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Order 99-11-6



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

Issued by the Department of Transportation  
on the 10<sup>th</sup> day of November, 1999

Served: November 10, 1999

In the matter of the joint application of

**SOUTHERN AIR TRANSPORT, INC.  
and SOUTHERN AIR, INC.**

for approval of transfer of certificate and exemption  
authority pursuant to 49 U.S.C. 41105

**Docket OST 99-5670**

In the matter of the fitness determination of

**SOUTHERN AIR TRANSPORT, INC.**

as a certificated air carrier under 49 U.S.C. 41102

**Docket OST-99-5670**

In the matter of the cancellation of the section 41102 and  
41103 certificates and exemption authority issued to

**SOUTHERN AIR TRANSPORT, INC.**

for dormancy under section 204.7 of the Department's  
Regulations

**Dockets OST-96-1153,  
96-987, 49043,  
41187, 32342, 30833  
and 30789**

**ORDER TO SHOW CAUSE**

**Summary**

Southern Air Transport, Inc. (SAT) and Southern Air, Inc. (Southern) have jointly requested that the Department transfer the certificate and exemption authority currently held by SAT to Southern. Upon consideration of this request, we have tentatively decided not to transfer the authority as requested, but to cancel such authority for the reasons set forth below. We are also tentatively finding Southern fit to engage in interstate and foreign charter air transportation of property and mail and are proposing to issue to it new section 41102 certificates of public convenience and necessity authorizing such operations.

## CERTIFICATE TRANSFER

### Background

SAT was initially issued authority in 1947. In the ensuing years, the carrier sought and was granted additional certificate and exemption authority and presently holds certificates authorizing it to provide a wide range of interstate and foreign scheduled and charter air transportation.<sup>1</sup> On September 25, 1998, SAT ceased all air transportation operations and on October 1, 1998, the carrier filed for Chapter 11 bankruptcy protection. On February 25, 1999, the U.S. Bankruptcy Court for the Southern District of Ohio Eastern Division approved the sale of certain assets of SAT, including its DOT authority, to Southern.

On May 10, SAT and Southern filed a joint application in Docket OST-99-5670 requesting that all of the certificate and exemption authority held by SAT be transferred to Southern.

On May 21, Polar Air Cargo, Inc. (Polar) filed an answer to the joint application. Polar states that, while it does not oppose the transfer of SAT's operating authority to Southern in general, it does oppose any transfer of SAT's dormant U.S.-Colombia all-cargo designation to Southern. Polar states that Southern does not contemplate starting any scheduled service anywhere until at least September 2000 and even then it does not propose to operate in the U.S.-Colombia market. Polar states that it has an application pending for authority in that market in Docket 98-3939 and is prepared to use one of the two available U.S.-Colombia designations. Polar contends that Southern's proposal to allow temporary allocation of this limited-entry authority to other carriers pending its own use of such authority is unacceptable, since entry into a new international market would involve significant outlays of capital and other resources that would be subject to loss should Southern subsequently decide to exercise its exemption authority.

On June 7, Kitty Hawk, Inc., filed an answer in opposition to the transfer application. Kitty Hawk states that Southern's filing more properly should have been fashioned as an application for initial certificate authority, and that the transfer of any certificate or exemption authority should be denied or deferred pending establishment of Southern's fitness. Like Polar, Kitty Hawk opposes the transfer of most of SAT's authority because Southern has no definite plans or timetable for using such authority. Kitty Hawk states that a certificate transfer must be

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<sup>1</sup> SAT holds certificates authorizing it to engage in section 41103 interstate all-cargo air transportation (Order 78-5-120), section 41102 interstate charter air transportation of persons, property and mail (Order 84-1-59), foreign charter air transportation of persons, property and mail (Order 80-1-87), foreign charter air transportation of property and mail (80-9-106), and foreign scheduled air transportation of property and mail between the U.S. and Hong Kong, Australia, South Korea, Taiwan, and Ireland (Order 95-1-6). The carrier also holds exemption authority to engage in foreign scheduled air transportation of property and mail between the U.S. and Chile (Order 95-3-31). This U.S.-Chile exemption authority expired on March 6, 1996, but has been kept in force pursuant to the provisions of the Administrative Procedure Act (APA), 5 U.S.C. 558(c) as implemented by 14 CFR Part 377, pending action on SAT's timely filed renewal application. Likewise, SAT holds exemption authority to operate scheduled cargo service between the U.S. and Colombia (Order 97-6-16) which expired on May 15, 1999, but has been kept in force pursuant to provisions of the APA.

shown to be consistent with the public interest, and that Southern's proposal to hold the transfer authority for use at some future, undetermined time would not be making maximum use of U.S. international route rights, and thus, would be inconsistent with public policy. Finally, Kitty Hawk raises certain questions as to whether Southern can meet the Department's financial fitness standard.

