OST-95-950-17

(65266 QA)

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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the Matter of	)	
ADVANCE NOTICE OF PROPOSED RULEMAKING CONCERNING PASSENGER MANIFEST INFORMATION (NOTICE 91-2)	)	Docket 47383

COMMENTS OF
AIR CANADA, AIR JAMAICA, BALAIR,
CONDOR FLUGDIENST GmbH, AND
THE ORIENT AIRLINES ASSOCIATION

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Dated: February 28, 1991

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These comments are being filed jointly on behalf of Air Canada, Air Jamaica, Balair, Condor Flugdienst GmbH and the Orient Airlines Association, representing the following airlines: Air New Zealand, Air Niugini, All Nippon Airways, Cathay Pacific Airways, China Airlines, Garuda Indonesia, Japan Airlines, Korean Air, Malaysia Airlines, Philippine Airlines, Qantas Airways, Royal Brunei Airlines, Singapore Airlines, and Thai Airways International ("Joint Commentors"). After reviewing submissions in this docket, the Joint Commenters wish to respond to the Advance Notice of Proposed Rulemaking ("ANPRM") issued by the Department of Transportation ("Department" or "DOT") prior to implementation of regulations requiring collection of extensive passenger manifest information for use by the Department of State when responding to an airline disaster. 56 Fed. Reg. 3810 (January 31, 1991). These comments would not have been necessary had the Department's ANPRM

merely sought to impose passenger manifest requirements on U.S. carriers, as mandated by the Aviation Security Improvement Act of 1990. Pub. L. No. 101-604 (November 16, 1990), hereinafter "Security Act." Instead, however, in its ANPRM, the Department gratuitously raised the issue of whether similar obligations should be imposed on foreign air carriers.

In response, the U.S. airline industry has strongly urged the Department to regulate foreign airline practices, notwithstanding the deference traditionally accorded to foreign governments in such matters. While the Joint Commentors have genuine sympathy for the victims of terrorism and are as intent as the United States is to promote effective for aviation security, the Joint Commentors are compelled to object to the flawed premises that underlie the U.S. carriers' arguments for extending this ANPRM to foreign carriers.

The emotionally charged political argument being made by the U.S. airline industry was succinctly summarized in recent Congressional testimony:

> Recent federal security requirements imposed only on U.S. airlines and, therefore, maximizing protection for only half of our citizens internationally, make it more difficult for U.S. airlines to compete with foreign airlines on overseas routes.[1/]

These comments take issue with the implicit suggestions that: (1) the United States should regulate all activities in which U.S.

1/ Oral statement of James Landry, Air Transport Association, before the Aviation Subcommittee, Public Works and Transportation Committee of the House of Representatives in Hearings on "The Financial Condition of the Airline Industry and the Adequacy of Competition," February 6, 1991.

citizens are involved, regardless of whether such citizens are residing or travelling outside the United States; (2) there is a "competitive imbalance" that should be redressed by imposing disproportionate regulatory burdens on foreign air carriers which enjoy limited competitive access to U.S. markets; and (3) airline passengers enjoy maximum protection only if all airlines adhere to DOT-dictated regulatory measures, which preclude, as a practical matter, other approaches that are equally or more effective -- and potentially more efficient -- or which have absolutely no relationship to enhanced aviation security, as is the case in this rulemaking.

The Joint Commentors urge the Department to reject requests to apply the proposed regulations to foreign carriers. Imposition of passenger manifest requirements on foreign carriers will not result in competitive balance, but instead will tip the scales further in favor of U.S. carriers. Unilateral regulation of foreign carriers by DOT would conflict with the intent of Security Act provisions which commit the United States to pursue its aviation security objectives through accepted multilateral and bilateral channels, reflecting the long-standing principles of comity which govern international aviation relationships. Finally, the Joint Commentors perceive little or no relationship between the collection of the specified passenger information and enhanced aviation security. Compliance with this proposed regulation will divert needed airline resources more properly spent on enhanced aviation security and improvements to facilitate efficient air

transportation. This costly procedure, at best, will improve only slightly the U.S. State Department's ability to perform the humanitarian service of notifying relatives in the very infrequent event of an airline disaster outside the United States.

