



Order 98-9-24
Served Sep. 24, 1998

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

Issued by the Department of Transportation
on the 24th day of September, 1998

Applications of

**SIMMONS AIRLINES, INC.
d/b/a AMERICAN EAGLE
THE COMMUNITY OF
SAVANNAH, GA/HILTON
HEAD, SC
EXEC EXPRESS II, INC.
d/b/a ASPEN MOUNTAIN AIR
ATLANTIC COAST AIRLINES**

Dockets OST-97-2985

OST-98-3603

OST-98-3671

OST-98-3982

For exemptions from CFR Part 93,
under 49 U.S.C. 41714

**ORDER GRANTING IN PART PETITION FOR RECONSIDERATION AND
DEFERRING APPLICATIONS FOR SLOT EXEMPTIONS AT CHICAGO
O'HARE AIRPORT**

By this order the Department is amending its action in Order 98-4-21 by increasing from 16 to 18 the number of slot exemptions granted to Simmons Airlines, d/b/a American Eagle (American Eagle), at Chicago O'Hare Airport as a means of facilitating the provision of nonstop regional jet services between O'Hare and Duluth, MN, Fayetteville, AR, Montgomery, AL, and Shreveport, LA. Specifically, consistent with the action we took in Order 98-4-21, we are permitting American Eagle to reassign to those markets 18 of the slots it is currently using to perform EAS operations between O'Hare and Bloomington, IL, Champaign, IL, and La Crosse, WI, and, pursuant to our authority under 49 U.S.C. section 41714(a), we will replenish those slots with an equal number of exemptions to assure the continued provision of the Essential Air Service (EAS) operations. Grant of the 18 exemptions is conditioned on their being used solely to provide the specified EAS operations and on American Eagle's implementation of an equal number of scheduled nonstop frequencies with regional jet aircraft between O'Hare

and the cities designated above.¹ We will authorize the exemptions for an indefinite period and will thus discontinue the interim (six-month) limitation previously imposed on the exemptions in Order 98-4-21. We are deferring action on pending applications for O'Hare slot exemptions by Exec Express II, d/b/a Aspen Mountain Air; the Community of Savannah/Hilton Head; and Atlantic Coast Airlines.

BACKGROUND

By Order 98-4-21, April 21, 1998, the Department, inter alia, granted 16 slot exemptions to each of three applicants -- American Eagle (then referred to as Simmons), Atlantic Coast Airlines (ACA), and Trans States Airlines -- for the implementation of nonstop regional jet operations between O'Hare and a total of ten cities. ACA and Trans States were designated to use their slot exemptions to implement service to three cities each, and American Eagle four. We found that grant of the exemptions was in the public interest and was consistent with the guidelines on exceptional circumstances as delineated in that and previous orders.² We noted that our goal was to enhance the access of underserved, nonhub cities to more responsive air transportation, and that the exemptions could not be used for any purpose whatsoever other than serving the markets explicitly designated. We also noted that each of the three air carrier recipients of the exemptions was an affiliate of either American Airlines or United Air Lines, both of whom are substantial slotholders at O'Hare. In that respect, we stated that we were allotting "sufficient exemptions to enable each applicant to initiate slightly over two round trips a day to each of three or four cities..." and that "we would encourage American and United ...to assist in enabling the carriers to implement the full three-roundtrip service patterns they have proposed." (Order at 19)

American Eagle's Objection or in the Alternative Petition for Reconsideration

On May 11 American Eagle filed an Objection or in the Alternative Petition for Reconsideration, requesting four additional slot exemptions, and requesting that the exemptions be directly designated for the new regional jet markets without affecting existing EAS slots.

American Eagle argues that the award of 32 slot exemptions to United Express carriers and 16 to American Eagle was unfair and contrary to the public interest; that the United Express carriers' exemptions place them in a position to offer three roundtrips a day to two of the three cities each was designated to serve, but American Eagle can only offer two roundtrips to each of the four cities it was designated to serve; and that that result is contrary to the Department's intent to give "equal consideration" to all three applicants, ACA, Trans States and American Eagle. American Eagle asserts, on that basis, that it should be given four additional slot exemptions.

¹ American Eagle's obligation to maintain Essential Air Service operations in full conformance with the service levels guaranteed to cities affected by this order is not diminished in any way.

² 49 U.S.C. 41714(c) authorizes the Department to grant exemptions to new entrant air carriers based on a public interest finding and under circumstances that the Department determines to be exceptional.

