

DEPT. OF TRANSPORTATION
DOCKETS

99 MAY 24 PM 1:12



British Embassy
Washington

3 100 Massachusetts Ave. N.W.
Washington, D.C 20008-3600

Telephone: 202-588-6697
Fax: 202-588-6695
E-mail: transp3@ix.netcom.com

By hand

Moira A. Lozada
Office of Civil Aviation Security Policy and Planning,
Civil Aviation Security Division
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

24 May, 1999

55838

FAA-98-4758-53

Dear Ms Lozada,

COMMENTS ON THE NPRM ON THE HATCH AMENDMENT

Please find attached the UK Government's comments on the Notice of Proposed Rulemaking (NPRM), Docket No. FAA-1998-4758; Notice No. 98-1 7. These comments are for submission to the public docket; separate comments will be also be submitted to the closed docket.

Yours sincerely,

Fiona McKay

Fiona McKay
Transport Section

99 MAY 24 PM 1:12

SECURITY PROGRAMS OF FOREIGN AIR CARRIERS

DOCKET FAA - 1998 - 4758

1. The UK Government wishes to make the following comments on the proposed Rulemaking set out in the Department of Transportation's Notice number 98-17, in addition to its oral presentation at the hearing in Washington DC on 24 February 1999. As the FAA is well aware, the UK has vigorously opposed the "identical measures" provision in the Antiterrorism and Effective Death Penalty Act of 1996, and continues to do so. The UK strongly urges the FAA Administrator to revert to Congress to explain that this legislation is fundamentally flawed and ultimately unworkable.

Introduction

2. Following the Lockerbie tragedy, the UK and the US led the world in seeking higher standards of aviation security. As in all other areas of counter-terrorism, there has been and continues to be the closest cooperation between our countries. The UK remains steadfastly committed to the highest standards achievable in practice, and for continuous efforts to be made to upgrade aviation security as new techniques become available. There is international recognition that the security at Britain's airports is now among the best in the world. The UK is also active with the US in assisting and urging others to make improvements. Against this background, the provisions of the new Act and the proposed Rule appear to be singularly inappropriate.

Legal issues

3. Relations between the UK and the USA in the field of civil aviation are governed by their current Air Services Agreement ("Bermuda 2"), which is a reflection of the arrangements between States envisaged in The Chicago Convention to which both countries are contracting parties. There is no provision made in Article 7 of Bermuda 2, covering aviation security, for the imposition by the FAA of its requirements within the UK. The US clearly **recognises** this is so, as witnessed by the attempts on the part of the US side in recent negotiations over a new Agreement to change Article 7 so as to allow implementation of

the "identical **measures**" provision. The UK continues to regard such a change as unacceptable.

4. The Chicago Convention itself makes it plain that responsibility for security at airports rests with host states. This is consonant with the sovereignty of nations; moreover it is a sensible practical arrangement. If every State attempted to impose its own standards on others, that would not only invite reciprocal action but the result would be chaos.

5. On 5 February 1999 a Resolution was adopted **unanimously by The** Council of the International Civil Aviation Organisation with only the US abstaining, roundly condemning the provisions of the new Act as infringing the basic principles of The Chicago Convention and running counter to its spirit of multilateralism. Standard 3.2.2. in Annex 17 to the Convention **recognises** that there may be circumstances when a State wishes to have additional security applied to its own air carriers overseas as a result of increased threat, and that when such a request is made of another State the latter should ensure that so far as is practicable the request is met. There is no provision in Annex 17 for a State demanding particular measures be applied to air carriers other than its own outside the geographical limits of its territory.

6. The Act attempts to apply US law extraterritorially and is therefore objectionable to the UK Government in principle. It is unacceptable as well as illegal for the US to try to dictate requirements in the UK.

Practicalities and Economics

(i) Implementation Costs

7. The UK's estimate of the costs of implementing the identical measures provision in the UK for non-US carriers is £15m (\$24m) annually, plus an initial capital charge in the first year of £11m (\$18.8m). These figures cover only the equipment, staffing and training costs, and allow for the fact that some of the present ACSSP Regime B requirements are already covered by the UK's own National Aviation Security Programme. This would mean that the security costs on flights to the US would more than double if applied solely to the carriers affected. However because of the way such costs are allocated in the UK, not all of this additional expenditure would fall on those directly affected. It would unavoidably result in increased airport landing charges, which would affect US and other carriers alike.

8. The above costs have been calculated on the basis of the FAA's present measures. These are likely to change over time and it is possible that the FAA's demands might become significantly more onerous. If the UK were to accept the provisions of the new legislation, it would be effectively writing a blank **cheque** for the FAA to impose anything it wished, no matter how costly or impractical for application in the UK environment.

