

111817

Order 2000-9-23



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

Issued by the Department of Transportation
on the 25th day of September, 2000

Served: September 25, 2000

In the Matter of

U.S.-Ecuador All-Cargo Frequency Allocation

Docket OST-2000-7513- 25

ORDER TO SHOW CAUSE

Summary

By this order, we tentatively grant Gemini Air Cargo, Inc., an exemption to conduct scheduled all-cargo services in the U.S.-Ecuador market and tentatively allocate Gemini three weekly frequencies to conduct such operations.

Background

Under the Air Transport Agreement between the United States and Ecuador, U.S. all-cargo carriers may operate a maximum of 15 round-trip scheduled all-cargo frequencies per week over the routes specified in the annex of the agreement, using narrow-body aircraft or their wide-body equivalent.¹

Frequency allocations for U.S. carriers are currently as follows (based on narrow-body aircraft): Challenge/UPS, 7; Arrow Air, 5 and Kitty Hawk International, 3.²

¹ The agreement provides that U.S. all-cargo carriers may operate services from the United States via the intermediate points of Mexico City, Mexico; Guatemala City, Guatemala; San Salvador, El Salvador; San Pedro Sula and Tegucigalpa, Honduras; Panama City, Panama; Cali, Bogota, and Medellin, Colombia; to the coterminal points of Quito and Guayaquil, Manu and Latacunga, Ecuador, and beyond Ecuador to Lima, Peru; Santiago, Chile; Buenos Aires, Argentina; La Paz and Santa Cruz, Bolivia; Asuncion, Paraguay; and Rio de Janeiro and Sao Paulo, Brazil.

The agreement further provides that narrow-body aircraft may be substituted, at the exclusive discretion of the designated airline, by wide-body aircraft at the following rates of conversion: one wide-body aircraft (E-100, DC-10, A-300, B747SP, B-767, or similar aircraft) shall be equivalent to 1.5 narrow-body aircraft (DC-8, B-707, B-727, B-737, B-757, MD-80 or similar aircraft), except that one B-747-100 or similar aircraft will be equivalent of two narrow body aircraft, and one B 747 Combi (with main deck cargo) shall be equivalent to 1.5 narrow-body passenger aircraft and one narrow-body all-cargo aircraft.

² Order 2000-6-7 transferred Challenge's Ecuador authority to United Parcel Service. The same order granted Challenge an interim allocation of the seven weekly frequencies for a period of six months from the service date of Order 2000-6-7 (i.e. through December 12, 2000), pending receipt by UPS of the necessary foreign government authorizations to conduct operations under its own name. The interim grant was conditioned to stipulate that frequencies would expire and would revert automatically to the Department if they are not used for a period of 90 days. The condition was effective immediately with respect to Challenge and will also become effective for United Parcel Service when it begins service in the market (See Order 2000-6-7 at 6).

(Continued next page)

By Notice served June 15, 2000, the Department acknowledged that Kitty Hawk International was no longer using its allocated three frequencies, has stated it has no intention of re-entering the U.S.-Ecuador market, and does not object to reallocation of the frequencies to another carrier. The Notice requested that all interested carriers submit applications for the available frequencies in Docket OST-2000-7513. The Notice also consolidated previously filed applications into the established docket and provided those applicants with the opportunity to supplement their earlier-filed applications if needed. The Notice called for applications or supplemented applications by June 22, 2000, answers thereto by June 27, 2000, and replies to answers by June 30, 2000.

Applications and Responsive Pleadings

Four carriers (Arrow Air, Atlas Air, Evergreen International, and Gemini Air Cargo) are seeking the available three frequencies.³ Arrow Air, the only scheduled cargo incumbent among them, seeks to increase its current frequency allocation from five to eight. Atlas Air, Evergreen International Airlines, and Gemini Air Cargo, as new entrants, request the necessary underlying exemption authority to provide scheduled all-cargo service in the U.S.-Ecuador market, and they also request allocation of three frequencies to perform their proposed all-cargo service.⁴

All applicants filed answers to the applications as well as replies.

Applications

Arrow proposes to operate the three frequencies over a Miami-Guayaquil-Quito-Miami routing with either DC-8-60 or L-1011F aircraft, both of which are in its fleet and available for use. Arrow states that if the northbound payload requires it, it will make a technical stop at Cali, Colombia, and that it plans to use the frequencies as soon as they are awarded. It states that the DC-8-60 has the capacity of 75,000 pounds southbound and 72,000 pounds northbound; the L-1011F has the capacity of 118,000 to 120,000 pounds southbound and 118,000 pounds northbound; and the use of wide-body aircraft in the market will depend on daily and weekly requirements for lift, which will be the only seasonal change anticipated in its schedules.⁵ Arrow states that if awarded three additional frequencies, it will provide 6 weekly U.S.-Ecuador flights, Monday through Saturday.⁶

Atlas proposes to operate two weekly frequencies for one weekly round-trip flight over a Miami-Bogota-Quito-Guayaquil-Miami routing with B-747-200 aircraft and to use the third frequency to operate an additional round-trip operation every other week by accumulating frequencies or an additional weekly

(Continuation)

Order 2000-8-5 transferred the authority of Fine Air Services for Ecuador services to Arrow Air, Inc. Arrow, which had an allocation of three frequencies, thus acquired Fine's two frequencies, making Arrow's total allocation five weekly frequencies.

