

4910-9X

DEPARTMENT OF TRANSPORTATION

Office of the Secretary of Transportation

Docket No. DOT-OST-2021-0103

Reassignment of Schedules at Newark-Liberty International Airport

AGENCY: Department of Transportation (DOT), Office of the Secretary of Transportation (OST) and Federal Aviation Administration (FAA).

ACTION: Notice of proposed reassignment of schedules at Newark Liberty International Airport.

SUMMARY: By this notice, the U.S. Department of Transportation (Department or DOT), including the Federal Aviation Administration (FAA), provides notice of its intention to approve schedule plans, for a single low-cost carrier (LCC) or ultra-low cost carrier (ULCC), to operate the 16 peak afternoon and evening runway timings previously approved for operation by Southwest Airlines, Inc. (Southwest) at Newark-Liberty International Airport (EWR or Newark). This notice and the actions the Department is proposing are in response to the Court of Appeals for the D.C. Circuit's decision in *Spirit Airlines v. DOT, et al.*, and in furtherance of the whole of government approach to competition embodied in the President's Executive Order 14036.¹

The Department is seeking comment on the proposed process as well as the proposed eligibility and evaluation criteria described below. Comments are due no later than [INSERT DATE 7 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

¹ See Executive Order issued July 9, 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>

DATES: Submit comments on or before [INSERT DATE 7 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit comments to docket DOT-OST-2021-0103.

FOR FURTHER INFORMATION CONTACT: Todd Homan, Director, Office of Aviation Analysis, 1200 New Jersey Avenue, S.E., Washington, DC 20590 or (202) 366-5903; or Al Meilus, Manager, Slot Administration, AJR-G, Federal Aviation Administration, 800 Independence Avenue S.W., Washington, DC 20591; telephone (202) 267-2822; e-mail Al.Meilus@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

In 2010, United Airlines, Inc. (United) and Continental Airlines, Inc. (Continental) announced plans to merge. In response to concerns raised by the Department of Justice (DOJ) over the transaction and its potential anticompetitive effects, particularly where Continental was the dominant carrier, United agreed to transfer 36 of its take-off and landing rights (operating authorizations or slots) at EWR to Southwest Airlines, Inc. (Southwest). DOJ found that, “[t]he transfer of slots and other assets at Newark to Southwest, a low cost carrier that currently has only limited service in the New York metropolitan area and no Newark service, resolves the department’s principal competition concerns and will likely significantly benefit consumers on overlap routes as well as on many other routes.”² United and Continental carried out their merger and the post-merger United became the dominant carrier at EWR.

² “United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice’s Antitrust Concerns”, United States Department of Justice Press Release, August 27, 2010, <https://www.justice.gov/opa/pr/united-airlines-and-continental-airlines-transfer-assets-southwest-airlines-response>.

At the time of the merger, EWR was an FAA-designated Level 3 (slot-coordinated) airport, meaning that, in order to perform a take-off or landing during most hours, an air carrier needed an FAA-allocated slot for the time of the operation. Under then-applicable rules, carriers that held slots could trade or lease them to other carriers.³ In 2016, as the result of improved operational metrics, FAA re-designated EWR a Level 2 (schedule facilitated) airport.⁴ Under Level 2, slots are not allocated. Rather, carriers submit schedule requests for the upcoming season to FAA, and FAA works cooperatively with carriers to seek voluntary schedule adjustments from carriers to alleviate delays and other operational issues. Once agreed upon, FAA approves each carrier's schedule. Under Level 2, carriers generally retain schedule priority based on actual operations conducted as approved in the previous corresponding season, but such schedule approvals are not transferrable like slots (*i.e.*, carriers cannot trade or lease their approved schedules to other carriers).

On July 25, 2019, Southwest announced that it would cease operations at EWR effective November 3, 2019.⁵ As Southwest could not lease its approved runway timings to another carrier under Level 2 rules, upon its cessation of service, Southwest's approved runway timings reverted to FAA. Sixteen of these operations were in peak afternoon and evening hours (specifically, the period from 14:00 – 21:59 Eastern Time) at EWR when schedule approvals were generally not otherwise available. These operations were also in hours when approved schedules were generally at or above the 79/hour operational cap imposed by FAA, on average and considering offsets in adjacent periods. In an effort to

³ See Operating Limitations at Newark Liberty International Airport, 74 FR 51648 (Oct. 7, 2009).

⁴ See "Change of Newark Liberty International Airport (EWR) Designation", 81 FR 19861, April 6, 2016.

