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Order 2002-2-2



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

Issued by the Department of Transportation
on the 4th day of February, 2002

Served: February 4, 2002

In the matter of

ALL U.S. CARRIERS

Waiver of dormancy conditions on limited-entry
route authority

Docket OST-2001-11065 - 11

Application of

DELTA AIR LINES, INC.

For temporary allocation of U.S.-Brazil
combination service frequencies for Atlanta-Rio
de Janeiro service

Docket OST-2001-10782 - 22

ORDER ON RECONSIDERATION

Summary

By this order, we grant the petition of Delta Air Lines for reconsideration of Order 2001-11-15 and, upon reconsideration, affirm, with one exception, our decision in that order. Specifically, we affirm our decision to require all U.S. carriers holding blanket dormancy waivers to file a notice no later than February 15, 2002, in Docket OST-2001-11065, listing each limited-entry market in which they will not resume service beginning April 1, 2002. We have decided to modify our decision in Order 2001-11-15 with respect to the filing of requests for further dormancy waivers in the U.S.-Brazil market. Carriers holding U.S.-Brazil service frequencies will be required to file any requests for further dormancy waivers by February 15, 2002, the same date that they are required to file notice of their U.S.-Brazil frequency utilization.

Background

By Order 2001-11-15, in response to the events of September 11, the Department granted to all U.S. carriers a blanket waiver of the dormancy conditions applicable to their limited-entry route authorities through March 31, 2002. The waiver was subject to the condition that carriers notify the Department by February 15, 2002, of each market where they will not resume service beginning April 1, 2002. The Department also stated that carriers would be free to seek extensions of the dormancy waiver for specific city-pair limited-entry services where they can demonstrate that circumstances warrant.¹ In addition, by Notice of Action Taken on November 2, 2001 (Docket OST-2001-10782), the Department granted Delta a temporary allocation of four weekly unused U.S.-Brazil frequencies through March 31, 2002. Delta is using its temporary frequencies to provide service in the Atlanta-Rio de Janeiro market. By Order 2001-11-15, we stated that Delta could seek a further extension of its temporary frequency allocation if and when other authorized U.S.-Brazil carriers seek further extensions of their U.S.-Brazil dormancy waivers.

Delta's Petition

On December 5, 2001, Delta filed a Petition for Reconsideration of Order 2001-11-15, urging the Department to reconsider and modify its blanket dormancy decision with respect to U.S.-Brazil frequencies. Specifically, Delta urges the Department to (a) require that carriers holding U.S.-Brazil frequency dormancy waivers notify the Department by December 31, 2001, rather than February 15, 2002, as to whether they intend to use their frequencies commencing April 1, 2002; (b) establish December 31, 2001, as the due date for any further dormancy waiver requests with respect to U.S.-Brazil frequencies; and (c) allow Delta to continue to use its U.S.-Brazil frequencies under a temporary allocation, subject to a 90-day recall by the Department, while the Department decides how to reallocate any frequencies currently allocated to carrier(s) that notify the Department that they do not intend to resume Brazil service by April 1, 2002.

In support of its request, Delta argues that at least 90 days are required to provide enough time for advertisement and sale of advanced bookings in a long-haul market such as U.S.-Brazil, and that such a time period is also necessary to schedule aircraft, crews, ground handling, and other incidentals before the start of the summer traffic season on April 1, 2002. The current deadline, February 15, 2002, provides less than 45 days notice, according to Delta. Thus, Delta argues that the current notification deadline will force Delta to assume that it will not be able to continue service beyond March 31, 2002, to the detriment of consumers, Delta, and the public interest. In light of current marketplace uncertainties, Delta maintains that there is good reason to believe that there will continue to be unused frequencies available to support Delta's daily Atlanta-Rio de Janeiro service beyond March 31, 2002.²

With a 90-day notification period, Delta states that it would be able to plan its services and avoid having to incur significant start-up costs all over again if one or more of the carriers with unused Brazil frequencies fails to restart its service on April 1, 2002. In this connection, Delta maintains

¹Order 2001-11-15 at 4.

