Order 2016-11-22

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

Issued by the Department of Transportation
on the 30th day of November, 2016

Served: December 2, 2016

Application of **NORWEGIAN AIR INTERNATIONAL LIMITED** for an exemption under 49 U.S.C. §40109 and a foreign air carrier permit under 49 U.S.C. §41301	Docket DOT-OST-2013-0204

FINAL ORDER

SUMMARY

By this Order, the Department makes final its tentative findings and conclusions set out in Order 2016-4-12 and awards Norwegian Air International Limited (NAI) the foreign air carrier permit attached as the Appendix to this Order.

BACKGROUND

By Order 2016-4-12, issued on April 15, 2016, in this Docket, the Department tentatively found under 49 U.S.C. §41301 that NAI should be issued a foreign air carrier permit to enable it to conduct foreign scheduled and charter air transportation of persons, property, and mail to the full extent permitted under the U.S.-European Union-Norway-Iceland Air Transport Agreement of June 21, 2011, as amended (the U.S.-EU Agreement).[1]

In reaching its tentative decision, the Department, relying on the legal analyses of its own General Counsel, the Department of State (DOS), and an authoritative opinion from the Department of Justice's Office of Legal Counsel (OLC), tentatively found that there was "no doubt that Article 17 *bis* cannot be decisional in this proceeding."[2]

[1] We fully summarized all of the materials submitted to the formal record in response to the NAI application, including the opponents' position on the proper interpretation of Article 17 *bis* of the U.S.-EU Agreement, as well as the procedural history of the case, in Order 2016-4-12 and accompanying appendices.
[2] Order 2016-4-12, at 7.

The Department further tentatively found that:

> the language of the statute is clear that, if an applicant is fit and qualified under the terms of an agreement with the United States, we do not reach the question of whether grant of authority would be in the public interest. The existence of an air service agreement demonstrates that granting operating authority to a foreign carrier is *per se* in the public interest. Therefore, we tentatively conclude that the two critical issues in this case require us to award the authority requested: first, that Article 17 *bis* cannot be invoked to take precedence over our normal licensing standards, and second, that those standards are met here and therefore, in light of the statute and the terms of the U.S.-EU Agreement, preclude a comparative public interest analysis.[3]

The Department gave interested persons twenty-one (21) days to file objections to Order 2016-4-12, with answers to objections due no later than seven (7) calendar days thereafter.[4]

A number of parties filed responsive pleadings to Order 2016-4-12, both in opposition to and support of the Department's tentative decision. We summarize the positions of the parties immediately below.

RESPONSIVE PLEADINGS[5]

Position of the Objecting Parties[6]

The objecting parties make many of the same arguments in response to the tentative decision that they made in their original opposition to the NAI application, and those arguments were comprehensively summarized by the Department in Order 2016-4-12. The objectors' arguments fall into two broad categories: 1) those relating to Article 17 *bis* of the U.S.-EU Agreement; and 2) those relating to an asserted need for a public interest evaluation. The objectors claim that the interpretation of Article 17 *bis* relied on by the Department in its tentative decision is erroneous and that under a correct interpretation granting NAI a permit would be inconsistent with the intent of the U.S.-EU Agreement.[7] Furthermore, the Labor Parties and some of the other opponents assert that in order for the Department to find NAI "qualified" to be awarded a foreign air carrier permit under 49 U.S.C. §41301, the Department must find that NAI's application is

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[3] Order 2016-412, at 7, footnote omitted.

[4] On April 22, 2016, the Department granted joint motions of the Transportation Trades Department of the AFL-CIO (TTD), the European Cockpit Association (ECA) and the Air Line Pilots Association (ALPA), the International Association of Machinists and Aerospace Workers (IAM), the Association of Flight Attendants (AFA), and the Transportation Workers Union (TWU) seeking a ten-day extension of time to file objections to the Department's tentative decision. Southwest Airlines Pilots' Association (SWAPA) had also filed a motion seeking identical relief. As a result of the Department's action, objections to Order 2016-4-12 were due by the close of business on May 16, 2016, and answers to objections were due by the close of business on May 23, 2016.

