



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

Issued by the Department of Transportation
on the 8th day of April, 1997

SERVED: April 11, 1997

1997 U.S.-Brazil Combination Service Proceeding

Docket OST-2016

FINAL ORDER

Summary

By this order, we make final our tentative decision in Order 97-3-8 and (a) grant Continental Airlines, Inc., and Delta Air Lines, Inc., certificate authority to provide scheduled combination services in the U.S.-Brazil market, and (b) allocate Continental 14 weekly frequencies for its services and Delta 7 weekly frequencies.

Background

Under the U.S.-Brazil Air Transport Agreement, as amended by a Memorandum of Consultations signed October 24, 1996, the United States may designate a total of four U.S. carriers for scheduled combination services effective April 1, 1997, and the designated carriers may operate a total of 98 weekly frequencies for combination air services. American Airlines, Inc., and United Air Lines, Inc., are already designated to serve the market and hold 49 and 28 weekly frequencies, respectively, for their services. Tower Air, Inc., serves under temporary exemption authority pending selection of a carrier to serve on a long-term basis. By Order 96-12-9, we instituted the above-captioned proceeding to select carriers to use the third- and fourth- U.S. carrier designations for U.S.-Brazil combination service and to allocate the available 21 weekly frequencies among the designated carriers. In that order, we stated that the major selection criteria would be: (1) which applicants will be most likely to offer and maintain the best service for the traveling and shipping public; (2) the effect of the applicants' service proposals on the overall market structure and level of competition in the U.S.-Brazil market, and any other market shown to be relevant, in order to promote an air transportation environment that will sustain the greatest public benefits.

Three carriers, Continental, Delta, and Tower Air, applied for the two available designations and for frequency allocations. American Airlines, Inc. also applied for additional frequencies. By

Order 97-3-8, the Department tentatively determined that the selection of Continental and Delta most effectively satisfies the selection criteria in this case, and that Continental should be allocated 14 weekly frequencies for services from Newark, and Delta should be allocated 7 weekly frequencies for services from Atlanta (with single-plane behind service from Cincinnati). The Department found that by serving from their respective hubs in Newark, Atlanta and Cincinnati, the carriers would provide the broadest range of services for access to Brazil and the greatest competition with the incumbent U.S. carriers, as well as between U.S. and foreign carriers serving the market. We further found that Continental's service from Newark would provide the New York area passengers the benefit of airport choice and nonstop services to both Sao Paulo and Rio de Janeiro.

Interested parties were directed to show cause why we should not make the tentative awards in Order 97-3-8 final. American, Delta, and the Air Line Pilots Association (ALPA) filed objections to the tentative decision; Tower filed comments regarding Order 97-3-8. Continental, the New Jersey Parties, and Delta filed answers to the objections.

Summary of Pleadings

American objects to the Department's tentative decision to the extent that it tentatively denies American's application for seven weekly U.S.-Brazil combination frequencies for nonstop Miami-Manaus service. American reiterates its previous arguments that its proposed Manaus services would offer greater public benefits than additional service to Sao Paulo and Rio de Janeiro proposed by Continental and Delta. In this regard, American contends that there is ample existing Sao Paulo/Rio de Janeiro service provided by multiple U.S. and foreign carriers from multiple U.S. gateways; and that American's Miami-Manaus nonstop service will bring substantial competitive benefits to the travelling and shipping public. Because it is proposing service in a new market, American maintains that its Miami-Manaus application should be granted before another carrier is authorized to serve the New York-Sao Paulo/Rio de Janeiro markets.

Delta and ALPA support the tentative decision with respect to the proposed award for Atlanta services, but object to the tentative decision to the extent that it failed to allocate Delta seven additional frequencies to operate its proposed New York (JFK)-Brazil service. They argue that Delta's proposed JFK-Brazil service would provide competitive benefits superior to those provided by a second Continental daily flight from Newark and that the Department should modify its decision to award Delta an additional seven weekly frequencies for its proposed New York service.

Delta argues that the Department ignored the superior intragateway competitive benefits that Delta's New York (JFK)-Brazil service would produce and failed to explain why Continental's alleged competitive benefits against foreign-flag carriers are superior to Delta's direct competition against both foreign and U.S. carriers at the only New York gateway at which nonstop service is offered to Brazil. Delta further argues that the Department failed to acknowledge the substantial competition that would result from an award of both Delta's New York and Continental's Newark proposals which would ensure two additional U.S.-carrier services in the New York market rather than just one under the Department's tentative decision. Furthermore, given the

¹ The New Jersey Parties consist of the City of Newark and the Regional Business Partnership (Newark).

relative sizes of the New York-Sao Paulo and New York-Rio markets, Delta states that the New York-Rio market receives sufficient nonstop service, and, thus, that the additional competitive service in the New York-Sao Paulo market with single-plane service to Rio outweighs the benefits of Continental's nonstop Rio proposal. In this regard, Delta reiterates arguments that Continental's Rio proposal is not economic and that Continental most likely would combine service to Sao Paulo and Rio if awarded seven rather than 14 frequencies. Finally, Delta argues that it is improper for the Department to give Continental's long-term competitive position in South America precedence, particularly since Delta, unlike Continental, would be an entirely new entrant to South America.²

Tower Air does not object to the Department's tentative decision. It does, however, object to what it believes is a policy underlying the Department's decision that militates against awards to smaller carriers in limited-entry markets. It states that smaller carriers do not operate large hub and spoke networks and do not fly multiple frequencies in any one market, but because of lower operating costs can be formidable competitors. Given that four carriers may serve Brazil, Tower contends that one award to a low-cost/low-fare airline would have been in the public interest. It expresses concern that a "larger is always better" policy will drive smaller carriers out of business and deprive the public of valuable service options.

