

ORDER: 82-5-11
ISSUED: MAY 5, 1982

(VOTING TRUST)

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

CIVIL AERONAUTICS
BOARD

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 5th day of May, 1982



Application of :
:
PREMIERE AIRLINES, INC. (FORMERLY :
WINGS INTERNATIONAL AIRWAYS, INC.) :
:
for a certificate of public convenience and :
necessity :

Docket 38965

PREMIERE AIRLINES, INC. FITNESS INVESTIGATION :

Docket 39158

ORDER ON DISCRETIONARY REVIEW

Premiere Airlines, Inc. 1/ has applied for a certificate to engage in scheduled interstate air transportation. 2/ By Order 81-1-75, January 15, 1981, we tentatively concluded that the grant of the requested authority would be consistent with the public convenience and necessity, and instituted a fitness investigation in Docket 39158. The issues to be considered in that proceeding were to include: (1) whether Premiere is fit, willing and able to perform the services described in its application in Docket 38965 and to comply with the Act and our rules, regulations and requirements; (2) whether Premiere is a citizen of the United States

1/ Premiere originally applied using the name Wings International Airways, Inc. Wings Airways, Inc., a commuter air carrier, objected that use of the name "Wings International Airways" by the applicant would be reasonably likely to result in public confusion. The applicant Wings decided to change its name to Premiere Airlines; its motion for leave to amend its application accordingly was granted by Judge Vittone in his I.D. dated August 27, 1981. Therefore, we shall refer to the applicant in its new name, Premiere Airlines, Inc.

2/ Although the applicant requested authority to serve several named coterminal points, we will award it a certificate authorizing it to engage in interstate and overseas air transportation of persons, and interstate and overseas air transportation of property and mail between all points in the United States, its territories and possessions. The certificate will not authorize it to engage in intra-Alaska and intra-Hawaii all-cargo air service. This action is consistent with our interpretation of December 22, 1981, Docket 40208, that the Federal Aviation Act no longer requires us to list domestic points on a section 401 certificate. See Orders 81-11-23 and 81-12-131, November 3, and December 22, 1981.

within the meaning of section 101(16) of the Federal Aviation Act; and (3) whether we should approve, exempt or disclaim jurisdiction over any control or interlocking relationships under sections 408 and 409 of the Act which may exist.

On August 27, 1981, Administrative Law Judge John M. Vittone issued his first Initial Decision (I.D.-1) in this proceeding, which found that the applicant had failed to establish that it was a United States citizen within the meaning of section 101(16) of the Act. I.D.-1 also found that the applicant was fit, willing and able to properly perform the air transportation it proposed and that certain interlocking relationships be approved. ^{3/} At the request of the applicant, we stayed further procedural dates by Order 81-10-14, October 1, 1981, so that it could reorganize and resolve its citizenship status. By Order 82-1-97, January 20, 1982, we reopened the proceeding and remanded it to the ALJ for such further proceedings on the citizenship issue as he deemed necessary.

Judge Vittone issued his second I.D. (I.D.-2) on April 6, 1982. In I.D.-2, he found that Premiere now met the citizenship test of section 101(16) of the Act and that it continues to be fit, willing and able. He further suggested that we impose four conditions on Premiere's authority to insure against the possibility of future foreign control. No exceptions were filed; however, we have decided to take review of I.D.-2 on our own initiative. ^{4/}

In I.D.-1, Judge Vittone found that Premiere did not meet the citizenship test because one of its cofounders, Mr. Joseph J. Cicippio, borrowed \$2.5 million from his employer, a Saudi Arabian citizen, to invest in Premiere. Although the applicant asserted that there was no evidence that there would be foreign control, Judge Vittone found that Mr. Cicippio's employer, Sheikh Shobokshi, had a substantial interest in Premiere's successful operation and was in a position to exert overriding influence and control over Mr. Cicippio and, through him, the applicant.

Following the issuance of I.D.-1, the applicant reorganized itself to nullify any control the Sheikh may exercise through Mr. Cicippio. According to I.D.-2, it took the following steps: (1) Mr. Cicippio resigned from the applicant's management and board of directors; (2) Mr. Cicippio's voting interest in the applicant has been transferred to an independent third-party voting trustee, the Bank of America; (3) a new senior financial officer has been hired to replace Mr. Cicippio; and (4) Premier will pursue equity capital from sources other than Mr. Cicippio and the Sheikh.

