COPY

CIVIL AERONAUTICS BOARD
WASHINGTON 25, D. C.

September 16, 1960

Laurence A. Short, Esq.
Chapman, Walsh & O'Connell
1001 Connecticut Avenue
Washington 6, D. C.

Dear Mr. Short:

This is in further reply to your letter of August 22, 1960, requesting the opinion of the General Counsel as to whether Japan Air Lines requires additional authority from the Board to undertake certain proposed operations.

JAL is the holder of a foreign air carrier permit issued pursuant to Section 402 of the Federal Aviation Act authorizing it to engage in foreign air transportation between a point or points in Japan, the intermediate point Naha, Okinawa, and the terminal point Hong Kong, and is now providing service pursuant to that authorization. Independently of its authorizations under the Federal Aviation Act, JAL operates between Tokyo and Singapore, via Hong Kong and Bangkok, without serving Okinawa. You state that JAL intends to operate its aircraft which perform the Tokyo-Okinawa-Hong Kong service beyond the terminal point Hong Kong to Bangkok and Singapore pursuant to the operating authority granted by those countries. Your specific question is whether it is necessary for JAL to obtain the approval of the Board for that operation.

It is my opinion that JAL will need additional authority from the Board. The type of authorization required will depend upon whether JAL intends to take on at Okinawa traffic which it will discharge at Bangkok and Singapore, or vice versa, or whether it intends only to combine its present Tokyo-Okinawa-Hong Kong and Tokyo-Hong Kong-Bangkok-Singapore operations so as to utilize the same aircraft, without carrying Okinawa-Bangkok or Okinawa-Singapore traffic. These two possibilities are discussed separately below.

Section 402 of the Act provides that "no foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage." Section 101(21) defines foreign air transportation as the carriage by aircraft of persons or property as a common carrier for compensation or hire "in commerce between" "a place in the United States

and any place outside thereof ...." Since the transportation by JAL of traffic originating at Okinawa and destined to Bangkok or Singapore would involve the carriage of persons and property "in commerce between" a place in the United States and a place outside thereof, it would constitute foreign air transportation within the meaning of Section 101(21) and, therefore, could not be performed unless authorized by a permit issued pursuant to Section 402 of the Act.

The fact that JAL's Section 402 permit designates Hong Kong as a terminal point on the Okinawa segment has no bearing on the question. Whether an operation involves foreign air transportation depends entirely upon an application of the definition in Section 101(21) to the particular service proposed. The route description contained in a Section 402 permit merely spells out the scope of the authority the Board has conferred under Section 402. It cannot limit, or otherwise change the scope of the statutory definition.

It is true that foreign air carriers holding Section 402 permits have been deemed to have the right to operate services between a U.S. point named in a permit and a foreign point not so named, provided the flights operate via, and land at, the designated terminal point in the homeland of the carrier. However, these "beyond-homeland" services have not been permitted on the theory that the carriage of traffic between a United States point named in a Section 402 permit and a foreign point not named in the permit does not constitute foreign air transportation. Rather, they have been allowed simply on the ground that the Board in issuing the permits intended to grant authority to engage in foreign air transportation between designated points in the United States and points beyond the homeland and that the permits should therefore be construed as impliedly granting the necessary Section 402 authority.

There remains for consideration the question of whether the Board in issuing a permit authorizing JAL to engage in foreign air transportation between a point or points in Japan, the intermediate point Okinawa, and the terminal point Hong Kong intended to authorize the carrier also to engage in foreign air transportation between Okinawa and a point or points located beyond Hong Kong. The Board itself has never spelled out the limits of these implied beyond-terminal authorizations, and in its order on reconsideration in the Foreign Air Carrier Off-Route Charter Investigation (Order E-14896, dated February 3, 1960), expressly declined to pass on the question of

Laurence A. Short, Esq. (3)

whether operations beyond a terminal point that is not in the homeland of the carrier were permissible. It thus appears that a final answer to this question could be given only by the Board itself.

While I cannot give you a definitive answer to this question, it is my opinion that the beyond-terminal authority of a foreign air carrier does not extend to operations beyond a terminal point that is in a third country. Considerations of administrative convenience and comity, which appear to have led the Board to describe routes in Section 402 permits extending only to the homeland of the carrier, would not seem to me to apply with the same force to routes beyond a United States point to a point in a third country. Additionally, in the absence of some indication of a contrary intent (and I have found no such indication in any Board decision), it would appear that as a matter of construction any theory of implied authorizations should be strictly limited.

