

the United Nations Recommendations on the Transport of Dangerous Goods, and review of Annex III of the Marine Pollution Convention (MARPOL 73/78), as amended.

- Review of the Code of Safe Practice for Solid Bulk Cargoes (BC Code), including evaluation of properties of solid bulk cargoes.

- Cargo securing manual.
- Casualty and incident reports and analysis.

- Development of a manual on loading and unloading of solid bulk cargoes for terminal representatives.

- Guidance on serious structural deficiencies in containers.

- Measures to enhance maritime security.

- Ship/terminal interface improvement for bulk carriers.

- Alternative hold loading ban for bulk carriers.

Members of the public may attend the meeting up to the seating capacity of the room. Interested persons may seek information by writing: Mr. E. P. Pfersich, U.S. Coast Guard (G-MSO-3), Room 1210, 2100 Second Street SW., Washington, DC 20593-0001 or by calling (202) 267-1217.

Dated: August 15, 2003.

Margaret F. Hayes,

Chairman, Shipping Coordinating Committee, Department of State.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA-2003-15745]

High Density Traffic Airports

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Disposition of comments on the lottery procedures.

SUMMARY: This notice addresses comments received on the lottery procedures to be used by the FAA in the allocation of limited air carrier and commuter slots at Washington Reagan National Airport on August 12, 2003. Additionally, this notice lists all carriers eligible to participate and provides the carriers' classification for slot selection in the lottery.

DATES: August 11, 2003.

Date/Location of Lottery: The lottery will be held in the Federal Aviation Administration (FAA) Auditorium, 3rd floor, 800 Independence Avenue, SW., Washington, DC 20591 on August 12, 2003, beginning a 1 p.m.

FOR FURTHER INFORMATION CONTACT: Lorelei Peter, Operations and Air Traffic Law Branch, Regulations Division, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone number (202) 267-3134.

SUPPLEMENTARY INFORMATION:

Background

On July 9, 2003, the FAA published in the **Federal Register** a notice of lottery and allocation procedures for a limited number of air carrier and commuter slots at Reagan National Airport (DCA) (68 FR 41037). A clarification regarding the applicable definition of a limited incumbent carrier was published in the **Federal Register** on July 18, 2003 (68 FR 42796). On July 24, 2003, the FAA opened a docket for the lottery (FAA-2003-15745) and invited interested parties to comment on issues related to the lottery procedures by July 28, 2003. On July 31, 2003, the FAA issued a notice rescheduling the lottery from July 31, 2003, to August 12, 2003, in order to address these issues and others raised in the comments, prior to the scheduled lottery (68 FR 47378; August 8, 2003).

This notice responds to the comments received, explains the lottery procedures, and classifies the carriers eligible to participate in the lottery under our applicable regulations as new entrants, limited incumbents, and incumbents, as defined in 14 CFR 93.213. We also note which carriers are considered single operators for the purposes of slot allocation.

Discussion of Comments

The FAA received comments from the Metropolitan Washington Airports Authority (MWAA), Air Canada, ATA Airlines (ATA), Spirit Airlines, US Airways, the Air Carrier Association of America (ACAA) and Congressman Regula, as well as several reply comments. The comments identified five major issues, which are discussed below.

1. Definition of New Entrant

Under the applicable regulations, a "new entrant" carrier is an air carrier or commuter operator that does not hold a slot at a particular airport and has neither sold or given up a slot at that airport since December 16, 1985 (14 CFR 93.213(a)(1)) (emphasis added). A limited incumbent carrier is defined in 14 CFR 93.213(a)(5) and is a commuter operator or air carrier operator that holds or operates fewer than 12 air carrier or commuter slots, in any combination, at a particular airport

(emphasis added). In determining who qualifies as a limited incumbent carrier, the definition requires that we exclude international slots, Essential Air Service Program slots, or slots allocated at DCA between the local hours of 2200 and 0659. A carrier that holds or operates 12 or more slots at an airport is an incumbent carrier.

There are two carriers requesting to participate in the lottery that do not hold slots at DCA, but have a presence at the airport, and in fact, conduct operations at DCA. Chautauqua and Atlantic Coast Airlines operate slots, which are actually held by larger, incumbent carriers, through codeshare arrangements or by lease and conduct these operations on behalf of the incumbents.

