



Order 2005-2-1
Served: February 1, 2005

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

Issued by the Department of Transportation
on the 1st day of February, 2005

SERVED February 1, 2005

Petition of the

**AIR CARRIER ASSOCIATION OF
AMERICA**

**to Block Transfer of High Density Slots
under 14 CFR §11.25 and 49 U.S.C. §41712**

Docket OST-04-18586

ORDER

On July 7, 2004, pursuant to 14 CFR §11.25 and 49 U.S.C. §41712, the Air Carrier Association of America ("ACAA") filed a petition to the Department of Transportation ("Department") and the Federal Aviation Administration ("FAA"). ACAA requests (1) that any proposed sale, lease, or extension of any current lease by Northwest Airlines ("Northwest") of about 24 slots at Ronald Reagan Washington National Airport ("DCA") to US Airways or any other carrier be suspended, (2) that the FAA's rule providing for slot transfers, 14 CFR §93.221 ("the Buy/Sell Rule"), be amended to require both notification to the FAA and all parties of all possible sales and leases of slots and disclosure of all details concerning slot transactions, (3) that the Department immediately investigate slot transactions between "dominant carriers" to determine the carriers' motives and the processes they employ "to expand their control over

DCA and LaGuardia Airport (“LGA”) and to block low-fare competition at these airports,” and (4) that pending completion of the Department’s review of these issues, all sales or leases of DCA and LGA slots among the largest six carriers be suspended. On July 27, Continental Airlines, Inc., (“Continental”) and the Regional Airline Association (“RAA”) filed answers opposing ACAA’s petition. ACAA filed a response to these answers on August 2.¹

For the reasons set forth below, we dismiss ACAA’s petition insofar as it requests an investigation and suspension of slot activity under 49 U.S.C. §41712. We take no action with respect to ACAA’s request that the Buy/Sell Rule be modified, as this issue is appropriately before the FAA.

ACAA’s Petition

The Buy/Sell Rule allows air carriers to sell or lease most of the slots they have been allocated by the FAA under the High Density Traffic Airports Rule (“HDR”), 14 CFR Subpart K.² Stating that the FAA originally adopted the Buy/Sell Rule “to open a very closed competitive environment,” ACAA maintains that in practice this rule “has become but one more barrier to competition” and has thus kept fares high in city-pairs that can only be served by carriers holding or leasing slots. ACAA contends that the procedures the FAA employs to administer the Buy/Sell Rule do not reflect “marketplace changes” and that therefore, the rule “supports the status quo” and lets the few carriers to which the slots were originally allocated determine which carriers may use them. ACAA maintains that few new entrants have been able to obtain slots at DCA and LGA and that none of these has “been able to expand operations or been allowed to operate on a level playing field.”³

Specifically, ACAA faults the Buy/Sell Rule for not requiring a slot-holding carrier to inform the government, the public, and all carriers of its intent to lease or sell slots, the details of any sale or lease agreement, and the carriers to which the slots were offered. ACAA maintains that permitting the slot-holding carrier to deal in secrecy effectively allows it to choose its competitors, a situation that

¹ ACAA did not request leave under 14 CFR 302.6 to file its response, which is not authorized by our Rules of Practice, 14 CFR Part 302. Nevertheless, as no party has objected to this pleading, we will accept it.

² A “slot” is “the operational authority to conduct one IFR landing or takeoff operation each day during a specific hour or 30 minute period at one of the High Density Traffic Airports” 14 CFR 93.213(a)(2). “IFR” means “instrument flight rules.” 14 CFR 1.2.

³ ACAA points out that new entrants cannot transfer slot exemptions that they have obtained under AIR-21 (Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, PL 106-181, April 5, 2000, 114 Stat 611) or Vision 100 (Vision 100—Century of Aviation Reauthorization Act, PL 108-176, December 12, 2003, 117 Stat 2490).

ACAA characterizes as “a form of government sponsored market allocation permitting the FAA protected carriers to charge premium fares without fear of competitive response.” In practice, ACAA maintains, a slot-holding carrier will not lease slots to new entrants or low-fare carriers that mean to compete with it or its alliance partners. Although the Buy/Sell Rule has a use-or-lose provision requiring holders to use slots at least 80 percent of the time, these carriers can and do avoid revocation of slots they are not using by arranging for short-term leases. ACAA asserts that only carriers that are already operating at the airport are likely to use the slots under such terms.