On June 17, SAT and Southern filed a joint consolidated reply to Polar's and Kitty Hawk's answers accompanied by a motion for leave to file, which we will grant. Southern states that it understands that it must be found fit before the Department will transfer to it any authority; and that, in response to the questions raised about its financial fitness, it is in the process of submitting amended financial data which includes evidence of additional working capital. Southern states that, contrary to Kitty Hawk's claim, it is not attempting to circumvent the Department's regulations and precedents for securing operating authority or a fitness determination. In support of this position, Southern states that the Department's regulations and precedents permit a non-operating applicant, like itself, to seek the Department's approval for a route transfer of authority it has acquired.<sup>2</sup> Additionally, Southern states that Kitty Hawk did not oppose SAT's application for renewal of its Colombia exemption authority and that Polar's answer is aimed at influencing the

On June 24, Kitty Hawk filed a motion for leave to file and a surreply to the Southern and SAT consolidated reply, which we will grant.<sup>3</sup> Kitty Hawk states that Southern has an obligation to articulate its route plan to allow the Department to make the required public interest and public convenience and necessity findings for the authority that Southern is requesting be transferred.<sup>4</sup>

### **Tentative Decision**

Under section 41105, the Department must determine that any transfer of certificate authority is in the public interest and, in addition, not inconsistent with international aviation policy. We must also determine that the entity to which the certificate authority is being transferred is fit, willing, and able to hold that authority.

We have reviewed the instant application, the answers of Kitty Hawk and Polar, and the responses of the applicants, as well as other information available to us. Based on that review,

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<sup>2</sup> Southern cites Orders 92-11-46 and 86-4-68 as precedent for the transfer of certificate authority to a non-operating entity.

<sup>3</sup> Kitty Hawk also filed a response to Southern's July 30 reply to a July 2 Department information request. Although it did not submit a motion to file an unauthorized document, we will accept the response.

<sup>4</sup> Kitty Hawk also argues that Southern's situation is not the same as that in Order 92-11-46, where Continental Micronesia sought a certificate in a docket separate and apart from the related request for the transfer of certificate authority of the old Air Micronesia. Kitty Hawk states that an important factor in that case was that Continental purchased all of the tangible and intangible assets in a "turn key" operation. On the other hand, Southern has acquired only a very few airline-assets from a non-operating carrier. The other case (Order 86-4-68) involved the initial certification of two airline divisions of Challenge Air Transport, Inc. Kitty Hawk argues that it was significant to the Department's decision that Challenge was an existing certificate holder and operating air carrier and that, in the instant case, neither SAT nor Southern is an operating carrier and therefore the Challenge precedent is not helpful to the joint applicants.

we tentatively conclude that Southern is fit to conduct the limited all-cargo charter operations that it proposes in its application. However, we tentatively conclude that we are not prepared to transfer to Southern the various additional authorities held by SAT, including its passenger authority and its scheduled all-cargo route authority. Southern has not presented any plans to conduct any passenger operations, nor has it hired the necessary personnel for such service. It also does not have firm plans to use the scheduled all-cargo authority at issue. In addition, as more fully discussed in the "FITNESS" section below, it is uncertain as to whether Southern would have the financial resources available to it to conduct passenger service or more extensive scheduled cargo operations and we tentatively find no basis on the record to conclude that Southern is fit to conduct operations under the authority for which it seeks transfer from SAT.