Turning now to a combined operation that would not involve the carriage of traffic between Okinawa and Bangkok or Singapore, it is clear that JAL in such an operation would not be engaging in foreign air transportation between any points other than those between which it is expressly authorized by its Section 402 permit so to engage. Accordingly, JAL would need no additional authority under Section 402. However, in my opinion it would have to obtain a foreign flight permit under Section 1108(b) of the Act.

Section 1108(b), insofar as pertinent here, provides that foreign registered aircraft may be navigated in the United States only if such navigation is authorized by permit, order, or regulation issued by the Board. The section further provides that nothing contained therein "shall be deemed to limit, modify or amend Section 402 of the Act, but any foreign air carrier holding a permit under said Section 402 shall not be required to obtain additional authorization ... with respect to any operation authorized by said permit." The critical question, therefore, is whether a combined operation by JAL would constitute an operation authorized by its Section 402 permit.

As you note in your letter, the question of combined operations was considered by the Board in the Air France polar route case. There the Board in issuing Air France a Section 402 permit authorizing it to engage in foreign air transportation between the terminal point Los Angeles and a terminal point in France specifically directed its attention to whether, in the absence of a restriction in the permit, the carrier in its Los Angeles-Paris operations could exercise traffic

Laurence A. Short, Esq. (4)

rights at Montreal (including the taking on or discharge of traffic between Canada and France not moving in foreign air transportation). The Board concluded that a restriction was unnecessary, since the carrier would require authorization for a Montreal traffic stop pursuant to Section 1108(b) or 402, depending upon the rights sought.

Although the Board did not spell out the reasons for its conclusion, the opinion, in my judgment, stands for the proposition that an operation to or from the United States by the holder of a Section 402 permit combining on the same aircraft traffic moving in air transportation pursuant to the permit and traffic not moving in air transportation which the holder takes on or discharges at a foreign point it is not authorized to serve under the permit does not constitute an operation authorized by a Section 402 permit. I recognize that the foreign point (Montreal) in that case was located between the terminal points named in the permit, rather than beyond the foreign terminal as in the case of JAL. However, in my opinion this difference would not make the Board's holding inapplicable to the operation beyond Hong Kong. In this connection, it should be noted that whereas Section 375.45 of the Board's Special Regulations grants blanket authority under Section 1108(b) for the navigation of foreign registered aircraft within the United States for transit flights in international air service operations, it specifically provides that the consolidation on the same aircraft of an operation under the section with a service authorized under Section 402 is not authorized.

Your questions have not been presented to the Board itself and, accordingly, the views expressed herein represent only my own opinion in the matter.

Very truly yours,

/s/ Robert L. Park
Robert L. Park
Acting General Counsel

E-15908

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 12th day of October, 1960

In the matter of the application of	:
	:
JAPAN AIR LINES COMPANY	:
	:
for a permit pursuant to Section 1108(b) of the Federal Aviation Act of 1958, as amended.	:

ORDER AUTHORIZING NAVIGATION OF FOREIGN REGISTERED AIRCRAFT

Japan Air Lines Company (JAL) is the holder of a foreign air carrier permit issued pursuant to Section 402 of the Federal Aviation Act of 1958, as amended, (Act) authorizing it to engage in foreign air transportation between a point or points in Japan, the intermediate point Naha, Okinawa and the terminal point Hong Kong. On September 21, 1960, JAL filed with the Board an application pursuant to Section 1108(b) of the Act to consolidate its Tokyo-Okinawa-Hong Kong service with its Tokyo-Hong Kong-Bangkok-Singapore operation. The Tokyo-Singapore operation does not involve service to any United States point and therefore is conducted without Board authorization. In essence, JAL is seeking authority to combine on the same aircraft traffic between Tokyo, Okinawa and Hong Kong which is moving in air transportation, and traffic between Tokyo and Bangkok or Singapore, which is not moving in air transportation.

In support of its application JAL represents inter alia that it is in the process of shifting to a winter schedule; that the Air Transport Agreement between United States and Japan provides for a designated Japanese flag carrier to operate from Japan to Okinawa and beyond and that under this provision of the agreement JAL's 402 permit for service between Japan and Hong Kong via Okinawa was approved; that it seeks no additional authorization to carry traffic destined for or originating at Okinawa; and that the combination of the two operations will not adversely affect any United States carrier or citizen.

No protest to the subject application has been received.