In response to the objections filed, Delta argues that the record of the proceeding overwhelming demonstrates that Delta should be selected for an award of 14 frequencies in this proceeding. Delta argues that American only reiterates arguments raised in its Brief and already considered by the Department, and that American could serve the Manaus market today if it chose (by reallocating some of its existing 49 frequencies). Delta's further argues that, while its Atlanta-Brazil services will provide valuable competition against American and Varig, the Department's failure to award Delta the New York-Brazil route forecloses the greatest benefits against American and Varig, as both those carriers operate from JFK and will not receive direct intragateway competition from Continental's Newark service. With respect to Tower, Delta states the Department does not have a policy of disfavoring smaller carriers in carrier selection cases, but that Tower had failed to make effective use of its Brazil authority and its proposal did not warrant selection in the case. Delta concurs with ALPA's objections in that they support an award of an additional seven frequencies to Delta to operate its New York-Brazil proposal.

Continental and the New Jersey Parties support the Department's decision to award Continental 14 weekly frequencies for Newark-Brazil services, and state that no party has presented any arguments not previously considered by the Department in its tentative decision. They argue that American has incorrectly characterized Continental's proposed services as duplicative, noting that

² Should the Department uphold its decision to award Delta only seven frequencies, Delta states that the Department should issue certificate authority to Delta to engage in scheduled foreign air transportation of persons, property, and mail between Atlanta, Georgia, on the one hand, and the coterminal points Sao Paulo and Rio de Janeiro, Brazil, on the other. Delta states that if it is not awarded New York -Brazil authority, it intends to extend the Cincinnati-Atlanta-Sao Paulo flight to Rio de Janeiro and that awarding Delta authority to provide single-plane service to Rio de Janeiro on its Cincinnati-Atlanta-Sao Paulo flight would be consistent with its service proposal and with the public interest. (Objections of Delta at 21). Delta also states that if it is awarded backup authority to Continental's primary award, that backup award should apply to both of Continental's Newark routes and should be activated if Continental suspends or fails to operate a full pattern of daily nonstop service on either route. (Objections of Delta at 20).

Continental's proposed operations will be the first and only Newark-Brazil service, and that the Department correctly concluded that the award to Continental of 14 frequencies will maximize the likelihood that the Newark hub can establish and maintain an effective and meaningful new U.S. competitive presence in the U.S.-Brazil market. They also concur with Delta that, because American can serve Manaus with its existing frequencies, it does not need an additional frequency allocation.

Both parties oppose Delta's request that the Department reverse its decision in order to authorize Delta to serve the New York-Brazil market. Regarding Delta's arguments as to the award of 14 frequencies to Continental, the New Jersey Parties and Continental contend that depriving Continental of seven frequencies will leave Continental's Newark services with only seven frequencies to compete against 52 weekly flights from JFK (45 existing and seven to Delta if Delta's New York proposal is granted); that awarding Delta seven frequencies would foreclose new nonstop Rio de Janeiro service, and that such results would neither serve the public interest nor enhance competition in the U.S.-Brazil market.

In addition, Continental and the New Jersey Parties maintain that, contrary to Delta's arguments, Continental's service will provide valuable intragateway competition with existing services at New York, and that the Department has made such findings with respect to similar Newark-South America services. Moreover, they argue that the record indicates that there is a large demand for international services from Newark; that its international traffic has surged when Continental has introduced new international services; and that Newark is a viable alternative choice of airport for New York passengers, noting that for many Manhattan and New Jersey travellers, JFK is inconvenient. In this regard, Continental and the New Jersey parties argue that the Department correctly concluded that selection of Continental, in addition to offering competition, offered the important additional benefit of a choice of airport for New York/New Jersey area passengers. Continental challenges Delta's argument that Delta has a stronger presence at New York than Continental and, therefore, would be a stronger competitor in the market. Continental argues that with 343 daily departures it has an even stronger presence at Newark than Delta at JFK with 58 daily departures. Finally, Continental argues that Delta's claims of disparate treatment with respect to the long-term service plans of the carriers in the South America market are without merit. Continental argues that it has systematically developed a South America network and if Delta is serious about developing a true Latin American system itself, it can begin with open-entry markets in Central America (as Continental did) and prove itself by operating the Atlanta-Sao Paulo service successfully.

Continental opposes Delta's proposed amendment to Delta's backup authority to make it effective if Continental does not operate nonstop service in both the Newark-Sao Paulo and the Newark-Rio markets. Continental states that while it fully intends to operate nonstop service in both markets, consistent with Department policy, it should have the flexibility to serve the Newark-Brazil routes in any manner it chooses in accordance with market demand. It also opposes Delta's request that its Atlanta certificate authorize service to Rio de Janeiro as well as Sao Paulo, arguing that such change constitutes an amendment to Delta's proposal and that to permit such change at this late stage of the proceeding, would establish a dangerous precedent, particularly given the Department's decision in similar situations to reject carrier requests to modify their proposals.

