BEFORE THE

DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

01-5058
OST-95-368-4

Application of SIMMONS AIRLINES, INC. d/b/a AMERICAN EAGLE for an exemption from Subparts K and S of Part 93 of the Federal Aviation Regulations	OST-95-368

REPLY OF SIMMONS AIRLINES, INC. d/b/a AMERICAN EAGLE
TO THE ANSWERS OF THE CITY OF CHICAGO
AND UNITED AIR LINES, INC.

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TO-THE ANSWERS OF THE CITY OF CHICAGO
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Simmons Airlines, Inc. d/b/a American Eagle hereby submits this reply in support of the City of Chicago's answer and in opposition to United Air Lines, Inc.'s answer to Simmons' application for six international exemption slots at Chicago O'Hare International Airport. The Secretary should promptly grant the relief Simmons has requested.

The standards for securing the requested relief are unambiguously stated in the Federal Aviation Administration Authorization Act of 1994 and have been duly met by Simmons. The Act permits exemptions to the High Density Rule to enable air carriers to provide international service from a high density airport (other than Washington National) if the Secretary finds it is in the public interest and the carrier uses Stage 3 aircraft. In applying the provisions of the Act to Simmons' application, the City of Chicago has demonstrated its awareness of two elementary principles of statutory

construction that United has conveniently forgotten: namely, that the language of a statute must be interpreted in accordance with its plain meaning, and that administrative regulations rank below statutes in order of precedence.

instead, United, in its zeal to protect its dominant position at O'Hare, has fabricated out of whole cloth a Congressional intent to deny Simmons the benefits of the Act. If Congress intended to exclude Simmons from the opportunity to secure international exemption slots, it would not have passed a law giving the Secretary the authority to grant exemptions from the High Density Rule to enable "air carriers and foreign air carriers to provide foreign air transportation." 49 U.S.C. §41714(b)(2) (emphasis added). United maintains, in its attempt to obfuscate the plain language of the statute, that "foreign carriers and smaller U.S. incumbents at O'Hare" are the only intended beneficiaries of the exemption provision. (United, at 7 (emphasis added)). However, it is a basic legal principle that when the language of a statute has a plain meaning, it must be followed. United States v. Alvarez-Sanchez, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994); Caminetti v. United States, 242 U.S. 470 (1916); Spink v. Lockheed Corp., 60 F.3d 616 (9th Cir. 1995); Johns 57 F.3d 1544 (10th Cir. 1995).

The centerpiece of United's argument is that "exemptions granted pursuant to this new authority must be consistent with the long-standing regulatory objectives of the High Density Rule." (United, at l-2). This is simply wrong (even though

Simmons' petition is in fact consistent with two primary objectives of the regulation, to encourage international service and enhance service to small communities). The novel notion that a Federal law must be made subordinate to an administrative regulation disregards a fundamental tenet of statutory interpretation; that is, in giving weight to the provisions of a statute and an administrative regulation, the former prevails. Colaate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355 (1949); Office of Consumers' Counsel v. FERC, 655 F.2d 1132 (D.C. Cir. 1980); Talley v. Matthews, 550 F.2d 911 (4th Cir. 1977). The Act does not need to be made consistent with the High Density Rule; rather, the High Density Rule needs to be made consistent with Act.

Finding this consistency is not difficult. In pertinent part, the Act states that notwithstanding the High Density Rule, the Secretary, upon a finding of the public interest, may grant slot exemptions to air carriers operating foreign air transportation with Stage 3 aircraft. The statute in effect sets the High Density Rule and its objectives aside and gives the Secretary the discretionary power to determine whether the public interest would be served by an air carrier's proposed foreign air transportation. The sum of Congressional intent in this section of the Act -- an intent which can be and should be divined from the unambiguous language of the statute -- is to promote international air service by air carriers operating quiet aircraft.

United's ominous warning to the Secretary to reject Simmons' application or

drown in a flood of international exemption applications from United and American is dramatically overblown. Other than its proposed service to London, Ontario, Simmons has no current plans to apply for additional international exemption slots at O'Hare; for its part, American currently possesses a sufficient number of slots to support its international operations. United's claimed intention to flood the Secretary with exemption requests is belied by its opposition to the instant application -- if United had the need for such slots, it would no doubt be vigorously pursuing them.

United's supposedly selfless plea on behalf of foreign carriers and smaller U.S. incumbents (none of whom have opposed Simmons' application) is patently disingenuous. United's opposition to Simmons' application strongly suggests that United and its "commuter alter egos" simply have no use themselves for international exemption slots. Like Aesop's dog in the manger, who refuses to let the ox dine on hay even though the dog has no interest in eating the hay himself, United would begrudge Simmons, the State of Illinois and the travelling and shipping public an opportunity to benefit from important new nonstop air service between Chicago and London, Ontario by a commuter carrier -- which despite United's protestations -- is all this application is about.