Moreover, we note that the scheduled cargo authorities at issue include authority in certain limited-entry markets. Limited-entry authorities are valuable rights that were obtained by the United States in exchange for foreign carriers' rights to serve the United States. Southern has stated that it has no plans to start any scheduled service until September 2000 at the earliest. It is not our policy to allow such limited-entry routes to be wasted, particularly where another carrier has firm long-term plans to use them. In these circumstances, with respect to the foreign route authority at issue, we have tentatively concluded that we are not persuaded that transfer of the authority would be consistent with our international aviation policy objectives.

We are similarly unpersuaded as to the merits of Southern's proposal for a temporary allocation of certain SAT authority. In these circumstances and given our findings relating to Southern's fitness and plans for operations and the need to provide U.S. flag service with more certainty, we are not persuaded that Southern's proposal best serves the public interest. As discussed below, Southern has proposed a very limited cargo charter operation. Should Southern subsequently decide to expand its operations, it could file for such limited-entry authorizations, if available, and be subject to a Department finding that it is fit to provide such operations.

Therefore, we have tentatively decided that transfer of SAT's certificate or exemption authority to Southern is not appropriate and would not be in the public interest. Instead, we propose to award Southern new certificates authorizing domestic and foreign cargo charter air transportation operations, subject to conditions, and, at the same time, cancel all certificate and exemption authority currently held by SAT.<sup>5</sup> We will, however, give interested persons an opportunity to show cause why we should not adopt as final these tentative findings and conclusions.

## **FITNESS**

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<sup>5</sup> SAT ceased operations on September 25, 1998. Section 204.7 of our rules provides that, once a certificated air carrier ceases all air transportation operations, its certificates shall be revoked for reason of dormancy if the carrier does not have its fitness redetermined and recommence operations within one year of the date of its cessation. Thus, since we have tentatively decided not to transfer SAT's operating authority to Southern, we propose to cancel SAT's authority for reason of dormancy.

In making fitness findings, the Department uses a three-part test that reconciles the Airline Deregulation Act's liberal entry policy with Congress' concern for operational safety and consumer protection. The three areas of inquiry that must be addressed in order to determine a company's fitness are whether the applicant (1) will have the managerial skills and technical ability to conduct the proposed operations, (2) will have access to resources sufficient to commence operations without posing an undue risk to consumers, and (3) will comply with the Statute and regulations imposed by Federal and State agencies. We must also find that the applicant is a U.S. citizen.

## **Background**

Southern is a Delaware corporation with its headquarters located in Columbus, Ohio. It was incorporated on March 10, 1999. The voting stock is held by Messrs. Randall Fiorenza (50 percent) and James Neff (25 percent), who will be providing start-up and capital funding,<sup>6</sup> and Ms. Carmit Neff, wife of James Neff (25 percent). Southern's Board of Directors consists of Messrs. Daniel McCauley, Southern's Secretary and General Counsel, and Jeffrey Portanova, Southern's Vice President and Treasurer. Southern proposes initially to operate one B-747-230-SF all-cargo configured aircraft in interstate and foreign all-cargo charter air transportation. Southern's service proposal includes the lease of one additional B-747-230-SF aircraft during the second half of its first year of operations.

## **Managerial Capabilities**

Mr. Thomas A. Gillies will serve as Southern's President. He previously served in various management positions with SAT beginning in March 1985, most recently as Executive Vice President of Operations. Mr. Gillies began his aviation career in 1977 as a dispatcher with Aspen Airways. Since then, he has served as a dispatcher with J.F.C. Enterprises, Mackey Airways, Jet 24, Inc., and as a Operations Manager with Air Florida, Inc., and Northeastern Airlines.

Mr. Clarence Lindsey will serve as one of Southern's Vice Presidents. He began his aviation career in 1959 with the U.S. Air Force where he served for 30 years. When he retired in 1989, he had attained the rank of Brigadier General. He was subsequently employed by SAT as Vice President of Quality Analysis and Senior Vice President of Technical Services.

Mr. Jeffrey Portanova will serve as Southern's Vice President and Treasurer. He is a Certified Public Accountant having begun his career with Price Waterhouse & Company in 1976. Since that time, he has been employed by various companies in accounting-related positions including Chief Financial Officer for United States Turbine Corp. and Unicapital Aircraft Engine Group where he is currently employed. Mr. Portanova also owns and manages Jeffrey Portanove CPA.

