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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 22nd day of February, 2000

Application of

MIDWEST EXPRESS AIRLINES, INC.

Docket OST-99-6240-14

For an exemption from 14 CFR Part 93, under
49 U.S.C. §41714

ORDER ON PETITION FOR RECONSIDERATION

SUMMARY

By this order the Department grants the petition for reconsideration of Order 99-11-4 filed by the Air Carrier Association of America (ACAA) on November 22, 1999, and upon reconsideration affirms our determinations in that order. Order 99-11-4 granted the application of Midwest Express Airlines, Inc. (Midwest Express) for an exemption to permit it to reassign certain slots at Ronald Reagan Washington National Airport (Reagan National) to alternative times.

BACKGROUND

On September 17, 1999, Midwest Express filed an application for an exemption to slide two 9:00 p.m. (2100) Reagan National slots that it had recently acquired to more desirable times. Midwest Express proposed to move, or "slide", one of the slots to 2:25 p.m. (1425) and the other to 3:00 p.m. (1500) for nonstop service to and from Milwaukee, WI, commencing February 1, 2000.

In support of its application, the carrier stated that it complied with all of the conditions specified in 49 U.S.C. §41714(d), which authorizes the Department to grant exemptions to air carriers operating or holding slots at Reagan National if such conditions are met. In addition, Midwest Express asserted that its request met the exceptional circumstances test required by statute and defined by Department guidelines and precedent, in that it would enable expanded schedules, with Stage 3 aircraft, in an underserved market, benefiting a large number of consumers.

On September 24 and October 1, the Air Carrier Association of America (ACAA) filed responsive pleadings opposing the application. ACAA objected to the process through which Midwest Express acquired the two slots at issue, specifically the offer of slots to a carrier that already had a presence at Reagan National, without opportunity for other new entrants to seek them through a public process. ACAA argued that 14 C.F.R. §93.225 requires that any unused slots be distributed through a lottery, and urges the Department to recall and reallocate through a lottery all 9:00 p.m. (2100) slots that were temporarily allocated over the past five years. Thus, ACAA argued that the FAA should reclaim the 2100 slots temporarily given to Midwest Express and reallocate them.

On November 4, the Department issued Order 99-11-4 granting Midwest Express's application. We found that Midwest Express met the requirements of 49 U.S.C. §41714(d) which permits the Department, under circumstances that it finds to be exceptional, to grant exemptions to an air carrier that holds or operates slots at Reagan National to enable it to slide the operating times of slots to different times.

We also addressed the issues raised by ACAA in its responsive pleadings. We did not find that other carriers were excluded from an opportunity to acquire the slots that Midwest Express obtained, nor did we agree that previous slot awards should be recalled by the FAA and distributed through a lottery at that time. We found that there had not been a demonstrated unmet demand for DCA slots in the 2100 hour, but rather that slots at that hour had become available for eligible carriers willing to schedule service. We found that it would be impractical for the FAA to hold a lottery at that time given the relatively low number of slots available for a lottery. We acknowledged that carriers might obtain 2100 hour slots and subsequently request the retiming of these operations for other time periods, but we concluded that "...speculation on future Department action on such a request does not warrant the disruption of current flights or changing long-standing FAA slot allocation policy to allocate available slots on a temporary basis." (Order at 5).

PETITION FOR RECONSIDERATION

On November 22, ACAA filed a petition for reconsideration of Order 99-11-4. ACAA requests that we reverse our decision granting the DCA slot slide requested by Midwest Express, and withdraw and reallocate to new entrant carriers through a lottery all 2100 hour DCA slots temporarily allocated under Part 93, Subpart S. ACAA contends that the Department's decision runs counter to Department policy to promote new entry and foster competition, especially at high density airports. ACAA argues that the Department has twice given preferential treatment to Midwest Express by allowing the

carrier to supplement its DCA slot holdings while during the past 14 years no other new entrant has been able to enter the DCA market. ACAA argues that “[t]he Department’s Order has blocked any new entrant from entering Reagan National and utilizing the same procedures utilized by Midwest Express.” (Petition at 2). ACAA also cites instances where the Department has generally advocated improved slot access at high density airports for new entrant carriers as a means of enhancing airline competition. ACAA maintains that our decision in Order 99-11-4 is contrary to this policy.

On December 2, Midwest Express filed an answer in response to ACAA’s petition. Midwest Express argues that the slot exemption process can be selective if there are competing applications, but that successful applicants are not “preferred” in a legal sense. Midwest Express states that in the case of its own application, there were no competing applications for 2100 slides. Midwest Express argues that ACAA members have had the same opportunities available for obtaining DCA slots as did Midwest Express, but failed to take advantage of them. Indeed, Midwest Express asserts that ACAA has not objected when its own members were granted slot exemptions at LaGuardia and were therefore “preferred.” Finally, Midwest Express states that the Department’s decision is fully consistent with the Department’s policies favoring new entry and greater airline competition since Midwest Express is a small airline and its improved DCA-Milwaukee services resulting from the Department’s decision will enhance competition at DCA.

On December 7 ACAA filed a motion for leave to file and a response to Midwest Express’s answer.¹ ACAA reiterates its contention that the process of gaining DCA slot access is not open, but rather is capricious and arbitrary, and that several of its members would be interested in obtaining DCA slots in a more open procedure. ACAA also repeats its argument that granting the Midwest Express request precludes other new entrants from gaining slot access in these more desirable time frames.

DECISION

We have decided to grant ACAA’s petition for reconsideration, but upon reconsideration to affirm our actions in Order 99-11-4.

