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Order 2001-12-10



**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 December, 2001

SERVED: December 17, 2001

Application of

AIR 2000 LIMITED

for a statement of authorization under 14 CFR 212 of the
Department's regulations

Docket OST-2001-11181

ORDER

Summary

In this order we are granting a request by Air 2000 Limited, a foreign air carrier of the United Kingdom, for a statement of authorization under 14 CFR Part 212 to perform a series of Fifth Freedom passenger charter flights.

Application

By application filed November 16, 2001, Air 2000 Limited (Air 2000), a foreign air carrier of the United Kingdom, requests a statement of authorization under Part 212 to perform a total of 75 roundtrip Fifth Freedom passenger charter flights between Chicago and various points in the Caribbean and Mexico, on behalf of Apple Vacations West, December 20, 2001-April 8, 2002.¹

In support of its request, Air 2000 states that the United Kingdom would grant similar authority to U.S. carriers.

Responsive pleadings

Various pleadings were filed in response to Air 2000's request. North American Airlines, Inc.; the Airline Pilots Association, International; Miami Air International, Inc.; Omni Air International, Inc.; the National Air Carrier Association, Inc.; and Sunworld International Airlines, Inc. (hereafter referred to as "the objectors") filed answers opposing Air 2000's request. Apple Vacations West (Apple) filed in support of Air 2000's request. Air 2000 filed various responsive pleadings.

¹ Foreign Air Carrier Licensing Division (X-45) file 2001-420.

The objectors argue that (1) insufficient reciprocity exists with the United Kingdom to warrant approval of Air 2000's request; (2) comparable commercial opportunities are not available to U.S. carriers for large turnaround charters services between the United Kingdom and third countries; (3) the U.K. has a "right of first refusal" on all U.S. carrier Fifth Freedom passenger charter requests,² and in any event would not allow U.S. carriers to operate a program of more than 10 Fifth Freedom charters during any traffic season; (4) Air 2000 operates very limited Third and Fourth Freedom services between the United Kingdom and the United States; (5) Air 2000 is "dumping" capacity in the U.S. during the off-season in Europe; (6) the number and regularity of the flights proposed by Air 2000 represent Seventh Freedom scheduled service not provided for under our bilateral aviation agreement with the United Kingdom; (7) approval of Air 2000's request will have a negative impact on U.S. carriers at a time when the U.S. government is trying to preserve the viability of the U.S. aviation industry; and (8) U.S. carrier lift is available to conduct the proposed charter program.

In responding to the objectors, Air 2000 states that (1) sufficient reciprocity exists to warrant approval of its request as demonstrated by a letter from the U.K. Department for Transport;³ (2) no objecting carrier has complained about suffering from the United Kingdom's first refusal policy, or has cited a U.K. denial of one of that carriers charter requests; (3) under Department regulations its proposed charter program is a Fifth Freedom charter program, and to treat the program as Seventh Freedom scheduled service as the objectors suggest, for the purpose of denying the program because it is not covered under an existing bilateral aviation agreement, would be illogical, unfair and inconsistent with the Department's rules; (4) the overwhelming majority of its U.S. operations involve Third and Fourth Freedom services; (5) approval of its request would not adversely effect the viability of U.S. carriers; and (6) approval of its request will allow Apple to use aircraft and services which best meet its needs and will benefit U.S. passengers with low cost transportation services.

In support of Air 2000's application, the tour operator Apple states that (1) it is also a U.S. carrier, albeit an indirect one, which conducts a large number of package tours utilizing both scheduled and charter carrier services;⁴ (2) historically, it has contracted for a majority of its lift from U.S. carriers, including some of the objectors, with only a handful of that lift being provided by foreign air carriers; (3) while it is sympathetic to the losses suffered by U.S. carriers following September 11, it too has seen a dramatic plunge in

² Specifically, NACA provided an email message from a representative of the U.K. Department for Transport stating that U.S. carriers seeking to conduct Fifth Freedom charters in U.K. markets must obtain non-objections from U.K. carriers before the U.K. will authorize such flights.

³ See December 10, 2001, letter to Air 2000, signed by the Assistant Director, International Aviation Negotiations, Department for Transport, stating that the 10 flight per season limit does not apply to U.S. carriers and that the U.K. accords U.S. reciprocity in return for Fifth Freedom charter grants to U.K. carriers by the U.S.

⁴ Apple states that 30% of its tour passengers are booked on scheduled service with a majority of the lift provided by U.S. carriers. Apple adds that annually it contracts tens of millions of dollars for U.S. carrier lift for its various programs.

revenues resulting from the significant downturn in traffic, and unlike the direct air carriers, is not receiving taxpayer funds or other financial support; (4) it disagrees with the objectors' view that its charter program constitutes unauthorized Seventh Freedom scheduled service, which if true, would suggest that every other tour operator operating similar track charters would be improperly engaging in unauthorized scheduled services; (5) since September 11 it has had to make difficult commercial decisions such as choosing which airline services best meet its needs at a time of declining traffic;⁵ and (6) we should not give U.S. carriers "first refusal" rights over foreign carrier charter requests.

