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Order 99-12-10

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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 10th day of December, 1999

In the matter of

**EXPANDED AIR SERVICES AT HAWAII
INTERNATIONAL AIRPORTS**

SERVED DEC 14 1999

Docket **OST-99-5723** //

ORDER

Summary

This order grants the petition of the State of Hawaii seeking Department authority to **facilitate** the **expansion** of air services at Honolulu and **Kona** International Airports.

Background

The Department has taken various regulatory measures over the years to facilitate the **operation** of new international services to isolated or under-served points, thereby helping to offset significant locality disadvantages or the service reductions experienced as a result of the introduction of new, long-range **aircraft** that no longer need refueling stops.

For example, in the case of Alaska, we have granted all foreign air carriers (except foreign air carriers of the United Kingdom) that have, or subsequently receive, exemption authority under **49 U.S.C. 41301** to engage in the following cargo transfer activities at Anchorage and Fairbanks International Airports: **(1)** on-line cargo **transfers** from one of their own aircraft to any of their other **aircraft**; **(2)** all forms of change of gauge for cargo operations, including "starburst" change of gauge; **(3)** commingling of cargo **traffic** moving in foreign air transportation with cargo traffic not moving in foreign air transportation; **(4)** interline cargo **transfers** to and from U.S. carriers; and **(5)** interline cargo transfers to and from other foreign carriers. ¹

We also granted 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 invited eligible foreign carriers to apply for

¹ See Order 96-11-2, served November 7, 1996. The authority granted in (4) and (5) does not permit cabotage operations by foreign carriers. See footnote 6, *infra*.

authority to serve new U.S. points on an extrabilateral basis, so long as these flights also serve Alaska. We stated that for a carrier to be eligible for the expanded extrabilateral authority, its homeland would need to be respecting all aspects of its bilateral agreement with the United States, and that our decision on whether to grant such applications would be on a case-by-case basis.²

In addition, the Department initiated the Cities Program to address the issue of expanding international air service opportunities to under-served cities in the United States. This program established a framework for granting eligible foreign air carriers extrabilateral authority to provide international service at these communities.³

Petition

On May 24, 1999, the State of Hawaii petitioned the Department to take the following actions to promote increased U.S. and foreign air carrier activity at its two international airports, Honolulu International Airport and **Kona** International Airport:

(1) Grant blanket exemption authority to foreign air carriers which currently hold or subsequently receive effective DOT authority to enable those carriers to engage in expanded cargo transfer activities at Honolulu and **Kona** with regard to cargo **traffic** moving between points in the Asia/Pacific region and points in the mainland U.S. or third countries via an **enroute** transit stop at Honolulu and **Kona**, except in cases in which the Department determines that grant of such blanket authority is inconsistent with other U.S. international aviation policy requirements or objectives.

(2) Grant blanket exemption authority to foreign air carriers which currently hold or subsequently receive effective DOT authority to allow those carriers to serve Honolulu and **Kona**, and to **coterminimize** Honolulu and **Kona** with other points in the U.S. for which they hold effective DOT authority.

(3) Grant specific exemption authority on application by individual foreign air carriers for authority to serve additional points in the mainland U.S. on an extra-bilateral basis, provided that such new services are operated via an **enroute** stop at Honolulu and/or **Kona**.

In support of its request, Hawaii states that its proposal is consistent with established principles and objectives of U.S. international aviation policy, and that the Department's findings with respect to Alaska apply equally to the State of Hawaii. It states that Hawaii's geographical location makes it uniquely dependent on air transportation, as well as an efficient transit point for passenger and cargo **traffic** moving between Asia/Pacific and North/South America. It further states that its proposal is warranted to offset the adverse economic impact on Hawaii of recent declines in tourism and air cargo activity as a result of the currently troubled state of economic conditions in numerous Asia/Pacific countries, and that expanded foreign carrier activity will provide substantial economic benefits to the State and to U.S. air carriers.

² See Order 99-5-9, served May 18, 1999.

³ See Orders 90-1-62 and 91-1-26 which set forth and discuss the Cities Program criteria.

