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

Order 2004-1-15

Issued by the Department of Transportation
on the 15th day of January, 2004

Served: January 15, 2004

In the Matter of

AEROLINEAS ARGENTINAS, S.A.

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

Docket OST-2003-15092-34

ORDER

Summary

By this order we deny the motion of Aerolineas Argentinas (Aerolineas) for a stay of the proceedings in this docket, and we approve the carrier's established escrow agreement, as modified.

Background

By Order 2003-11-26, in the above-captioned docket, the Department required Aerolineas, among other things, 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. Under the terms of the order, by December 5, 2003, Aerolineas was to provide the Department evidence, for Department approval, of the establishment of an Escrow Account, the retention of an Escrow Agent, and an agreement among the carrier, the bank and the agent.

On December 4, 2003, Aerolineas filed a motion for a stay of all proceedings in this matter, stating that it was doing so "because of the recent decision issued by the Argentine Federal Court of Appeals Sala II, dated November 27, 2003, and served upon Aerolineas on December 3, 2003, a copy attached hereto."¹ The copy of the court decision relied upon by Aerolineas in support of its motion was provided to us exclusively in Spanish. On December 8, 2003, Aerolineas filed an escrow agreement under cover of a motion for leave to file.² On December 12, 2003, Aerolineas filed the English translation of the Argentine court decision.

¹ December 4, 2003, Motion for Stay of Proceedings, at 1.

² We will grant the motion for leave to file.

Responsive Pleadings to Motions of Aerolineas

On December 17, 2003, American Airlines, Inc., United Air Lines, Inc., Federal Express Corporation, and United Parcel Service Co. (Joint Complainants) filed an answer to the two motions. The Joint Complainants argue that the escrow agreement filed by Aerolineas fails to comply with Order 2003-11-26 and that unless Aerolineas brings itself into compliance with that order, Aerolineas' operating rights to serve the United States should be curtailed. They state that the escrow agreement presented is between the carrier and its own attorney rather than with a U.S. bank. The Joint Complainants oppose what they characterize as an attempt by Aerolineas to "derail and defy Order 2003-11-26."³ With regard to the Argentine escrow obligation cited by Aerolineas, the Joint Complainants argue that Aerolineas would have the IATFCPA administered by a foreign court, and they maintain that the Department should summarily reject this course of action.⁴

On December 19, 2003, Aerolineas filed a reply.⁵ In its reply, Aerolineas argues that the Joint Complainants have not challenged any of the arguments for the motion to stay and that

Joint Complainants do not dispute the fact that "the November 27, 2003 order of the Argentine Appellate Court modified the preliminary injunction of the trial court which had directed Aerolineas to pay on a '1-for-1' basis, to an injunction similar to the injunction that the same appellate court had issued in the Lufthansa case," namely, an injunction which requires Aerolines[sic] to pay the airport operator at the "3-for-1" basis ...[and that] there is no "difference between the rates that Aerolineas is paying and the rates that the Joint Complainants as well as the other non-Argentine airlines are paying."(Motion at 3).⁶

Aerolineas also attaches to its reply a modified escrow agreement, which it states has been modified to address the objections of the Joint Complainants. The modified escrow agreement is signed by the Vice President of the North Fork Bank and the Attorney-in-fact for Aerolineas. Aerolineas states that it would agree to any further modifications that were acceptable to the bank and the Department.

³ Answer of Joint Complainants to Motions of Aerolineas Argentinas, at 3.

⁴ The Joint Complainants also include a footnote that states:

In view of Aerolineas' purported reliance on the Argentine court order of November 27, 2003... the Department should amend Order 2003-11-26 to provide that the measure of the amounts to be paid into the U.S. escrow account is the difference between the amounts Aerolineas and U.S. carriers were actually required to pay and were paying as of the date of that order (November 25, 2003), prior to Aerolineas' attempted end-run around the U.S. escrow requirement.

Answer of Joint Complainants to Motions of Aerolineas Argentinas, at 4, note 1.

⁵ Aerolineas accompanied its reply with a motion for leave to file late. In the interest of having a complete record, we will grant the motion.

⁶ December 19, 2003, Reply of Aerolineas to Answer of Joint Complainants Concerning Aerolineas' Motion for a Stay of Proceedings and an Escrow Agreement, at 5.

On December 19, 2003, the Government of Argentina submitted comments, through diplomatic channels, referencing the Argentine court order of November 27, 2003, and requesting, in light of the Argentine court order, that the Department rescind its decision.