^{3/} As reorganized, Premiere no longer has an interlocking relationship that requires section 409 approval. Therefore, we will not pass on the section 409 issue.

^{4/} Except to the extent modified, we accept the findings and conclusions of I.D.-1 and I.D.-2.

We agree with Judge Vittone that, as reorganized, the applicant is now a citizen of the United States. In order to be found to be a U.S. citizen, we have consistently held that section 101(16) requires (1) that the president and two-thirds or more of the board of directors and other managing officers of a corporation must be U.S. citizens, and that 75% of the outstanding stock must be owned by U.S. citizens; and (2) that as a factual matter, the carrier must actually be controlled by U.S. citizens. ^{5/} In this case, there was never any question that 75% of the stock was owned by U.S. citizens. Judge Vittone so found in I.D.-1. Rather, he found that the applicant had failed to demonstrate that the carrier was in fact controlled by U.S. citizens. In its reorganization plan, the applicant attempted to free itself from significant direct or indirect foreign involvement and we find that it did so effectively.

Under the terms of the trust, the trustee Bank of America is instructed to vote the shares in trust as the majority of outstanding shares are voted. ^{6/} If, however, Premiere's Board of Directors is expanded to no less than seven members, these shares may be voted to elect a representative of Mr. Cicippio to the Board of Directors. The trust agreement provides that the trustee will notify us of any transfer of the stock certificates during the term of the trust. Under the terms of the trust, Mr. Cicippio has agreed to refrain from influencing Premiere's management during the term of the trust. Finally, the trust agreement may be terminated at Mr. Cicippio's request and by order of the CAB giving the trustee notice that the Board has approved the termination.

In order to further free itself from foreign influence, Premiere is also seeking funds from sources other than the Shohokshi-Cicippio loan. It is pursuing additional capital from a private sale of stock, and it hopes to make a public offering in the future.

The Bureau of Domestic Aviation suggested, and Premiere agreed to, imposition of four conditions, which Judge Vittone found we should attach to Premiere's authority. We agree, but we will modify the first condition slightly. As the condition is currently stated, we do not think it is clear that the voting trust cannot be used to meet the 75% ownership test of section 101(16). Rather, we will only permit use of a voting trust to meet the actual control test. We shall modify the condition to reflect our interpretation.

5/ Uraba, Medellin and Central Airways, Inc., 2 C.A.B. 334 (1940); Willye Peter Daetwyler, d/b/a Interamerican Airfreight Co., 58 C.A.B. 118 (1971).

6/ The remainder of Premiere's stock is held as follows: 26% is held by a U.S. citizen, 25% is held by an Australian citizen. We caution the applicant that acquisition of any further stock by a non-U.S. citizen may jeopardize its recently established citizenship status in two ways: (1) it will result in less than 75% of its stock being owned by U.S. citizens; and (2) because of the clause in the voting trust directing the shares to be voted with the majority of outstanding stock, it may result in the shares being voted with the non-U.S. citizens' holdings, resulting in foreign control.

In addition, given the facts of this case, we are concerned that any additional infusion of funds from foreign sources, whether debt or equity, could jeopardize our finding of U.S. citizen control and, thereby, undermine Premiere's citizenship status. We have an obligation under the Act to monitor the citizenship of air carriers, and are not convinced that the suggested conditions alone will permit us to monitor adequately changes that may result in effective foreign control. Therefore, we will require Premiere to report the receipt of any additional funds from foreign sources within 15 days of their receipt.

Finally, we shall dismiss Premiere's request that we determine whether its proposed service is consistent with the public convenience and necessity by show-cause procedures. We have previously concluded that, after December 31, 1982, no finding of consistency with the public convenience and necessity would be required for the award of certificate authority to engage in interstate and overseas air transportation of persons, property and mail under sections 401(d)(1), (2) and (3) of the Act, with the exception of intra-Alaska and intra-Hawaii all-cargo service. 7/

ACCORDINGLY:

1. We find that Premiere Airlines, Inc. is fit, willing and able to operate the proposed service and issue the attached certificate authorizing it to engage in scheduled interstate and overseas air transportation;

2. The authority granted here shall become effective five days after the Board has received from the FAA a copy of the applicant's Air Carrier Operating Certificate and Operations Specifications; Provided, however, that the Board may stay the effectiveness of this authority prior to that date; and Provided, further, that the continuing effectiveness of the authority granted here is conditioned upon the timely payment of such license fees as we may prescribe; and

3. Except to the extent granted, we deny all other pending motions, petitions, applications and requests in Dockets 38965 and 39158.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

All Members concurred.