[5] In the interest of attaining a complete record in this proceeding, we grant all motions for leave to file and will also accept all other late-filed pleadings.

[6] The Department's tentative decision is opposed by ALPA, AFA, ECA, IAM, TTD, TWU, the International Transport Workers' Federation, and the European Transport Workers' Federation (collectively, the Labor Parties). The Allied Pilots Association, the European Social Partners in the Air Crew Working Group, the Maritime Labor Unions, the Irish Air Line Pilots Association, SWAPA, Scandinavian Airlines System, Captain Stephen Colman, and a number of additional transportation and other labor organizations also oppose the Department's tentative decision. No U.S. air carrier filed in opposition to the Department's tentative decision.

[7] *See, e.g.*, Objection of Labor Parties to Order to Show Cause, at 12-14.

consistent with the U.S.-EU Agreement, which means consistent with Article 17 *bis*.[8] They assert that under a correct interpretation of Article 17 *bis*, and taking into account NAI's business model, no such finding is possible.

With regard to the public interest, the Labor Parties and some of the other objecting parties challenge the Department's tentative finding that it is precluded from conducting a comparative public interest analysis on the NAI application. They claim that had the Department conducted such a comparative public interest analysis, it properly would have concluded that NAI is not entitled to a foreign air carrier permit.[9]

Position of the Supporting Parties[10]

NAI and its supporters generally agree with the Department's analysis of the record and its tentative decision, and further emphasize the competitive and other consumer benefits that they claim would result from approval of NAI's application. In addition, FedEx asserts that prompt final approval of NAI's permit is critical to maintain the confidence on both sides of the Atlantic in the implementation of the U.S.-EU Agreement.[11] Atlas states that approval would fulfill legal commitments made by the U.S. government in the groundbreaking U.S.-EU Agreement, which benefits U.S. airlines, travelers, shippers, and economic activity in the broadest sense.[12]

DECISION

This case is among the most novel and complex ever undertaken by the Department. We have taken the necessary amount of time to review and consider the comments from a wide range of stakeholders. Regardless of our appreciation of the public policy arguments raised by opponents, we have been advised that the law and our bilateral obligations leave us no avenue to reject this application.

Therefore, we have decided to finalize our tentative decision to grant NAI's request for a foreign air carrier permit under 49 U.S.C. §41301 to enable it to conduct foreign scheduled and charter air transportation of persons, property, and mail to the full extent permitted under the U.S.-EU Agreement, as specified in the foreign air carrier permit attached as the Appendix to this Order.[13]

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[8] Objection of Labor Parties to Order to Show Cause, at 11-13.
[9] Objection of Labor Parties to Order to Show Cause, at 22-26.
[10] Along with NAI itself, the parties that filed in support of the Department's tentative decision include Federal Express Corporation (FedEx); Atlas Air, Inc. (Atlas); the European Low Fares Airlines Association; the Washington Airports Task Force; the Business Travel Coalition; the Milwaukee County General Mitchell International Airport; the Greater Orlando Aviation Authority; the Las Vegas Convention and Visitors Authority; FlyersRights.org; the leadership of various Northern Virginia business and tourism organizations; the Irish Aviation Authority; the Irish Department of Transport, Tourism, and Sport; and the European Travel Agents' and Tour Operators' Association. In addition, a number of other U.S. civic organizations and airport authorities, as well as a significant number of Irish and other European businesses, airlines, civic organizations, airport authorities, and political interests also filed responsive pleadings expressing overall support for NAI's application and/or the Department's tentative decision.
[11] Response of FedEx to Objections to Order to Show Cause, at 2-3.
[12] Answer of Atlas to Show-Cause Objections, at 4-5.
[13] This includes the finding that NAI is "qualified" to receive a license as contemplated by Article 4(c) of the Agreement.

