

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Application of)
)
)

NATIONAL AIRLINES, INC.)

Docket OST-99-5521

for an exemption from 14 C.F.R.)
Part 93, Subparts K & S, pursuant)
to 49 U.S.C. § 41714)
)

ANSWER OF UNITED AIR LINES, INC.

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ANSWER OF UNITED AIR LINES, INC.

United Airlines opposes the application filed in this docket by National Airlines, Inc. ("National") for five exemption slots at Chicago's O'Hare Airport pursuant to 49 U.S.C. § 41714. National has simply failed to show that its application is consistent with the guidelines the Department uses to decide whether to grant such exemptions. Nor is National able to show that granting its application would maximize the transportation benefits obtainable from the very limited number of exemption slots that currently are available at O'Hare.

The Chicago-Las Vegas market is already extremely well served. And National has not presented the Department any persuasive evidence on which it could base findings that National's entry into that market "would likely produce substantial competition benefits." Order 98-10-29 (Accessair Holdings et al.) at 4. Under these circumstances, it clearly would not be in the public interest for the Department to award

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National any of the very limited number of exemption slots that currently are available at O'Hare so that National could become the fourth carrier operating daily nonstop O'Hare-Las Vegas service and the sixth carrier operating daily nonstop and single-plane Chicago-Las Vegas service.¹ National's application should, therefore, be denied.

In further support of this position, United submits the following:

1. Under current Departmental policies, exemption slots at O'Hare are a finite and scarce resource. Indeed, only last month, the Department again "emphasized that the number of available slot exemptions [at O'Hare] is very limited...." Order 99-3-12 at 3. For that reason, in deferring action on several pending exemption requests, the Department stressed that it may need to apply its guidelines on an even more stringent basis in the future because the number of exemption slots available is too limited to grant all of the requests it has already received. Id. With very few exemption slots available, the Department has emphasized that it is "especially important to allocate these

¹ In any event, even if National's application is denied, it will soon become the fifth carrier operating nonstop service between Chicago and Las Vegas when it starts nonstop Midway-Las Vegas service now planned to commence on May 27.

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slot[s] ... where they will produce the maximum transportation benefits" possible. Id at 2.

Against this backdrop, in granting exemption slots to new entrants, as defined in the statute, the Department has, through a series of ad hoc adjudications, adopted guidelines that favor proposals offering the introduction of new nonstop jet service in city pairs where there is no current nonstop service, and new competitive services, "especially by applicants that have the demonstrated potential to offer low-fare competition."² Id. at 3. These guidelines are intended by the Department to carry

² The Department also indicated that it intends to favor proposals based on using jet aircraft that meet Stage 3 noise requirements, and to require a showing by applicants that there is a reasonable expectation the service proposed would be operationally and financially viable. The Department apparently intends to rely on these two criteria to limit the applications it will consider under the exceptional circumstances criteria of the statute. However, the use of Stage 3 aircraft, and a showing that a proposal appears to be operationally and economically viable, clearly do not in themselves constitute exceptional circumstances. If they did, almost any application for exemption slots at a High Density airport filed by a "new entrant," as defined in the statute, would satisfy the criteria. If Congress had intended such a result, it would not have included the "exceptional circumstances" requirement in the statute. It is a cardinal rule of statutory construction, however, that a statute must be read so as to give effect to all of its provisions. 2A Sutherland, Statutes and Statutory Construction § 46.06 (N. Singer rev. 5th ed. 1992). And "[t]o read out of a statutory provision a clause setting forth a specific condition or trigger to the provision's applicability is ... an entirely unacceptable method of construing statutes." Natural Resources Defense Council v. U.S. E.P.A., 822 F. 2d 104, 113 (D.C. Cir. 1987).

out the intent of Congress, in authorizing the grant of exemptions from the High Density Rule ("HDR"), that the Department utilize such discretionary authority "to facilitate the vital public interest objective of enabling qualified air carriers to fill voids in underserved markets and to instill price competition in specific markets." Id. at 2.

In its application, National has utterly failed to show that its request for five exemption slots at O'Hare satisfies either of these requirements. First, National simply cannot show that the Chicago-Las Vegas market is underserved. Even if the market is artificially limited to scheduled nonstop service between O'Hare Airport and Las Vegas, as National urges, three major network carriers offer a total of 158 weekly one-way frequencies between these airports. National Application at Exhibit NA-2. These carriers are United, American and America West.³

The route is also served nonstop by American Trans Air, a low-fare, point-to-point carrier, which operates a total of 14 weekly roundtrip frequencies between Chicago's close-in Midway Airport and Las Vegas. In addition, Southwest, the quintessential no-frills, low-fare carrier, operates multiple

³ America West also operates nonstop service between Midway and Las Vegas.

daily single-plane services between Midway and Las Vegas, and other carriers offer convenient online connecting service in the market.⁴ According to the Department's most recent Domestic Airline Fares Consumer Report, dated January 1999, Southwest had an 11% share of the Chicago-Las Vegas market in the second quarter of 1998, even though it currently chooses to operate only single-plane service. Certainly, if Southwest believed the market were underserved or non-competitive, it could quickly and easily replace these single-plane services with nonstops.