(ii) Loss of Airport Capacity

9. Because of the additional space which would be required to implement the proposed Rule, both on the check-in concourse and at departure gates, terminal capacity at the **UK's** major airports would be markedly reduced and aircraft would be on-stand for longer. It is estimated, for example, that the result would be a loss of between 9,400 and 14,850 departure slots per annum at London Heathrow, and between 30,100 and 38,300 at London Gatwick. If this were to occur, all carriers operating transatlantic routes would be obliged to lose their slot quota in proportion, and it would be necessary to spread departures with some at less favourable times than at present. **Replacing** such a loss of capacity would be extremely costly and certainly could not be achieved for many years.

10. On the basis of present services to the US, BAA plc has estimated the percentage share of slot-losses among the carriers concerned would be as follows:

Heathrow

British Airways	40%
American Airlines	23%
United Airlines	19%
Virgin Atlantic	13%
Others	5%

Gatwick

British Airways	33%
American Airlines	13%
Continental Airlines	13%
Virgin Atlantic	11%
Delta Airlines	10%
North West	6%
Others	14%

The consequential economic impact of such reductions in **airport** capacity would plainly be severe for the UK and US aviation industries, and would far outweigh the costs of the extra measures themselves. The **loss** of revenue to the UK carriers which would accrue from losses in airport capacity is estimated at between **£750m (\$1,200m)** and **£1,080m (\$1,728m)** a year. Doubtless the losses to the US carriers in toto would be of a similar order because they have much the same overall market share of traffic. Given the already very considerable excess of demand for slots at Heathrow and Gatwick over the foreseeable level of supply, capacity losses of this magnitude would also be highly damaging to the development of expanded air services between the UK and US - a shared objective of our Governments and the subject of renewed bilateral discussions in May 1999.

(iii) Checked Baggage Screening

11. The UK's National Aviation Security Programme has been designed to take into account the realities of the operating environment in the UK. By contrast with US airports, space is often at a far greater premium. Also international traffic, with its particular security demands, is of the order of 80% of the total with only 20% domestic.. This is the reverse of the situation in the US, where some 80% of the traffic is domestic. Over the past few years, the UK aviation industry has expended the equivalent of hundreds of millions of dollars installing the most sophisticated baggage screening machinery available, and the UK can claim to lead the world in this regard. The UK Government took the decision to require this major investment in recognition that such an approach was the only practical means of achieving its goal of screening every piece of checked baggage on international flights from UK airports.

12. Because it was a bomb in a transfer bag in the hold which brought down flight PA 103 over Lockerbie, the screening of transfer bags is regarded as particularly important. Approximately 40% of the traffic through London Heathrow, for example, is on transfer, much of this to and from the US. The NPRM sets out a requirement to apply the **FAA's** measures at the last airport of departure. This would disrupt the present highly automated transfer baggage screening arrangements at the **UK's** major airports, causing extra congestion and further reduction of terminal capacity, as well as an increase in minimum connection times of 15 to 30 minutes - all of which would have a significant economic impact in addition to that caused by slot losses.

13. The automated checked **baggage** screening process also accommodates off-airport check-in. This is an important factor in maximising terminal capacity, and an advantage of the **high-speed** rail links to the UK's major airports, use of which the UK Government wishes to foster in order to reduce road traffic. The NPRM proposal to prohibit off-airport check-in for US-bound flights conflicts with these benefits.

(iv) Staffing

14. A further practical obstacle to implementing the NPRM proposals would be the difficulty of recruiting the numerous staff required for the FAA's additional requirements. This would be a particularly acute problem in the Heathrow and Gatwick airport catchment areas, where there is almost no unemployment and the recruitment of quality personnel is exceedingly difficult.

Risk Management : Effective Countering of the Terrorist Threat

15. The FAA clearly subscribes to the well-established principle that the degree of protective security should be commensurate with the level of threat in order to manage risks **most** effectively. For example' the FAA's Regimes A and B differentiate between the security measures required by the **FAA** according to the FAA's assessment of the level of threat to **US** carriers in different regions of the world. As the **NPRM** acknowledges, there are situations when an increased threat indicates a need for additional measures: in such circumstances it is envisaged the FAA will impose such a requirement (pages **12** and **18**). Moreover the NPRM notes that a foreign carrier will not be considered in violation of the Rule if its security programme exceeds the security measures required of US carriers serving the same airport (p.35). Such a situation would pertain if a foreign carrier was at a higher level of threat than US carriers, when additional measures would undoubtedly be justified.

