

Posted: 12/1/2000
4:00 p.m

Order 2000-12-2



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

Issued by the Department of Transportation
on the 1st day of December, 2000

Served: December 1, 2000

1999 U.S.-BRAZIL COMBINATION SERVICE CASE

Docket OST-99-6284

FINAL ORDER

Summary

By this order, we make final our tentative decision in Order 2000-10-6, and allocate seven weekly frequencies to American Airlines, Inc. for New York-Rio de Janeiro service and three weekly frequencies to Delta Air Lines, Inc. for Atlanta-Rio de Janeiro service.

Background

Under the U.S.-Brazil aviation agreement, four U.S. carriers may be authorized for combination services in the U.S.-Brazil market. American Airlines, Delta Air Lines, Continental Airlines, and United Air Lines are the four authorized U.S. carriers. These carriers may operate a total of 105 weekly frequencies. Over the past three years the Department has conducted several proceedings to allocate the available frequencies.¹ This proceeding was instituted to consider reallocation of eleven previously allocated frequencies.²

By Order 2000-10-6, the Department tentatively awarded American seven weekly frequencies and Delta three weekly frequencies for services to Rio de Janeiro from New York (JFK) and Atlanta, respectively. The Department also in a final action awarded Continental one weekly frequency for Newark-Rio de Janeiro service.

¹See Orders 96-12-9, 98-5-27, and 99-9-23.

² See Order 2000-10-6, for complete description of how these frequencies became available.

Responses to Order 2000-10-6

Delta, United, and Continental filed in response to Order 2000-10-6. American, Continental, Delta, United, the Houston Parties, and the Los Angeles Parties filed answers to the responses.^{3 4}

United objects to the Department's decision to award American seven weekly frequencies and urges the Department to modify its tentative decision so as to award United seven frequencies for Los Angeles-Sao Paulo services or, in the alternative, to allocate United the three weekly frequencies tentatively allocated to Delta. To the extent United is not granted a full allocation of seven frequencies, it urges the Department to select United as backup for the number of frequencies needed to make up the difference between seven and the number of frequencies United is actually allocated.

United argues that the tentative decision ignores the benefits of United's Los Angeles-Sao Paulo proposal as well as the need for U.S.-carrier service at Los Angeles; that the Department's exclusion of foreign carrier nonstop traffic in assessing the size of the Los Angeles-Sao Paulo market vastly understates the size of the Los Angeles-Sao Paulo market and has a disproportionate negative impact on Los Angeles as a gateway for Brazil service; and that United's proposed service will benefit over 143,000 passengers in the forecast year compared to 108,000 passengers under American's proposal. It also maintains that the tentative decision ignores a statutory mandate to strengthen the competitive position of U.S. air carriers *vis-a-vis* foreign air carriers in the market and that the effect of the tentative decision is to retain the dominance of foreign carriers in the Los Angeles-Sao Paulo market. United further argues that its code share with Varig should not disqualify it from operating its own services, and that if United were able to offer its own services, it would introduce more capacity and competition into the market and lower fares. United further maintains that the Department's reliance upon loss of American's JFK-Rio service that is operated pursuant to a *pendente lite* award of frequencies as a basis to support continuation of that service is contrary to Department policy in *pendente lite* situations. Finally, if the Department makes final its decision to reallocate the frequencies to American, United urges that the remaining three frequencies should be allocated to United to start a Los Angeles-Sao Paulo nonstop service.

The Los Angeles Parties concur with United's position and urge the Department to reconsider the tentative award of frequencies in the proceeding and to allocate United seven frequencies to serve the Los Angeles-Sao Paulo market.

³ The Los Angeles Parties consist of the Los Angeles World Airports and the Los Angeles Convention and Visitors Bureau.

⁴ Continental stated that it had no objection to the Department's show-cause order as long as Continental's request in Docket OST-2000-8081 to move three Newark-Rio de Janeiro frequencies to Houston for Houston-Sao Paulo services was granted. By Notice of Action Taken, dated November 3, 2000, the Department granted Continental's request. Those three frequencies are unrelated to the frequencies at issue in this proceeding. By letter dated November 13, 2000, Continental withdrew its contingent objection in this proceeding. The comments of the Houston Parties (the City of Houston and the Greater Houston Partnership) expressed support for Continental's request to move three frequencies from Newark to Houston.

Delta supports the Department's tentative award of three weekly frequencies, but argues that the Department erred by not authorizing Delta new competitive entry to New York. Delta maintains that it should get the primary award. Delta notes that United holds out vastly more nonstop and online Los Angeles-Brazil service than any other carrier through its code share. It further argues that United could use some of its existing 28 frequencies to implement Los Angeles service. In response, United maintains that Delta ignores the body of evidence that demonstrates the New York-Sao Paulo market is overserved and states that there is greater unmet demand for Los Angeles-Sao Paulo service.