BACKGROUND

This proceeding was instituted pursuant to the requirements of the Security Act. Section 203(a) of the Security Act directs the Secretary of Transportation to promulgate regulations, before March 16, 1991, requiring all U.S air carriers to provide a passenger manifest to the U.S. Department of State for any flight which has been involved in an aviation disaster outside of the United States.[2/] U.S. air carriers must provide such a passenger manifest to the State Department within one hour of being notified of the disaster, or as expeditiously as possible, but no later than three hours after receiving such notification.

The directive to adopt regulations within the specified time frame applies only to U.S. carriers; Congress merely directed the Secretary of Transportation to consider a comparable requirement for foreign air carriers, in evident recognition of the complex jurisdictional and policy issues raised by extra-territorial application of U.S. law.

2/ The passenger manifest must contain each passenger's name, passport number (where a passport is required for travel), and the name and telephone number of a contact person for each passenger.

On January 31, 1991, DOT issued the ANPRM and solicited public comment on the methods which should be adopted for facilitating the collection of the required passenger information. On February 21, 1991, the Air Transport Association of America ("ATA"), representing the U.S. airline industry, submitted comments which prompted this response. U.S. airlines, which are explicitly required by the legislation to supply passenger manifest information in the event of a aviation disaster, wholeheartedly favor subjecting foreign air carriers to the exceedingly burdensome and impractical information collection procedures. Moreover, the U.S. airline industry favors collection of such information for U.S. citizens flying not only between a U.S. and foreign point, but also between any two foreign points. At the same time, ATA advocates exempting domestic U.S. air transportation, and transportation between the United States and Canada, Mexico and the Caribbean, the latter undoubtedly accounting for a large portion of international air transportation provided by U.S. carriers to U.S. citizens. The rationale for this position is that it will result in a "level playing field."

DISCUSSION

Imposing Passenger Manifest Requirements on Foreign Air Carriers Will Not Result in a Level Playing Field

In its comments, the ATA alleges that the passenger manifest regulations will create adverse financial and operational

consequences for the U.S. air carrier industry. Therefore, it urges DOT to impose those same costly requirements on foreign air carriers in order to ensure that U.S. air carriers are not placed at a competitive disadvantage vis-a-vis foreign air carriers.

1. The Excessive Costs Of Foreign Carrie Compliance Are Unreasonable

There is a consensus among U.S. and foreign carriers that implementing passenger information collection procedures will be costly. Specifically, both U.S. and foreign air carrier commentors anticipate significant costs in the area of automation, and in the need to procure additional personnel, equipment and counter space to handle expected delays in passenger check-in. The U.S. carriers contend that a competitive balance will be maintained only if all players -- i.e. airlines -- are required to bear the same costs of these new regulations. The Joint Connectors respectfully suggest that upon examination, this superficial logic fails.

The benefits to U.S. citizens of extending these regulations to foreign carriers are questionable. Each airline disaster poses unique and unanticipated problems for personnel of the affected carrier. Despite their best efforts to comply, no carrier is likely to develop a perfect system for notification of next of kin, or to perform perfectly even if such a plan is devised, in large part because airline disasters occur so infrequently that carriers develop no experience with implementing the specified procedures. Were the Department inclined to expand the applicability of the regulations, it should first perform an in-depth cost-benefit

analysis to assess more precisely the economic and competitive burdens which would be imposed on foreign air carriers, in relationship to the alleged benefits to U.S. citizens.

Without doubt, foreign air carriers would be forced to absorb costs in excess of those of the major U.S. international carriers, which are also CRS vendors. The largest U.S. carriers and their travel agents have achieved a degree of automation which exceeds the capabilities of foreign carriers and their local distribution networks. If the passenger manifest rule were extended to foreign carriers, the relevant data would have to be collected from U.S. citizens either at the point of sale or prior to boarding any flight outside the United States.

