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Order 2002-2-10

Served: February 12, 2002

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

Issued by the Department of Transportation
on the 12th day of February, 2002

45-day notice filed by

SPIRIT AIRLINES, INC.

Of intent to suspend service at Melbourne,
Florida under 49 U.S.C. § 41716(d)

Docket OST-2001-11113 -8

ORDER ALLOWING SUSPENSION OF SERVICE

SUMMARY

By this order we are allowing Spirit Airlines, Inc., to suspend its Melbourne-La Guardia service, effective September 17, 2001.

BACKGROUND

Section 41716(d) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, P.L. 106-181 (AIR-21) imposed a residual service obligation on carriers that had received La Guardia slot exemptions prior to the passage of AIR-21. Generally, a carrier providing service between a small hub or nonhub airport and La Guardia on or before April 5, 2000, as a result of having been granted La Guardia slot exemptions, may not suspend that service unless it first files notice under 49 U.S.C § 41719 and the Department determines that the carrier suffered excessive losses, including substantial losses on operations on that route during any three calendar quarters of the year immediately preceding submission of the notice. Section 41719 requires the carrier to provide at least 45-days' notice of intent to terminate, but allows for a number of exceptions permitting termination with lesser notice.

APPLICATION

On December 5, 2001, Spirit filed a document characterized as a Contingent Application for Waiver of Notice and Early Termination of Service for the Melbourne-La Guardia market. Prior to September 11, Spirit had operated a single daily round trip between La Guardia and Melbourne using B-737 aircraft.¹ As a result of the September 11 events, Spirit had been forced to suspend scheduled service between La Guardia Airport and Melbourne. On October 16, pursuant to Order 2001-9-20, Spirit filed notice that it had terminated Melbourne-La Guardia service effective September 17, 2001.

In its current filing, Spirit requests that the Department find that the events of September 11 constitute an exception under 49 U.S.C § 41719(b)(1) to the 45-day notice requirement. In the alternative, Spirit requests either a waiver of the section 41716(d) notice requirement as an exception under Section 41719(b)(1) or an exemption under Section 40109 from the 45-day notice requirement.²

Spirit also argues that Section 41719 provides exceptions to the filing requirement including a “sudden or unforeseen financial emergency.” Spirit contends that the events of September 11 constituted just such an emergency when Spirit terminated its La Guardia-Melbourne service. Spirit argues that the Department made such a finding when it permitted United Air Lines/Air Wisconsin to exit the O’Hare-Tri Cities market (Order 2001-10-6) and United Air Lines/Atlantic Coast Airlines to exit the O’Hare-Mobile market (Order 2001-10-7). Spirit alleges that the circumstances are analogous in the La Guardia-Melbourne market.

Furthermore, Spirit argues that the La Guardia-Melbourne market has never been profitable, and, in the current difficult economic environment, Spirit should not be forced to resume service when its own long-term viability may be placed into question.

Spirit also asserts that it meets the Section 41716(d) requirement that it suffered excessive losses, including substantial losses on the La Guardia-Melbourne service in any three calendar quarters of the year immediately preceding the date of submission of the notice. In this regard, Spirit contends that it lost nearly \$850,000 on the La Guardia-Melbourne market for the first three quarters of calendar 2001.

Finally, Spirit argues that Melbourne continues to receive one-stop and connecting service to La Guardia via Atlanta and that another carrier could serve the La Guardia-Melbourne market if it wanted to do so.³

¹ By Order 98-4-22, issued April 21, 1998, the Department granted four slot exemptions to Spirit to provide nonstop service between La Guardia and Melbourne.

² Spirit argues that with its October 16 notice, it has already substantially complied with the Section 41719 notice required by Section 41716(d).

³ The Melbourne Airport is classified as a nonhub by the Department of Transportation’s *Airport Activity Statistics of Certificated Route Air Carriers*, since it accounts for less than .05 percent of all U.S. enplanements.