American supports the Department's tentative decision with respect to the seven-frequency award and urges the Department to make the award final. Regarding United's objections, American maintains that the New York-Rio de Janeiro market should not be deprived of its only nonstop service in order to enable United and Varig to carry more Asia-Brazil passengers and argues that the failure to select American would leave New York (JFK) with no nonstop service at all to Rio de Janeiro, whereas selecting United would give Los Angeles two daily nonstop carriers to Sao Paulo, overlapping daily code-sharing service, as well as nonstop service by Japan Airlines and Korean Airlines. American also notes that the Department properly compared the O&D survey totals for New York (JFK)-Rio de Janeiro (94,100 annual local passengers) and Los Angeles-Sao Paulo (27,730 annual local passengers), and concluded that New York (JFK)-Rio de Janeiro had a far greater need for service.⁵ In response to United's argument that it should not be disqualified due to its code-share service with Varig, American argues that given the limited availability of U.S.-Brazil frequencies, the relevant issue in this case is whether the large New York-Rio de Janeiro market should be deprived of its only nonstop service so that the small Los Angeles-Sao Paulo market can have yet another online option. Finally, American argues that the Department did not improperly consider its *pendente lite* services. American argues that it did not receive a *pendente lite* award to begin new service since American has held frequencies for the route since 1996 and had continuously provided that service, except for a brief period in 1999, and that the Department should recognize the adverse consequences to the public of a decision that would leave New York JFK-Rio de Janeiro without nonstop service.

In its comments Delta also raised two other issues related to the Department's proposed awards in Order 2000-10-6.

First, Delta argues that the Department erred by omitting the selection of a backup carrier for the seven-frequency award to ensure the frequencies would be used should American default. To rectify the omission, Delta states that the Department should select Delta as backup for the seven-frequency award should American default anytime within the first two years of service. It further states that the Department should make clear that a default on any aspect of the service proposal constitutes a default of the entire award and, thus, if American fails to operate all seven frequencies on a year-round basis, the backup authority should be triggered.

⁵ See footnotes 12 and 14, Order 2000-10-6, where we noted that O&D data for YE 12/31/99 show Newark/New York with 94,100 passengers and Los Angeles-Sao Paulo with 27,730 passengers.

United maintains that if backup is granted, United should be selected for Los Angeles-Sao Paulo service. American does not oppose Delta's suggestion for a backup award, but does object to a two-year term, noting that the Department, to American's knowledge, has never granted backup authority for longer than one year.

Second, Delta objects to the Department's proposal to limit its frequency allocation to the Atlanta-Rio de Janeiro market. While committed to Atlanta-Rio de Janeiro nonstop service, Delta argues that the Department should not place unnecessary restrictions on its award and argues that the Department should either remove the unnecessary restrictions on Delta's new frequencies or require all U.S.-Brazil carriers to seek and obtain permission from the Department prior to moving any allocated Brazil frequencies to new city-pair routes.

Continental agrees with Delta that recent Brazil entrants with fewer frequencies than American or United should have the same flexibility to move Brazil frequencies from one route to another that American and United have, and, thus, that Continental should be permitted to move its Brazil frequencies without Department permission.

American opposes Delta's request that Delta's award not be limited to Atlanta-Rio de Janeiro services, while Delta proposes that American's award should be strictly limited to New York (JFK)-Rio de Janeiro service.

United states that it is prepared to accept a city-pair restriction on Los Angeles-Sao Paulo service should it be allocated frequencies.

Decision

We have decided to make final our tentative findings and conclusions set forth in Order 2000-10-6, and award American Airlines, Inc. seven weekly frequencies for nonstop service in the New York (JFK)-Rio de Janeiro market and Delta Air Lines, Inc. three weekly frequencies for nonstop service in the Atlanta-Rio de Janeiro market. We have also decided not to award backup authority or modify our standard conditions for frequency awards as suggested by Delta.

This case involves the allocation of eleven weekly frequencies for U.S.-Brazil service, of which ten are the subject of our tentative decision. The proposals for these frequencies were divided between those for daily services and those for thrice-weekly service. American, Delta, and United offered proposals for daily services, and Delta and Continental offered proposals for thrice-weekly service.

In our show-cause order, we noted that Rio de Janeiro is the second largest destination point for U.S.-Brazil passengers, with New York/Newark being the largest U.S.-Brazil market. We also noted that American would provide the only U.S. or foreign carrier service between Rio de Janeiro and JFK and that American was the only carrier that would compete with Continental's service from Newark. In these circumstances, and given that the competing proposals for these frequencies involved markets where U.S. and foreign-carrier service was already provided, we tentatively found that American's

proposal offered greater overall public benefits and that American should be allocated the seven weekly frequencies at issue in this case.

