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Order 2001-12-24

Served: December 28, 2001



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

Issued by the Department of Transportation
on the 28th day of December, 2001

Application of

MIDWAY AIRLINES CORPORATION

for a waiver from the 45-day advance notice provision
of section 204.7 of the Department's Aviation Economic
Regulations

Docket OST-01-10989 - 5

**ORDER CONFIRMING ORAL ACTION
AUTHORIZING RESUMPTION OF OPERATIONS**

Summary

By this order, we are confirming our oral action authorizing Midway Airlines Corporation (Midway) to resume its scheduled passenger operations.

Background

On September 12, 2001, Midway, a certificated air carrier based in Morrisville, North Carolina, ceased all revenue flight operations as a direct result of the September 11 terrorist attacks. As a result of this cessation, Midway's certificate authority was automatically suspended pursuant to the provisions of section 204.7 of the Department's Aviation Economic Regulations (14 CFR 204.7). Under that section, in order for Midway to recommence certificated operations, it was required to file a notice at least 45 days in advance of the date it intended to resume service and have its fitness re-established.¹

On November 9, 2001, Midway requested a waiver from the 45-day notice provisions of section 204.7 and filed the information we required to redetermine its fitness to

¹ By letter dated September 13, 2001, the Department notified Midway of the impact of section 204.7 on its certificate authority.

recommence operations.² In support of its request, Midway noted that its resumption of service at its Raleigh-Durham hub would restore important service benefits for both local and network passengers that utilize Midway's services, and that its resumption of operations would be a positive step in stemming the loss of jobs in the airline industry. Further, Midway noted that it desired to resume operations on or about December 1.

Decision

After reviewing the fitness information provided by Midway, we determined that the company would meet our fitness standards provided it received the funds it was due under the Air Transportation Safety and System Stabilization Act (Public Law 107-42, enacted September 22, 2001). Further, we found that it was in the public interest to grant Midway's waiver request immediately, subject to conditions,³ so that it could make all necessary preparations to resume operations in a timely manner.⁴ We orally granted the waiver on November 30 and we confirm that action by this order.

² Supplemental information supporting Midway's fitness was filed on November 19. Midway requested that certain of the fitness information filed be granted confidential treatment pursuant to Rule 12. In support of its request, Midway noted that the information set forth included non-public financial data and future operating plans, which, if released, could cause it, substantial harm. Under Rule 12, the Department evaluates requests for confidential treatment in accordance with the standards of disclosure found in the Freedom of Information Act (FOIA) (5 U.S.C. 552). Under Exemption 4 of FOIA, business information may be withheld from disclosure if it is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential." (*Gulf & Western Industries, Inc. v. U.S.*, 615 F.2d 527, 529 (D.C. Cir. 1979).) The information contained in Midway's filings clearly meets the first two requirements. The only question, therefore, is whether the information is privileged or confidential--whether "disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." (*National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).) Furthermore, to be privileged or confidential, the information must not be of the type that is usually released to the public. (*Gulf & Western Industries, Inc. v. U.S.*, *supra* at 530.) We agree with Midway that premature release of its future operating plans and the detailed financial information reflecting these proposed operations could cause substantial harm to its competitive position through the release of proprietary financial information. Therefore, we will grant Midway's request for confidential treatment of the fitness information submitted in support of its request.

³ Specifically, we stated that our approval for Midway to resume actual revenue flight operations was contingent upon the company's receiving the compensation due it under the Air Transportation Safety and System Stabilization Act, as well as Midway's complying with all safety requirements set by the Federal Aviation Administration (FAA).

⁴ Midway received the referenced compensation on November 30 and, over the next days, worked to complete all steps necessary for the resumption of its operations, including addressing all FAA safety-related matters. Having met the conditions imposed, Midway resumed actual flight operations on December 19.

ACCORDINGLY, Acting under authority assigned by the Department in its Regulations, 14 CFR 385.12(a)(5)(iv) and (b)(1):

1. We confirm our oral action of November 30, 2001, granting the application of Midway Airlines Corporation for a waiver from the 45-day advance notice requirements of section 204.7 of the Department's Aviation Economic Regulations to permit it to resume certificated operations, subject to conditions.
2. We grant the request of Midway Airlines Corporation to withhold from public disclosure all of the supporting fitness information submitted pursuant to Rule 12.
3. We will serve a copy of this order on the persons listed in Attachment A.

Persons entitled to petition the Department for review of this order under the Department's Regulations, 14 CFR 385.30, may file their petitions within 10 days of the service date of this order.

The action confirmed in this order was effective when taken and the filing of a petition for review shall not alter its effectiveness.

By:

Randall D. Bennett
Director
Office of Aviation Analysis

(SEAL)

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

SERVICE LIST FOR MIDWAY AIRLINES

Attachment A

MR STEVEN WESTBERG
EXECUTIVE VICE PRESIDENT
MIDWAY AIRLINES CORP
2801 SLATER ROAD STE 200
MORRISVILLE NC 27560

MR DON BRIGHT K-25
OFFICE OF AIRLINE INFO
DEPT OF TRANSPORTATION
400 SEVENTH ST SW
WASHINGTON DC 20590

MR ALLEN MUTEN
ASSISTANT TREASURER
AIRLINES REPORTING CORP
1530 WILSON BLVD STE 800
ARLINGTON VA 22209-2448

MR ROBERT E COHN
MR ALEXANDER VAN DER BELLEN
COUNSEL FOR MIDWAY AIRLINES
SHAW PITTMAN
2300 N STREET NW
WASHINGTON DC 20037

MR RICHARD DUTTON AFS-900
ASST MANAGER CSET
FAA SUITE 203B
45005 AVIATION DRIVE
DULLES VA 20166-7537

MR JAMES ZAMMAR
DIR OF REV ACCOUNTING
ATA SUITE 1100
1301 PENN AVE NW
WASHINGTON DC 20004

MGR FLIGHT STANDARDS DIV
FAA ASO-200
SOUTHERN REGION HDQ
PO BOX 20636
ATLANTA GA 30320

MR PETER LYNCH AGC-300
ASST CHIEF COUNSEL FOR
ENFORCEMENT
FEDERAL AVIATION ADMIN
800 INDEPENDENCE AVE SW
WASHINGTON DC 20591

AM ASSOC OF AIRPORT
EXECUTIVES
601 MADISON ST SUITE 400
ALEXANDRIA VA 22314-1756

ASST CHIEF COUNSEL
FAA ASO-7
SOUTHERN REGION HDQ
PO BOX 20636
ATLANTA GA 30320

MR MIKE HARVILLE
POI FOR MIDWAY AIRLINES
FAA FSDO-05
6433 BRYAN BLVD.
GREENSBORO NC 27409

MR J D MEALOR
AIRLINE DATA COORD
INNOVATA LLC
3915 OLD MUNDY MILL RD
OAKWOOD GA 30566-3410

MANAGER
FAA FSDO-05
6433 BRYAN BLVD.
GREENSBORO NC 27409

MS JONI MOUNT
PRODUCT MANAGER
TRANSPORT PRINT PRODUCTS
OFFICIAL AIRLINE GUIDE
2000 CLEARWATER DRIVE
OAK BROOK IL 60521