Decision

We have decided to make final, as modified in this order, our awards to Continental and Delta as described below. Specifically, we award Continental certificate authority and 14 weekly frequencies for operations between Newark, New Jersey, on the one hand, and Sao Paulo and Rio de Janeiro, Brazil, on the other; and we award Delta certificate authority and seven weekly frequencies for operations between Atlanta, Georgia, on the one hand, and the coterminal points Sao Paulo and Rio de Janeiro, Brazil, on the other. We also make final our tentative decision to award Delta backup authority to the Continental award and Tower backup authority to the Delta primary award.

We have carefully considered the objections and responses to our tentative decision and conclude that no party has presented any new arguments or evidence that warrants a different result. Indeed, the evidence of record continues to persuade us that the greatest service and competitive benefits in this case are achieved by selecting carriers for services operated from their hubs, thereby benefiting the greatest number of passengers and providing the strongest competition with both incumbent U.S. carriers, as well as foreign carriers serving the market. Also, selection of Continental with an award of 14 weekly frequencies for its proposed services from Newark, and Delta with an award of seven weekly frequencies for its proposed services from Atlanta, best achieves this goal given the limited number of frequencies available in this proceeding.

In our show-cause order we noted that currently two U.S. carriers operate the majority of U.S. carrier frequencies in the market. American holds 49 weekly frequencies and operates services from its hubs at Miami and Dallas/Ft. Worth, as well as services from New York; United holds 28 weekly frequencies serving from Miami and New York. We also noted that the largest Brazil markets are Sao Paulo and Rio de Janeiro, and that the majority of services are operated from Miami, while New York, the second largest market, receives considerably less service (over 80 weekly flights from Miami and 48 weekly flights from New York).

Given the service and competitive situation in the market, we recognized that the ability to authorize two additional carriers in the market with 21 weekly frequencies provided a valuable opportunity to provide new service and thereby enhance the overall U.S. carrier presence in the market, and to increase competition not only among U.S. carriers, but also among the U.S. and foreign carriers that serve these markets.

After carefully reviewing the proposals of all the applicant carriers, we tentatively concluded that the selection of Continental and Delta, both of which proposed services from their respective hubs, Continental at Newark and Delta at Atlanta, provided the greatest public benefits. We specifically noted that the services from their hubs would benefit the greatest number of local and behind-gateway passengers, and that by operating services from their hubs, these carriers would be able to offer strong competition to American's services at Miami and Dallas/Ft. Worth, and would enhance the U.S. carrier competitive presence against foreign carriers operating services from four U.S. gateways--Miami, New York, Atlanta, and Los Angeles.

Only American has opposed our selection of these carriers, reiterating arguments previously raised that its proposal to commence service in a new U.S.-Brazil market should be given priority over approval of services in existing markets. As we noted in our show-cause order, American

proposes service in one of the smallest U.S.-Brazil markets, and the smallest market at issue in this proceeding, and it projects carrying the fewest passengers of any of the applicants in this case. In these circumstances, and in light of the fact that foreign carriers in the market operate only three weekly flights in the Manaus market, we tentatively concluded that the service and competitive benefits offered by American's Miami-Manaus service were small, and considerably less valuable than awards to other carriers.

American has presented nothing in response to our tentative decision that persuades us otherwise. Indeed, as we have noted, American already holds the majority of the total number of frequencies available for all U.S. carrier services. Two additional carriers now have the opportunity to serve the U.S.-Brazil market and, together, have sought more than the limited number of frequencies available to mount their services and to compete with existing services in the market. In these circumstances, and absent compelling countervailing service benefits, which have not been demonstrated in this case, an award of additional frequencies to American would not serve our goals to enhance competition in the U.S.-Brazil market.³ Rather, we believe that the selection of Delta and Continental in this case would create a more favorable competitive balance in this market and, therefore, best serves the public interest. That said, we remain supportive of carrier aspirations to serve new markets. Given the overall level of frequencies held by American, to the extent that it believes that demand in the Miami-Manaus market warrants nonstop service, it is free to use frequencies from its existing allocation to meet that demand.

Delta has opposed our tentative decision to the extent that we did not propose to award it the authority and seven weekly frequencies it seeks to operate services in the New York (JFK)-Sao Paulo/Rio markets, arguing that we failed to consider the intragateway competitive benefits of its service at JFK and the overall competitive benefits that would result from authorizing two additional carriers--Continental and Delta--to serve from the New York area.

Contrary to Delta's arguments, we fully considered the benefits of each carrier's proposal in reaching our tentative decision. In our show-cause order we recognized that the services of both Continental at Newark and Delta at JFK would offer the New York area new services. We also noted that all of the existing services from New York were operated from JFK, with 31 weekly nonstop flights in the Sao Paulo market and 14 weekly nonstop flights in the Rio de Janeiro market. Continental proposed service from its hub at Newark, offering competition with existing services at JFK, as well as a choice of airport for New York/New Jersey passengers, and nonstop service to the two largest Brazilian destinations--Sao Paulo and Rio. Delta also offered service to New York from JFK with nonstop service to Sao Paulo and single-plane service to Rio, service that essentially duplicates existing service at JFK. While both carriers' proposals would provide New York with additional service to Brazil and offered valuable intragateway competitive benefits--Continental through its Newark hub and Delta at JFK--only Continental's proposal offers the additional service and competitive benefits of choice of airport for New York/New Jersey passengers and nonstop service to both Sao Paulo and Rio de Janeiro, benefits we found compelling in this case.