We also tentatively found that Delta's proposal for Atlanta-Rio de Janeiro service was superior to Continental's Houston-Lima-Sao Paulo proposal because it would be operated nonstop compared to one-stop for Continental, would benefit more passengers than Continental, and would provide intergateway competition with Rio services from Newark, New York (JFK), and Miami.

We have carefully reviewed the objections and comments to our show-cause order and find that no party has presented any new argument or evidence that persuades us to modify our tentative decision. Rather, the opposing parties have reiterated their arguments that greater public benefits would result if awards were made to other carriers. United and the Los Angeles Parties argue that United should be awarded the seven or alternatively the three frequencies available. Delta maintains that it should have been allocated the seven weekly frequencies.

Specifically, United maintains that the Los Angeles-Sao Paulo market has no U.S.-flag operated service, whereas New York-Rio de Janeiro does have service via Newark from Continental. It further argues that its selection would enhance U.S./foreign-carrier competition from the Los Angeles gateway where all of the services are operated by foreign carriers, a factor not affecting New York-Rio de Janeiro services. Given the large size of the Los Angeles-Sao Paulo market, United maintains that its proposal offers greater service and competitive benefits than American's.

We agree with United that its proposal offers certain service and competitive advantages. For example, it would provide west coast passengers to Brazil with U.S.-flag operated (as opposed to held out) nonstop service and would, as United asserts, provide additional competition with foreign-flag operators. However, we find these attributes outweighed by the critical public interest factor that only American's proposal would provide nonstop service in a city pair, New York (JFK)-Rio de Janeiro, that now has no nonstop service. United's proposal, on the other hand, would do no more than increase service at a gateway that already receives service not only from foreign carriers, but also from United under its code share with Varig and on United's own aircraft service on a single-flight number basis connecting with United's daily Miami-Sao Paulo flight.

Moreover, the record shows that the New York-Rio de Janeiro market generates significantly more traffic than Los Angeles, with 94,100 annual O&D passengers in the New York-Rio de Janeiro market and 27,730 passengers in the Los Angeles-Sao Paulo market. Even taking into consideration the local traffic carried by foreign carriers, as United suggests, the record shows that New York-Rio de Janeiro generates more passengers than Los Angeles-Sao Paulo (151,920 for New York-Rio de Janeiro vs 90,863 for Los Angeles-Sao Paulo).⁶

⁶ Exhibit UA-301 and AA-310. Taking into consideration United's proposed single-flight number San Francisco service, New York-Rio de Janeiro is still larger with New York-Rio de Janeiro at 151,920 and Los Angeles/San Francisco-Sao Paulo at 126,826.

Regarding the issue of comparative competitive benefits, the fact is that United now competes in the Los Angeles-Sao Paulo market not only with Varig but also on its own single-flight number service from Los Angeles operated via Miami. While the frequencies it seeks here would strengthen that competitive position, and thus enhance the U.S.-flag competitive position in the market, we find it more compelling that, absent an award here, American could not compete in the New York (JFK)-Rio de Janeiro market, leaving only Continental to serve the market through Newark.⁷ With our award, American would offer a strong competitive service with Continental's services.

Taking into consideration the relative overall sizes of the markets at issue, and the services in those markets, we remain convinced that using the frequencies at issue to ensure the only service for New York (JFK)-Rio de Janeiro passengers offers greater public benefits in the circumstances of this case than would an award to United to increase its service at the Los Angeles gateway.⁸

Similarly, we are unpersuaded by Delta's arguments that its proposal to serve New York-Sao Paulo would provide greater public benefits than American's New York-Rio de Janeiro proposal. The New York-Sao Paulo market now receives 32 weekly flights by five carriers. While Delta's proposal would provide intragateway competitive benefits, we are not persuaded that these benefits in a well-served market outweigh the public benefits of selecting a U.S. carrier that would be providing the only nonstop service between New York (JFK) and Rio de Janeiro.

As to our proposed three-frequency award, we will also make final our tentative award of these frequencies to Delta for Atlanta-Rio de Janeiro service. Delta's Atlanta service will afford Atlanta its first nonstop service to Rio de Janeiro, improving service to local passengers at the gateway and providing convenient connections for other passengers through its large Atlanta hub. Its service will also provide intergateway competition for nonstop Rio de Janeiro services from Newark, New York (JFK), and Miami. Continental, the only other applicant, did not object to the award.⁹

We will not grant Delta's request that we refrain from imposing city-pair market conditions on the frequencies awarded Delta in this proceeding.

⁷ We note that while Continental currently provides daily nonstop service in the Newark-Rio de Janeiro market, it has stated that in April it will move three of those frequencies to Houston to expand its Houston-Sao Paulo services. See Notice of Action Taken, dated November 3, 2000, in Docket OST-2000-8081.

