

Posted: 5/14/99  
4:45 p.m.

ORDER 99-5-9



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

Issued by the Department of Transportation  
on the 14<sup>th</sup> day of May, 1999

Served: May 18, 1999

In the Matter of

**EXPANDED AIR SERVICES AT ALASKA  
INTERNATIONAL AIRPORTS**

Docket OST-99-5035

**FINAL ORDER**

**Summary**

This order finalizes the steps proposed in Order 99-1-11 to expand service opportunities at international airports in the State of Alaska.

**Background**

By Order 99-1-11, served January 26, 1999, we proposed several measures to facilitate the development of additional international services at airports in Alaska. We noted that Alaska's airports have suffered significant losses in service because of the introduction of new, long-range aircraft that no longer need an Alaska refueling stop, and the opening of Russian airspace with the resulting shortening of many northerly air routes. While the Department, over the years, has taken various steps to increase Alaska's international air service, we concluded that, in light of Alaska's special geographic and economic circumstances, a more comprehensive approach was still needed.

As an initial matter, we announced our intention to seek in appropriate bilateral aviation negotiations, on a reciprocal basis, to waive any designation and/or frequency limitations in the bilateral agreement for services by carriers of both countries on flights that operate via Alaska.<sup>1</sup> We stated that this would permit each side in an otherwise restricted bilateral relationship to add carriers beyond the number permitted in the agreement, so long as those new carriers operated via Alaska, and to add frequencies beyond the number permitted in the agreement, so long as those additional frequencies were operated via Alaska.

In addition to pursuing the change in negotiating policy, we proposed two changes in regulatory policy to address Alaska's special needs for expanded air service. First, we directed interested persons to show cause why we should not grant exemption authority to all foreign air carriers that hold scheduled permit or exemption authority

---

<sup>1</sup> We said that we would not offer this provision in negotiations where to do so would inhibit our ability to achieve a more liberal result.

(except foreign air carriers of the United Kingdom),<sup>2</sup> to allow them to serve any point or points in Alaska, and to coterminate points in Alaska with other U.S. points for which they hold our authority.

Second, we sought comments on whether we should invite foreign air carriers to apply for exemption authority to serve additional U.S. points on an extrabilateral basis, where those additional points would be served only on flights also serving Alaska.<sup>3</sup> We specifically asked commenters to address whether, if we extended such an invitation, we should limit the number of points involved. Under this proposal, a foreign applicant's homeland would need to respect all aspects of its bilateral aviation regime with the United States in order for the carrier to be eligible for the expanded authority.<sup>4</sup>

### **Comments and Responses**

We received comments to the order from the State of Alaska, United Air Lines, Inc., and the State of Hawaii.

The State of Alaska generally supports the Department's order. It states that the proposed regulatory actions are consistent with past Department actions and U.S. trade and transportation liberalization policies, and should help address the special needs of Alaska for expanded air service opportunities. It urges the Department to consider authorizing service to new city points on flights also serving Alaska upon confirmation that the applicant's homeland is not in "material breach or bad-faith noncompliance" with its bilateral obligations, to place no general limitation on the number of new points, and to exempt carriers on a case-by-case basis from any frequency limitation that might inhibit their ability to provide new Alaska service.

United believes that the Department should not adopt a policy of granting extrabilateral authority to additional U.S. points unless it also imposes safeguards to protect the U.S. bilateral negotiating position with respect to restricted-entry countries. It states that, at a minimum, the Department should employ criteria similar to those contained in its Cities Program.<sup>5</sup> It further states that the issue of granting open-ended extrabilateral authority or limiting the number of points should be addressed on a case-by-case basis, taking into account the state of bilateral relations with the applicant's homeland, the constraints on U.S. carrier operations there, and relevant public interest factors.

The State of Hawaii urges the Department to finalize and expand the scope of Order 99-1-11 to include both Alaska and Hawaii, or to institute a separate, concurrent proceeding proposing the same actions, including the expanded cargo transfer authority granted by Order 96-11-2, with respect to foreign carriers serving Hawaii. It states that Hawaii's geographic and economic circumstances are similar to Alaska's, citing its own geographic isolation, dependence on air transportation, and reduction in air service and tourism due to Asian economic difficulties.

Reply comments were filed by Polar Air Cargo, Inc., United Air Lines, Inc., Continental Airlines, Inc./Continental Micronesia, Inc., Hawaiian Airlines, Inc., and the State of Alaska.

Polar expressed its concerns about exchanging U.S. traffic rights for a stop in Alaska based on whether a carrier's homeland abides by its bilateral agreement with respect to all-cargo operations, given that such operations, at least as concerns U.S.-Pacific rim services, in many instances already require refueling stops in

---

<sup>2</sup> For the reasons discussed in Orders 96-9-19 and 96-11-2, we are not prepared at this time to grant this type of extrabilateral authority to foreign air carriers of the United Kingdom. However, we do not intend existing Alaska authority held by carriers of the United Kingdom to be affected by our action here.

<sup>3</sup> For example, if the U.S. air service agreement with the homeland of a foreign carrier does not include rights to serve Chicago, the carrier could secure authority to serve Chicago provided its flights to/from Chicago also serve a point in Alaska.

<sup>4</sup> We stated that, for the reasons discussed in Orders 96-9-19 and 96-11-2, we were not prepared at this time to grant this type of extrabilateral authority to foreign air carriers of the United Kingdom.

<sup>5</sup> See Orders 90-1-62 and 91-11-26 which set forth and discuss the Cities Program criteria.

Alaska. It states that such an analysis does not address the severe limits on U.S.-carrier all-cargo access and growth imposed by restrictive agreements in several major Asian markets. Polar urges the Department to restructure this initiative to ensure that U.S. negotiating leverage for all-cargo operations is not lost.