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<sup>6</sup> Messrs. Fiorenza and Neff are currently co-Chief Executive Officers of U.S. Turbine Engine Corporation. Both Messrs. Fiorenza and Neff have held aviation-related executive positions. Mr. Fiorenza was previously Director of Special Projects for Aircraft Trading and Services Company and project engineer with Cross Continent Aircraft Services. He holds an MBA degree from Embry-Riddle Aeronautical University. Mr. Neff has served as President of JKN Associates, Inc., an aviation consulting firm, and as Vice President of Fleet Planning with Emery Air Freight Corporation. He holds an engineering degree from Purdue University.

Mr. Daniel McCauley will serve as Southern's Vice President and Secretary. He holds a law degree and has served in attorney-related positions, primarily with Emery Air Freight (1967-1991). He is currently employed by Air Express International as Vice President and General Counsel.

Mr. Ricardo Llanos will serve as Southern's Director of Operations. He began his aviation career in 1979 as an aircraft technician with Southeast Airlines where he also served as a Flight Engineer. Between 1982 and 1985, he served as Flight Officer for Jet Charter. From September 1985 to September 1998, he held various positions with SAT including Flight Officer, Captain and Chief Pilot. He holds an FAA-issued Airframe and Powerplant Mechanic License with Inspection Authorization and an FAA-issued Airline Transport Pilot Certificate and has accumulated over 1,800 hours of flight time.

Mr. Michael Webber, Southern's Chief Pilot, served with SAT from October 1983 until September 1998, holding various positions including First Officer, Captain and Chief Pilot. Mr. Webber began his aviation career in the U.S. Air Force where he served as a pilot. After leaving the Air Force, he joined TransAmerica Airlines as a pilot and First Officer. From November 1998 until April 1999, he was First Officer with Atlas Air, Inc. Mr. Webber holds an FAA-issued Airline Transport Pilot Certificate and has accumulated over 16,000 hours of flight time.

Mr. Mark Ryan, Southern's Director of Safety, began his aviation career in 1970 as a pilot with the Ohio Department of Natural Resources. While serving in that position, he also filled the position of state safety officer for the Ohio Army National Guard from 1971 to 1995. Mr. Ryan was employed by SAT from September 1995 to October 1998 as Director of Crew Planning and Scheduling and was employed by Atlas Air, Inc., as Market Manager and consultant from October 1998 to April 1999. He holds an FAA-issued Airline Transport Pilot Certificate and has accumulated over 8,700 hours of flight time.

Mr. Bryan Dillion, who will serve as Southern's Director of Maintenance, began his aviation career as a Stores Manager/Mechanic with Rosenbalm Aviation in 1987. He subsequently served as an Airframe and Powerplant Mechanic for Flagship Express (June 1990 to October 1991). From October 1991 to December 1996, he served in various positions with Emery Worldwide Airlines, including Avionics Technician, Technical Analyst and Manager of Reliability. Mr. Dillion was employed by SAT from December 1996 to September 1998 as Director of Engineering and with Trans Continental as Director of Maintenance for three months. His most recent employment was with AeroLease Financial Group (December 1998 to April 1999). He immediately joined Southern upon resigning from AeroLease. Mr. Dillion holds an FAA-issued Airframe and Powerplant Mechanic License.

Mr. Jeffrey C. Hunneshagen will serve as Southern's Director of Quality Control. He began his aviation career as a mechanic with Plymouth Aviation in December 1985. In February 1986, he began employment with SAT as a mechanic. He served in various maintenance management positions including Station Foreman, Manager of Maintenance Training and was serving as Chief Inspector when SAT ceased operations in September 1998. Mr. Hunneshagen holds an FAA-issued Airframe and Powerplant Mechanic License.

In view of the experience and background of the applicant's key personnel, we tentatively conclude that Southern has demonstrated that it has the management skills and technical ability to conduct its proposed service.<sup>7</sup>

### **Operating Proposal and Financial Position**

Southern proposes to use a leased B-747-230 SF aircraft to provide interstate and foreign all-cargo charter air transportation. Initially, it will use one aircraft with a second aircraft to be added during the second half of its first year of operations. Southern intends to operate on an aircraft, crew, maintenance, and insurance (ACMI) basis. Southern's customers will assume liability for fuel and other operating costs ( ground handling, landing fees, etc.) on a direct-payment basis between those customers and third-party suppliers. Thus, the applicant has not accounted for such costs in its first year projections. Although Southern indicates that it may begin foreign scheduled all-cargo service sometime in its second year, its proposal contains no indication that the applicant has any immediate plans for providing passenger operations (either scheduled or charter) or any specific plans to implement such scheduled cargo operations.

