

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION**

14 CFR Parts 108, 109, 111, 129, and 191)	Docket No. FAA-1999 - 6673
)	
Certification of Screening Companies; Proposed Rule)	Notice No. 99-21
)	

**COMMENTS OF
BRITANNIA AIRWAYS, LTD. AND MONARCH AIRLINES, LTD.**

Britannia Airways, Ltd. ("Britannia") and Monarch Airlines, Ltd. ("Monarch") submit the following comments on the proposed rules on "Certification of Screening Companies."

Both Britannia and Monarch are British charter air carriers holding foreign air carrier permits authorizing operation between the United Kingdom and the United States; Britannia since 1980 and Monarch since 1981.

It is the position of both Britannia and Monarch that the imposition, by regulation, of screening company oversight requirements on charter carriers such as Britannia and Monarch, is ultra vires, and is impractical and unrealistic; most particularly as applied to smaller air carriers of any nationality. Such carriers do not have the power or the facilities to carry out the supervisory and enforcement duties that the regulations would assign to them as surrogates for the FAA.

The extra-territorial application of the proposed U.S. screening rules upon foreign carriers would contravene international agreements.

Both the oversight requirement and the apparently intended extra-territorial effect of the proposed regulation should be eliminated. Alternatively, the FAA should exercise the power granted it by 49 U.S.C. § 44901(c) to exempt foreign charter air carriers from the scope of the proposed regulations.

PRELIMINARY STATEMENT

Both Monarch and **Britannia** are relatively small carriers by U.S. standards. **Britannia** now operates a total fleet of some 33 jet aircraft and Monarch a total fleet of 22 jet aircraft. These carriers operate within Europe, and between the United Kingdom and points in Africa, Asia, North America and the Caribbean. 17 of **Britannia's** aircraft and seven of Monarch's aircraft are capable of operating, and do operate, transatlantic. Both carriers' operations to and from the United States are exclusively in charter air transportation.

In calendar 1999 **Britannia** operated 560 round-trip flights to the United States, its territories and possessions, transporting a total of 113,814 passengers. 506 of **Britannia's** flights operated to Orlando (MCO), 25 to San Juan and the remaining 29 to the U.S. Virgin Islands, New Orleans, and Sanford, Florida.

In the 12-month period, April 1999 -April 2000, Monarch operated 317 flights to the United States, transporting over 103,000 passengers. 282 of Monarch's flights operated to Sanford, Florida, 30 to Las Vegas, four to Orlando and one to Ft. Lauderdale.

Britannia does not originate any passengers in the United States. Monarch has originated U.S. passengers in four November-March periods since 1994. All such U.S.-originating operations have been from and to Newark; none has involved more than 114 passengers per flight; and the total number of such flights was fewer than 45 in any one series. There have been no U.S. originations by Monarch since March 1998.

Neither of these airlines has employees in the United States who deal with passengers. All passenger handling activities in the United States are carried out through independent-contractor handling agents.

Neither **Britannia** nor Monarch does its own passenger screening at any point in the United States or at any other point in the world to or from which it operates. At all U.S. points at which **Britannia** and Monarch operate, screening of their passengers is carried out by airport-contracted screening companies. At all such points, those screening companies are used by many other airlines whose aircraft operate to and from those airports. As the above figures indicate, **Britannia** and Monarch, individually and in combination, are minor players at all U.S. airports from which they operate.

Essentially all passengers of both airlines over the past several years, with the exception of Monarch's Newark-originating passengers, have originated either in the United Kingdom or in Ireland. Those passengers book passage to the United States through tour organizers many months, and sometimes as long as a year, in advance of their chosen flight dates. At the time that many of these passengers first deposit money with a tour organizer for transportation to the United States on a given date, they do not

know the identity of the air carrier with which the organizer will contract to perform the flight on the date the passenger has selected.

The characteristics of the U.S. business of both carriers do not differ in any **essential** respect from the activities of other British charter carriers or, indeed, of European charter carriers, generally, that operate to the United States.

I. THE IMPOSITION OF A REGULATORY OVERSIGHT REQUIREMENT UPON CARRIERS WHICH DO NOT SCREEN, AND DO NOT EMPLOY OR EXERCISE CONTROLLING POWER OVER SCREENING COMPANIES, IS UNWORKABLE AND ULTRA VIRES.

