



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

Issued by the Department of Transportation
on the 12th day of September, 2008

**Thai Airways International Public
Company Ltd.**

**Violations of 49 U.S.C. §§ 41301, 41703,
and 41712**

Docket OST-2008-0031

Served September 12, 2008

CONSENT ORDER

This order concerns the unlawful assertion of sovereign immunity by Thai Airways International Public Company Ltd. (“Thai Airways”), a foreign air carrier holding permit and exemption authority to operate to and from the United States, conduct that violated the express terms of its operating authority, 49 U.S.C. § 41301, and constituted an unfair and deceptive practice in violation of 49 U.S.C. § 41712. By engaging in air commerce within the United States after it violated the terms of its authority, Thai Airways also engaged in unlawful foreign air transportation in violation of 49 U.S.C. § 41703. This consent order directs Thai Airways to cease and desist from future violations and assesses the carrier a compromise civil penalty of \$15,000.

Background

Before a foreign air carrier may offer or provide transportation into or out of the United States, it must hold a valid permit issued by the Department of Transportation pursuant to 49 U.S.C. § 41301, or a valid exemption from this section. The violation of any term, condition or restriction contained in a permit or exemption constitutes a violation of Section 41301. *See Export Air del Peru, S.A.*, Order 93-10-21 (1993); *Transporte Aereo Dominicano, S.A. d/b/a Trans Dominican Airways*, Order 91-12-15 (1991); *see also Belize Air International, Ltd.*, Notice of Enforcement Proceeding, Docket 49706 (Aug. 5, 1994); *Regal Air Ltd.*, Notice of Enforcement Proceeding, Docket 48605 (Jan. 19, 1993). In addition, a foreign aircraft not authorized to engage in air commerce pursuant to section 41301, may nevertheless do so, but only if and to the extent authorized by the Secretary of Transportation pursuant to 49 U.S.C. § 41703 *et seq.* A violation of either of these sections constitutes an unfair method of competition and an unfair and deceptive practice in violation of 49 U.S.C. § 41712.

Thai Airways is a foreign air carrier, and has been authorized to offer and provide air transportation into and out of the United States since as early as 1980. *See* Order 80-9-74 (issuing foreign air carrier permit to Thai Airways); *see also* exemptions granted to Thai Airways in dockets OST-1996-1410, OST-1998-4796, OST-1999-6700, OST-2000-7955, OST-1995-338, OST-2001-11127, OST-2004-17624 and OST-2003-16293. The permit and exemptions under which Thai Airways has operated have consistently provided, in relevant part, that “operations under this authority constitute a waiver of sovereign immunity, for purposes of 28 U.S.C. § 1605(a), ... with respect to those actions or proceedings instituted against it in any court or other tribunal of the United States that are ... 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...” Notice of Action Taken, Docket OST-2006-23693, Attachment ¶7; *see also, e.g.*, Order 80-9-74, Permit at 2 ¶3. The orders by which the Department has granted Thai Airways authority to operate have generally stated that the granted authority “shall not be effective during any period when the holder is not in compliance with the [enumerated] conditions...” Notice of Action Taken, Docket OST-2006-23693, Attachment.

On August 13, 2000, a ticketed Thai Airways passenger, Subir Gupta, attempting to travel from Bangkok to Los Angeles, was denied boarding by Thai Airways employees who questioned the validity of his United States visa. Mr. Gupta subsequently filed suit against the carrier in Superior Court of the State of California for the County of Los Angeles asserting claims for negligence, intentional infliction of emotional distress, intentional interference with contractual relations, and slander *per se*.

Thai Airways responded to the complaint with a motion to dismiss for lack of subject matter jurisdiction, asserting that, as a “foreign state” under the Foreign Sovereign Immunities Act (FSIA or “the Act”) (28 U.S.C. § 1602 *et seq.*), it is immune from suit in state or federal court. Thai Airways argued that, as a corporation whose shares are principally owned by the Ministry of Finance of the Kingdom of Thailand, it is an “agency or instrumentality of a foreign state,” and *ipso facto*, a “foreign state” within the meaning of the Act. Thai Airways failed to inform the state court that by the terms of its operating authority it had waived sovereign immunity and, instead, affirmatively asserted that it had not waived immunity “explicitly or by implication” within the meaning of 28 U.S.C. § 1605(a)(1).¹ Thai Airways’ Mot. for Relief from Default and to Dismiss, *Gupta v. Thai Airways*, No. BC252276 (Cal.Super.Ct., Aug. 28, 2003). The California state court dismissed the complaint on October 10, 2003.

¹ Specifically, Thai Airways asserted that its “action in questioning [Mr. Gupta’s] international travel privileges was not ordinary commercial activity exercised by a private citizen; it was the exercise of its police power as a sovereign authority in its country of origin.” We disagree. First, all air carriers engaged in international transportation must ensure that persons destined for the United States are entitled to entry, by confirming the person’s possession of a valid passport and unexpired visa, where required, regardless of whether the carrier is owned or controlled by a foreign sovereign. 8 U.S.C. § 1323(a)(1). Second, it is not the country of origin (Thailand) for which Thai Airways was inspecting Mr. Gupta’s travel documents, but the country of destination (the United States); and with respect to the United States, Thai Airways is unmistakably not an agency or instrumentality.

Throughout these and subsequent related proceedings, Thai Airways maintained its position that the FSIA applied to the claims asserted by Mr. Gupta, and that it was accordingly immune from suit. Importantly, Thai Airways did not acknowledge to any competent tribunal during the course of these proceedings that, as a condition of its right to provide foreign air transportation into and out of the United States, it had agreed to the waiver of sovereign immunity noted above. In fact, Thai Airways states that its counsel in *Gupta* was unaware that its authority to operate into and out of the United States is conditioned upon a qualified waiver of sovereign immunity.

