

B-258059

December 6, 1994

Mr. James T. Lloyd
Executive Vice President and General Counsel
USAir
2345 Crystal Drive
Arlington, Virginia 22227

Dear Mr. Lloyd:

This is in reply to your letter of July 29, 1994, asking that we determine whether a "wet-lease" operation performed by USAir for British Airways using USAir aircraft and crews between Baltimore and London qualifies as air transportation "provided by" a U.S. carrier under the Fly America Act.¹ Your letter states that under the wet-lease arrangement, aircraft used on this route are "painted in British Airways livery," but are owned by USAir, registered in the U.S. and flown by USAir crews.² You point out that USAir is a "certificated" U.S. air carrier and that these flights constitute the only nonstop service offered between Baltimore and London.³ In essence, you seek to determine whether federal government employees and others whose fares are paid by the federal government may avail themselves of these Baltimore-London flights.

The Fly America Act requires generally that federal agencies ensure that government-financed air transportation is provided by a U.S. flag air carrier if such a carrier is available. To qualify as a U.S. flag carrier, the Act provides that an airline must (1) hold

¹Formerly 49 U.S.C. App. § 1517 (1988), recodified in 49 U.S.C. § 40118, Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 862, 1116-1117, July 5, 1994.

²The term "wet-lease" refers to an arrangement under which a lessor provides an aircraft and its crew to a lessee. See 14 C.F.R. § 207.1. The lessee can then hold itself out to the public to the extent of its authority as offering the service under the wet-lease. This enables a lessee to enter a new market without investing in additional equipment and hiring new staff.

³We note that the service in question is provided by flights designated in the Official Airline Guide as British Airways flight numbers 194 and 195.

an appropriate certificate under 49 U.S.C. § 41102,⁴ and (2) be "authorized by the certificate or by regulation or exemption of the Secretary of Transportation" to provide the transportation in question. This second requirement is commonly referred to as "route authority."

To assist agencies in carrying out their responsibilities under the Act, the General Accounting Office interprets the Act's provisions through the issuance of guidelines and through Comptroller General decisions on the application of the Act to specific transportation arrangements agencies have made or are contemplating. The Act permits exceptions only when satisfactory proof is presented showing the "necessity" for the transportation.

We have reviewed the status of USAir's certificate issued under 49 U.S.C. § 41102, and the route authority provided in this certificate. We agree, as you indicate, that USAir is a certified U.S. air carrier. However, USAir does not possess the required route authority. As we understand recent events, the Department of Transportation (DOT) granted USAir certificate authority in April 1992 to fly the Baltimore-London route⁵ and USAir did in fact provide scheduled service under its own flight numbers and tickets, using its own aircraft and crews. Subsequently, as a part of its agreement with British Airways and with the approval of the Department of Transportation, USAir relinquished its authority to provide scheduled service between Baltimore and London.⁶ It agreed instead to lease its equipment and crews to

⁴Certificates under this section are certificates of public convenience and necessity issued by the Department of Transportation authorizing an air carrier to engage in air transportation as authorized under the certificate. Such certificates are available only to citizens of the United States. 49 U.S.C. § 40102(a)(2).

⁵DOT granted USAir this authority by Final Order 92-4-49 on April 23, 1992. The order, which incorporates a certificate of convenience and necessity, states that USAir "is authorized to engage in scheduled foreign air transportations of persons, property and mail . . . Between Baltimore, MD; and London, United Kingdom." This authority is made subject "to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary." Through diplomatic arrangements between the U.S. and the U.K., USAir was subsequently "designated" to provide service on the Baltimore-London route.

⁶The operative language of the agreement between USAir and British Airways reads: "The Company [USAir] shall . . . divest or, if divestiture is not possible, relinquish all licenses, certificates and authorities for each of the Company's routes between the U.S. and U.K. . . ." This agreement was then translated by DOT into regulation, under DOT Order 93-3-17, dated March 15, 1993. Because international routes were involved, the agreement was also implemented diplomatically, through an exchange of notes between the United States and the United Kingdom. While the device typically used at the diplomatic

British Airways for British Airways to use in providing service between these points. USAir flights between Baltimore and London are not offered and not available. Lacking authority to operate on this route, USAir is consequently without authority to strike an arrangement with British Airways or any other carrier, whether by wet-lease or otherwise, to provide service that will qualify as air transportation provided by a U.S. carrier for the purposes of the Act, given that Act's requirements.

British Airways has authority as a foreign carrier to provide scheduled service between these points based on a United States-United Kingdom aviation agreement and on a foreign air carrier permit British Airways holds.⁷ However, British Airways does not and cannot hold a certificate under 49 U.S.C. § 41102, and therefore cannot qualify under the Fly America Act in its own name.

The arrangement here differs from the arrangement discussed in a prior decision of this Office, rendered in response to an inquiry from the Department of State, Fly America Act - Code Sharing, 70 Comp. Gen. 713 (1991), to which you refer in your letter. Unlike

stage in such cases is "de-designation" of an airline's certificate authority on an international route, a different device, change of gateway, was employed here. The diplomatic note from the U.S. Embassy in London to the U.K.'s Foreign and Commonwealth Office in this instance states that the U.S. "is changing its gateway selections of Baltimore and Charlotte to Raleigh/Durham and Nashville" and designates American Airlines as the carrier authorized to operate the routes between these U.S. cities and London. Cable 143, November 12, 1993. Under the change of gateway, federal government employees and others required by the Fly America Act to use a U.S. flag carrier if they wish to fly to or from London may no longer do so through Baltimore, since the Baltimore-London route is no longer served by a U.S. flag carrier. Officials at DOT's Office of International Aviation responsible for certification on international routes explained that this gateway change thus has essentially the same effect on USAir as a de-designation of USAir. However, by avoiding "de-designation," USAir remains qualified to enter into a wet-lease arrangement with British Airways for its service in and out of Baltimore; USAir would become ineligible to do so if it were "de-designated." While the Baltimore-London service provided under the wet-lease arrangement is not available to passengers prohibited from using it under the Fly America Act, USAir nonetheless, under its agreement with British Airways, shares in the economic benefits generated by the arrangement.

⁷See Department of Transportation Order 93-3-17, March 15, 1993, In the Matter of USAir and British Airways, which shows clearly that USAir relinquished its authority to provide Baltimore-London service, and that British Airways operates such service under the wet-lease arrangement using USAir equipment and crews. See also 49 U.S.C. § 41301, under which the Department of Transportation may issue a permit to a foreign air carrier to engage in transportation between the United States and places outside the United States.

USAir in this case, the U.S. certificated carrier in our 1991 decision had the legal authority to provide the scheduled service in question and did so, offering its services to the public under its own flight codes. While it used space on a foreign carrier to provide the underlying transportation under the code-sharing agreement approved by the Department of Transportation, this service was still considered service provided by the U.S. flag carrier having authority to provide scheduled service between the points in question.

Sincerely yours,

Robert P. Murphy
Acting General Counsel

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DIGEST

Flights provided by a foreign air carrier which issues the tickets in its name under its flight number and takes responsibility for the passengers but performs the service under a wet-lease from a U.S. air carrier in which the U.S. carrier furnishes the airplane, flight crew, ticket counter, and gate and ramp personnel to the foreign air carrier, may not be considered to be flights "provided by" a U.S. air carrier under the Fly America Act, formerly 49 U.S.C. App. § 1517 (1988), recodified in 49 U.S.C. § 40118.