The proposed rules would superimpose upon the existing legal regime a new regulatory requirement that every U.S. and foreign air carrier operating from a United States airport assume an affirmative duty to oversee operation and training, and assure compliance, by the company that screens its passengers, with FAA requirements imposed upon the screening company. The Notice of Proposed Rulemaking indicates that the failure of any carrier actively to participate in the oversight and control of screening company compliance could result in the imposition of sanctions against the carrier by the FAA. The administrative burden, and the adverse economic and legal impact, of these duties of active and continuing oversight upon companies such as **Britannia** and **Monarch**, would be substantial, while providing no real likelihood of enhancing screening company effectiveness. For the reasons set out below, the agency's proposed imposition of supervisory and enforcement duties upon carriers such as **Britannia** and **Monarch** is unworkable and beyond the scope of the statutory power granted the FAA.

Neither **Britannia** nor **Monarch** is attempting here to avoid any potential liability that it might incur under existing law as the result of harm arising from any failure by any company screening its passengers to act in accordance with accepted standards, whether set by FAA certification or otherwise. Rather, the issue both companies raise is whether the FAA may, or should, impose upon carriers a new level of affirmative duties of doubtful legality and highly questionable benefit to the regulatory objective.

Neither **Britannia** nor **Monarch** performs its own passenger screening. Neither would seek certification under the new rules proposed by the FAA. Neither is the sole or the dominant carrier at any U.S. airport. Each is a minor carrier-factor at each U.S. airport at which it operates. Each of them, together with many other air carriers, both foreign and domestic, makes use at each United States point it serves of a screening company selected by the local airport authority. Each company pays an agreed price to the airport authority for that service as do many other carriers. If every air carrier using a screening company at any U.S. airport used by **Monarch** or **Britannia** were to attempt to comply with

the oversight rules suggested, screening companies would be overrun on a continuing basis by airline-employed overseers attempting to carry out their regulatory functions.

But the fact is that neither **Britannia** nor **Monarch** has the power, at any airport in the United States, to audit, much less to discipline or to discharge a screening company because of the views of either carrier respecting the manner in which that screening company carries out its activities; compare proposed § 129.25(c)-(p); § 129.28, § 108.15, § 108.229 and, generally, § 111. Their oversight and their views would be ineffective because the only power that companies such as **Britannia** and **Monarch** could have, if they concluded that there was a defect in screening company compliance, would be to complain to the airport authority that ultimately controls that screening company. There is every reason to assume, moreover, that any unfavorable audit by a minor carrier at any US airport at which it operates, would be ineffective absent intervention/participation by one or more large or dominant carriers at that airport. But the audits and oversight by other carriers, or by the airport authority, may result in different views of screening company performance. What then are the supervisory or enforcement powers or duties of the minority carriers?*

¹§ IV I of the Notice suggests that

“The FAA does not intend to impose unrealistic burdens on carriers with this requirement [of monitoring of screener training tests]. In a situation where multiple carriers contract with one screening company, one carrier could be designated to monitor the screener tests, or the responsibility could be rotated among all of the responsible carriers.”

This suggestion is, however, directly antithetical to the individual “carrier responsibility” goal that the proposed rules purportedly seek to attain; and it avoids dealing with carrier responsibility for actual screening functions, as distinguished from training of screeners.

² The confusion is compounded by the statement in the **NPRM** at § II A that

“The FAA has also decided not to specifically address joint-use screening locations in this rulemaking A joint-use screening location is a **security** location that is screening for multiple carriers.”

Having announced its determination not to deal with joint-use screening locations, however, nothing appears in the regulations that would exclude such locations. See e.g. § 111.3 “Definitions.” Does this mean that these rules do not apply to carriers using joint-use screening? If so, the proposed regulation does not appear to reflect that.

Moreover, no carrier has the contractual right to discipline or to discharge a screening company that has a contractual relationship only with the airport authority but not with the carriers. The proposed rules fail to take account of the potential legal liability that carriers could face if they were to suggest to an airport authority that screening company A's contract should be terminated because it is not performing the job in the manner that, in the opinion of the complaining carrier, it should be. If screening company A should, in fact, be discharged by the airport authority on the basis of the complaint of one or more, but not all, carriers is it likely that screening company B would leap to fill the gap if there were any likelihood of litigation asserting interference with business relations, and the possibility of ultimate replacement by the original screener?

There is an obvious solution to the problem created by a proposal that would make each air carrier responsible for the supervision and control of screening companies in a system that has grown for years under arrangements whereby most carriers do not, cannot, and could not, exercise control in any meaningful way over any screening company.

That solution is to put the responsibility where the Congress placed it . . . with the Federal Aviation Administration. This is the clear intent of § 302 of the Federal Aviation Reauthorization Act of 1996:

"The Administrator of the Federal Aviation Administration is directed to certify companies providing security screening and to improve the training and testing of security screeners, through development of uniform performance standards for providing security screening services." (Emphasis added)

Nothing in the statute directs, or authorizes, the FAA to abdicate its authority to a multitude of foreign and domestic air carriers. Nothing in the statute suggests that the Federal Aviation Administration, to any greater degree than any other agency of the Federal government, has the power to delegate to a variety of private entities, both foreign and domestic, the power to execute the duties imposed upon it by the Congress.

