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Order 2001-8-16



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

Issued by the Department of Transportation
on the 17th day of August, 2001

Served: August 17, 2001

In the matter of

2001 CHINA CODE-SHARE POINTS CASE

Docket OST-2001-10172-3

FINAL ORDER

Summary

By this order we make final our tentative findings and conclusions set forth in Order 2001-7-10, and select the Chinese cities Kunming, Changsha, Dalian, and Chongqing as four of the nine available Chinese points for use by U.S. carriers for code-share operations with their Chinese code-share partners.¹ We also make final our tentative decision to permit American Airlines and Delta Air Lines to choose one additional code-share point each from those requested in their respective applications with notification of the selected cities within five calendar days from the service date of this order.

Background

Under the 1999 U.S.-China Protocol, U.S. carriers may offer code-sharing services to additional China points on a phased-in basis, with no limits on the number of U.S. carriers that can operate these code-share services but with limits on the number of Chinese points to be served. Effective April 1, 2000, through March 31, 2001, U.S. carriers could operate code-share services to a total of six points in China in addition to those served on gateway-to-gateway services. On September 15, 2000, the United States selected Chengdu, Nanjing, Qingdao, Shenyang, Xiamen, and Xian as the six additional code-share points. Effective April 1, 2001 through March 31, 2002, U.S. carriers can serve an additional nine Chinese points for their code-share services, and beginning April 1, 2002, U.S. carriers can serve an additional five points.

By Order 2001-7-10, the Department selected the Chinese cities of Wuhan, Fuzhou, and Guilin, as three of the nine 2001 additional code-share only points for U.S. carrier U.S-China services. The Department also tentatively selected Dalian, Kunming, Changsha, and Chongqing as four additional code-share only points and tentatively determined that American and Delta should each be permitted to select one additional point, thus completing the nine available points

¹ The Department, by final action, selected Wuhan, Fuzhou, and Guilin as three of the available nine Chinese points in Order 2001-7-10.

available as of April 1, 2001. Objections to the Department's tentative decision were due by July 27, 2001, and answers to objections by August 1, 2001.

Responses to Order 2001-7-10

No objections were filed to the Department's tentative decision in Order 2001-7-10. Delta filed comments, noting the important new code-share benefits that all three U.S. carriers would receive and urging the Department to make final the tentative portion of Order 2001-7-10.

Decision

We have decided to make final our tentative findings and conclusions set forth in Order 2001-7-10. As we stated in that order, we believe, given the nature of our aviation agreement with China, that it is important to maximize use of the code-share opportunities, and that the public interest will best be served by our selection of code-share only points that will enhance the likelihood of service and competition in the market. We note that no party has objected to our proposed selection of code-share points.

The U.S.-China Protocol permits all U.S. carriers with a Chinese carrier code-share partner to serve the points selected for code-share only services. Thus, even though all of the carriers to this proceeding did not apply for all of the points we have selected, we are granting all carriers the necessary regulatory authorities required to serve the Chinese points selected in this order (Dalian, Kunming, Changsha, and Chongqing). Furthermore, once American and Delta each name the additional point of their choice, we intend to grant all parties the necessary authority to serve those selected points as well. To the extent that the applicants in this case applied for points not selected by the U.S. government, we deny the balance of the applications.

ACCORDINGLY,

1. We determine that the Chinese cities of Dalian, Kunming, Changsha, and Chongqing should be selected as four additional code-share only points for U.S. carrier U.S.-China services;²
2. We grant, subject to the attached conditions, American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., and China Eastern Airlines Corporation Limited an exemption to engage in foreign scheduled air transportation of persons, property, and

² We will request the Department of State to forward the selection of Dalian, Kunming, Changsha, and Chongqing as additional code-share points to the appropriate Chinese authorities.

mail between the United States and Dalian, Kunming, Changsha, and Chongqing, People's Republic of China;³

3. We grant, subject to conditions, China Eastern Airlines Corporation Limited, Air China International Corp., and China Southern Airlines Company Limited Statements of Authorization to display their respective U.S. carrier code-share partners' codes on flights between their respective Chinese gateways and Dalian, Kunming, Changsha, and Chongqing;

4. The exemption authority granted in ordering paragraph two is effective immediately and will remain in effect through July 17, 2003, for American Airlines, Inc., Delta Air Lines, Inc. and Northwest Airlines, Inc., and through July 17, 2002, for China Eastern Airlines Corporation Limited;⁴

5. The Statements of Authorization granted in ordering paragraph 3 are effective immediately and will remain in effect indefinitely, subject to the following conditions:

(a) The Statements of Authorization will remain in effect only as long as (i) American and China Eastern; Delta and China Southern; and Northwest and Air China continue to hold the necessary underlying authority to operate the code-share services at issue; and (ii) the code-share agreements providing for the code-share operations remain in effect.