The definitions cited do create something of an anomaly in that a carrier that holds no slots but operates more than 12 cannot be a "limited incumbent" under the lottery rule but could be a "new entrant." Similarly, a carrier could be both a limited incumbent and a new entrant if it operates fewer than 12 slots but holds none. ATA and Air Canada urge the FAA to apply the term "new entrant" as plainly defined and argue that any carrier that does not hold slots in its own right at DCA should be included in the new entrant category regardless of its operations at the airport. ACAA argues that Air Canada and Mesa should not be allowed to participate either as a "new entrant" or "limited incumbent" given that both operate more than 12 slots at the airport. ACAA argues if the regulations preclude a carrier from being a limited incumbent, the carrier logically cannot be a new entrant.

In making the argument that the FAA should veer from the plain language of the regulation, ACAA selects a phrase from section 93.225(e), the provision which sets out the lottery procedures and provides that "any U.S. carrier or foreign carrier where provided for by bilateral agreement, *that is not operating scheduled service at the airport * * * but wishes to initiate scheduled passenger service at the airport*, shall be included in the lottery if it notifies the FAA." (Emphasis added.) ACAA contends that because this provision distinguishes carriers operating at the airport from those who do not, a "new entrant" must mean a carrier that is not already operating at the airport.

A significant difference between a new entrant carrier and a limited incumbent carrier is that slots allocated under the Essential Air Service Program, for international operation or in the low-demand hours at DCA (2200-0659) are counted in determining whether a

carrier is a new entrant. Air Canada and ATA Airlines both hold slots in the low-demand hours. Mesa previously has held EAS slots at DCA. Consequently, Air Canada and Mesa are incumbents and ATA Airlines is a limited incumbent.

For several reasons we conclude that the definition of "new entrant" should be applied as written, with the result that carriers who do not hold any slots at the airport according to the FAA's records will be considered new entrants for purposes of this lottery, regardless of whether they also operate any slots at the airport. First, in 1985, when the definition of "new entrant" was promulgated as part of the "buy/sell" rule, (50 FR 52189; December 20, 1985), the industry operated much differently than today. At that time, most commuter service was provided by independent companies who held their own slots and entered into feeder or marketing relationships with the larger carriers. The Department did not want to define "new entrant" in such a way as to create a disincentive toward such arrangements by making it more difficult for carriers to conduct operations at the airport through leased slots to obtain permanent slots of their own. Chautauqua, and Atlantic Coast's access to DCA is a result of lease arrangements and neither of these carriers hold slots outright. The underlying policy goal that was the basis for first defining a new entrant in this way remains a valid consideration today.

Second, leasing a slot that is necessary to enter competition is a far cry from holding the slot outright. Both air carriers who would be adversely affected by an interpretation that equated "operations" with "holdings" are independent companies who have entered into codeshare arrangements with larger carriers to operate commuter flights. We have no information to suggest that these carriers cannot conduct operations on their own, outside of their codeshare arrangements, competing against incumbents.¹ ACAA's proposed interpretation of our rules would potentially inhibit competition.

Lastly, interpreting the definition of "new entrant" in the manner suggested by ACAA—that is, against its literal language—would necessitate a lengthier proceeding that we believe is warranted. It may well be that a review of this

definition along with other important questions is justified in view of the changes that have occurred in the industry since 1985, and the plethora of arrangements by which slots are made available under the rule (common ownership, contracts, leases and multiple codeshare arrangements). For now, however, the FAA finds that the public interest lies in allocating these slots promptly. Therefore, the new entrant definition will be applied in its present form.

2. New Entrant Preference

ATA claims that the FAA's intended procedure, by which we will permit the first ranked new entrant carrier to select four of the available six air carrier slots, is inconsistent with the regulatory requirements and fundamentally unfair. ATA contends that the original rationale for our rule allowing new entrants to select four slots in the first sequence of the lottery—*i.e.*, that four slots are minimally necessary for an economically viable operation—is clearly no longer justified. ATA would prefer that we remake the procedures so as to maximize the number of carriers who receive slots in the lottery, by allowing three new entrant carriers to select two slots each.

The regulation governing slot lotteries establishes two preferences for new entrant carriers: (1) In the first selection sequence, 25 percent of the slots available in the lottery, or no less than 2, are reserved for new entrants ("new entrant set-aside"); and (2) new entrant carriers may select four slots, if available in the first sequence. (*See* 14 CFR 93.225(h) and (f) respectively.)

