

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

In the matter of

THE WENDELL H. FORD AVIATION
INVESTMENT AND REFORM ACT FOR
THE 21st CENTURY

For exemptions from 14 C.F.R. Part 93,
under 49 U.S.C. § 41717(c)

Docket OST-2000-7180

MOTION FOR LEAVE TO FILE AND
REPLY OF NATIONAL AIRLINES, INC.

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Dated: May 9, 2000

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I. Motion for Leave to File

National Airlines, Inc. ("National") hereby requests leave to file the following reply to the "Motion for Leave to File and Response of America West Airlines, Inc.," filed in this proceeding on April 21, 2000 ("America West Response"). In support of this motion for leave to file, National submits that: (1) acceptance of this reply will help to ensure the accuracy and completeness of the record before the Department; (2) this reply is being filed before the Department has taken action on America West's motion for leave to file or on the pending applications for slot exemptions at Chicago O'Hare International

Airport (“O’Hare”); and (3) no party to this proceeding will be prejudiced by granting this request for leave to file. 1/

II. National’s Reply to the Response Filed by America West

Notwithstanding America West’s protestations, National has clearly demonstrated that its nonstop O’Hare-Las Vegas service is in the public interest 2/ and that its service satisfies the statutory criteria for relief from the high density rule at O’Hare under section 231(d) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR-21”).

1/ America West contends that National’s “Notice of Continuing Interest and Supplement” was an unauthorized filing. America West Response at 1. National notes in this regard that the Department has expressly stated that all parties with pending O’Hare slot exemption applications “should amend their applications to address the criteria mandated by the AIR 21 Act.” See Notice of Establishment of Slot Exemption Proceedings under 49 U.S.C. §§ 41716, 41717, and 41718, issued by the Department on April 14, 2000, at 3. This is precisely what National did. Moreover, the Department has already indicated its acceptance of National’s “Notice of Continuing Interest and Supplement” by identifying National’s pending O’Hare slot application as an application that has “been appropriately amended” to “specifically address [the AIR-21] criteria for the grant of such awards.” Id. at 2.

2/ See DOT Order 99-7-17 at 7 (finding that National’s O’Hare-Las Vegas proposal even satisfied the more exacting “exceptional circumstances” test that applied under prior law).

The arguments put forth by America West in its response do not detract from the conclusion that National's application for O'Hare slot exemptions should be favored over that of America West.

A. America West Relies on Spurious Arguments to Support Its Slot Request

The Department should give no decisional weight to several arguments asserted by America West which are obviously flawed.

1. First, America West argues that National should be denied slot exemptions at O'Hare because National could provide service between Las Vegas and Midway Airport. America West Response at 3. This point is entitled to no consideration in distinguishing between the competitive applications in this proceeding because every carrier, including America West, that has applied for the new O'Hare slot exemptions presumably could operate from Midway if it wished.

Indeed, America West's argument is disingenuous because, as America West itself has recognized, O'Hare and Midway represent two very distinct markets. In one pleading, for example, America West stated its case as follows:

"United, TWA and US Airways, all of which operate substantial service from one or both airports make it clear they are quite happy to send new entrant carriers to Midway and Newark and retain the slot controlled airports as the domain of the pre-1978 incumbents. However, it is apparent that these non-controlled airports are not substitutes for O'Hare and LaGuardia.

“Moreover, if the airports were economic substitutes it would not be virtually impossible for new entrants to obtain slots because there would be a more even distribution of traffic. Indeed, United’s exhortation to America West to increase service to Midway as the ‘alternative’ Chicago airport, is obviously disingenuous given its willingness to spend \$300 million on O’Hare slots rather than operate flights from Midway.”

See, e.g., Consolidated Reply of America West Airlines, filed in Docket OST-97-2970 on October 27, 1997, at 8, 10 (emphasis added). Moreover, the Department has agreed with America West’s contention that the two markets are distinct. 3/

2. America West next argues that National should be denied slot exemptions at O’Hare now because National can start service later when the high density rule at O’Hare is phased out. America West Response at 3. Again, this point provides absolutely no basis for the Department to grant or deny O’Hare slot exemptions to any applicant because each applicant, including American West, obviously will be able to provide service at O’Hare without having slots when the high density rule is phased out.