The Board concludes that there is no reason to believe that the combination of the two operations in the manner sought will adversely affect any United States carrier or any other citizen of the United States. Moreover, the Board notes that the Air Transport Agreement between United States and Japan provides for a route between Japan and points beyond Okinawa and, accordingly, the operation for which authority is sought could be authorized pursuant to Section 402 of the Act. Under these circumstances we find that approval of the application is in the interest of the public of the United States. However, there is nothing before the Board to indicate that grant of this authority on an indefinite basis would be warranted.1/ Therefore, the authority granted herein will be limited to a six-month period.

The Board is informed and finds that reciprocal rights would be offered by the Japanese Government in like circumstances to United States carriers. Upon consideration of the foregoing, and acting pursuant to Section 375.70 of the Board's Special Regulations and Section 1108(b) of the Act:

IT IS ORDERED:

1. That JAL be and it hereby is authorized to navigate between Naha, Okinawa, on the one hand, and Bangkok and Singapore, on the other, any aircraft registered under the laws of Japan which it operates in foreign air transportation over its route Japan-Okinawa-Hong Kong; Provided, That on flights operated pursuant to this authorization JAL shall not take on or discharge at Naha, Okinawa passengers, property and foreign mail which it enplanes or deplanes at a point beyond Hong Kong and shall not grant stopovers at Naha, Okinawa to passengers which it enplanes or deplanes at Hong Kong or beyond;

2. That notwithstanding any provisions to the contrary in Section 375.42 of the Special Regulations, this authorization shall be effective for six months from the date of this Order;

3. That the authority granted herein may be amended, modified or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

(SEAL)

Robert C. Lester
Secretary

1/ In addition, JAL has indicated an interest in the authority only for purposes of accommodating its winter schedule.

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NOTATION
APPROVED

RECEIVED NOTATION
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MINUTES SECTION

Director, Bureau
of Air Operations

CIVIL AERONAUTICS BOARD

October 10, 1960

TO: Director, Bureau of Air Operations

FROM: Chief, Special Authorities Division

SUBJECT: Japan Air Lines application to consolidate 402 with non-402 operations

I. RECOMMENDATION

Approval for six months. Draft order attached.

II. STATEMENT OF PROBLEM

A. On September 21, 1960, Japan Air Lines filed an application pursuant to Section 375.70 of the Board's Special Regulation to combine its scheduled Tokyo-Okinawa-Hong Kong flights which it operates under a 402 permit, with its Tokyo-Hong Kong-Bangkok-Singapore flights, which are not specifically covered under JAL's permit. In support of its application, Japan Air Lines represents, inter alia, that it is in the process of shifting to a winter operation; that the Japan-United States bilateral Agreement provides that a carrier designated by the Government of Japan has the right to operate from Japan to Okinawa and beyond; that, it does not desire to take on or discharge at a point beyond Hong Kong passengers, cargo or mail destined to or originating at Okinawa; and that the two authorized operations cannot adversely affect any United States carrier or other citizen.

B. No objections to the subject application have been received.

III. BASIS FOR RECOMMENDATION

A. The subject application was filed after an exchange of correspondence

between applicant's counsel and the Board's Acting General Counsel. Japan Air Lines was advised that if the combined operation did not involve the carriage of traffic between Okinawa and Bangkok or Singapore it would not constitute foreign air transportation. However, the combination of the two operations utilizing the same aircraft would require a foreign civil aircraft flight permit under Section 1108(b) of the Act. (Copy of the letter is attached as Appendix A.)

B. The request herein is similar in principle with that of Air France, which the Board authorized earlier this year. Air France was permitted to carry Montreal-France traffic on the same aircraft it used in its 402 service, provided no local traffic would be carried between Los Angeles and Montreal (Order E-15127, dated April 20, 1960). The Board has also permitted the combination of certain other 402 operations with non-402 operations (See Orders E-13203, November 26, 1958; E-13042, October 2, 1958 and E-14937, February 18, 1960).

C. The bilateral Agreement between United States and Japan provides for a carrier designated by the Government of Japan to render service to points beyond Hong Kong on the Tokyo-Okinawa-Hong Kong segment. The Board in issuing Japan Air Lines' 402 permit took into consideration the pertinent provisions of the bilateral, and had the carrier requested points beyond Hong Kong it could have been a proper subject for consideration at that time. Since the applicant only makes reference to proposed changes in its winter schedule, we recommend that the authorization be limited to a six-month period.

In view of the foregoing and in the absence of objections to the issuance of the requested permit, we believe that the Board would be warranted in granting the authorization sought.

J. W. Rosenthal

Coordinated:

General Counsel
10/10/60