⁵ "Southwest Reports Record Second Quarter Revenues And Earnings Per Share", Southwest Airlines PressRelease, July 25, 2019, <https://www.swamedia.com/releases/release-424146113c6f2a2eebe84fb61d59a4ff-southwest-reports-record-second-quarter-revenues-and-earnings-per-share?query=newark>.

improve performance at EWR, FAA lowered the scheduling limit effective with the summer 2018 season that commenced in March 2018.⁶ Following this change, FAA approved flights above the 79/hour limit only if operated in the previous corresponding season by the same carrier and dating back to the higher limit.

In a letter dated August 12, 2019, the Assistant Attorney General for the Antitrust Division stated that, “[Southwest’s] decision implicates the relief we negotiated with United Airlines as a condition of its merger with Continental in 2010. We are therefore committed to working with the DOT and FAA to evaluate how best to reallocate Southwest's capacity at the airport in a manner consistent with our enforcement decision in that matter.” The letter goes on to state:

Those divestitures indeed facilitated important competition at the airport.

Southwest used the slots to introduce new low-fare competition to United on multiple routes resulting in substantially lowered fares and increased service ...

Given that United already holds approximately 66% of authorizations at

Newark, and that competition for United is already in short supply at the airport (e.g., 81 of 148 routes at the airport are monopoly routes operated by United),

we believe the DOT and FAA should seek to resolve the reallocation issue in a way that preserves competition at the airport. To do otherwise would undermine the goal of the remedy the DOJ negotiated with United as a condition of its merger with Continental.

⁶ See Notice of Submission Deadline for the Summer 2018 Scheduling Season, 82 FR 45938 (Oct. 2, 2017). The winter season limits were already at 79 per hour based on winter season capacity analyses. See also Notice of Submission Deadline for the Winter 2018 Scheduling Season, 83 FR 21335 (May 9, 2018). The FAA had also previously targeted a scheduling limit of 79 operations per hour in the initial transition from Level 3 slot controls to Level 2 schedule facilitation at EWR.

On October 2, 2019, as part of a routine scheduling notice, FAA announced that it would not replace or “backfill” all of Southwest’s operations in the EWR schedule to the extent such operations exceeded the scheduling limits for purposes of the summer 2020 scheduling season.⁷ However, FAA also stated that it planned to assess the impacts of the peak period Southwest reductions and other schedule changes at EWR on performance, as well as the impacts on competition in close coordination with the Office of the Secretary of Transportation, in the upcoming Winter 2019/2020 and Summer 2020 scheduling seasons.⁸ Ultimately, for the 36 slots that were the subject of the 2010 United/Continental divestiture, FAA reallocated 20 of Southwest’s operations, but did not “backfill” 16 peak-hour operations.

Spirit Airlines sought review by the U.S. Court of Appeals for the D.C. Circuit, challenging FAA’s decision not to backfill the 16 peak-hour operations, claiming that FAA’s decision was arbitrary and capricious because FAA failed to consider the effect of its decision on competition and did not explain why it could not use a less burdensome tool (such as a schedule reduction meeting under 49 U.S.C. § 41722), and lacked substantial evidence for its decision. On May 21, 2021, the D.C. Circuit vacated FAA’s decision and remanded the matter to the agency to address the issue of competition.⁹ In doing so, the D.C. Circuit stated that “the agency... ignored information about the competitive situation at Newark” and that the “record provides precious little insight into whether or how the FAA approached the competition problem.”¹⁰ The D.C. Circuit also highlighted the fact that the agency did not discuss “why it prefers miniscule reductions in delay more than competition that could lower fares for

⁷ See “Submission Deadline for Schedule Information for Newark Liberty International Airport for the Summer 2020 Scheduling Season”, 84 FR 52580, October 2, 2019, at 52582.

⁸ *Ibid.*

⁹ *Spirit Airlines Inc. v. DOT et. al.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021).

¹⁰ *Id.* at 1256.

passengers.”¹¹ Finally, the Court cautioned that “[i]f the FAA again decides to retire Southwest’s peak-period slots, it should be prepared to provide a reasoned explanation for preferring to cut travel time an average of one minute rather than to cut the price of flying by as much as 45 percent on routes that would gain a second carrier.”¹²

Demand and Congestion at EWR

Consistent with the delay modeling results included in the administrative record in *Spirit Airlines v. DOT, et al.* (D.C. Cir. 19-1248), with demand at pre-pandemic levels, FAA estimates that “backfilling” the 16 runway timings previously held by Southwest in peak afternoon and evening periods would increase delay at EWR by 5.9%, or by an average of 1.2 minutes per operation throughout the day. However, since the 16 runway timings are all in the peak afternoon and evening period; the added delay would be concentrated in these hours.

