

Order 2020-6-13



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

Issued by the Department of Transportation
on the 22nd day of June, 2020

Served: June 22, 2020

In the Matter of

**NATIONAL AVIATION COMPANY OF
INDIA LIMITED, D/B/A AIR INDIA**

**Authority to conduct Third and Fourth
Freedom cargo charter operations under 14
CFR Part 212 of the Department's regulations**

Docket DOT-OST-2007-0125

ORDER

By this Order, we are notifying National Aviation Company of India Limited d/b/a Air India (Air India), a foreign air carrier of India that holds economic authority from the Department,¹ that it will be required, effective 30 days after the service date of this Order, to obtain prior approval from the Department in the form of a statement of authorization before operating any Third- and/or Fourth-Freedom charter flights to or from the United States.²

We are taking this action because the Government of India (GoI) has impaired the operating rights of U.S. carriers and has engaged in discriminatory and restrictive practices with respect to U.S. carrier services to and from India.

Annex II of the U.S.-India Air Transport Agreement (“the Agreement”) provides that designated carriers under the Agreement “have the right to carry international charter traffic of passengers (and their accompanying baggage) and/or cargo...[b]etween any

¹ Air India is currently the only foreign air carrier of India that holds Department authority to conduct operations to/from the United States with its own aircraft and crew. Air India’s permit was issued by Order 2008-9-19 in Docket DOT-OST-2007-0125, and authorizes the carrier to conduct the full scope of scheduled and charter rights provided for in the U.S.-India Air Transport Agreement (“the Agreement”), which entered into force on June 5, 2005. We note that an additional foreign air carrier of India, TATA SIA Airlines Limited d/b/a Vistara (TSAL), holds Department authority that is limited to code-share operations. TSAL cannot serve the United States with its own aircraft and crew.

² 14 CFR Part 212(9)(d) of our regulations states that the Department may, with at least 30 days' notice, require a foreign air carrier to obtain a statement of authorization before operating any charter flight. Under Part 212, foreign air carriers must obtain a statement of authorization before operating any Fifth-, Sixth- and/or Seventh-Freedom charter flights to or from the United States.

point or points in the territory of the Party that has designated the airline and any point or points in the territory of the other Party.”

The GoI has imposed restrictions that prevent U.S. air carriers from making full use of these charter rights. Specifically, the GoI has prevented U.S. carriers from conducting India-U.S. passenger charter operations involving direct sales to individual passengers or through other distribution systems. For its part, the United States has not placed any limitations on U.S. – India charter operations, and Air India has been and remains free to conduct the full complement of passenger charter services provided for in the Agreement.

In this regard, we note that Air India has been conducting self-described “evacuation” charters (*i.e.*, repatriation charters), between India and the United States in both directions since May 18, 2020. On May 19, 2020, an official from the Department advised Air India of the Department’s concerns that some, if not all, of Air India’s so-called evacuation charters have gone beyond true evacuations (at least on the India to the United States segments) and involved sales to any member of the general public able to enter the United States. On May 26, 2020, Delta Air Lines, Inc. (“Delta”), via letter, requested permission from the Indian Ministry of Civil Aviation (MoCA) to perform repatriation charter services similar to those provided by Air India. To date, Delta has not received approval to perform the requested repatriation charters.

This restrictive and discriminatory treatment of U.S. carriers as regards charters has important implications in the area of scheduled operations as well. On March 25, 2020, the GoI suspended all scheduled passenger services in response to public health threats. On June 3, 2020, Air India released a schedule for additional repatriation flights that includes 49 U.S.-India round-trip charter flights that are scheduled to operate between June 10-July 1, 2020. On June 13, Air India released a schedule for 10 additional repatriation flights between June 20-July 3, 2020. Prior to the March 25th suspension of scheduled passenger services, Air India operated 34 round-trip flights per week to the United States. With 59 flights advertised for the period from June 10 to July 3, 2020, Air India would be performing charter operation at a rate of 53% of the operations it previously performed as scheduled services. As such, it appears that Air India may be using its passenger repatriation charters as a way of circumventing the GoI-imposed prohibition of all scheduled services. This situation, in which Indian airlines are permitted to perform services pursuant to their rights under the Agreement while U.S. carriers are not, creates a competitive disadvantage for U.S. carriers vis-à-vis Indian carriers, in contravention of the fair and equal opportunity to compete provision of Article 11 of the Agreement.

The U.S. Government (“USG”) views this situation, in which Indian carriers may perform charter services that U.S. carriers may not, and the resulting competitive imbalance, as inconsistent with U.S. carrier rights under Article 11 and Annex II of the Agreement. The USG first registered its objections with the GoI through engagement by the U.S. Embassy New Delhi on May 28, 2020. However, the GoI has thus far failed to remedy the situation.

Accordingly, the Department has determined that this situation calls for close scrutiny, on a case-by-case basis, of Air India passenger charter operations until this issue has been satisfactorily resolved. A prior-approval requirement for all Air India Third- and/or Fourth-Freedom charter flights will enable the Department to exercise that close scrutiny.

In light of these circumstances, in accordance with 14 CFR Part 212.9(d), the Department is imposing prior-approval conditions on Air India, as outlined above. The Department finds that such action is in the public interest.³

ACCORDINGLY,

1. We notify National Aviation Company of India Limited d/b/a Air India, in accordance with 14 CFR Part 212.9(d) of the Department's regulations, that, effective 30 days from the service date of this Order, it shall not perform any Third- and/or Fourth-Freedom charter flights unless the Department has granted it specific authority in the form of a statement of authorization to conduct such charters;
2. In accordance with the provisions of 14 CFR Part 212.10(d)(3), National Aviation Company of India Limited d/b/a Air India shall file applications for statements of authorization required by paragraph 1 above at least 30 calendar days before the proposed charter flights (10 calendar days before for proposed cargo charter flights); however, under 14 CFR Part 212.11(c), we need not submit for Presidential review denials of any applications filed less than 30 calendar days before the proposed flight;
3. We may amend, modify, or revoke this Order at any time and without hearing; and
4. We will serve this Order on National Aviation Company of India Limited d/b/a Air India; the Embassy of India in Washington, D.C.; the Indian Ministry of Civil Aviation; the Department of State; the Transportation Security Administration; and the Federal Aviation Administration.

By:

JOEL SZABAT
Assistant Secretary
Aviation and International Affairs

(SEAL)

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<http://www.regulations.gov>

³ We will also impose this prior approval requirement on any foreign air carriers of India that receive economic authority from the Department to conduct charter operations in the future.