This level of daily nonstop service offered by multiple carriers clearly demonstrates that a decision by the Department to use its discretionary exemption authority so that National could become the fifth carrier offering nonstop Chicago-Las Vegas service (and fourth operating nonstop O'Hare-Las Vegas service) would not "produce the maximum transportation benefits" possible from the use of these scarce resources. Order 99-3-12 at 3. Indeed, if a city pair receiving this level of service from three network carriers, multiple daily nonstops from a low-fare specialist, multiple daily single-plane frequencies from Southwest, and convenient online connecting service from other

⁴ For example, Trans World and Delta offer convenient online connecting service between O'Hare and Las Vegas via their hubs at St. Louis and Salt Lake City, respectively, and Frontier offers online connections via its hub in Denver.

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major network carriers can be found to be underserved, then the guidelines the Department ostensibly uses to grant slot requests are meaningless and fail completely to delimit the "exceptional circumstances" the Department must find before it can grant an exemption from the HDR pursuant to 49 U.S.C. § 41714(c).⁵

Despite the abundant nonstop and single-plane services offered daily between Chicago and Las Vegas by three network carriers and two low-fare specialists, National, nonetheless, contends that the market is underserved. The sole basis for this claim is the fact that the existing nonstop flights between O'Hare and Las Vegas operate at relatively high average load factors, and that some of the flights are scheduled at off-peak hours.⁶

⁵ The Department has some discretion in defining what constitutes "exceptional circumstances." However, it is not free in effect to read the requirement out of the statute. If Congress had intended to give the Department authority to grant new entrants, as defined in the statute, slots at High Density airports without limitation, it would not have included the "exceptional circumstance" requirement in the statute. That it did so, however, precludes the Department from defining the exceptional circumstances requirements so loosely as to read the requirement out of the statute. See, supra note 2.

⁶ National supports its claim that relatively high average load factors can be an indication that a market is underserved by pointing to the Department's decision to grant America West five exemption slots at O'Hare to increase its Chicago-Phoenix service. National Application at 12-13. The Department nominally based its decision in that case, in part, on America
(continued...)

However, these high load factors are explained by the fact that average fares in the market are already extremely low, and are not indicative of an underserved market in any economically meaningful sense of the term. Low average fares and high average load factors are necessary collaries of each other. Carriers can operate profitably in any city pair at lower than average fares only if the load factors they achieve in that city pair are higher than average.⁷

⁶ (...continued)

West's claim that load factors on O'Hare-Phoenix and O'Hare-Las Vegas flights were among the highest of all O'Hare markets. See Order 98-4-21 at 13. Notwithstanding those conclusions, the America West decision provides no substantial support for granting National's application. These high average load factors were only one of the reasons the Department was ostensibly persuaded to grant America West's application. As to the other decisional factors cited by the Department -- America West's unique disadvantage vis-a-vis other major network carriers because of its limited number of O'Hare slot holdings, its supposed ability to inject new low-fare competition into Chicago-West Coast city pairs it served via its Phoenix hub if awarded exemption slots, and its asserted ability to influence Chicago-Phoenix local fares if granted slots to increase its Chicago-Phoenix service -- none is present here, making the America West decision inapposite.

⁷ United would note that Chicago-Milwaukee is another city pair where average fares in the second quarter of 1998 were relatively low, according to the Department's most recent Domestic Airline Fares Consumer Report. America West is the only carrier serving this route on a nonstop basis. According to America West's T-100 reports, for calender year 1998, America West operated its Milwaukee-Las Vegas service at an average load factor of 74.1%, virtually the same load factor it achieved on its O'Hare-Las Vegas service during the 12-months ended September

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With the industry now experiencing average year-round load factors approximating 70%, it should hardly be surprising that the average load factor in a highly discretionary travel market like Las Vegas would be higher than the industry average.⁸ For the Department to turn around, however, and find such high average load factors to be indicative of an underserved market would be illogical and wholly inconsistent with fundamental airline economics. High load factors would be a sign of an underserved market only if the load factors were accompanied by high average fares. The high average load factors in the Chicago-Las Vegas market, on the other hand, which (as discussed

⁷ (...continued)
30, 1998 (76.8%), according to National's application. See Exhibit NA-3. America West's Milwaukee-Las Vegas load factor was several percentage points higher than its system average, just as its O'Hare-Las Vegas load factor was higher than its system average. This tends to confirm that higher than average load factors are a necessary corollary of lower than average fares, and do not, standing alone, demonstrate that a market is underserved.

