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Order 2002-10-5



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

SERVED: October 3, 2002

Issued by the Department of Transportation
on the 3rd day of October, 2002

Application of

CONDOR FLUGDIENST GMBH

Docket OST-2002-13511

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

ORDER

Summary

In this order, we are denying a request by Condor Flugdienst GmbH (Condor), a foreign air carrier of Germany, for a statement of authorization under 14 CFR Part 212 of the Department's regulations to operate a 400 roundtrip flight fifth-freedom passenger charter program.

Application

By application filed August 8, 2002, Condor, a foreign air carrier of Germany, requests a statement of authorization under Part 212 to perform a total of 400 roundtrip fifth-freedom passenger charter flights between various cities in the U.S. Midwest and points in Mexico and Jamaica, on behalf of Apple Vacations West (Apple), during the period December 16, 2002, through April 27, 2003.¹ In support of its request, Condor states that Germany and the United States share a positive aviation relationship and that Germany has indicated its willingness to "grant similar applications lodged by U.S. carriers."

Responsive pleadings

The National Air Carrier Association, Inc. (NACA) and the Air Line Pilots Association, International (ALPA) filed answers in opposition to Condor's request. Condor and Apple filed replies, and Condor, NACA and Apple filed additional submissions.

NACA states that the proposed flights are seventh-freedom passenger operations, and notes that it has filed a petition for rulemaking (Docket OST-2002-11741), seeking to revise the Department's charter rules to provide certain protections to U.S. charter air

¹ Foreign Air Carrier Licensing Division (X-45) file 2002-315.

carriers. NACA states that based on the large number of flights proposed in Condor's application, Condor would clearly be placing undue reliance on fifth-freedom operations. It states that while these flights are styled as charters, they operate on a schedule that is just as frequent as scheduled service and serve the individual traveling public in the same manner as scheduled service. NACA further states that foreign carrier charters that are operated on such a high frequency only serve to further damage the U.S. charter industry. Finally, NACA states that "several NACA member airlines are fit, willing and able to fly this traffic."

ALPA incorporates by reference its comments filed in support of NACA's petition for rulemaking in Docket OST-2002-11741, and states that the proposed flights should be labeled seventh-freedom rather than fifth-freedom and should not be permitted unless the applicant can show that no U.S. carrier is willing and able to perform them.² ALPA further states its opposition to granting authority to a foreign carrier to perform large charter programs of this kind between the United States and points outside the carrier's homeland.

Condor in its reply states that this proceeding, involving a request to conduct seasonal charters, is not the appropriate forum to resolve the issues NACA has raised in its petition for rulemaking. Condor states that in the rulemaking proceeding it and other parties have shown why the Department should not change its policies on the grant of fifth-freedom charter authority to foreign carriers; and that such a change would be inconsistent with the Department's open-skies policies.³ Condor states that denial of its request would be contrary to the terms of the U.S.-Germany Open-Skies Agreement, which provides that the parties "shall extend favorable consideration to applications by airlines of the other contracting party to carry traffic not covered by this Part on the basis of comity and reciprocity." Condor further states that the Government of Germany routinely approves U.S. carrier operating requests, including wet leases to German carriers; and that reciprocity and past approvals for U.S. carriers warrant approval of its request here.⁴ In

² See comments of ALPA filed in support of NACA's petition, dated May 6, 2002, in Docket OST-2002-11741. Briefly, ALPA states in those comments that it supports NACA's view that the Department's definitions and procedures concerning fifth-freedom charters should be amended, and that the Department's approval of certain large charter programs is contrary to its longstanding policy of not granting seventh-freedom scheduled rights to foreign carriers.

³ See comments of Condor opposing NACA's petition, dated April 26, 2002, in Docket OST-2002-11741. Briefly, Condor states that if the Department adopts NACA's recommendations, the Department will be retreating from its support of liberalization as the cornerstone of U.S. aviation policy. Condor further states that if "economic balance" is scrutinized, there is a large category of traffic for which non-U.S. carriers are unable to compete because such arrangements are prohibited under FAA rules (wet leasing aircraft to U.S. carriers). Condor believes that NACA should be concerned lest foreign governments apply a strict reciprocity test with respect to such wet-lease services against U.S. carriers.

⁴ Condor provided a copy of a letter to the Department from Sabine Dannelke, Chief Negotiator Air Services, German Civil Aviation Authority, requesting that we approve Condor's application, and providing assurance "that the German Civil Aviation Authority is prepared and willing to give reciprocal treatment to U.S. carriers in similar cases." On August 30, 2002, Sabine

response to NACA's allegation that Condor is unduly reliant on fifth-freedom traffic, Condor states that it currently offers a variety of year-round and seasonal third- and fourth-freedom services from Germany to a number of U.S. cities, and intends to introduce new services to two additional points in the coming months.

