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Order 2001-9-13

Served: September 24, 2001



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

Issued by the Department of Transportation
on the 31st day of July, 2001

Application of
AIR NAURU
for renewal of foreign air carrier permit
under 49 U.S.C. § 41301

Docket OST-2001-9965 - 5

ORDER RENEWING FOREIGN AIR CARRIER PERMIT

Summary

In this order we are renewing Air Nauru's foreign air carrier permit to engage in scheduled foreign air transportation of persons, property and mail between the Republic of Nauru (Nauru) and specified points in the United States; and authority to conduct charters in accordance with Part 212 of the Department's rules, for a period of five years.

Application

Air Nauru's existing foreign air carrier permit, issued by Order 82-10-92, authorizes the carrier to conduct various services between Nauru and specified points in the United States, via specified intermediate points.¹

By application filed October 23, 1987, as most recently amended June 19, 2001, Air Nauru requests that we renew its existing foreign air carrier permit and, further, that we amend the permit to enable Air Nauru to engage in scheduled foreign air transportation of persons, property and mail from points behind Nauru, via Nauru and intermediate points, and any point or points in the United States and beyond. Air Nauru requests that we issue its amended permit for an indefinite duration.

In support of its application, Air Nauru states that it has been licensed by the Government of Nauru to perform the proposed services; that it is substantially owned and effectively

¹ The permit became effective on October 25, 1982, for a period of five years. On October 23, 1987, Air Nauru filed a timely renewal application in Docket 45236 and invoked the automatic extension provisions of the Administrative Procedure Act (5 USC 558(c)) to continue its authority in effect pending final Department action. Pleadings filed in Docket 45236 have been incorporated into the present docket, Docket OST-2001-9965.

controlled by citizens of the Republic of Nauru; and that it is operationally and financially fit to perform the proposed services.

No answers were filed in response to Air Nauru's permit application.

Decision

We have reviewed the record in this case and have decided to process the application using simplified Subpart B procedures.² The public was informed of the application by notice in the Federal Register and the Department's published weekly list of applications filed.³ The notice described the authority sought and gave interested persons an opportunity to submit evidence and objections to the award of the authority. Simplified procedures are appropriate in this case because there are no material determinative issues of fact requiring other procedures.

We have decided to grant the application in part, specifically, to the extent of renewal of Air Nauru's existing authority for the standard five-year duration. We find that renewal of the foreign air carrier permit is in the public interest, and that Air Nauru is qualified to conduct these proposed operations.

Public Interest Considerations

Air Nauru requests that we renew its existing foreign air carrier permit, which provides for service to named U.S. points via named intermediate points. As just stated, we regard this request as in the public interest. However, Air Nauru also asks that we amend its permit to enable the carrier to engage in scheduled foreign air transportation of persons, property and mail from points behind Nauru, via Nauru and intermediate points, and any point or points in the United States and beyond, and that we renew that authority for an indefinite period. We are not prepared to grant this broad scope of authority to a foreign air carrier of Nauru at this time.

While we are sympathetic to Air Nauru's request for broad unrestricted route authority, the Department, as a matter of policy, has granted such authority only to carriers from countries where the United States has entered into an open-skies bilateral aviation agreement. There is no bilateral aviation agreement in place between the United States and Nauru and, accordingly, air service between the two countries is based on comity and reciprocity. For this reason, we shall limit the authority we are granting Air Nauru here to that which the carrier currently holds in its foreign air carrier permit. We find that adequate comity and reciprocity and our overall aviation relationship with Nauru support such action.⁴ Having said that, we understand the valuable benefits that Air Nauru's services provide to the traveling and shipping

² 14 CFR 302.210 (a)(2) and 302.213.

³ 52 FR 42056, November 2, 1987.

⁴ The applicant states that the government of Nauru welcomes scheduled and charter services by U.S. carriers and notes that Continental Micronesia, a U.S. certificated air carrier, holds Department authority to serve Nauru as an intermediate point on its authorized services.

public in the Pacific and are prepared to give prompt consideration on a case-by-case basis to future requests by Air Nauru for a specific expansion of its services beyond those we are granting here.

Finally, as is our usual practice in cases such as this where we have no bilateral aviation agreement with the homeland of the applicant, we will renew the requested authority for a period of five years.

