time of the Argentina case and maintains that the actions of Delta and LAPA warrant reconsideration of Delta's award in the route case and authorization to Continental to activate its back-up authority.

The Houston Parties share the concerns raised by Continental in its pleading.

Alaska takes no position with respect to the instant application but disagrees with the policy issues raised by United. Alaska states that the Department's longstanding policy of favoring new entrants to maximize competition in the marketplace should be reinforced, not diluted.

Delta disagrees with United that we have established a "disqualification" standard for code-sharing carriers in carrier selection cases and states that contrary to the assertions of United and Continental, Delta did not withhold evidence of a code-share arrangement with LAPA in the Argentina case. Delta states that no agreement, oral or written, existed prior to the signed March 16, 2001, agreement attached to the joint application.

LAPA echoes Delta's assertions, maintaining that the LAPA/Delta code-share arrangement did not exist at the time of the U.S.-Argentina case and was appropriately announced shortly before the joint filing of the instant application.

In a further response, United argues that Delta downplays the significance of code sharing in the selection process and reiterates arguments that the Department has applied incumbency and code-sharing criteria against United to justify its selection decisions in several Latin America cases.

Motion for Immediate Action

On May 4, 2001, Delta and LAPA filed a joint motion in which they asked that the Department act immediately on the Atlanta-Buenos Aires portion of the joint code-share application. The applicants state that the diplomatic note authorizing the selection of LAPA's U.S. beyond points has been delayed, and they request that we hold in abeyance the remainder of the request pending appropriate notification from the Government of Argentina.

No comments were filed in response to the joint motion.

Decision

We have decided to grant the joint motion of Delta and LAPA for immediate action on the Atlanta-Buenos Aires portion of their request. We will also, as requested by the applicants in

their May 4 joint motion, defer action on the balance of the authority sought in their joint application.

Specifically, we have decided to grant Delta a statement of authorization under 14 CFR Part 212 to display LAPA's designator code ("MJ") on flights operated by Delta between Atlanta and Buenos Aires. We will defer action on LAPA's request for exemption authority to conduct scheduled combination services between Argentina and specified points in the United States under a code-share arrangement with Delta; and Delta's request for a statement of authorization to display LAPA's designator code on flights operated by Delta between Atlanta, on the one hand, and Los Angeles, Miami, New York and Orlando, on the other hand, for the carriage of LAPA's Argentina-U.S. traffic. We will make the authority granted above subject to our standard conditions for such services.

The Department regulates code-share arrangements under Part 212 of its rules and exemption applications under 49 U.S.C. § 40109. The Department will grant the required authority if it determines that the proposed arrangement is consistent with the public interest. In determining the public interest, we consider a number of factors, including the extent to which the authority sought is consistent with bilateral aviation agreements to which the United States is a party or is supported by reciprocity and the benefits to consumers from the proposed services. In this instance, we find that the proposed Atlanta-Buenos Aires operations meet the standards for approval and are consistent with our bilateral aviation agreement with Argentina, as amended. A key feature of the November 24, 2000, amendment to the U.S.-Argentina agreement is the ability of U.S. and Argentine carriers to operate code-share services in the U.S.-Argentina market. Furthermore, we note that LAPA is not now serving the United States, so approval of the requested code share with Delta will enable the carrier to maintain a presence in the U.S.-Argentina market and will afford consumers an additional competitive service option in that market.

We are not persuaded by the arguments of United and Continental that we should either delay or deny an award in this case. Both carriers acknowledge that the authority granted is fully consistent with the recently amended aviation agreement. Their concern that Delta and LAPA have not been forthcoming regarding their relationship has been disputed by the applicants on the record of this case and, in any event, provides no basis to withhold or deny the bilaterally authorized services at issue here and that we have found will benefit the public.

