



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

SERVED October 21, 1998

Issued by the Department of Transportation
on the **19th day of October, 1998**

Application of

CONTINENTAL AIRLINES, INC.

under 49 U.S.C. §§ 41108 and 41102 for a
certificate of public convenience and necessity
(Cleveland-London)

Docket OST 96-1642

Application of

CONTINENTAL AIRLINES, INC.

for designation (Cleveland, Ohio-London
Gatwick)

Undocketed

Application of

AMERICAN AIRLINES, INC.

for designation (San Jose, California-London
Gatwick)

Docket OST 98-3765

FINAL ORDER

SUMMARY

By this order, we make final our tentative decision in Order 98-7-25 to (1) restore the selection of Cleveland as a U.S. gateway on U.S. Route 1; (2) renew Continental Airlines' certificate authority to provide combination services in the Cleveland-London (Gatwick) market; and (3) select American Airlines' San Jose-London (Gatwick) proposal as a backup to Continental's services.

* To reflect (1) correct docket number (OST-98-3765) for the application of American Airlines, Inc., in the caption block above; and (2) correct date (May 17, 1999) on page 2 of the Terms, Conditions, and Limitations of the Certificate of Public Convenience and Necessity of Continental Airlines, Inc., for Route # 729.

BACKGROUND

Under the current United States-United Kingdom Air Services Agreement, U.S. carriers may provide service on U.S. Route 1 from various U.S. gateways to London. Under section 6 of Annex 1 to the Agreement, certain U.S. gateway selections on U.S. Route 1 may be moved to alternative U.S. cities. By Order 98-2-20, the Department withdrew the gateway status of Cleveland and Ft. Lauderdale, which were not being used as U.S. gateways on Route 1, and named Charlotte as a new U.S. gateway, leaving one gateway opportunity available for new U.S.-London services.¹

Continental and American submitted competing applications for the remaining gateway opportunity--Continental proposed daily nonstop Cleveland-London Gatwick service and American proposed daily nonstop San Jose-London Gatwick service.

By Order to Show Cause 98-7-25, July 31, 1998, the Department tentatively decided to (1) restore the selection of Cleveland as a U.S. gateway on U.S. Route 1; (2) renew Continental Airlines' certificate authority to provide combination services in the Cleveland-London (Gatwick) market; and (3) select American Airlines' San Jose-London (Gatwick) proposal as a backup to Continental's services.

RESPONSES TO THE SHOW-CAUSE ORDER

American and the City of San Jose filed objections. Continental, the City of Cleveland, and the City of San Jose filed answers.

American argues that the proposed decision is procedurally deficient because the Department failed to provide for the submission of evidentiary exhibits, contrary to long-standing precedent in carrier-selection proceedings. American also argues that the Department should immediately vacate Order 98-7-25 and issue an expedited procedural schedule calling for information responses, direct exhibits, rebuttal exhibits, and briefs. With respect to such a proceeding, American argues that its exhibits would show why its San Jose proposal should be preferred over Continental's Cleveland proposal. In this regard, American again argues that service from San Jose would benefit more passengers than Continental's Cleveland service. American adds that its enhanced interline arrangement with Reno Air, Inc., would provide important beyond feed for San Jose from a number of cities in California and other western states.

The City of San Jose echoes American's arguments both as to the merits of the Department's proposed decision and as to the procedures by which that decision was reached.² In addition, San Jose argues that in view of the Department's finding in the *1990 U.S.-Japan Gateways Proceeding*, Docket 46700, that San Jose was a separate gateway from San Francisco for service

¹ Such services cannot currently be operated to London's Heathrow Airport, but they can be operated to London Gatwick.

² San Jose also argues that an award to Continental would not increase competition in the Midwestern U.S. in light of the proposed investment agreement between Continental and Northwest. We are considering the proposed investment agreement separately and the issues in that matter remain unresolved.

to Japan, San Jose's proximity to San Francisco should not be held against it in selecting a gateway for service to London.

Continental argues that the procedural objections of American and San Jose lack merit because the Department in the past has selected among competing applications for authority in limited-entry markets using procedures comparable to those used here. Continental also argues that the case was rightly decided on the merits and that the Department had before it all the necessary evidence to support its proposed findings.

The City of Cleveland argues that Cleveland is the largest Consolidated Metropolitan Statistical Area lacking nonstop intercontinental service and that Continental's Cleveland-London service would be the first nonstop London access for Cleveland, not just competitive service as San Jose-London service would be for the San Francisco/San Jose area.

