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Aviation Insights: DOT's Regulation of Seventh Freedom Charters (Apr. 2019)

Seventh freedom charters (that is, charters that do not begin or end in a carrier's homeland and which serve two other nations[1]) to and from the United States are permissible in certain circumstances, but only within strict limits set by the U.S. Department of Transportation ("DOT"). Seventh freedom cargo charters are permitted under several U.S. bilateral air service agreements, and, if the foreign carrier holds the appropriate DOT economic authority (or "traffic rights"), may be freely operated with no prior approval. Prior approval (called a "statement of authorization) is required for seventh freedom charters in which the foreign carriers lacks the requisite DOT economic rights, including all seventh freedom passenger charters. As a general matter, the U.S. does not include seventh freedom passenger rights in bilateral agreements with its treaty partners, and foreign air carriers seeking to operate such charters must carefully observe DOT's charter regulations in order obtain a statement of authorization.

Flights not specifically provided for in a bilateral air service agreement with the U.S. are "extrabilateral" and approval is thus at DOT's discretion. DOT policy is to grant approval for such flights (i) on the basis of reciprocity, i.e., if the foreign carrier's homeland grants U.S. carriers a similar privilege, and (ii) in accordance with DOT regulations and policies. These requirements are discussed below in more detail.

DOT's charter regulations, 14 C.F.R Part 212, while not a model of clarity, provide that an applicant seeking to operate seventh freedom charters must ensure that (i) its homeland has filed a statement of reciprocity with DOT (in essence, a formal letter from the civil aviation authority of the applicant's homeland affirmatively starting it will grant to U.S. carriers a similar privilege to operate seventh freedom charters) and (ii) grant of the application would be in the "public interest". In determining the public interest, and pursuant to 14 CFR § 212.11(b), DOT will consider the following factors:

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> (1) The extent to which the authority sought is covered by and consistent with bilateral agreements to which the United States is a party.
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> (2) The extent to which an applicant foreign air carrier's home country…deals with U.S. air carriers on the basis of substantial reciprocity.
>
> (3) Whether the applicant or its agent has previously violated the provisions of [Part 212].

DOT applied these factors in a formal Order Granting Statement of Authorization to Arubaanse Luchtvaart Maatschappij N.V. d/b/a Aruba Airlines ("Aruba Airlines"), Order 2017-3-7. In that case, Aruba Airlines applied to operate 275 round-trip charter flights between Miami and points in Cuba over a seven-month period. Several U.S. carriers and a U.S. carrier trade association submitted objections. DOT granted the application and set forth its decisional criteria as follows, quoting an earlier Notice of Proposed Rulemaking under Part 212:

> Reciprocity on the part of the applicant's home country is the primary criterion for approval (§ 212.11(b)(2)). The Department also examines other factors that may be relevant in specific cases (for example, the extent of the applicant's reliance on fifth-freedom operations in relation to its third- and fourth-freedom services). In making its public interest determination, the Department's approach consistently has been to look not only to the interests of U.S. charter carriers, but also to consider the needs and concerns of other parties affected by its decision, notably the tour operator (frequently a U.S. company), and members of the traveling public (often U.S. citizens). The Department's longstanding policy has been to give charterers the maximum flexibility possible to choose the airline services that best meet their needs. The Department repeatedly has rejected according U.S. carriers a right of ''first refusal''.

Order 2017-3-7 at 8 (internal citations omitted). DOT considered each factor in turn:

- DOT determined there was sufficient reciprocity with Aruba. DOT found that the U.S. and Aruba enjoyed a "healthy" bilateral relationship; that Aruba had not denied any U.S. carrier seventh freedom charter requests.
- DOT next examined whether there was "undue reliance", i.e. was Aruba Airlines deriving too much of its traffic from non-homeland sources? DOT expects foreign carriers to conduct the bulk of their operations between their homeland and the U.S. To determine whether there has been undue reliance DOT considers several factors as it does "not apply rigid formulas or view the undue reliance factor in isolation." Id. at 9. These factors include the charterer's preference ("[t]he Department's longstanding policy has been to give charterers the maximum flexibility possible to choose the airline services that best meets their needs", Id., citing 70 FR at 3162) and the needs and concerns of the travelling public.

A finding of undue reliance depends on the circumstances of each application ("our approach varies depending on the circumstances of each particular case", Order 93-5-31, footnote 7.) For example, in the Condor Flugdienst GmbH ("Condor") case (Order 2002-10-5), DOT denied an application from Condor, a German carrier, to operate 400 round-trip seventh freedom flights between Midwestern cities and points in Mexico and Jamaica over a four and half month period. DOT denied Condor's application on the grounds that Condor's service between its homeland of Germany and the U.S. had been declining; in 2001 Condor operated 242 roundtrip flights between Germany and the U.S.; its projections for 2002 operations were even lower. This decline in operations between Condor's homeland and he U.S., combined with the relatively larger charter program Condor sought to operate, constituted undue reliance. In contrast, DOT recently approved an application submitted by WOW air hf ("WOW air") (submitted prior to its cessation of operations) to extend an existing seventh freedom charter program to add an additional 143 round-trip flights between the U.S. and Cuba. In that case DOT found no undue reliance where WOW air had operated 6,235 one-way flights (i.e., 3,117 round-trips) between its homeland of Iceland and the U.S. in the previous year. DOT found that the proposed flights did not constitute undue reliance – even considering certain objections projecting that WOW air would only operate 3,456 one-way flights in 2019.

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Charterers and foreign carriers certainly have opportunities in the U.S. market. These opportunities are not without risk, and a tailored approach should be taken prior to committing on a course of action. For the latest developments, charterers and foreign carriers should consult with legal counsel and develop a strategic plan of action.

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[1] Or as the International Civil Aviation Organization ("ICAO") puts it, "the right or privilege, in respect of scheduled international air services, granted by one State to another State, of transporting traffic between the territory of the granting State and any third State with no requirement to include on such operation any point in the territory of the recipient State, i.e. the service need not connect to or be an extension of any service to/from the home State of the carrier." *Freedoms of the Air,* available at https://www.icao.int/pages/freedomsair.aspx.