



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

Order 2003-6-33

Issued by the Department of Transportation
on the 25th day of June, 2003

Served: June 25, 2003

Joint Complaint of

AMERICAN AIRLINES, INC.
FEDERAL EXPRESS CORPORATION
UNITED AIR LINES, INC.
UNITED PARCEL SERVICE CO.

against

AEROLINEAS ARGENTINAS, S.A.
AIR PLUS ARGENTINA, S.A.
SOUTHERN WINDS, S.A.
and
THE GOVERNMENT OF ARGENTINA

under Section 2(b) of the International Air Transportation
Fair Competitive Practices Act, as amended

Docket OST-2003-15092

ORDER APPROVING COMPLAINT

Summary

By this Order, under 49 U.S.C. 41310(d), we approve the joint complaint of American Airlines, Inc., Federal Express Corporation, United Air Lines, Inc., and United Parcel Service Co. against the Government of Argentina and the Argentine carriers Aerolineas Argentinas, S.A., Air Plus Argentina, S.A., and Southern Winds, S.A. We have decided to defer a decision on the issue of appropriate sanctions.

Background

On May 1, 2003, American, FedEx, United, and UPS (joint complainants) filed a joint complaint under former section 2(b) of the International Air Transportation Fair Competitive Practices Act, as amended (49 U.S.C. 41310(d)), against the Government of Argentina and the above-mentioned Argentine carriers. The joint complainants state that the Government of Argentina has violated the Air Transport Agreement between the United States and Argentina by imposing unreasonable airport charges (for landing fees, parking, and air traffic control) at Buenos Aires International Airport (Aeropuerto Internacional Ministro Pistarini de Ezeiza—EZE)(Ezeiza) and

requiring the joint complainants to pay airport charges approximately three times higher than those paid by Aerolineas Argentinas.

The joint complainants state that by Argentine Decree, the exchange rate for international flights at Ezeiza is set in U.S. Dollars or at Pesos at the market exchange rate at the time of payment.¹ They also state that the Argentine carrier, Aerolineas Argentinas, has obtained judicial relief from that Decree, permitting it to pay in Pesos at the more favorable one-to-one exchange rate. The joint complainants further state that they have been unsuccessful in obtaining comparable relief through the Argentine courts.

The joint complainants assert that, given these circumstances, Argentina's airport fees are discriminatory, unjust and unreasonable, and directly violate Article VII provisions on user charges in the U.S.-Argentina bilateral agreement, and that Argentina is obtaining benefits under the Air Transport Agreement through the operations of Aerolineas Argentinas, Air Plus Argentina, and Southern Winds as authorized airlines to serve between Argentina and points in the United States. The joint complainants maintain that they have sought relief from both the Judicial and Executive Branches of the Argentine Government without success.

The joint complainants maintain that action by the Department is required under the International Air Transportation Fair Competitive Practices Act in order to bring Argentina into compliance with its bilateral obligations under Article VII of the U.S.-Argentina Air Transport Agreement, as amended. In this regard, the joint complainants urge the Department to issue a show-cause order providing that, unless the Government of Argentina immediately ends the collection of discriminatory, unjust, and unreasonable airport charges at Ezeiza, the authority held by Aerolineas Argentinas, Air Plus Argentina, and Southern Winds to serve the United States will be curtailed or suspended, or such other countermeasures as the Department finds to be in the public interest will be placed in force.

Section 41310(d)(1) provides that the Department shall approve, deny, dismiss, or set a complaint for hearing, or institute other procedures proposing remedial action, within 60 days after receipt of the complaint. We may extend the period for taking action up to 90 days from the date of the complaint if we conclude that it is likely that the complaint can be resolved satisfactorily through negotiations. We may further extend the action deadline up to 180 days from receipt of the complaint, in 30-day increments, if we find that intergovernmental negotiations have progressed to a point that a satisfactory resolution of the complaint appears imminent.

In light of the above, by Order 2003-5-4, we invited interested persons to file answers and replies to the joint complaint.² Aerolineas Argentinas, S.A. and Southern Winds, S.A. filed answers. The joint complainants filed a joint reply.

¹ They also note that at the time of the filing of the complaint the value of the Peso on the open market fell to approximately 3 Pesos to 1 USD. (Exhibit 1 to joint complaint)

²Subsequent to the issuance of our order inviting comments, Southern Winds, S.A. filed an objection to that portion of the Joint Complaint that sought May 8 as the answer date for comments and requested an additional 4 days to respond to the complaint. Since the Department established May 16 as the filing date for answers, we are dismissing Southern Winds' request as moot.