²In a letter filed in the captioned dockets on December 7, 2001, Delta states that there are currently 26 unused frequencies available in the U.S.-Brazil market.

that no “rational” carrier that actually intends to restart U.S.-Brazil service on April 1 would wait until February 15 to announce its service. For this reason, Delta argues that the Department should establish December 31, 2001, as the due date for any further dormancy waiver requests with respect to U.S.-Brazil frequencies. Delta states that the Department’s blanket waiver order did not specify any due date for further waivers and, thus, there is no incentive for any carrier that decides not to restart service by April 1, 2002, to make such a notification before February 15, 2002, at the earliest. Delta further maintains that any carrier that does not restart its U.S.-Brazil services by April 1 will most likely seek a further *ad hoc* dormancy waiver.

Delta argues that there is no reason to allow frequencies to go unused while the Department decides what to do with those U.S.-Brazil frequencies that do become dormant or for those frequencies where carriers request an additional dormancy waiver. In this connection, Delta requests that the Department extend Delta’s temporary allocation of U.S.-Brazil frequencies on an indefinite basis, subject to a recall of not less than 90 days by the Department, while the Department makes any necessary decisions with respect to dormant frequencies or further waiver requests. Delta states that its objections relate specifically to the U.S.-Brazil market, the only limited-entry market where otherwise unused frequencies are currently being used on a temporary basis by another carrier to provide immediate benefits to the traveling public.

Responsive Pleadings

American Airlines, Continental Airlines, United Air Lines, and the Georgia and Atlanta Parties (Georgia Department of Industry and Trade, Hartsfield Atlanta International Airport, and the Metro Atlanta Chamber of Commerce) (“Georgia Civic Parties”) filed answers to Delta’s petition. Delta filed a reply and United filed a supplemental answer.³

The Georgia Civic Parties support Delta’s petition and urge the Department to reconsider its decision, stating that Delta’s Atlanta-Rio de Janeiro services help to sustain aviation-related employment at Atlanta, and provide additional economic benefits for the entire Georgia and Atlanta region. Consequently, the Georgia Civic Parties maintain that the Department should modify its decision to ensure that Atlanta-Rio de Janeiro services are not needlessly disrupted. In this regard, the Georgia Civic Parties emphasize that it is highly likely that at least four of the currently unused U.S.-Brazil frequencies will be available for the continuation of Delta’s service.

American, United, and Continental oppose Delta’s petition and argue that no relief should be given to Delta with respect to its temporary allocation of U.S.-Brazil frequencies unless comparable relief is also given to other carriers holding U.S.-Brazil frequencies. Specifically, American, United, and Continental maintain that they should be granted dormancy waivers extending beyond March 31, 2002, if the Department were to grant any relief sought by Delta from Order 2001-11-15.⁴ In light of the uncertainties stemming from the events of September 11, American, United, and Continental argue that requiring notice by December 31 is unreasonable.

³Delta’s reply and United’s supplemental answer were accompanied by motions for leave to file otherwise unauthorized documents. We will grant the motions.

⁴American maintains that Delta’s Attachment A to its December 7 letter in this docket is inaccurate regarding the number of frequencies currently being used by American.

American further argues that the Department's blanket dormancy waiver order struck a proper balance between the needs of carriers to have sufficient time to finalize their summer season schedules, on the one hand, and the public interest in seeing that limited-entry route rights not go unused, on the other hand. Nonetheless, American states that it would not object if the Department established February 15 as the date for the required notice as well as for any individual dormancy waiver applications.

Continental states that the U.S.-Brazil market may be "unique," since Delta is using frequencies in that market on an interim basis, but states that no relief should be given to Delta unless comparable relief is also given to Continental and other carriers. In addition, Continental indicates that it would not object to an indefinite temporary award of Brazil frequencies to Delta, provided that Continental is granted an indefinite dormancy waiver and could recall four Brazil frequencies on 90 days' notice.

United states that it had planned to restart its temporarily suspended New York (JFK) – Sao Paulo services on December 15, 2001, but subsequently decided to temporarily put off such plans after the Christmas holiday period because sales did not meet expectations. United maintains that the seven frequencies it uses for New York – Sao Paulo are not subject to a 90-day dormancy condition, nor to the February 15 notice requirement in Order 2001-11-15. However, United cites this case as an example of the great uncertainties in rescheduling services at the present time and an illustration of why Delta's demand for a December 31 notice is not reasonable.

