



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

Issued by the Department of Transportation
on the 3rd day of September, 1997

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**1997 U.S.-BRAZIL COMBINATION SERVICE
PROCEEDING**

Docket OST-96-2016

Petition of

DELTA AIR LINES, INC.

Docket OST-97-2680

**to modify, suspend, or revoke certificate authority
authorizing Continental Airlines, Inc. to provide
Newark, New Jersey - Rio de Janeiro, Brazil
Foreign Air Transportation**

ORDER

Summary

By this order, we deny the petition of Delta Air Lines, Inc., requesting that we (a) revoke Continental Airlines, Inc.'s Newark-Rio de Janeiro certificate authority and (b) activate Delta's backup certificate for service between New York and Sao Paulo and Rio de Janeiro, Brazil.

Background

By Order 97-4-13, the Department issued Continental Airlines, Inc., and Delta Air Lines, Inc. certificate authority to serve the U.S.-Brazil market, effective April 11, 1997. Both carriers' certificates authorize service to the coterminal points Sao Paulo and Rio de Janeiro, Brazil, with Continental's service originating from Newark, New Jersey, and Delta's service from Atlanta, Georgia. Continental was awarded 14 weekly frequencies and Delta 7 weekly frequencies for their respective services. The frequencies were awarded for a one-year period and are subject to a 90-day dormancy condition.

Order 97-4-13 also issued Delta a backup certificate for services between New York, New York (JFK) and the coterminal points Sao Paulo and Rio de Janeiro, Brazil. The backup award states that the backup 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 frequency allocation, in which case the dormant frequencies, upon request or 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.

Delta's Petition

On July 3, 1997, Delta filed a petition requesting the Department to institute immediately procedures to modify, suspend or delete Continental's certificate authority for Newark-Rio de Janeiro service, and to activate Delta's backup certificate for Route 741 and to allocate it seven weekly frequencies to provide New York (JFK)-Brazil service. Delta also requested that the Department stay the effectiveness of Continental's certificate authority for Newark-Rio de Janeiro pending a final decision on its petition. In support of its petition, Delta argues that Continental's announced schedules for its Newark-Rio de Janeiro service deviate materially from its proposal in the competitive selection case, warranting revocation of Continental's certificate and activation of Delta's backup award. Delta cites three major factors in support of its position: (a) Continental has failed to implement its proposed two aircraft Newark-Rio de Janeiro service proposal, proposing now to serve the route with only one aircraft; (b) Continental has published schedules for a daytime rather than its proposed evening departure; and (c) Continental's revised timetable eliminates nonstop-to-nonstop connections for 24-behind gateway cities, reducing significantly the benefits of Continental's Newark-Rio service. Delta also argues that Continental's proposed Newark-Rio de Janeiro service will not begin until August 31, 1997, fifty-two days beyond the ninety-day startup requirement contained in the certificate.

Responsive Pleadings

Answers to Delta's petition were filed by Continental and jointly by the Regional Business Partnership and the New Jersey Department of Commerce and Economic Development (the New Jersey Parties). Delta filed a reply, and Continental filed a response to Delta's reply.¹

Continental opposes Delta's petition, arguing that it has complied fully with the startup conditions of its U.S.-Brazil award, having inaugurated Newark-Sao Paulo service July 10 and plans to commence Newark-Rio service on August 31, and that by the terms of the Department's order,

¹ Delta's and Continental's replies were accompanied by separate motions for leave to file otherwise unauthorized documents. Continental argues that Delta offered no good cause for the Department to accept its unauthorized reply. In the interests of a more complete record, we have decided to accept both Delta's reply and Continental's surreply.

its unused frequencies would not become dormant until 90 days after its July 10 startup. Continental further argues that Delta has presented no other basis to revoke its certificate authority. Continental maintains that contrary to Delta's arguments, the Department did not select Continental over Delta for the New York service because of the number of aircraft it would operate on the route or the departure/arrival times of its service, but rather because of its proposal to provide nonstop service in the Rio market and the service and competitive benefits of its Newark proposal over Delta's JFK proposal.

Continental further argues that it believes an innovative daytime departure from Newark to Rio de Janeiro will offer an important service alternative not otherwise available to passengers in the Newark/New York area and that morning schedules will enable business and pleasure travellers to arrive at their destinations in time for a good night's sleep before they engage in business or tourist activities.² Continental maintains that it will be providing the maximum number of nonstop Newark-Brazil flights it is permitted to operate and providing valuable Newark/New York-Rio de Janeiro nonstop service no other carrier, including Delta, proposed. Finally, Continental argues that the schedule change will have little impact on New York-Rio de Janeiro connecting services.

The New Jersey Parties also jointly filed in opposition to Delta's petition, arguing that revocation of Continental's certificate is unwarranted and unprecedented and would deprive travellers and shippers using the Newark hub of a valuable service option. They state that Continental was the only applicant in this proceeding proposing nonstop services to both Rio de Janeiro and Sao Paulo and that they support Continental's "innovative" daytime Newark-Rio de Janeiro flights.³ They argue that Delta did not propose nonstop JFK-Rio service, that its best Rio de Janeiro service for the Newark/New York-Rio de Janeiro market is one-stop JFK service over Sao Paulo at almost the same times as other carrier flights, and that new nonstop service in the market is more important than additional duplicative service at New York as Delta proposed.

Delta in its consolidated reply maintains that Continental has not adequately addressed the changes to its service proposal or its failure to implement seven of its fourteen allocated frequencies within 90 days of the effective date of its certificate. It maintains that Continental revised its schedule four days after the Department's final order issued and because of this Delta urges the Department to investigate the *bona fides* of Continental's route case submissions.

