

Order 2021-3-29



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

Issued by the Department of Transportation
on the 16th day of March, 2021

Served: March 16, 2021

In the matter of

**Cathay Pacific Airways Limited
Hong Kong Airlines Limited; and
Hong Kong Express Airways Limited**

Dockets DOT-OST-2021-0033
DOT-OST-2017-0009
DOT-OST-2015-0229
DOT-OST-2016-0039

ORDER TO FILE SCHEDULES

Summary

By this Order, the U.S. Department of Transportation (the Department) is taking steps in response to the actions of the Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong"), over the objections of the U.S. Government (USG), to deny the fair and equal opportunity of U.S. carriers to exercise the operating rights provided for in the Agreement Between the Government of the United States of America and the Government of Hong Kong Concerning Air Services, signed on April 7, 1997, as amended (the Agreement)¹. Specifically, in this Order, we are imposing Phase 1 schedule filing requirements under 14 CFR Part 213 of the Department's regulations to cover all of the scheduled all-cargo, passenger, and combination services of the captioned foreign air carriers operating to/from the United States.²

¹ 14 CFR §213.3(c).

² These carriers hold foreign air carrier permits authorizing them to conduct various Hong-Hong-U.S. services. *See* Order 2017-9-20 - Cathay Pacific Airways Limited (Cathay Pacific); Order 2016-4-18 - Hong Kong Airlines Limited; and Order 2016-8-8 - Hong Kong Express Airways Limited (Hong Kong Express). In addition, (1) Cathay Pacific holds exemption authority most recently granted by Notice of Action Taken dated June 7, 2019, in Docket DOT-OST-2003-14493, and (2) Hong Kong Express holds exemption authority most recently granted by Notice of Action Taken dated April 24, 2019, in Docket DOT-OST-2016-0083. Cathay Pacific's exemption authority is currently valid through June 7, 2021. Hong Kong Express' exemption authority remains in effect pursuant to the carrier's pending timely-filed renewal application and the Administrative Procedure Act (APA) (5 U.S.C. § 558(c)), as implemented by 14 CFR Part 377 of the Department's regulations.

Background

Civil aviation relations between the Governments of the United States and Hong Kong are governed by the provisions of the Agreement, which establishes, among other things, rights for the carriers of both parties to provide certain air services between the United States and Hong Kong. The Agreement also establishes that “[t]here shall be fair and equal opportunity for the designated airlines of each Contracting Party to compete with the designated airlines of the other Contracting Party.”³

In late January 2021, U.S. all-cargo airlines advised the Department that Hong Kong was considering requiring a two- or three-week quarantine applicable to all Hong Kong-based crew members upon returning to Hong Kong from international locations. According to Federal Express Corporation (FedEx), which bases approximately 180 crew members in Hong Kong, such a requirement would make it impossible to maintain its Hong Kong crew base, which serves as a critical hub in its intra-Asia network.

On January 28, the Department contacted the Hong Kong Transport and Housing Bureau (THB) by letter to raise its concerns about the reported forthcoming requirements and the lack of government-to-government discussions in advance. On February 5, the U.S. Consulate General Hong Kong & Macau met with THB and the Hong Kong Food and Health Bureau (FHB) to discuss Hong Kong’s plans and the USG’s concerns, particularly with respect to a reported possible exception from the forthcoming quarantine requirement for crews returning to Hong Kong from Anchorage, Alaska. In that meeting, Hong Kong gave no indication that new quarantine requirements would be announced imminently.

Later that same day, Hong Kong issued a new quarantine requirement applicable to locally-based air crews returning to Hong Kong from international locations. Hong Kong, without consultation with the USG, included the anticipated exception from the quarantine requirement for crews traveling between Hong Kong and Anchorage, Alaska. Hong Kong carrier Cathay Pacific operates a large transshipment operation at Anchorage; it conducts multiple daily all-cargo operations between Hong Kong and Anchorage that connect to other Cathay flights between Anchorage and points throughout the continental United States. This carve out effectively provides Cathay Pacific with the ability to continue those operations without impact from the new crew quarantine requirements. Meanwhile, FedEx’s Hong Kong-based crews serve only intra-Asia routings and therefore do not benefit from the Anchorage exception.

Almost immediately after Hong Kong publicized the new requirements, FedEx announced that it would begin temporarily relocating its Hong Kong-based crews to San Francisco in order to maintain the viability of critical operations in its intra-Asia network. The carrier advised the Department that the new arrangement would incur significant operational costs and personal burden on its Hong Kong crewmembers.

Since February 5, FedEx has sought to work with Hong Kong to establish an exception for its intra-Asia service points similar to that provided by Hong Kong for Anchorage, considering that FedEx applies health and safety controls for its intra-Asia operations commensurate to those required for Anchorage. However, the Department’s January 28 letter on the subject to Hong Kong authorities went unanswered until March 1. The Department sent a subsequent letter to

³ Agreement Between the Government of the United States of America and the Government of Hong Kong Concerning Air Services, signed April 7, 1997, Article 8, Paragraph 1.

