CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

IN REPLY REFER TO:

B-30-32

DEC 7 1982

Robert D. Papkin, Esq.
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Papkin:

This is in reply to your recent letter requesting an interpretation of the section 1108(b) cabotage prohibition with respect to proposed cargo operations of AVIANCA. As we understand AVIANCA's proposal, the carrier would carry cargo on a through air waybill between New York and foreign points on AVIANCA's authorized Colombia-Panama City-Jamaica-Miami-New York route, with a transshipment to a separate AVIANCA flight at Miami. We understand, however, that the cargo would be carried only to points on the authorized route which includes Miami and New York as coterminal points.

Based on our understanding of the proposed operation, it is our view that the Miami cargo transshipment operation would not be precluded by the cabotage prohibition of section 1108(b) of the Federal Aviation Act. Although the Qantas case, 29 CAB 33, 36 (1959), dealt primarily with questions of passenger stopovers, as you have noted, cargo transshipment operations also appear to have been clearly contemplated under the stopover doctrine. Thus, where the origin and destination on the air waybill constitute transportation between a U.S. and a foreign point, and the transshipment is made between flights on the same foreign airlines for transportation over an authorized route, the fact that the cargo is carried between two U.S. points prior or subsequent to the transshipment does not, in our view, constitute prohibited cabotage under section 1108(b) of the Act. AVIANCA could, therefore, transship cargo at Miami carried on aircraft routed through the intermediate points Panama or Jamaica for onward shipment to New York on a through flight which did not operate as frequently, or which did not stop at one of the intermediate points involved. Similarly, AVIANCA could transship at Miami, New York originating cargo destined for the authorized foreign intermediate points to a Miami-Jamaica-Panama-Colombia flight which did not originate in New York.

I am sure you recognize that the views here expressed are those of the Office of the General Counsel, and do not necessarily reflect the views of the Board. Moreover, our opinion is limited to the facts presented by you, as we understand them.

Sincerely,

/s/

Ivars V. Mellups
Acting General Counsel

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cc: B-32(w/cy/inc)
B-30(w/cy/inc)
B-25(2)(w/inc)
B-37(opinion file)
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November 19, 1982

Mr. Ivars V. Mellups
Acting General Counsel
Civil Aeronautics Board
1825 Connecticut Avenue, N.W.
Washington, D.C. 20428

Dear Mr. Mellups:

I am writing on behalf of the Colombian air carrier Aerovias Nacionales de Colombia, S.A. (AVIANCA) to request an opinion regarding the proper interpretation of the cabotage provision of the Federal Aviation Act (Section 1108(b)). AVIANCA's current foreign carrier permit (Order 78-10-135) authorizes that carrier to provide transportation with respect to persons, property or mail between, among other routes, a point or points in Colombia, specified intermediate points, and the co-terminal points Miami, Florida and New York, New York. For many years AVIANCA has provided passenger service between Colombia and New York both on a nonstop basis and with a stop at Miami. At the present time, AVIANCA also provides direct nonstop cargo service to both Miami and New York.

AVIANCA has determined that current international market conditions require a change in the pattern of its cargo services involving New York. AVIANCA is proposing to carry southbound cargo destined for points outside the United States from New York to Miami on one of its flights with that cargo to be transported from Miami by AVIANCA to one of the foreign destinations that it is authorized to serve on a second AVIANCA aircraft. All such traffic would travel under through airwaybills showing transportation exclusively from New York to the relevant authorized foreign point. AVIANCA may also perform similar operations with respect to northbound flights. In the case of northbound operations, cargo either would be held in bonded Customs storage in Miami pending transfer between AVIANCA aircraft

or would be cleared through Customs at Miami. The staff of the Bureau of International Aviation has expressed concern to us that the operations proposed by AVIANCA might constitute cabotage under Section 1108(b) of the Federal Aviation Act of 1958 as amended. We believe that this concern is unjustified, and that in fact the Board has previously expressly recognized that AVIANCA's proposed operations do not constitute cabotage. For this reason, we request your opinion that the operations described in this letter are authorized under the Federal Aviation Act and the terms of AVIANCA's foreign carrier permit. Officials of the United States Customs Service have told us they regard this problem as an aviation and not a Customs problem, and that they would be willing to allow AVIANCA to operate in the manner set forth above if the CAB has no objection.

In pertinent part, Section 1108(b) provides as follows:

> "Foreign civil aircraft permitted to navigate in the United States under this subsection may be authorized by the Board to engage in air commerce within the United States except that they shall not take on at any point within the United States, persons, property, or mail carried for compensation or hire and destined for another point within the United States, unless specifically authorized under Section 416(b)(7) of this Act or under regulations prescribed by the Secretary authorizing United States air carriers to engage in otherwise authorized common carriage and carriage of mail with foreign-registered aircraft under lease or charter to them without crew."

Since AVIANCA has no exemption under Section 416 (b)(7) that would authorize the proposed pattern of operation and since this operation would not constitute common carriage by an authorized United States air carrier, the essential question is whether by performing the flights described in this letter AVIANCA would be taking on within the United States property carried for compensation or hire and destined for another point in this country.