(b) American and/or China Eastern, Delta and/or China Southern, or Northwest and/or Air China must promptly notify the Department (Office of International Aviation) if the code-share agreement providing for their respective code-share operations is no longer effective or if the carriers decide to cease operating all or a portion of the approved code-share services.⁵ (Such notice should be filed in Docket OST-2001-10172.)

(c) The code-sharing operations conducted under this authority must comply with 14 CFR 257 and any amendments to the Department's regulations concerning

³ We note that China Eastern applied for exemption authority to serve between the United States and Shanghai/Beijing and beyond to named points. China Eastern states in its application that carriers selected by the Government of China are authorized to operate to the United States from any point or points in China. We granted China Eastern exemption authority to the extent necessary to permit it to hold out services between the United States and Dalian, Kunming, Changsha, and Chongqing. To the extent that China Eastern intends solely to display American's code on China Eastern's domestic flights between Beijing and Shanghai and the interior China points named above, China Eastern already holds the necessary underlying economic authority in its foreign air carrier permit (Order 92-11-7) for those services, subject to its holding the Statement of Authorization under 14 CFR Part 212 that we have granted it here.

⁴ For administrative convenience, we have made the exemption authority awarded here coextensive with the exemption awards granted in Order 2001-7-10.

⁵ We expect this notification to be received within 10 days of such non-effectiveness or of such decision.

code-share 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 the computer reservations 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; that the passenger liability of the operating carrier be unaffected; and that the operating carrier shall not permit the code of its U.S. code-sharing partner to be carried on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition.

(d) The authority granted here is specifically conditioned so that neither American nor China Eastern, neither Delta nor China Southern, and neither Northwest nor Air China shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions; and

(e) The authority granted here is further conditioned so that:

(i) neither American Airlines, Inc. nor China Eastern Airlines Corporation Limited shall give any force or effect to any exclusivity provision in their code-share agreement (Article 14 of the Codeshare Agreement dated December 17, 1997); and (ii) approval of the statement of authorization for Northwest Airlines, Inc. and Air China International Corp. precludes the carriers from exercising the exclusivity provisions (section 10) of the commercial cooperation agreement, dated May 12, 1998, to the extent that they would prevent Northwest and Air China from entering into cooperative service arrangements with U.S. and Chinese air carriers that have not been designated to provide combination services in the U.S.-China market;⁶

6. We will authorize American Airlines, Inc. and Delta Air Lines, Inc. to select one additional Chinese city for U.S.-China code-share service from the points included in their respective applications, and require American and Delta to make that selection within five calendar days from the date of service of this order and to serve the Department and all parties to this proceeding with notification of the selection;⁷

⁶ We note that the code-share arrangement between Delta Air Lines, Inc. and China Southern Airlines Limited did not include provisions regarding exclusive dealings between the code-share parties. Should the parties subsequently decide to amend their code-share agreement or any other agreement between them to include any provision relating to an exclusive arrangement between the parties regarding their code-share services, that amended language must first be submitted for consideration by the Department.

⁷ Once the Department has received notification of the selected Chinese cities by American and by Delta, we will, *sua sponte*, grant the parties to this proceeding the necessary regulatory authority to serve the cities and will request the Department of State to forward such selection(s) as additional code-share points to the appropriate Chinese authorities.

7. We may amend, modify or revoke the authority granted above without hearing at our discretion;

8. To the extent not granted, we deny the balance of the applications in Docket OST-2001-10172; and

9. We will serve this order on American Airlines, Inc.; Delta Air Lines, Inc.; Northwest Airlines, Inc.; Air China International Corp.; China Eastern Airlines Corporation Limited; China Southern Airlines Company Limited.; the Ambassador of the People's Republic of China in Washington DC; the Federal Aviation Administration; and the U.S. Department of State (Office of Aviation Negotiations).

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).

