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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fly America Act - Code Sharing - Transportation by U.S. Carrier

File: B-240956

Date: September 25, 1991

DIGEST

Travel under a ticket issued by a U.S. certificated air carrier which leases space on the aircraft of a foreign air carrier under a "code-share" arrangement in international air transportation is considered to be "transportation provided by air carriers holding certificates" as required under 49 U.S.C. App. § 1517 (1988), the Fly America Act. Thus, passengers may properly use tickets paid for by the government under a "code-share" arrangement if the tickets were purchased from the U.S. air carrier.

DECISION

The question in this case, presented by the Department of State, is whether a U.S.-flag air carrier's arrangement to provide passenger service in international air transportation on the aircraft of a foreign air carrier under a "code-share" arrangement with the foreign air carrier would meet the requirements of the Fly America Act, 49 U.S.C. App. § 1517 (1988).1/ Since it appears that such service generally would be considered to be service by a U.S. air carrier in international air transportation rather than by a foreign air carrier, that service should also be considered transportation provided by a U.S. air carrier for purposes of the Fly America Act.

BACKGROUND

The State Department's submission states that to allow themselves access to markets for passengers which they would prefer not to serve with their own aircraft, U.S. air carriers have developed a technique called "code-sharing." Through the technique, a U.S. air carrier leases space on a foreign air carrier and intends this service to be considered as service provided by the U.S. air carrier. The benefits of this for

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1/ The question was submitted by the Assistant Secretary of State for Administration.

the U.S. air carrier are stated to be developing new markets, expanding sales and services to U.S. and other customers, and providing substantial new income without having to use their own aircraft.

As we understand this arrangement, generally, code-sharing between domestic and foreign airlines operates as follows:

1. The foreign air carrier and U.S. air carrier must each have the bilateral rights and economic authority to serve the city-pair markets in which they offer code-share service.

2. The U.S. air carrier and the foreign air carrier each uses its own code on the tickets it issues for the flight between the two cities in question, resulting in both air carriers claiming responsibility for a portion of the passengers on a single aircraft. For example, a U.S. certificated carrier, Continental Airlines, has a code-share with a foreign carrier, Scandinavian Airlines System (SAS). Under this code-share, a ticket issued by Continental on its ticket stock for a flight from Chicago, Illinois, to Copenhagen, Denmark, would show flight CO 8912 for the portion of the flight from Newark, New Jersey, to Copenhagen, Denmark, whereas a ticket issued by SAS on its stock for the same portion of that flight would show SK 912.

3. The U.S. air carrier and foreign air carrier each advertises to the public that it is providing the service, and each indicates responsibility for the service on the tickets it sells, regardless of which air carrier's aircraft actually provides the transportation. However, each selling/ticketing air carrier must disclose, in all holding out, the operation of any part of the trip by another air carrier.

4. In some code-share arrangements, neither code-sharing carrier need commit in advance to purchase a specified number of seats on the code-shared flight provided by the cooperating air carrier; in others, each carrier has purchased a specified number of seats.

5. A significant portion of the cost of the ticket goes to the U.S. carrier (over 50 percent in the example above, but this varies depending on the agreement and length of the route flown).

The way the code-share flight from Chicago to Copenhagen in fact operates is that a Continental Airlines aircraft picks up the passenger in Chicago and flies to Newark where the passenger is transferred to an SAS aircraft manned with an SAS crew which departs from Newark and completes the journey to Copenhagen. The Official Airline Guide (Worldwide Edition) (OAG), the industry guide used by airlines to provide travel

offices and passengers notice of scheduled flights, does not list the flight from Chicago to Copenhagen as a through flight, but lists it as a connecting flight through New Jersey with one Continental flight number from Chicago to Newark listed and another Continental flight number (the code-share flight number) listed from Newark to Copenhagen. The OAG has a star beside Continental's code-share flight number from Newark to Copenhagen, indicating that the actual flight is operated by a different air carrier than Continental. Thus, if the traveler buys a ticket from Continental, the ticket indicates that Continental is the air carrier responsible for the entire flight between Chicago and Copenhagen, and the OAG indicates that Continental is the responsible carrier for both legs of the journey in which aircraft are exchanged at Newark. Since the Fly America Act permits government-financed air transportation to be provided by available U.S. air carriers only, the question in this case is whether the part of the flight from Newark to Copenhagen, for example, on a foreign aircraft is being provided by a U.S. air carrier.