American Eagle also argues that there is no statutory bar to the Department's grant of slot exemptions to non-new entrant applicants to serve small communities, and that it was therefore unnecessary for the Department to encumber American Eagle's existing EAS slots as an indirect means of enabling implementation of the proposed regional jet service. It notes that it had filed its application under 49 USC 41714(a), as modified by language in the Senate Report to the DOT FY 1997 appropriations bill that directs the Department to "use exemption authority to improve service to nonhub airports where significant improvements can be achieved." (S. Rep. No. 325, 104th Cong., 2nd Sess. at 12, 1996); and that there is precedent for grant of slot exemptions on that basis in Order 97-1-7, where the Department granted slot exemptions to Great Lakes Aviation d/b/a United Express under 41714(a) to serve Sioux Falls, South Dakota, a nonhub city that did not qualify as an EAS point.

United Air Lines filed objections to the award of slot exemptions to American Eagle and to the latter's request for additional exemptions. United's position is that American Eagle should not have received any slot exemptions, unless the Department also reconsiders the Federal Aviation Administration's denial of United's exemption request in FAA Docket 29009. It argues that American Eagle does not qualify as a new entrant and that the award of exemptions to American Eagle in the name of EAS obligations is not valid because the carrier does not need slots to support its EAS operations. At the same time, United notes that American Eagle's application had been filed under the provisions of section 41714(a), which refers to EAS operations, and that the Department had premised previous grants of slot exemptions for nonhub, non-EAS operations on 41714(a) and related Senate Report language. United questions why the Department did not address American Eagle's application similarly and, in fact, agrees with American Eagle's position that any slot exemptions it receives in this proceeding should not encumber any of its existing EAS-related slots.

Atlantic Coast Airlines also filed an answer in opposition to American Eagle's request for additional exemptions. ACA notes that all of the exemption recipients have the option of adding a third roundtrip in their subject markets by operating outside the slot-controlled hours, an option that ACA itself will exercise. Moreover, it notes that American and its American Eagle subsidiary already hold 914 O'Hare slots, more than any other carrier, which should enable Eagle to increase its regional jet frequencies in its new markets.

American Eagle filed a motion for leave to file an answer to United's objections, reinforcing the positions it had stated in its Petition for Reconsideration. We will grant the motion.

DECISION

We have decided to amend our decision in Order 98-4-21 by revising the number of slot exemptions granted to American Eagle from 16 to 18.

Our stated intention in Order 98-4-21 was to take steps within our power to enhance air transportation for underserved, nonhub cities, consistent with the guidelines established in that and previous orders on exceptional circumstances. We found that the operations proposed by American Eagle, as well as by Atlantic Coast and Trans States, would provide substantial benefits in the form of nonstop jet service in markets that do not now have such service, and that grant of exemptions to enable those operations was in the public interest and consistent with our guidelines on exceptional circumstances. We noted that the number of available slot exemptions is very limited and that we may have to deny applications that otherwise meet the standards we have established for the grant of such exemptions. With that background, our decision was to grant a total of 48 slot exemptions, divided equally among the three applicants.

In reviewing that decision now, we will first reaffirm those and the following relevant findings in Order 98-4-21: that both American and United have the ability to support the proposals of their subsidiaries or affiliates through their very substantial slot holdings at O'Hare; and that the applicants themselves have the ability to augment their regional jet frequencies in the designated markets by operating outside the slot-controlled hours, as indeed ACA has told us it will do. We stated then, and we reiterate, that we would encourage the carriers' cooperation to implement the full three-roundtrip service patterns they had proposed. However, in arriving at the precise numbers for our decision, we also stated that our intent was to allot sufficient slot exemptions to enable each applicant to initiate slightly over two roundtrips a day to each of its designated cities. In American Eagle's case, the grant of 16 exemptions for service in four city-pair markets obviously does not comport with that intent. Accordingly, we will revise the American Eagle allotment upward by two additional exemptions, for a total of 18.

There is no dispute over United's contention that American Eagle does not qualify as a new entrant under the provisions of section 41714(h)(3). Rather, both American Eagle and United have objected to the manner in which we used 41714(a) as a vehicle for granting slot exemptions to Eagle -- United, in support of its position that we should not award *any* exemptions to Eagle, and Eagle because it objects to our encumbering its EAS slots in the process.

