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Order 2000-11-1



UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, DC

Issued by the Department of Transportation  
on the 2nd day of November, 2000

Served: November 2, 2000

In the matter of  
  
U.S.-Ukraine Third-Country  
Code-Share Opportunities

Docket OST-2000-7784 - 7

FINAL ORDER

SUMMARY

By this order we make final our tentative decision in Order 2000-8-11 to select American Airlines, Inc., to serve Kiev, Ukraine, via Zurich, under a third-country code-share arrangement with Swissair, and to allocate it 3.5 weekly frequencies for that service.

BACKGROUND

Under the U.S.-Ukraine Air Transport Agreement, up to four U.S. carriers may be designated for combination or code-share service in the U.S.-Ukraine market, and collectively may operate up to 18 weekly frequencies.<sup>1</sup> Northwest Airlines, United Air Lines, Delta Air Lines, and Trans World Airlines (TWA) are the four U.S. carriers now designated. In addition to the designation limitations, third-country code-share authorizations are limited under the agreement to service to two Ukraine points, Kiev and Odessa, via a total of four European intermediate points, up to a total of four Europe-Ukraine city-pair markets.

By Order 2000-8-11, we described the circumstances under which one carrier designation and one third-country code-share authorization became available for reallocation to other carriers. Specifically, we noted that TWA's Ukraine authority had expired and its designation was dormant, and that Delta had ceased one of its authorized third-country code-share services.

<sup>1</sup> Under the U.S.-Ukraine aviation agreement, frequencies operated under code-share arrangements with third-country carriers count as one-half frequency.

American applied for both the available designation and the third-country code-share authorization. United applied only for the available third-country code-share authorization, since it is already designated and serving the Ukraine market. By Order 2000-8-11, the Department tentatively selected American to serve Kiev under a code-share arrangement with Swissair, and tentatively allocated it 3.5 weekly frequencies to perform that service. Objections to the show-cause order were due August 17, 2000. Answers to the objections were due August 22, 2000.

## **RESPONSIVE PLEADINGS**

United and TWA filed objections to the Department's tentative decision. American filed a reply. United and TWA filed answers to American's reply.<sup>2</sup>

TWA states that it was unable to implement its previously authorized code-share services with Ukraine International Airlines because there was a Computer Reservation System (CRS) automation limitation that prevented it from being able to communicate with Ukraine International's CRS. TWA further states that as a result of the incompatibility, the code-share agreement between TWA and Ukraine International lapsed, as did TWA's underlying exemption authority. TWA states that the parties have now resolved those issues and have entered into a new code-share agreement for services to Kiev via London and Paris.<sup>3</sup> In these circumstances, TWA urges the Department to reconsider its tentative award to American and to consider whether U.S. bilateral interests would be better served by allowing TWA to continue to hold its current designation to provide services to Ukraine on a code-share basis with Ukraine International Airlines.

United states that, based on TWA's pleading, TWA is now prepared to use its designation, that its designation, therefore, would not be dormant, and thus the designation needed to support the American/Swissair service is not available for reallocation. United, therefore, urges the Department to reverse its tentative decision and to award the available third-country code-share opportunity to United for its proposed code-share service to Odessa. United maintains that because TWA is now prepared to use its designation, by also granting United's request, the Department will achieve its goal of additional U.S. carrier service to Kiev, as well as the recognized benefit of a U.S. carrier presence in Odessa, providing travelers access to another Ukrainian city.

American states that the Department should dismiss TWA's attempt to resurrect a code-share arrangement with Ukraine International Airlines that TWA never implemented during the two years it held authority to do so. American further states that to allow TWA to enter this proceeding after the Department has issued its tentative decision choosing between two timely applicants, would violate any notion of orderly decision making, and would be contrary to the public interest in securing prompt utilization of valuable, limited-entry rights. American states

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<sup>2</sup> United's and TWA's pleadings were each accompanied by a motion for leave to file an otherwise unauthorized document. In the interest of a complete record, we will grant the motions.