The Notice of Proposed Rulemaking itself expressly concedes in § III H that, by certificating screening companies under § 302, the FAA has the power under 49 U.S.C. § 44707, to "reinspect an air agency [screening company] at any time. § 44709 also provides a procedure by which the Administrator may amend, modify, suspend or revoke the certificate of an air agency."

But there is no basis for the FAA to assume that the power delegated by Section 302 of the Reauthorization Act authorizes the agency to create a "paper tiger," although that is precisely what the proposed rules would do. The "certification" proposed by the FAA would entail nothing more than FAA approval of documents setting forth the wishful thinking or the intentions of screening companies concerning training, equipment,

screening procedures and techniques, etc. The rules would then permit the FAA to wash its hands of the task of assuring that any of the paper ideals presented would become reality. The FAA would delegate that job by dividing it among a plethora of private companies which are, in the main, unequipped, in any sense, to become the surrogates of the agency in enforcing its rules. Neither Section 302 nor 49 U.S.C. § 44935 authorizes that delegation of authority; and it is highly doubtful, at best, that the FAA has the constitutional authority to do so.³ See 49 U.S.C. § 322(a)-(c).

The Notice (§ III J) would have it that the requirement of carrier oversight of screening companies “. . . is a natural consequence of the fact that carriers are ultimately responsible for proper screening and must be able to ensure that their screening companies are in compliance and that screening personnel are performing adequately.” But the proposed carrier oversight procedure is not, in any sense, a “natural consequence” of carrier responsibility.

Carriers are certainly responsible for the safety of their passengers as a matter of domestic and international law. But no one, including the Federal Aviation Administration, has ever suggested that it is the duty of carriers, for example, to inspect and oversee the facilities of aircraft manufacturers or component manufacturers for compliance with FAA requirements. The NPRM statement, at § II C, that the proposed relationship as to screening oversight “is not unlike that between repair stations and air carriers,” is simply not correct.

The Notice does correctly state that “repair stations are certificated under Part 145 and are responsible for performing maintenance in accordance with regulations; however the air carriers remain ultimately responsible for the airworthiness of their aircraft.” But that statement omits the highly material fact that nothing in Part 145, and nothing in the practice of the Federal Aviation Administration, suggests or directs that airlines, rather than the FAA, should be responsible for the oversight of repair stations to assure compliance with FAA requirements. Any ultimate airline responsibility or potential liability for equipment failures cannot be equated with a legal duty to supervise the operations of FAA-approved repair stations.

³ The United States Supreme Court suggested its agreement with this proposition in discussing an analogous issue in *Printz v. United States*, 528 U.S. 828, 138 L. Ed. 2nd 914 (1997). In dealing there with the issue of Federal power to require state officers to administer or enforce Federal laws, it considered also the broader issue of the scope of the Interstate Commerce Clause, the constitutional duty of the President and his officers, under Article II Section 3 of the Federal Constitution, to “take care that the laws be faithfully executed,” and constitutional limitations upon the delegation to persons, other than officers of the Executive Branch, of the duty to administer or enforce Federal laws. 138 L. Ed. 2nd 914 at 936-939.

There is simply no statutory foundation for the agency to avoid its responsibilities by delegating them to private parties, even assuming that such delegation were not otherwise blocked by constitutional and statutory limitations. That basis cannot be found in 49 U.S.C. § 44901(a) which provides, by its terms only that

“The Administrator of the Federal Aviation Administration shall prescribe regulations requiring screening of all passengers and property . . . in air transportation The screening must . . . be carried out by a **weapon-detecting facility or procedure used or operated by an employee or agent** of an air carrier . . . or foreign air carrier.” (Emphasis added).

While that statute clearly does impose ultimate responsibility upon the carrier for compliance with screening requirements, it does **not** require that the screening be carried out by the carrier. Indeed, virtually all aspects of the Notice of Proposed Rulemaking and the proposed rules, explicitly recognize the distinction between carrier and screening company. The undeniable proposition that carriers may ultimately be liable for the screening failures no more creates a supposed affirmative legal duty of carrier supervision of screening companies than does the ultimate possible liability of carriers for accidents resulting from faulty repairs, or components or fuel quality, create a requirement for airline supervision of repair stations or component manufacturers, or fuel suppliers.

In short, the statutory duty of the Federal Aviation Administration is to certify and to assure that that certification has meaning by directly carrying out, rather than avoiding, its statutory duty.