The upcoming lottery offers six slots in the air carrier category. A rank order of all carriers eligible to participate in the lottery will be established at the start of the lottery. Incumbent carriers may only select after all new entrant and limited incumbent carriers have made their selections. After the rank order is established, the first new entrant may select two slots. This will complete the new entrant set-aside. The lottery continues with the first selection sequence by starting at the top of the established rank order and moving to the first new entrant or limited incumbent carrier. If the first carrier in the rank order is a new entrant (that also selected two slots in the new entrant set-aside), that this new entrant is eligible to select only two additional slots, which completes its selection of four slots in the first selection sequence, as provided for in the regulation. Alternatively, after completing the new entrant set-aside selections, if the first non-incumbent carrier in the rank order

is a limited incumbent carrier, then that carrier may select two slots. Following the rank order to the next new entrant or limited incumbent carrier, that carrier would in this case select the remaining two slots.

ATA asks the FAA to disregard the governing regulatory provisions referenced above and instead adopt an *ad hoc* allocation approach that ATA argues will better achieve the policy goal of maximizing competitive services at DCA. In promulgating the lottery procedures, the FAA and the Department of Transportation specifically found that the two articulated preferences for new entrants were warranted to further policies enunciated in the Airline Deregulation Act of 1978 (50 FR 52193; December 20, 1985). The resulting lottery provision is quite specific in this regard and the FAA does not find that it has the latitude suggested by ATA to arbitrarily change this provision, or ignore it. Given the limited number of slots available in this lottery relative to the number of participants, it may be that only a few carriers will get to select slots. As discussed below, the FAA and the Department are neither amending nor abandoning the agencies' position that the opportunity for a new entrant carrier to select four slots is preferable in meeting the stated goals.

ATA also argues that all the new entrants already have some slots (or slot exemptions) and that four slots are not economically necessary for new entrants to establish service at the airport. ATA points to service conducted by Alaska Airlines and Frontier Airlines, which have both been successful conducting a single roundtrip at DCA. In recent FAA and Department proceedings however, several new entrant carriers have argued the opposite, contending that even four slots during peak hours are not enough today to launch viable service.

We recognize that ATA successfully operates at DCA using only four peak hour AIR-21 exemption slots and two off-peak hour slots. Likewise, both Alaska Airlines and Frontier Airlines are the recipients of AIR-21 slot exemptions by the Department for beyond the perimeter service at DCA. Frontier Airlines provides the only nonstop DCA/Denver service (Order 2000-7-1) and Alaska Airlines (Order 2001-6-20) provides the only nonstop DCA/Seattle service. That nonstop service from DCA to these markets can be operated successfully in the absence of other non-stop competition is not surprising; new entrant carriers seeking to provide competitive alternatives on city-pairs already served by other

¹ Indeed, very recently one of these carriers—Atlantic Coast announced it anticipates that its longstanding relationship with United Airlines will end, and that it will establish a new, independent low-fare airline. See <http://www.atlanticcoast.com/pressreleasearchive/2003/july/728.htm>.

carriers on a nonstop basis is a different situation.

US Airways objects to any lottery, characterizes the lottery mechanism as "anti-incumbent" and argues that "redistributive lotteries" are not appropriate.

One of the primary purposes of the lottery provision was to enhance competition by affording new entrant and limited incumbent carriers greater access to slot-controlled airports. Thus, the Department believed that allowing incumbent carriers to participate on equal terms with new entrants in seeking permanent allocation of slots would reduce the opportunities for new entrants or limited incumbents to introduce competitive service (57 FR 37309; August 18, 1992). Therefore, in promulgating this rule, the FAA and the Department restricted the permanent allocation of slots to incumbent carriers. Whether or not that policy should be revisited today, in light of the economic condition of incumbent carriers, the FAA is clearly bound to give it its full force and effect and to carry out the intent of our regulations.

US Airways complains that the lottery provision is "anti-incumbent" in that airlines that hold a substantial number of slots may only receive a temporary allocation through the lottery after all new entrant and limited incumbent carriers have finished their selections. However, incumbent carriers such as US Airways received a large base level of slots at the time the allocation rules were adopted in 1985; as a whole, arguably, the provisions benefited incumbents. Today, US Airways and its wholly owned subsidiaries hold 43 percent of the slots at DCA, the next largest slot holder at the airport is Delta and its wholly owned subsidiaries with approximately 14 percent of the slots. Thus, two carrier groups account for nearly 60 percent of the slots at the airport. Despite the buy-sell rule, the lottery provision in the regulations is the only mechanism that specifically addresses competitive access to slot-controlled airports such as DCA.

The need for a lottery also stems from other aspects of our rules. The slots in question have never been allocated permanently, and the lottery allocation provision is the only means of allocating these peak hour slots on a permanent basis. US Airways and other carriers were allocated slots during peak hours on a temporary basis subject to recall by the FAA and distribution by lottery in accordance with the regulations. Consequently, this process is entirely appropriate to allocate available slots.

