



**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 May, 2004**

Applications of

**AMERICAN AIRLINES, INC. and
AMERICAN EAGLE AIRLINES, INC.**

For an exemption from 14 CFR 93 pursuant to 49
U.S.C. § 41714(d) (DCA Slot Slides)

Served: May 4, 2004

Docket OST-2003-16349

ORDER

SUMMARY

By this Order, the Department denies the request of American Airlines, Inc. and American Eagle Airlines, Inc. (together referred to as “American”) to retime various slots at Ronald Reagan Washington National Airport (“DCA”).

BACKGROUND

Applicable Law

Ten years ago, in the process of reauthorizing aviation programs, Congress expressed concern about the impact of slot restrictions on competition, congestion, and open access at high-density airports.¹ When it passed the Federal Aviation Administration Authorization Act of 1994, Congress made several calculated changes to the slot regime, including special rules for DCA.² Among those special rules was a new authorization for the Department to grant “slot slides,” *i.e.*, to permit carriers serving DCA to move their slot times from one hour to another on a limited basis, if warranted by exceptional circumstances. This authority has been codified at 49 U.S.C. § 41714(d).

Under § 41714(d), the Department may, under circumstances that it finds to be exceptional, grant exemptions to an air carrier that holds slots at DCA to enable it to slide the operating times to

¹H. REP. NO. 103-240, at Section IX (1993); 140 CONG. REC. H7117 (daily ed. Aug. 8, 1994) (statement of Rep. William Clinger, Ranking Member of the House Public Works & Transportation Committee).

²Federal Aviation Administration Authorization Act, Pub. L. No. 103-305. *See* 49 U.S.C. § 41714.

different times. In addition to the “exceptional circumstances” requirement, no exemption may be granted if it would (1) result in an increase in the total number of slots per day at DCA; (2) result in an increase in the total number of slots at DCA from the hours of 0700 to 2159; (3) increase the number of operations at DCA in any one-hour period by more than two operations; (4) result in the withdrawal or reduction of slots operated by an air carrier; or (5) result in a net increase in noise impact on surrounding communities resulting from changes in timing of the exempted operations.

In determining what circumstances qualify as “exceptional,” the Department must be guided by the usual meaning of that term.³ “Exceptional” means “forming an exception; rare...”⁴ In order for circumstances to be “exceptional” according to the usual meaning of the term, we must find that they are ones not generally encountered, ones clearly different from most other circumstances. During deliberation of § 41714(d), Congress discussed its intent behind the provision. The Conference Committee for the 1994 legislation creating slides reported that:

The Managers believe this [section on slot slides] should be used in limited circumstances to meet the needs of carriers holding a limited number of slots. Carriers holding numerous slots should be able to adjust their schedules, and thus the flexibility permitted by this section should not be available to such carriers.⁵

A prior Senate colloquy offers, as an example of exceptional circumstances, the situation of a new entrant carrier with a limited number of slots who, with an ability to slide two slots, could bring service to a community currently lacking nonstop service to DCA and stimulate job growth there.⁶

Accordingly, the usual meaning of “exceptional circumstances,” as informed by the legislative history, would suggest that there is a very high bar to finding such circumstances exist where a carrier has sufficient slot holdings to be able to adjust its schedules and operations. It further suggests that even where a carrier does not have sufficient slot holdings, the Department must consider the totality of the circumstances, with one relevant factor being the utility of the slots it holds.

³ See, e.g. *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

⁴ Webster's New Collegiate Dictionary, 1976.

⁵ Joint Explanatory Statement, H. REP. No. 103-677 at 53 (1994).

⁶ Mr. EXON: “[T]he Secretary can use this power only in circumstances determined by the Secretary to be exceptional. Omaha, NE, for example, faces such exceptional circumstances. Presently, Omaha has no nonstop air service to National Airport. If two slots could be slid to accommodate Omaha's need, a significant package of air service would become secure for the people of Nebraska and western Iowa not only to National Airport but to points west and southeast of Omaha. This package of air service, which hinges on timely access to National Airport, would also be a significant factor in Omaha's economic development. In addition, exceptional circumstances exist in Omaha's case because sliding a slot would give a newer carrier with a limited number of slots an opportunity to create jobs in Omaha and Washington and provide new, needed and convenient service to the Nation's Capital from Omaha....”

Mr. FORD: “I appreciate the Senator's explanation and concur in his interpretation of that section....”
140 CONG. REC. S6997 (daily ed. June 16, 1994) (colloquy between Sen. Wendell Ford, Sen. Charles Robb and Sen. James Exon).