16. However the Act forces the FAA to take a line which is inconsistent with the principles of risk management. The UK Government also believes Congress's intention in passing the new law was to ensure a commercial level playing field between US

and foreign carriers and that in reality it has nothing to do with risk management or improvements. to security. For example:

(i) The proposed Rule would apply to foreign carriers only when flying a route served by a US carrier to the US (page 27). It would not apply to US routes served only by foreign carriers; nor to routes outside the US. This was made absolutely clear by the FAA's Associate Administrator in answer to a question at the hearing on the NPRM in Washington DC on 24 February 1999.

(ii) The NPRM also refers to the connection between the threat and the specific nationality of the air carrier (pages 16,17). The UK Government agrees with the FAA that "The implication of the Act is that the terrorist threat to US interests relates not only to US air carriers but also to air carriers of any nationality engaged in commerce with the United States" (page 17). But this is manifestly not the case in practice: to cite a recent example, in 1995 the terrorist Ramzi Yousef clearly intended targeting US airlines, not others. Moreover, foreign carriers flying to the US where there is no US carrier in competition will not be subject to the proposed Rule, yet they will plainly be "engaged in commerce with the United States? This further reinforces the **UK government's** belief that the true purpose of the Act is aimed at trade not security.

(iii) By requiring the FAA to impose identical measures on foreign carriers, the Act removes all discretion as to how risks are to be managed. The FAA would no doubt accept that there are different approaches to security which can be equally valid. By foreclosing on the possibility of any variation, this could lead to the imposition of inappropriate or inefficient techniques. That would certainly be the case in the UK if the Rule was implemented.

(iv) Section 3.2.2. of Annex 17 to the Chicago Convention allows a State which has concerns about increased threats to its carriers to ask other States to implement additional security measures. This provision has been exercised by the FAA with the UK, and the UK has responded positively. The UK government therefore sees no need for the Act, since the proper concern of each State is with its own carriers, and section 3.2.2 of Annex 17 not only affords **a State** the opportunity to seek special treatment for its airlines in

order to manage the risks to them appropriately, but the 3.2.2. provision works' **well** in practice from a risk management point of view.

17. The FAA also doubtless accepts that the UK counter terrorism apparatus is sufficiently well developed to enable it to be the best judge of the threat to its own air carriers, and for the UK authorities to be best placed to decide what security measures are appropriate to manage the risk to them.

International Cooperation against Terrorism

18. The stated purpose of the amended legislation is "to ensure that all Americans would be guaranteed adequate protection from terrorist attacks on international flights arriving in or departing from the United States" (page 11). The UK believes that implementation of the Act as set out in the NPRM would have the reverse of the intended outcome. By seeking to impose this Act on other States against their wishes the US can only damage international cooperation against terrorism. The FAA's anticipation of "the assistance of the affected parties to implement the **Congressional mandate**" (page 15) is most unlikely to be forthcoming in practice.

19. The UK remains concerned, along with the US, about the general standard of aviation security world-wide. Diversion of limited resources to meet the requirements of the 'identical measures' provision, and the attempt by the US to impose rather than agree procedures, will be bound to be counter productive in obtaining the improvements urgently needed to protect our air carriers at foreign airports if the proposed Rule is implemented. The UK Government can only **view** such an outcome with dismay.

Summary

20. The UK Government's principal objections to the Act and the proposed Rule are:

(i) the infringement of UK sovereignty by attempting to impose US regulations in the UK; and

(ii) the severe economic consequences for the UK aviation industry which would flow from implementation of the intended measures, amounting to losses of between \$1.2 and \$1.7 billion per annum as well as other disbenefits.

Neither of these can be viewed as being anything other than unacceptable.

21. The UK Government further wishes to draw the attention of the FAA to the serious economic consequences which would result for US carriers operating from the UK. On a pro-rata basis in comparison with losses to UK carriers, this might amount to a total revenue loss to US carriers of between \$1.0 and \$1.4 billion per annum. In addition, if the UK were to decide to require in response to implementation of the proposed Rule that its security regime should be applied to flights departing from the US to the UK, the introduction of UK-style 100% screening and reconciliation of checked baggage would cost US airports hundreds of millions of dollars.

22. There would also be an unavoidable setback to the development of improved air services between the UK and the US, which is inimical to the wishes of both Governments and their aviation industries. US Airways and other US carriers seeking additional services from the major London airports would face an effective cap on slots for the foreseeable future, as well as a reduction in the present number.

23. The UK trusts the FAA will have due regard to the strong and universal international condemnation of the proposed Rule as 'set out in the ICAO Resolution of 5 February 1999.

24. Finally, as the US's staunchest ally in the fight against terrorism, the UK deprecates the negative effect which implementing the new legislation would have on international cooperation against the terrorist threat, and the inevitable setback to the development of improved aviation security world-wide. Outcomes such as these would do great harm to the interests of the UK and the US alike.

DEPARTMENT OF ENVIRONMENT, TRANSPORT AND THE REGIONS
14 May 1999

