



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

Issued by the Department of Transportation
on the 2nd day of April, 2001

Application of

AMERICA WEST AIRLINES, INC.

For an exemption from 14 CFR Part 93, under
49 U.S.C. §41714

**Dockets OST-2000-7176-56
OST-2001-8844 /**

ORDER

SUMMARY

By this order the Department denies, without prejudice, the application of America West Airlines, Inc. (America West) for 12 New York LaGuardia slot exemptions for service to and from Phoenix, Arizona, and Las Vegas, Nevada.

BACKGROUND

On April 5, 2000, the President signed into law the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21). Among other things, AIR-21 liberalizes slot and slot exemption access at the four airports now subject to the provisions of the High Density Rule, 14 CFR 93 Subparts K and S. Specifically, at New York's La Guardia and John F. Kennedy International Airport (New York Airports), the Act provides *inter alia* that slot restrictions will be totally eliminated after January 1, 2007. AIR-21 also allows for additional access to the New York airports prior to that date. Under one of these interim provisions, new 49 U.S.C. section 41716, exemptions must be granted to any new entrant or limited incumbent airline using Stage 3 aircraft that proposes "...to provide air transportation to or from LaGuardia or John F. Kennedy International Airport if the number of slot exemptions granted under this subsection to such air carrier with respect to such airport when added to the slots and slot exemptions held by such air carrier with respect to such airport does not exceed 20."¹ The application must identify (1) the airports to be

¹ 49 U.S.C. § 41716(b). In addition, under 49 U.S.C. § 41714(k) "...an air carrier that operates under the same designator code, or has or enters into a code-share agreement, with any other air carrier shall not

served and ~~(2) the times~~ requested.² Also, the Department has 60 days to issue a decision from the date of application for slot exemptions for such service,³ or else the application is deemed to have been approved. Order 2000-4-10, issued April 14, 2000, implemented the provisions of the new section 41716.

As a result of the increased AIR-21 La Guardia slot access, approximately 300 flights were added under the provisions of AIR-21 and scheduled La Guardia flights increased more than 25 percent during calendar year 2000. La Guardia delays increased by up to 41 percent over the previous year. These delays translated into disrupted airline schedules, flight cancellations, and dissatisfied passengers.

In response to this situation, under its authority to manage the national airspace system, the Federal Aviation Administration (FAA) decided to roll back some of the flights that had been added at La Guardia under exemptions authorized by AIR-21. On December 4, 2000, the FAA conducted a lottery proceeding to reallocate 159 slot exemptions at La Guardia until September 15, 2001. The FAA took this temporary action until a long-term mechanism is in place to better address congestion at the airport.

APPLICATION

On February 1, 2001, America West applied for 12 New York La Guardia slot exemptions for service to and from Phoenix, Arizona, and Las Vegas, Nevada. Specifically, America West filed for an exemption from Subparts K and S of 14 C.F.R. Part 93 pursuant to 49 U.S.C. 41714(c). America West requests that the Department simultaneously grant it 12 slot exemptions and grant it the ability to operate beyond the 1500-mile perimeter rule imposed by the Port Authority of New York and New Jersey (Port Authority) which prohibits nonstop operations to or from La Guardia outside the perimeter. Both Phoenix and Las Vegas are beyond the perimeter.

In support of its application, America West contends that the intent of AIR-21 to improve competition at slot-controlled airports has been frustrated by the La Guardia perimeter rule and that large incumbent air carriers continue to dominate LaGuardia service. America West asserts that the circumstances justifying imposition of the perimeter rule have changed and that the public interest now requires that America West should be allowed to pass the benefits of nonstop La Guardia service to the passengers at its Phoenix and Las Vegas hubs. In order to provide this service,

qualify for a new slot or slot exemption as a new entrant or limited incumbent air carrier at an airport if the total number of slots and slot exemptions held by the 2 carriers at the airport exceed 20 slots and slot exemptions.”

² 49 U.S.C. § 41714(i)(1).

³ Under 49 U.S.C. § 41716(i)(2), within 20 days of the date of application, the Department may request additional information of the applicant, thus temporarily stopping, or “tolling,” the 60-day clock. Upon submission of the requested information the 60-day period would then restart from when it was “tolled.”

America West contends that it also needs 12 La Guardia slot exemptions to operate four daily roundtrip flights to Phoenix and two daily roundtrip flights to Las Vegas.

RESPONSIVE PLEADINGS

On February 15, 2001, the Port Authority of New York and New Jersey (Port Authority) filed an answer opposing the America West application. The Port Authority argues that the LaGuardia perimeter rule is a valid exercise of an airport proprietor's rights under Federal aviation law. The Port Authority cites various examples of case law to support its position. The Port Authority contends that America West has not demonstrated that the underlying justification for the perimeter rule, *i.e.*, La Guardia congestion problems, have lessened. The Port Authority argues that the high level of La Guardia congestion requires the Department maintain the restrictions put in place by the FAA's slot lottery. The Port Authority asserts that this in turn requires that the Department deny the America West request.

On February 16, 2001, Continental Airlines filed an answer in opposition to America West's request. Continental argues that granting America West's application for 12 additional La Guardia slot exemptions would be manifestly unfair in light of the FAA's recent action limiting additional AIR-21 slot exemptions through a slot lottery. Continental argues that the perimeter rule has been upheld by two federal courts. Continental argues that the Department has abided by the perimeter rule for 20 years and that in its drafting of AIR-21, the Congress had the opportunity to modify the effectiveness of the perimeter rule but elected not to do so. Continental contends that grant of America West's application under 49 U.S.C. §41714 (c) would not be in the public interest since by increasing La Guardia operations, an additional award of slot exemptions would conflict with the intent of the recent FAA slot lottery to limit new La Guardia operations.