On December 24, 2003, the Joint Complainants filed comments on the Government of Argentina's submission. The Joint Complainants argue that although Aerolineas and the Government of Argentina rely on the November 27, 2003 Argentine court orders, neither Aerolineas nor the Government of Argentina makes reference to the fact that Aerolineas has filed motions in Argentina for reversal of the court orders. Thus, the Joint Complainants maintain that "it is all the more important for the Department to finalize its own action and require Aerolineas to pay the required amounts into an escrow account under the Department's jurisdiction."⁷ They further argue that the "Joint Complainants are continuing to pay an amount for airport fees in Buenos Aires that is three times higher than Aerolineas, their primary foreign flag competitor" and that Aerolineas "is taking actions in the Argentine courts aimed at assuring continuation of its competitive advantage." In this regard, the Joint Complainants maintain that:

the Department can end this discriminatory advantage only by implementing the escrow payments it has directed in its previous orders that Aerolineas establish. Should actions by the Argentine court or government agency result in duplicative payments against which Aerolineas complains, Aerolineas can apply to that court or agency for appropriate relief.⁸

No further responses were submitted in response to the Department's December 22 Notice requesting comments on the submission of the Government of Argentina.

Decision

We have reviewed the submissions of the Government of Argentina, Aerolineas, and responses by the Joint Complainants and have decided to deny the carrier's request for a stay of this proceeding. The record indicates that Aerolineas is in fact seeking reversal of the very Argentine court orders that the carrier relies on as a basis for requesting a stay of our proceedings. Furthermore, we have been advised through diplomatic channels that, notwithstanding the Argentine court orders cited to us by the carrier, Aerolineas has yet to pay the Buenos Aires airport fees as evidently ordered by the Argentine court. Against this background, we deny the request of Aerolineas for a stay of this proceeding and direct Aerolineas to comply fully with Order 2003-11-26.

We have reviewed the escrow agreement originally filed on December 8 and the modification of that agreement as filed on December 19, 2003. We have decided to approve the agreement as modified.

In accordance with the Terms and Conditions for Escrow Payment appended to Order 2003-11-26, Aerolineas is required within 10 days from the date of this order to begin paying into the U.S.

⁷ Comments of Joint Complainants, at 2-3.

⁸ *Id.*, at 3.

escrow account.⁹ Aerolineas shall also provide summaries of its operations and payments into the escrow account as set forth in the Appendix to Order 2003-11-26. Failure to comply with this order or any other Department order will subject Aerolineas to enforcement action, which could include, among other things, the assessment of civil penalties.

ACCORDINGLY.

1. We deny the motion to stay filed by Aerolineas Argentinas, S.A. in this docket;
2. We grant the motions for leave to file of Aerolineas Argentinas, S.A.;
3. We approve the Escrow Agreement, as modified;
4. We direct Aerolineas Argentinas, S.A. to begin, within 10 days from the date of this order, (as stipulated in the Appendix to Order 2003-11-26) to pay monies into the established escrow account at the North Fork Bank, with an office at 31 East 17th Street, New York, New York 10003, as directed by Order 2003-11-26 and as stated in the text of this order;
5. We direct Aerolineas Argentinas, S.A. to submit weekly summaries providing, in English, a day-to-day account of its U.S.-Argentina operations and payments to Buenos Aires Ezeiza airport, as provided for in the Appendix to Order 2003-11-26 and the approved Escrow Agreement;¹⁰ direct the North Fork Bank to submit monthly statements of such activities to the Department¹¹ as provided for in the approved Escrow Agreement; and further direct that Aerolineas and the Bank comply with the agreement and this directive; and
6. We will serve this order on American Airlines, Inc.; Federal Express Corporation; United Air Lines, Inc.; United Parcel Service Co.; Aerolineas Argentinas, S.A.; the North Fork Bank; 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

⁹ For the convenience of interested parties, we are attaching a copy of the Appendix to Order 2003-11-26 to this order. We do not adopt the suggestion of the Joint Complainants to amend Order 2003-11-26.

¹⁰ The weekly summaries should be submitted to the Director, Office of International Aviation, X-40, 400 Seventh Street, SW, Washington DC 20590. Aerolineas should also file the summaries in Docket OST-2003-15092 and serve the summaries on all parties to this proceeding.

¹¹ The monthly summaries should be submitted to the Director, Office of International Aviation, X-40, 400 Seventh Street, SW, Washington DC 20590. The North Fork Bank should also file the summaries in Docket OST-2003-15092 and serve the summaries on all parties to the proceeding.

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:

Karan K. Bhatia
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

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.