United would have the Secretary believe that Simmons and American are the same entity, a canard that is not worthy of any lengthy discussion here, other than to point out that United blatantly misrepresented the finding of the recent National

Mediation Board decision it cites in its answer. (United, at 1). The NMB found that the four American Eagle commuters (Simmons, Wings West Airlines, Inc., Flagship Airlines, Inc. and Executive Airlines, Inc.) are a single carrier for NMB purposes and as such may be represented by a single collective bargaining unit; the NMB decision has absolutely nothing to do with American Airlines.

The fact is that Simmons is a regional commuter carrier and as such has more limited flexibility in using its slots than does a jet carrier. While commuter slots can in some circumstances be upgraded to jet slots, no jet slot holder is likely to downgrade its slots for commuter operations, even if the jet slot holder were an affiliated airline. While a jet carrier operating multiple frequencies on a given route is able to transfer some slots to support a new route without seriously jeopardizing the existing route, a commuter carrier rarely can do this without making painful cutbacks to its existing service. Simmons must carefully manage its existing slot allocation, anallocation that is further constrained by its EAS obligations. Without the requested relief, adding six new slots for the London, Ontario service will create a zero sum game in which some of Simmons' existing cities will lose badly.

In its answer, the City of Chicago carefully and correctly explains the legislative history of the provisions of the Act relating to slot exemption procedures. Most importantly, the City gives strong support to Simmons' argument about how the new service would serve the public interest. To this end, the City has convincingly

explained what the service would mean to the region :

> The slots will bring new service to an important, emerging market. Canada is the largest and fastest growing aviation market for the Chicago area, and the largest export market for Illinois. . . . The slots will help take advantage of the enormous opportunities created by the new U.S.-Canada bilateral air transport agreement signed on February 24, 1995. (City, at 6)

The City also states that the new service would offset the arguable imbalance created by the grant of 10 slots without charge for Canadian carriers as a result of the bilateral and that permitting U.S. carriers to avail themselves of the foreign air transportation exemptions assures equality as foreign air carriers begin to request exemptions for new service to Chicago. The City recognizes that granting the application would obviate Simmons' need to cut backs valuable, existing service to and from O'Hare to mid-sized communities throughout the Midwest.

The benefits the U.S.-Canada bilateral created for Canadian carriers at O'Hare make Simmons' application particularly compelling. In its vision of open skies between the United States and Canada, the Department surely did not intend to create new transborder opportunities at O'Hare only for Canadian carriers, or to create transborder opportunities for U.S. carriers at the expense of existing service to smaller communities.

Finally, since Simmons filed its application, the Secretary has denied the application of Spirit Airlines, Inc. for an exemption pursuant to 49 U.S.C. §41714(c)(1)

to enable Spirit to operate five nonstop round-trip jet flights between New York LaGuardia Airport and Detroit City Airport. (Order 95-8-38 (August 24, 1995)). That decision is based on a finding that Spirit's "application does not fully meet the exceptional circumstances criterion of the Act." (Order, at 5). Simmons' application is fully distinguishable. Granting slots for new entrants requires the Secretary to find the public interest and exceptional circumstances; granting slots for foreign air transportation, as Simmons has requested, requires only a finding of the public interest. The "exceptional circumstances criterion" does not apply to an application for slots for foreign air transportation.

In addition, while no determination about the impact of Simmons' proposed service on operational delays is required under the Act, it is significant that objections about delays and congestion -- which were forcefully made against Spirit's proposed service -- are completely absent here. The Department itself recognized in its May 1995 report to Congress on the High Density Rule that the balanced airfield capacity at O'Hare is at least an additional four slots per hour. The six commuter slots per day requested by Simmons can be comfortably accommodated at O'Hare.

For all the foregoing reasons, Simmons Airlines, Inc. d/b/a American Eagle respectfully requests that the Secretary grant the application and such other relief as may be necessary and proper.

Respectfully submitted,

SIMMONS AIRLINES, INC. d/b/a
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing reply by first-class mail on the following persons:

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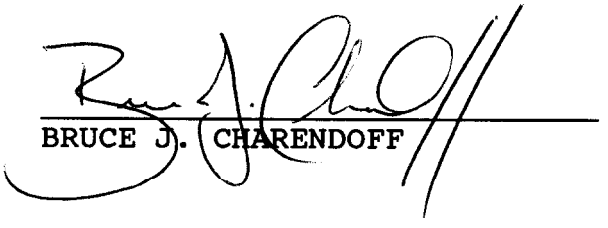

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