³ Indeed, American has characterized its Miami-Manaus services as "developmental". American Direct Exhibits, AA-101; American's Brief at 5.

Delta has tried to minimize the benefits of these features of Continental's proposal. Delta reiterates its contention that JFK is the preferable airport for Brazil service and, thus, that only its service from JFK will offer meaningful intragateway competition with existing services. It has failed to recognize, however, that Continental has already developed a significant Latin America route system from its Newark hub, offering services to Mexico, various cities in Central America, and several destinations in South America, including Colombia, Ecuador, and Peru. These services compete with flights operated by other carriers in these markets from JFK, and offer the best evidence that the availability of choice does meet a public need and that services at Newark offer valuable intragateway competition with services at JFK. Given these services and the broad geographic range of the New York area, we are not persuaded that services from JFK offer superior service or competitive benefits as Delta suggests. Indeed, with respect to similar South America markets, we have found that Continental's Newark service offers valuable intragateway competition to existing services from JFK. We find no reason to conclude on this record that Continental would be unable to provide comparable benefits here, particularly given the large size of the New York-Brazil market.

Nor are we persuaded that Delta's single-plane Rio proposal offers superior benefits to Continental's nonstop proposal. As we noted in our show-cause order, New York is the second largest U.S.-Brazil market. Currently, the New York-Sao Paulo market receives 31 weekly nonstop flights from four carriers (two U.S. carriers and two Brazilian carriers). With the selection of Continental, services in the New York-Sao Paulo market will increase to 38 weekly nonstop frequencies (21 from U.S. carriers and 17 from Brazilian carriers). Rio de Janeiro, on the other hand, currently receives just 14 weekly nonstop frequencies, one daily flight from American and one from Varig. In addition, United and Transbrasil serve Rio beyond Sao Paulo on their New York-Sao Paulo flights. Continental's service will offer an additional service option to those passengers and a superior service alternative to passengers that must now use single-plane and connecting services over Sao Paulo or connecting services over Miami. While it is true that selection of Delta's New York proposal would facilitate services by four U.S. carriers at New York, it would foreclose the availability of additional nonstop service to Rio, and significantly reduce the benefits to consumers of an additional airport of choice and the number of frequencies necessary to provide effective competitive service with JFK, as 52 flights would be operated in the Sao Paulo/Rio markets from JFK compared to only 7 from Newark. Taking into consideration the level of competitive U.S. and foreign-flag Sao Paulo/Rio services that already exist at JFK--45 weekly flights by two U.S. and two Brazilian carriers, and given the limited number of frequencies available, we believe that the combined advantages of Continental's Newark proposal--airport choice, hub benefits, and nonstop service to two major Brazilian cities--outweigh the benefits of Delta's duplicate proposal at JFK.

Delta has also argued that the Department relied on intergateway competitive benefits in selecting Continental's New York-Rio proposal. Delta contends that the market is primarily a local market and, therefore, any intergateway competitive benefits from Continental's Newark hub are irrelevant. As discussed above, intergateway competitive benefits were only one factor which

⁴ Continental's services in the Newark-Bogota/Guayaquil/Lima markets compete with services by foreign carriers at JFK. In addition, Continental's Newark-Manchester, U.K., and Newark-Montreal services compete with services in these markets from foreign carriers. See Worldwide Desktop Guide OAG, April 1997.

⁵ See, e.g., *U.S.-Peru Combination Service Proceeding* Docket OST-95-370, Order 95-10-24 at 7 and 95-12-26 at 4.

supported our selection of Continental's Newark services. Notwithstanding the primarily local nature of the market, the fact is Continental will serve the local market as well as Delta and, with its hub at Newark, it can compete for traffic that could flow through Newark or other hubs. Delta does not have a hub at New York and, thus, this additional benefit is not available from Delta's proposal.

That said, we appreciate Delta's desire for additional access to the Brazil market. We believe that there would be valuable public benefits to increasing competitive services among the U.S. carriers authorized to serve the Brazil market. Should additional frequencies become available, Delta will be free to present its proposal for additional services for consideration with any others that may be filed.

Finally, Delta has argued that our tentative decision afforded greater priority to Continental's regional service plans in South America than Delta's, and that in determining which carrier should receive the larger award, greater consideration should have been given to the fact that Delta is a new entrant to South America.

There is no question that awards to both carriers not only facilitate their operations and competitive position in the U.S.-Brazil market, but also in the U.S.-South America market. Both carriers have acknowledged on the record of this case that Brazil, which is the largest U.S.-South America market, is important in developing a competitive South American route network. We also recognized that the awards in this case would further the goals of both carriers in this regard. Our selection of Continental for the larger award in this case was not based solely on the regional competitive benefits to passengers that its proposal offers. Rather, those passenger benefits are one of several factors, most notably the superior benefits its proposal offers for service and competition in the U.S.-Brazil market, that collectively persuade us that Continental warrants the greater allocation of frequencies. Each case for service in additional South America markets must be considered separately based on the circumstances present. Given the collective circumstances of this case, we do not conclude that Delta's new entry into South America warrants a preference in terms of frequency allocation.