In support of its financial fitness, Southern provided forecasts of its pre-operating costs and its first-year operating revenues and expenses under its service proposal. Southern estimates that it will incur \$1.3 million in pre-operating expenses and \$23.8 million in operating expenses during its first year of operations, which we find reasonable.

In evaluating an applicant's financial fitness, the Department generally asks that the applicant have available to it resources to cover all pre-operating costs plus a working capital reserve equal to operating costs that would be incurred in three months of normal certificated operations.<sup>8</sup> Under these conditions, Southern requires access to funds of \$5.95 million to meet the Department's three-month test in addition to its projected pre-operating expenses of \$1.3 million for a total of \$7.25 million. Southern intends to finance its operations through loans from its owners, Mr. Randall Fiorenza and Mr. James Neff<sup>9</sup> and cash-on-hand of \$100,000. These funds will slightly exceed the amount required to meet our fitness test.

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<sup>7</sup> Before authorizing a carrier to conduct air transportation operations, the FAA also evaluates certain of the carrier's key personnel with respect to the minimum qualifications for those positions as prescribed in the Federal Aviation Regulations. The FAA's evaluation of these key personnel provides an added practical and in-person test of the skills and technical ability of these individuals. The FAA has advised us that all of Southern's key technical personnel are qualified and acceptable for their positions.

<sup>8</sup> Because projected expenses during one or more of the first several months of service frequently do not include all costs that will be incurred during a normal period of operations, it is our practice to base our three-month test on one quarter of the first year's operating cost forecast. In calculating available resources, projected revenues may not be used.

<sup>9</sup> Messrs. Fiorenza and Neff supplied statements of their intent to each provide one-half of the funding needed through personal loans to Southern and submitted third-party verification indicating their wherewithal to provide the level of funding that they have pledged to Southern. Included were statements from brokerage firms and other financial institutions. Also, Messrs. Fiorenza and Neff have both indicated that their loans will not require full or partial repayment of principal or interest during the pre-operating period or first year of Southern's actual operations.

Given the financial resources available to Southern, we tentatively find that it has access to sufficient funding to commence the ACMI operations proposed without posing an undue risk to the shipping public. It is not clear, however, whether we could make such a finding if Southern were to conduct passenger service or scheduled cargo operations.

Consequently, we have tentatively decided to limit any authority awarded to Southern to charter operations as proposed in the instant application. In addition, should Southern desire to expand its aircraft fleet beyond two aircraft, it must notify the Department in writing at least 45 days in advance and demonstrate its fitness for such expanded operations prior to implementing any such change.

### **Compliance Disposition**

Southern states that neither it, its owners, nor any of its key personnel have been charged with unfair or deceptive or anticompetitive business practices, or with fraud, felony or antitrust violations within the past ten years, and that there are no actions or judgments outstanding against it, or any of these persons. In addition, the applicant declared that there are no investigations pending and that no enforcement actions have been taken against it or any of its key personnel regarding compliance with the Statute or any regulations or orders issued pursuant to the Statute in the past ten years.

We have searched our records, including those of the FAA, and have found nothing adverse regarding Southern, its owners, or any of its key personnel. The FAA advises us that the applicant has applied for authority to conduct its prospective interstate and foreign all-cargo charter operations, and that it knows of no reason why we should act unfavorably on Southern's application.

Based on these considerations, we tentatively find that Southern will have the proper regard for the laws, rules and regulations governing its service to ensure that its aircraft and personnel will conform to applicable safety standards and that acceptable consumer relations practices will be followed.

### **CITIZENSHIP**

Section 41102 requires that certificates to engage in air transportation be held only by citizens of the United States as defined in 49 U.S.C. 40102(a)(15). That section requires that the president and two-thirds of the board of directors and other managing officers be U.S. citizens and that at least 75 percent of the outstanding voting stock be owned by U.S. citizens. We have also interpreted the Statute to mean that, as a factual matter, the carrier must actually be controlled by U.S. citizens.