Operational and Financial Fitness

We find that Air Nauru is operationally and financially fit to conduct the operations at issue here. Air Nauru was founded in 1970 as a function of the Government of Nauru shortly after Nauru became an independent republic on January 31, 1968. Air Nauru was issued an initial foreign air carrier permit by the former Civil Aeronautics Board in 1971 to conduct scheduled combination services between Nauru and Majuro, Marshall Islands (see Order 71-7-31). Air Nauru has held authority to serve the United States on a continuous basis since that time. Air Nauru's current foreign air carrier permit was issued by Order 82-10-92. In 1996 the Nauru Air Corporation, a statutory corporation of the Republic of Nauru, took control of the airline. Air Nauru has experienced management, and has had no safety violations, fatal accidents or tariff violations in the last five years.

Air Nauru is subject to the regulatory jurisdiction of the Australian Civil Aviation Safety Authority (CASA).⁵ As such, Air Nauru's aircraft bear Australian registry and Air Nauru operates pursuant to an Air Operator's Certificate issued by CASA. Aircraft maintenance on Air Nauru's aircraft will be performed by Qantas, the flag carrier of Australia. By memorandum dated June 21, 2001, the Federal Aviation Administration advised us that it knows of no reason why Air Nauru's request to renew its foreign air carrier permit should not be approved. Finally, we have verified Air Nauru's compliance with 14 CFR Parts 203 (Warsaw liability waiver), 205 (aircraft accident liability insurance requirements) and 129 (FAA Operations Specifications).

Air Nauru states that because it is an integral part of the Nauru government, the carrier does not maintain balance sheets or profit and loss statements and that revenues generated from Air Nauru's operations form part of the consolidated revenue of the republic. Air Nauru did, however, provide a copy of a letter to the Department dated June 8, 2001, from Rene R. Harris, President of the Republic of Nauru, in which he states that Air Nauru is a state-owned corporation and that the Government of Nauru recognizes the importance of Air Nauru to the social economic and cultural development of Nauru and its Pacific neighbors.⁶ In that regard, President Harris states that the Government of Nauru, as in the past, is "ready to provide

⁵ The government of Nauru, which is currently listed as a Category 2 country under the FAA's International Aviation Safety Assessment Program (IASA) is no longer the air transport authority with regulatory responsibility over Air Nauru's operations.

⁶ See Exhibit 2, Docket OST-2001-9965, dated June 19, 2001.

sovereign and financial support” to Air Nauru to ensure that Air Nauru’s air services “are enhanced, remain viable and economical.” Based on the commitment of the Government of Nauru to support Air Nauru’s services, and its long history of providing valuable air services in the Pacific, we believe that Air Nauru can conduct the proposed services without jeopardizing passenger or shipper funds.

Ownership and Control

We find that Air Nauru is substantially owned and effectively controlled by citizens of Nauru. Specifically, Air Nauru is wholly owned by the Government of Nauru. While there continues to be involvement by non-homeland citizen’s in the carrier’s operations, the carrier’s senior officials are citizens of Nauru, and economic and managerial control is exercised by citizens of Nauru.

In view of the foregoing, and all the facts of record, we find and conclude that:

1. It is in the public interest to renew Air Nauru’s foreign air carrier permit in the form attached;
2. Air Nauru is fit, willing and able properly to perform the foreign air transportation described in the attached permit and to conform to the provisions of the Act, and to our rules, regulations, and requirements;
3. The public interest requires that the exercise of the privileges granted by the permit should be subject to the terms, conditions, and limitations contained in the attached permit, and to such other reasonable terms, conditions, and limitations required by the public interest as we may prescribe;
4. The issuance of this foreign air carrier permit will not constitute a “major regulatory action” under the Energy Policy and Conservation Act of 1975, as defined in section 313.4(a)(1) of our Regulations;⁷ and
5. The public interest does not require an oral evidentiary hearing on the application.

ACCORDINGLY,

1. We renew, in the form attached, a foreign air carrier permit to Air Nauru authorizing it to engage in scheduled foreign air transportation of persons, property and mail between Nauru and specified points; and authority to perform charters in accordance with 14 CFR Part 212 of the Department’s regulations;

⁷ This finding is based on the fact that the grant of this permit will not result in a near-term increase in fuel consumption in excess of 10 million gallons.