II. THE PROPOSED REQUIREMENT THAT FOREIGN AIR CARRIERS ADHERE TO STANDARDS SET BY THE UNITED STATES FOR SCREENING AT FOREIGN AIRPORTS WOULD EXPAND THE JURISDICTION OF THE UNITED STATES IN VIOLATION OF INTERNATIONAL AGREEMENTS AND LAW.

One of the anomalies of the Notice of Proposed Rulemaking is that, having started with an effective admission that screening in the United States is less thorough than it is in other countries, the proposed rule would then impose upon the carriers of other countries the standards of the United States. Nevertheless, without regard to standards set by other countries and without regard to the limitations imposed by international law and agreements, the proposed rule would apparently impose upon foreign carriers at foreign locations the same screening standards (other than certification) that would be imposed upon carriers at U.S. airports. Indeed, the regulations as proposed may be read as imposing U.S. requirements upon screening activities at airports utilized by carriers subject to the regulation whether or not those airports are gateways for United States traffic.

To the extent that the proposed regulations attempt to apply U.S. rules extra-territorially, they appear to violate Article 37(b) of the Chicago Convention and are certainly inconsistent with Article 7 of the bilateral air services agreement between the governments of the United States and the United Kingdom ("Bermuda II"), as well as the security provisions of many other bilateral agreements to which the United States is a party.

III. IF THE PROPOSED RULES ARE NOT AMENDED TO EXCLUDE SMALLER CARRIERS FROM SCREENING OVERSIGHT REQUIREMENTS, AND TO ELIMINATE THE EXTRA-TERRITORIAL IMPACT OF THE PROPOSED REGULATIONS UPON FOREIGN AIR CARRIERS, THEN FOREIGN CHARTER AIR CARRIERS SHOULD BE EXEMPTED FROM THE OVERSIGHT AND EXTRATERRITORIAL PROVISIONS.

The opening Summary Description of the Notice of Proposed Rulemaking expresses a straightforward limitation upon the purpose of the proposed rule:

"This document proposes to require that all companies that perform aviation security screening be certificated by the FAA and meet enhanced requirements. This proposal is in response to a recommendation of The White House Commission on Aviation Safety and Security and to a congressional mandate in the Federal Aviation Reauthorization Act of 1996. . . ."

The Federal Aviation Reauthorization Act of 1996, in § 302, provides merely that "the Administrator of the Federal Aviation Administration is directed to certify companies providing security screening and to improve the training and testing of security screeners through development of uniform performance standards for providing security screening services.

Like many other carriers, neither Monarch nor Britannia performs its own aviation security screening. Thus, § 302 has no application to these carriers. If there is any pertinent statutory provision it is 49 U.S.C. § 44901(a) (page 8), upon which the Notice ultimately relies in part.

Subsection (c) of the same statute, however, provides that the Administrator

"may exempt from this section, air transportation operations, except scheduled passenger operations, of an air carrier providing air transportation under . . . a permit issued under § 41302 of this title . . ."

Both Monarch and Britannia, as well as all other foreign charter air carriers, operate under permits "issued under § 41302" that do not authorize or permit scheduled operations to or from the United States.

Foreign charter carriers, such as **Britannia** and **Monarch**, should properly be exempted from requirements of § 44901(a), pursuant to the provisions of § 44901(c)(1).

As shown above, neither carrier actively engages in the screening of passengers in the United States or abroad. Neither is a significant operator in terms of percentage of arriving/departing passengers or flights at any airport in the United States at which either operates. Neither has the power to affect or control the selection or rejection of any screening company at any airport in the United States at which it operates. Neither may properly be subjected to the extraterritorial application of the proposed rules at foreign airports.

Moreover, charter air carriers are less susceptible to terrorist attacks or violence than has been the case with scheduled carriers, particularly American scheduled carriers. The very nature of European charter air transportation; i.e., the practice of making reservations well in advance of flight dates; the frequent lack of knowledge on the part of the passenger, upon first reserving space what airline and what aircraft type will provide his or her transportation, as well as other factors including the largely family nature of transatlantic European-originating charter travel significantly reduces the potential for use of foreign charter aircraft for violent attacks against persons or property. The experience of European charter airlines with the type of violent behavior described in the Notice of Proposed Rulemaking has been nil.

For all of the reasons above stated, unless the final rules are amended so as to exclude from the oversight requirement airlines that are not also screening companies, do not directly contract with screening companies and/or are not the sole or dominant carriers at any U.S. airport; and unless the extraterritorial scope of the rules is deleted, then the final rule should exempt from those provisions, at least, all foreign charter air carriers,

Respectfully submitted



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