3. Lottery Allocation in Light of Other Related Proceedings

Spirit Airlines points to the variety of pending proceedings concerning slots and slot exemptions and asks the FAA and the Department to end the practice of allocating slots on a piecemeal basis, saying this practice makes it difficult for any new entrant carrier to evaluate the true economics of potential operations at the airport. Spirit would defer the lottery until other agency actions on slots exemptions and/or the potential exemptions in pending legislation, in particular, H.R. 2115 "Aviation Investment and Revitalization Vision Act," are allocated. Conversely, ATA argues that the public interest requires that slots be allocated whenever they become available and says that slots should be used once allocated. ATA and MWAA also oppose a delay of the lottery to wait for the potential allocation of slot exemptions currently under consideration by Congress. US Airways again questions the basis for any lottery and forecasts that it is likely that slots will become available after the current slot usage waiver terminates and that a lottery should be conducted at that time.

The FAA has discretion to conduct a lottery when it determines that there are sufficient slots available for allocation. The fifteen slots that are available for allocation in this lottery are slots that were previously returned to the FAA or were allocated temporarily to carriers on a first-come, first-served basis on the express condition that they would be recalled when the FAA determines that it is necessary to allocate the slots permanently. Over the past many months the FAA received numerous inquiries and requests for slots at DCA by new entrant carriers. In light of the expressed demand for permanent allocation of the available slots at the airport, we believe that the spirit of our regulations require that we allocate whatever capacity is available at the earliest practical time. As indicated by the number of carriers that filed requests to participate in the lottery and by the comments submitted to the docket, it is evident that there is demand by many carriers for even this limited number of slots.

We have no indication that slots at DCA will be returned to the FAA after the expiration of the slot usage waiver period, instituted in April 2003. (Temporary return of peak-hour slots for non-use during this waiver period has been minimal.) Some AIR-21 slot exemptions were recalled for non-use, however, their reallocation process is not done by lottery. We find it would be

inconsistent with the regulatory allocation regime to indefinitely postpone the lottery. Consequently, the FAA will proceed with the lottery on August 12, 2003.

4. Use of Commuter Equipment in Air Carrier Slots

MWAA and the ACAA express concern over the increasing incidence with which air carrier slots are operated by carriers using commuter type aircraft that qualify for commuter slots. These parties argue that this practice has resulted in a decline of passenger activity at DCA even as the number of overall operations at the airport has remained relatively constant. MWAA asks that we require air carriers participating in the lottery not only to have aircraft that meet the definition of the equipment that may be operated in this category of slots, but also to have the stated intention to use these slots for operations with the larger aircraft.

A carrier that wishes to participate in a lottery for either air carrier or commuter slots must hold the appropriate FAA operating authority for the slots the operator seeks to select (14 CFR 93.225a(g)). The FAA has interpreted the existing provisions of § 93.225 to limit participation in air carrier lotteries to carriers capable of operating air carrier equipment within the meaning of 14 CFR 93.123(c) (51 FR 21706; June 13, 1986). After air carrier slots have been allocated, a carrier may use smaller aircraft in air carrier slots in accordance with 14 CFR 93.221(c). While we are sympathetic to MWAA's position, the FAA cannot limit or condition approval on participation in the air carrier lottery in the manner suggested by MWAA, without amending the regulation.

5. "Mandatory Participation"

ATA complains that the FAA plans to include all carriers that currently operate at DCA in the lottery, even if those carriers did not actually notify the FAA that they want to participate in the lottery. ATA says this plan constitutes a "mandatory participation" regime that is not in accordance with either the regulations or the lottery notice.

This argument reflects a misunderstanding of the rule. The rule expressly provides that "participation in a lottery is *open* to each U.S. air carrier or commuter operating at the airport * * * as well as where provided for by bilateral agreement" (14 CFR 93.225(e) (emphasis added). Participation is not mandatory. As a matter of procedure, the FAA includes every carrier at the airport as eligible to participate and each carrier receives a rank order. These

carriers also are not required to submit notice to the FAA of their intention to participate in the lottery; carriers that do not conduct scheduled service at the airport are required to submit notice to the FAA of intention to participate in the lottery no later than the date specified in the **Federal Register** notice, which was July 16. However, it is up to each carrier as to whether it ultimately chooses to participate or select slots in the lottery. A carrier may advise the FAA at any time that it does not want to participate or it may simply pass at the lottery by not selecting available slots.

