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Order 2003-10-18

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

Issued by the Department of Transportation
on the 15th day of October, 2003

Served: October 15, 2003

In the Matter of

AEROLINEAS ARGENTINAS, S.A.

under Section 41310(c)(2) International Air Transportation
Fair Competitive Practices Act, as amended

Docket OST-2003-15092 - 10

ORDER TO SHOW CAUSE

Summary

By this Order, we propose to require Aerolineas Argentinas, S.A. to remit into a U.S. escrow account, on a per flight basis, the difference between what it actually pays for services at Buenos Aires Ezeiza airport and the higher amounts it would be paying if it were not benefitting from discriminatorily favorable treatment *vis-à-vis* U.S. carriers.

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 Aerolineas Argentinas, S.A., Air Plus Argentina, S.A., and Southern Winds, S.A. The joint complainants maintained that the Government of Argentina 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, which had obtained judicial relief that permitted it to pay in pesos at the more favorable one-to-one exchange rate.¹ The joint complainants requested the Department to issue a show-cause order providing that, unless the Government of Argentina immediately ended the collection of discriminatory, unjust, and unreasonable airport charges at Ezeiza, the authority held by the Argentine carriers to serve the United States would be curtailed or suspended, or such other countermeasures as the Department found to be in the public interest would be placed in force.

¹ 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. At the time the complaint was filed, the value of the peso on the open market fell to approximately 3 Pesos to 1 USD. (See Order 2003-6-33 at 2)

By Order 2003-6-33, the Department found 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...[and] that this situation constitutes a violation of the Air Transport Agreement between the United States and the Republic of Argentina.”² The Department noted that the issue of user charges had been the subject of informal discussions for several months between the Governments of the United States and Argentina, and that the Department anticipated further discussions regarding user charges. In those circumstances, the Department deferred on the issue of countermeasures, noting that the IATFCPA legislative approach favors, under prescribed parameters, negotiated resolution and that the public interest would be best served if we deferred action at that time on the issue of countermeasures while the negotiated process continued.³

Subsequent to the issuance of our order, formal consultations were held between the United States and Argentina on the user charges paid by U.S. carriers serving Ezeiza airport. Those consultations did not prove successful. There has been no satisfactory resolution to the problems facing U.S. carriers serving Ezeiza; the Argentine carrier Aerolineas Argentinas continues to be permitted to pay lesser fees than those assessed on U.S. carriers serving the same airport; and the U.S. carriers serving Ezeiza airport continue to be forced to pay higher fees. Furthermore, informal communications following the consultations offer no basis to conclude that a satisfactory resolution will be forthcoming.

Decision

Section 41310(c)(1) states, among other things, that we may take actions that are in the public interest to eliminate an activity of a government of a foreign country or another foreign entity, including a foreign air carrier, when we decide that the activity is an unjustifiable or unreasonable discriminatory, predatory, or anticompetitive practice against an air carrier. Section 41310(c)(2) states that we “may ... amend ... under paragraph (1) of this subsection a foreign air carrier permit ... under section ...41304(a) ... of this title.”

Taking into account our findings and conclusions of Order 2003-6-33 and the developments subsequent to that order, we have tentatively decided to proceed to impose countermeasures under Section 41310(c). Specifically, we propose to amend the foreign air carrier permit of Aerolineas Argentinas, S.A.⁴ to add a condition requiring the carrier to remit into a U.S. escrow account, on a per flight basis, the difference between what it actually pays for services at Buenos Aires Ezeiza airport and the higher amounts it would be paying if it were not benefitting from discriminatorily favorable treatment *vis-à-vis* U.S. carriers.⁵ We have tentatively concluded that this would be a proportionate response in the circumstances presented.

² Order 2003-6-33 at 4.

³ *Id.*, at 5.

⁴ Aerolineas Argentinas holds a foreign air carrier permit issued by Order 77-12-53.

⁵ We have tentatively decided not to impose a similar condition upon the other named Argentine carriers in the original complaint. Those carriers have maintained, and no party has offered contrary proof, that they are assessed at the same rate as U.S. carriers and that only Aerolineas Argentinas, S.A. has been accorded the privilege of paying lesser fees.

