



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

Issued by the Department of Transportation
on the 19th day of November, 2003

Served: November 25, 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

FINAL ORDER

Summary

By this Order, we make final the tentative findings and conclusions set forth in Order 2003-10-18, and require Aerolineas Argentinas, S.A. (Aerolineas) 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 benefiting from discriminatorily favorable treatment *vis-à-vis* U.S. carriers.

Background

On May 1, 2003, American Airlines (American), Federal Express Corporation (FedEx), United Air Lines (United), and United Parcel Service (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, Air Plus Argentina, S.A. (Air Plus), and Southern Winds, S.A. (Southern Winds). 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, 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

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)

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.

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 constituted a violation of the Air Transport Agreement between the United States and the Republic of Argentina. 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.²

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. Furthermore, informal communications following the consultations offered no basis to conclude that a satisfactory resolution would be forthcoming.

By Order 2003-10-18, the Department tentatively found that countermeasures should be imposed. The Department tentatively decided to condition Aerolineas Argentinas' permit so as to require 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 benefiting from discriminatorily favorable treatment *vis-à-vis* U.S. carriers. Comments on the Department's tentative decision were due October 23, 2003, and replies to comments, October 28, 2003.

Responsive Pleadings to Order 2003-10-18

FedEx, Aerolineas, Southern Winds, and the Government of the Republic of Argentina (Government of Argentina) filed comments to the tentative decision.³ American, FedEx, United, and UPS filed a joint reply. American, FedEx, United, and UPS filed a joint supplemental reply to the submission of the Government of Argentina. Aerolineas Argentinas also filed comments on the Government of Argentina's submission.

FedEx supports the Department's tentative decision and urges the Department to proceed to finalize and implement the relief proposed in the show-cause order as soon as possible. FedEx maintains that "it is clearly within the power of the Argentine Government to remedy the discrimination" but that the Argentine government has failed to implement any solution,

² Order 2003-6-33 at 4 and at 5.

³ The Government of Argentina's comments were submitted through diplomatic channels and were placed in the Docket after the response date. On October 29, 2003, the Department issued a notice extending the reply date for comments on the Government of Argentina's submission until November 3, 2003.

preferring to allow the discrimination to persist.⁴ FedEx argues that, if Aerolíneas Argentinas wishes to end sanctions, all it need do is to persuade its homeland government to afford U.S. carriers nondiscriminatory treatment, to which they are entitled under the bilateral agreement.

Aerolíneas requests the Department not to impose the tentative sanction, arguing that the proposed sanction is not an effective countermeasure because it would not eliminate “the dollarization Decree” issued by the Argentine Executive Branch. Aerolíneas argues that the current situation is the result of decisions by the Argentine judiciary, which the Argentine Executive Branch is attempting to reverse, and that imposition of the sanctions will not relieve U.S. carriers from, or cause repeal of, the dollarization Decree. It further argues that if the Executive branch is successful, both U.S. carriers and Aerolíneas will be required to pay three times more than they did before the Decree was enacted. Aerolíneas alleges that the Argentine Government subsidizes Southern Winds, Aerolíneas’ competitor, which is not challenging the Decree and “voluntarily” pays at the higher three for one rate. Aerolíneas maintains that the proposed sanction would have an unfair impact on it and questions what the Department intends to do with the escrowed funds if the Argentine Executive prevails. Aerolíneas argues that if the Argentine Executive and the Airport Authority are ultimately successful in their litigation, they would claim all unpaid amounts from Aerolíneas, and that, plus the monies Aerolíneas would have to pay into the escrow account, would impact the carrier unfairly. Aerolíneas suggests that the Department refer this matter to the Department of State for placement on the list of economic items to be negotiated with the Argentine Republic together with non-aviation economic issues.

Southern Winds urges the Department to make final its tentative decision to limit the imposition of sanctions on the only carrier that may have benefited from any unfairly applied airport fees or charges. It goes on to argue that the U.S. Government has not treated Argentine carriers in a fair and nondiscriminatory manner, citing treatment of carriers under the FAA’s International Aviation Safety Assessment (IASA) program.

The Government of Argentina argues that the joint complainants have not demonstrated that the Aerolíneas situation constitutes discriminatory behavior attributable to the Executive Branch. It argues that

from the point of view of Argentine legal order, it cannot be stated that the Aerolíneas Argentinas situation is illegal or runs contrary to current regulations in view of the fact that payment of airport user charges is based on a judicial resolution that is currently in force and applies to Aerolíneas Argentinas, regardless of the appeal lodged by the Government of Argentina.⁵

The Government of Argentina further argues that the Executive Branch is not empowered to modify a decision of the judicial branch or to interfere in the courts’ exercise of their powers. It states that the Executive Branch is only empowered to attempt to reverse the judicial decision in favor of Aerolíneas and that this has been done via an appeal. The Government of Argentina

⁴ October 23, 2003 Response of FedEx at 2-3.

⁵ Comments of Government of Argentina at 2

requests that the Government of the United States refrain from or suspend applying the measure proposed by the Department until the Government of Argentina reaches a satisfactory solution.