Summary of Responsive Pleadings

Aerolineas Argentinas filed an answer in opposition, arguing that the case does not warrant the imposition of sanctions or countermeasures; that the issues involved are currently the subject of lawsuits in Argentina brought by U.S. carriers, Aerolineas Argentinas, and other international air-lines; and that it is likely that the Argentine Supreme Court will ultimately uphold the airlines' view that the Argentine Executive Decrees are unconstitutional, thereby resolving the matter in favor of the U.S. airlines and thus not requiring the imposition of harsh countermeasures. It maintains that sanctions or even the threat of sanctions during the summer season will harm the traveling public. It further maintains that the complainants can neither show that discriminatory practices within the meaning of section 41310 have occurred (arguing that disputes are not the equivalent of discrimination) nor that the joint complainants have exhausted their legal remedies in Argentina to resolve the dispute. Moreover, it maintains that the joint complainants have not shown that all possible alternative means, including inter-governmental negotiations, have been exhausted. Regarding the Decrees by the Executive Branch, Aerolineas Argentinas maintains that they were generally applicable to all airlines operating international flights in Argentina and that several airlines, including Aerolineas Argentinas, have brought suit in the Argentine courts, arguing that the Decrees are unconstitutional. It finally argues that since the U.S. air carriers have not demonstrated that intervention under section 41310 is warranted, their complaint should be denied or, at the very least, sanctions should be deferred until sufficient time is allowed for the matter to be resolved in the Argentine courts.

Southern Winds argues that it should not be the subject of any sanctions, should they be applied, and urges the Department to dismiss the complaint, if not in its entirety, then as it relates to Southern Winds. Southern Winds maintains that the joint complaint omitted the critical fact that the "Executive Branch of the Argentine Government has appealed the decision enjoining enforcement of the decree against Aerolineas Argentinas,"³ and notes that Southern Winds also pays the same fees as those paid by the U.S. carriers. It maintains that the complaint is devoid of any substantive cost-related data or other empirical information and that it fails to make a prima facie case for the claim that the charges at Ezeiza are unjust and unreasonable. Southern Winds argues that Aerolineas Argentinas has gained competitive advantage over all of U.S. and Argentine air carriers; that Aerolineas Argentinas is the only beneficiary of the lower rates at Ezeiza; and that the Department should consider these facts in fashioning any remedy it may seek to impose under section 41310. Thus, Southern Winds urges the Department to reject immediately the "unsubstantiated position" of U.S. carriers that the authority of Southern Winds should be curtailed and that to this extent the joint complaint should be dismissed.

The joint complainants filed a joint reply, stating that neither Aerolineas nor Southern Winds denies that the U.S. carriers serving Ezeiza are paying discriminatory fees for airport services and that only Aerolineas has been successful in procuring an order enjoining the collection from it of the increased fees set under the Decree. They maintain that "the combination of the unjustified dollarization Decree and the judicial injunctive relief exclusively applied to Aerolineas has resulted in discrimination against the U.S. carriers serving EZE that is contrary to the U.S.-

³ Answer of Southern Winds, at 3.

Argentina bilateral air services agreement,”⁴ and that, contrary to the arguments of the Argentine carriers, the U.S. carriers have properly sought from the Department relief against such discrimination. The joint complainants argue:

No action of any Argentine judicial or legislative body is needed to eliminate the discrimination. It is the failure of the Executive Branch to act within its own powers to eliminate this discrimination that gives rise to this complaint. All efforts by the U.S. carriers in Argentina to achieve that result have failed, leaving joint complainants no alternative but to seek intervention by the U.S. government under the bilateral agreement and IATF CPA.⁵

The joint complainants also argue that sanctions against Argentine carriers are appropriate. Regarding Southern Winds, they maintain that it enjoys fair and equal treatment in the United States under the applicable bilateral agreement while its government is denying such treatment to U.S. carriers under the same agreements. They note that, to the extent that Southern Winds has chosen for its own reasons to pay higher charges, from which Aerolineas was discriminatorily relieved, that fact should have no bearing on what sanctions the Department imposes or on which carriers they are imposed. Last, the joint complainants argue that the Argentine government’s actions in this matter violate not only Article VII of the U.S.-Argentina Air Services Agreement but also Article 15 of the Chicago Convention.

