

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

U.S.-CHINA AIR SERVICES

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Docket OST-99-5539

DATED: May 17, 1999

**RESPONSE OF UNITED AIR LINES, INC.
AND CONTINGENT MOTION FOR LEAVE TO FILE**

United Air Lines, Inc. ("United") submits the following response to the reply of Northwest Airlines, Inc. ("Northwest") dated May 13, 1999, in the above-captioned proceeding:

1. In what has become a seemingly never-ending stream of unauthorized pleadings filed by Northwest and its allies, Northwest again seeks to delay this case by submitting yet another pleading relating to exhibits filed by United with its timely reply. Northwest on this occasion has merely repeated the arguments it raised in its "surreply" relating to the same issues.¹

The Department should put an end to this steady stream of invective and issue a notice directing that no more such pleadings be filed. The Department is attempting to decide this proceeding under an expedited schedule, and Northwest and its allies continue to try to slow it down. Northwest and Detroit have given themselves the opportunity of dumping late-filed exhibits into the record that should have been filed within the time-frame established by the

¹ Northwest denominates its latest filing merely a reply. It might more properly be called a "reply-cubed" or a "pluperfect surreply."

Department's April 14, 1999 Notice. To the extent that the Department is prepared to accept Northwest's most recent late-filed reply, United contingently requests leave to respond.

2. Northwest in its May 13 reply makes the same request as before that United's application be stricken from the record because United allegedly changed its service proposal in its timely-filed reply. United has already explained that the submission of its service proposal was entirely consistent with the requirements of the Department's April 14, 1999, notice and will not burden the record by repeating that explanation here. See United Response, dated May 10, 1999, pp. 4-8.

Although purporting to reply to United's May 10, 1999, response, Northwest instead ignores United's explanation based on the clear and unambiguous language of the April 14, 1999 notice. Northwest instead seizes on another case which it asserts supports its request that United's application and reply be stricken. Northwest now cites an order in the U.S.-Lima Combination Service Proceeding (Non-Miami Phase) as supporting its request. Why Northwest was unable to cite this order in its May 6, 1999, "surreply" is not explained. The order was issued in 1995 and was certainly available on the public record at the time Northwest prepared its "surreply." With each successive pleading, Northwest's delaying tactics become more and more transparent.

The U.S.-Lima case is, however, no more relevant than the others Northwest cited. That case was instituted by a procedural order quite different from the April 14, 1999 notice in this proceeding. In Order 95-7-23, the Department set down a proceeding to select a carrier to operate new services between the U.S. and Peru. That order consolidated competing

applications filed by two carriers seeking both operating authority and frequency allocations for services from new (i.e., non-Miami) U.S. gateways to Peru. The order established dates, which were later shortened, for the submission of applications, answers to applications, information responses, direct exhibits, rebuttal exhibits, and briefs. Id. at 6-7.

Attached to Order 95-7-23 was a five-page Evidence Request, directing the applicants to file as direct exhibits not only their service proposals but, in addition, detailed traffic and financial forecasts relating to those proposals. The applicants were also required to indicate in their direct exhibits "any anticipated traffic changes in other markets on the applicant's existing system in which service will be altered as a result of the [service] proposal in this case." Order 95-7-23, Appendix A, pp. 2-4.

One of the applicants, Continental, filed as a direct exhibit a service proposal illustrating how it would use the seven available frequencies by operating one-stop service between a U.S. gateway and Peru via a stop in an intermediate third country. Continental's traffic and financial forecasts accompanying its direct exhibits were based on that "one-stop" proposal. Continental then filed with its rebuttal exhibits a service proposal illustrating nonstop service between the same U.S. gateway and Peru. That nonstop proposal was inconsistent with and not supported by the detailed traffic and financial forecasts that were required to accompany its direct exhibits.

The Department, having adopted formal evidentiary requirements, properly struck the rebuttal exhibits containing information relating to nonstop services as late-filed because the competing applicant was unable to address them in its own rebuttal exhibits and brief, as intended

by the procedural order. Notwithstanding this action, the Department went on to award the authority at issue to Continental, the carrier whose exhibits were stricken, based on a detailed analysis of the traffic and financial forecasts it properly filed as direct exhibits in support of its one-stop service proposal. Order 95-10-24, pp. 7-8.