In its surreply Continental argues that Delta has shown no basis for revoking the Newark-Rio de Janeiro frequencies it was allocated. It maintains that the Department has already determined that Continental's nonstop Rio de Janeiro service from Newark is superior to the duplicative JFK-Sao Paulo-Rio service proposed by Delta. Continental also argues that Delta would not be operating the proposed Rio service but would be codesharing with TransBrasil for the proposed services. In addition, Continental argues that the Department should reject Delta's request for an investigation since Continental's service is identical to the two aircraft service (one aircraft for the

² Continental also notes that it will be evaluating the results of its daytime service and is fully prepared to offer a nighttime departure from Newark to Rio de Janeiro if the results of the daytime service fail to meet Continental's expectations.

³ Joint Answer, dated July 15, 1997, at 4.

Sao Paulo route and one for the Rio route) it proposed throughout the route case except for the time of its southbound Rio de Janeiro departure.⁴ Regarding Delta's allegations that Continental knew during the proceeding that it would alter its schedules, Continental states that it began reexamining its options following the Department's March 7 tentative award and that its change to daytime service was made three weeks following the tentative award. Finally, Continental maintains that Delta fails to demonstrate that even 5% of the traffic forecast by Continental for Rio service will be without nonstop to nonstop round-trip connecting daytime service.

Decision

We have decided to deny Delta's petition requesting that we revoke Continental's Newark-Rio authority and activate Delta's backup certificate. Delta has provided no basis to justify either revocation of Continental's authority or activation of Delta's backup award.

Contrary to Delta's assertions, Continental has met the terms of its certificate. Our selection order granted Continental authority between Newark and the coterminal points Sao Paulo and Rio de Janeiro. Under the terms of the certificate, Continental was required to commence service on the route by July 10, 1997.⁵ Continental did so, inaugurating its Newark-Sao Paulo service and operating beyond to Rio de Janeiro. The order also stated that once service was inaugurated, the fourteen frequencies would be dormant if not used within 90 days, *i.e.*, October 8, 1997.⁶ Continental implemented seven weekly frequencies on July 10 and began daily nonstop Newark-Rio service on August 31, 1997, well within the dormancy period.⁷

We are also unpersuaded by Delta's arguments that Continental has materially changed its service proposal, warranting revocation of its award and activation of Delta's backup certificate. The thrust of Delta's argument is that Continental plans now to operate a daytime rather than nighttime departure. In selecting Continental over Delta for the route, we did not base our decision on the timing of the flights or the aircraft to be operated.⁸ Rather, we found that Continental's proposal at its Newark hub offered superior service and competitive benefits because it provided a choice of airport for New York/New Jersey passengers and nonstop service to both Sao Paulo and Rio de Janeiro, benefits we found compelling, particularly since Delta's

⁴ It notes that Delta's own code-share partner, TransBrasil, has also chosen to operate daytime departures between New York and Brazil but it offers no nonstop service between New York/Newark and Rio de Janeiro.

⁵ The certificate clearly states that it does not expire "if the holder inaugurates service under this certificate on or before" 90 days after the certificate's effective date. The certificate became effective April 11, 1997, and Continental had until July 10 to begin service under that certificate.

⁶ See footnote 13 to Order 97-4-13. Similarly, since Delta began its Atlanta service June 15, 1997, the dormancy period for its frequencies began June 15, 1997, and they would revert to the Department September 14, 1997, if unused.

⁷ See August and September 1997 Official Airline Guides.

⁸ Contrary to Delta's argument, Continental did not propose to provide the Newark-Rio service with two aircraft. Rather, as Continental notes and is demonstrated in Continental's Direct Exhibits CO-205 and C)-206, the carrier proposed one aircraft for service in each market--Newark-Sao Paulo and Newark-Rio de Janeiro, with separate schedules for summer and winter service.

proposal would duplicate existing U.S. and foreign carrier services at New York (JFK).⁹ Continental's revised departure schedule does not alter this finding. Moreover, notwithstanding Delta's criticisms, we note that there is evidence of demand for daytime service since Delta's proposed code-share partner, TransBrasil, operates a daytime flight to Sao Paulo/Rio de Janeiro from New York.

Nor has Delta demonstrated that the revised schedule has had a material impact on any other issue in this case. Although the fact remains that fewer beyond points would be served under the revised schedule, Continental's service with the schedule change will still benefit over 110,000 passengers, nearly 90,000 more passengers than Delta proposed for its New York-Rio de Janeiro service.¹⁰

We also see no need for an investigation of the *bona fides* of Continental's submissions in this proceeding since, as discussed fully above, in our view there has been no material change to Continental's proposal that would warrant such a review.

⁹ Order 97-7-13 at 6.

¹⁰ See Delta's Direct Exhibits DL-402 at 2 and Continental's Direct Exhibits CO-302. The revised schedule would affect only 3 percent (3,527 passengers) of Continental's total Newark-Rio passenger forecast and will continue to benefit nearly 70 percent of its projected nonstop-to-nonstop domestic connecting passengers. See Continental's Direct Exhibits CO-302.

ACCORDINGLY,

1. We deny the petition of Delta Air Lines, Inc. in Docket OST-97-2680;
2. We grant the separate motions of Delta Air Lines, Inc. and Continental Airlines, Inc. to file otherwise unauthorized documents, and
3. We will serve this order on Continental Airlines, Inc.; Delta Air Lines, Inc.; Regional Business Partnership (Newark); the New Jersey Department of Commerce and Economic Development; the Ambassador of Brazil in Washington, DC; the U.S. Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)