Decision

After careful consideration of the pleadings and the issues in this case, we have decided to approve the Joint Complaint. We will defer action, at this time, on the issue of sanctions.

49 U.S.C. 41310 provides that, upon complaint or on our own initiative, when we determine that an activity of a foreign country is an unjustifiable or unreasonable discriminatory, predatory, or anticompetitive practice against an air carrier, or imposes an unjustifiable or unreasonable restriction on the access of a U.S. carrier to foreign markets, we may take such action as we deem to be in the public interest to eliminate such activity. We find that the imposition of higher fees at Ezeiza airport on U.S. carriers than those paid by Aerolineas Argentinas constitutes, on its face, the type of activity that 49 U.S.C. 41310 was intended to reach. We further find that this situation constitutes a violation of the Air Transport Agreement between the United States and the Republic of Argentina.

Specifically, Article VII of the Agreement provides that

User charges, imposed by the competent charging authorities on the airline of the other Party shall be just, reasonable, and non-discriminatory. Airlines shall not be required to pay charges higher than those paid by the airlines of the charging Party.⁶

⁴ Joint Reply of AA, FedEx, United, and UPS, at 2.

⁵ *Id.*, at 4-5.

⁶ Air Transport Services Agreement between the Governments of the United States of America and the Republic of Argentina, 1985.

United States carriers have suffered substantial financial hardship from the fact that, through actions of branches of the Argentine government, U.S. carriers serving Argentina pay, for comparable services, far higher fees at Ezeiza than Aerolineas Argentinas. They have attempted, over a substantial period, to remedy this situation, as has the U.S. government, through numerous dealings with the Argentine government both in Argentina and in Washington, DC, all without positive outcome. In this connection, we do not agree that the complainants must await resolution in the Argentine courts. Under the provisions of 49 U.S.C. 41310 they are entitled now to seek relief, and we as a Government are entitled now to expect the Government of Argentina to honor its obligations under our bilateral agreement.

The joint complainants recommend the issuance of a show-cause order that would curtail or suspend the authority of the named Argentine carriers or would impose such other counter-measures as the Department would find in the public interest. We have decided, however, to defer a decision on sanctions at this time.⁷ The issue of user charges has been the subject of informal discussions for several months, and we anticipate further discussions. In these circumstances, and taking into account the IATF CPA legislative approach of favoring, under prescribed parameters, negotiated resolution, we believe that the public interest is best served if we defer action at this time on the issue of sanctions while this process continues.

ACCORDINGLY,

1. We approve, under 49 U.S.C. 41310(d), the joint complaint filed by American Airlines, Inc., Federal Express Corporation, United Air Lines, Inc., and United Parcel Service Co.;
2. We find that the facts presented in the joint complaint filed by American Airlines, Inc., Federal Express Corporation, United Air Lines, Inc., and United Parcel Service Co. against the Government of Argentina and the Argentine carriers Aerolineas Argentinas, S.A., Air Plus Argentina, S.A., and Southern Winds, S.A. establish an unjustifiable, unreasonable, and discriminatory activity against U.S. carrier operations at Ezeiza airport and that American Airlines, Inc., Federal Express Corporation, United Air Lines, Inc., and United Parcel Service Co. are entitled to relief under subsection (c) of 49 U.S.C. 41310;
3. We defer action on the issue of imposing sanctions in this proceeding until further order of the Department;
4. We dismiss as moot the request of Southern Winds, S.A. regarding an answer date in this proceeding; and
5. We will serve this order on American Airlines, Inc.; Federal Express Corporation; United Air Lines, Inc.; United Parcel Service Co.; Aerolineas Argentinas, S.A.; Air Plus Argentina, S.A.; Southern Winds, S.A.; the Air Transport Association; the U.S. Department of State (Office of Aviation Negotiations); the Assistant U.S. Trade Representative (South America), Office of the

⁷ Southern Winds has argued that it should not be the subject of sanctions and requests dismissal of the complaint at least insofar as it relates to Southern Winds. Since we have decided to defer on the issue of sanctions, we need not resolve these matters at this time. Should we reach the issue of sanctions we will resolve those matters then.

United States Trade Representative; the U.S. Department of Commerce (Office of Service Industries); and the Ambassador of Argentina in Washington, DC.

By:

MICHAEL W. REYNOLDS
Acting Assistant Secretary for
Aviation and International Affairs

(SEAL)

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