RESPONSIVE PLEADINGS

On December 21, the Melbourne Airport Authority (Melbourne) filed an answer in opposition to Spirit's application. Melbourne argues that the Spirit request violates the requirements of Section 41716(d) and the intent of the Air Transportation Safety and System Stabilization Act (Stabilization Act). Melbourne argues that under the provisions of that Act, Spirit has received approximately \$19 million. Melbourne asserts that the Department recognized the importance of the La Guardia-Melbourne market when it first awarded slot exemptions to Spirit by Order 98-4-22 and that Spirit's unapproved termination of service, coupled with Continental's service termination at Melbourne, has left the community with a 43 percent reduction in service and no nonstop service in Melbourne's top-ranked O&D market, New York. Melbourne requests that the Department require that Spirit restore the nonstop La Guardia-Melbourne service.

Melbourne contends that Spirit must not only give proper notice of termination under Section 41719, the carrier must also demonstrate that it has suffered excessive losses and substantial losses on the La Guardia-Melbourne service for three quarters prior to submission or its notice to terminate service. Melbourne alleges that Spirit's sudden termination of service has denied the community the opportunity to evaluate Spirit's claim of losses in the La Guardia-Melbourne market and that Spirit should have followed the procedures used by United/Air Wisconsin and United/Atlantic Coast in their applications to suspend service at Tri-Cities and Mobile, respectively. Melbourne contends that in those cases the Department allowed early suspension of service because the affected communities did not oppose the request, and the proposed service deletions would not severely impact overall service to the communities. Melbourne alleges that its situation contrasts sharply with Tri Cities and Mobile in that it has lost 43 percent of its total available seats per month, all nonstop service to its most important market, New York, and two of its three carriers. Melbourne contends that the loss of Spirit's Reagan National and La Guardia-Melbourne services accounted for 36 percent of Melbourne's total available seats per month.

Finally, Melbourne argues that the Department should require Spirit to restore La Guardia-Melbourne service for policy reasons. Melbourne asserts that Section 105(a) of the Stabilization Act directs the Department to "take appropriate action to ensure that all communities that had scheduled air service before September 11, 2001, continue to receive adequate air transportation service..." Melbourne contends that to this end, the Department is authorized "to require an air carrier receiving direct financial assistance under this Act to maintain scheduled air service to any point served by that carrier before September 11, 2001." Melbourne asserts that the \$19 million in direct assistance received by Spirit is based on a formula that includes Spirit's pre-September 11 La Guardia-Melbourne service. Melbourne argues that, in effect, Spirit has been provided a level of financial assistance based on Spirit's operating its pre-September 11 La Guardia-Melbourne service and that Spirit should now be required to provide the La Guardia-Melbourne service commensurate with the level of financial assistance Spirit has received.

In a reply filed January 2, Spirit asserts that Melbourne has ignored the financial blows suffered by Spirit and the airline industry as a result of the September 11 events, that Spirit has not been “made whole” by the direct federal assistance given in the wake of September 11, and that it would be unfair to require Spirit to serve an unprofitable route, especially one where the outlook for profitability has diminished significantly since September 11.

Spirit argues that the Melbourne’s statutory interpretation would eliminate the effectiveness of the Section 41719 exception that excuses carriers from obtaining prior Department approval for service termination on a route if there is a sudden or unforeseen financial emergency. Spirit contends that if a carrier experiences a financial trauma as addressed by section 41719(b)(1), such as the September 11 events, the carrier is not compelled to file the Notice required by section 41716(d) before terminating service.

Regarding the profitability of the La Guardia-Melbourne service, Spirit asserts that it has met with Melbourne and has shared financial information regarding the La Guardia market. Spirit alleges that the more recent information filed in this docket confirms that the La Guardia-Melbourne financial performance had worsened prior to September 11. Spirit asserts that this information is available for Melbourne’s review and that its La Guardia-Melbourne losses are far in excess of the margins found by the Department to be excessive and substantial in other cases, such as the United/Air Wisconsin at Tri-Cities and United/Atlantic Coast at Mobile cases cited above. In particular, Spirit contends that it lost nearly \$850,000 on the La Guardia-Melbourne service during the first nine months of 2001 and that the La Guardia-Melbourne service was also unprofitable for calendar 2000.