<sup>3</sup> On August 18, 2000, TWA filed an application for exemption authority and for a statement of authorization to code share with Ukraine International Airlines between St. Louis and New York, on the one hand, and Kiev, Ukraine, on the other. See Docket OST-2000-7826.

that when it filed its application for U.S.-Ukraine code-share designation and allocation of frequencies in April, American highlighted that it was seeking to succeed to TWA's dormant authority and served TWA both by fax and mail. Yet, TWA remained totally silent, responding only after the Department issued its show-cause order selecting American. American further argues that United's interest in reinstating TWA's designation is self-serving and aimed only at blocking American's competitive entry.

In its further response, TWA states that its determination not to intercede in the proceedings reflected that it was not in a position to claim accurately that it was prepared to implement a code-share arrangement that had already lapsed. TWA urges the Department to use both bilateral and extra-bilateral means to achieve a way to ensure that smaller carriers, such as TWA, will be able to compete in a consolidated airline environment.

United, in its further response, reasserts and elaborates on its previously stated position that if the Department finalizes its tentative selection of American to receive both the fourth designation and the fourth code-share opportunity, neither United nor TWA will be able to implement their proposed services, whereas if American is authorized, only one additional service will be available to the public.

## **FINAL DECISION**

We have decided to make final our tentative decision in Order 2000-8-11 to select American Airlines to serve Kiev, Ukraine, via Zurich, under its code-share arrangement with Swissair, and to allocate American 3.5 frequencies for that service.

No U.S. carriers currently operate services in the U.S.-Ukraine market with their own aircraft. Therefore, the code-share rights under the U.S.-Ukraine aviation agreement provide valuable opportunities for U.S. carriers to introduce service, establish a competitive presence, and develop and serve the market. Until recently all of the code-share authorizations were being used fully. As a result of TWA's expired authorizations and Delta's change in service, opportunities have become available that now enable additional service by U.S. carriers.<sup>4</sup>

U.S.-Kiev is the largest U.S.-Ukraine market. It is the capital of Ukraine and a major government, business, and cultural center. Currently, three U.S. carriers offer third-country code-share service to Kiev. Northwest serves with KLM via Amsterdam, United serves with Lufthansa via Frankfurt, and Delta serves with Air France via Paris.<sup>5</sup> As we noted in our show-cause order, the selection of American would maximize the number of competitors in the market and would benefit consumers by offering daily service with nonstop-to-nonstop U.S.-Ukraine connections to ten U.S. cities. Given the developmental nature of the market, we tentatively concluded that the benefits of American's broad daily service offer greater public benefits in this case than United's proposal to expand its current Ukraine operations to operate less than daily service in the much smaller U.S.-Odessa market.

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<sup>4</sup> Although American had also raised the issue of reallocating Delta's authorization to serve Ukraine, it did so only as an alternative to reallocation of TWA's dormant designation. As TWA's authorization is available, there is no need to address American's arguments with respect to Delta's Ukraine authority.

<sup>5</sup> These carriers collectively now operate nine weekly frequencies in the market.

We have carefully reviewed the objections to our show-cause order. Neither TWA nor United has presented any new evidence or arguments that persuade us to modify our tentative decision. Moreover, no party has disputed the public benefits we tentatively found in connection with American's service.

Rather, TWA maintains that it is now ready to use its long-dormant designation and suggests that the Department should reconsider its tentative decision. We disagree. As TWA states, it no longer holds underlying economic authority to serve Ukraine or a current statement of authorization for its code-share agreement. TWA neither sought to renew its underlying authority, nor updated the state of its relationship with Ukraine International in response to American's application, an application that clearly noted the dormancy of TWA's designation. TWA has not received a statement of authorization to implement its new code-share agreement with Ukraine International. The other applicants have approved statements of authorization. In these circumstances, TWA's pleading and subsequent separately filed application need not be considered for the available U.S.-Ukraine service designation at issue in this proceeding.