⁸ While National tries to create the impression that average load factors on nonstop flights between O'Hare and Las Vegas are extraordinary, this is not the case. During last summer's peak travel season to Europe (June through August), United operated its entire transatlantic route network at an average load factor of 84.3%, not materially different from United's average load factor on O'Hare-Las Vegas flights, which forms the basis for National's claim that the Chicago-Las Vegas market is underserved. See Exhibit NA-3.

below) benefits from very low average fares, are indicative of a highly competitive market, not one that is underserved.

2. Nor is National able to show that the Chicago-Las Vegas city pair is noncompetitive. According to the Department's most recently published Domestic Airline Fares Consumer Report, for the second quarter of 1998, the average one-way fare in the Chicago-Las Vegas market was \$147, lower than the average fare in 82% of the city pairs surveyed in the same mileage block. Moreover, the average yield in the Chicago-Las Vegas market of 9.7¢ per mile is nearly 13% below the average yield of 11.1¢ per mile for the 61 Las Vegas city pairs included in the Department's most recent domestic fare survey.⁹ Certainly, a city pair where the average fare is already lower than the average fare in 82% of

⁹ Some part of the yield difference may be explained by the fact that the Chicago-Las Vegas nonstop mileage is 1515 miles, while the average passenger trip distance in the 61 city pairs included in the survey was just 1,005 miles. Because yields tend to decline with distance, other things being equal, the yield for the Chicago-Las Vegas route should be somewhat lower than the yield for passenger trips with an average stage length of 1,005 miles. Nonetheless, the normal fare taper as distance increases does not fully account for the significantly lower yield in the Chicago-Las Vegas market. For example, according to the Department's Fare Summary, the Cincinnati-Las Vegas market, which has a nonstop distance of 1679 miles, had a yield during the second quarter of 1998 of 12.7¢, 30% greater than the yield in the Chicago-Las Vegas market, despite being somewhat longer. Delta is the only carrier operating nonstop service between Cincinnati and Las Vegas, suggesting that yields in the Chicago-Las Vegas market are substantially lower because the market is highly competitive despite the HDR.

the city pairs of comparable distance among the nation's 1,188 largest domestic city pairs cannot be found to be noncompetitive.¹⁰

The low level of Chicago-Las Vegas average fares simply reflects the fact that the market already receives a significant amount of competition from no-frill, low-fare carriers (and from inclusive tour charter services, which can operate to Las Vegas from both O'Hare and Midway). For that reason, the grant of National's application is unlikely to have any meaningful impact over the long term on the level of fares charged between Chicago and Las Vegas, despite National's essentially pro forma claim to the contrary.

Notably, National does not include in its application the fares it would offer between Chicago and Las Vegas if its application for exemption slots is granted. Nor, because National is today still a pre-operating start-up carrier, is this a case where the Department could find, based on National's

¹⁰ Further proof that the Chicago-Las Vegas market is highly competitive is the fact that between the second quarter of 1997 and the second quarter of 1998 average one-way local fares in the Chicago-Las Vegas market increased less than 2% percent, while average one-way fares in the 61 Las Vegas city pairs included in the Department's Consumer Report increased nearly 6%. Thus, despite the existence of the HDR, Chicago-Las Vegas average fares remained essentially flat while Las Vegas fares in unconstrained markets rose, refuting any claim by National that the Chicago-Las Vegas market is non-competitive or underserved.

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performance in other markets, that National has the "demonstrated potential to offer low-fare competition," Order 99-3-12 at 3, to the five Chicago-Las Vegas incumbents already offering nonstop and single-plane service in the market, one of the two tests the Department uses for determining whether to grant an exemption from the HDR.

United would note in this regard that in its application for a certificate, docket OST-98-4538, National did not describe its business plan as being dependent upon the offering of uniformly low-fare service. Rather, National indicated it "intends to offer two-class, full-service transportation at competitive fares...." Application at 4. Consistent with this description of its business plan, the projected income statements National included with its application to satisfy the Department's fitness requirements forecast average revenues per passenger in the four Las-Vegas-city pairs it proposed to serve initially as ranging between 90.67% and 98.86% percent of the fares charged by the incumbents in those city pairs for the 12-months ended December 1997, as adjusted.¹¹ National Exhibits 11-1 at 1 and 11-3 at 5.

¹¹ United would further note that Chicago O'Hare-Las Vegas was not one of the city pairs National proposed to serve initially in its application. Thus, it is impossible on the public record to
(continued...)