EWR and LaGuardia Airport (LGA) are the two most delayed airports in the National Airspace System (NAS) as reported through Aviation System Performance Metrics (ASPM) delays compared to scheduled gate departures/arrivals. Congestion at EWR should be considered in context against the other NYC area airports as well as Philadelphia International Airport (PHL), airports within similar operational and passenger catchment areas.¹³ Compared to LGA, EWR has a slightly higher completion rate,¹⁴ but also a higher rate of delayed

¹¹ *Id.*

¹² *Id.* at 1257.

¹³ An airport’s catchment area is the geographic area from which your airport can reasonably expect to draw commercial air service passengers. See “Defining Your Airport’s Catchment Area” available at: <https://crp.trb.org/acrpwebresource1/defining-your-airports-catchment-area/>

¹⁴ Completion Rate refers to the percentage of scheduled and/or planned air carrier arrivals that were not cancelled. Calculated as Metric Arrivals/(Metric Arrivals + Cancelled Arrivals). Cancelled Arrivals are determined next day using air carrier flight plan cancellation messages and scheduled flights not flown. Airline Service Quality Performance (ASQP) cancellation data are used when available. See “ASPM Cancellations: Definitions of Variables” available at: https://aspm.faa.gov/aspmhelp/index/ASPM_Cancellations_Definitions_of_Variables.html

operations. In fiscal year (FY) 2019, EWR's completion rate (97.0%) was lower than the NAS average, but similar to the completion rate at LGA (96.8%) and PHL (97.4%). Also in FY 2019, EWR's rate of delayed flights was 29.4% compared to schedule for gate departures and gate arrivals, which is higher than LGA (26.1%), John F. Kennedy International Airport (22.5%), and PHL (20.4%).¹⁵

The FAA made significant progress smoothing and balancing the schedule at EWR under the Level 2 construct just prior to the COVID-19 pandemic. The sudden, drastic disruption caused by COVID-19 affects the analysis and relevant long-term effects of operational, performance, and demand-related changes at EWR, including those changes resulting from Southwest leaving the airport. Access to EWR and the New York City area generally remains coveted, and schedule requests for flights at EWR have exceeded the desired scheduling limits in multiple hours. While the FAA would accommodate the reassignment of the 16 peak afternoon and evening operations as proposed in this notice, the FAA would continue to seek voluntary cooperation from all carriers to adjust schedules at EWR in an effort to manage the operation within the desired scheduling limits.

FAA notes that the COVID-19 public health emergency has created uncertainty about the ultimate recovery of demand back to pre-COVID levels or the potential for a "new normal" in demand levels at EWR as the public's travel patterns have, and continue, to evolve, and carriers restructure their networks to accommodate this dynamic. Given this evolving situation, FAA will continue to monitor performance at EWR and review its capacity evaluation and targeted scheduling limits at EWR in the future. However, at the current time, the desired hourly scheduling limit at EWR remains at 79 operations per hour and 43

¹⁵ See docket for ASPM data.

operations per half-hour.¹⁶ Based on historical demand and an increase in operations in “shoulder” periods adjacent to the busiest hours before the COVID-19 public health emergency, most hours are now at the desired hourly scheduling limits. To help with a balance between arrivals and departures, the desired maximum number of scheduled arrivals or departures, respectively, is 43 in an hour and 24 in a half-hour. This would allow some higher levels of operations in certain periods (not to exceed the hourly limits) and some recovery from lower demand in adjacent periods. FAA will seek to work in coordination with the awarded carrier to adjust schedules within the peak afternoon and evening period, including minor changes between adjacent half hours, in the interest of optimizing efficiency and accommodating the carrier’s schedule plans, consistent with the usual Level 2 process.

Proposed Reassignment

As stated above, FAA estimates that, in a pre-COVID-19 environment, reassigning the 16 peak-hour operations would result in additional delays, for all EWR operations, of approximately 1.2 minutes per operation throughout the day. United, by far the largest carrier at EWR by several measures, operates many routes on a monopoly basis. The Department has previously found that introducing LCC services in competition on monopoly routes significantly reduces fares on those routes.¹⁷ One study found that the presence of LCCs and ULCCs causes a decrease in average one-way fares of between \$15-\$36.¹⁸ Absent introduction

¹⁶ See 86 FR 24448 (May 6, 2021).

¹⁷ See “U.S. DOT/FAA - Notice of a Petition for Waiver and Solicitation of Comments on Grant of Petition with Conditions”, FAA-2010-0109-0097, Jul 21, 2011, at 33-34.