3. Northwest continues to confuse the procedures followed in proceedings such as the U.S.-Lima case, where the Department has required more detailed evidence and briefs, from the more expedited procedures followed here. The U.S.-Lima case, unlike this one, involved new gateways and a potential new entrant. The Department required more detailed evidence to reach its decision. Here, on the other hand, the Department is faced with applications from incumbent carriers involving existing gateways and has chosen more abbreviated procedures, not requiring detailed traffic and financial forecasts, rebuttal exhibits and briefs. United has complied with those procedures by filing with its application the service proposal illustrating how it would use the new frequencies it applied for and by filing, with its reply, schedules showing how it would modify its one-stop services using its existing frequencies.

These one-stop schedules were filed in direct response to charges by Northwest and Federal Express that United would waste its existing frequencies by continuing to use them for one-stop services at San Francisco. It was neither United nor the Department that made utilization of existing frequencies an issue; it was Northwest and Federal Express. The Department did not request such schedules, and United only filed them after Northwest and Federal Express left it with no alternative.

Northwest now whines that it was denied the same due process to respond to United's one-stop schedules that caused the Department to strike Continental's rebuttal exhibits in the U.S.-Lima case. It was, however, the lack of an opportunity to rebut the revised traffic and financial forecasts filed by Continental in support of its late-filed service proposal in that case that denied due process to the other parties. That late-filed service proposal, moreover, illustrated how Continental would use the very route authority and frequencies for which it had applied, not how it would change its existing services. All such material was clearly required by the detailed Evidence Request, in the U.S.-Lima case, to be submitted as direct exhibits. There was, quite simply, no comparable evidentiary requirement here and no denial of due process.

In any event, it is inconceivable that Northwest could require any more due process than it has already been afforded to address issues related to United's one-stop service. It was, after all, Northwest that chose to make those services an issue in the first place. Northwest is now in the fourth round of pleadings arguing the merits of United's one-stop services and the second round relating to the services illustrated in United's reply. Northwest has now given itself 14 days to prepare and submit arguments relating to the one-stop service illustrated in United's reply. If, as Northwest urges, those exhibits had been filed with United's application, Northwest would have had only five days to answer and an additional three days to reply, for a total of eight days. Northwest has effectively given itself more due process than the Department's procedures allowed.²

² Northwest also argues (NW Reply, p.2) that it has no real concern that United's one-stop service poses any "serious threat" to Northwest's own proposal but is merely acting to protect the
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4. Finally, Northwest reaches out to bolster an argument raised by Detroit relating to Northwest's allegedly greater dedication to the operation of nonstop services. United noted in response to Detroit that Northwest's service to China was instituted on a nonstop basis because it had no alternative under the 1995 U.S./China MOU which prohibited Northwest from operating one-stop service. Northwest counters that the 1995 MOU "reflects Northwest's intent" to operate on a nonstop basis. Northwest neglects to mention that its intent was strongly influenced, indeed was dictated, by the Chinese government's adamant refusal at the time to allow the expansion of U.S. carrier services via Japan, the only one-stop services allowed under the U.S./China bilateral agreement. Under the circumstances, either Northwest "intended" to operate nonstop or not at all.

In this proceeding, on the other hand, it is United that has demonstrated the greater dedication to the provision of nonstop service. United would use 100 percent of the new frequencies it seeks to operate nonstop service, while Northwest would use only 33 percent of its new combination frequencies for nonstop service.³ And United, unlike Northwest, is willing to accept all of its new frequencies subject to the bilaterally-agreed condition limiting them to the

² (...continued)

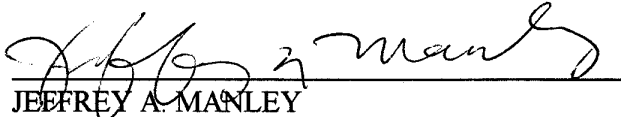
integrity of the Department's process. United will rely on the Department to decide which carrier in this proceeding is abusing its process – United, with its timely submissions consistent with the April 14, 1999, procedural notice, or Northwest and Detroit with their evergrowing number of late-filed submissions of evidence and argumentation.

³ If Northwest's all-cargo services are included, it is proposing to use less than 25 percent of its new frequencies for nonstop U.S.-China service.

operation of nonstop services only. If dedication to nonstop service is an appropriate consideration, United's application clearly prevails over Northwest's.

5. In conclusion, United urges the Department to take the action necessary to put a stop to the delaying tactics of Northwest and its allies in this proceeding. This is intended to be an expedited proceeding and United, consistent with that intent, urges the Department to issue an order awarding United seven nonstop U.S.-China frequencies for its proposed daily San Francisco-Shanghai nonstop services. For the reasons set forth above and in United's response dated May 10, 1999, Northwest's motion to strike United's application and reply should be denied.

Respectfully submitted,



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