Although National does assert in support of its current application, by way of an ipse dixit, that its "estimated first class fare for nonstop transportation between O'Hare and Las Vegas will be approximately 38% of United's" current fare, and its unrestricted economy fare will be "roughly 30% less than America West's current fare," National Application at 14, these claims are flatly inconsistent with the fare estimates National provided the Department to demonstrate its fitness to be granted a certificate. In any event, there is no public interest justification for the Department to grant a carrier some of the very few exemptions slots available at O'Hare based on unsupported, and unenforceable promises by the carrier that if granted exemption slots, it will offer lower fares than those presently offered by the incumbents. This is especially the case here where the fares National claims it would lower are first class and unrestricted walk-up fares, fares which are used by very few passengers. Indeed, because the Chicago-Las Vegas

¹¹ (...continued)
compare National's present claim that it would offer Chicago-Las Vegas fares "significantly" below those currently being charged by the incumbents with the information it provided the Department to support its application for a certificate. Nonetheless, as noted in the text, the exhibits National filed do not support its claim that its entry into the O'Hare-Las Vegas market would be based on a plan to reduce fares substantially from current levels.

market is overwhelmingly a leisure travel market, even if National's claim that it will reduce first class and unrestricted coach fares if granted exemption slots were true, that would hardly represent the highest and best use the Department could make of these scarce resources.

3. In authorizing the Department to grant exemptions from the HDR, Congress established three classes of service for which exemptions may be granted: foreign air transportation, essential air service, and service to a high density airport by "new entrants" as defined in 49 U.S.C. § 41714(h). Only in the case of a new entrant, however, must the Department find that "exceptional circumstances" exist before it can grant an exemption.

This strict standard becomes especially meaningful in light of the Department's admonishment in Order 99-3-12 that the number of additional slots it can create at O'Hare by exemptions from the HDR is both finite and "very limited." Order 99-3-12 at 2. Under these circumstances, applications for exemption slots are, for all practical purposes, mutually exclusive. Each exemption granted reduces the Department's ability to grant other exemptions. The Department, therefore, has a special responsibility to ensure that its decisions are based on a sound

economic analysis and will maximize consumer welfare. A decision to grant National's application would clearly fail this test.

Presently, the Department appears to have only nine exemption slots available at O'Hare to award to new entrants. There also appear to be pending before the Department applications for more exemption slots than are available.¹² Most, if not all, of these applications involve requests for slots that would be used to link O'Hare to communities that have no nonstop service at all to Chicago.

Many of the communities that have benefitted from previous exemption awards are small and mid-sized communities

¹² Applications for exemption slots are already pending from Sioux City, Iowa (docket OST-99-5475), Newport News/Hampton, Virginia (docket OST-98-4604), Huntsville, Alabama (docket OST-99-5533), and Baton Rouge, Louisiana (docket OST-99-5532). None of these communities has nonstop service to O'Hare. Even though United has strenuously opposed awarding exemption slots to communities as an unsound policy and inconsistent with the statute, see e.g., United's filings in docket OST 99-5475, the filing of these applications demonstrates that many communities want (and need) nonstop service to O'Hare to improve their access to the national transportation system. It is quite possible that one or more eligible new entrant carriers, including carriers operating under the United Express servicemark, may seek the available exemption slots to serve these or other underserved cities. With only nine O'Hare exemption slots currently available, the granting of National's application would effectively deny these other, more deserving, communities the O'Hare slots eligible carriers will need to serve such communities. Given the substantial nonstop and single-plane access Las Vegas already has to Chicago, there simply is no justification whatsoever to favor National's application at the expense of these truly underserved communities.

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that are isolated to one degree or another from the national transportation system.¹³ The grant of National's application would severely limit the Department's ability to assist other such communities to gain similar access to the global transportation networks United and other carriers have available at O'Hare.

As long as exemption slots at O'Hare continue to be a finite and limited resource, the grant of exemption applications such as that filed by National would be a particularly poor use of these limited resources. As noted above, the Chicago-Las Vegas market is neither underserved nor noncompetitive. Nonstop service is already available in the market from both Midway and O'Hare, and no-frill, low-fare service is available from Southwest and other carriers.

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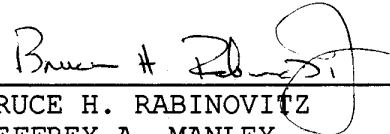
The Department cannot grant exemptions from the HDR pursuant to 49 U.S.C. § 41714(c) unless it can find that exceptional circumstances exist. Under the current test the

¹³ For example, the Department has used its discretionary exemption authority to grant slots to eligible independent commuter carriers operating as United Express to initiate new nonstop regional jet service between O'Hare and Charleston, West Virginia, Chattanooga, Tennessee, Springfield, Missouri, Wilkes Barre/Scranton, Pennsylvania, Roanoke Virginia and the Tri Cities Airport serving Virginia and Tennessee.

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Department is using for establishing such exceptional circumstances, National simply cannot show that its circumstances are exceptional. Its application must, therefore, be denied.

Respectfully submitted,



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