¹⁸ Wittman, Michael D.; Swelbar, William S. (August 2013). *Evolving Trends of U.S. Domestic Airfares: The Impacts of Competition, Consolidation, and Low-Cost Carriers* at 20; see also Bennett, Randall D.; Craun, James M. (May 1993). *The Airline Deregulation Evolution Continues: The Southwest Effect*. Office of Aviation Analysis, U.S. Department of Transportation.

of these LCC services, it is highly unlikely that there will be any significant reduction in fares. These potential savings to consumers are important objectives of the President's Executive Order on competition, particularly in a concentrated market. There are many benefits of competition, including lower fares, more throughput, higher utilization of scarce assets, more opportunities to develop flexible or common use airport facilities, and reduced opportunities for exclusionary behavior such as "babysitting." That will not change unless we introduce the LCC services and at the same time, seek necessary adjustments by incumbent carriers to mitigate the potential delays. The Department believes that the benefits of lower fares significantly outweigh the impacts of additional delays.

Given the court's decision, ongoing competition issues at EWR, and Executive Order 14036, the Department believes that it is necessary to reintroduce the competition that was previously provided by Southwest at EWR even though this will increase delays at EWR. Pursuant to the Department and FAA's authority under 49 U.S.C. §§ 40101, 40103, and 41712, the Department is initiating a proceeding to reassign the 16 peak-hour runway timings at issue. The Department believes that reassigning these schedule plans to operate in the 16-peak hour runway timings, in a manner that would continue to satisfy DOJ's competition remedy related to the United/Continental merger, and as quickly as possible, best satisfies the public interest and addresses the concerns of the D.C. Circuit.

This action is not a routine approval of schedule plans that would typically be handled under FAA's standard schedule facilitation procedures. The Department notes that this proceeding arises out of an unusual circumstance, where Southwest stopped operating at EWR, thus returning a large number of operations that Southwest acquired as a condition of the United-Continental merger. Thus, the Department is treating this matter as the

reassignment and continuation of the DOJ-approved competition remedy to the United-Continental merger. As such, the Department proposes to evaluate proposals from eligible carriers that can effectively carry out the goals of that competition remedy, namely to provide price and service competition to United, the dominant hub carrier at EWR, and for FAA to approve the peak-hour schedule plans of the carrier chosen based on that evaluation. In order to maintain the effect of the 2010 competition remedy, the Department has tentatively concluded that the schedule plans to operate in the 16 peak-hour runway timings should be approved as a package to a single carrier able to provide the type and magnitude of competitive discipline at EWR contemplated by the DOJ remedy.

Previously, DOJ found that the divestiture to Southwest of 36 slots at Newark (i.e., United's pre-merger holdings), including the 16 peak afternoon and evening period slots at issue in this notice, resolved its competition concerns with the transaction. By divesting all of the slots to a single carrier with a proven track record and the capability to provide a competitive pattern of frequent service in markets operated by United-Continental, DOJ was able to minimize the number of slots divested while maximizing the competitive impact of the remedy.

Based upon current competitive conditions, the Department finds that, in order to provide price discipline for the services of a hub carrier in particular, the LCC or ULCC approved to operate in the 16 peak-hour runway timings needs to have a sufficient pattern of service to achieve economies of scale in its operations at the airport consistent with its low-cost or low-fare business model, to protect itself from potential anticompetitive behavior from the dominant carrier(s), and to have sufficient incentive and ability to compete head to head with

dominant carriers.¹⁹ Furthermore, we have previously found that a single carrier offering a broader competitive alternative to the hub carrier's customer proposition at the airport can extend the benefits of the low-fare service even in markets without LCC or ULCC services by changing passengers' perception of what a fair price is for a particular itinerary.²⁰ When fares are substantially higher, customers tend to look for cheaper alternatives at other airlines or nearby airports to avoid paying "above market" prices. This "halo effect" tends to discipline high fares charged by the incumbent even in markets where the LCC does not operate, at the margin.

For these reasons, the Department proposes to approve, as a package to an eligible LCC or ULCC, schedule plans to operate in the 16 peak-hour runway timings previously approved for operation by Southwest. The Department seeks to finalize this process to enable a carrier to begin operations as soon as possible, as early as the start of the Winter 2021/2022 scheduling season. To determine eligibility, the Department is proposing several criteria, described below.

