

Statement of

DEPARTMENT OF TRANSPORTATION

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SWISSAIR, SWISS AIR TRANSPORT CO., LTD.

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DOCKET SECTION

FAA-98-4758-11 concerning

SECURITY PROGRAMS OF FOREIGN AIR CARRIERS

FAA Public Meeting, February 24, 1999

Good afternoon. My name is William Karas of Steptoe & Johnson LLP, attorneys for Swissair. I appear here today to present Swissair's views on the rule proposed by the Federal Aviation Administration in Docket No. FAA-1998-4758. Swissair thanks the FAA for holding this meeting and hopes that its views will be received in the same constructive and cooperative spirit with which they are offered.

The rule in question would require Swissair to adopt and comply with aviation security measures mandated by the FAA for application at Swiss airports on flights to the U.S. Moreover, such security measures would have to be identical to the measures the FAA requires U.S. carriers to adhere to when operating out of any such airport on flights to the U.S. Swissair believes that this rule, if finally adopted --

- will intrude impermissibly on the territorial sovereignty of Switzerland (the host state);
- will result in an inefficient and chaotic aviation security system in Switzerland, detracting from an optimal security program based on an accurate assessment of risks for particular flights of particular airlines; and
- will run counter to the aviation security regime -- Annex 17 of the Chicago Convention -- established by the nations of the world through the International Civil Aviation Organization.

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Territorial Sovereignty

Swissair believes that it is a clear violation of the territorial sovereignty of Switzerland for the FAA to dictate security requirements for Swiss airports applicable to Swissair's flights to the U.S. A nation may not make rules applicable inside the territory of another nation. Although the FAA purports to be respectful of the sovereignty of other nations in the Supplementary Information to the NPRM, the rule it proposes is nothing less than a usurpation of Switzerland's sovereign right to determine for itself the aviation security procedures applicable on Swiss soil, at least for Swiss airlines.

The U.S. Aviation Code itself recognizes the indisputable concept that the USG should not *unilaterally* make U.S. laws applicable in another nation's territory. For example, § 40 120(b) establishes two criteria for the United States President to extend the application of Aviation Code provisions to places outside U.S. territory: an international arrangement must give the USG authority to make the extension *and* the President must decide that the extension is in the national interest. Both criteria must be met, but in this case neither has. In addition, § 449 10 requires the Secretary of State to seek "multilateral and bilateral agreement on strengthening enforcement measures and standards for compliance related to . . . airport security," and is therefore antithetical to unilateral U.S. regulation of airport security outside the U.S. Unfortunately, § 44906 of the Aviation Code -- the provision underlying the proposed rule -- is not quite as respectful of the rights of other nations. That is why the FAA, through this NPRM or otherwise, should remind the legislators and their staffs not only that § 44906 contravenes international law principles regarding the primacy of territorial jurisdiction, but also that the "identical" standard is not one that is required for adequate protection of aviation. It is to this latter consideration that I will next turn.

Effective Security

Swissair deems aviation security to be a mission of the highest order. However, **Swissair** believes that security rules should not be unilaterally declared by a non-host state in a legal proceeding outside the host state. Rather, appropriate and effective security measures should be discussed and developed in a cooperative framework outside any public forum. Adequate security measures must be tailored to the risks involved for particular flights, depending on a variety

of well-known factors, as well as on information gathered by internal security authorities of the host state.

The FAA's proposed requirement for foreign-airline security measures identical to U.S.-airline security measures is a very blunt instrument that does not take into account the nature of aviation security risks for particular flights of particular carriers at particular airports. The proposed rule's arbitrary and inflexible "identical" standard is highly inefficient for dealing with security risks. Such inefficiency of course means that the effectiveness of the system will not be optimal and, to make matters worse, will be burdened by increased and unnecessary costs. The FAA, in Swissair's view, should not be concerned about equalizing cost burdens as between U.S. and **non-U.S.** airlines. Rather, the sole focus of the FAA, and its counterparts in other countries, should be on the performance of effective aviation security procedures consistent with "the advantage of speed inherent in air **transport.**"¹ Ironically, the end result of the proposed rule could very well be not only conflict and confusion but actually a less effective overall security system than is currently the case at airports such as Zurich's.

It is Swissair's view that to the extent there is any perceived shortcoming of security measures applicable to Swiss airlines at Switzerland airports, that matter should be taken up with, and addressed at, the International Civil Aviation Organization (ICAO), which is the internationally-designated body charged with the establishment of aviation security standards and recommendations. Indeed, Annex 17 of the Chicago Convention is the product of ICAO discussions, deliberations and decisions. ICAO is the appropriate non-public vehicle for further discussions on aviation security, not an FAA rule

¹ In this regard, see clauses 2.2 and 3.2 of Annex 9 to the Convention (also attached to Annex 17), which provide in pertinent part that "Contracting States shall make provision whereby procedures for" the clearance of aircraft [clause 2.2] and clearance of persons travelling by air [clause 3.21, "including those normally applied for **aviation security** purposes . . . will be applied and carried out in such a manner as to retain **the advantage of speed inherent in air transport.**" See also clause 6.1 of Annex 9 (also attached to the aviation security annex, Annex 17) requiring Contracting States to "take all necessary steps to secure the co-operation of operators and airport administrations in ensuring that satisfactory facilities and services are provided for **rapid** handling and clearance of passengers, crew, baggage, cargo and mail at **their** international airports."

adopting an unyielding “identical” standard without regard to risk assessment. Now I will turn to a brief discussion of the Convention, Annex 17 and the Switzerland-U.S. aviation bilateral.

