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Order 2000-2-29



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

Issued by the Department of Transportation
on the 25th day of February, 2000

73018

U.S.-CHINA AIR SERVICES (2001)

Served: February 25, 2000

Docket OST-99-6323 - 445

ORDER ON RECONSIDERATION

SUMMARY

By this order, we grant the petition for reconsideration of Order 2000-1-21 filed by American Airlines, Inc. and, on reconsideration, we will defer a decision on American's request with respect to the scope of authority to be awarded in this proceeding until we issue our tentative decision, and we will deny American's request with respect to requiring applicants to file additional historical cargo data.

BACKGROUND

By Order 2000-1-21, the Department instituted the above captioned case to consider the selection of a fourth U.S. carrier to serve the market and to allocate 10 additional weekly frequencies to designated carriers to provide scheduled services in the U.S.-China market effective April 1, 2001, under the April 8, 1999 protocol that amended the U.S.-China Transport Services Agreement. The order discussed the scope of authority that we would consider awarding in this proceeding and established a procedural schedule for the submission of written evidentiary material that the Department needs to reach a decision.

PETITION FOR RECONSIDERATION

American filed a petition for reconsideration of Order 2000-1-21 with respect to two issues, one relating to the scope of certificate authority that could be awarded to a new carrier in the U.S.-China market, and the other relating to the submission of additional information on historical cargo shipments by carriers operating in the market, either directly, using their own aircraft, or indirectly, using the services of other airlines.

American argues that the Department's determination in Order 2000-1-21 that the scope of any certificate authority to be awarded in this proceeding would be limited to the route(s) specifically proposed to be served would put the new carrier at a disadvantage to the incumbent U.S. carriers

that have broad certificate authority in the U.S.-China market and the flexibility to move their services to different city-pair markets.¹ American also argues that while it is committed to serving the routes it has proposed in this case, if it is selected for new authority it should have the same flexibility to adjust its service patterns as the three incumbent carriers currently enjoy.

Regarding the second element in its petition, American requests that the evidence request be revised to include the requirement that the following information be provided by both incumbent carriers and non-incumbent applicants.

Provide total weight and number of shipments (regardless of piece count) for each of (1) total cargo, and (2) express cargo, broken out by month and country of origin, beginning January 1, 1996 through the latest available month, between the United States and China. "Express cargo" would be defined as a shipment under 150 pounds, with a defined or requested door-to-door transit time of three business days or less. Non-incumbent applicants should provide the requested data with respect to cargo and express cargo shipped under their own brand.

American states that the Department will have to choose between a combination carrier and an all-cargo carrier to use the new designation. In this regard, American argues that some applicants have asserted that the U.S.-China market requires substantial additional capacity for cargo shipments generally, and for express cargo shipments in particular, and that the additional information it proposes be submitted would aid in the Department's assessment of such assertions and the threshold issue of whether a combination or all-cargo carrier should be selected for the new route opportunity.

RESPONSES TO THE PETITION FOR RECONSIDERATION

United Air Lines, Inc., United Parcel Service Co. (UPS), Federal Express Corporation, and Northwest Airlines, Inc., filed answers. American, Federal Express, Northwest, and UPS filed replies.² Federal Express filed a response to UPS's reply.³

United and UPS oppose American's petition to modify the scope of authority to be issued in this proceeding. United argues that the Department has acted consistently in carrier selection proceedings to limit new entrant certificate authority and frequency allocations to the markets for which carriers proposed service and which were the basis on which the carriers were selected. United asserts that American has not demonstrated why this standard is not appropriate in this case. UPS states that it agrees with the Department's objective of requiring carriers to adhere to

¹ American references Order to Show Cause 99-6-17, June 18, 1999, p. 9, affirmed by Final Order 99-8-9, August 12, 1999, p. 5.

² Each carrier accompanied its Reply with a motion for leave to file. UPS argues that the unauthorized replies of American, Federal Express, and Northwest should be rejected since they are contrary to the Department's Rules (citing 14 CFR 302.6) and the parties have made no showing why their unauthorized replies should be accepted. In the interest of a complete record we will grant the motions.

³ Federal Express accompanied its filing with a motion for leave to file an otherwise unauthorized document, which we will grant.

their service proposals and to provide the services promised in the route proceeding because, as the Department noted in its instituting order, this is the only means of making an informed decision among the carrier applicants. UPS also states that it is fully prepared to initiate service exactly as it proposes in this case. Neither Federal Express nor Northwest took a position with respect to American's petition on the scope of authority issue.

On the evidentiary issue raised by American, Federal Express supports American's request to require the filing of additional cargo data. Northwest, United, and UPS oppose it.

Federal Express argues that the additional data will give the Department critical information regarding the actual size of the U.S.-China market and the extent of U.S.-carrier participation in it. Federal Express, furthermore, suggests several modifications to American's request, regarding when the additional data should be supplied, suggesting an alternate definition of express cargo, and proposing that carriers report cargo data only on the basis of the U.S.-China market. Federal Express also argues that historical data also be supplied for code-share passengers carried by carriers in the U.S.-China market.