While Tower has stated that it "will not object" to our tentative decision, it expresses concern that the Department has adopted a "larger is better" policy and that smaller carriers will not be given fair consideration in carrier selection proceedings.⁷ Tower has misread our tentative decision. Contrary to Tower's comments, the Department, has actively supported smaller carrier/new entrant services in numerous markets.⁸ And we will continue to support the selection of smaller carriers in markets where the record demonstrates that such carriers will offer the greatest public benefits. In this case, however, Tower did not present the superior proposal. As we discussed in our show-cause order, Tower proposed the fewest number of frequencies--less than daily service

⁶ Continental Brief at 2, and 7-10; Delta Brief at 2 and 8.

⁷ Comments of Tower Air, Inc., Regarding Order 97-3-8, at 1 and 2.

⁸ See, e.g., the *U.S.-U.S.S.R North Atlantic Route Proceeding* Docket 47149, selecting Baltia Air Lines for an award, Order 91-6-2; the *1990 U.S. Japan Gateways Proceeding* Docket 46700, in which America West Airlines and Hawaiian Airlines were selected for awards, Order 90-10-15; *The U.S.-Toronto Third Year Service Proceeding*, Docket OST 96-1538, regarding the selection of Midway Airlines for an award, Order 96-11-11, at 8; and the *U.S.-Vancouver Exemption Proceeding* Docket 50048, selecting America West Airlines and Reno Air for awards, Order 95-2-53 at 8.

for the majority of the first year of service, and proposed service in a market that already was well served by both U.S. and foreign carriers. The other applicants in this proceeding proposed to offer competitive services in new and underserved markets, providing a broader range of options to the public.

Certificate Conditions

As we stated in Orders 96-12-9 and 97-3-8, we will issue the U.S.-Brazil authority awarded here in the form of temporary, experimental certificates of public convenience and necessity under 49 U.S.C. section 41102(c) and the duration of the authority awarded will be five years for the primary carriers and one year for the backup carriers, unless the latter authority is activated during that time, in which case, it will continue in effect for five years. Consistent with our standard practice, the authority to be awarded will only be for those points specifically proposed for service in the carriers' service plans. Since no party objected to our proposed 90-day startup provision, we will make final our tentative decision to require institution of service within 90 days after the effective date of the certificates being issued here. Also consistent with our standard practice, the frequencies allocated in this proceeding will be for one year's duration and will be subject to our standard 90-day dormancy condition, wherein frequencies will be deemed dormant if they are not operated for 90 days, except where the market is seasonal.

Delta has specifically requested that its certificate for Atlanta-Brazil service be issued to authorize service to the coterminal points Sao Paulo and Rio de Janeiro, if its New York-Sao Paulo/Rio proposal is not selected in this proceeding. Delta states that if not awarded the New York authority sought, it will serve Rio de Janeiro beyond Sao Paulo on its Cincinnati-Atlanta-Sao Paulo flights. Continental opposes Delta's request, arguing that Delta did not propose to serve Rio on its Atlanta flights and that it would be improper for the Department to permit Delta to amend its proposal at this late stage of the proceeding.

We have decided to grant Delta's request authorizing service to both Sao Paulo and Rio. We find that authorizing Delta to serve Rio on its Atlanta flight will offer improved services to passengers and shippers and, therefore, that approval of the coterminal authority is in the public interest. Moreover, contrary to Continental's arguments, we find that award of the authority as Delta requests is fully consistent with its proposal in this proceeding. Delta proposed to operate two flights--one flight operating on a Cincinnati-Atlanta-Sao Paulo routing, and the other on a New York-Sao Paulo-Rio de Janeiro routing. It also proposed to coordinate the timing of these flights so that traffic on its Atlanta flight could connect with its New York flight at Sao Paulo for service to Rio, and provided a traffic forecast for these services in its exhibits in this case.⁹ In these circumstances, since Delta will not be able to implement its New York proposal due to our decision here, we find that including Rio in its Atlanta certificate, thereby facilitating single-plane service on the route, is appropriate and best serves our goal of maximizing service to the public from the awards available in this proceeding.¹⁰

⁹ See Delta Direct Exhibits, DL-303.

¹⁰ This situation is clearly distinguishable from those cited in Continental's answer (at 10). In both the *U.S.-Philippine All-Cargo Service Proceeding* Docket OST-96-1074, and the *U.S.-Lima Combination Service Proceeding (Non-Miami Phase)* Docket OST-95-370, the applicants proposed fundamental changes to their service proposals for which they had not provided traffic forecasts.

Backup Awards

In Order 97-8-3, we tentatively decided to award Delta backup certificate authority to Continental's primary award and a backup allocation of seven weekly frequencies for service in the New York-Brazil market. We also proposed to award Tower Air backup authority to Delta's primary award and a backup allocation of seven weekly frequencies for services in the Miami-Sao Paulo/Rio de Janeiro markets. No party has opposed our backup awards and, therefore, we will make these awards final. However, Delta has requested that its backup award be modified to become effective if Continental does not provide the full pattern of nonstop service in either the Newark-Sao Paulo or Newark-Rio de Janeiro market. Continental opposes Delta's request stating that although it intends to operate its Newark-Brazil services as proposed--daily nonstop service to each Brazil city--it should have the flexibility to operate the services in accordance with market demand.

