

Order 97-11-8

Served November 6, 1997



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

Issued by the Department of Transportation
on the 6th day of November, 1997

Joint Application of

**AMERICAN INTERNATIONAL AIRWAYS, INC.
and
KITTY HAWK AIRCARGO, INC.**

for an exemption from the provisions of
49 U.S.C. 41105

Docket OST-97-3015

ORDER GRANTING EXEMPTION

Summary

By this order, we exempt American International Airways, Inc. ("AIA") and Kitty Hawk Aircargo, Inc. ("Kitty Hawk") from the provisions of section 41105 of Title 49 of the United States Code ("the Statute"), subject to certain conditions.

Background

On September 3, 1997, in accordance with the provisions of section 204.5 of our rules (14 CFR 204.5) that require air carriers to notify us of substantial changes affecting their operations, Kitty Hawk, located in Dallas, Texas, and AIA, based in Ypsilanti, Michigan, advised the Department that they proposed to enter into an agreement and plan of merger whereby Kitty Hawk's parent, Kitty Hawk, Inc. ("KHI"), would acquire all of the outstanding common stock of AIA and other

companies under the ownership and control of Mr. Conrad A. Kalitta (“the Kalitta companies”).¹ The agreement provides that the Kalitta companies, which would become wholly owned subsidiaries of KHI, would continue to be operated independently of Kitty Hawk until merger plans are finalized. On September 9, the Department asked the two parties to furnish certain information on the forthcoming transaction and on Kitty Hawk’s and AIA’s continuing fitness.

De Facto Transfer Application

On October 15, 1997, AIA and Kitty Hawk jointly filed an application in Docket OST-97-3011 seeking the Department’s approval under section 41105 of the Statute of the *de facto* transfer² of the economic authorities held by AIA to AIA under the ownership of KHI.³ A partial response to

¹ The Kalitta companies consist of the following: Kalitta Flying Services, Inc., a Part 298 air taxi operator; American International Travel, Inc., which arranges travel services for AIA employees; Flight One Logistics, Inc., a provider of air cargo transport logistics services to shippers; and O.K. Turbines, Inc., which provides aircraft maintenance services to AIA and other airlines. The Kalitta companies also own a 60 percent interest in American International Cargo, Inc., based in Phoenix, Los Angeles and Honolulu, which provides freight forwarding services between the continental U.S. and Hawaii, among the Pacific islands, and to the Pacific rim.

² The Department has held that “[a] stock acquisition resulting in common control of two carriers having international route authority constitutes a *de facto* certificate transfer subject to section 401(h).” [Former section 401(h) of the Federal Aviation Act was recodified as section 41105 of the Statute.] *Federal Express Corporation and The Flying Tiger Line, Inc.*, Order 89-3-21, p. 2, note 2. *Also see, AMR Eagle, Inc. and Executive Air Charter, Inc.*, Order 90-2-1, January 24, 1990; and *Texas Air-TWA Acquisition Case*, Order 85-8-25, August 9, 1985, pp. 5-6.

³ Kitty Hawk holds an all-cargo air transportation certificate under section 41103 of the Statute. (That certificate was originally issued in the name “Kitty Hawk Air Cargo, Inc.” by Order 89-4-15 on April 7, 1989. By Order 89-8-38, dated August 23, 1989, the certificate was reissued in the name “Kitty Hawk Aircargo, Inc.” and made effective. By Order 92-12-13, dated December 10, 1992, Kitty Hawk’s certificate was reissued in the name “Postal Air, Inc.,” and by Order 93-1-25 on January 22, 1993, the certificate was reissued again in the name Kitty Hawk Aircargo, Inc.) The carrier was also issued a certificate under section 41102 of the Statute (Order 93-7-15, served July 8, 1993) authorizing it to engage in foreign scheduled air transportation of property and mail between Miami, Florida, and Santo Domingo, Dominican Republic (Route 642).