Southern, a corporation organized under the laws of Delaware, was incorporated on March 10, 1999, and is owned by Randall Fiorenza (50 percent), James Neff (25 percent) and Carmit Neff (25 percent), all of whom are U.S. citizens. All of the company's key personnel are U.S. citizens, and Southern has provided an affidavit attesting that it is a citizen of the United States

within the meaning of the Statute. Finally, our review of the applicant's citizenship has uncovered no reason to suggest that control of Southern rests with non-U.S. citizens.

Based on the above, we tentatively conclude that Southern is a citizen of the United States and is fit, willing, and able to conduct the limited interstate and foreign all-cargo charter operations proposed in its application.

### **PUBLIC CONVENIENCE AND NECESSITY**

No finding of consistency with the public convenience and necessity is required for the award of authority for interstate charter air transportation of property and mail under section 41102, although such a finding is required for authority to engage in foreign charter air transportation. We tentatively find that the foreign charter air transportation proposed by Southern is consistent with the public convenience and necessity. By Order 78-7-106, which instituted the *Former Large Irregular Air Service Investigation*, the Civil Aeronautics Board found that there was a continuing demand and need for additional charter air carriers. These findings remain valid and apply to the authority sought by Southern. Therefore, if Southern meets the fitness requirements of the statute, it will receive certificates authorizing it to engage in interstate and foreign charter air transportation of property and mail under section 41102.<sup>10</sup>

### **OBJECTIONS**

We will give interested persons 14 calendar days following the service date of this order to show cause why the tentative findings and conclusions set forth here should not be made final; answers to objections will be due within 7 calendar days thereafter. We expect such persons to direct their objections, if any, to the points at issue and to support such objections with detailed economic analyses.<sup>11</sup> We will not entertain general, vague, or unsupported objections. If no substantive objections are filed, we will issue orders that will make final our tentative findings and conclusions with respect to Southern's fitness, and will issue certificates that will contain an exact copy of the attached Terms, Conditions, and Limitations.

### **CERTIFICATE CONDITIONS AND LIMITATIONS**

If Southern is found fit and issued certificates in this proceeding, its authority will not become effective until the company has fulfilled all requirements for effectiveness as set forth in the terms and conditions attached to its certificates. Among other things, this includes our receipt of evidence that Southern has been certificated by the FAA to engage in charter cargo operations; a fully executed OST Form 6410 evidencing liability insurance coverage that meets the requirements of 14 CFR 205.5(b); a revised list of pre-operating expenses already paid and those remaining to be paid, along with third-party verification that the company continues to have access to sufficient funds to meet our financial criteria; and a statement of any changes it may have undergone since its fitness was examined.

<sup>10</sup> Pursuant to 49 U.S.C. 41307, issuance of foreign authority to Southern is subject to Presidential review.

<sup>11</sup> If an oral evidentiary hearing or discovery procedures are requested, the objector should state in detail why such a hearing or discovery is considered necessary, and what material issues of decisional fact the objector would expect to establish through a hearing or discovery that cannot be established in written pleadings. The objector should consider whether discovery procedures alone would be sufficient to resolve material issues of decisional fact. If so, the type of procedure should be specified ( Part 302, Rules 19 and 20); if not, the reasons why not should be explained.

Furthermore, we remind Southern of the requirements of 49 U.S.C. 41110(e). Specifically, that section requires that, once a carrier is found fit initially, it must remain fit in order to hold its authority. To be assured that certificated air carriers continue to be fit after effective authority has been issued to them, we require that they supply information describing any subsequent substantial changes they may undergo in areas affecting fitness. Along these lines, we note that our finding of fitness for Southern is based on its limited operating plans described in its application, namely, charter cargo air transportation using one aircraft with expansion to a second aircraft within the first year of operations. Should Southern propose to expand its fleet to include more than two aircraft, our fitness findings, particularly those regarding the adequacy of its financial resources, might no longer apply. Therefore we propose to limit any authority issued to Southern to charter all-cargo operations utilizing two aircraft. Should Southern subsequently desire to operate more than two aircraft, it must first be determined fit for such operations.<sup>12</sup> Furthermore, should Southern propose other substantial changes in its ownership, management, or operations, it must first comply with the requirements of section 204.5 of our rules.<sup>13</sup> The compliance of the company with this requirement is essential if we are to carry out our responsibilities under section 41110(e).<sup>14</sup>

