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BEFORE THE
FEDERAL AVIATION ADMINISTRATION
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION

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DOCKET SECTION

In the Matter of)

Notice of Proposed Rulemaking)
No. 99-1)

High Density Airports; Allocation of Slots)

Docket No. FAA 1999-4971 -- 5

COMMENTS OF UNITED AIR LINES, INC.

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DATED: February 11, 1999

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COMMENTS OF UNITED AIR LINES, INC.

By Notice of Proposed Rulemaking 99-1, published in the Federal Register on January 12, 1999, the Federal Aviation Administration (“FAA”) requested comments on proposed amendments to Subparts K and S of Part 93 of the Federal Aviation Regulations (“FARs”), which govern the establishment and allocation of take-off and landing slots at High Density Airports. According to the Notice, the proposed amendments are intended to **codify** in Part 93 certain provisions of the Air Services Agreement entered into between the United States and Canada on February 24, 1995 (the “Agreement”) pertaining to slots.

Except to the extent noted below, United Air Lines, Inc. (“United”) generally supports the proposed amendments. As explained in the Notice, the purpose of the amendments is generally to reflect in the terms of Part 93 the provisions of the Agreement relating to Canadian carriers’ access to Chicago’s O’Hare International Airport and New York’s **LaGuardia** Airport, two of the four U.S. airports subject to Part 93. To comply

with the terms of the Agreement, the FAA proposes, among other things, (1) to convert certain slots allocated to Canadian carriers at O'Hare and LaGuardia Airports **from** international to domestic, and (2) to establish a regulatory base level of slots for Canadian carriers at those airports.'

To prevent the change in the classification of the Canadian carriers' international slots **from** giving those carriers **an unfair** advantage **over** their U.S.-flag competitors, the FAA also proposes to reclassify as domestic 35 international slots at O'Hare and 17 international slots at **LaGuardia** held by U.S. carriers. According to the Notice, these slots were designated as international slots in December of 1985, when the current buy/sell rule was initially adopted, to ensure U.S. carriers the same opportunities and protections as foreign carriers, "particularly with respect to U.S.-Canada operations." Notice at 2088.

In order to provide Canadian carriers the base level of slots provided for in the Agreement, the FM proposes to create 24 new slots at O'Hare for these carriers use.* According to the Notice, Canadian carriers have held 12 slots at O'Hare since the buy/sell rule was adopted in 1985. Notice at 2088. The Canadian carriers held an additional 14 slots at O'Hare when the Agreement was signed that the FAA obtained by withdrawing

¹ The FAA also proposes to change the deadline by which carriers must apply for international slots at airports subject to Part 93 to coincide with the deadlines established for the seasonal schedule coordination conferences conducted under the auspices of the International Air Transport Association. **See** Notice at 2089. United **fully** supports this proposed change.

² The Canadian carriers' guaranteed base level of slots at O'Hare is 36 slots for the Summer season and 32 slots for the Winter season.

domestic slots **from** U.S. carriers. Id. at 2088-2089. These slots were then allocated to the Canadian carriers for transborder service. In addition, in June 1995, the FAA allocated ten more slots to Canadian carriers. The 24 slots to be newly created consist of the 14 slots that have heretofore been withdrawn from domestic services plus the ten slots the FAA allocated to the Canadian carriers in June 1995. The 24 newly created slots, when added to the 12 O'Hare slots the Canadian carriers have held since 1985, establish the guaranteed base level of slots for Canadian carriers at O'Hare called for by the Agreement.

At LaGuardia, the Canadian carriers' guaranteed base level of slots set forth in the Agreement is 42. At the time the Agreement was signed, Canadian carriers held 28 slots at LaGuardia. In June 1995, the FAA allocated to Canadian carriers an additional 14 newly created LaGuardia slots. The FAA now proposes to add these 14 slots to the daily quota of slots for air carrier operations at LaGuardia set forth in §93.123.