The questions posed by the ANPRM seem to suggest little familiarity with the extent to which international air transportation entails interline ticketing. The costs of developing airline reservations software that does not presently exist to store this information and establishing telecommunications links between travel agents, carriers and interlining carriers for sales outside the United States undoubtedly would be greater than the costs to U.S. carriers to modify their CRS.

A significant number of U.S. citizens purchasing tickets abroad for travel wholly outside the United States may be manually ticketed by unautomated agents. Thus, foreign carriers would not only have to incur substantial costs of automation, but also have to develop costly procedures to collect these data from agents or otherwise screenfor U.S. passengers prior to every flight they

operate, either system-wide or on any flight connecting with a U.S.-destined flight.

The ATA acknowledges that the industry has "no procedures to accommodate the intercarrier exchange of manifest information." ATA Comments, pp. 13-14. Rather than ignore the troubling technical issues related to the cost and feasibility of compliance, as ATA suggests, the Department must acknowledge that there are compelling practical reasons not to extend the Security Act obligations to collect the specified passenger data to foreign carriers. These practical considerations are the same regardless of whether the data collected is to be passed on to U.S. carriers participating in an interline ticket, to be provided by the foreign carrier for flights to U.S. points, or to apply to foreign point-foreign point travel. Accordingly, there should be no requirement that foreign carriers or travel or ticket agents outside the United States collect data on U.S. citizens, as the costs of compliance for foreign carriers and their agents are excessive.

2. The Disproportionate Costs Of Compliance Will Place Foreign Carriers At A Competitive Disadvantage

To assess the competitive impact of the proposed passenger manifest regulation, the relevant measure is not total capital outlay needed for compliance; arguably, this would be equivalent for U.S. and foreign air carriers. Rather, the relevant measure is the per passenger cost of compliance for each affected air carrier.

When evaluated from this perspective, the true potential of the ATA proposal to affect competition adversely for foreign Carriers (and conversely, advantageously for U.S. carriers) becomes clear, and demonstrates why foreign carriers should be excluded from the scope of the proposed regulation. Rather than comparing total U.S. flag market share to total foreign flag market share, it is more appropriate to consider the comparative costs of serving passengers in a given city-pair market.

Each foreign carrier is constrained by the existing bilateral aviation agreements to serve only a few U.S. gateway points, operating a limited number of weekly flights. In contrast, most U.S. carriers serve a large number of gateways in a number of foreign countries, all connected at U.S. carrier hubs to numerous U.S. points. A U.S. carrier expending funds to comply with this regulation will be able to recover its fixed costs from a large number of passengers destined to the many international points which it serves; a foreign carrier will be able to recover the costs of servicing the special needs of U.S. citizens only from its limited U.S. services. Thus, the average cost of compliance for foreign air carriers will be far greater than the average compliance cost of U.S. carriers.

Moreover, U.S. air carriers transport the majority of U.S. citizens in international travel. In calendar year 1989, 63 percent of all U.S. citizens traveling from the United States to foreign points departed on U.S. flag carriers. Sixty-one percent

of all U.S. citizens returning to the United States from foreign points did so on U.S. flag carriers.[3/]

When a U.S. carrier's incremental cost of compliance with the passenger manifest regulations is divided among the number of U.S. citizen passengers who will actually benefit from the regulations, the cost per passenger is minimal. Foreign carriers are faced with higher costs of compliance, and many fewer U.S. citizen passengers to whom it can allocate that cost. Therefore, the foreign air carrier's cost per U.S. citizen passenger is notably higher, and disproportionate to the benefit provided to those passengers. This higher cost which would result from the unfair regulatory burden imposed by the Department may inhibit foreign carriers from successfully competing with U.S. carriers to U.S. gateway markets. For smaller carriers, the cost of compliance with the regulations may be prohibitively high, forcing them to cease operations or to operate in non-compliance.