3/ See, e.g., Applications of Trans States Airlines, Inc., et al., Order 98-4-21 at 14 (“United and TWA further argue that O’Hare and Midway both serve the same relevant market. We disagree on both counts.”).

3. America West also makes two fairness arguments which lack substance. The carrier first asserts that it would be unfair to give National O'Hare slot exemptions before America West because, to put it bluntly, America West wanted them first. America West Response at 3. In response, National notes that how long a carrier has wanted to offer a particular service is not a standard for the award of slot exemptions at O'Hare under AIR-21 or the Department's implementing Order 2000-4-15.

4. America West also contends that it would be unfair to give O'Hare slot exemptions to National instead of America West because the latter has a "strong commitment to serving Las Vegas." America West Response at 3-4. However, while National's dedication to developing its Las Vegas hub is unsurpassed, America West's professed desire to expand its Las Vegas hub is questionable. According to data reported to the Department, America West has generally reduced service to its Las Vegas hub over the last five years ending in 1999. During that period, America West's daily departures at Las Vegas decreased by 7.6% from 7,680 to 7,096. Meanwhile, America West's departures at its Phoenix hub steadily increased by 45.7% from 13,313 to 19,399.

B. National Accurately Referred to America West as an
“Incumbent” in the O’Hare-Las Vegas Market

In its Response, America West complains that National called it an “incumbent” in the O’Hare-Las Vegas market. America West Response at 2-3. Evidently, America West attaches more significance to National’s use of the word “incumbent” than National had intended in its pleading.

National simply used the word “incumbent” to identify America West as a carrier that is currently serving the O’Hare-Las Vegas market. Since America West’s current participation in the market is indisputable, National’s generic use of the word “incumbent” cannot be termed “misleading.”

However, America West protests too much. While America West claims in its Response and elsewhere 4/ that it is a “limited incumbent” for purposes of O’Hare slot award eligibility, the facts and applicable law prove otherwise. As shown below, America West’s position: (1) is inconsistent with the plain language and purpose of AIR-21, and (2) could produce absurd results.

4/ See Answer of America West Airlines filed in Dockets OST-00-7180 & OST-00-7134 on May 3, 2000.

1. Under the Plain Language of AIR-21, America West Can Not Qualify as a “New Entrant” or “Limited Incumbent” at O’Hare

Under AIR-21, a carrier qualifies for O’Hare slot exemptions only if it is a “new entrant air carrier” or “limited incumbent air carrier.” The term “new entrant air carrier” is defined, in relevant part, to mean “an air carrier that does not hold a slot at the airport concerned.” 49 U.S.C. § 41714(h)(3). The term “limited incumbent air carrier” is defined, in relevant part, to mean an air carrier that holds or operates fewer than 20 domestic air carrier slots or commuter slots, in any combination, at a particular airport. 49 U.S.C. § 41714(h)(5) (defining the term with reference to 14 C.F.R. Part 93); 14 C.F.R. § 93.213(a)(5).

Importantly, section 231(a)(3) of AIR-21 also provides that an air carrier does not qualify as a new entrant or limited incumbent air carrier at an airport if the total number of slots and slot exemptions held by the carrier and a code-share partner exceed 20 slots and slot exemptions at that airport. See AIR-21 § 231(a)(3) (codified at 49 U.S.C. § 41714(k)).

America West claims that this aggregating rule does not apply to it, in spite of its code-share agreement with Continental Air Lines and their

combined holdings of more than 20 slots at O'Hare, because the two carriers do not operate code-share flights at O'Hare. ^{5/} However, this interpretation is inconsistent with the plain language of section 231(a)(3), which reads as follows.

“For purposes of this section [41714] and sections 41716, 41717 [pertaining to O'Hare slot exemptions], and 41718, an air carrier that operates under the same designator code, or has or enters into a code-share agreement, with any other air carrier shall not qualify for a slot or slot exemption as a new entrant or limited incumbent air carrier at an airport if the total number of slots and slot exemptions held by the 2 carriers at the airport exceed 20 slots and slot exemptions.”

AIR-21 § 231(a)(3) (codified at 49 U.S.C. § 41714(k)) (emphasis added).

The first underlined portion of the statute describes the types of air carriers that are subject to the aggregating rule, i.e., any air carrier that operates under the same designator code with another carrier or that has or enters into a code-sharing agreement with another carrier. The second two underlined portions identify the airport where the carrier's limited incumbent status is to be measured.