The U.S. carriers in their joint reply urge the Department to finalize promptly the sanctions proposed against Aerolineas in Order 2003-10-18. They argue that the Department's collection of the fee differential is intended to eliminate the discriminatory cost advantage enjoyed by Aerolineas in competing with U.S. carriers for traffic at Ezeiza airport, and that it is immaterial which branch of the Argentine government is the source of discrimination—the relevant fact is that Aerolineas has been relieved from the payment of higher fees and the same relief has been denied to U.S. carriers. The U.S. carriers maintain that the Department is fully warranted in rejecting the pleas of Aerolineas in opposition to the required escrow payment and that by requiring Aerolineas to make payment, the Department will eliminate the discrimination that has been created by the actions of various branches of the Argentine government. Moreover, they believe that the collection of the differential by the Department will afford the U.S. leverage on the dispute. Regarding Southern Winds' arguments on treatment under the IASA, the U.S. carriers argue that this is not the correct forum to resolve that dispute and that there is no basis for the Department to expand this proceeding to include the extraneous issues raised by Southern Winds.

In their supplemental reply, the joint complainants argue that the fact that the Argentine Judiciary has granted relief to Aerolineas yet withheld relief from the joint complainants is what led to the discriminatory application of the fees, and that the DOT show-cause order is designed to eliminate such discrimination. They argue that the Executive could rescind or at least suspend the increase in fees by further decree pending the completion of judicial review. Thus, the joint complainants argue that the Argentine Government is not entitled to deference by the United States.

Aerolineas reiterates its earlier position that the Department's proposed sanctions are not appropriate since they will not motivate the Executive Branch to alter its position or advance the interests of U.S. air carriers. Aerolineas maintains that the situation could be remedied by the Executive and that "there is currently activity in this matter on the diplomatic front involving the government of the United States in Argentina."⁶

Decision

As discussed above, we have already approved the complaint in this proceeding and determined that a basis for redress exists under 49 U.S.C. section 41301(c)(1). Order 2003-6-33. The remaining issue before us now is the imposition of countermeasures. By Order 2003-10-18, we tentatively decided to attach a condition to the foreign air carrier permit of Aerolineas Argentinas to require 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 benefiting from discriminatorily favorable treatment *vis-à-vis* U.S. carriers.⁷

⁶ Id. at 7.

⁷ Order 2003-6-33 at 4 and Order 2003-10-18 at 2.

No party has persuaded us to alter our tentative decision. Indeed, both Aerolineas and the Government of Argentina acknowledge in their submissions that treatment of U.S. carriers and of Aerolineas is different. Although the Executive Branch argues that it is not responsible for and cannot alter a decision of the Argentine judiciary, nevertheless, both the Executive and the Judiciary are components of the Government of the Argentina, and the Government of Argentina is a signatory to an agreement with the Government of the United States which states that “airlines shall not be required to pay charges higher than those paid by airlines of the charging Party.”⁸

Notwithstanding these circumstances, U.S. carriers have not been given any relief from the higher fees required by the Government of Argentina for U.S. carrier services at Ezeiza, and Aerolineas continues to be afforded special treatment so that it pays lesser fees for services to Ezeiza. We have no basis to conclude, either from the record in this proceeding or from diplomatic communications, that the Government of Argentina will be taking any immediate action to eliminate the disparate treatment or otherwise provide relief to the complainant U.S. carriers. We have concluded that our announced countermeasure would constitute effective and proportionate relief in the circumstances presented. Therefore, we find that finalization of our tentative decision in Order 2003-10-18 is warranted and is in the public interest, and hereby impose and attach the following condition to the Foreign Air Carrier Permit of Aerolineas Argentinas, S.A.:

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-2003-15092.⁹

This condition requires Aerolineas Argentinas, within 10 days of the effective date of this order, to set up an escrow account with a U.S. Bank and take certain other steps as prescribed in the Appendix to this order. Implementation of this escrow agreement is subject to approval in advance by the Department of Transportation, Office of International Aviation. The terms and conditions for escrow payment are set forth in the attached Appendix.¹⁰

ACCORDINGLY,

1. The foreign air carrier permit of Aerolineas Argentinas, S.A. is conditioned as follows:

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

⁸Air Transport Services Agreement between the Governments of the United States of America and the Republic of Argentina, 1985.

⁹ Pursuant to 49 U.S.C. 41307, amendment of a foreign air carrier permit is subject to Presidential review.

¹⁰We have not addressed Aerolineas’ allegations concerning subsidization of Southern Winds by the Government of Argentina, since we do not view these allegations as germane to the matter of discrimination against U.S. carriers at Ezeiza. Nor do we address Southern Winds’ comments concerning its treatment under the FAA IASA program, since we do not view this proceeding as the appropriate forum for such considerations.

prescribed manner set forth by the
Docket OST-2003-15092;

U.S. Department of Transportation, in

2. To the extent not granted, we deny all requests in this docket;

3. We will not entertain petitions for reconsideration of this order;¹¹

4. Unless disapproved by the President of the United States under 49 U.S.C. 41307, this order and the condition stated in ordering paragraph 1 above shall become effective upon the 61st day after submission for section 41307 review, or upon the date of receipt of advice from the President or his designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove the Department's order under that section, whichever occurs first;¹² 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 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

¹¹ All parties have had a full opportunity to comment on the complaint filed and the Department's proposed action.

¹² This order was submitted for section 41307 review on November 19, 2003. On November 25, 2003, we received notification that the President's designee under Executive Order 12597 and implementing regulations did not intend to disapprove the Department's order.

http://dms.dot.gov/reports/reports_aviation.asp

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 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.