To aid the Department in its responsibility to monitor the fitness of new carriers, we have adopted a requirement that all start-up carriers must submit a detailed progress report, within 45 days following the end of the first year of actual flight operations, to the Air Carrier Fitness Division. The report should include a description of the carrier's current operations (number and type of aircraft, principal markets served, total number of full-time and part-time employees), a summary of how its operations have changed during the year, a discussion of any changes it anticipates from its current operations during its second year, current financial statements,<sup>15</sup> and a listing of current senior management and key technical personnel. The carrier should also be prepared to meet with staff members of the Fitness Division to discuss its current and future operations.

### **CONFIDENTIAL TREATMENT**

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<sup>12</sup> Of course, should Southern propose to operate passenger service or scheduled all-cargo operations, it would have to file the appropriate certificate or exemption applications for such authority.

<sup>13</sup> Southern may contact our Air Carrier Fitness Division to report proposed substantial changes in its operations, ownership or management, and to determine what additional information, if any, will be required under section 204.5. Moreover, by notice dated July 21, 1998, the Department requested air carriers to provide a 30-day advance notification of any proposed change in ownership, restructuring, or recapitalization. If the carrier fails to file the information or if the information fails to demonstrate that the carrier will continue to be fit upon implementation of the substantial change, the Department may take such action as is appropriate, including enforcement action or steps to modify, suspend, or revoke the carrier's certificate authority.

<sup>14</sup> We also remind Southern about the requirements of section 204.7 of our rules. This section provides, among other things, that (1) the certificate authority granted to a company shall be revoked if the company does not commence actual flying operations under that authority within one year of the date of the Department's determination of its fitness; (2) if the company commences operations for which it was found fit and subsequently ceases such operations, it may not resume certificated operations unless its fitness has been redetermined; and (3) if the company does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

<sup>15</sup> These financial statements should include a balance sheet as of the end of the company's first full year of actual flight operations and a twelve-month income statement ending that same date.

On May 10, 1999, Southern filed a motion under section 302.39 of the Department's regulations requesting confidential treatment of Exhibit 3, p. 2 (shareholder list) and Exhibit 6, pp. 2-9 (financial accounts). By letter dated July 2, 1999, we notified Southern that we were granting confidential treatment as requested with the exception of the stock distribution list in Exhibit 3, p. 2 for those individuals who held at least 10 percent of the stock. The applicant subsequently filed a list of those individuals in the public portion of the docket. The applicant requested that the list of stockholders holding non-voting stock be granted confidential treatment.

On July 30, 1999, Southern filed a motion for confidential treatment of a proposed agreement for engine and overhaul component repair and a proposed agreement for conformity and inspection services. On September 20, 1999, Southern filed a motion for confidential treatment of a fully-executed lease agreement between Southern and its aircraft supplier.

Rule 39 instructs us to evaluate requests for confidential treatment in accordance with the standards of disclosure found in the Freedom of Information Act (5 U.S.C. section 552). Information may be withheld from disclosure under 5 U.S.C. section 552(b)(4) if it is (1) commercial or financial, (2) obtained from a person outside of government, and (3) privileged or confidential. [ 615 F.2d 527, 529 (D.C. Cir 1979)]

There is no question that the information for which confidential treatment is sought is financial or commercial in nature and that it was obtained from a person outside the government. The remaining question is whether the information is privileged or confidential--whether "disclosure of the information is likely to have either of the following effects: (1) impair the Government's ability to obtain necessary information; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained." [ 498 F.2d 765, 770 (D.C. Cir. 1974)] Further, to be privileged or confidential, the information must not be the type that is usually released to the public. [, 615 F.2d 527, 530 (D.C. Cir. 1979)]

We have decided to grant confidential treatment to Exhibit 3, p. 2 of the May 10 filing with respect to the list of stockholders holding less 10 percent of the voting stock and those holding non-voting stock. We will also grant confidential treatment to the agreements attached to the July 30, 1999, motion and to the agreement accompanying the September 20 motion. These documents are similar to those for which we have granted confidential treatment in the past and contain information that if released could cause substantial harm to the competitive position of the applicant.