We propose to attach to the Foreign Air Carrier Permit of Aerolineas Argentinas, S.A. the following condition:

Until further order of the Department, Aerolineas Argentinas S.A. must establish and remit into an escrow account with a U.S. Bank payments in the amounts and in the prescribed manner set forth by the U.S. Department of Transportation, in Docket OST-2003-15092.⁶

The proposed condition would require Aerolineas Argentinas to set up an escrow account with a U.S. Bank and to have an escrow agreement approved in advance by the Department of Transportation, Office of International Aviation. The proposed terms and conditions for escrow payment are set forth in the attached Appendix.

ACCORDINGLY,

1. We direct all interested parties to show cause why the tentative decision set forth above should not be made final;
2. Comments in response to this order shall be filed with the Department of Transportation, Docket OST-2003-15092, Dockets Section, 400 Seventh Street, SW, Washington DC 20590, no later than 7 calendar days from the date of service of this order, and any replies thereto shall be filed no later than 5 calendar days thereafter, and shall be served on all parties named in ordering paragraph 4 below;
3. In the event no comments are filed, all further procedural steps shall be deemed waived, and the Department shall enter an order, subject to the disapproval of the President pursuant to 49 U.S.C. 41307 which shall make final our tentative findings and conclusions set forth in this order;⁷ and
4. 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

⁶ Pursuant to 49 U.S.C. 41307, amendment of a foreign air carrier permit is subject to Presidential review.

⁷ Since provision is made for the filing of comments to this order, petitions for reconsideration will not be entertained.

America), Office of the U.S. 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)

An electronic version of this order is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp

Proposed Terms and Conditions for Escrow Payment

Aerolineas Argentinas shall establish an Escrow Account with a U.S. bank insured by the Federal Deposit Insurance Corporation and the bank shall maintain a separate accounting for the receipt of monies from Aerolineas Argentinas, S.A.

Aerolineas Argentinas shall provide an effective agreement between the carrier and the designated bank, with a named escrow agent. The named bank, named escrow agent, and agreement are subject to approval of the U.S. Department of Transportation.

Within 10 days after the effective date of a final order effectuating the permit amendment, Aerolineas Argentinas shall establish an Escrow Account, obtain an Escrow Agent, effectuate an agreement among the carrier, the bank and the agent, and provide evidence of all three actions to the U.S. Department of Transportation for approval.^{1 2}

Within 10 calendar days of U.S. Department of Transportation approval of the bank, agent and agreement, Aerolineas Argentinas must begin paying into the escrow account, monies for each of its flights from/to Ezeiza airport in connection with services to the United States in amounts equal to the difference between what Aerolineas Argentinas pays in pesos for airport charges at Ezeiza, on a per-flight basis, for its U.S. operations from/to Ezeiza, and what Aerolineas Argentinas would have paid for such flights if it were assessed on the same basis as a U.S. carrier would be assessed for comparable services to/from Ezeiza in U.S. dollars.³ The amounts paid must be in U.S. dollars at the exchange rate applicable on each day of operation.

Aerolineas Argentinas shall submit a summary in English of a day-to-day account of its U.S.-Argentina operations, payments it makes to Ezeiza, and payments it makes to the approved Escrow Account in the approved U.S. bank. Aerolineas Argentinas's summary must also provide documentation supporting the accuracy of its payments to the Escrow Account. This summary shall be submitted no later than 5:00 p.m. local time on each Monday for the prior week to the U.S. Department of Transportation, Office of International Aviation, so that verification can be made that the Argentine carrier is submitting funds consistent with the terms of this Appendix.

At a time to be determined at a later date, the accumulated funds shall be disbursed by the Escrow Agent, as directed by the U.S. Department of Transportation, and this provision must be covered in the Escrow Agreement.

¹ This evidence shall be submitted to the Director, Office of International Aviation, and to the Assistant General Counsel for International Law. These offices shall review the submissions to ascertain whether the submissions will be approved by the Department.

² Failure to submit the necessary evidence to justify approval by the Department will constitute a violation of the final order in this proceeding and of Aerolineas Argentinas' permit and will subject Aerolineas Argentinas to assessment of civil penalties on the basis that each day of non-compliance constitutes an additional violation.

³ The monies to be paid by Aerolineas Argentinas shall include airport charges for landing fees, parking fees, and air traffic control at Ezeiza airport.