3. While Imposing Unreasonable Costs On Foreign Airline Competitors, U.S. Carriers Propose TO Exempt Most U.S. Citizen Travel

Analysis of the competitive effects of the proposal to extend the burdensome passenger manifest requirements to foreign air carriers transporting U.S. citizens must take into account the fairness of the regulatory scheme proposed by the U.S. carriers.

3/ Source: U.S. International Air Travel Statistics, U.S. Department of Transportation, Research and Special Programs Administration, Calendar year 1989.

ATA advocates that the Department impose costly regulations for all international flight segments, while exempting all U.S. domestic operations, as implied by the statute, and international travel between the United States and Canada, Mexico, and the Caribbean.[4/] See, ATA Comments, pp. 10-12.

U.S. air carriers generate substantial revenues from their domestic operations, which comprise more than 50 percent of all air travel worldwide. U.S. carrier domestic services account for more than 90% of the total passengers enplaned by U.S. carriers. Revenues generated by U.S. carriers as a function of their domestic operations are, consequently, substantially greater than foreign carriers and can be used to defray the cost of compliance with the passenger manifest regulations. Foreign air carriers are precluded from competing in the U.S. domestic markets and, therefore, do not have the opportunity to spread their cost of compliance over a market which is exempt from the passenger manifest requirements.

In addition, the majority of foreign air carriers do n.ot have the benefit of a comparably robust home market. Even where foreign air carriers do generate significant revenues from their home markets, they face the possibility that the regulations may apply to all international route segments, which would encompass not only their home markets, but their entire system. Consequently, unlike U.S. carriers, they would not be able to subsidize the cost of

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4/ The Joint Commentors agree that there are valid technical and operational reasons to exclude North American markets.

compliance with revenues generated in a market not affected by the regulations.

In assessing the slope of the playing field, DOT should not confine its analysis to the foreign flag share of U.S. international passengers, but should instead look at each individual foreign carrier's market share in relationship to the total number of U.S. citizens transported in domestic and international air transportation. It is then readily apparent that U.S. carriers derive significant economic benefits as U.S. flag carriers by their exclusive access to domestic U.S. traffic which is unavailable to foreign flag carriers.

While the Joint Commentors would have preferred to be in a position to sympathize with U.S. carrier complaints about requirements imposed by the U.S. Congress on U.S. flag carriers, it is impossible to do so when the U.S. airline industry seeks to turn regulation into a competitive weapon against foreign carriers.[5/] The privileges enjoyed by U.S. flag carriers include an incomparable home field advantage -- protection from foreign carrier competition. If the U.S. Congress determines that U.S. flag carriers should assist the U.S. State Department to provide more timely services to U.S. citizens, it would seem a very small price to pay for the economic benefits enjoyed by U.S. carriers. If, as ATA suggests, regulatory burdens should be imposed on the basis of U.S. citizenship, regardless of where the U.S. citizen

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5/ If the regulation is truly unworkable, the responsible approach for the U.S. airline industry would be to seek its repeal.

travels, it follows that foreign carriers should enjoy the economic opportunity to compete for U.S. citizens travelling between two points in the United States as well as between two foreign points.

Unilateral Regulation Of Foreign Air Carrier Passenger Manifests Conflicts With The Aviation Security Improvement Act, The Chicago Convention, and P ' 'ples of International Comity

The Department would be ill-advised to accept ATA's invitation to extend the frontiers of its legal jurisdiction by imposing the requirements of the ANPRM upon foreign air carriers. DOT is not only not compelled to do so, but Section 204(a) of the Security Act merely directs DOT to consider whether the passenger manifest requirements should apply to foreign air carriers. Congress did not direct that DOT impose such requirements on foreign carriers through rulemaking procedures.