We have decided not to grant Delta's request. Continental has stated on the record of this case that it intends to operate nonstop service to both Sao Paulo and Rio from Newark, and we fully expect that it will implement its services as proposed. However, we also recognize that airlines must adapt their services to market conditions, and in these circumstances we are not persuaded that Continental's authority should be so restricted. It has been our longstanding policy to rely on the temporary and conditional nature of section 41102 awards and to afford carriers the necessary flexibility to tailor their services to the changing demands of the marketplace, rather than imposing specific service restrictions.¹¹ Should subsequent circumstances warrant reexamination of this issue, it is always in our discretion to do so.

While we are not prepared to impose the condition Delta requests, we will make its backup award effective if Continental does not operate all 14 of its allocated frequencies. The frequencies available for U.S.-Brazil services constitute valuable operating rights that we do not intend be wasted. Thus, should up to seven of Continental's allocated frequencies become dormant under the dormancy conditions set forth in this order, we are prepared to activate Delta's backup certificate and frequency allocation for its services in the New York-Brazil market, even in circumstances where fewer than the seven weekly frequencies Delta sought for its New York proposal become available.

Finally, we note that until the selected carriers in this case begin services, Tower has exemption authority to perform two weekly flights between Miami and Sao Paulo¹². We expect the carriers to work together cooperatively to facilitate an orderly transition of services.

ACCORDINGLY,

1. We make final, as modified by this order, our tentative findings and conclusions in Order 97-3-8;

¹¹ See, e.g., Order 95-12-26, *U.S.-Peru Combination Service Proceeding* Docket OST-95-370.

¹² Tower's authority would expire March 30, 1997, but Tower timely filed an exemption renewal and, thus, its authority continues in effect pending a final decision in this case. Tower should officially inform the Department of the actual date its scheduled services will be discontinued.

2. We select Continental Airlines, Inc., for award of primary authority to engage in foreign scheduled air transportation of persons, property, and mail between Newark, New Jersey, on the one hand, and the coterminal points Sao Paulo and Rio de Janeiro, Brazil, on the other, and issue it a certificate of public convenience and necessity in the form attached;
3. We select Delta Air Lines, Inc., for award of primary authority to engage in foreign scheduled air transportation of persons, property, and mail between Atlanta, Georgia, on the one hand, and the coterminal points Sao Paulo and Rio de Janeiro, Brazil, on the other, and issue it a certificate of public convenience and necessity in the form attached;
4. We select Delta Air Lines, Inc., for backup authority to the Continental primary award and issue it a certificate of public convenience and necessity in the form attached;
5. We select Tower Air, Inc., for backup authority to the Delta primary award and issue it a certificate of public convenience and necessity in the form attached;
6. We allocate to Continental Airlines, Inc., 14 weekly frequencies to perform its authorized operations in the Newark-Brazil market; and up to a total of seven weekly frequencies to Delta Air Lines, Inc., should its backup certificate become activated;
7. We allocate to Delta Air Lines, Inc, seven weekly frequencies to perform its authorized operations in the Atlanta-Sao Paulo/Rio de Janeiro market; and seven weekly frequencies to Tower Air, Inc., should its backup certificate become activated;
8. Except as modified with respect to Delta's backup certificate award in this case, the frequencies allocated here are awarded for a period of one year and are subject to a 90-day dormancy condition wherein frequencies not used by a carrier for any 90-day period will automatically expire and will revert back to the Department for reallocation¹³;
9. We direct Tower Air, Inc., to notify the Department, by letter filed in this docket and served on the other parties, no later than seven calendar days from the date of service of this order, as to the date on which it will discontinue its scheduled service operations in the U.S.-Brazil market;
10. To the extent not granted, we deny all other motions and requests in this docket;
11. Unless disapproved by the President of the United States under 49 U.S.C. 41307, this order and the attached certificates shall become effective on the 61st day after its submission for section 41307 review or upon the date of receipt of advice from the President or his designee under Executive Order 12597 and implementing regulations that the President does not intend to disapprove the Department's order under that section, whichever occurs earlier¹⁴ and
12. We shall serve this order on American Airlines, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; Tower Air, Inc.; United Air Lines, Inc.; the Cincinnati/Northern Kentucky Parties; the

¹³ The dormancy period will begin upon the selected carrier's inauguration of service.

¹⁴ This order was submitted for section 41307 review on April 8, 1997. On April 11, 1997, we received notification that the President's designee, under Executive Order 12597 and implementing regulations, did not intend to disapprove the Department's order.

Georgia and Atlanta Parties; the New Jersey Parties; the Air Line Pilots Association; the Ambassador of Brazil in Washington DC; the Federal Aviation Administration; and the U.S. Department of State (Office of Aviation Negotiations).

By:

PATRICK V. MURPHY
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at
<http://www.dot.gov/general/orders/aviation.html>.*



**Experimental Certificate
of Public Convenience and Necessity**

**For Route
739**

This Certifies That

Continental Airlines, Inc.

is authorized, subject to the provisions of Subtitle VII of Title 49 of United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in foreign air transportation of persons, property, and mail.