Northwest, United, and UPS argue that the additional data requested is unnecessarily burdensome and would not provide useful information to the Department to decide this case. They all argue that they would have to search an unwieldy number of records for the data requested and that the data, if available, would not be useful for comparative purposes since carriers do not maintain data in a uniform, or at least consistent, way that distinguishes express cargo. Northwest further argues that the Department's information requests in this case are consistent with the Department's requests in past cargo cases involving applicants proposing to provide general cargo and express cargo service; that, as in past cases, the Department has asked the applicants to provide detailed traffic forecasts specifying among other things, the relative percentages of express/small package and general freight expected to be carried; and that American has not explained why these data and evidence requests would not be adequate in this case.

In its reply, American supports the modifications to the reporting of cargo data as suggested by Federal Express, and contends that the modifications alleviate the reporting difficulties brought up by Northwest and United. Federal Express also maintains that its suggested modifications address the concerns raised by other parties. In its reply, Northwest reiterates its argument that significant differences between cargo data maintained by Northwest and data maintained by Federal Express would result in the submission of inconsistent and confusing data that would be of little value to the parties for purposes of this case.

DECISION

We have decided to grant American's petition for reconsideration and, on reconsideration, have decided to defer a decision on American's request that any new carrier authorized to serve the U.S.-China market in this proceeding be granted the same operating flexibility as the incumbent U.S. carriers to move their services to other city-pair markets. On the other hand, we have decided to deny American's request that applicants submit historical cargo data.

As the parties have correctly noted, the Department's standard practice in carrier selection cases is to require the selected carrier to serve the city-pair market(s) that it proposed to serve. This is because that specific service pattern is often critical to the Department's decision to select one carrier over another for the available route rights. Nevertheless, we recognize that in a given situation there may be circumstances where the standard condition may not be appropriate. Given the particular facts and circumstances of the U.S.-China market, we believe that such a decision is better made in this case after the record has been fully developed and, specifically, after we are in a position to make a tentative decision as to which carrier, if any, to authorize for new service to China and how to allocate the available frequencies. By deferring a decision on the issue raised by American until we issue our tentative carrier selection decision, we will afford all parties and the Department the opportunity, based on a complete evidentiary record, to determine whether the Department's standard condition should be applied in this case. Parties that have not commented on the issue, but wish to do so, and parties that have commented and wish to supplement their comments will be free to do so at the various evidentiary stages of the case.

We have decided to deny American's petition to the extent that it requests that all applicants be required to provide additional evidence on their historical cargo traffic, with the data broken down into express cargo traffic and total cargo traffic.

We conclude that the evidence request attached to Order 2000-1-21 will result in sufficient historical cargo data to provide an adequate record for decision in this proceeding, including a decision on the precise issues raised by American. We have already released to the parties to this case the historical traffic data (cargo and passenger) collected by the Department for U.S. and foreign carriers serving the U.S.-China market. Furthermore, the evidence request attached to Order 2000-1-21 requires applicants to provide specific details on their traffic forecasts. As such, the applicants can be expected to provide considerable additional information regarding the cargo needs of the market in their direct and rebuttal exhibits, thereby further enhancing the record in this proceeding. Our evidentiary approach is consistent with that we have followed in other selection cases where we found the record adequate for decision. Against this background, we are not persuaded that the additional information requested by American, or as revised by Federal Express, would be of sufficient use in this case to justify the additional burden on the applicants required to produce it.

We also will not require applicants to provide historical data on code-share traffic. The evidence request already requires carriers to provide a full description of the code-share services provided in the U.S.-China market. In addition, as discussed above, applicants are required to provide specific details to support their forecasts of any code-share traffic and we are confident that the information supplied together with that already available will provide an adequate record on this matter.

ACCORDINGLY,

1. We grant the petition for reconsideration of Order 2000-1-21 filed by American Airlines, Inc., and on reconsideration we defer a decision on the issue of the scope of new authority to be

awarded in this proceeding and we deny the request that applicant carriers report additional cargo data for a historical period;

2. We grant the motions of American Airlines, Inc., Federal Express Corporation, Northwest Airlines, Inc., and United Parcel Service Co. for leave to file otherwise unauthorized documents in Docket OST-99-6323; and

3. We will serve this order on American Airlines, Inc.; Delta Air Lines, Inc.; Federal Express Corporation; Northwest Airlines, Inc.; Polar Air Cargo, Inc.; United Air Lines, Inc.; United Parcel Service Company; the Port of Portland; Wayne County, Michigan and the Detroit Metropolitan Wayne County Airport; the Greater Rockford Airport Authority; the Louisville International Airport; the Ontario, California International Airport; the City of Chicago; the City and County of San Francisco; the State of Alaska/Anchorage and Fairbanks International Airports; the International Brotherhood of Teamsters; the Ambassador of the People's Republic of China in Washington, D.C.; and the U.S. Department of State (Office of Aviation Negotiations).

By:

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

(SEAL)

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