On the contrary, Congress specifically set forth the mechanism for the application of any passenger manifest requirements to foreign carriers. Congress explicitly states, in Section 201(b) (1) of the Security Act, that:

> the Department of State, in consultation with the Department of Transportation, shall be responsible for negotiating requisite aviation security agreements with foreign governments concerning the implementation of United States rules and regulations which affect the foreign operations of United States air carriers, foreign air carriers, and foreign international airports. The Secretary of State is directed to enter, expeditiously, into negotiations for bilateral and multilateral agreements . . . (C) to achieve imwroved availability of passenger manifest information. (Emphasis added.)

Congress also notes in Section 201(b)(2) that:

> [a] principle objective of bilateral and multilateral negotiations with foreign governments and the International Civil Aviation Organization shall be improved availability of passenger manifest information.

Any attempt by DOT to unilaterally impose passenger manifest requirements on foreign air carriers through an expedited rulemaking proceeding would not be consistent with the clear Congressional intent that this matter be the subject of international consultations.

Section 201(b) of the Security Act acknowledges that international principles of comity and reciprocity dictate the recognition of, and respect for, the sovereignty of individual nations. Although DOT has solicited comment on making regulations applicable in every international jurisdiction in which any U.S. citizen travels, insufficient consideration has evidently been given to the constraints placed by international law on the extraterritorial exercise of jurisdiction by sovereign nations.

The proposals to regulate collection of passenger information for sales outside of the United States or for travel wholly between two foreign points are particularly objectionable to foreign flag carriers whose conduct is primarily regulated by their foreign governments. Just as the United States has laws limiting the collection and distribution of personal information, the laws or cultural practices of other sovereign nations may prohibit or make it difficult to collect the specified information. The Department's economic regulations implicitly recognize the

impropriety of asserting jurisdiction over reservations systems and ticket agents located outside the United States. See 14 CPR § 255.2 (CRS regulations apply only to computer reservations systems supplied to travel agent subscribers in the United States). The Department also routinely declines to review the reasonableness of IATA-agreed fares for transportation between foreign points. Indeed, it is unclear by what regulatory device DOT could compel a foreign airline not serving the United States to collect information on U.S. citizen travel between two foreign points or to provide data to U.S. carriers concerning U.S. citizens whose itineraries at some point include transportation to the United States.

Recognizing that disparate governmental regulations could cripple the fledgling airline industry, sovereign nations long ago agreed on the need to develop principles to govern international air transportation which have served airline passengers well for almost 50 years. The Convention on International Civil Aviation (the "Chicago Convention") governs the actions of member States (including the United States) as they affect international civil aviation.[6/] The preamble to the Convention states that the

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6/ For example, Chapter 1, Article 1 of the Chicago Convention states: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." Chapter 3, Article IX confers the obligation to investigate an aviation disaster on the State in which an accident occurs, and provides a more limited role for the State in which aircraft was registered. As drafted, section 203(a) would only come into effect if the airline disaster occurs outside the United States, i.e., within the acknowledged jurisdiction of another State. Also, the principle of comity in matters affecting conduct

Convention was entered into in order to provide a framework within which international civil aviation could be developed in a safe and organized manner. The unilateral imposition by the United States of security measures on foreign air carriers is at odds with the stated intent of the Convention, which is to develop an organized framework within which civil aviation can be safely conducted.

Chapter 5, Article 37 of the Chicago Convention specifically provides that each contracting State should collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization concerning the safety, regularity and efficiency of air transportation. DOT's unilateral imposition of the passenger manifest requirements on foreign carriers, through rulemaking procedures, would violate the basic premise set forth in Article 37.

First, it would circumvent the multilateral process anticipated under the Convention. Second, it would result in procedures which impose a disproportionate cost of compliance on foreign air carriers. Finally, it may result in each air carrier, and indeed perhaps even each travel agent, formulating its own procedures for compliance, thus making the transfer of information between them difficult, if not impossible.

More generally, the current rulemakingproceeding is offensive to basic international trade principles because it benefits U.S.