THB on February 26, once again underscoring the USG's concerns and noting the Department's disappointment that Hong Kong proceeded to implement the Anchorage exception with no consultation even after the USG had communicated its concerns. The Department's February 26 letter went on to "urge the Hong Kong authorities to take actions as a matter of urgency to restore the level playing field in the U.S.-Hong Kong market; otherwise, the Department may have no choice but to consider regulatory action in order to restore the 'fair and equal opportunity' that is a core tenet of our aviation relationship under the Agreement."

In THB's March 1 response to the Department, Hong Kong did not explain its rationale for incorporating an exception for Anchorage in advance of the requirement's implementation. While Hong Kong indicated in a March 1 communication to FedEx its willingness to consider justifications for similar exceptions, as a matter of timing and process, Hong Kong already has significantly harmed the U.S. carrier's operations and drastically upended the competitive dynamics of the market by implementing an exception for Anchorage at the outset of its new policy effective February 20. At present, there is no indication from the Hong Kong authorities as to a timeline for consideration of FedEx's proposals.⁴

Decision

The manner in which Hong Kong has imposed its restrictions disproportionately impacts U.S. carriers to the exclusive benefit of Hong Kong carriers, and this imbalance denies U.S. carriers their bilateral right to a fair and equal opportunity to compete in the U.S.-Hong Kong market. The USG has relayed its objections to Hong Kong about this situation and has actively sought to reach resolution with Hong Kong that would reestablish a level playing field for both Hong Kong and U.S. carriers while providing the necessary public health protections. To date, Hong Kong has not responded in a manner that suggests a satisfactory resolution will be forthcoming.

Based on the facts before us, we find that Hong Kong has, over the objections of the U.S. Government, impaired the operating rights of U.S. carriers and denied them the fair and equal opportunity to exercise their operating rights under the Agreement and thus has acted contrary to Hong Kong obligations under Article 8, paragraph 1 of the Agreement.

These circumstances require the imposition of the schedule filing requirements of 14 CFR Part 213 outlined in this Order. We conclude that the public interest requires that the captioned carriers file their schedules for all-cargo, passenger, and combination services so that we may determine whether the operation of the services contained in those schedules, or any part thereof, may be contrary to applicable law or adversely affect the public interest.⁵ We are requiring these schedules to be filed within seven days of the service date of this Order.

⁴ We note that in addition to the matters discussed in this order concerning U.S. carrier cargo operations with Hong Kong-based crews, Hong Kong has imposed onerous crew testing and quarantine requirements on non-Hong Kong based crews since July 2020. These requirements have given rise to further concerns as to the denial of fair and equal opportunity, as they effectively prevent U.S. combination carriers from reinstating any passenger services to Hong Kong and force U.S. cargo carriers to reconfigure their Hong Kong operations so as to avoid layovers in Hong Kong.

⁵ While we recognize that Cathay Pacific is the only Hong Kong carrier currently providing scheduled combination and all-cargo services in the U.S.-Hong Kong market, we are including the other Hong Kong carriers now holding DOT authority to ensure that those other carriers will be covered by this order should their operations change and thereby come within the scope of our decision.

ACCORDINGLY,

1. Cathay Pacific Airways Limited, Hong Kong Airlines Limited, and Hong Kong Express Airways Limited shall file with the Department (via electronic mail to ScheduleFiling@dot.gov and in the above-referenced Docket), within seven days of the service date of this order, any and all of their existing schedules for all-cargo, passenger, and combination services, including code-share, common branding, and extra sections, between any point or points in the United States and any point or points not in the United States, which shall include:

- the type of equipment used or to be used,
- the frequency and day(s) of operation of each flight,
- the specific airport served at each point, and
- the time of arrival and departure at each point;

2. Cathay Pacific Airways Limited, Hong Kong Airlines Limited, and Hong Kong Express Airways Limited shall file with the Department (via electronic mail to ScheduleFiling@dot.gov and in the above-referenced Docket) any and all of their proposed schedules for all-cargo, passenger, and combination services, including code-share, common branding, and extra sections, between any point or points in the United States and any point or points not in the United States, including the information noted in ordering paragraph 1 above, the proposed effective date of such schedules, and the proposed termination date of such schedules (if known), at least 30 days prior to inauguration of service;

3. We may amend, modify, or revoke this Order at any time and without hearing; and

4. We will serve this Order on Cathay Pacific Airways Limited; Hong Kong Airlines Limited; and Hong Kong Express Airways Limited; all certificated U.S. carriers operating large aircraft; the Hong Kong Economic and Trade Office in Washington, D.C.; the Transport and Housing Bureau (THB) of the Government of the Hong Kong Special Administrative Region; the Department of State; and the Federal Aviation Administration.

By:

**Carol A. (Annie) Petsonk
Acting Assistant Secretary
Aviation and International Affairs**

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
<http://www.regulations.gov>*