Although the proposed amendments appear, on their face, to be consistent with the terms of the Agreement, the changes raise two issues United believes the FAA must address in the **final** rule to comply with the intent of Congress in imposing a cap on the number of domestic slots that can be withdrawn seasonally at O'Hare starting in 1993, and to ensure that the changes are fully consistent with the public interest. First, the FAA should **confirm** by rule that the 14 domestic slots it has been withdrawing seasonally from U.S. carriers at O'Hare to allocate to Canadian carriers for transborder services will be

permanently restored to their domestic holders now that the FAA will no longer need these slots to fund Canadian carrier operations. Second, the FAA should protect from **future** withdrawals the slots it intends to convert from international to domestic for U.S. carriers to the same extent the slots converted for Canadian carriers will be protected from withdrawal pursuant to proposed §93.223(c)(4). In further support of these modifications, United submits the following:

- I. The FAA's Proposal To Create New Slots At O'Hare In Order To Establish The Base Level Of Permanent Slots For Canadian Carriers Called For By The Agreement Is Consistent With Congressional Intent In Curtailing The FAA's Ability To Withdraw Slots From Domestic Service To Fund International Operations.

Starting in 1993, Congress has imposed a cap on the number of domestic slots the FAA can withdraw from an air carrier at O'Hare to allocate to other carriers to provide foreign air transportation. The cap is currently fixed at the number of slots that were withdrawn from a carrier as of October 31, 1993. The cap is now codified in the transportation code at 49 U.S.C. §41714(b)(2).

In imposing this cap, Congress had two objectives: To end prospectively the FAA's practice of withdrawing domestic slots from U.S. carriers at O'Hare on a seasonal basis to accommodate expanded international operations, but to avoid any disruption in service that might result if the FAA could not continue to withdraw those slots that were already

being used to provide foreign air transportation.³ In large measure, Congress decided to cap slot withdrawals because foreign countries neither guaranteed U.S. airlines access to slot-coordinated airports, nor sacrificed air service in domestic markets to permit an increase in international service. Indeed, the FAA itself has always recognized that the practice of withdrawing slots from an existing operation to accommodate a new international service is inconsistent with prevailing international practice. See, e.g., 51 Fed. Reg. 21708 (June 13, 1986) (“... throughout the rest of the world that requests by operators for additional slots, including schedule changes, will be accommodated if there are unutilized slots, but that existing operating rights will not be canceled.” Id.

Having decided to curtail the FAA’s authority to withdraw domestic slots at O’Hare in 1993, in 1994 Congress gave the Secretary explicit authority to grant exemptions from the High Density Rule (except at Washington’s Ronald Reagan National Airport) to a carrier interested in providing new foreign air transportation services if the carrier could show that the grant of an exemption would be consistent with the public interest. 49 U.S.C. §41714(b)(1). In so doing, Congress brought slot allocation

³ The intent of the cap was to level the playing field between domestic air carriers and foreign air carriers in light of the fact that the domestic carriers were being forced to surrender slots to foreign carriers at O’Hare while not receiving slots from those foreign carriers’ countries. Thus, the cap was imposed in order to establish “reciprocity and fairness” in the process of allocating slots for foreign air transportation. See 139 Cong. Rec. H6908-04 and H6946, H6947 (September 23, 1993).

procedures at O'Hare more in line with those prevailing in other countries. Where unused slots are available, the FAA can allocate those slots to carriers upon request. However, where unused slots are not available, the FM can no longer force cancellation of an existing domestic service to grant requests for additional international slots. Instead, the Secretary is authorized to grant such requests by exemption if doing so is consistent with the public interest.

The combined effect of these two provisions essentially is to **nullify** the FAA's authority to withdraw domestic slots at O'Hare pursuant to §93.217(a)(6) of the FARs to allocate to carriers to provide foreign air transportation, except for the number of slots being withdrawn as of October 31, 1993, and to substitute an exemption process. As a result, carriers that were not providing international service at O'Hare as of October 31, 1993, or that want to expand their international operations beyond what they were operating as of that date, must now apply to the Secretary for an exemption, rather than look to the FAA to make the necessary slots available by withdrawing domestic slots **from** U.S. carriers.

II The FAA's Proposal To Cease Slot Withdrawals Is Not In Itself Sufficient To Conform With The Intent Of Congress In Curtailing Slot Withdrawals.

The amendments the FAA has proposed to Part 93 are not, however, fully consistent with the limitations Congress imposed in 1993 on the FAA's ability to withdraw domestic slots at O'Hare for allocation to carriers to provide international

services. At the time that cap was imposed, the FAA was withdrawing 14 domestic slots seasonally at O'Hare for allocation to Canadian carriers to provide transborder services. See Notice at 2088-2089. Although the legislation permitted the FAA to continue to withdraw these 14 slots, it precluded the agency **from** withdrawing additional slots to allocate to Canadian or other carriers for new international services.