Apple's reply states that Condor's proposed charter program comprises only a small portion of the Apple companies' 2002/2003 winter public charter program; no U.S. carrier has objected to Condor's operation of the subject flights or indicated availability to operate the B-757 charter flights; and NACA's assertion that Condor places "undue reliance" on fifth-freedom services is incorrect.

Condor subsequently supplemented the record with information concerning its homeland-U.S. services.⁵ Specifically, Condor states that during calendar years 1999-2001, it operated 435, 299 and 242 roundtrip Germany-U.S. flights, respectively. For calendar year 2002, Condor projects that it will operate 202 roundtrip Germany-U.S. flights.

On September 20, NACA responded to the supplemental flight information provided by Condor. NACA states that Condor's proposed 400 roundtrip fifth-freedom charter program exceeds the number of third- and fourth-freedom flights reported by Condor in any previous traffic season or year; that any fifth-freedom operations that exceeds 50 percent of the applicant's total flights is justification for a finding by the Department of "undue reliance;" that earlier this year the Department approved a request by Condor to operate a number of fifth-freedom charter flights; and that NACA-member carriers are able to provide the proposed services with a variety of aircraft types, including the B-757.

On September 23, Condor and Apple filed additional responsive pleadings.

Condor states that it has shown that it has consistently conducted third- and fourth-freedom services between Germany and the United States; that it would be "ironic" if the Department adopted NACA's efforts to create a "hard and fast" 50% seasonal threshold to show "undue reliance" on fifth-freedom operations (in this regard Condor cites orders from certain IATFPCA complaint proceedings involving the United States and Australia); that for decades, U.S. carriers have operated fifth-freedom hubs at Frankfurt; that any "fair" reading of the U.S.-Germany bilateral aviation agreement would warrant prompt approval of its request, especially in view of the assurances of reciprocal treatment for U.S. carriers by the German government; and that NACA's statements of aircraft availability and its effort to raise "first refusal" as a basis to reject Condor's instant application is "troubling" and a violation of the agreement.

Apple disputes statements that it says NACA made in its September 20 pleading concerning efforts by NACA or NACA-member carriers to contact Apple about the type,

Dannelke sent a follow-up letter to the Director, Office of International Aviation, requesting positive action on Condor's request.

⁵ See Condor letters dated September 13 and 18, 2002. In its September 13 letter, Condor also states that no U.S. carrier has come forward indicating that it was prepared to operate the subject charter program, nor had any U.S. carrier even responded to its request.

availability or practicality of certain aircraft to conduct these and other Apple charter programs.

On September 26, NACA responded to the most recent pleadings of Condor and Apple.⁶ NACA addresses three issues. First, with respect to the question of Condor's reliance on fifth-freedom operations, NACA asserts that it is expressed Department policy to require foreign carriers to place substantial reliance on their homeland-U.S. operations, with any fifth-freedom services taking only a secondary, supportive role.⁷ NACA states that this statement of policy means that the number of fifth-freedom charters a foreign carrier operates must be lower than the number of its third- and fourth-freedom services, and that this criterion is not met in the Condor case at issue here. Second, NACA states that it is the responsibility of the applicant and its tour operator to satisfy the Department on the question of the availability of U.S. carrier lift in cases such as this, and they have not done so. Finally, NACA states that the authority sought by Condor is outside the scope of the U.S.-Germany agreement; that while the agreement indeed provides for third-country charters that include service to the carrier's homeland, it does not mandate approval for an operation of the kind proposed by Condor, which includes no such homeland stops.

Decision

We have decided to deny Condor's request.

As an initial matter, with regard to NACA's assertions that the proposed operations are seventh-freedom in nature, we note that the operations at issue are in fact encompassed by the definition of "fifth-freedom" charters under our charter rules (see 14 CFR § 212.2 and Order 2001-12-10 at 4). Moreover, NACA has not persuaded us of its view that, because of the size of the program, the flights at issue here should be considered to be scheduled, rather than charter services. Indeed, the record plainly shows that the program is organized and sold by a charter tour operator, Apple Vacations West, which is acting as principal, and is to be operated over a set period of time.

We do not concur with Condor that our agreement with Germany requires that we approve the instant charter program. The authority at issue is not among those rights explicitly provided for German carriers under the agreement. Therefore, the authority Condor seeks is discretionary.

⁶ On September 24, NACA had notified all parties by email that it intended to respond to the September 23 pleadings of Condor and Apple by September 27. On September 25, Condor filed a motion requesting that we strike or reject the announced NACA filing, arguing that "NACA has had its say, and then some." NACA subsequently notified all parties by email that it would respond to the Condor and Apple filings by September 26, and in fact it did so. We have decided to accept NACA's pleading in the interest of a complete record. Accordingly, we will deny Condor's motion to strike.

⁷ In this regard, NACA cites our 1997 decision denying an application by Balkan Bulgarian Airlines.