Both parties have argued that the Department has the authority to use 41714(a) for non-EAS markets, on the grounds that a congressional directive contained in a Senate Report on the fiscal year 1997 DOT appropriations bill gives us such power. In support of that view, they note that the Department granted six slot exemptions to Great Lakes Aviation, in Order 97-1-7, for service between O'Hare and Sioux Falls, SD, and they assert that we did so on the basis of the cited Senate Report directive. The carriers are correct in noting

that Order 97-1-7 contained a reference to that report language as an acknowledgment of the congressional expression of intent. However, the order also noted that Great Lakes' proposed service to Sioux Falls was part of a linear routing that also included Huron, SD, an EAS point that Great Lakes is obligated to serve.

In relying on section 41714(a) to afford equal consideration to American Eagle's application in this proceeding, we were fully aware that a direct award of slot exemptions for Eagle's proposed regional jet markets would be administratively and logistically far preferable to the process we adopted, *i.e.*, allowing the transfer of slots from existing EAS operations and replenishing them with exemptions. However, we were not able to conclude that that action was permissible under our governing statute. Rather, as we stated in Order 98-4-21, in reviewing the statutory authorities available to us we found that subsection 41714(a), together with Congressional direction given the Department in utilizing that authority, permitted the alternative approach we adopted under the circumstances presented. We affirm that conclusion here.

United argues that American Eagle does not need exemptions to support its EAS obligations and that the award of such exemptions is thus inconsistent with the provisions of section 41714(a); and that, in any event, "basic EAS", the slot-exemption measure for EAS purposes, is defined as two round trips a day and would thus warrant a total of only 12 slot exemptions (four for each of the three EAS cities American Eagle serves), not the 16 we granted, or any additional ones in response to American Eagle's petition for reconsideration.

Again, section 41714(a) simply provides that "if basic essential air service...is to be provided...to a high density airport..." then the Secretary "shall ensure that the carrier providing...such service has sufficient operational authority at the high density airport to provide such service." This mandate was literally fulfilled in Order 98-4-21, which in part ensured that American Eagle had sufficient authority at O'Hare to maintain its service to Bloomington, Champaign and LaCrosse. We thus see no inconsistency between our award of slot exemptions to American Eagle and our obligations under section 41714(a).

As to the number of roundtrip frequencies necessary for EAS to be met at American Eagle's three EAS communities (Bloomington, Champaign and La Crosse), "basic EAS" under the Department's governing law requires *at least* two round trips, as well as "flights at reasonable times considering the needs of passengers with connecting flights at the airport...." In practice, the Department has in many EAS carrier selection proceedings selected service patterns consisting of three or more round trips a day, for reasons reflecting total demand, the need for meeting varied connecting banks, seat preemption on linear, multi-point routings, or other considerations. Thus, it is fully reasonable to identify three daily American Eagle round trips between O'Hare and each of the communities Bloomington, Champaign and La Crosse as EAS flights.

United contends also that our grant of slot exemptions to American Eagle is inconsistent with the FAA's denial in March of an exemption request by United for the return of slots

it had had withdrawn to support foreign airline operations at O'Hare. We disagree. The action taken by the FAA addressed entirely separate international considerations that are not at issue here. In granting exemptions in Order 98-4-21, not only to American Eagle but to carriers flying United's name as well, we articulated in detail the policy goal for our action, *i.e.*, to use those means available to us "to enhance the access of underserved, nonhub cities to more responsive air transportation," and we found that "the new regional jet proposals are uniquely directed toward that goal." We stated our belief also that we were acting in exactly the manner contemplated by Congress. We remain firm that our actions were consistent with the public interest and do not require reconsideration on the basis of the redress United is seeking.

OTHER PENDING APPLICATIONS

We are deciding in this order only American Eagle's petition for reconsideration. However, we will acknowledge and discuss briefly the status of the several applications for O'Hare slot exemptions that remain pending. They include applications by the Community of Savannah, Georgia/Hilton Head, South Carolina for eight slot exemptions, "so that either American Eagle or United Express can work with the O'Hare incumbents to start service at Savannah/Hilton Head" (Docket OST-98-3603); by Atlantic Coast Airlines for five slot exemptions to enable it to operate three round trips a day between O'Hare and Savannah/Hilton Head (Docket OST-98-3982); and by Exec Express II, d/b/a Aspen Mountain Air for eight exemptions to operate two round trips a day each to Sioux City, Iowa, and Branson, Missouri (Docket OST-98-3671).