On February 16, 2001, Delta Air Lines filed an answer opposing the America West request. Delta argues that the longstanding La Guardia perimeter rule has withstood judicial review and that it would be imprudent for the Department to attempt to overturn the judicial precedent. Delta maintains that the essential circumstances underlying the Court's decision are unchanged and the basic purpose of the perimeter rule to control traffic flows at New York's multi-airport system remains valid. Delta argues that America West is not the only carrier disadvantaged by the perimeter rule and that in any event the Department should not selectively permit exceptions to the rule, but rather should consider revising or eliminating the rule in a more comprehensive proceeding. Delta argues that granting additional La Guardia slot exemptions to America West would be unfair given the sacrifices made by other carriers at La Guardia in compliance with the conditions of the FAA lottery.

On February 21, 2001, the Office of the President of the Borough of Queens (Queens) filed a Motion to File a Late Answer. We will grant the motion. Queens argues that that the additional La Guardia operations permitted under AIR-21 generated an

operational ~~crisis~~ of delay and congestion at the airport. Queens contends that the FAA lottery has provided some relief, but that it is important that the *status quo* should be maintained until a longer term operational solution for La Guardia is developed. Queens also argues that the Department must perform a thorough environmental review before any additional La Guardia slot exemptions are granted or any exceptions to the perimeter rule are permitted. Queens argues that the Port Authority opposes the grant of substantial additional slot exemptions and strongly opposes modification of the perimeter rule. Queens argues that the Department should defer to the Port Authority as the La Guardia airport operator.

America West filed for leave to file a late reply to the answers filed by the parties opposing its application. We will grant the motion. America West states that grant of its request would bring new low-fare competitive La Guardia services to numerous communities in the West and would improve competition generally at La Guardia. America West argues that the airline objectors are merely seeking to maintain their privileged La Guardia positions against new competition and that while the Port Authority is simply attempting to sustain its control of the LaGuardia service area, the perimeter rule has not reduced La Guardia congestion as it claims. America West asserts that the Department has the legal authority to preempt the perimeter rule and that under AIR-21 America West is entitled to 20 La Guardia slot exemptions. America West argues that the perimeter rule is not a market-based solution to La Guardia's congestion problems and that it distorts normal service and traffic flows.

DECISION

We have decided to deny America West's application at this time, without prejudice.

America West has applied for these slot exemptions under the provisions of 49 U.S.C. section 41714(c), which, as amended by AIR-21, authorizes the Secretary to grant them to qualifying new entrants at LGA, ORD, and JFK if he finds such grant to be "in the public interest."

As to public interest factors, America West argues that service between LGA and its hubs at Phoenix and Las Vegas is "much needed," and that the Department's authorization of such service would be "pro-competitive." It asserts that these flights would benefit more passengers, make more efficient use of airspace, and make better use of scarce capacity at LGA than other services being initiated with AIR-21 exemption slots allocated by the FAA lottery. It further argues that the original rationale for the perimeter rule has been substantially undermined by various factors.

As noted, the responsive pleadings have instead focused on the continuing congestion problems at LGA, and argued that an award of exemptions to America West under this order would conflict with the FAA's effort, through its temporary slot lottery, to address these problems. As to the perimeter rule, the respondents have generally stated

that the rule ~~continues~~ to have purpose and vitality, that it affects other carriers equally, and that it has been upheld by Federal courts.

The Department agrees that, if granted, service between LGA and America West's western hubs would likely be quite successful, and, given America West's new entrant status⁴, the granting of such exemptions would be pro-competitive. However, it is unclear as to how the Department could grant these exemptions at this time without impairing other important interests – notably, the serious congestion that has affected LGA, and the Department's efforts to relieve that congestion with the slot lottery.

In order to grant America West the exemptions it seeks, we would either have to withdraw slots or slot exemptions from carriers permitted to operate them under the terms of the lottery in order to reaward them to America West, or authorize additional flights over and above the ceiling established for maximum operations by the lottery. The former approach would effectively require us to terminate service by carriers, to communities and for passengers that have current expectations of being able to provide and receive such service until at least September 15, 2001. Nor is the latter approach any more viable, for it would be inconsistent with the FAA's determination that, to appropriately restrain congestion problems at LGA, scheduled operations should be limited to 75 per hour.⁵

FAA is now considering various alternative longer-term approaches to supplant the slot lottery at LGA. These alternatives may be more conducive to permitting America West's arguments to be favorably considered. Our action on this application is therefore without prejudice to America West reapplying for these exemptions, to the extent it believes appropriate under any successor congestion management regime at LGA.

This Order is issued under authority delegated in 49 CFR 1.56a(f)(1).

ACCORDINGLY,

1. The Department denies the application of America West Airlines, Inc., for an exemption from 14 CFR Part 93, subparts K and S filed in Dockets OST 2000-7176 and 8144 without prejudice; and

⁴ America West has stated that it qualifies as a La Guardia new entrant/limited incumbent under 49 U.S.C. § 41716(b), and under 49 U.S.C. § 41714(c), and no party has disputed this assertion (Application at 4).

⁵ Because we are not able to grant America West any slots or slot exemptions, we do not reach the issue of allowing additional beyond-perimeter service.

2. We will serve a copy of this order on all interested parties.

By:

SUSAN MCDERMOTT
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

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