The submission states that it is the view of the Department of State that a code-share agreement provides transportation on a U.S. carrier notwithstanding the fact that the aircraft used to provide some of the service may not belong to the U.S. carrier. The Department recognizes that the purpose of the Fly America Act as shown by its legislative history was to help improve the economic and competitive position of the U.S.-flag carriers against the foreign air carriers. See 57 Comp. Gen. 401, 403 (1978). Therefore, so that U.S. carriers might maintain a significant role in the transaction, the Department suggests that it might be advisable to apply the following restraints to a code-share agreement before it may be considered service provided by a U.S. air carrier:

1. The entire ticket must be issued by and on the U.S.-flag carrier (not necessarily the carrier operating the aircraft);

2. At least one leg of the journey must be on the U.S. domestic service of the U.S. carrier beyond (or behind, depending on the direction of travel) the U.S. gateway; and,

3. A code-share flight may not be used solely for travel between the U.S. and foreign gateway or vice versa, unless no other U.S. carrier participates in that market.

ANALYSIS AND CONCLUSION

The Fly America Act, 49 U.S.C. App. § 1517, requires U.S. government-financed air transportation to be "provided by" air carriers holding certificates of public convenience and necessity under 49 U.S.C. App. § 1371, i.e., U.S.-flag air carriers. We note that there is no language in the Fly

America Act specifying that air transportation must occur "on" aircraft of any particular registry, but simply, that the air transportation must be provided by a U.S. air carrier. We have had no previous cases exploring the manner in which U.S. air carriers holding such certificates may provide air transportation and still be considered as U.S. air carriers.2/ Also, our Guidelines for Implementation of the "Fly America Act"3/ do not treat this issue.

When the Fly America Act was amended in 1980 to permit, among other things, foreign air carriers to be used in addition to U.S. air carriers for government-financed air transportation as part of a negotiated bilateral agreement4/, a related issue was whether or not the Federal Aviation Act would be amended to grant U.S. air carriers new authority to lease foreign aircraft with or without foreign crews to provide their own service in interstate or overseas air commerce. Although the act was not amended to provide this authority, the evidence in support of the amendment showed that U.S. air carriers were already allowed to lease foreign aircraft with or without foreign crews in order to provide U.S. service in some international air commerce. See Hearings on H.R. 5481 Before the House Subcommittee on Aviation, Committee on Public Works and Transportation, 96th Cong., 1st Sess. 133-139 (1979). Presumably, U.S. air carriers are still leasing foreign aircraft in international air commerce today.

Consequently, since apparently leasing an entire foreign aircraft by a U.S. carrier is a permissible practice in international commerce and is considered to be service by a U.S. carrier, we see no reason why the same approach could not apply to the more limited control of individual seats on foreign aircraft for which the U.S. air carrier sells its

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2/ Our cases involving involuntary rerouting of a passenger by a U.S. air carrier to a foreign air carrier involve the rewriting of a ticket substituting a foreign air carrier for a U.S. air carrier rather than a holding out that the service on a foreign air carrier was provided by a U.S. air carrier. See e.g., 62 Comp. Gen. 496 (1983).

3/ See Comptroller General's Guidelines, B-138942, Mar. 31, 1981, restated in the Federal Travel Regulations, 41 C.F.R. § 301-3.6(b) and (c) (1991).

4/ See section 21 of the International Air Transportation Competition Act of 1979, 49 U.S.C. App. § 1517(c) (1988). We informally inquired of the Department of State whether code-sharing arrangements had been negotiated specifically under section 1517(c), and the Department replied that they had not.

tickets under the code-share arrangement.5/ Although we have not been provided any particular code-share agreements and related documentation, we assume that the code-share arrangement which is described here as the type engaged in by U.S. air carriers and which has the endorsement of the Department of State as service provided by a U.S. air carrier is in effect similar to a lease by a U.S. air carrier of a portion of a foreign air carrier's aircraft and crew. As such, it is the U.S. carrier that is responsible for the travel service. Also, it is our understanding that the U.S. carrier receives a substantial portion of the revenue; it does not act as a mere booking agent on behalf of the foreign carrier. Therefore, we conclude that such service is air transportation provided by a U.S. air carrier for purposes of the Fly America Act and an acceptable form of air transportation service for government-financed travelers.

As to the three restraints that the State Department suggests might be advisable, we agree that the entire ticket must be issued by the U.S. carrier. It follows, in our view, that the government's payment should be made to the U.S. carrier.

Concerning the other two suggested restraints, we recognize that they are designed to insure that the U.S carrier maintains a significant role in the transaction and that code sharing is not used to undermine the competitive position of other U.S. carriers. Thus, we agree that they would be appropriate to consider incorporating into the agency's travel management policies. We suggest that, in doing so, the agency consult with the General Services Administration.

Milton J. Socolar

for Comptroller General
of the United States

5/ An informal contact with a representative from the Department of Transportation confirms this view.