The Board answered this question in Petition of Qantas Empire Airways, Limited, for Interpretive Rule 29 C.A.B. 33 (1959). The Board initiated this proceeding to consider a

request by Qantas for a ruling that foreign carriers are permitted to carry on domestic U.S. segments international traffic which they do not carry into or out of the United States. The Board concluded that the carriage of such "foreign transfer traffic" by foreign carriers would constitute cabotage forbidden by Section 1108(b) and not within the scope of the terms of the relevant Section 402 permits. The Board's opinion went beyond discussing this narrow question, however, since the Board indicated that confusion had arisen on cabotage issues in the past and it wished this opinion "to be the starting point for future solution of problems arising in this general area." [29 C.A.B. at 40, n. 17.] The Board discussed the precise issue raised by AVIANCA's proposed operations in the following terms:

> "Moreover, whether by reason of former Section 6 of the Air Commerce Act or otherwise, the generally prevailing view (except for a comparatively recent ruling by our staff mentioned subsequently in this opinion) appears to have been that transportation may be provided between two U.S. points by a foreign air carrier only where the same air carrier providing a domestic portion of the transportation also provides transportation to or from an unauthorized foreign point, and where both the domestic and foreign segments of the journey are covered by through tickets or bills of lading, or in circumstances where the carrier is merely transporting across the United States traffic picked up by it at a foreign point and to be discharged by it at yet another foreign point. In other words, under U.S. authorizations permitting commercial access to this nation, a foreign carrier may incidentally transport within this country only that traffic which it brings in or carries out." [29 C.A.B. at 36 (emphasis supplied)].

While much of the discussion in the Qantas opinion speaks in terms of passenger operations, particularly where foreign transfer traffic is concerned, this is undoubtedly because Qantas' request for ruling dealt primarily with passenger flights. The notice of proposed rulemaking which instituted the Qantas case [29 C.A.B. 47-48] clearly refers to the carriage of "persons, property, or mail" and "traffic" -- both of which terms obviously include cargo operations. The discussion of this particular point in the

Qantas opinion as cited above, as well as the Board's holding in that case and the terms of Section 1108(b) itself do not distinguish between passenger and cargo operations. Accordingly, it is clear that the Board's previous ruling in the Qantas case governs the question raised in this letter, and that the operations which AVIANCA proposes are within its current authority.

It also should be noted that there is no policy reason for prohibiting these operations by AVIANCA or for imposing special restrictions on them. There is no significant likelihood that the operation of these flights will result in the carriage of cabotage traffic between New York and Miami. In the first place, AVIANCA is well aware that it is not authorized to carry any traffic between these points, except that traffic which it is bringing into or out of the United States. The carrier intends to comply with the provisions of the Federal Aviation Act in this area as well as in others, and thus will take steps to prevent the unlawful diversion of this cargo from its international journey.

Secondly, since AVIANCA is permitted to perform international transportation only, all airwaybills issued with respect to New York shipments will necessarily be for transportation between New York and an authorized foreign point. In view of the numerous air cargo services offered between New York and Miami by U.S. carriers, the economic penalty of paying freight rates to a more distant foreign point will inevitably deter shippers from attempting to send local consignments between New York and Miami on AVIANCA flights. Finally, it should be noted that the type of operation that AVIANCA is proposing here in the cargo area has been performed by AVIANCA and all other foreign carriers having United States co-terminal points in the passenger area for many years. AVIANCA does not believe that there is any greater likelihood that cargo traffic will be diverted from international flights so as to constitute unlawful cabotage than would be true in the passenger area.

AVIANCA would also note that it does not believe that its proposed change in the pattern of its cargo operations will create security problems. While this is an issue primarily within the jurisdiction of the Customs Service, AVIANCA recognizes the heightened sensitivity which the

Board has displayed to issues of this sort recently. The question would seem to arise solely with respect to northbound operations. Once a cargo shipment destined for New York arrives at Miami, AVIANCA would have two alternatives. One possibility would be to clear that shipment through Customs at Miami for subsequent passage to New York. Since Customs clearance is normally handled by the consignee, this is an alternative which is unlikely to receive significant use. The other alternative will be for AVIANCA to transfer this cargo to bonded Customs storage facilities. Under Customs Service regulations, AVIANCA is required to account for all cargo that moves in and out of such facilities and to maintain careful security. There is no reason to believe that this type of operation will in any way significantly increase the risks of unlawful importations into the United States. Indeed, AVIANCA would note that this is precisely the same procedure that would be utilized if AVIANCA were holding cargo for transfer to another carrier in bond at Miami. AVIANCA knows of no reason why this procedure, if acceptable with respect to interline shipments, should not provide effective security for online cargo transfers as well.

Finally, it is our understanding that the Board has previously advised the United States Customs Service that a very similar operation by another foreign air carrier did not violate the cabotage provisions of the Act. Attached is a copy of a memorandum dated June 19, 1981 from the Carrier Rulings Branch of the United States Customs Service in Washington to the Regional Commissioner of Customs in Miami. That memorandum states:

> ". . . the CAB interprets section 1508(b) to permit a foreign carrier to transport between two points in the United States on one aircraft passengers and cargo the carrier transported to or from this country on another aircraft, provided the domestic segment of the carriage is part of a continuous journey. The CAB goes on to state that, for passengers, a continuous journey can be one that lasts for no more than a year, provided the air transportation is on a single ticket and, for cargo a continuous journey includes interruptions in the transportation, provided the cargo is not changed in nature during the interruptions."

We have been unable to obtain a copy of the CAB letter referred to in the memorandum, but the summary of the letter certainly suggests a position identical to the position advocated by AVIANCA in this letter.

In view of the foregoing considerations, AVIANCA requests the General Counsel's opinion that its proposal to carry cargo between New York and Miami on an AVIANCA aircraft and to transport that same cargo beyond Miami on another AVIANCA aircraft is not precluded by the terms of the Federal Aviation Act, Board regulations, or AVIANCA's foreign carrier permit. AVIANCA desires to adjust its pattern of operations as soon as possible in order to take account of market factors, and therefore requests your prompt consideration of this letter.

Sincerely yours,

Robert D. Papkin

Robert D. Papkin

RDP/bjs
Enclosure

cc: Joseph Dibella, Jr.