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BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION

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DOCKET SECTION

International Air Transport Association:)
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Agreement Relating to) Docket OST 95 - 232 - 41
Liability Limitations of the)
Warsaw Convention)
)

Air Transport Association of America:)
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Agreement Relating to) Docket OST 96 - 1607 - //
Liability Limitations of the)
Warsaw Convention)
)

**OBJECTIONS OF ROYAL JORDANIAN
TO SHOW CAUSE ORDER 96-10-7**

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October 24, 1996

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OBJECTIONS OF ROYAL JORDANIAN

1. Introduction

Alia - the Royal Jordanian Airline ("Royal Jordanian") hereby submits its objections in response to the Department of Transportation's Order to Show Cause, Order 96-10-7, dated October 7, 1996, in which the Department tentatively decides to approve with certain conditions three agreements among U.S. and foreign carriers concerning passenger liability limits. Carriers participating in these agreements have agreed to waive the Warsaw Convention passenger liability limits for death or injury, and would waive the defense of non-negligence for all claims up to 100,000 SDRs (approximately \$145,000). In addition to approving these agreements and granting antitrust immunity to the participants, the

Department further proposes to amend all foreign air carrier permits and other U.S. authority held by foreign carriers to require the carriers to submit to the terms of the agreement, whether or not they are willing to voluntarily become signatories to the agreements.

Royal Jordanian does not object to the Department's approval of the agreements entered into by members of the International Air Transport Association ("IATA") and the Air Transport Association of America ("ATA") and the grant of antitrust immunity to carriers wishing to participate in these agreements. But Royal Jordanian objects to the Department's efforts to force all carriers serving the U.S. to submit to the terms of these agreements and thus involuntarily be subjected to strict liability up to 100,000 SDRs, and unlimited liability even in the absence of evidence of willful misconduct. The Department's proposed action in forcing these terms on carriers that have not agreed to them voluntarily conflicts with U.S. law and with U.S. obligations pursuant to the Warsaw Convention, an international treaty to which the United States is a party. In addition, by making participation in the agreements mandatory, the Department would exceed the scope of the IATA and ATA applications and undermine the voluntary nature of the carrier agreements. Finally, eliminating the liability limits would impose an undue burden on small and medium-sized air carriers serving the U.S., and would thereby put them at a considerable competitive disadvantage to the detriment of consumer interests. Royal Jordanian therefore urges the Department to refrain from making participation in these agreements mandatory for all carriers serving the United States.

2. As an Administrative Agency, the Department Does Not Have the Power to Take Actions in Violation of International Treaties to which the United States is Party.

The Warsaw Convention of 1929, 49 Stat. 3000, T.S. 876, established limits on air carrier liability for damages incurred by passengers in international air travel. Both Jordan and the United States are parties to the Convention. The Convention has since been supplemented by the Montreal Agreement, which raised the liability limit to US \$75,000. To this day, the Warsaw Convention remains in force as an international treaty to which the U.S. is party. Significantly, under Article VI, cl.2 of the United States Constitution, treaties such as this convention are considered the supreme law of the land. In fact, the Warsaw Convention's status as controlling law in the U.S. has repeatedly been acknowledged by U.S. courts. See e.g. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984); In re Korean Air Lines Disaster of September 1, 1983, 814 F. Supp. 592 (E.D.Mich. 1993).

With this Order the Department is proposing to not only approve the carrier agreements, but to condition all foreign air carriers' operations to the U.S. on adherence to the agreements. No carrier of any country would henceforth be allowed to serve the United States unless it unconditionally accepted the terms of these agreements. The Department would thus take an action establishing new mandatory standards for air carrier liability that directly conflict with those established through intergovernmental negotiation and reflected in the Warsaw Convention.

With respect, Royal Jordanian submits the Department does not possess the legal authority to take an action that conflicts with U.S. treaty obligations. Not only are treaties

the "supreme law of the land" pursuant to the U.S. Constitution, but the Department of Transportation is specifically required to "act consistently with obligations of the United States Government under an international agreement." 49 U.S.C. 40105(b). Forcing the terms of the IATA agreements on non-signatory carriers is a violation of the Warsaw Convention and this statute. It is not contested that the Department has the power to approve the carrier agreements and to grant antitrust immunity to the participants. But going one step further in requiring non-signatory carriers to be bound by these provisions is an action in violation of an international treaty to which the U.S. is a party, and thus beyond the bounds of the Department's authority.

There is no basis in law for an administrative agency to take action to supersede an international treaty. The Supreme Court has held that administrative agencies may not take actions inconsistent with international treaties to which the United States is a party.

McCullough v. Sociedad Nacional, etc., 372 U.S. 10 (1963). Courts will not hesitate to inquire into whether administrative rules comply with a treaty to which the U.S. is a party.

See e.g. Bullfrog Films, Inc. v. Wick, 847 F.2d 502 (9th Cir. 1988), Sohappy v. Hodel, 911 F.2d 1312 (9th Cir. 1990).

The power to create legislation that would supersede a treaty does lie in the hands of Congress, which can supersede a treaty by subsequently enacting an inconsistent statute. See Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889). As an administrative agency without such legislative power, the Department's authority in turn has to be consistent with the authority given to it by Congress. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). In the case at hand, the only relevant pronouncement

by Congress is 49 U.S.C. §40105, directing the Department to act consistently with all U.S. treaty obligations, including the Warsaw Convention.