Finally, Spirit argues that Melbourne has overstated its recent service loss. Spirit asserts that Continental Connection has announced its intention to resume some services to Melbourne, effective February 1, 2002.

DECISION

We have decided to grant Spirit’s request to suspend service.

Despite this action, we take note of and are concerned with the procedural shortcomings in Spirit’s notification to terminate its La Guardia-Melbourne service. Although on October 16, Spirit complied with the provisions of Department Order 2001-9-20 by notifying the Department of its La Guardia-Melbourne service termination of in the wake of September 11 events, that action did not relieve Spirit of its obligation to comply with the provisions of section 41716(d), especially the requirement that Spirit demonstrate operating losses for the La Guardia-Melbourne service. The notice requirements of Order 2001-9-20 were made in addition to, and not in place of, the section 41716(d) requirements. After October 16, when Spirit made its decision not to re-institute La Guardia-Melbourne service, the carrier should have immediately filed its section 41719

notice and demonstrated its operating losses as required by section 41716(d). In this regard, we view Spirit's December 5 filing as tardy.

As we have noted in previous orders,⁴ as a result of the September 11 events, the U.S. air transportation industry has experienced a critical contraction in traffic and revenues. As indicated in testimony leading up to the Stabilization Act and a study by the General Accounting Office (GAO), many air carriers suffered precipitous losses in traffic and revenue as consequences of the September 11 events.⁵ Spirit itself has stated that its uncompensated losses resulting from the September 11 attacks are in excess of \$10 million.⁶

Additionally, Spirit has reported losses of nearly \$850,000 during the first nine months of 2001 on the La Guardia-Melbourne route. Under these circumstances, we find that Spirit's losses may be deemed excessive and substantial. Spirit thereby has satisfied the requirements of section 41716(d) and may terminate service on the route. We also find that the financial losses sustained by Spirit directly attributable to the terrorist attacks of September 11 meet the requirements for an exception to the 45-day notice standard, as a "sudden and unforeseen financial emergency" under section 41719(b)(1). While we regret that this finding results in the loss of Melbourne's nonstop service to La Guardia, Melbourne will still receive access to the national air transportation system with nonstop service to Atlanta and Orlando.

We also disagree with Melbourne's contention that, because Spirit received compensation under the Stabilization Act that was computed based on a formula that included the available-seat-miles it operated in August 2001 between La Guardia and Melbourne, there is an obligation for it to continue operating that particular service. The statutory formula in the Stabilization Act was intended to provide a measure of comparative operations for purposes of allocating compensation payments. We see no indication in the language of that Act or its legislative history that that formula was somehow intended to supersede the Airline Deregulation Act and re-impose federal controls over air carrier rates, routes and service.

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

⁴ See Orders 2001-10-6 and 2001-10-7.

⁵ General Accounting Office, Memorandum to Congressional Requesters dated October 15, 2001, Subject: Financial Management: Assessment of the Airline Industry's Estimated Losses Arising From the Events of September 11, (GAO-02-133R). The GAO stated at page 2 "...that there is a reasonable basis to assume that the airline industry will incur losses resulting from the terrorist attacks of at least \$5 billion and possibly more through December 31, 2001." Further, "[o]ur high level analysis, [footnote omitted] using various revenue and cost savings assumptions, indicates possible losses in the range of \$6.5 billion to \$10.5 billion."

⁶ Reply of Spirit Airlines, Inc., at 2.

ACCORDINGLY,

1. We allow Spirit Airlines, Inc., to suspend its scheduled air service between New York (La Guardia Airport) and Melbourne, Florida, effective September 17, 2001; and
2. We will serve copies of this order on the mayor of Melbourne, Florida, the Melbourne International Airport, and Spirit Airlines, Inc.

By:

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

(SEAL)

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