DECISION

We have decided to make final our tentative decision to (1) restore the selection of Cleveland as a U.S. gateway on U.S. Route 1; (2) renew Continental Airlines' certificate authority to provide combination services in the Cleveland-London (Gatwick) market; and (3) select American Airlines' San Jose-London (Gatwick) proposal as a backup to Continental's services.

In our show-cause order, we tentatively found that Continental's proposal to serve Cleveland would provide greater public benefits than American's proposal to serve San Jose. Specifically, we concluded that Continental's proposed service would benefit more passengers in the local market and would provide benefits to a greater catchment pool behind the U.S. gateway. In addition, we found that Continental's Cleveland-London services would provide valuable intergateway competition to the nonstop London services available at Detroit (by Northwest) and Cincinnati (by Delta), thereby promoting competition in the U.S.-London market. Finally, we found that the selection of Continental to serve the Cleveland-London (Gatwick) market would better advance our policies regarding market structure by better promoting competition in the U.S.-U.K. market. In this regard we noted that American provides nonstop services to London from seven U.S. gateways, more than any other U.S. carrier, while in contrast Continental serves London from only two U.S. gateways.

We have carefully reviewed the procedural and substantive objections of American and the City of San Jose. We do not find that additional procedures are necessary in this proceeding, nor do we find that either party has presented information that warrants a change in our tentative decision.

1. Procedural Issues

Both American and San Jose argue that we should have proceeded with more extensive evidentiary carrier-selection procedures. We addressed that issue in our show-cause order. No new arguments have been made that cause us to change that procedural decision.

Now that the parties, following our show-cause order, have had still another opportunity to present their comments on each applicant's proposal, we are all the more persuaded that we have

before us an adequate record for final decision and that no meaningful public interest purpose would be served by adopting further evidentiary procedures. We reach this conclusion mindful that the procedures we followed here are effectively the same as we have used before in other comparable proceedings.³ Furthermore, they reflect our commitment to achieving sound regulatory results with a maximum of efficiency and a minimum of procedural burden. In view of these circumstances, we conclude that all parties have been afforded an adequate opportunity to present their case and arguments and that there is no procedural bar to issuing a final decision in this case.

2. Merits of the Decision

With respect to the merits, both American and San Jose primarily reiterate earlier arguments, already considered in our show-cause order, that selection of American would benefit more passengers, whether in markets behind San Jose (through connections on Reno Air) or in the San Jose market itself. We find that none of the arguments raised in response to our show-cause order warrants changing our decision.

Specifically, we do not find that American's enhanced interline relationship with Reno Air will provide behind-gateway benefits superior to those of Continental. At the outset, we are not persuaded that an "enhanced interline relationship" would offer benefits as extensive as those deriving from true online service. We still find that Continental would offer greater behind-gateway benefits in this case. In the show-cause order, we found that Continental would provide on-line connecting service to 64 cities behind Cleveland, while American would serve only one U.S. city behind San Jose that is not already a gateway to London. Reno Air would provide connecting service in both directions at San Jose to five points--two of which are currently gateways to London. Thus, Continental would still offer substantially more connecting service at Cleveland than the combination of American and Reno Air would provide at San Jose.

Similarly, nothing that American or San Jose argue regarding the relative strengths of the San Jose and Cleveland local markets persuades us to alter our result. In our show-cause order we found that the record in this case showed that for the twelve months ended September 30, 1997, Cleveland generated 29,260 local O&D passengers in the London market, or more than three times the local O&D passengers generated in the same period by San Jose. We also considered American's arguments that San Jose's share of the San Francisco Bay area's London traffic base would be approximately 69,500 annual O&D passengers. We tentatively found, however, that in this case, involving the relative merits of two specific gateway possibilities for service to London, the close proximity of San Jose to San Francisco (only 30 miles away), which receives daily nonstop service to London by one U.S. carrier (United) and two foreign-flag carriers (British Airways and Virgin Atlantic) dilutes the strength of the San Jose proposal in this case. In contrast, Cleveland, the only other potential gateway before us, enjoys no nonstop London

³ See, e.g., *U.S.-Japan Combination Services Proceeding*, Orders 98-5-17 and 98-3-15; *Boston-Paris exemption authority*, Order 96-4-31; and *Los Angeles-Guadalajara Exemption Proceeding*, Orders 95-8-3 and 95-6-27.

service and has no existing London gateway in comparable proximity.⁴ We tentatively concluded that the balance accordingly favored Cleveland. The selection of Cleveland eliminates the much greater distance that local travelers from the Cleveland catchment area would have to travel for access to a gateway to London, compared to local travelers in the San Jose catchment area.