The United and Continental pleadings in effect constitute untimely petitions for reconsideration of finally decided carrier selection cases. We see no persuasive reasons to entertain such petitions here or to rely on the arguments they contain as a basis to delay approval of the present application. With respect to United's belief that our carrier selection process disqualifies or disfavors carriers with pre-existing code-share arrangements and requires review or modification, as we said recently when United raised these concerns in another docket:

it has been and continues to be our policy, consistent with our carrier

selection guidelines, to consider each comparative selection decision based on the specific service and competitive circumstances of the case at issue. The weight given each of the relevant factors depends on the particular service and competitive environment present, as well as the particular bilateral context in which the services are provided.⁷

In view of the above, we find that grant of the Atlanta-Buenos Aires code-share authority described above is consistent with the public interest.

ACCORDINGLY,

1. We grant Delta Air Lines, Inc. a statement of authorization under 14 CFR Part 212 to permit it to display Lineas Aereas Privadas Argentinas, S.A.'s designator code ("MJ") on flights operated by Delta between Atlanta, Georgia, and Buenos Aires, Argentina;
2. We defer action on Lineas Aereas Privadas Argentinas, S.A.'s request for an exemption from § 41301 of Title 49 of the U.S. Code to engage in scheduled foreign air transportation of persons, property, and mail from points behind Argentina via Argentina and intermediate points to Los Angeles, Miami, and Orlando and New York, pursuant to a code-share arrangement with Delta Air Lines, Inc.;
3. We defer action on Delta Air Lines' request for a statement of authorization under 14 CFR Part 212 to display Lineas Aereas Privadas Argentinas, S.A.'s designator code ("MJ") on flights operated by Delta between Atlanta, on the one hand, and Los Angeles, Miami, Orlando and New York, on the other hand, for the carriage of LAPA's Argentina-U.S. traffic;
4. The authority granted Delta Air Lines, Inc. in ordering paragraph 1 above is effective on the service date of this order and will remain in effect indefinitely;
5. The statement of authorization granted Delta Air Lines, Inc. in ordering paragraph 1 above will remain in effect only as long as (i) Lines Areas Privates Argentines, S.A. and Delta Air Lines, Inc. continue to hold the necessary underlying authority to operate the code-share services at issue, and (ii) the code-share agreement providing for the code-share operations remains in effect;
6. Lineas Aereas Privadas Argentinas, S.A. and/or Delta Air Lines, Inc. must promptly notify the Department (Office of International Aviation) if the code-share agreement providing for the code-share operations is no longer effective or the carriers decide to cease operating any or all of the approved code-share services. Such notices shall be filed in Docket OST-2001-9196;⁸
7. The code-sharing operations conducted under this authority must comply with 14 CFR Part 257 and with any amendments to the Department's regulations concerning code-share

⁷ See Notice of Action Taken, dated May 16, 2001, in Docket OST-2001-9431.

⁸ We expect this notification to be received within 10 days of such non-effectiveness or of such decision.

arrangements that may be adopted. Notwithstanding any provisions in the contract between the 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 such service in computer reservation systems and elsewhere; that the carrier selling such transportation (*i.e.*, 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;

8. The 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;

9. We grant the motions of Delta Air Lines, Inc.; United Air Lines, Inc.; Alaska Airlines, Inc. and the Houston Parties to file otherwise unauthorized documents;

10. We grant the May 4, 2001, joint motion of Delta and LAPA;

11. To the extent not granted, or specifically deferred, we deny any additional requests for relief in Docket OST-2001-9196;

12. We may amend, modify or revoke the authorities granted by this order at any time and without hearing; and

13. We will serve a copy of this order on Lineas Aereas Privadas Argentinas, S.A.; Delta Air Lines, Inc.; United Air Lines, Inc.; the Greater Orlando Aviation Authority; Continental Airlines, Inc.; Alaska Airlines, Inc.; the City of Houston and the Greater Houston Partnership; the Embassy of Argentina in Washington, D.C.; the Department of State (Office of Aviation) and the Federal Aviation Administration (Miami-IFO).

By:

SUSAN MCDERMOTT
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

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