Having carefully reviewed the submissions filed in response to Order 2016-4-12, we find that the clear weight of legal analysis in this case directs us to uphold the tentative findings and conclusions previously made.

The opponents' position on what they view as the proper interpretation of Article 17 *bis* relies on arguments submitted to us before we reached our tentative decision, and we fully considered and rejected those arguments there.[14] As stated above, our tentative decision reflected our own General Counsel's analysis of Article 17 *bis*, and that interpretation was subsequently supported by the legal analyses of DOS and an authoritative legal opinion from OLC. In these circumstances, we conclude that our tentative findings with regard to Article 17 *bis* should be finalized, and we do so here.

Opponents have also raised another novel and important argument that goes directly to a central legal feature of the Agreement. By arguing that NAI represents a "flag of convenience," opponents lose sight of this key feature of the Agreement: that under the concept of a "Community airline," Article 4(b), any carrier may fly under the flag of *any* European Union country, as well as Norway or Iceland, as long as it is satisfactorily owned and controlled by citizens of those countries.

With regard to the opponents' assertion for the need for a comparative public interest analysis, no legal grounds exist to set aside our tentative determination. Opponents of our tentative decision raise public interest arguments against the granting of this permit. However, the statute does not allow us to reach a different conclusion and there is no legal course available to decide this matter on the public interest grounds cited by the opponents. The legislative history of our current licensing statute (49 U.S.C. §41302) specifically states that "the negotiation of a bilateral agreement itself represents a determination by the Government of the United States that grant of route authority is in the 'public interest.'"[15] This legislative history explained a critical change to the language of the licensing statute, specifically substituting the word "or" for "and."[16] For qualified applicants seeking authority provided for in an international agreement, the public interest test is generally deemed met. The opponents cite other language from the legislative history that indicates a narrow example of an extraordinary circumstance that could be cited to deny a permit based on the public interest when a bilateral agreement is in place: "where the foreign government was not complying with its obligations under an international agreement." There is no failure by the EU to meet its obligations under the agreement.

As we stated in our tentative decision, the parties opposing NAI's application have raised significant concerns regarding the applicant's potential hiring and employment practices affecting its operations in U.S. markets. As parties to this proceeding are aware, the CEO of NAI discussed a number of voluntary practices on the part of NAI designed to address these concerns.[17]

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[14] We have taken note of the Labor Parties' June 28, 2016 Motion for Leave to File Newly-Available Information in the form of an article by former Deputy Secretary of Transportation John Porcari. We have reviewed the article in question and determined that it presented no information or argument of which we were not previously aware.
[15] See S. REP. NO. 96-329, at 4 (1979).
[16] *Id.* at 4 and 19.
[17] Motion of Norwegian Air International Limited for Leave to File and Expedited Treatment filed June 1, 2015.

In reaching our decision to grant NAI's permit, we have taken into account the totality of the record regarding its application, including those changes to its hiring and employment practices that it has offered as a direct result of the difficult issues that have been raised during the course of this proceeding. We anticipate that they will be implemented, consistently with applicable laws.

Therefore, against this background, we have decided to make final our tentative decision to grant the request of NAI for a foreign air carrier permit.

ACCORDINGLY,

1. We make final our findings and conclusions as stated in the Order and award to Norwegian Air International Limited the foreign air carrier permit with associated conditions attached to the Order 2016-4-12 (and attached as the Appendix to the present order);

2. Unless disapproved by the President of the United States under 49 U.S.C. §41307, this order shall become effective on the 61st day after its 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 earlier;[18]

3. To the extent not acted upon earlier or above, we dismiss all remaining requests for relief in Docket DOT-OST-2013-0204;

4. We grant all motions for leave to file;

5. We will not entertain petitions for reconsideration of this order; and

[18] This order was submitted for review under 49 USC § 41307 on November 30, 2016. On December 2, 2016, we received notification that the President's designee, under Executive Order 12597 and implementing regulations, did not intend to disapprove the Department's Order.