Citing a pleading Northwest filed in Docket OST-2000-7181 on July 6, 2004, ACAA reports that Delta Air Lines (“Delta”) was to return leased slots to Northwest as of October 30. ACAA is concerned by the prospect that Northwest might lease or sell the slots to US Airways, because US Airways and its alliance partner, United Air Lines, together control 47 percent of the slots at DCA, and Northwest and its alliance partners, Delta and Continental, together control another 28 percent. ACAA faults the Department for “allow[ing] carriers controlling such a large portion of the market [to] work with each other to dominate the market” and warns that continuing to do so will result in “dominance at the airport and over multiple regions of the country” being “locked in place.”

ACAA calls for the Department to stop allowing the large slot-holding carriers to block new entry at DCA and to provide for “full public scrutiny of slot transfer actions.” Thus, noting that the Department and the FAA have consistently maintained that slots do not belong to the carriers and can be withdrawn and reallocated by the FAA, ACAA asks that Northwest henceforth be barred from leasing or selling slots at DCA or New York LaGuardia Airport (“LGA”) to US Airways, Delta, or any other legacy carrier and that Northwest instead be required to make these slots available to new entrants. ACAA asks that the Department “thoroughly investigate all slot transactions between major carriers” and “establish a public process identifying all slot transactions.”

The Answers

Continental and RAA oppose ACAA’s petition. Continental maintains that the Department should “allow the marketplace, rather than regulation, to continue to govern slot sales and leases at slot-controlled airports, including [DCA].” In Continental’s view, the Buy/Sell Rule still serves its original purpose of allowing adjustments of capacity and operations to accommodate demand at DCA and LGA. When adopted, this rule permitted incumbent carriers to keep their slots to avoid disruption of, and in recognition of their investment in, the services they had developed. The rule also gave new entrants and limited incumbents a chance to obtain slots through lotteries as well as by purchase or lease. Continental contends that the rule has let carriers “develop reasonably effective service patterns despite constraints on the number of slots available.” It observes

that Congress has repeatedly considered slot issues since the Buy/Sell Rule's adoption but has taken no action to end the buying and selling of slots. Instead, Congress has provided for additional service at DCA and LGA "by creating exemptions, subject to specific criteria, for new services at [DCA] for small cities, national networks and new entrant and limited incumbent airlines." Noting that members of ACAA have secured slot exemptions at DCA and LGA and have also secured slots at LGA via lottery, Continental maintains that these carriers are also free to buy or lease additional slots at market rates and that their not having done so does not justify ending this mode of exchange.⁴

RAA agrees with Continental that the Buy/Sell Rule continues to serve its original purpose; RAA also notes that the Federal Trade Commission and the Department of Justice both supported the rule when it was adopted in 1985. Like Continental, RAA points to Congress's repeated review of the slot rules governing DCA without amending the Buy/Sell Rule and to the steps Congress has taken "to expand slot availability for new entrants and limited incumbents, service to small communities and long-haul network access."⁵ RAA notes that these steps have enabled ACAA's members and other new entrants and limited incumbents to procure "a significant number of DCA slots," including slots for service to small communities. RAA takes the position that prohibiting the purchase, sale, and leasing of slots would bar carriers from changing their service patterns in response to changed circumstances. It contends that by virtue of the Buy/Sell rule, regional airlines and their code-share partners have been able to maintain regional-jet service between slot-controlled airports and small communities and to sustain the frequency travelers in both large and small markets demand. It maintains that ACAA's members have not only benefited from slots exemptions but "are continuing to prosper, and could acquire DCA slots at market prices if they chose to do so."

ACAA's Response

In its response, ACAA states that Northwest has not offered new entrants the opportunity to lease slots or even notified all carriers of its intent to lease or sell slots; it also states that in practice new entrants have not been able to buy or lease slots and have not secured more than four to seven slots each. ACAA maintains that government studies and reports show that the Buy/Sell Rule "serves to

⁴ Continental also takes issue with ACAA's insinuation that its alliance with Northwest and Delta "is an alliance partnership 'controlling DCA.'" Continental asserts that it holds fewer slots than other major carriers at DCA, competes vigorously with its alliance partners for passengers in DCA city-pair markets, and "could not conceivably 'control' [DCA]."

⁵ In fact, RAA states, Congress amended the rules for small community service to and from DCA most recently to delete the "promotion of air transportation by new entrant air carriers and limited incumbent air carriers" as a factor to be considered in awarding slots for service to small communities.

preserve the stranglehold that a few large carriers have over high-density airports.” ACAA suggests that even if Congress has not acted to amend the Buy/Sell Rule, the Department and the FAA may do so. ACAA opposes allowing Northwest to transfer the slots Delta has been using to US Airways, “a carrier that dominates DCA,” when potential competitors cannot secure slots. As in its petition, ACAA points to the FAA’s authority to withdraw and reallocate slots and calls on the Department to “provide full public scrutiny of slot transfer actions,” to block further sales or leases of slots at DCA or LGA by any “legacy carrier” to any other “legacy carrier,” and to make the slots Northwest wishes to transfer to US Airways available to new entrants.