As we stated in Order 98-4-21, wherein we granted O'Hare slot exemptions to four different carriers, we are adhering at this time to a limit of sixty slot exemptions following the environmental assessment we had performed in October 1997. In that assessment we found that the addition of sixty flight operations a day at O'Hare would not have a significant effect on the human environment. Based on that review, the Department has since granted a total of 57 exemptions -- two in Order 97-10-16, 53 in Order 98-4-21, and two in this order. Thus, absent a further environmental review we would not at this time grant more than three additional exemptions.

The pending applications are seeking at least five exemptions each, and thus exceed the number currently available. In addition, there are considerations weighing against our deciding any of the requests at this time. Savannah/Hilton Head's application is not accompanied by a specific operating proposal naming a committed air carrier and its actual schedule, including aircraft type. As a practical matter, therefore, the Department is not in a position to ascertain whether its request comports with our guidelines (see, *e.g.*, Order 98-4-21, at 4), which include a requirement that the proposed service should be operationally and financially viable.

ACA's application does give us the necessary information to adjudge its operational and financial viability, but we have not reached a conclusion on whether ACA qualifies as a new entrant, *i.e.*, whether it holds or operates fewer than twelve slots at O'Hare, as

defined in 49 U.S.C. section 41714(h). ACA was awarded 16 slot exemptions in Order 98-4-21, but holds no slots outside of the exemption process, and it argues that a slot exemption is not the legal equivalent of a slot. We are aware that legislation is being considered by Congress that may both amend the definition of a new entrant and clarify whether slot exemptions are to be construed as slots under such definition. In these circumstances we will defer action on ACA's application, and on the Community of Savannah/Hilton Head's application at this time.

Aspen Mountain Air has recently reduced its fleet of Dornier 328 aircraft, which it proposed to use to implement its slot exemptions. It is thus doubtful that it would be in a position to begin its proposed new services in the foreseeable future. We will therefore defer action on its application as well.

FUTURE CHANGES

As the FAA slot regulation makes clear "slot(s) do not represent a property right but represent an operating privilege subject to absolute FAA control (and) slots may be withdrawn at any time to fulfill the Department's operating needs..." 14 CFR 93.223(a). This order should not be construed as conferring on these carriers any ability to sell, trade, transfer, or convey the operating authorities granted by the subject exemptions.

The Department is granting slot exemptions by this order on the ground that the services proposed by the applicants meet the statutory public interest and exceptional circumstances criteria. The Department reserves the right to modify or terminate such exemption authority if the Department determines that, due to changed circumstances, these criteria are no longer satisfied by an applicant's use of the authority.

This Order is issued under authority delegated in 49 CFR 1.56(l).

ACCORDINGLY,

1. The Department grants, in part, the petition for reconsideration of American Eagle, by increasing from 16 to 18 the number of flight operations (departures or arrivals) that American Eagle may operate each day at Chicago O'Hare Airport during the slot-controlled period of 6:45 a.m. to 9:15 p.m. pursuant to the exemption from 14 CFR Part 93, Subparts K and S, granted in Order 98-4-21. This authority may be used only to provide Essential Air Service operations, comparable in quality to existing services, between Chicago O'Hare Airport and the cities of Bloomington, IL, Champaign, IL, and La Crosse, WI, and only to the extent that American Eagle performs an equal number of flight operations during the slot-controlled hours each day with regional jet aircraft between Chicago O'Hare Airport and the cities of Duluth, MN, Fayetteville, AR, Montgomery, AL, and Shreveport, LA;
2. The Department rescinds the six-month limitation placed on American Eagle's exemption authority in Order 98-4-21;

3. Except to the extent granted in ordering paragraph 2 above, the remainder of American Eagle's petition for reconsideration is denied;

4. The Department directs American Eagle to contact the Airspace and Traffic Law Branch of the Office of Chief Counsel in the Federal Aviation Administration as soon as possible following issuance of this order to determine with the FAA the actual times for arriving and departing flights authorized by this order;

5. The authority granted under these exemptions is subject to all of the other requirements delineated in 14 CFR Part 93, Subparts K and S, including, but not limited to, the reporting provisions and use or lose requirements; and

5. We will serve this order on all persons on the service lists in Dockets OST-97-2985, 98-3603, 98-3671, and 98-3982.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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