Pertinent International Agreements

The Chicago Convention is the basic document governing the conduct of international civil aviation. Its purpose was, and still is, to avoid chaos and confusion through commonly-agreed rules consistent with territorial sovereignty. The head of the U.S. delegation to the Chicago Conference, Adolph Berle, set forth the view of the United States: “**[W]ithout prejudice to full rights of sovereignty**, we should work upon the basis of exchange of needed privileges and permissions which friendly nations have a right to expect from each other.” (Emphasis supplied).

The Convention addresses aviation security in detail in Annex 17. That document is absolutely clear that the host state is in charge of aviation security on its own soil. For example, Clause 3.1.18 states: “Each Contracting State shall require operators providing **service from that State** to implement a security programme appropriate to meet the requirements of the national civil aviation security programme of that State.” In other words, Switzerland is the only nation empowered by the Convention to impose aviation security requirements on airlines departing **from** its soil.

The FAA’s proposed rule obviously contravenes the host-state rationale of Annex 17, as well as the principle of territorial sovereignty announced in the very first article of the Convention. If each state of first arrival were to dictate security measures to be followed by **Swissair** in its own country, **not only** would the authority of Switzerland (the **host** state) be completely undermined, but at its Swiss gateways **Swissair** would have to comply with any number of different and perhaps inconsistent security programs, depending on the destination of each flight. Moreover, under the FAA’s theory of jurisdiction, Switzerland would be able to dictate to American Airlines, for example, the security measures such airline would need to adopt at O’Hare for flights to Switzerland. Mr. Berle and the other framers of the Convention **certainly did not** have these possibilities in mind. Indeed, the Convention’s Annex 17 **recognizes the primacy** of the host state in aviation security matters.

Swissair recognizes that the aviation security article of the Switzerland-U.S. air services **agreement** (Article 7) is less than crystal clear on

whether anything in that article is meant to alter the international law tenet, discussed earlier, that the host state, rather than the state of first arrival, has primacy to dictate security measures applicable to airlines of the host state, within the host state, with respect to flights destined to the other state. The very first sentence of the article refers to the Parties' "rights and obligations under international law." Arguably, therefore, the principles of international law, including the basic principle of territorial sovereignty, condition all the undertakings which follow.

More telling, perhaps, is paragraph 3 of Article 7 in which each Party in effect undertakes that its airlines (and its airports) shall abide by its civil aviation security program, as that term is used in Annex 17 to the Convention. In other words, as **Swissair** understands it, paragraph 3 directs Switzerland to require Swiss airlines and airports to comply with the civil aviation security program of Switzerland, not of the U.S. This reading is consistent with host-state responsibility under clause 3.1.18 of Annex 17, discussed above.

Moreover, the second sentence of paragraph 4 of Article 7 invests each Party with the responsibility to ensure that adequate aviation security "measures are effectively applied *within* its *territory* to protect aircraft and to inspect passengers, crew, carry-on items, cargo (including baggage), and aircraft stores prior to and during boarding or loading." Under this provision, Switzerland, not the U.S., is responsible for aviation security within Switzerland.

All of this supports host-state responsibility and primacy; the first sentence of paragraph 4, however, raises the question of whether Switzerland can impose its own civil aviation security program on U.S. airlines operating flights out of U.S. airports destined for Switzerland, and vice versa. **Swissair** doubts that this is what was intended in that sentence, given that such an interpretation would mean that the U.S. has agreed to cede to Switzerland jurisdiction over security on U.S. airline operations at U.S. airports when flights are destined to Switzerland as the foreign nation of first arrival, and vice versa. In any event, the sentence in question seems to **Swissair** a slim reed upon which the FAA can base a rule that directs **Swissair** to comply with U.S. security regulations at Zurich Airport, for example, and that requires **Swissair** to adhere **identically** to whatever the FAA requires of U.S. airlines at Zurich Airport. **Swissair** believes that this is just the kind of policy issue that should, if necessary, be deliberated upon in a friendly manner within ICAO, the entity-established by the world's nations to develop a harmonious global civil aviation regime.

Conclusion

The U.S. has long been a leader in the formulation of the principles which govern and support the remarkably effective international civil aviation regime. **Swissair** urges the U.S. to again demonstrate its leadership position by adhering to the rule of law regarding territorial jurisdiction and by complying with the letter and spirit of Annex 17 of the Chicago Convention.

Thank you.