AIA was originally issued certificates to engage in interstate and foreign charter air transportation in the name “Commercial Airlines, Inc.” by Order 80-10-122, served October 24, 1980. These charter certificates were reissued in the name “American International Airways, Inc.” by Order 81-11-78 on November 12, 1981. By Order 83-7-83, July 20, 1983, AIA was issued a certificate authorizing it to engage in interstate air transportation of persons, property and mail. In 1984, AIA ceased operations under its certificates following a Chapter 11 filing. Subsequently, the carrier was acquired by Mr. Conrad A. Kalitta, who owned and operated Connie Kalitta Services, Inc. (“CKS”) which operated large aircraft under interstate and foreign all-cargo certificate authority, and small aircraft under Part 298 air taxi authority. Following the acquisition, by Order 89-5-40, dated May 18, 1989, we found AIA fit to resume operations under its own name and under the trade name “Connie Kalitta Flying Service,” and reissued the interstate air transportation certificate originally issued to AIA by Order 83-7-83. By Order 91-2-43, dated February 27, 1991, we made the latter certificate effective for air transportation of property and mail only,

our information request of September 9 was included with this submission, with the balance of the information filed on October 31.

The applicants state that KHI will acquire the Kalitta companies for \$20 million in cash consideration and 5,099,150 shares of KHI common stock. The cash portion of the purchase price is to be raised by a public offering of 4.1 million shares of KHI stock. KHI also intends to offer an aggregate principal amount of \$340 million in senior secured notes, the proceeds from which will be used principally to refinance the carriers' debt and to purchase three B-747 aircraft. Following the acquisition, Mr. M. Tom Christopher, Chairman and Chief Executive Office of KHI, will own approximately 30.6 percent of KHI's stock, and Mr. Kalitta, who will be the Vice Chairman of KHI and President of AIA, will own approximately 27.5 percent. No other individuals are expected to hold 10 percent or more of the company's stock. KHI's board of directors will be composed of seven members -- Mr. Christopher and three individuals of his choosing, and Mr. Kalitta and two members of his choosing. The carriers declare that, otherwise, each company's current personnel will remain unchanged.

and cancelled a redundant interstate charter certificate issued to AIA by Order 81-11-78 and the interstate all-cargo certificate issued to CKS by Order 84-4-35. By Order 91-4-40, served April 23, 1991, we cancelled the foreign charter certificates issued to AIA and CKS by Orders 81-11-78 and 84-11-45, respectively. AIA thence provided interstate and foreign cargo air transportation with large aircraft under its own name and under the trade name "Connie Kalitta Flying Service," and CKS operated cargo flights separately under Part 298 with small aircraft. By Order 91-5-23, dated May 22, 1991, AIA changed the trade name used in operations conducted under its interstate scheduled air transportation certificate (previously reissued by Order 91-2-43) from "Connie Kalitta Flying Service" to "Connie Kalitta Services, Inc." By Order 93-4-36, dated April 16, 1993, AIA was found fit to engage in passenger-carrying operations, and, by Order 93-5-22, dated May 13, 1993, its interstate scheduled certificate (previously reissued by Order 91-5-23) was made effective for the transportation of persons. In addition, AIA holds the following authorities to engage in foreign air transportation: (1) a five-year experimental certificate authorizing AIA to provide cargo air service between Miami and Manaus, Sao Paulo, Recife and Rio de Janeiro, Brazil, via Bogota, Colombia (Order 96-6-12); (2) a certificate authorizing AIA to engage in cargo air transportation between points in the U.S. and points in Australia, New Zealand, Taiwan, and Hong Kong (Order 95-9-23); and between points in the U.S. and points in Costa Rica, Colombia, Belize, El Salvador, Guatemala, Honduras, Nicaragua, and Panama (Order 95-9-23, amended by Order 97-10-8); (3) exemption authority to provide cargo air service between Miami and Quito and Guayaquil, Ecuador, including authority to integrate these services with its existing authority to serve Colombia, and allocation of three narrow-body cargo frequencies (Order 97-8-20); (4) exemption authority to provide cargo air service between the co-terminal points Honolulu and Guam and Jakarta, Indonesia, via the intermediate point Melbourne, Australia (Order 96-7-42); (5) a statement of authorization for long-term wet-lease service to Aerolineas Argentinas, effective September 12, 1997, for one year; and (6) statements of authorization for long-term wet-lease services to TACA, NICA, and AVIATECA, effective April 16, 1997, for one year. AIA notes that it has two applications pending before the Department for additional foreign authority (to Venezuela (Docket 49577) and to Singapore, Jakarta and Bangkok (Docket OST-97-2765)), and requests that its *de facto* transfer application in Docket OST-97-3011 include these and any other authorities subsequently requested or granted. By Order 97-11-2, the Department granted AIA's requests for certificate authority to serve Singapore and Indonesia, and dismissed its application to serve Thailand.