This Certificate is not transferable without the approval of the Department of Transportation.

By Direction of the Secretary

**Issued by Order 97-4-13
On April 8, 1997
Effective on April 11, 1997**

**Patrick V. Murphy
Deputy Assistant Secretary for
Aviation and International Affairs**

Issued by
Order 97-4-13
Route #739



TERMS, CONDITIONS, AND LIMITATIONS

CONTINENTAL AIRLINES, INC.

is authorized to engage in foreign air transportation of persons, property, and mail:

Between Newark, New Jersey, and the coterminal points Sao Paulo and Rio de Janeiro, Brazil.

This authority is subject to the following provisions:

- (1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.
- (2) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department of Transportation issued under them or for the purpose of requiring compliance with them.
- (3) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.
- (4) The holder's authority under this certificate is effective only to the extent that such operations are also authorized by the Federal Aviation Administration.
- (5) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102 (a)(15).
- (6) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this certificate.

Issued by
Order 97-4-13
Route #739

- (7) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.
- (8) In the event that the holder does not commence actual flying operations under this certificate within one year of the date of the Department's determination of its fitness, its authority shall be revoked for dormancy. Further, in the event that the holder commences operations for which it was found "fit, willing, and able" and subsequently ceases all such operations, its authority under this certificate shall be suspended under the terms of 14 CFR 204.7 and the holder may not recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.
- (9) The holder acknowledges that this certificate is granted to determine if the holder's projected services, efficiencies, methods, rates, fares, charges, and other projected results, will, in fact, materialize and remain for a sustained period of time, and to determine whether the holder will provide the innovative or low-priced air transportation it proposed in its application for authority.
- (10) The holder may combine services on this certificate with all services authorized by other Department of Transportation certificates or exemptions ~~provided that~~ such operations are consistent with applicable international agreements; ~~and provided further,~~ that (a) nothing in the award of the route integration authority requested should be construed as conferring upon the holder additional rights (including fifth freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless the holder first notifies us of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use the limited-entry route rights that are included in the holder's authority by virtue of the route integration authority granted here, but not being used, the holding of such authority by route integration will not be considered as providing any preference for the holder in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

This certificate shall become effective April 11, 1997. It shall expire 90 days thereafter; provided, however, that if the holder inaugurates service under this certificate on or before that date, the authorization will continue in effect until five years after its effective date unless the Department of Transportation earlier suspends, modifies, or deletes the authority.



**Experimental Certificate
of Public Convenience and Necessity**

**For Route
740**

This Certifies That

Delta Air Lines, Inc.

is authorized, subject to the provisions of Subtitle VII of Title 49 of United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in foreign air transportation of persons, property, and mail.

This Certificate is not transferable without the approval of the Department of Transportation.

By Direction of the Secretary

**Issued by Order 97-4-13
On April 8, 1997
Effective on April 11, 1997**

**Patrick V. Murphy
Deputy Assistant Secretary for
Aviation and International Affairs**

Issued by
Order 97-4-13
Route #740



TERMS, CONDITIONS, AND LIMITATIONS

DELTA AIR LINES, INC.

is authorized to engage in foreign air transportation of persons, property, and mail:

Between Atlanta, Georgia, and the coterminapoints Sao Paulo and Rio de Janeiro, Brazil.

This authority is subject to the following provisions:

- (1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.
- (2) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department of Transportation issued under them or for the purpose of requiring compliance with them.
- (3) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.
- (4) The holder's authority under this certificate is effective only to the extent that such operations are also authorized by the Federal Aviation Administration.
- (5) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102 (a)(15).
- (6) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this certificate.

Issued by
Order 97-4-13
Route #740

- (7) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.
- (8) In the event that the holder does not commence actual flying operations under this certificate within one year of the date of the Department's determination of its fitness, its authority shall be revoked for dormancy. Further, in the event that the holder commences operations for which it was found "fit, willing, and able" and subsequently ceases all such operations, its authority under this certificate shall be suspended under the terms of 14 CFR 204.7 and the holder may not recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.
- (9) The holder acknowledges that this certificate is granted to determine if the holder's projected services, efficiencies, methods, rates, fares, charges, and other projected results, will, in fact, materialize and remain for a sustained period of time, and to determine whether the holder will provide the innovative or low-priced air transportation it proposed in its application for authority.
- (10) The holder may combine services on this certificate with all services authorized by other Department of Transportation certificates or exemptions ~~provided that~~ such operations are consistent with applicable international agreements; ~~and provided further,~~ that (a) nothing in the award of the route integration authority requested should be construed as conferring upon the holder additional rights (including fifth freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless the holder first notifies us of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use the limited-entry route rights that are included in the holder's authority by virtue of the route integration authority granted here, but not being used, the holding of such authority by route integration will not be considered as providing any preference for the holder in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

This certificate shall become effective April 11, 1997. It shall expire 90 days thereafter; provided, however, that if the holder inaugurates service under this certificate on or before that date, the authorization will continue in effect until five years after its effective date unless the Department of Transportation earlier suspends, modifies, or deletes the authority.