⁸ Contrary to United's arguments, we did not rely on American's *pendente lite* service to support an award to American. Our reference in the show-cause order only summarized statements made by American.

⁹ In its objections to the show-cause order, United states that it should be allocated the three frequencies allocated to Delta, which it would use for its Los Angeles-Sao Paulo service. However, United has no three-frequency proposal properly before us, it having presented no evidentiary submissions to support such an award. Indeed, it made no mention of any interest in such an award until after issuance of our show-cause order. In these circumstances, we will not accept United's request for a three-frequency award at this late stage of the proceeding.

The Department's long-standing general position in carrier selection cases has been to award frequencies for specific city-pair market services.¹⁰ In this case, our tentative selections of American and Delta were based on the specific city-pair markets that they proposed to serve—New York-Rio de Janeiro for American and Atlanta-Rio de Janeiro for Delta—and after comparative consideration of proposals from other carriers. To now, as Delta suggests, afford it the full flexibility to move the frequencies without prior Department approval would undermine the integrity of the carrier-selection process in this case as well as the foundation on which our tentative selections were based. The fact that American and United have certain Brazil frequencies that are moveable is not a basis to grant Delta's request. We recognize that there are instances, including Brazil, where certain carriers may hold frequencies that are not subject to city-pair restrictions. This fact derives from the particular history of those carriers' route authorities. Therefore, the frequencies allocated to American and Delta in this proceeding will be limited to the city-pair markets for which they were selected to serve. Should either carrier seek to move all or some of the frequencies to a different market, it must first seek and obtain prior Department approval.

Finally, we will not grant Delta's or United's requests for a backup award in this case. It has not been our general policy to grant backup awards in frequency allocation cases. This stems from the fact that such awards are routinely subject to dormancy conditions under which the frequencies automatically revert to the Department if they are not used, enabling the Department to take prompt action to reallocate the flights. In this case, it is necessary only to allocate frequencies for the services selected. In these circumstances, we believe the dormancy/automatic reversion provisions of the awards provide sufficient ability to reassess the public interest should American not use its award and the frequencies need to be reallocated.¹¹

ACCORDINGLY,

1. We make final our tentative findings and conclusions in Order 2000-10-6;
2. We allocate seven weekly frequencies to American Airlines, Inc. for nonstop services in the New York (JFK)-Rio de Janeiro market and three weekly frequencies to Delta Air Lines, Inc. for nonstop services in the Atlanta-Rio de Janeiro market;
3. The frequencies awarded in ordering paragraph two, above, with respect to American are effective immediately for an indefinite period, subject to the continued effectiveness of the holder's underlying economic authority to serve the city-pair specific market for which the frequencies are allocated;¹²

¹⁰ See e.g., Allocations for U.S.-France services, Orders 98-5-8, 98-11-19, and 99-9-10.

¹¹ While our instituting order made provisions for award of backup authority, such provisions were made in consideration of the possibility that the authority awarded might necessitate backup certificate awards. Ultimately, certificate awards were not necessary in this case as the selected carriers need no additional certificate authority to implement service with the awarded frequencies.

¹² Since American has stated it will begin service immediately, and on a year-round basis, the 90-day dormancy period will begin immediately, and no further startup requirement is necessary for American's service.

4. The frequencies awarded in ordering paragraph two, above, with respect to Delta, shall be effective immediately and will expire 120 days from the date of service of this order; provided, however, that if Delta inaugurates service with these frequencies on or before that date, the frequencies shall be effective for an indefinite period, subject to the continued effectiveness of the holder's underlying economic authority to serve the city-pair specific market for which the frequencies are allocated;

5. The frequencies allocated to American and Delta are subject to the condition that the frequencies will expire and will revert automatically to the Department if they are not used for a period of 90 days except where service in the market is seasonal; if services are to be seasonal, they must notify the Department in writing;¹³

6. To the extent not granted, we deny all other requests in this docket;

7. Since we provided for objections to Order 2000-10-6, we will not entertain petitions for reconsideration of this order; and

8. We will serve this order on American Airlines, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; United Air Lines, Inc.; the Georgia and Atlanta Parties; the New Jersey Parties; the Houston Parties; the Los Angeles Parties; the Ambassador of Brazil in Washington DC; the Federal Aviation Administration; and the U.S. Department of State (Office of Aviation Negotiations).

By:

SUSAN MCDERMOTT
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp*

¹³Both carriers have proposed year-round services. The 90-day dormancy period will begin upon the service date of this order for American since it has proposed to begin services immediately. The 90-day dormancy period will begin on the date Delta implements service. Delta is required to begin service no later than 120 days of this award, and it must inform the Department in writing in this docket as to the date its services actually begin.