In its reply, Delta argues that no carrier disputes that substantial notice is required to plan and market a major long-haul route such as U.S.-Brazil, nor that ample U.S.-Brazil frequencies are likely to be available beyond April 1, 2002, to allow Delta to continue its Atlanta-Rio de Janeiro service. In addition, Delta notes that none of the responding carriers indicated firm plans to use all of their U.S.-Brazil frequencies on April 1, 2002. In this regard, Delta maintains that American, United, and Continental have tacitly admitted that they do not intend to use their full allocation of U.S.-Brazil frequencies by April 1, 2002, given that these carriers continue to argue for a February 15 notice date and continuation of their blanket dormancy waivers beyond March 31. Whatever notification date the Department ultimately decides upon, Delta emphasizes that such date should also be the due date for any further U.S.-Brazil dormancy waiver requests.

With respect to United's assertion that certain of its Brazil frequencies are not subject to dormancy, Delta maintains that the Department has previously reallocated United's former Pan Am frequencies on a temporary basis, and cautioned United that it might do so on a permanent basis if United did not use them (*See* Order 95-3-52). Thus, Delta states that the Department should clarify that United is, in fact, required to inform the Department of its plans to use (or not use) its dormant Brazil frequencies on the specified notice date.

United responded to Delta's reply, stating that Delta's request for clarification regarding United's former Pan Am frequencies raises new and fundamental issues not previously addressed in the captioned dockets to this proceeding. Specifically, United maintains that Order 2001-11-15 deals only with frequency allocations that are subject to dormancy conditions. According to

United, there are other classes of frequencies, such as the majority of United's U.S.-Brazil holdings, which are "grandfather" allocations not subject to dormancy conditions. United argues that these grandfather allocations are subject to reallocation based on fundamentally different procedures than the procedures used for more recently granted frequency allocations, and that Order 2001-11-15 addressed only the latter type of frequency allocation. United states that the Department could not extend the reach of Order 2001-11-15 to include grandfather frequencies through the unjustified "clarification" sought by Delta. United argues that those carriers holding grandfather frequencies would first have to be given adequate notice and a opportunity to be heard on Delta's proposed amendments. Against this background, United urges the Department to reject Delta's request for clarification within the context of this proceeding.

Decision

We have decided to grant Delta's petition for reconsideration of Order 2001-11-15 and, upon reconsideration, affirm, with one modification, our decision in that order. Specifically, we affirm our decision to require all U.S. carriers holding blanket dormancy waivers to file a notice no later than February 15, 2002, in Docket OST-2001-11065, listing each limited-entry market subject to the blanket dormancy waiver in which it will not resume service beginning April 1, 2002. We have also decided to modify our decision in Order 2001-11-15 to require carriers holding U.S.-Brazil service frequencies to file any requests for further dormancy waivers no later than February 15, 2002, the same date that they are required to file notice of their U.S.-Brazil and other limited-entry service utilization.

By Order 2001-11-15, we decided to grant all U.S. carriers holding limited-entry route authority temporary blanket relief from the dormancy conditions attached to their authorities through March 31, 2002, subject to certain conditions specified in the order. In granting the waivers, we thoroughly evaluated the need to provide carriers added flexibility with regard to their limited-entry authorities, given marketplace uncertainties associated with the events of September 11, as well as the need to ensure that services in restricted markets are available to consumers to the full extent possible.

Having weighed and balanced these considerations, we decided, *inter alia*, that any limited-entry authorities not used for the applicable dormancy period through April 1, 2002, would be deemed dormant as of that date. We further stated that carriers were free to seek extensions of the dormancy waiver period beyond March 31 for specific services, provided that carriers demonstrate the need for such extensions and file their requests in a timely manner. In addition, we required that all U.S. carriers notify the Department, in writing, no later than February 15, 2002, of any affected limited-entry route rights that would not be used beginning April 1, 2002.