Royal Jordanian disagrees with the implication in the Show Cause Order that requiring all carriers to adhere to these agreements would be comparable to the practice of requiring adherence to the 1966 Montreal Agreement. The Montreal Agreement was clear in preserving the fundamental structure of the Warsaw regime, including the principles that liability would be limited except in cases where willful misconduct were proven, and that carriers could be exonerated from liability if they could prove they had "taken all necessary measures to avoid the damage" or could establish contributory negligence. The Montreal Agreement was essentially an undertaking in furtherance of Article 22(1) of Warsaw, which specifically contemplates carriers may agree to higher limits of liability "by special contract." Thus, the 1966 Montreal Agreement was fully consistent with the Warsaw Convention structure. The agreements now before the Department, in contrast, would depart from the longstanding Warsaw structure, imposing strict liability for damages up to 100,000 SDRs, and unlimited liability for damages above that level based on a showing of ordinary negligence rather than willful misconduct. It is logically and legally impossible to construe these agreements as being consistent with the Warsaw Convention structure. While those carriers willing to do so are free to waive the rights accorded under Warsaw, for the Department to impose such a requirement on an industry-wide basis on unwilling carriers is nothing less than a purported abrogation by an administrative agency of a solemn U.S. treaty obligation. Royal Jordanian respectfully urges the Department not to embark on such a course of action.

Royal Jordanian believes that if the United States is dissatisfied with the current liability limits of the Warsaw Convention as supplemented by the Montreal Agreement, it should try to work within the parameters of the Convention to negotiate a further modification, or perhaps create a new Convention, rather than to snub treaty partners equally concerned with the issue of carrier liability. In particular, Royal Jordanian, along with other members of the Arab Air Carrier Organization, would be willing to raise the liability limits to 250,000 SDRs, or approximately US \$362,500, while preserving the basic Warsaw Convention framework. This would more than quadruple the current limit. In light of this international desire for multilateral modification of the liability regime, the U.S. need not and should not unilaterally take actions which undercut its commitments to other states pursuant to the Warsaw Convention.

3. By Making Participation in the Agreements Mandatory, the Department is Exceeding the Scope of the IATA and ATA Applications and Undermining the Voluntary Nature of the Carrier Agreements.

In addition to being in conflict with U.S. and international law, the Department's proposed action is patently inconsistent with the agreements themselves. As evidenced both by the agreements and the IATA and ATA applications to the Department on July 31, 1996, the basis for these agreements is the voluntary participation by air carriers. Each carrier which has signed the agreements - and thus subjected itself to higher liability - has done so voluntarily, presumably because it considered doing so to be in its best interest.

The Department's Order goes far beyond what the applicants themselves requested. In their applications, IATA and ATA only requested approval of the agreements, antitrust immunity for carriers opting to sign the agreements, and exemption from the regulatory requirements tied to the Montreal Agreement. Neither association asked the Department to force other carriers to submit to the terms of the agreements. The actual spirit of the agreements is well displayed in Article 4 of the IATA agreement, which states that the carriers hope to "encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage." No provision exists for forcing other carriers to participate, or for requesting any government to impose such mandatory requirements. The signatory carriers themselves agree that voluntary participation is the basis for these agreements. Accordingly, the Department should respect the spirit of these agreements and refrain from taking the contradictory step of sua sponte making participation in voluntary agreements mandatory.

4. Forcing the New Liability Scheme on Small International Carriers Will Adversely Affect Their Ability to Compete.

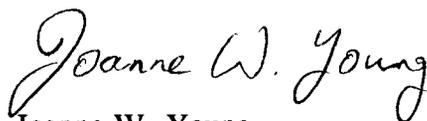
As acknowledged in the IATA and ATA applications, the Department is required by law to examine the agreements' impact on competition. The Department must deny approval to a cooperative agreement that "substantially reduces or eliminates competition." 49 U.S.C. 41309. In the case at hand, there is insufficient evidence in the record as to whether applying these agreements to all air carriers serving the U.S. would or would not adversely affect competition. The Department has not adequately studied the potential affect of these

agreements, and should, at a minimum, proceed to conduct such a study before imposing these agreements on an industry-wide basis.

It is in fact very likely that mandatory participation in these agreements will have adverse affects on international aviation competition. By summarily and dramatically increasing liability exposure, the action the Department proposes will impose significant new costs, which will disproportionately impact the operating economics for smaller and medium-sized carriers, which cannot avail themselves of the economies of scale in purchasing insurance coverage available to their larger competitors. Accordingly, this requirement may force some of these carriers to reduce or discontinue service to the United States, resulting in less competition and fewer service options for the travelling public. Thus, in addition to being legally flawed, the Department's proposed action appears to be in direct contravention of the U.S. policy to promote competition in international aviation. See U.S. International Air Transportation Policy Statement, April 1995; 49 U.S.C. §40101.

For the foregoing reasons, Royal Jordanian respectfully urges the Department to refrain from making participation in the air carrier liability agreement mandatory for all carriers serving the United States.

Respectfully submitted,



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October 24, 1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objections of Royal Jordanian Airlines was this 24th day of October 1996 served by first-class mail on all parties listed on the attached service list.

A handwritten signature in cursive script that reads "David E. Short". The signature is written in black ink and is positioned above a horizontal line.

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