2. The exercise of the privileges granted above are subject to Air Nauru's compliance with the conditions listed in Attachment A;
3. The authority of Air Nauru granted above to conduct services to and from the United States with its own aircraft and crews will remain in effect only so long as Air Nauru holds a valid Air Operator's Certificate issued by the Government of Australia or until such time as Nauru is rated as a Category 1 (meets ICAO standards) country under the FAA's IASA Program;
4. To the extent not granted, we deny all requests for relief in Docket OST-2001-9965;
5. Unless disapproved by the President of the United States under § 41307 of Title 49 of the U.S. Code, this order and the attached permit shall become effective on the 61st day after its submission for § 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;⁸ and
6. We will serve a copy of this order on Air Nauru; Congressman Robert A. Underwood (Guam); the Department of State and the Federal Aviation Administration (San Francisco- IFO).

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*

⁸ This order was submitted for § 41307 review on July 31, 2001.
On September 21, 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.

http://dms.dot.gov/reports/reports_aviation.asp

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

PERMIT TO FOREIGN AIR CARRIER
(as renewed)

Air Nauru

A Flag Carrier of the Republic of Nauru

is authorized, subject to the following provisions, the provisions of Title 49 of the U.S. Code, and the orders, rules, and regulations of the Department of Transportation, to engage in scheduled foreign air transportation of persons, property and mail as follows:

1. Between a point or points in the Republic of Nauru; the intermediate points Tarawa, Kiribati; Majuro, Trust Territory of the Pacific Islands; and the terminal point Honolulu, Hawaii.
2. Between a point or points in the Republic of Nauru; the intermediate points Ponape, Trust Territory of the Pacific Islands; Guam, Okinawa, Japan; and the terminal point Kagoshima, Japan.
3. Between a point or points in the Republic of Nauru; the intermediate points Ponape and Truk, Trust Territory of the Pacific Islands; Guam; Saipan, Commonwealth of the Northern Marianas; and
 - (a) beyond Saipan, the intermediate points Palau (Belau), Trust Territory of the Pacific Islands; Manila, Philippines; Taipei, Taiwan; and the terminal point Hong Kong; and
 - (b) beyond Saipan, the intermediate points Palau (Belau), Trust Territory of the Pacific Islands; Manila, Philippines; Taipei, Taiwan; and the terminal point Singapore.

4. Between a point or points in the Republic of Nauru; the intermediate points Tarawa, Kiribati; Kanton Island, Apia, Western Samoa; Pago Pago, American Samoa; and
 - (a) beyond Pago Pago, the intermediate point Rarotonga, Cook Islands; and and the terminal point Papeete, Society Islands; and
 - (b) beyond Pago Pago, the intermediate point Niue Island, Niue; and the terminal point Auckland, New Zealand.

The holder shall also be authorized to engage in other charter trips in foreign air transportation, subject to the terms, conditions, and limitations of the Department's regulations governing charters.

This permit and the exercise of the privileges granted in it shall be subject to the terms, conditions and limitations attached, and to the following:

1. All flights serving Kagoshima on segment 2, or Manila, Taipei or Hong Kong on segment 3 shall also serve the Republic of Nauru.
2. The holder is not authorized to carry local traffic between Honolulu , Palau (Belau), Guam, Saipan or Pago Pago.
3. The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of Australia for Australian international air service.
4. This permit shall be subject to all applicable provisions of any treaty, convention or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the holder's homeland are or shall become parties.
5. This permit shall be subject to the condition that in the event any practice develops which the Department of Transportation regards as inimical to fair competition, the holder and the Department of Transportation will consult and will use their best efforts to agree upon modifications satisfactory to the Department of Transportation and the holder.

This permit shall be effective on September 21, 2001, and shall terminate five years thereafter. However, this permit shall terminate upon the dissolution or liquidation of the holder to which it was issued. Authority under this permit shall be subject to termination at any time if the authority to conduct flight operations to and from the holder's homeland to any U.S. carrier authorized by the United States is denied, canceled, or unreasonably

restricted; provided, however, that if during the period this permit is effective, the operation of the foreign air transportation authorized become the subject of any treaty, convention, or agreement to which the United States and the holder's homeland are or shall become parties, this permit shall continue in effect during the period provided in such treaty, convention, or agreement.

The Department of Transportation has executed this permit and affixed its seal on **July 31, 2001**.

By:

SUSAN MCDERMOTT
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

FOREIGN AIR CARRIER CONDITIONS OF AUTHORITY

In the conduct of the operations authorized, the holder shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are:

(a) based on its operations in international air transportation that, according to the contract of

carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or

(b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States.

In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;

- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
- (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- (10) If charter operations are authorized, comply (except as otherwise provided in the applicable bilateral agreement) with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code (formerly the Federal Aviation Act of 1958, as amended).

