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Order 99-5-4
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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 5th day of May, 1999

Application of **VIRGIN ATLANTIC AIRWAYS LIMITED** for an exemption from Subparts K and S of Part 93 of Title 14, Code of Federal Regulations pursuant to 49 U.S.C. § 41714(b)(1)	**Docket OST-99-5239**

ORDER

APPLICATION

On March 12, 1999, Virgin Atlantic Airways Limited (Virgin Atlantic) requested an exemption from 14 C.F.R. Part 93, Subparts K and S, under 49 U.S.C. § 41714(b)(1), to the extent necessary to enable it to introduce a new daily nonstop, round-trip flight between London, United Kingdom (Heathrow Airport) and Chicago, Illinois (O'Hare International Airport), using Airbus A-340 equipment (a Stage 3 aircraft). Virgin Atlantic requests two slot exemptions to accommodate an O'Hare arrival at 6:10 P.M. and an O'Hare departure at 10:00 P.M. Virgin Atlantic hopes to commence these operations on or about August 11, 1999, and continue them through the remainder of the 1999 summer season.[1]

In support of its request, Virgin Atlantic states that on March 4, 1999, the Government of the United Kingdom informed the Department of State that it had designated Virgin Atlantic to operate nonstop roundtrip service between London Heathrow Airport and Chicago O'Hare. On March 9, 1999, Virgin Atlantic formally requested slots from the Federal Aviation Administration (FAA) to operate its proposed new service, but on the same day the FAA informally notified the carrier that Virgin Atlantic's request, along with those of other carriers, exceeded the number of slots that FAA could allocate. Virgin Atlantic does not argue that it had made a timely request for the additional slots with the FAA for the 1999 summer season.[2] Rather, the applicant states that the filing of a request for O'Hare slots for the 1999 summer season prior to the filing deadline established by the FAA would have been premature because Virgin Atlantic had not yet received a formal route designation from the United Kingdom government at that time. Virgin Atlantic contends that grant of the requested slot exemptions would provide additional competition and significant new service for the London-Chicago market and would generate substantial tourism

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1 The summer season began April 4, 1999 and ends October 30, 1999.

2 Under 14 C.F.R. § 93.217(a)(5) slot requests for the summer season must be submitted by October 15 of the preceding year.

and economic benefits to the City of Chicago and to the United States. Virgin Atlantic argues that denial of its slot exemption request would contradict the intent of Bermuda 2 to increase competition in large gateway markets. Virgin Atlantic also contends that U.S. carriers have a large majority of the operating service in the Chicago-London market and given this imbalance, equivalency of access should not be an issue for its request. Although the applicant acknowledges that two U.S. carriers have experienced difficulty in gaining access to London Gatwick, Virgin Atlantic states these problems have been resolved. Finally, Virgin Atlantic argues that its request would be effective for only a short period in order that it could begin its startup operations in the Chicago-London market prior to its normal participation in the slot allocation process.

RESPONSIVE PLEADINGS

On March 29, 1999 United Air Lines, Inc. (United) filed an answer opposing the Virgin Atlantic application. United argues that Virgin Atlantic has not filed a timely application for O'Hare slot exemptions for the 1999 summer season and that the Department has strictly applied this requirement in past orders dealing with foreign carrier slot exemption requests at O'Hare.[3] It asserts that the London Heathrow slot application process is rigidly administered and filing deadlines are strictly enforced. United argues that the U.S. Buy-Sell rule allows Virgin Atlantic to obtain O'Hare slots, an option unavailable to U.S. carriers at Heathrow. Finally, United contends that the O'Hare-Heathrow market is not only slot constrained but is also frequency limited. In applying for O'Hare-Heathrow frequencies, United alleges that it has not been fairly treated by the Government of the United Kingdom and that this policy reflects a lack of reciprocity.

On March 29, 1999, the City of Chicago (Chicago) filed an answer in support of the Virgin Atlantic application. Chicago argues that grant of the application would improve competition in the London-Chicago market, provide important service benefits, and generate over $174 million in benefits to the Chicago area. Chicago asserts that in the particular circumstances of its filing, Virgin Atlantic made a timely application. Chicago asserts that Virgin Atlantic's application is consistent with the bilateral obligations of Bermuda 2 and as a matter of goodwill, grant of the application could facilitate liberalization of the U.S.-United Kingdom bilateral regime.

