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BEFORE THE
DEPARTMENT OF TRANSPORTATION

AGREEMENT RELATING TO
LIABILITY LIMITATIONS OF THE
WARSAW CONVENTION

Docket Nos. OST-95-232, OST-96-1607

COMMENTS OF
SWISSAIR, SWISS AIR TRANSPORT CO., LTD.

OST-95-232-47
OST-96-1607-17

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Dated October 24, 1996

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Swissair, Swiss Air Transport Company, Ltd.
("Swissair"), a signatory to the IATA Inter-carrier Agreement
("IIA") and the Agreement on Measures to Implement the IATA
Inter-carrier Agreement ("MIA"), hereby objects to the issuance of
an order making final the tentative findings and conclusions of
the Department in its Order to Show Cause, issued on October 3,
1996 in these proceedings. Swissair fully supports the
objections filed by IATA on behalf of the non-U.S. signatories to
these agreements (including Swissair). These comments should
therefore be considered as simply supplementary of IATA's
comments.

While the Department has tentatively approved the IIA and MIA, it has proposed to condition its approval on the acceptance by the signatories of various additional provisions which it seems to believe will enhance the agreements. Moreover, the Department has proposed to amend the foreign air carrier permits of Swissair and the other non-U.S. signatories apparently in an attempt to require them -- as a price for flying to/from the United States -- to abide by the Department's version of the IIA/MIA (i.e., as conditioned) even if they do not accept the Department's conditions to their agreements. In Swissair's view, a final DOT order containing either of these elements would be imprudent and, in many respects, unlawful.

I. CONDITIONING THE AGREEMENTS

The central and overwhelming aspect of the IIA and MIA is that they would replace the current limited liability regime with a system that essentially fully compensates for injury or death to a passenger on an international flight. The major international carriers of the world have achieved this result -- which has eluded governments for decades -- by voluntary agreements, assuming that governments do not destroy that achievement through regulatory overreach.

As far as the U.S. is concerned, regulatory review of the IIA and MIA is governed by section 41309 of the Aviation Code (49 U.S.C. § 41309) dealing with the approval/disapproval of intercarrier agreements. Under that section, the Department must approve the IIA/MIA if they (a) are "not adverse to the public interest," (b) are not in violation of the Aviation Code (Part A, Subtitle VII of Title 49), and (c) do not substantially reduce or eliminate competition. There is absolutely no question that the IIA/MIA fully meet this three-pronged test. Nothing in the Show Cause Order suggests otherwise. Indeed, the Department has accurately characterized these voluntary agreements as a "gigantic step" in the protection of passengers (Order at 8) and has stated that "[c]learly, therefore, the agreements are not adverse to the public interest" (Order at 9).

When an agreement meets the statutory criteria, it is impermissible for the Department to withhold approval pending acceptance by the parties to the agreement of additional provisions or conditions that the Department might in its own judgment deem worthy or, indeed, deem to be in the public interest. The fact that the Department may view its conditions as "in the public interest" is immaterial to an agreement's approvability so long as the agreement (without such conditions)

is not adverse to the public interest. Simply put, the Department is not authorized to add its own bells and whistles to a voluntary agreement that meets the three-pronged test. While the Department is of course free, in appropriate circumstances, to propose any regulation it deems to be "in the public interest," it may not do so in these proceedings, the sole purpose of which is to determine whether the carriers' voluntary agreements comport with section 41309. Accordingly, the Department is obliged to approve the IIA/MIA as submitted to it.

Legalities aside, however, the Department should reconsider the wisdom of placing the proposed conditions on approval of the IIA/MIA. By and large, those conditions are, in Swissair's judgment, ill-advised. While one must of course wait and see how the final order deals with conditions to approval, if that order finally adopts the conditions proposed and suggested in the Show Cause Order, Swissair (and perhaps all or most of the other non-U.S. carrier signatories) would probably find them unacceptable for the reasons detailed in IATA's objections. At this point, Swissair can only say that it reserves the right to withdraw from the IIA/MIA unless the agreements are approved without the Department's revisions.

In reconsidering the conditions, the Department should bear in mind that the IIA/MIA were very carefully crafted to take the gigantic step of providing for essentially unlimited liability and, at the same time, to assure that carriers of all sizes and descriptions (including airlines that do not fly to/from the U.S.) would be prepared to join. The IIA/MIA package thus represents a delicate balance of interests that the Department should be loathe to upset. The imposition of the proposed conditions would put at risk the airlines' historic accomplishment for a series of legalistic, relatively marginal, and ethno-centric revisions. It has been precisely this kind of governmental thinking and haggling that has in the past prevented governments from achieving Warsaw Convention modernization that could find wide acceptance.