Prior Orders

The Department's application of § 41714(d) has sought to reflect statutory language and legislative intent. In Order 2003-9-30 (Sept. 30, 2003), the Department granted exemptions for slides to four new entrant commuter carriers (ATA Airlines, Spirit Airlines, Colgan Air, and Chautauqua Airlines). All four carriers had received slots in the 2100 hour in a Federal Aviation Administration (FAA) lottery held on August 12, 2003. The carriers then applied to the Department under § 41714(d) for slides. In granting those slides, the Department emphasized that exceptional circumstances existed because the four carriers had limited slot holdings at DCA and had received slots that, under the circumstances, had little utility, thus frustrating the very purpose of the slot lottery. The order noted that providing "better connections at alternative hubs [is also] a factor indicating exceptional circumstances."⁷

Prior orders show the same treatment of § 41714(d). The Department has granted slide requests to new entrants or limited slot holders that demonstrated specific needs to slide slots to ensure their utility, with relevant factors being whether they facilitate connecting operations (Order 94-9-49 (Sept. 30, 1994)), improve service and strengthen competition (Order 99-11-4 (Nov. 4, 1999) and Order 2000-2-26, affirming Order 99-11-4 (Feb. 22, 2000)), and meet increasing demand in a market (Order 2000-7-20 (July 14, 2000)), or inaugurate service in new markets (Order 2000-2-33 (Feb. 29, 2000)). *See also* Order 2000-10-27 (Oct. 26, 2000); Order 2000-10-32 (Oct. 27, 2000); Order 2001-3-17 (Mar. 15, 2001); Order 2001-3-30 (Mar. 29, 2001); Order 2002-9-16 (Sept. 16, 2002).

American's Application

On October 17, 2003, American applied to the Department for three slides at DCA. American's request to slide operations to the 0900, 1000, and 1700 hours addresses all statutory criteria and claims that exceptional circumstances exist.⁸ American states that its request is "fully consistent" with § 41714(d) and Order 2003-9-30 (Sept. 30, 2003). In support of its request, American pleads that Department approval (1) will not increase the total number of operations per day at DCA; (2) will not increase the number of slots allocated between the hours of 0700-2159; (3) will not increase the number of operations at DCA by more than two in any one-hour period; (4) will not result in the withdrawal or reduction of slots operated by any other carriers; and (5) will not increase the noise impact on the surrounding community.

To satisfy the exceptional circumstances test, American pleads that Department approval will allow it to operate a more effective pattern of service and to maximize connecting opportunities. Specifically, with the three proposed slides, American could provide

⁷ Order 2003-9-30 at 6 (Sept. 30, 2003).

⁸ American proposes not only a slot slide, but also a "slot swap," whereby it obtains an additional peak 1700 slot under the guise of a slide. Application of American at 1. The Department understands that American has targeted the 1900 hour. However, since there is no more availability in that hour (the Department is prohibited from an increase of more than two operations per hour under § 41714(d)(1)(C)), American applies for the available 1700 hour, and swaps one of its current 1900 hour flights to achieve the desired result. Under the route-specific conditions included in Order 2003-9-30 and previous slide orders, American's plan would be prohibited. *See, e.g.,* Order 2003-9-30 at 7 (Sept. 30, 2003).

“better connections”⁹ and help meet demand in respective markets. American states that (1) moving the Miami to DCA operation will allow a later departure from Miami and provide additional connections to the Nation’s capital for northbound travelers; (2) moving the DCA to Miami operation will enable American to re-time other DCA flights thereby freeing up slots to give Washington area travelers the convenience of additional southbound connections to eight important Latin American destinations; and (3) moving the DCA to Raleigh/Durham operation will enhance the feasibility of same-day business travel.

Responsive Pleadings

United Air Lines, Inc. (“United”) filed an answer on November 3, 2003. United states that, like American, it is constrained by less than optimal slots that complicate connections. If American’s request is granted, United asserts that it will also request slides to remedy its scheduling concerns. United also asks the Department to (1) clarify how it scores slot slides against the baseline in § 41714(d)(1)(C) (prohibiting an increase of more than two operations per hour); and (2) create an efficient, accessible, up-to-date process of awarding slot slides.

Delta Air Lines, Inc., Comair, Inc. and Atlantic Southeast Airlines, Inc. (together referred to as “Delta”) filed an answer on November 3, 2003. While Delta believes that incumbent slot holders should not be prevented from receiving slides, it states that American’s request goes well beyond the Department’s narrowly tailored exceptional circumstances test from past orders. Delta states that American has failed to make the requisite showing of exceptional circumstances. To support its statement, Delta points to the flexibility that American has within its existing slot holdings. According to Delta, American is making a backdoor attempt to move its operations during slot-controlled hours, which the Department rejected in Order 2003-9-30. Delta indicates that fairness and due process prohibit the Department from granting American’s request without instituting a new proceeding open to all incumbent slot holders.

Midwest Airlines, Inc. (“Midwest”) filed an answer on November 4, 2003.¹⁰ Midwest opposes American’s request on the grounds that American fails to meet the exceptional circumstances test. Midwest claims that American and its wholly owned subsidiary, American Eagle, hold over 120 slots, significantly more than carriers such as Midwest. Midwest states that slides have only been granted to limited incumbent carriers, noting that American fails to cite any authority to the contrary. Midwest states that the Department should expect applicants for slides to exercise some degree of self-help prior to applying to the Department for relief. Midwest asks the Department, as a matter of policy, to reserve the finite amount of slides under § 41714(d) for carriers like Midwest that have a “far greater practical need.”