**ACCORDINGLY:**

1. We direct all interested persons to show cause why we should not issue an order making final the tentative findings and conclusions stated above, and

A. Award certificates to Southern Air Inc., authorizing it to engage in interstate and foreign charter air transportation of property and mail, subject to the attached specimen Terms, Conditions, and Limitations,

B. Deny the joint application filed by Southern Air Transport, Inc., and Southern Air, Inc., for transfer of certificate authority; and

C: Cancel the certificates issued to Southern Air Transport, Inc., by Orders 78-5-120 (Docket 32342), 84-1-59 (Docket 41187), 80-1-87 (Docket 30883), 80-9-106 (Docket 30789), 95-1-6 (Docket 49043) and the exemptions held by Southern Air Transport, Inc., under Orders 95-3-31 (Docket OST-96-987) and 97-6-16 (Docket OST-96-1153).<sup>16</sup>

2. We direct any interested persons having objections to the issuance of orders making final any of the proposed findings, conclusions, or the actions proposed in paragraph 1, above, to file them with Department of Transportation Dockets, 400 Seventh Street, SW, Room PL-401, Washington, D.C. 20590, in Docket OST-99-5670 and serve them upon all persons listed in Attachment A no later than 14 calendar days after the service date of this order; answers to objections shall be filed no later than 7 calendar days thereafter.

3. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action.<sup>17</sup>

4. In the event that no objections are filed, we will consider all further procedural steps to be waived and we will enter orders making final our tentative findings and conclusions.

5. We grant the request of Southern Air, Inc., to withhold from public disclosure the information submitted pursuant to Rule 39 on May 10, 1999 (Exhibit 3, p. 2) with respect to the list of non-voting shareholders and on July 30 and September 20, 1999.

6. We grant the motions filed by Southern Air, Inc., on June 17, 1999, and Kitty Hawk, Inc., on June 24 1999, to file unauthorized documents.

9. We will serve a copy of this order on the persons listed in Attachment A.

10. We will publish a summary of this order in the Federal Register.

By:

**A. BRADLEY MIMS**  
Deputy Assistant Secretary for Aviation  
and International Affairs

(SEAL)

<sup>16</sup> Pursuant to 49 U.S.C. 41307 issuance or cancellation of foreign authority is subject to Presidential review.

<sup>17</sup> Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.

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**SPECIMEN**

Terms, Conditions, and Limitations

**SOUTHERN AIR, INC.**



is authorized to engage in interstate charter air transportation of property and mail between any point in any State, territory, or possession of the United States or the District of Columbia, and any other point in any of those entities.

This authority is subject to the following provisions:

(1) The authority to operate under this certificate will not become effective until six (business) days after the Department has received the following documents; provided, however, that the Department may stay the effectiveness of this authority at any time prior to that date:

(a) A copy of the holder's Air Carrier Certificate and Operations Specifications authorizing such operations from the Federal Aviation Administration (FAA).

(b) A certificate of insurance on OST Form 6410 evidencing liability insurance coverage meeting the requirements of 14 CFR 205.5(b) for all of its aircraft.

(c) A statement of any changes the holder has undergone in its ownership, key personnel, operating plans, financial posture, or compliance history, since the date of the Show Cause Order in this case.

(d) A revised list of pre-operating expenses already paid and those remaining to be paid, as well as independent verification that the holder has available to it funds sufficient to cover any remaining pre-operating expenses and to provide a working capital reserve equal to the operating costs that would be incurred in three months of operations.

(2) Pending receipt of effective authority, the holder may not accept payment of any kind (i.e., cash, check, or credit card), or enter into contracts for the







## Terms, Conditions, and Limitations

### **SOUTHERN AIR, INC.**

is authorized to engage in foreign charter air transportation of property and mail:

Between any place in the United States and any place outside thereof.

This authority is subject to the following provisions:

(1) The authority to operate under this certificate will not become effective until six (business) days after the Department has received the following documents; provided, however, that the Department may stay the effectiveness of this authority at any time prior to that date:

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