In order to comply fully with the terms of the Agreement, the FAA has concluded that it should not continue to withdraw these 14 domestic slots on a seasonal basis for allocation to Canadian carriers. The Agreement clearly provides that Canadian carriers are to receive slots that can be bought, sold, leased, or traded on the same terms as domestic slots. As the FAA concedes in the Notice, there is no regulatory process in place that permits the permanent withdrawal of domestic slots for allocation to Canadian carriers. Therefore, to meet the obligations of the United States under the Agreement, the FAA has proposed to create 14 new slots at O'Hare for allocation to Canadian carriers, and to cease withdrawing domestic slots for those carriers. The FAA states in the Notice that this approach should have two desired benefits. First, it addresses the Agreement's requirements. Second, it avoids a permanent withdrawal of domestic slots to benefit foreign air carriers. *Id.* at 2089.

The FAA fails to explain in the Notice, however, what it intends to do with the 14 domestic slots it has been withdrawing seasonally for allocation to the Canadian carriers. Two outcomes are possible. The FAA can reduce by 14 the number of domestic slots it

withdraws at O'Hare each traffic season for allocation to international service, or it can continue withdrawing that number of slots and allocate them for services that were not being offered at O'Hare when Congress capped the number of domestic slots it could withdraw.

The second alternative -- continuing to withdraw these 14 domestic slots to allocate for other international services -- would be inconsistent with the Congressional decision to cap domestic slot withdrawals. As noted above, the 1993 legislation that capped the FAA's authority to withdraw domestic slots was structured to permit continued withdrawals only to the extent necessary to avoid a serious disruption in existing services. It was clearly not intended by Congress to permit slots to be withdrawn by the FAA so that new international services not available as of October 31, 1993, could be instituted at O'Hare. That, however, is precisely what would happen if the FAA does not return the slots on a permanent basis to their original holders.

Moreover, continuing to withdraw the slots would produce anomalous results. To the extent the FAA receives new requests for international slots that exceed the seven roundtrips per day that can be operated with the slots heretofore withdrawn for use by Canadian carriers, it has no procedure in place to pick and choose which seven requests to grant. The Secretary, on the other hand, is not similarly limited as to the number of exemptions that can be granted. The end result is that unless the FM restores these 14 slots to their holders, the agency will inevitably be forced into arbitrary decision making

as to how to allocate these slots to foreign carriers, raising serious discrimination concerns. These concerns would be wholly avoided, however, by **returning** the 14 slots to their holders, and protecting them from future withdrawals, leaving all requests for new slots to be decided by the Secretary under the exemption procedures of §4 17 14(b) of the statute.

Failing to **return** the slots would also be inconsistent with the FAA's conclusion that one of the benefits of creating new slots at O'Hare to meet the obligations of the United States under the Agreement is that it avoids the permanent withdrawal of domestic slots to the benefit of foreign airlines. If the FM nonetheless continues withdrawing these 14 slots even though they are no longer to be allocated to Canadian carriers, it will in effect be withdrawing these domestic slots on a permanent basis to benefit foreign airlines, a result the FAA has already found is not in the public interest.

Permanently restoring these 14 slots to their domestic holders would also serve the public interest better than would the continued withdrawal of the slots. These slots are withdrawn primarily, if not exclusively, from American and United, which operate major hub-and-spoke networks at O'Hare. Restoring these slots to American and United will enable these carriers to add new service to their O'Hare networks, offering additional service options to passengers in thousand of city pairs, and increased domestic and international competition both in local O'Hare city pairs and in city pairs where United and American compete with other network carriers. These new services, and the increased

competition they make possible, will benefit consumers and enhance the competitiveness of the U.S. air transport industry. And, these consumer and competition benefits will be gamed without any adverse effect on the service other carriers now offer at O'Hare.⁴

III. Converted International Slots Of U.S. Carriers Should Be Protected From Withdrawal To The Same Extent As Are The Canadian Carriers' Converted Slots.

In order to comply with the terms of the Agreement, the FM is proposing to convert the 36 international slots Canadian carriers hold at O'Hare and the 42 international slots they hold at **LaGuardia** to domestic slots. Among other things, this will enable the carriers to buy, sell, trade, or lease these slots as provided for in the Agreement. This would also make the slots subject to the minimum use requirements of Part 93, which is consistent with the Agreement. However, the Agreement further provides that the slots which constitute the Canadian carriers' base level of slots at O'Hare and **LaGuardia** may not be withdrawn by the FM for the purpose of providing a U.S. or foreign carrier slots to provide international services, or to provide a slot for a new entrant. Notice at 2087. To incorporate in Part 93 this limitation on the FM's authority to withdraw these base level slots, the FM proposes to add a new §93.223(c)(4) to the Part. By its terms, this subsection precludes the FM from withdrawing from Canadian carriers for international or new entrant operations slots comprising the Canadian carriers' guaranteed slot base.