Answers

Answers in response to Hawaii's petition were filed by Delta Air Lines, Inc., Continental Airlines, Inc./Continental Micronesia, Inc., and United Air Lines, Inc. While these U.S. carriers generally support Hawaii's desire to encourage additional air service, they are concerned that certain actions proposed by Hawaii would lessen U.S. negotiating leverage to achieve liberal aviation agreements in the Pacific. They contend that there are important differences between Hawaii's circumstances and the facts that prompted the Department to grant similar authority to Alaska, and that Hawaii's current air service difficulties are primarily a result of the economic **downturn** affecting the Asia/Pacific region rather than the lack of available operating authority for foreign carriers to serve the State.

Delta states that, rather than the blanket approach urged by Hawaii, the Department should consider on a country-by-country basis if the aviation relationship justifies the type of relief proposed by Hawaii.

Continental and Continental Micronesia support the award of rights to foreign airlines seeking to serve Hawaii or additional U.S. cities on flights that also serve Hawaii as long as the foreign country is willing to grant reciprocal rights to U.S. airlines, and the foreign government is honoring its bilateral commitments. They state that any proposal to open Hawaii to countries which prevent U.S. airlines from providing additional service at Hawaii could impair efforts to achieve improved aviation agreements with countries such as Japan and China.

United states that, while it supports Hawaii's first two proposals, the Department should deny Hawaii's request to permit foreign carriers to seek additional mainland U.S. points on an extrabilateral basis provided they operate via Hawaii. United states that, given the differences between Hawaii's and Alaska's circumstances, adopting such a policy would undermine U.S. negotiating leverage and inflict competitive harm on U.S. carriers that would continue to be subject to restrictive aviation regimes. It states that foreign carrier access to additional U.S. mainland points should be the subject of intergovernmental negotiations.

Responsive Pleadings

Hawaii filed a reply stating that its petition fully addresses the international policy and negotiating leverage concerns expressed by the respondents, expressly stipulating that increased operating flexibility should not be granted to carriers of any country that the Department finds imposes unacceptable restrictions on U.S. air carriers, and that any blanket authority would also be subject to applicable frequency limitations. It states that the procedure proposed (and adopted by the Department in the case of Alaska) for inviting and considering applications to serve **extrabilateral** U.S. points provides an explicit mechanism which affords interested U.S. carriers an opportunity to object to the grant of such authority in specific cases, and which requires the Department to make specific findings of fact, law and policy.

United filed an additional pleading expressing its concern that the Department's standard for determining a foreign carrier's eligibility for expanded extrabilateral privileges in the case of Alaska, *i.e.*, that a carrier's homeland must be respecting all aspects of its bilateral agreement

with the United States, is too liberal to be applied to Hawaii, given the number of restrictive agreements in the Asia/Pacific region. United states that a more appropriate standard would be that of the Department's International Cities Program which, among other things, provides that there be a procompetitive agreement with the homeland country, and that interested parties be allowed to raise overriding public interest reasons for denying the requested authority, including problems that put U.S. carriers at a competitive disadvantage.

Hawaii filed a further response agreeing with United that application of the Cities Program standard would be appropriate in considering foreign carrier requests for extrabilateral authority to serve new mainland U.S. points.

Decision

After careful consideration, we have decided to grant the petition of the State of Hawaii and grant certain blanket exemption authority to foreign air carriers. Specifically, we are granting blanket exemption authority to all foreign air carriers that hold scheduled permit or exemption authority (except foreign air carriers of the United Kingdom) ⁴ (1) to conduct expanded cargo transfer flexibility at Honolulu and **Kona** International Airports and (2) to serve Honolulu and **Kona**, and to **coterminalize** Honolulu and **Kona** with other U.S. points for which they hold our authority. We are also inviting eligible foreign carriers to apply, subject to the standard discussed below, for authority to serve new U.S. points on an extrabilateral basis, so long as these flights also serve Honolulu and/or **Kona**. We find that our actions are consistent with the public interest, as they will provide important benefits to the State of Hawaii, its economy, and the traveling and shipping public.

We recognize that air service is vitally important to the State of Hawaii. Hawaii, the only other non-contiguous state in the United States besides Alaska, is geographically isolated and heavily dependent on air transportation as a vital element of its economy. In its petition, Hawaii has provided specific evidence of the impact that the state has suffered because of the recent declines in Asian economies and the related effects on air transportation to the island. With these considerations in mind, we conclude that Hawaii has succeeded in demonstrating that a public interest basis exists for the type of relief it seeks, and we view the public interest basis as persuasive.