**Experimental Certificate
of Public Convenience and Necessity
(Backup award)**

**For Route
741**

This Certifies That

Delta Air Lines, Inc.

is authorized, subject to the provisions of Subtitle VII of Title 49 of United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in foreign air transportation of persons, property, and mail.

This Certificate is not transferable without the approval of the Department of Transportation.

By Direction of the Secretary

**Issued by Order 97-4-13
On April 8, 1997
Effective on (See Attached)**

**Patrick V. Murphy
Deputy Assistant Secretary for
Aviation and International Affairs**

Issued by
Order 97-4-13
Route #741



TERMS, CONDITIONS, AND LIMITATIONS

DELTA AIR LINES, INC.

is authorized to engage in foreign air transportation of persons, property, and mail:

Between New York, New York (JFK), and the coterminal points Sao Paulo and Rio de Janeiro, Brazil.

This authority is subject to the following provisions:

- (1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.
- (2) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department of Transportation issued under them or for the purpose of requiring compliance with them.
- (3) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.
- (4) The holder's authority under this certificate is effective only to the extent that such operations are also authorized by the Federal Aviation Administration.
- (5) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102 (a)(15).
- (6) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this certificate.

Issued by
Order 97-4-13
Route #741

- (7) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.
- (8) In the event that the holder does not commence actual flying operations under this certificate within one year of the date of the Department's determination of its fitness, its authority shall be revoked for dormancy. Further, in the event that the holder commences operations for which it was found "fit, willing, and able" and subsequently ceases all such operations, its authority under this certificate shall be suspended under the terms of 14 CFR 204.7 and the holder may not recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.
- (9) The holder acknowledges that this certificate is granted to determine if the holder's projected services, efficiencies, methods, rates, fares, charges, and other projected results, will, in fact, materialize and remain for a sustained period of time, and to determine whether the holder will provide the innovative or low-priced air transportation it proposed in its application for authority.
- (10) The holder may combine services on this certificate with all services authorized by other Department of Transportation certificates or exemptions, ~~provided that~~ such operations are consistent with applicable international agreements; ~~and~~ provided further, that (a) nothing in the award of the route integration authority requested should be construed as conferring upon the holder additional rights (including fifth freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless the holder first notifies us of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use the limited-entry route rights that are included in the holder's authority by virtue of the route integration authority granted here, but not being used, the holding of such authority by route integration will not be considered as providing any preference for the holder in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

Issued by
Order 97-4-13
Route #741

This certificate shall not become effective until either (1) Continental notifies the Department that it is not using all of the frequencies allocated in this proceeding and relinquishes those frequencies to the Department for reallocation, or such frequencies become dormant and automatically revert back to the Department under the dormancy conditions imposed on the frequency allocation, in which case the dormant frequencies, upon request and further order of the Department, will be allocated to Delta for New York services or (2) the certificate authority of Continental has expired or has been deleted or suspended; and it shall expire April 11, 1998 provided, however, that if this authority becomes effective before that date, it shall not expire until April 11, 2002, unless the holder fails to inaugurate service within 90 days of that effective date, in which case, this certificate will expire on the 91st day.



**Experimental Certificate
of Public Convenience and Necessity
(Backup award)**

**For Route
742**

This Certifies That

Tower Air, Inc.

is authorized, subject to the provisions of Subtitle VII of Title 49 of United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in foreign air transportation of persons, property, and mail.

This Certificate is not transferable without the approval of the Department of Transportation.

By Direction of the Secretary

**Issued by Order 97-4-13
On April 8, 1997
Effective on (See Attached)**

**Patrick V. Murphy
Deputy Assistant Secretary for
Aviation and International Affairs**

Issued by
Order 97-4-13
Route #742



TERMS, CONDITIONS, AND LIMITATIONS

TOWER AIR, INC.

is authorized to engage in foreign air transportation of persons, property, and mail:

Between Miami, Florida, and the coterminal points Sao Paulo and Rio de Janeiro, Brazil.

This authority is subject to the following provisions:

- (1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.
- (2) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department of Transportation issued under them or for the purpose of requiring compliance with them.
- (3) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.
- (4) The holder's authority under this certificate is effective only to the extent that such operations are also authorized by the Federal Aviation Administration.
- (5) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102 (a)(15).
- (6) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this certificate.

Issued by
Order 97-4-13
Route #742

(7) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.

(8) In the event that the holder does not commence actual flying operations under this certificate within one year of the date of the Department's determination of its fitness, its authority shall be revoked for dormancy. Further, in the event that the holder commences operations for which it was found "fit, willing, and able" and subsequently ceases all such operations, its authority under this certificate shall be suspended under the terms of 14 CFR 204.7 and the holder may not recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

(9) The holder acknowledges that this certificate is granted to determine if the holder's projected services, efficiencies, methods, rates, fares, charges, and other projected results, will, in fact, materialize and remain for a sustained period of time, and to determine whether the holder will provide the innovative or low-priced air transportation it proposed in its application for authority.

This certificate shall not become effective until the certificate authority of Delta Air Lines, Inc. in the Atlanta-Sao Paulo/Rio de Janeiro market has expired or has been deleted or suspended and it shall expire April 11, 1998~~provided, however,~~ that if this authority becomes effective before that date, it shall not expire until April 11, 2002, unless the holder fails to inaugurate service within 90 days of that effective date, in which case, this certificate will expire on the 91st day.