The applicants state that the present independent operations of Kitty Hawk (wet-lease and ad-hoc air cargo charters and air logistics services) and AIA (scheduled interstate and foreign air freight services, and cargo and passenger charters) will continue, although certain functions, such as purchasing and maintenance, will be centralized to save costs. The carriers maintain that they have no present plans to expand their combined fleet or to cease any current operations; however, certain Stage 2 aircraft may be replaced with Stage 3 aircraft. Kitty Hawk presently has a fleet of 24 aircraft, including twelve B-727s, five DC-9Fs and seven Convair 600/640s. AIA has a 55-aircraft fleet, composed of twenty DC-8s, ten L-1011s, nine B-747s, and sixteen B-727s that it agreed to sell to Kitty Hawk in September 1997. While the B-727s are phased in with Kitty Hawk's fleet over the next two years, AIA will continue to operate them on behalf of Kitty Hawk pursuant to an operating agreement. In addition, AIA has two B-747s and one L-1011 on order.

Exemption Application

The applicants also filed, in Docket OST-97-3015, a joint application for an exemption from section 41105 to the extent necessary to allow KHI and AIA to complete the acquisition pending the Department's action on their *de facto* transfer application. In support of their exemption request, Kitty Hawk and AIA state that, under the Securities and Exchange Commission's Regulation S-X, their S-1 registration statement will become stale on November 12, which necessitates the closing of the acquisition transaction before that date. They declare that the closing is scheduled to occur on November 10, and request action by the Department on their exemption request by November 7.

Kitty Hawk and AIA assert that there are no anticompetitiveness issues involved here since the air services provided by the two carriers do not overlap. In addition, the applicants declare that they have complied with the filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act and have been granted an early termination of the required waiting period, indicating that the Department of Justice and the Federal Trade Commission have not identified any significant competitive issues requiring further review. The petitioners also point out that, since they have pledged to operate independently at least until the Department has ruled on the *de facto* transfer application, the acquisition could be reversed should the Department ultimately determine that approval of the *de facto* transfer was not in the public interest. Moreover, the carriers note that expeditious approval of exemptions in such circumstances is consistent with the Department's past practice.⁴

No answers to the exemption application have been received.

⁴ See *Pan Am Corporation and Carnival Air Lines, Inc.*, Order 97-9-3, September 4, 1997, and *Federal Express Corporation and The Flying Tiger Line, Inc.*, Order 89-1-60, January 31, 1989.

Decision

We will grant the request of Kitty Hawk and AIA for an exemption from the provisions of section 41105 pending our ruling on their request for a *de facto* transfer of AIA's economic authorities, subject to the condition that Kitty Hawk and AIA will remain separate and independently operated corporations until such a ruling has been made. Based on our preliminary review of the documentation underlying the applicants' proposed combination, we have not identified any provisions or transactions that would adversely affect either carrier's fitness or that would bar our eventual approval of the *de facto* transfer of AIA's economic authorities. Moreover, as the applicants note, where it is not contrary to the public interest, our practice has been to allow scheduled business transactions to go forward pending completion of all applicable regulatory processes.⁵ In this instance, Kitty Hawk and AIA have promised that their operations will not be merged prior to the Department's ruling on the *de facto* transfer issue; therefore, should we find cause to deny that request, KHI could divest itself of the Kalitta companies. We conclude that allowing the acquisition to close with a "keep-separate" condition pending our decision on the transfer will not impede the carriers' merger plans yet will prevent the formation of an irreversible situation.

ACCORDINGLY,

1. We exempt American International Airways, Inc., and Kitty Hawk Aircargo, Inc., from the provisions of section 41105 of the Statute, subject to the condition that American International Airways, Inc., shall be maintained as a separate corporation.
2. This authority shall be effective until 90 days after the Department issues its final order on the joint application of American International Airways, Inc., and Kitty Hawk Aircargo, Inc., in Docket OST-97-3011 for approval of a transfer of route authority under section 41105 of the Statute.
3. We may amend, modify, or revoke this order at any time and without hearing.
4. We will serve a copy of this order on the persons listed in Attachment A.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

⁵ Order 89-1-60, p. 4, Order 97-9-3, p. 3.

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