List of Carriers Eligible to Participate in the Lottery by Category

The lottery for the air carrier slots will be conducted first and the lottery for the commuter slots will follow.

Air Carrier Slot Lottery	Category
Air Canada	Incumbent
AirTran Airway	New Entrant
Alaska Airlines	New Entrant
ATA Airlines	Limited Incumbent
Frontier Airlines	New Entrant
Mesa Air Group (Air Midwest, Freedom, Mesa)	Incumbent
Spirit Airlines	New Entrant
America West Airlines	Limited Incumbent
American Airlines	Incumbent
Continental Airlines	Incumbent
Delta Air Lines	Incumbent
Midwest Airlines	Incumbent
Northwest Airlines	Incumbent
United Airlines	Incumbent
US Airways	Incumbent
Commuter Slot Lottery	Category
Air Canada	Incumbent
Atlantic Coast Airlines	New Entrant
Chautauqua Airlines/Shuttle America	New Entrant
Colgan Air	New Entrant
Corporate Airlines	New Entrant
Mesa Air Group (Air Midwest, Freedom, Mesa)	Incumbent
Allegheny Airlines/Piedmont Airlines/PSA Airlines (US Airways Express)	Incumbent
American Eagle	Incumbent
Atlantic Southwest/Comair (Delta Connection)	Incumbent
Midway Airlines	Incumbent
Skyway Airlines	Incumbent
Trans States Airlines	Incumbent

Issued on August 11, 2003 in Washington, DC.

Andrew B. Steinberg,
Chief Counsel.

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From Requirements

Pursuant to Title 49 Code of Federal Regulations (CFR) part 235 and 49 U.S.C. 20502(a), the following railroads have petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR part 236 as detailed below.

Docket Number FRA-2003-15639

Applicant: New Jersey Transit, Mr. William B. Duggan, Vice President and General Manager, Rail Operations, One Penn Plaza East, Newark, New Jersey 07105-2246.

New Jersey Transit (NJT) seeks temporary relief from the requirements of section 236.566 of the Rules, Standard and Instructions, to the extent that NJT be permitted to operate non-equipped New York Susquehanna and Western (NYS&W) steam locomotive number 142, in automatic train control territory, on NJT's Raritan Valley Line between Cranford, New Jersey, milepost 15.0 and High Bridge, New Jersey, milepost 52.2, on Saturday and Sunday, September 13 and 14, 2003, in celebration of the City of Dunellen, New Jersey's event, "Dunellen Railroad Days." In addition, NJT seeks temporary relief from the requirements in section 236.566 to the extent that NJT be permitted to operate non-equipped NYS&W steam locomotive number 142, in automatic train control territory, on NJT's Montclair and Morristown Lines between Newark, New Jersey, milepost 9.0 and Hackettstown, New Jersey, milepost 56.9, on Saturday and Sunday, October 4 and 5, 2003, in celebration of the Borough of Lincoln Park, New Jersey's event, "Lincoln Park Days."

Also, excursion trips are in the planning stages that would either take place on NJT's Main Line to Suffern, New York, then over MTA Metro-North Railroad (MNR) to Port Jervis, New York, or on NJT's Bergen County Line to the NYS&W interchange at BT Interlocking, milepost 14.2. Thus, NJT seeks temporary relief from the requirements in section 236.566 to the extent that NJT be permitted to operate non-equipped NYS&W steam locomotive number 142, in automatic train control territory, on NJT's Main Line between Jersey City, New Jersey, milepost 2.2 and Suffern, New York,

milepost 30.5, or on the Bergen County Line between Jersey City, New Jersey, milepost P 2.2 and Ridgewood Junction Interlocking, milepost 19.0, on Saturday and Sunday, October 11 and 12, and October 25 and 26, 2003, for the proposed NYS&W Technical and Historical Society events.

Applicant's justification for relief: The three NJT lines are equipped with automatic block signals and operate under NORAC Rules 251 and 261, and the steam excursion train movements for each event would be limited to no more than four trips daily, would not exceed 50 miles per hour, and would establish an absolute block ahead of each movement.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and contain a concise statement of the interest of the party in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

All communications concerning this proceeding should be identified by the docket number and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, Room PL-401 (Plaza Level), 400 7th Street, SW., Washington, DC 20590-0001. Since the anticipated operations would take place early next month, communications must be received within 15 days of the date of this notice to be considered by the FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.-5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at <http://dms.dot.gov>.

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written