7/ See, Application of Trenton Hub Express, Order 81-12-146, December 23, 1981.

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

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

for Route 337

PREMIERE AIRLINES, INC.

is authorized, subject to the following provisions, the provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the orders, rules, and regulations issued under it, to engage in interstate and overseas air transportation of persons.

The holder is also authorized to engage in interstate and overseas air transportation of property and mail between all points in the United States, its territories and possessions.

This authority is subject to the following terms, conditions and limitations:

(1) The holder must remain in compliance with the section 101(16) definition of a U.S. citizen, which requires (i) that the president and at least two-thirds of the board of directors and other managing officers be U.S. citizens, and that at least 75 percent of the voting interest be owned by U.S. citizens; and (ii) that the holder be in fact controlled by U.S. citizens. The holder shall not consider Mr. Joseph Cicippio or any person who is employed by, indebted to, associated with or otherwise involved with him or with any member of the Shobokshi group, to be a U.S. citizen for purposes of meeting the U.S.-control requirement of clause (ii) above, for as long as Mr. Cicippio remains an employee of, or indebted to, the Shobokshi Group, or any member thereof.

(2) The holder shall prohibit Mr. Joseph Cicippio from exercising his voting interest, from being a member of the board of directors or from holding a corporate office until the termination of the December 16, 1981, Voting Trust Agreement executed between Mr. Cicippio, the beneficiary, and the Bank of America, the Trustee, except as provided by section 3 of the voting trust.

(3) The December 16, 1981, Voting Trust Agreement executed between Mr. Cicippio, the beneficiary, and the Bank of America NT & SA, the Trustee, shall not be terminated without the approval of the Board.

(4) Prior to the inauguration of service under this certificate and thereafter, on August 10th and February 10th of each year, the holder shall file with the Director of the Bureau of Domestic Aviation a report, in narrative form, describing any changes in its officers or directors and a current financial statement which includes the identification of all persons who hold more than five percent of its equity and the amount held by each. The report shall include the citizenship and residence of all creditors holding in excess of five percent of the total outstanding debt. If any debt or equity interest in excess of five percent is held directly or indirectly on behalf of some other person, the report shall include the citizenship and residence of the beneficial owner together with the full text of any written agreement or a summary of any oral agreement between the parties pertaining to such interest; provided that this requirement will be terminated upon Board approval of the termination of the Voting Trust Agreement dated as of December 16, 1981 entered into by and between Mr. Joseph J. Cicippio and Bank of America NT & SA as voting trustee, unless the Board determines at that time that the public interest requires continuation of this reporting requirement.

(5) The holder shall report to the Director of the Bureau of Domestic Aviation, in narrative form, any receipt of capital or other funds used to finance the holder's operations, whether as debt or equity, from any source directly or indirectly controlled by foreign nationals, within 15 days of the receipt of such funds.

(6) The holder shall not engage in air transportation of property or mail in all-cargo service between points wholly within the States of Alaska or Hawaii.

(7) Subject to compliance with the provisions of sections 401(j) and 419 of the Act, and all orders and regulations issued by the Board under those sections, the holder may reduce or terminate service at any point or between any two points.

(8) The holder shall not provide scheduled passenger air transportation to or from Dallas (Love Field), Texas, and one or more points outside Texas except that:

(a) The holder may provide charter air transportation not to exceed ten flights per month:

(b) The holder may provide scheduled passenger air transportation between Love Field and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico and Texas, if in connection with this service:

(i) the holder does not offer or provide any through service or ticketing with another air carrier or foreign air carrier; and

(ii) the holder does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside Texas or the four contiguous states.

The exercise of the privileges granted by this certificate shall be subject to such other reasonable terms, conditions and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate shall become effective on _____ :
Provided, That the continued effectiveness of the authority to serve Route 337 shall be subject to timely payment by the holder of such license fees as may be prescribed by the Board.

The Civil Aeronautics Board has directed its Secretary to execute this certificate and to affix the Board's seal on May 5, 1982.

PHYLLIS T. KAYLOR
Secretary

(SEAL)