While the **commenters** generally support Hawaii's proposals, they expressed concerns regarding the standard to be applied for granting extrabilateral authority to additional mainland U.S. points. Hawaii responded to those concerns by agreeing to accept United's proposal that we adopt the same standard here that we use in our Cities Program. None of the other **commenters** took issue with this suggested approach as agreed to by Hawaii. Against this background, we have elected to consider any extrabilateral requests to serve additional U.S. points via Hawaii subject to the standard that there must be a procompetitive agreement with the applicant's homeland country and that interested parties will be allowed to raise overriding public interest reasons for denying the requested authority. We believe that use of this standard here will bring about the desired

⁴ 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 Hawaii authority held by carriers of the United Kingdom to be affected by our actions here.

benefits for the State of Hawaii without compromising our ability to protect the full range of important U.S. aviation interests or hampering U.S. negotiating ability.⁵

ACCORDINGLY,

1. We grant all foreign air carriers which currently hold, or which may subsequently receive, effective Department authority, except as noted in paragraph 6 below, to engage in scheduled foreign air transportation of cargo (whether under authorizations permitting combination or all-cargo services), exemption authority under **49 U.S.C. 41301** to engage in the following cargo transfer activities at Honolulu and **Kona** International Airports, Hawaii: **(1)** to transfer cargo from any of their aircraft to any of their other aircraft, provided that both aircraft are operating to/from a point in the carrier's homeland; **(2)** to make changes, at Honolulu and **Kona** International Airports, in the type or number of aircraft used to transport cargo, provided that in the outbound direction the transportation beyond Hawaii is a continuation of the transportation from the carrier's homeland to Hawaii, and in the inbound direction, the transportation to the carrier's homeland is a continuation of the transportation from behind Hawaii; **(3)** to commingle cargo moving in foreign air transportation with cargo traffic not moving in foreign air transportation; **(4)** to discharge cargo at Honolulu and **Kona** International Airports for transfer to a U.S. carrier for onward carriage to a final destination in the United States or in a third country, and to uplift from Honolulu and **Kona** cargo transferred from a U.S. carrier which was transported by that carrier to those airports from a point of origin elsewhere in the United States or in a third country; and **(5)** to discharge cargo in Honolulu and **Kona** International Airports for transfer to another foreign carrier for onward carriage to a final destination in a third country, and to uplift from Honolulu and **Kona** International Airports cargo transferred **from** another foreign carrier which was transported by that carrier to those airports from a point of origin in a third country;

2. The authority granted in paragraph 1 above will not permit **(1)** the carriage of traffic by a foreign air carrier, in its own name and under its code, **from** any point in the carrier's homeland to a point in the United States not otherwise authorized by the Department from that homeland point; **(2)** the **carriage** of traffic by a foreign air carrier, in its own name and under its code, from any third country point to a point in the United States except as otherwise authorized by the Department; **(3)** code-share operations to U.S. points **unless** both carriers otherwise hold Department authority between the points involved and the requisite Statement of Authorization; and **(4)** **cabotage** operations;⁶

3. We grant all foreign air carriers which currently hold, or which may subsequently receive, effective Department authority to engage in scheduled foreign air transportation, except as noted in paragraph **6** below, an exemption from **49 U.S.C. 41301** to allow **them** to serve both Honolulu and **Kona** International Airports, Hawaii, and to **coterminimize** Honolulu and **Kona** with other

⁵ In adopting this one aspect of the Cities Program, it is not our intent to subject applications filed under this order to all of the Cities Program criteria.

⁶ **Cabotage** operations would include the carriage by a foreign air carrier of cargo between Hawaii and other U.S. points for transfer to either a U.S. air carrier, or another foreign air carrier for carriage between Hawaii and a foreign point, in either direction. *Qantas Empire Air, Foreign Transfer Traffic*, 29 C.A.B. 33 (1959).

U.S. points for which they hold Department authority, subject to the eligibility standards set forth in this order;

4. The authority granted above shall be effective on the date of issuance of this order, and shall remain in effect for **two years**;

5. We invite eligible foreign air carriers, except as noted in paragraph 6 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 Honolulu and/or **Kona** International Airports, Hawaii;

6. The authority granted in this order shall not apply to foreign air carriers of the United Kingdom;

7. We grant all motions for leave to file;

8. To the extent not granted, we dismiss all requests for relief in Docket **OST-99-5723**;

9. 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; and

10. We will serve this order on **all** U.S. certificated air carriers and foreign air carriers, and **all** other parties to this proceeding.

By:

A. BRADLEY **MIMS**
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

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