Given the circumstances of this case, consideration of TWA's late-filed application would be unfair to the other parties and would further delay a decision in this case. Rather, it is in the public interest to proceed to a final decision. The rights at issue are valuable and are available now, and American is in a position to use them immediately. We stated in Order 2000-8-11, and reiterate above, the benefits that would derive from the introduction of American's services. Against this background, and in the interest of making full use of the available bilateral opportunities as quickly as possible, we do not find in the circumstances presented that it is in the public interest, or consistent with the integrity of the selection process, to delay the proceeding pending consideration and action on TWA's pending application for a statement of authorization at this late stage of the proceeding.

That said, we fully support TWA's plans to operate code-share services with Ukraine International. We would be prepared to authorize that service on an extrabilateral basis should TWA and Ukraine International successfully complete the regulatory processes necessary for authorization of the services, and should the Government of Ukraine specifically advise us that it would be prepared to approve the services without counting them against the designation limitations.

We are also unpersuaded by United's arguments to reverse our tentative decision. United's position is premised on TWA retaining its designation for U.S.-Ukraine services. That is not the case. While United's proposed Odessa service would offer limited service to another Ukraine city, we maintain our view that those benefits do not outweigh the public benefits of providing a fourth carrier service in the Kiev market, offering daily service with larger aircraft and nonstop-to-nonstop connections to ten U.S. cities.

## ECONOMIC AUTHORITY

As discussed in our show-cause order, we will grant American exemption authority to serve the U.S.-Kiev market.<sup>6</sup> With respect to the statement of authorization for the proposed code-share services, American and Swissair hold a blanket statement of authorization and have filed the required notice for expansion of their service into additional markets.<sup>7</sup>

### ACCORDINGLY,

1. We make final our tentative findings and conclusions in Order 2000-8-11;
2. We grant American Airlines, for a period of two years, exemption authority under the provisions of 49 U.S.C. 40109 to the extent necessary to provide scheduled foreign air transportation of persons, property, and mail between points in the United States and Kiev, Ukraine, and to integrate this authority with its existing certificate and exemption authority;
3. We allocate American Airlines 3.5 weekly frequencies to perform its authorized code-share operations in the U.S.-Kiev market;
4. The frequencies allocated American are effective immediately and shall remain in effect indefinitely, provided that the carrier continues to hold the necessary underlying economic authority to serve the authorized market and a third-country code-share authorization for the authorized services;
5. The frequency allocation granted in ordering paragraph 3, above, will expire and the frequencies will revert automatically to the Department if they are not used for a period of 90 days;<sup>8</sup>
6. The route integration authority granted American is subject to the condition that any service provided under this exemption shall be consistent with all applicable agreements between the United States and the foreign countries involved. Furthermore, (a) nothing in the award of the route integration authority requested should be construed as conferring upon American rights (including fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless American notifies the Department of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights;

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<sup>6</sup> As also noted in our show-cause order, as a result of our decision here, we will withdraw the designation of TWA and designate American as the fourth carrier authorized to serve Ukraine under the aviation agreement.

<sup>7</sup> The blanket statement of authorization requires the carriers to provide at least 30 days' notice to the Department of their intent to provide code-share services in limited-entry markets and may not commence such services unless and until the Department has completed any necessary carrier selection procedures. On August 17, 2000, Swissair filed the required 30-day notice in Docket OST-99-5944. Our final decision here completes the carrier selection process.

<sup>8</sup> As American and Swissair have stated that they are prepared to commence their proposed services immediately, the 90-day dormancy period will begin on the date of service of this order.

and (b) should there be a request by any carrier to use the limited-entry route rights that are included in American's authority by virtue of the route integration exemption granted here, but that are not then being used by American, the holding of such authority by route integration will not be considered as providing any preference for American in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue;

7. We grant all motions for leave to file otherwise unauthorized documents in this docket;

8. We may amend, modify, or revoke the authority granted by this order at any time at our discretion without notice or hearing;

9. To the extent not granted, we deny all requests in the captioned docket; and

10. We will serve this order on American Airlines, Inc.; United Air Lines, Inc.; Trans World Airlines, Inc.; the Ambassador of Ukraine in Washington, DC; the Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration (AFS-220).

By:

**SUSAN MCDERMOTT**  
Deputy Assistant Secretary for  
Aviation and International Affairs

(SEAL)

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