Disposition

To recapitulate the substance of the joint petition to the Department and the FAA, ACAA is seeking the following four actions: (1) suspension of any proposed lease or sale by Northwest of the slots at DCA to be returned by Delta at the end of October, 2004, (2) amendment of the Buy/Sell Rule to require that slot offerings and slot transactions and their details be made public, (3) investigation by the Department of slot transactions between “dominant carriers” at DCA and LGA to determine whether these carriers are actively expanding their domination and blocking competition from low-fare carriers, and (4) suspension of all sales or leases by the largest six carriers of DCA and LGA slots pending completion of this investigation.

The first two of ACAA’s requests are properly before the FAA. That agency has the authority and primary responsibility under 49 U.S.C. §40103(b) to ensure the efficient use of the navigable airspace and to assign its use by rule or order. The HDR was promulgated in 1969 under this authority. The Buy/Sell Rule is part of Subpart S of 14 CFR Part 93, which is the regulatory scheme governing the allocation of IFR operations at HDR airports such as DCA and LGA. The FAA and the Office of the Secretary (“OST”) will give the same careful, thorough consideration to the competitive issues ACAA raises here that they gave to competitive issues when considering whether to allow slots to be bought, sold, and leased, as documented in the regulatory history of the Buy/Sell Rule. *See* 50 FR 52180 at 52182- 52186 (December 20, 1985).⁶

OST and the FAA have lately been devoting considerable attention to the broader issue of how to handle operations at congested airports such as Chicago O’Hare (“ORD”), where the slot rule expired in mid-2002 and where the FAA imposed a six-month scheduling reduction order (*see* Order Limiting Scheduled Operations at O’Hare International Airport, Docket FAA-2004-16944, issued August 18, 2004), and at LGA, where the slot rule will expire on January 1, 2007. The FAA has opened Docket No. FAA-2001-9854 for comments about how to

⁶ The FAA’s Chief Counsel responded to ACAA’s petition by letter on January 25, 2005.

manage operations at LGA after the rule's expiration. In addition, on July 30, 2004, under the auspices of the National Academy of Sciences, OST and the FAA held an auctions roundtable at which the aviation industry, airports, economists, and academics were invited to discuss market-based pricing approaches to access at congested airports. The FAA and OST have also entered into a research contract with the National Center for Excellence for Aviation Operations Research ("NEXTOR") to conduct research and present information about market-based approaches to managing demand at airports. The issues ACAA raises concerning the Buy/Sell rule exist for any slot-controlled airport, so any rulemaking or other initiative that the FAA and OST undertake to resolve access issues at ORD and LGA may appropriately extend to DCA as well.

As for ACAA's third and fourth requests, we must decline to grant them. The petition, read as a whole, primarily challenges the Buy/Sell Rule and only tangentially invokes 49 U.S.C. §41712, the Department's authority to investigate and prohibit unfair or deceptive practices and unfair methods of competition. The Buy/Sell Rule allows carriers that hold slots to sell or lease them without first informing the government, the public, or all air carriers of their intent to dispose of the slots and without making the details of sale or lease agreements public. As noted, the FAA and OST adopted this rule after giving due consideration to all competitive issues raised, and it is the FAA, again in conjunction with OST, that will now be considering whether the rule should be amended along the lines ACAA proposes. The pleadings here do not provide sufficient grounds for the Enforcement Office to institute an investigation into whether slot-holding carriers at DCA and LGA have been engaging in unfair methods of competition within the meaning of 49 U.S.C. §41712. Moreover, even if we were to institute such an investigation, we would not have the authority to suspend slot transactions pending its completion. Section 41712 empowers the Department to order carriers to stop offensive practices only after finding the practices to be violations, which in turn it can only do after providing the carriers with notice and an opportunity for a hearing.

For all of these reasons, we dismiss ACAA's petition insofar as it asks the Department to investigate whether slot-holding carriers at DCA have been engaging in unfair methods of competition within the meaning of 49 U.S.C. §41712 and to suspend slot trades while this investigation is in process. We take no action on the remainder of ACAA's petition, as it is properly before the FAA.

ACCORDINGLY, we dismiss the Petition of the Air Carrier Association of America to Block Transfer of High Density Slots under 14 CFR §11.25 and 49 U.S.C. §41712 in Docket OST-04-18581 to the extent discussed above.

This order is issued under authority assigned in 14 CFR 302.406 and shall be effective as the final action of the Department within 30 days after service.

BY:

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(SEAL)

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