⁹ In citing previous orders, American fails to include the Department’s complete language and rationale. The Department has found that exceptional circumstances exist in part where a carrier provides “better connections *at alternative hubs*” (emphasis added), not simply better connections. See Order 2003-9-30 at 6 (Sept. 30, 2003); Order 2000-10-32 at 3 (Oct. 27, 2000).

¹⁰ Because its answer was not timely filed under 14 C.F.R. § 302.11, Midwest sought leave from the Department to file one day out of time. In the interest of a full record on this proceeding, the Department grants Midwest’s request.

DECISION

We have decided to deny American's request. In making this decision, we have carefully reviewed the application, responsive pleadings, the language of the applicable law, and expressed legislative intent. Nothing we have found in our review indicates that American, as an incumbent with numerous DCA slots, satisfies the very high bar required to show exceptional circumstances. We conclude that the circumstances surrounding American's application are not exceptional. Rather, they are typical of the circumstances attendant to an incumbent slot holder operating within a slot-controlled, high-density regime at DCA. *Cf.* Answer of United at ¶ 2.

American holds 125 slots at DCA,¹¹ which gives it substantial flexibility to make schedule adjustments with existing slot holdings, and to engage in other "stopgap measures," such as trading, that accomplish the same objective as slides. *See* Answer of United at ¶2. American does not address these issues in its application. *See* Answer of Midwest at ¶2. Further, American has not shown specific practical or commercial circumstances that distinguish its position from other major or limited slot holders. *See* Answer of Delta at 2. While we recognize the limitations of operating in a slot-controlled, high-density environment such as DCA, and while we also recognize that American could improve its own operations by sliding slots, the Department must tailor its limited relief according to the confines of § 41714(d).

Under § 41714(d), the Department may only grant a request for slides where it determines that exceptional circumstances exist *and* where it finds that the applicant meets statutory criteria limiting the availability of slides. While American makes a showing on each of the statutory factors in § 41714(d), the circumstances surrounding its application are not exceptional, as discussed above. Thus, the Department need not consider American's contentions that the Department approval will (1) not result in an increase in the total number of DCA slots; (2) not result in an increase in the total number of DCA slots between the hours of 0700 and 2159; (3) not increase the number of DCA operations in any one-hour period by more than two operations; (4) not result in withdrawal or reduction of slots operated by a carrier; and (5) not result in a net increase in noise on surrounding communities stemming from changes in operating times granted under § 41714(d).¹²

While American argues that its request is "fully consistent" with Order 2003-9-30 (Sept. 30, 2003), we disagree. In Order 2003-9-30, the Department found that exceptional circumstances existed for four limited incumbent carriers because their limited slot holdings did not permit them to effectively operate the 2100 hour slots awarded by the FAA lottery without slides. The carriers, in the Department's view, lacked the flexibility to provide effective service, including better connections at alternative hubs, rendering its slots of little commercial utility.¹³ American has made no such claims in this proceeding.¹⁴

¹¹ American Airlines, Inc. and American Eagle Airlines, Inc. are both held by AMR Corporation, and are therefore considered by the Department to be a single entity for slot holding purposes.

¹² Application of American at 3-5; § 41714(d)(1)(A)-(E).

¹³ Order 2003-9-30 at 6 (Sept. 30, 2003).

¹⁴ We agree with Delta and Midwest that American does not meet the exceptional circumstances test. Since we are not granting American's request, Delta's request for a new proceeding open to all incumbent carriers is moot.

In a related matter, United asks the Department to clarify how it scores slot slides against the baseline in § 41714(d)(1)(C). In other words, if the Department grants a slide from 1000 to 1100, does that free up a slot in the former hour (*i.e.*, 1000)? Having considered that question carefully, the Department answers in the negative. The Department will not backfill slot slides. When the Department has granted exemptions for slides in the past, it has typically imposed route-specific conditions on the requesting carriers and reserved the right to retake the slot times.¹⁵ Backfilling the slot slides subject to these conditions and reservations will create an uncertain regime whereby one carrier's action or inaction may result in a domino effect leading to the withdrawal of slides on short notice.¹⁶

In conclusion, the Department denies American's request for slot slides on the ground that exceptional circumstances do not exist.

This Order is issued under authority delegated in 49 C.F.R. § 1.56(a).

ACCORDINGLY,

1. American's request for slot slides under 49 U.S.C. § 41714(d), submitted on October 17, 2003, is denied;
2. This docket will remain open until further order of the Department; and
3. We will serve this order on all interested parties and the Federal Aviation Administration Slot Administration Office.

By:

KARAN K. BHATIA
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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<http://dms.dot.gov/>

¹⁵ See Order 2003-9-30 at 7, ordering ¶¶ 5-9 (Sept. 30, 2003).

¹⁶ United also expresses a concern that the Department should create a clearinghouse or process for determining the availability of slots and the Department's ground rules. The FAA Slot Administration Office holds all records of slot availability. The Department declines to make any specific changes at this time.