We have carefully reviewed Delta's petition and find that, with the exception of its request to establish a specific due date for further U.S.-Brazil dormancy waivers, Delta has not persuaded us to change our decision in this proceeding.

We continue to believe that our decision to establish February 15, 2002, as the notification date regarding dormant services is appropriate and strikes the proper balance between our dual objectives in awarding the blanket dormancy waivers. The record in this case shows that carriers

are continuing the process of adjusting their resumption of service in specific city-pair markets, including the Brazil market, thereby supporting our findings in Order 2001-11-15 regarding the need for route-planning flexibility. At the same time, while our decision may not provide Delta with the full advanced notification that it seeks, Delta still will have nearly 45 days' notice of any continued dormant Brazil frequencies. Moreover, Delta has acknowledged, and the other parties have not disagreed, that sufficient Brazil frequencies should be available to facilitate continuation of Delta's daily service in the Atlanta-Rio de Janeiro market.⁵ In these circumstances, we are unpersuaded that we should modify our decision in Order 2001-11-15 to require an earlier notification date with respect to dormant Brazil services. Nor are we persuaded that we should modify our decision and now grant Delta an indefinite temporary award of Brazil frequencies beyond March 31, 2002. Should frequencies remain dormant, Delta will be able to seek a timely extension of its frequency allocation.

However, we will modify Order 2001-11-15 to require that any requests to extend the dormancy waiver with respect to Brazil combination services be filed no later than February 15, 2002. Order 2001-11-15 expressed the Department's willingness to entertain dormancy waiver extensions in specific city-pair markets where carriers could demonstrate that such an extension would be warranted. We also made clear that such requests should be filed "in sufficient time for other carriers to comment and for the Department to make a decision in a timely manner with respect to disposition of the authority at issue."⁶

Given Delta's current temporary use of frequencies in the U.S.-Brazil market, we believe that establishing a specific due date for further dormancy waiver requests is justified. It is not unreasonable to expect that by February 15, carriers will have made plans to resume service in a particular market if they are going to do so. A specific date will also afford Delta more accurate information on which to make its plans with respect to its expanded Atlanta-Brazil services. Indeed, we note that with respect to its request here, Delta has stated: "Whatever date the Department establishes for carrier notices of U.S.-Brazil frequency utilization should also be the due date for any Brazil dormancy waiver requests."⁷

Finally, with respect to United's former Pan Am frequencies, Order 2001-11-15 applies only to limited-entry authorities that are subject to the Department's standard dormancy condition. The majority of United's allocated Brazil frequencies were, indeed, "grandfathered" and are not subject to our standard dormancy condition.

ACCORDINGLY,

1. We grant the petition of Delta Air Lines, Inc. for reconsideration of Order 2001-11-15;

⁵See, e.g., Continental's answer at 2-3 and the Georgia Civic Parties answer at 1.

⁶Order 2001-11-15 at 4.

⁷Delta reply at 3. We will not establish February 15, 2002, as the due date for further dormancy waiver requests in other limited-entry markets. As mentioned above, U.S.-Brazil is the only market with service currently provided under a temporary allocation of unused frequencies. Incumbent carriers in other limited-entry markets will have the added flexibility to request further dormancy waivers as needed, provided that they observe our guidance in Order 2001-11-15.

2. Upon reconsideration, we (a) affirm our decision in Order 2001-11-15 to require each U.S. carrier holding a blanket dormancy waiver to file a notice no later than February 15, 2002, in Docket OST-2001-11065 listing each limited-entry market in which it will not resume service beginning April 1, 2002; and (b) modify our order to establish February 15, 2002, as the due date for applying for any further waivers of the dormancy condition applicable to U.S.-Brazil frequencies;
3. We grant all requests for leave to file otherwise unauthorized documents in the captioned dockets;
4. To the extent not granted by this order, we deny all requests in Delta Air Lines, Inc.'s petition for reconsideration; and
5. We will serve this order on Delta Air Lines, Inc.; American Airlines, Inc.; United Air Lines, Inc.; Continental Airlines, Inc.; the Georgia and Atlanta Parties; the Ambassador of Brazil in Washington, DC; and the U.S. Department of State.

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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