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of foreign flag airline operations is expressed in Chapter 5, Article 33, which provides for reciprocal recognition of the validity of certificates of airworthiness and certificates of competency and licenses.

citizens only, while placing a significant burden on foreign carriers. Historically, countries have entered negotiations, on a bilateral or multilateral basis, to more appropriately allocate such benefits and burdens. The negotiation process is a more appropriate forum for balancing the burden and benefit which will follow any requirement that foreign air carriers comply with the passenger manifest regulations.

C. The Passenger Manifest Requirements Will Not Enhance Aviation Security and May Adversely Affect It

The passenger manifest requirements were a direct response to recommendations made by the President's Commission on Aviation Security and Terrorism[7/] in its May 15, 1990, report to the President (Report of the President's Commission on Aviation Security and Terrorism, Washington, D.C., May 15, 1990). The sole purpose of the requirements appears to be the prompt notification of next of kin in the event of an aviation disaster. Therefore, although the passenger manifest requirements came out of the Security Act, it appears, in reality, to have less to do with the enhancement of aviation security than with the sensitive treatment of victims' families.

In fact, it appears that passenger manifest requirements may actually cause a degradation in the level of security at airports

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7/ By Executive Order 12686 (August 4, 1989), President Bush ordered the formation of the Commission on Aviation Security and Terrorism. The Commission undertook a study of existing aviation security systems, options for handling terrorist threats and the treatment of families of victims of terrorist acts.

worldwide. There can be no doubt that collection of additional passenger information can only be accomplished using procedures that will produce significant delays during passenger check-in. The delays and congestion created by these new requirements will compound the security problems being experienced at already congested airports.[8/]

Finally, the implementation of passenger information collection procedures will be extremely costly. Adherence to passenger manifest requirements may detract from efforts to voluntarily upgrade security procedures. Moreover, expenditure of time and effort to.implement these regulations will detract from airline resources that would be far better spent to improve airport facilities, expedite -- rather than impede -- passenger check-in, and otherwise benefit millions of passengers.[9/]

CONCLUSION

While the Joint Commentors agree that the families of those involved in aviation disasters must be treated with kindness and compassion, good intentions do not necessarily produce good regulations. Regrettably, Congress may have constrained DOT's

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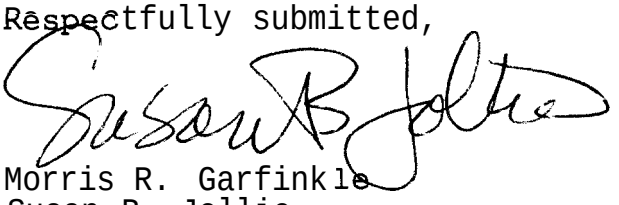
8/ The President's Commission on Aviation Security and Terrorism, at page 40 of its Report, recognized that congested airports compound security problems.

9/ If ATA is correct in arguing that air travellers will avoid U.S. carriers because of the inconvenience of complying with regulations they deem have no benefit in relationship to the costs of the time wasted by the procedures, this would reflect the judgment of the marketplace. Rather than interfering with competition, efforts should be directed to removing the unduly burdensome regulation, not to making all carriers less efficient.

ability to strike a balance between the costs and benefits by specifying the performance standards which must be met by U.S. carriers. DOT, however, must not compound the problems identified by the U.S. airlines by unilaterally imposing passenger manifest requirements on foreign carriers. The Aviation Security Improvement Act provides for multilateral and bilateral consultations, which are more in keeping with basic principles of international law. Furthermore, DOT must resist efforts to place foreign carriers at a competitive disadvantage vis-a-vis U.S. air carriers. Regulation that is insensitive to these issues could frustrate international cooperation on aviation security concerns that are shared by all airlines.

WHEREFORE, the Joint Commentors urge that requirements of Section 203(a) of the Security Act and that the proposed ANPRM not be made applicable to foreign air carriers.

Respectfully submitted,



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Dated: February 28, 1991