On April 7, 1999, Virgin Atlantic filed a reply to United's answer. Virgin Atlantic asserts that it was not in a position to file a complete application for O'Hare slot authority with the FAA during the prescribed period and that the circumstances of its filing are therefore unique. It also contends that the Department has never denied a slot exemption request that would have prevented a foreign carrier from operating bilaterally authorized services. Virgin Atlantic contends that the Department's denial of a slot exemption request of Pakistan International Airlines Corporation (PIA) is not analogous to Virgin Atlantic's circumstances since the Department initially approved the request of PIA, but later disapproved PIA's attempts to change its proposed schedule. Finally, Virgin Atlantic asserts that there exists reciprocal fairness regarding the administration of slot allocation procedures by both the U.S. and United Kingdom governments. Virgin contends that United has raised the issue of reciprocity simply because it is unhappy with the capacity regime currently agreed to by the U.S. and United Kingdom governments.

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[3] United also noted that although Virgin Atlantic is requesting two slot exemptions, its proposed O'Hare departure at 10:00 P.M. is outside the O'Hare slot controlled period, 6:45 A.M.-9:15 P.M. Thus, Virgin Atlantic would require only one slot exemption to operate its proposed service, and we will treat the application accordingly. However, we note that Virgin Atlantic's times requested with the FAA were for 1810 (UTC) and 2200 (UTC), or the equivalent of 1:10 P.M. and 5:00 P.M., Chicago local time. As discussed later in this order, the issue is moot.

On April 16 United filed a motion for leave to file and reply. United reiterates the arguments made in its answer and asserts that Virgin Atlantic has distorted and mischaracterized United's objections to Virgin Atlantic's request. We will grant the motion.

REGULATORY BACKGROUND

Subparts K and S of 14 C.F.R. Part 93 designate Chicago's O'Hare International Airport, New York's John F. Kennedy International and LaGuardia Airports, and Ronald Reagan Washington National Airport as high density traffic airports and prescribe certain air traffic rules for the operation of aircraft at these airports. These regulations limit the number of allocated Instrument Flight Rule (IFR) operations (takeoffs and landings) for specified classes of users during certain periods of the day.

Pursuant to 49 U.S.C. § 41714(b)(1), the Secretary of Transportation may, by order, grant exemptions from the requirements of Subparts K and S of 14 C.F.R. Part 93 (pertaining to slots at high density airports other than National), to enable air carriers and foreign air carriers to provide foreign air transportation using Stage 3 aircraft, if he finds such action to be in the public interest.

DECISION

We have decided to deny Virgin Atlantic's application without prejudice to the carrier's filing future slot exemption requests for subsequent seasonal periods should the need arise.

As United correctly noted, we have placed great weight on the timeliness of filings with regard to all foreign air carrier slot exemption requests. Thus, the Department has not granted any foreign carrier slot exemption requests that were late-filed. The fact that Virgin Atlantic did not obtain a formal designation for this route from its own government in time for it to seek O'Hare slots for the current season is not grounds for us to deviate from our procedural requirements. Moreover, we disagree with Virgin Atlantic's suggestion that we made such an exception for PIA. To the contrary, by Order 97-4-1, the Department denied the application of PIA for O'Hare slot exemption authority precisely because of PIA's failure to submit its application in a timely fashion. It is correct that the FAA initially approved a PIA request for slots for the 1997 summer season--however, that approval responded to an application that was timely filed. When PIA subsequently sought to amend the timing and frequency of such slots through the Department's exemption process, the Department disapproved the change, on the grounds that the request was not timely filed.

As we have affirmed,[4] while 49 U.S.C. § 41714(b)(1) provides the Department with discretionary authority to grant slot exemptions for foreign air transportation at a high density airport, we do not view this authority as a substitute mechanism for the slot-allocation procedures outlined in Subpart S of 14 C.F.R. Part 93. We fully expect air carriers and foreign air carriers to follow and exhaust all appropriate procedures for slot acquisition before filing a slot exemption request with the Department.

This Order is issued under authority delegated in 49 C.F.R. 1.56a(f)(l).

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4 See Orders 98-6-8 at 3 and 98-8-26 at 3.

ACCORDINGLY,

1. The Department denies the request of Virgin Atlantic Airways Limited for a temporary exemption from 14 C.F.R. Part 93, Subparts K and S under 49 U.S.C. 41714(b)(1) to the extent necessary to enable it to operate one daily scheduled arrival at Chicago's O'Hare International Airport between 5:45 P.M. and 6:14 P.M. (local time);

2. We will serve this order on the Ambassador of the United Kingdom in Washington, D.C.; the City of Chicago; Virgin Atlantic Airways Limited, the Department of State (Office of Aviation Negotiations); and all other parties served with the application; and

3. We grant all motions to file otherwise unauthorized documents.

By:

A. BRADLEY MIMS
Acting Assistant Secretary for Aviation
and International Affairs

(SEAL)

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