Decision

We have decided to grant Air 2000's requests for statements of authorization under Part 212 to perform a total of 75 roundtrip Fifth Freedom passenger charter flights.

Under Part 212 we will grant a foreign air carrier a statement of authorization to conduct Fifth Freedom charters if the proposed operations meet the requirements of that part and are in the public interest. In considering the public interest, we look at a broad range of factors, including (1) reciprocity on the part of the applicant's homeland; (2) the extent of the applicant's reliance on Fifth Freedom operations in relation to its Third and Fourth Freedom services; (3) the needs of shippers and travelers; and (4) other factors which may be relevant in specific cases.

We find that Air 2000's request meets this standard, and that none of the respondents have presented any facts warranting denial of Air 2000's request.

In considering whether grant of a particular application is in the public interest, the primary factor we consider is reciprocity on the part of the applicant's homeland. In these instances, we had no statement on the record from any objecting party that the Government of the United Kingdom has denied any recent requests by U.S. carriers for authority to conduct Fifth Freedom charter operations. Nor did the objectors demonstrate persuasively that the U.K. authorities would not accord reciprocal rights to U.S. carriers in the future. In this regard, in order to clarify the U.K. position, given the information contained in the two documents received in the record from the U.K. Department for Transport, we have directly contacted the two officials who authored those documents. They have advised us that while they do require U.S. carriers to seek "non-objection" from U.K. carriers as part of their application process for Fifth Freedom charters, even if a U.K. carrier objected and stated that it could operate the flights in question, that would be only one factor the U.K. authorities would consider in acting on a U.S. carrier request. The U.K. officials further advised that they are aware that the U.S. has had a liberal policy with respect to U.K. carrier Fifth Freedom charter requests, and that this fact is also given decisional weight. They told us that, for the years 1998-2001, they had approved U.S. carrier requests to

⁵ Apple notes that its charter program with Air 2000 represents only 4% of Apple's charter lift requirements for the up-coming season, and should not be viewed as Air 2000 "dumping" seasonal capacity as alleged by the objectors.

operate 243 Fifth Freedom charters. Against this background we do not see a public interest basis to withhold this authority on grounds of reciprocity.⁶

We also do not see grounds to withhold the authority described above based on assertions that Air 2000 operates a limited number of Third and Fourth Freedom services, or otherwise places undue reliance on Fifth Freedom operations. As noted above, between November 2000 and October 2001, Air 2000 operated more than ten times as many Third and Fourth Freedom services as it did Fifth Freedom services (462 roundtrip Third/Fourth vs. a total of 37 Fifth Freedom charter flights). Against this background, it is clear that Air 2000 operates a significant number of Third and Fourth Freedom flights and does not place undue reliance on Fifth Freedom charter services. Nor does the record before us cause us to conclude that Air 2000 is “dumping” excess capacity in the U.S. market.

Similarly, we are not persuaded that the services at issue here are Seventh Freedom scheduled operations. We believe that Apple, the tour operator, has accurately characterized the program a Fifth Freedom Public Charter program consistent with the definition for such services in § 212.2 of our rules. In these circumstances, we do not find that the program raises issues cited by the objectors concerning Seventh Freedom scheduled service rights under our bilateral agreement with the United Kingdom.

While we sympathize with the current plight of U.S. carriers, including NACA members, we must not overlook the needs and concerns of the other parties affected by our decision, notably, the tour operator and the members of the traveling public. In that regard, we note the Department’s longstanding policy has been to give charterers the maximum flexibility possible to choose the airline services which best meet their needs. Apple has shown on the record why respecting its choice here will ultimately redound to the benefit of the public. Against this background, we see no persuasive basis that would cause us to intrude, on public interest grounds, on Apple’s choice of Air 2000. Nor, as here, where a foreign carrier’s Fifth Freedom charter application otherwise warrants approval under our public interest criteria, would we alter our longstanding policy against affording U.S. carriers “first refusal” privileges or regarding as in any way dispositive the availability of U.S. carrier lift to conduct the operations.

In view of the above, we find that grant of the requested statement of authorization described above is consistent with the public interest.

⁶ While the U.K. Government statements and practice on the application of the first refusal policy satisfy us that we can make an affirmative reciprocity finding we nevertheless would urge U.K. authorities formally to remove the first refusal element from U.K. charter regulations as it pertains to U.S. carriers.

ACCORDINGLY,

1. We grant Air 2000 Limited a statement of authorization under 14 CFR Part 212 to permit it to perform a total of 75 roundtrip Fifth Freedom passenger charter flights between Chicago and various points in the Caribbean and Mexico, on behalf of Apple Vacations West, Inc.;
2. The authority granted above is effective on the service date of this order and will remain in effect until April 15, 2002;
3. We may amend, modify or revoke the authority above at any time and without hearing; and
4. We will serve a copy of this order on Air 2000 Limited; North American Airlines, Inc.; the Airline Pilots Association, International; Miami Air International, Inc.; Omni Air International, Inc.; the Embassy of the United Kingdom in Washington, D.C.; the National Air Carrier Association, Inc.; Sunworld International Airlines, Inc.; Apple Vacations West, Inc.; the Department of State (Office of Aviation) and the Federal Aviation Administration (New York-IFO).

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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