Decision

Thai Airways is a foreign state within the meaning of the FSIA. The FSIA provides the exclusive means for obtaining jurisdiction over foreign states and their commercial instrumentalities in the courts of the United States. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). Jurisdiction is conferred when the allegations on the surface of the complaint, or more precisely, when the facts necessary to prove a claim asserted in the complaint, fall within one of the listed exceptions to immunity. *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349, 356-57 (1993) (jurisdiction conferred by commercial activity exception); *see also Kirkham v. Societe Air France*, 429 F.3d 288 (D.C. Cir. 2005) (same). Here we are principally concerned with the “waiver” exception to sovereign immunity. As is pertinent here, Thai Airways’ waiver applied to cases based on operations in foreign air transportation, which includes those in international air transportation with a destination in the United States. The Gupta proceeding was such a case and the actions taken by Thai Airways at issue in the proceeding of reviewing Mr. Gupta’s visa were part and parcel of legally providing that air transportation.

Nevertheless, Thai Airways affirmatively asserted to courts in the United States that it had not waived sovereign immunity explicitly or by implication, when to the contrary it had specifically done so by the terms under which it was granted authority to operate to and from the United States. Its false assertion and failure properly to inform the courts regarding the terms of its authority constitute an unfair and deceptive practice in violation of 49 U.S.C. § 41712 and that conduct violated the terms of its operating authority, rendering the operations to which the assertion applied in violation of 49 U.S.C. § 41301 and unlawful under 49 U.S.C. § 41703.

In mitigation, Thai Airways states that it takes its obligations as a foreign air carrier seriously and has a strong record of compliance with the Department’s rules and regulations. According to Thai Airways, its U.S.-based staff does not include any attorneys, and its limited staff of lawyers based outside the United States does not include any U.S.-licensed or trained attorneys. Therefore, Thai Airways states that it is dependent on the U.S. law firms that act as its outside counsel for U.S. legal advice and assistance, including representation in U.S. litigation matters. Thai Airways further states that it defers extensively to the advice of those counsel on U.S. litigation matters, including decisions regarding litigation strategy and the identification and use of the most appropriate and effective substantive and procedural arguments in the conduct of such litigation. In the *Gupta* case, Thai Airways asserts that it was represented by a Los Angeles area attorney who handles local civil litigation matters for Thai Airways, and he raised the defense of sovereign immunity on Thai Airways’ behalf in

good faith, with no intent to mislead the court or any party. According to the carrier, counsel would not have raised the immunity issue in such a manner if counsel had been aware of the condition contained in Thai Airways' operating authority. Moreover, Thai Airways argues that this was an isolated case: Thai Airways provided the Aviation Enforcement Office with detailed information about legal proceedings commenced within the past 10 years in the United States in which Thai Airways was a party, but that office has not identified any other case in which it believes that Thai Airways' counsel's invocation of sovereign immunity may have been inconsistent with the terms of its operating authority. Nonetheless, Thai Airways states that it has conducted a diligent review to ensure that all of the counsel representing it in legal proceedings in the United States are aware of the conditions attached to the operating authority, including the condition relating to sovereign immunity.

We have carefully considered the facts of this case, including the explanation provided by Thai Airways, and continue to believe enforcement action is necessary. Thai Airways, in order to avoid litigation, and without admitting or denying the alleged violations, agrees to the issuance of this order to cease and desist from future violations of 49 U.S.C. §§ 41301, 41703, and 41712, and to an assessment of \$15,000 in compromise of potential civil liabilities, of which \$7,500 shall be paid within 30 days of the date of issuance of this order. The additional \$7,500 shall become payable immediately if Thai Airways violates any provision of this order within one year of its date of issuance. This compromise assessment is appropriate in view of the nature and extent of the alleged violations at issue and serves the public interest.

We believe that this consent order and the penalty it assesses provide an adequate deterrence to future noncompliance with the above-cited statutory requirements by Thai Airways, as well as by other foreign air carriers.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that by engaging in the conduct described herein, Thai Airways engaged in foreign air transportation without appropriate authority in violation of 49 U.S.C. §§ 41301 and 41703;
3. We find that by engaging in the conduct described herein and the violations described in paragraph 2 above, Thai Airways engaged in an unfair and deceptive practice in violation of 49 U.S.C. § 41712;
4. We order Thai Airways, and all other entities owned and controlled by or under the common ownership and control with Thai Airways, and their successors and assignees to cease and desist from further violations of 49 U.S.C. §§ 41301, 41703, or 41712;
5. Thai Airways is assessed a civil penalty of \$15,000 in compromise of civil penalties that might otherwise be assessed for the violations described herein. Of this total penalty amount, \$7,500 shall be due and payable within 30 days of the date of

issuance of this order. If Thai Airways violates any provision of this order within one-year following the date of issuance, the carrier shall pay the remaining additional \$7,500 within 15 days of being notified of such violation by the Office of Aviation Enforcement and Proceedings; and

6. Payment of the above mentioned civil penalty amount shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the attached instructions. Failure to pay the penalty as ordered will subject Thai Airways and its successors or assignees, to the assessment of interest, penalty, and collection charges under the Debt Collection Act, as well as possible further enforcement action for failure to comply with this order.

This order will become a final order of the Department 15 days after its service unless a timely petition for review is filed or the Department takes review on its own initiative.

BY:



SAMUEL PODBERESKY
Assistant General Counsel for
Aviation Enforcement and Proceedings

(SEAL)

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