While approving an LCC or ULCC's schedule plans to operate in these 16 peak-hour runway timings is necessary to address ongoing competition issues at EWR, the Department is not concluding by virtue of this process that such action will be sufficient to resolve all of those issues. In addition, the Department notes that, aside from this proceeding to reassign 16

¹⁹ "Restricting eligibility to these ... carriers would assist new or small non-aligned carriers in defending themselves against increasingly dominant competitors, which, with the benefit of additional slot interests, could pursue anticompetitive strategies such as significantly increasing existing services in any new entrant/limited incumbent/low-cost/non-aligned carrier market." Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 75 FR 7306, February 18, 2010 at 7310.

²⁰ See Bennett, Randall D.; Craun, James M. (May 1993). *The Airline Deregulation Evolution Continues: The Southwest Effect*. Office of Aviation Analysis, U.S. Department of Transportation; and Wittman, Michael D.; Swelbar, William S. (August 2013). *Evolving Trends of U.S. Domestic Airfares: The Impacts of Competition, Consolidation, and Low-Cost Carriers*.

operations historically approved for operation by Southwest, usual policies and procedures for Level 2 schedule facilitation at EWR continue to apply.²¹ The FAA intends to provide responses to all pending schedule requests for the Winter 2021/2022 scheduling season as soon as possible following issuance of this notice. Once this reassignment proceeding has been completed, the FAA will take action to approve the 16 additional operations for the benefit of the awarded carrier.

Eligibility and Evaluation Criteria

In airline transactions involving constrained markets, where market concentration is at issue, the Department has found that LCCs and ULCCs have the greatest competitive impact upon entry by their ability to dramatically lower fares and increase the volume of passengers in a market.²² In the 2010 United/Continental divestiture, DOJ was satisfied that its competition concerns had been addressed by the transfer to Southwest, a LCC, of United's EWR slots and other assets.

Given competitive conditions at Newark – including United's ongoing dominance at EWR and the relatively small number of operating authorizations being reassigned – the Department tentatively believes that continuing to limit eligibility to LCC or ULCC carriers would best serve the public interest by providing the maximum level of competition with the available public assets.

In determining which LCC or ULCC would provide the maximum competition, the Department tentatively proposes to consider, among other factors, carriers' business model and

²¹ See *e.g.*, Notice of Submission Deadline for Winter 2021/2022 Scheduling Season, 86 FR 24428 (May 6, 2021).
²² See "Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport", 76 FR 63702, October 13, 2011 at 63705, and, Order 2016-11-2 at 21.

track record to ensure that they have the ability and stamina to provide the level of competition required. The business model and track record will be determined by analysis of revenue, traffic, and schedule data. More specifically, the Department will consider:

- Business model and product offering that allow the carrier to effectively compete, including the extent to which offering low fares to large numbers of travelers is core to its business proposition across markets;
- Record of entering and effectively competing in markets like those served by dominant carrier(s) at Newark;
- Staying power and track record in highly competitive markets, especially vis-à-vis the specific hub carrier and at network carrier hubs and focus cities where the competitive responses from incumbent airlines to new entry by price competitors may be particularly aggressive; and
- Ability to appeal to a broad cross section of passengers by offering a competitive schedule with (at least) minimum levels of daily and weekly frequency appropriate for the market(s) at issue, along with reasonably competitive onboard products and services and the ability to deliver them to customers consistently over time.

The Department tentatively proposes to evaluate eligible carriers based on the above criteria.

Comments Requested

The Department requests comments on various aspects of the proposed process outlined in this notice. Specifically, the Department seeks comments on its tentative decision to approve schedule plans, for a single carrier, to operate in the 16 peak-hour runway timings as soon as possible; its tentative decision to limit eligibility to LCC and ULCC carriers; and its

proposed evaluation criteria. The Department will consider comments outside of the scope of this request as nonresponsive. Comments must be filed in this docket and are due not later than [INSERT DATE 7 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Since the issuance of the D.C. Circuit's decision, the Department has received letters from interested stakeholders. Any correspondence related to the specific issues discussed in this notice have been included in the docket.

The Department will consider all responsive comments received and issue a further notice finalizing its decision and soliciting proposals from eligible carriers. If no responsive comments are received, the Department may proceed directly to issuing a notice requesting proposals and providing instruction for doing so.²³

Issued in Washington, DC on September 16, 2021.

/s/ Carol Annette Petsonk
Deputy Assistant Secretary for Aviation and International Affairs
U.S. Department of Transportation

/s/ Virginia T. Boyle
Vice President, System Operations Services
Federal Aviation Administration

²³ The Department will solicit proposals on a confidential basis given the sensitive commercial information that they are likely to contain.