Continental and Continental Micronesia support the Department's proposals as long as U.S. airlines are offered reciprocal rights, and urge the Department to consider separately Hawaii's request for comparable relief. They state that allowing foreign airlines, particularly those of countries with restrictive bilateral agreements, unlimited U.S. access via Alaska could discourage more open aviation regimes, but Alaska's unique circumstances justify an exception.

Hawaiian Airlines recommends that the Department expand Order 99-1-11 to include the State of Hawaii, or institute a similar proceeding to address issues particular to the State. The carrier states that, while the first two elements of the Department's proposal would have beneficial market effects for Hawaii, extending "beyond gateway" authority is inappropriate for the Hawaiian market unless such rights are available to U.S. carriers on a reciprocal basis.

United contends that the State of Alaska's suggested "material breach or bad-faith noncompliance" criteria is too narrow and does not adequately protect the public interest and the United States' bilateral negotiating position, and restates that such requests should be considered on a case-by-case basis. It believes that the State of Hawaii's proposal raises significant public policy concerns and, if explored, should be done so in a separate proceeding.

The State of Alaska asserts that the respondents have provided no substantive objection to Order 99-1-11, and reemphasizes its position in support of finalizing the Department's proposals. It states that United's concern is already addressed in the Department's proposals and that employing "Cities Program"-type criteria is not appropriate, since each request for extrabilateral exemption authority would be by application, thus affording the Department the opportunity to consider any "overriding public interest" factors and to protect the U.S. negotiating position. It also suggests that the issues raised by the State of Hawaii warrant independent consideration for a more proper review.

## **Decision**

We have decided to finalize our tentative findings and conclusions in Order 99-1-11. Specifically, we are granting all foreign air carriers (except foreign air carriers of the United Kingdom) that have, or subsequently receive, the right to serve the United States, exemption authority to also serve any points in Alaska, and to combine their Alaska services with those to other U.S. cities for which they hold authority. In addition, we are inviting foreign carriers to apply for authority to serve new U.S. points on an extrabilateral basis, so long as these flights also serve Alaska. We remain of the view that these regulatory measures will facilitate the operation of new international services to Alaskan points, thereby helping to offset the service reductions experienced by Alaska airports, and providing the potential for significant benefits to Alaska and its economy. We have decided not to place a fixed limit on the number of extrabilateral points a foreign carrier could apply for under this proposal. We believe that proceeding instead on a case-by-case basis will enhance the ability of carriers to use the new opportunities while preserving our ability to tailor specific awards of authority as circumstances might require, thereby ensuring the most effective pursuit of our public policy objectives.

While the commenters generally supported the proposals set forth in Order 99-1-11, they expressed concerns regarding our standards for granting extrabilateral authority to additional U.S. points. Specifically, we stated that for a carrier to be eligible for the expanded authority, its homeland would need to be respecting all aspects of its bilateral agreement with the United States. The commenters have variously suggested criteria similar to those of our Cities Program or the adoption of a "material breach" test. We have elected to finalize the standards that we proposed. We believe that they will permit our new regulatory actions to bring about the desired benefits for the State of Alaska without compromising our ability to protect the full range of important U.S. aviation interests.

Since our decision on whether to grant applications for extrabilateral authority will be on a case-by-case basis, each application will provide an opportunity for U.S. parties to raise their public interest concerns. Thus, a

process will exist for us to make reasoned determinations on whether to grant the requested extrabilateral authority.<sup>6</sup> We are convinced that this approach will provide an appropriate basis for achieving our goal of expanding air service at Alaska international airports without hampering U.S. negotiating ability.<sup>7</sup>

Finally, while we recognize that air service is also vitally important to the State of Hawaii and that both Hawaii and Alaska are dependent on air transportation, we also recognize that there are important differences in circumstances between the two States. We emphasize that our proposals were tailored expressly to meet Alaska's unique needs. Based on the record here, we cannot find that the public interest warrants our expanding Order 99-1-11 to include Hawaii or instituting a separate proceeding at this time to propose similar actions as requested by Hawaii.

**ACCORDINGLY,**

1. We grant all foreign air carriers which currently hold, or which may subsequently receive, effective Department authority, except as noted in paragraph (4) below, an exemption from 49 U.S.C. 41301 to allow them to serve any point or points in Alaska, and to coterminize points in Alaska with other U.S. points for which they hold Department authority;
2. This authority granted above shall be effective on the date of issuance of this order, and shall remain in effect for two years;
3. We invite foreign air carriers, except as noted in paragraph (4) below, to apply for exemption authority to serve additional U.S. points on an extrabilateral basis, where those additional points would be served only on flights also serving Alaska;
4. Our action shall not apply to foreign air carriers of the United Kingdom;
5. To the extent not granted, we dismiss all requests for relief in Docket OST-99-5035;
6. Our action is subject to amendment, modification, or revocation, at our discretion and without public hearing, should such action be necessary in the public interest;
7. We will serve this order on all U.S. certificated air carriers and foreign air carriers, and all other parties to this proceeding; and

This constitutes a final order by the Department of Transportation within the meaning of 5 U.S.C. 551(6). We will not entertain petitions for reconsideration of this decision. See 14 CFR §385.54(b).

By:

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

(SEAL)

---

<sup>6</sup> We stress that, while we will consider any assertions of overriding public interest concerns raised during this process, the benefits we seek to secure for Alaska through this initiative are such that we will not be limited to the application of a traditional reciprocity test in acting on these requests for extrabilateral authority.

<sup>7</sup> This includes our ability to negotiate for expanded U.S.-carrier all-cargo rights.