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 generally look first to reciprocity on the part of the applicant's homeland. We note first the absence of any indication in the record that the Government of Germany has denied any recent requests by U.S. carriers for authority to conduct fifth-freedom charter operations. Also, while the Open-Skies Agreement between the United States and Germany does not explicitly provide for the operation of fifth-freedom passenger charter services of this kind by carriers of the two parties, we note the letter from the German Civil Aviation Authority, providing assurances that the Government of Germany will provide fifth-freedom charter reciprocity to U.S. carriers. Against this background, we conclude that the reciprocity test contained in Part 212 has been satisfied.

However, as noted above, as part of our public interest determination, we also consider the extent of the applicant's reliance on fifth-freedom operations (as opposed to U.S.-homeland traffic). It has long been U.S. aviation policy, even where reciprocity is not an issue, to require foreign airlines to place substantial reliance on their U.S.-homeland services, with fifth-freedom operations taking a secondary, supportive role.⁸ In the case before us, we find that the operation by Condor of this program would result in the carrier placing undue reliance on fifth-freedom operations.

If we were to approve the instant Condor request, it would mean that we would be approving 400 roundtrip fifth-freedom flights, all to be operated during a four and a half month period, December 16, 2002, through April 27, 2003.⁹ Yet, during the most recent calendar year, 2001, Condor, based on the data which it has recently submitted for the record, operated only 242 roundtrip homeland-U.S. services, and in calendar year 2002, Condor projects operating even fewer homeland-U.S. flights. Against this background, Condor's explanations and its level of third/fourth-freedom operations fail to persuade us that its operations do not constitute undue reliance on fifth-freedom service.

We disagree with Condor's assertion that our actions here in any way establish a formulaic calculation for assessing "undue reliance" on fifth-freedom operations. Nor do we find the cases that Condor has cited in support of its position as dispositive.¹⁰ The cases cited by Condor involve U.S. carrier fifth-freedom traffic carried on scheduled

⁸ See, for example, Order 92-4-42 (World Wide Air Charter Transport).

⁹ We also note that we previously approved a Condor request to operate 66 rountrip fifth-freedom charter flights between the United States and Mexico/Caribbean, April 1-May 2, 2002. See letter dated March 15, 2002, from the Director, Office of International Aviation, to counsel for Condor (X-45 file 2002-077).

¹⁰ The U.S. carrier hub services at Frankfurt to which Condor refers are scheduled rights U.S. carriers derive from our bilateral aviation agreement with Germany.

services over bilaterally-agreed routes, not extrabilateral fifth-freedom charter services such as those at issue here. Indeed, in Order 93-5-31, one of the cases Condor cited, the Department specifically stated that “the policy that we pursue when exercising our absolute discretion with regard to extrabilateral charter operations is not relevant to, and quite different from,” how a foreign government deals with a U.S. carrier’s scheduled services under a bilateral agreement.¹¹ The Department went on to say that “even with regard to extrabilateral fifth freedom charters, we do not apply a rigid formula. Rather, our approach varies depending on the circumstances of each particular case.” We have followed that policy here.¹²

Also, we disagree with Condor’s suggestion that we have applied a “first refusal” test to Condor’s charter program. While it has long been our preferred policy to allow charterers to choose the carriers which best meet their transportation needs, we are not bound to consider Condor’s application based on the charterer’s choice alone if adhering to that choice would contravene any element of our longstanding public interest decisional criteria. In the case before us, and for the reasons described above, Condor’s request does not warrant approval under those public interest criteria.

Regarding Apple’s comments, we note that Apple proceeded from an assumption that Condor’s level of Germany-U.S. services were such that Condor could not be accused of “undue reliance.” However, as we have discussed above, the circumstances of this case demonstrate that were we to approve Condor’s request, the carrier would in fact be placing undue reliance on fifth-freedom services.

In summary, based on the record before us, and the application of our traditional public interest standards, we do not find approval of Condor’s application to be warranted. Therefore, we will deny the application.

ACCORDINGLY,

1. We deny the request of Condor Flugdienst GmbH for a statement of authorization under 14 CFR Part 212 to permit it to perform a total of 400 roundtrip fifth-freedom passenger charter flights between various cities in the U.S. Midwest and points in Mexico and Jamaica, on behalf of Apple Vacations West, during the period December 16, 2002, through April 27, 2003;
2. We deny the motion of Condor to strike NACA’s September 26, 2002, pleading; and
3. We will serve a copy of this order on Condor Flugdienst GmbH; the National Air Carrier Association, Inc.; the Air Line Pilots Association, International; Apple Vacations West, Inc.; the Embassy of Germany in Washington, D.C.; the Department of State (Office of Aviation) and the Federal Aviation Administration (New York-IFO).

¹¹ See Order 93-5-31, footnote 7.

¹² We would note that in the Balkan Bulgarian case cited by NACA, we likewise did not apply a rigid formula to our determination of undue reliance. *See* letter of Paul Gretch to Jeffrey A. Manley, dated November 26, 1997, regarding this case.

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
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(SEAL)

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