^{5/} See Answer of America West Airlines filed in Dockets OST-00-7180 & OST-00-7134 on May 3, 2000, at 2 (“[T]he slots of codeshare carriers are considered jointly only if the two carriers codeshare at the particular airport.”).

America West's interpretation of section 231(a)(3) suggests that there is a direct nexus between the language describing the relevant code-share relationships and the language identifying which airport is at issue under the statute. However, neither of the underlined phrases regarding airports modifies, or is modified by, the language regarding code-share relationships.

The first airport phrase ("at an airport") modifies the immediately preceding language "qualify for a slot or slot exemption as a new entrant or limited incumbent air carrier." It merely establishes the location where the air carrier's new entrant or limited incumbent carrier status is to be measured. It is not limited by the code-share language that was placed separately in the statute.

The second airport phrase ("at the airport") refers to the same airport location identified by the "at an airport" language. It modifies the immediately preceding text, which reads "the total number of slots and slot exemptions held by the 2 carriers," by limiting that text to a specified airport. Like the first reference, it is not limited by the code-share language that was placed separately in the statute.

Thus, a careful reading of the plain language of section 231(a)(3) demonstrates that it identifies which air carriers are subject to the aggregating rule, not which airports are subject to the rule. Under this plain

language interpretation, America West is subject to the aggregating rule because it has a code-share agreement with Continental, and O'Hare is the airport at which America West's limited incumbent status is being measured. Because America West and Continental have more than 20 slots and slot exemptions at O'Hare, America West cannot be a limited incumbent air carrier and, therefore, is not eligible to receive additional O'Hare slot exemptions.

2. The Title of the Relevant Statutory Section Supports the Conclusion that America West Does Not Qualify as a "New Entrant" or "Limited Incumbent" at O'Hare

The intended purpose of AIR-21 section 231(a)(3), as evidenced by its title, "Equal Treatment of Affiliated Carriers," also refutes America West's interpretation of the statute. The plain language interpretation advocated above would guarantee equal treatment of affiliated, code-share partners like America West and Continental. The interpretation offered by America West would not.

Under the plain language interpretation, neither America West nor Continental would qualify as a limited incumbent air carrier because the carriers have more than 20 slots and slot exemptions at O'Hare. America West offers the untenable proposition, however, that it qualifies as a limited incumbent air carrier, in spite of its code-share relationship with Continental and their combined O'Hare slot holdings, merely because America West and

Continental do not conduct code-share operations at O'Hare. However, this result would cause Continental to be treated unequally because it would still not qualify as a limited incumbent air carrier since it alone possesses more than 20 slots at O'Hare.

3. America West's Interpretation of the Statute Would Lead to Incongruous Results

As discussed above, America West interprets the aggregating rule as applying only when two carriers are code sharing at the airport that is the subject of a slot exemption application. Under this interpretation, an applicant could qualify as a limited incumbent air carrier at O'Hare even though: (1) it held 19 slots and slot exemptions of its own, (2) it conducted domestic and international code-sharing operations with its code-share partner at every major airport except O'Hare, and (3) its code-share partner held a majority of the slots at O'Hare. America West would argue that the applicant would qualify nevertheless as a limited incumbent air carrier simply because it did not happen to conduct the requisite code-share operations at O'Hare.

This would be an unacceptable result because the purpose of section 231(a)(3) and the associated slot exemption provisions in AIR-21 is to open the high density airports to carriers that lack significant access to the markets and

to provide valuable new services for passengers. These goals would not be realized by granting slot exemptions to a carrier that already has a presence at a high density airport, as well as extensive code-share operations in many other markets with the dominant carrier at that airport. Such an applicant might be disinclined to compete vigorously with its partner or to promote pricing and service benefits.

In contrast, the plain language interpretation would enable O'Hare slot exemptions to be awarded to a carrier that does not have more than 20 slots and slot exemptions between it and its code-share partner, regardless of where they conduct their code-sharing operations.

C. National's O'Hare-Las Vegas Service Proposal Is Far Superior to that of America West

America West argues that the Department should favor its application over National's because America West is the "network carrier applicant," which will provide more than point-to-point, leisure air transportation, and will really enhance competition. America West Response at 2-3.

As discussed above, America West does not qualify to receive new O'Hare slot exemptions under AIR-21. Nevertheless, even if America West were eligible, its proposal would provide far fewer public benefits than National's.