⁴ United has attached hereto as Appendix A a suggested amendment to §93.223 that would confirm the permanent return of these 14 domestic slots to their holders as proposed herein.

The FAA concludes in the Notice that the classification of international slots held by Canadian carriers as domestic may give these carriers an unfair advantage over U.S. carriers. Id. at 2088. According to the Notice, this results from the fact the Canadian carriers will be able to buy, sell or lease the slots they use for transborder service, while U.S. carriers would still have to use international slots to provide transborder service. International slots cannot be bought, sold or leased. Id. On the other hand, U.S. carriers could continue to request international slots to operate transborder service pursuant to §93.217(a)(1), while Canadian carriers would have to use the procedures applicable to domestic slots, a difference the FAA believes Canadian carriers may perceive as conferring an unfair benefit on their U.S. competitors. Id.

To avoid this disparate treatment, the FAA proposes to treat carriers of both countries in the same manner for purpose of slot allocations for transborder services. To accomplish this result, the FAA proposes to convert to domestic the international slots U.S. carriers have been using at O'Hare and LaGuardia to operate transborder service since 1985 when the buy/sell rule was adopted. Id. A total of 35 slots at O'Hare and 17 at LaGuardia would be affected.

Although United supports this change, it notes that under the specific rules the FAA has proposed, Canadian carriers would still have a substantial unfair advantage over their U.S. competitors. The reason is that the international slots allocated to Canadian carriers that are being converted to domestic to form these carriers' guaranteed slot base would be

exempt from withdrawal, while U.S. carriers' international slots converted to domestic would not be comparably protected. If the FAA's objective is, as stated in the Notice, to provide "similar treatment" for those international slots both groups of carriers used historically to operate transborder service, it must exempt from withdrawal the international slots of U.S. carriers being converted to domestic to the same extent the Canadian carriers' comparable slots are exempt. Otherwise, U.S. carriers could actually be worse off with the conversion than they were before. This can easily be remedied to ensure both groups of carriers equal treatment by adding a new subsection (5) to §93.223 reading as follows:

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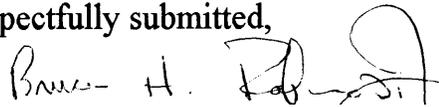
(5) No slot determined by the Chief Counsel of the FAA to be a domestic slot pursuant to §93.218(a) shall be withdrawn for use for international operations or for new entrants.

IV. Conclusion

The amendments the FAA has proposed to Part 93 to reflect provisions of the Air Services Agreement the U.S. and Canada signed in February of 1995 need to be modified in two respects to be consistent with the limitations Congress has imposed on the FAA's authority to withdraw domestic slots at O'Hare from U.S. carriers, to ensure that the equitable intent of the Agreement to treat carriers of both countries in the same manner for purposes of slot allocations is achieved, and to be consistent with the public interest.

First, the FAA should revise Part 93 to provide that it will no longer withdraw from U.S. carriers the 14 domestic slots it has been withdrawing seasonally from them at Chicago's O'Hare Airport to allocate to Canadian carriers to provide transborder service. Second, the rules proposed should be modified to protect from future withdrawals the slots the FAA is proposing to convert from international to domestic for U.S. carriers to the same extent it has proposed to protect from withdrawal the slots converted for Canadian carriers pursuant to §93.223(c)(4).

Respectfully submitted,



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DATED: February 11, 1999

APPENDIX A

1. Amend §93.223 by adding a new paragraph (g) to read as follows:

993.223 Slot Withdrawal

* * * * *

- (g) Notwithstanding the provisions of §93.217(a)(6) hereof, no domestic slot will be withdrawn **from** an air carrier at O'Hare Airport in order to allocate that slot to a carrier to provide foreign air transportation if such withdrawal would result in more slots being withdrawn from such air carrier than were withdrawn from the carrier as of October 31, 1993. In determining the number of domestic slots that were withdrawn from an air carrier as of October 31, 1993, the FAA will not include slots that were withdrawn to be allocated to a Canadian carrier to operate service between O'Hare and an airport in Canada.