6. We will serve a copy of this order on Norwegian Air International Limited; all other parties to this proceeding; the Embassy of Ireland in Washington, D.C.; the Embassy of Norway in Washington, D.C.; the Department of State; the Department of Justice's Office of Legal Counsel; and the Federal Aviation Administration.

By:

JENNY T. ROSENBERG
Acting Assistant Secretary for
Aviation and International Affairs

(SEAL)

Appendix

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http://www.regulations.gov

Issued by
Order 2016-11-22

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

PERMIT TO FOREIGN AIR CARRIER

NORWEGIAN AIR INTERNATIONAL LIMITED

A Foreign Air Carrier of Ireland

is authorized, subject to the following provisions, the provisions of Title 49 of the U.S. Code, and the orders, rules, and regulations of the Department of Transportation, to engage in:

Foreign scheduled and charter air transportation of persons, property, and mail from any point or points behind any Member State of the European Union, via any point or points in any Member State and via intermediate points to any point or points in the United States and beyond;

Foreign scheduled and charter air transportation of persons, property, and mail between any point or points in the United States and any point or points in any member of the European Common Aviation Area;

Foreign scheduled and charter air transportation of cargo between any point or points in the United States and any other point or points;

Other charters pursuant to the prior approval requirements set forth in 14 CFR Part 212 of the Department's regulations; and

Transportation authorized by any additional route rights made available to European Union carriers in the future; *provided*, that the holder shall, before it commences any new service under such additional route rights, provide the Department with evidence that it holds a homeland license for that new service (unless it has already provided such evidence to the Department). Such evidence shall be filed in Docket DOT-OST-2013-0204.

This permit and the exercise of the privileges granted in it shall be subject to the terms, conditions and limitations in both the order issuing this permit and the attachment to this order, and to all applicable provisions of any treaty, convention or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the holder's homeland are or shall become parties.

This permit shall be effective on December 2, 2016. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention or agreement, this permit shall terminate (1) upon the dissolution or liquidation of the holder to whom it was issued; (2) upon the effective date of any treaty, convention, or agreement or amendment, which shall have the effect of eliminating the right for the service authorized by this permit from the service which may be operated by airlines of the European Union and its Member States (or, if the right is partially eliminated, then the authority of this permit shall terminate in like part); or (3) upon the termination or expiration of the applicable air services agreement between the United States and the European Union and its Member States. However, clause (3) of this paragraph shall not apply if prior to such termination or expiration, the foreign air transportation authorized herein becomes the subject of another treaty, convention or agreement to which the United States and the European Union and its Member States become parties.

The Department of Transportation has executed this permit and affixed its seal on November 30, 2016.

By:

JENNY T. ROSENBERG
Acting Assistant Secretary for
Aviation and International Affairs

(SEAL)

Foreign Air Carrier Permit Conditions

In the conduct of the operations authorized, the foreign carrier applicant shall:

(1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;

(2) Comply with all applicable requirements of the Federal Aviation Administration, the Transportation Security Administration, and with all applicable U.S. Government requirements concerning security, including, but not limited to, 14 CFR Parts 129, 91, and 36 and 49 CFR Part 1546 or 1550, as applicable. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) from a foreign airport that would be the holder's last point of departure for the United States, contact its International Industry Representative (IIR) (formerly referred to as International Principal Security Inspector) to advise the IIR of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served;

(3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);

(4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;

(5) Conform to the airworthiness and airman competency requirements of its Government for international air services;

(6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;

(7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are: (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States. In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;

(8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in Norway or a Member State of the European Union;

(9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;

(10) If charter operations are authorized, except as otherwise provided in the applicable aviation agreement, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and

(11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code.