1. National's Promotion of Price and Service Competition

National's new service will provide significantly more price and service competition in the O'Hare-Las Vegas market. National's service also will provide greater price and service competition in the connecting markets to and from Los Angeles and San Francisco – the two largest connecting markets at Las Vegas – which serve a substantial number of business travelers.

The price competition National will provide is demonstrated by comparing National's proposed O'Hare-Las Vegas fares with those currently charged by America West, as documented in Exhibit NA-4 to National's April 7, 2000 Notice of Continuing Interest and Supplement included in this Docket. 6/ America West's fares generally are identical to, and in some cases are even higher than, the fares offered by one or both of the carriers with which America West claims it will compete, American Airlines and United Air Lines. The following examples illustrate this.

- All of America West's round-trip fares are identical to American's.
- America West's unrestricted one-way fares for coach and first class are identical to American's.
- America West's 7-day advance purchase, round-trip fares are identical to United's.

6/ A copy of Exhibit NA-4 is attached hereto for convenient reference.

- America West's one-way, night-only flights are more expensive than either American's or United's.

While America West weakly promises to offer "reasonable fares," 7/ National's entrance into the O'Hare-Las Vegas market will truly promote price competition and ensure the availability of lower average ticket prices for passengers. As indicated in Exhibit NA-4, all of National's proposed fares are significantly less than the comparable fares that America West, American, and United are charging. For instance, National's estimated first class fare for nonstop transportation between O'Hare and Las Vegas (\$526 one-way) will be approximately 59.6% less than the \$1,302 fare being charged by America West, American, and United. National also estimates that its unrestricted fare for tourist class seating (\$376 one-way) will be roughly 54.4% less than America West's and American's current fare of \$825, as well as 59.4% less than United's \$925 fare.

Besides providing attractive fare savings, every National flight will offer more first class and tourist class seats, more leg room, more liberal carry-on baggage allowances, more overhead bin space per passenger, and superior

7/ America West Response at 3.

meal and cabin service than America West offers on its existing O'Hare-Las Vegas frequencies.

2. National's New Service Will Benefit a Wide Variety of Passengers, Including Connecting and Point-to-Point Travelers and Business and Leisure Travelers

National attracts many different types of passengers who are drawn to National's lower prices, superior service, and convenient connections between Las Vegas and major business and leisure destinations around the country. America West is simply wrong in its characterization of National as a mere point-to-point, leisure air transportation service provider.

To be sure, many point-to-point, leisure travelers will benefit from National's new air service at O'Hare, as well as from the new connections that will become available through National's Las Vegas hub. However, many persons traveling on business to National's Las Vegas hub, and from Las Vegas to other points on National's route network, will also benefit greatly from National's new service, which will offer greater leg room, liberal carry-on baggage allowances, more overhead bin space per passenger, and prepared meal service.

3. Department Precedent Weighs Against Granting America West More Slot Exemptions at O'Hare

The Department has previously rejected America West's requests for O'Hare slot exemptions on the ground that the Department has already granted America West a number of exemptions at O'Hare and elsewhere so that it would be able "to implement a significant portion of its aggregate plan as presented in its slot exemption applications." See Applications of Accessair Holdings, Inc., et al., DOT Order 98-10-29 at 11.

Based on this public interest standard, the Department should grant five of the new O'Hare slot exemptions to National because it has never before received a slot exemption at O'Hare from the Department.

III. Conclusion

The Department should disregard the arguments that America West made in its Response. As discussed above, under a proper interpretation of AIR-21, America West is not eligible to receive new O'Hare slot exemptions because it does not qualify as a limited incumbent air carrier at that airport. Further, National's new nonstop O'Hare-Las Vegas service will provide tremendous new pricing and service options for passengers and will greatly enhance competition in a market dominated by two major air carriers.

WHEREFORE, National Airlines, Inc. again requests that the Department grant it five slot exemptions under 49 U.S.C. § 41717(c) so that National may conduct five flight operations per day at O'Hare during slot-controlled hours in order to provide three daily nonstop roundtrips between O'Hare and Las Vegas.

Respectfully Submitted,

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Dated: May 9, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing
“Motion for Leave to File and Reply of National Airlines, Inc.” on all persons
named on the attached Service List by causing a copy to be sent by first class
mail, postage prepaid.

Ronald P. Brower

Dated: May 9, 2000