As a threshold matter, we will address ACAA’s contention that the Department should take action to promote new entry at Reagan National. As ACAA of course recognizes,

¹ We will grant the motion to file.

takeoff and landing rights there, as well as at O'Hare, John F. Kennedy, and LaGuardia Airports, are restricted by the high density "slot" rule.² Congress subsequently authorized the Department to grant new entrants and certain others exemptions from the slot rule under varying circumstances, 49 U.S.C. 41714. However, the exemption authority established at the other three airports that would allow the cap on IFR operations to be exceeded does *not* extend to Reagan National. Subsections (a), (b) and (c) of section 41714 specifically state that the Secretary may grant such exemptions "at high density airports (*other than Washington National Airport*)" (emphasis supplied). Thus, if we read ACAA's argument to be that the Department should use exemption authority to enable new entrants to exceed current operational limits in serving Reagan National, we must respond that it asks us to take an action that we are prohibited from taking under current law.

Congress dealt with slot restriction flexibility at Reagan National separately, in 49 U.S.C. 41714(d). That subsection allows the Department to improve the efficiency at Reagan National, not by authorizing more daily operations, but by sliding the operating times of slots to different times. This authority is, by comparison, very limited, and even it can be exercised only in exceptional circumstances and under narrow and strict conditions.³ Midwest Express correctly notes that the legislative intent of section 41714(d) was to facilitate Reagan National operations for carriers holding only a limited number of slots at the airport.⁴ In Order 99-11-4 we found that Midwest Express met those conditions and had demonstrated exceptional circumstances. ACAA has not disputed those findings.⁵

² Under sections 6005(c)(5)(C) and 6009(e)(1) of the Metropolitan Washington Airports Act of 1986, Pub. L. 99-591, neither the Metropolitan Washington Airports Authority nor the FAA may increase the number of instrument flight rule takeoffs and landings authorized by the FAA's high density rule, 14 C.F.R. 93.121 et seq., above the number authorized on the date of enactment of that Act.

³ Under the terms of the statute, the Department must find that grant of the authority would not (1) result in an increase in the total number of slots per day at Reagan National; (2) result in an increase in the total number of slots at Reagan National from 0700 to 2159; (3) increase the number of operations at Reagan National in any one-hour period by more than two operations; (4) result in the withdrawal or reduction of slots operated by an air carrier; or (5) result in a net increase in noise impact on surrounding communities resulting from changes in timing of the exempted operations.

⁴ Midwest Express states that it operates ten DCA slots (Order 99-11-4 at 2).

⁵ Midwest Express states that it is one of the nation's smallest air carriers, generating only .3% of domestic passenger revenue miles, and that it operates only 10 slots, third fewest of any DCA carrier. Application of Midwest Express at 8-9. Authorizing Midwest Express to slide two late evening slots to mid-afternoon times for service to its hub in Milwaukee enabled it to compete more effectively with four major carriers with service between Reagan National and their hubs in the Midwest. *Ibid.* at 4. To the extent that ACAA argues that DOT should use its authority to "facilitate a competitive environment" (ACAA Petition for Reconsideration at 1-2) at the slot controlled airports, we believe we in fact did so in Order 99-11-4.

Rather, ACAA would have us focus on the process whereby Midwest Express had obtained its 2100 slots that it then proposed for retiming. In that regard, ACAA has not presented any arguments that were not considered in our earlier decision nor has ACAA persuaded us that our decision was in error. As we stated in our decision, from time to time 2100 slots have become available on a temporary basis, subject to recall. We noted "...these slots were available to any carrier (new entrant, limited incumbent and incumbent airline) who was willing to schedule service given that the agency may recall the slots if a viable pool of slots becomes available for lottery." (Order at 4). Thus there was nothing to prevent qualifying carriers from seeking to obtain, as Midwest Express did, a 2100 slot, and seeking approval to slide it to another time. No carrier other than Midwest Express – whether an ACAA member or otherwise – chose to do so, despite the fact that the relevant authority and procedures are matters of public record (Order 94-9-49, issued September 30, 1994). We would not consider equity served by rescinding the approval granted Midwest Express in order to benefit other carriers who had not applied over six years for the same authority.

ACAA further argues that FAA should recall the 2100 slots and conduct a lottery. In Order 99-11-4, we noted that FAA is vested with considerable discretion in determining whether there are sufficient slots available to allocate via lottery. The FAA's determination in Order 99-11-4 that the circumstances did not warrant recourse to a lottery was well supported, and ACAA has neither presented any arguments that were not considered in our earlier decision nor shown that determination to be in error. Moreover, Congress now has before it several competing proposals for significant reform of the slot and slot exemption rules. Given that congressional intent remains unclear, we are reluctant to initiate steps at this point at Reagan National that could upset existing Congressional expectations and potentially undermine the prospect of obtaining meaningful reform in the near future.

At the same time, we are mindful that, as a result of our action in Order 99-11-4 or of other interest in maximizing slot efficiencies at Reagan National, there may be increased attention given to sliding slots from less popular to more popular times, with perhaps even competing proposals being made. As we stated in Order 99-11-4, and we here confirm, the FAA will closely monitor DCA slot availability, and when a sufficient number become available to justify holding a lottery, the FAA will consider utilizing that approach to distribute those slots.

This Order is issued under authority delegated in 49 CFR 1.56a(f)(1).

ACCORDINGLY,

1. The Department grants, to the extent indicated in this order, the petition of Air Carrier Association of America for reconsideration of Order 99-11-4;
2. We affirm the actions take by the Department in Order 99-11-4;
3. We grant all motions to file otherwise unauthorized documents; and
4. We shall serve a copy of this order on the parties in this docket.

By:

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

(SEAL)

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