The Department's decision to select San Jose as a gateway for service in the earlier Japan case, under an entirely separate set of circumstances, is not controlling in this case involving a choice between the two specific possibilities before us here, San Jose or Cleveland for service to London. In the 1990 Japan case, the Department selected American's proposal to serve San Jose as a U.S. gateway based on a combination of attributes of the carrier's service proposal at that time that the Department found superior to other carrier/gateway proposals for U.S.-Japan service.⁵ Some of the attributes of American's San Jose-Japan proposal are not present in its San Jose-London proposal and, for the reasons discussed above, we find that Continental's Cleveland-London proposal is superior.

Taking all these factors into account, we conclude that the selection of Cleveland provides the greater public benefits. Therefore, we will make final our selection of Cleveland as a new gateway for service to London.

CERTIFICATE AUTHORITY, STARTUP CONDITIONS AND BACKUP AWARD

As proposed in the show-cause order, we will renew Continental's five-year experimental certificate of public convenience and necessity for service in the Cleveland-London (Gatwick) market, and we will require institution of service by Continental within 90 days of the carrier's proposed startup date of February 19, 1999. Also, as proposed we will award American backup authority.⁶ We will make the backup award effective for a one-year period from the service date of this order. Should Continental not inaugurate service in the Cleveland-London market, we would select San Jose in place of Cleveland as a U.S. gateway to London. No party objected to these proposed provisions.

ACCORDINGLY,

1. We issue, in the form attached, authority to Continental Airlines, Inc., in Docket OST-96-1642, to provide scheduled foreign air transportation of persons, property, and mail in the Cleveland-London (Gatwick) market;
2. We restore the selection of Cleveland, Ohio, as a U.S. gateway under section 6 of Annex 1 to the current United States-United Kingdom Air Services Agreement;

⁴ The closest alternate airport for Cleveland is Detroit, which is in a wholly separate metropolitan area and is 173 highway miles from Cleveland, or nearly six times farther than the San Jose airport is from the San Francisco airport.

⁵ Order 90-10-15 at 14-20.

⁶ American holds certificate authority Route 602, Segment 1, to serve the San Francisco/Oakland/San Jose-London market.

3. We select American Airlines, Inc., for backup authority for one year from the date of service of this order to provide scheduled foreign combination air services in the San Jose-London (Gatwick) market;
4. Unless disapproved by the President of the United States under 49 U.S.C. § 41307, this order and the attached certificate shall become effective on the 61st day after its submission for § 41307 review or upon the date of advice from the President or his designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove the Department's order under that section, whichever occurs earlier;⁷ and
5. We will serve this order on American Airlines, Inc.; Continental Airlines, Inc.; the City of Cleveland, Ohio; the City of San Jose, California, and the San Jose International Airport; the Ambassador of the United Kingdom of Great Britain and Northern Ireland in Washington, D.C.; the U.S. Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration (AFS-220).

By:

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

(SEAL)

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

⁷ This order was submitted for § 41307 review on October 9, 1998. On October 19, 1998, we received notification that the President's designee, under Executive Order 12597 and implementing regulations, did not intend to disapprove the Department's order.



**Experimental Certificate
of Public Convenience and Necessity
for
Foreign Air Transportation**

Route 729
(as reissued)

This Certifies That

Continental Airlines, Inc.

is authorized, subject to the provisions of Subtitle VII of Title 49 of the 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 98-10-19
On October 19, 1998
Effective on October 19, 1998**

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



Terms, Conditions, and Limitations

CONTINENTAL AIRLINES, INC.

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

Between Cleveland, Ohio, and London (Gatwick), England.

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 order of the Department of Transportation issued under them. To the extent that the holder has authority to serve more than one country or points in more than one country on the same route segment, that authority does not confer upon the holder any additional rights (including fifth-freedom intermediate and/or beyond rights) in limited-entry markets unless the holder has been specifically designated to conduct such services and the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights. In such cases, the fact that the carrier may hold authority to serve the countries (points) at issue on the same segment will not be considered as providing any preference to the holder in a carrier selection proceeding.
- (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 insurance 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.

(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 ceases all operations for which it was found "fit, willing, and able," its authority under this certificate shall be suspended under the terms of 14 CFR 204.7 and the holder may neither 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 October 19, 1998. It shall expire May 17, 1999, 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.