Now that the world's airlines are on the threshold of embarking on a new and universally-welcome era of liability reform, the Department should not turn back the clock in an effort to have its own package adopted. Rather, the Department should provide immediate relief from the now-unrealistic liability limits of the Montreal Agreement and the even more unrealistic limits of the Warsaw Convention (on routes where the Montreal Agreement is not applicable). The Department can do

this by promptly approving the IIA/MIA instead of adorning the core IIA/MIA principles with contentious additions and revisions. However, the Department also can and should contemporaneously pursue Warsaw Convention modernization multilaterally with other governments under the auspices of ICAO. ICAO deliberations, with full U.S. participation, are already being held on this subject. Indeed, Swissair understands that governments, through ICAO, are discussing the important issue of the fifth-jurisdiction. That issue is the source of some of the most troublesome proposals of the Show Cause Order. In any event, changes to the Convention should be agreed by governments and should not be imposed unilaterally by the Department, and most particularly should not (and cannot) be imposed unilaterally in a case of this kind.

II. AMENDING THE PERMITS

If all, some or any of the IIA/MIA signatory airlines do not accept whatever conditions the Department may impose in its final order -- and Swissair earnestly hopes there will be none -- (a) those airlines can withdraw from the IIA and MIA, and/or (b) those agreements will stand disapproved insofar as those airlines are concerned. In either event, those airlines would not be participants in the IIA/MIA. The Department cannot force such airlines to accept the Department's revisions to their

voluntary agreements (otherwise they would not be voluntary and would be outside the scope of section 41309). In particular, the Department may not amend the foreign air carrier permits of non-U.S. airlines in order to impose on them its own package of unlimited liability/Warsaw Convention provisions which those airlines will have already rejected in the context of proposed DOT amendments to their IIA/MIA agreements.

Any such attempt to amend the permits should first be taken up in consultations between the U.S and the airlines' governments under the pertinent bilateral aviation agreements since the proposed permit amendments would necessarily affect the very purpose of civil aviation bilateral agreements -- the ability of one nation's airline(s) to serve another nation. Moreover, under section 41304 of the Aviation Code (49 U.S. § 41304) the Department may not so amend the permits without notice and an opportunity for a hearing. These proceedings do not provide such notice and opportunity for hearing as contemplated by section 41304 and the Administrative Procedure Act.

The Department may not promulgate a rule in this case to require permit amendments. This case deals with the

approvability of voluntary agreements and is neither an appropriate nor sufficient proceeding for consideration of permit amendments. Certainly the show cause process herein does not meet elementary standards of fairness and due process to all those who would be affected by the permit-amendment rule that was first proposed in the Show Cause Order itself at the tail end of the case after the Department had already reached its tentative conclusions on the issue in secret. In its final order, the Department should therefore abandon any notion of amending the permits of those non-U.S. carriers that do not agree to the Department's IIA/MIA revisions.

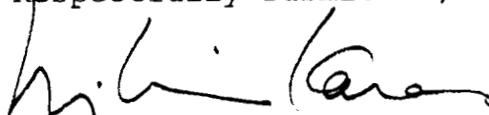
Finally, with respect to the Department's proposal to impose (through permit amendments) involuntary conditions on the rights of non-U.S. airlines to serve the U.S., Swissair would remind the Department of its obligation under section 40105 of the Aviation Code (49 U.S.C. § 40105) to carry out its duties "consistently with obligations of the United States Government under an international agreement." Since a number of the Department's proposed conditions and suggestions are contrary to the terms of the Warsaw Convention (as explained in the IATA objections), the Department would be acting contrary to the Congressional directive of section 40105 if it were to impose

them as permit conditions. Indeed, Swissair believes that, at least in the spirit of that section, the U.S. Government should consult with relevant foreign governments on the permit-amendment issue.

III. CONCLUSION

For the foregoing reasons, Swissair urges the Department to promptly approve the IIA and MIA agreements without amendments/conditions and, in any event, to abandon its proposal to amend the foreign air carrier permits of non-U.S. airlines.

Respectfully submitted,

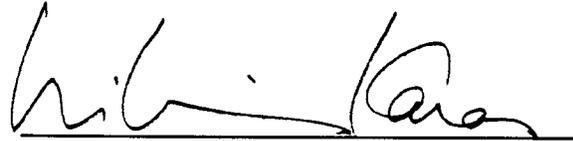


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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing
Comments by facsimile on all persons named on the attached
service list.

A handwritten signature in black ink, appearing to read "William Karas", written over a horizontal line.

William Karas

October 24, 1996

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