Kitty Hawk was named American International Airways (AIA) at the time it received Ecuador frequency allocations. AIA was later acquired by Kitty Hawk, Inc. (its current parent company) and certificates were reissued in its present name by Order 99-1-X.

³ Fine Air applied but subsequently withdrew its application. Amerijet International filed an answer to Evergreen's application, indicating a possible interest in Ecuador frequencies, but ultimately elected not to respond to our Notice inviting applications.

⁴ Each also seeks route integration authority.

⁵ The DC-8-60 will require an intermediate fuel stop or will operate at 56,000 pounds nonstop. The L-1011 will require an intermediate fuel stop and will require 1 1/2 weekly frequencies, which will reduce the number of frequencies operated weekly.

⁶ As noted above, Arrow acquired Fine's frequencies by Order 2000-8-5, thus giving Arrow five weekly frequencies. By letter dated August 8, 2000, the Department requested Arrow and Fine to clarify the impact of the transfer in Order 2000-8-5 on the existing applications. In its joint response with Fine Air, dated August 15, 2000, Arrow made no adjustments to its current application.

one-way operation. Atlas states that its proposed aircraft has the capacity of 248,000 pounds but that Quito's altitude restricts gross departure payloads with the aircraft to 200,000 pounds and that additional northbound cargo can be loaded at Guayaquil up to a gross payload of 237,000 pounds. Atlas states that if the Department does not grant the three frequencies Atlas requests, Atlas will accept a reduced allocation of two frequencies, the minimum necessary to support a round-trip service. Atlas states that it will begin operations as soon as government approvals are received, but will continue serving the market on a charter status pending government approval.

Evergreen requests three weekly frequencies to operate over a New York (JFK)-Miami-Quito-Guayaquil-Miami routing with B-747-100 or -200 aircraft from its existing fleet, having a 220,000-pound capacity.⁷ Evergreen states that its flights would be operated as a continuation of its existing services between Asia and New York, permitting connection of traffic between Evergreen service points in Asia and Ecuador. Evergreen states that it will operate an alternating pattern of service of one flight per week and two flights per week. If a determination is made that such an approach is not permitted under the U.S.-Ecuador Agreement, Evergreen contemplates it will meet market demand by taking advantage of the liberal opportunity to operate additional sections, as the agreement allows. Evergreen states that it can begin service September 1, 2000, or sooner if government approvals are received.

Gemini proposes twice weekly service with DC-10-30F aircraft with an 180,000-pound capacity over a Miami-Quito-Guayaquil-Miami routing. Gemini states that its aircraft is available from its fleet and that the carrier will begin operations immediately upon receipt of the exemption. Gemini states that it has operated charter services in the U.S.-Ecuador market, but desires the authority to operate scheduled service in order to provide a more consistent product to shippers and that its service proposal will insure full usage of the unallocated frequencies and will be dedicated to U.S.-Ecuador service.

Responsive pleadings

Each applicant argues that its proposal is the best of those presented and that the other applicant proposals should be rejected, and each urges the Department to proceed to reallocate the frequencies without delay.

Atlas, Evergreen and Gemini argue that an award to Arrow would not be in the public interest because an additional award of frequencies to Arrow could give it over 50% of the available frequencies for the U.S.-Ecuador market and would reduce the number of scheduled all-cargo carriers in the U.S.-Ecuador market to two. Thus, such an award would be anticompetitive.

Arrow argues that the proposals of Evergreen, Gemini and Atlas lack the flexibility of more frequent service with narrow-body aircraft; that the proposed operation of Atlas cannot be granted without the Department's first obtaining assurances from the Ecuadorian government that the service pattern proposed would be acceptable and that the Colombian government may not allow flights stopping in Colombia and then continuing to points south of Colombia. Arrow assures the Department that its present Ecuador all-cargo service is profitable and that its additional service will also be profitable.

Atlas argues that neither Evergreen nor Gemini has significant presence in the U.S.-Ecuador market, that they have only a modest presence in the Miami market, and that their proposals poorly match the needs of the market. It further argues that there is no demand for New York-Ecuador service as presented in

⁷ While Evergreen's application indicates the carrier may operate to Latacunga, its proposed service exhibit omits that point. Evergreen's application states its aircraft has a 100 ton capacity; its reply explains that that is 100 metric tons, which is the equivalent of 220,000 pounds.

Evergreen's proposal and that the carriage of Asia-Ecuador traffic as proposed by Evergreen does not advance U.S. aviation policy for U.S.-Ecuador frequencies. Atlas also argues that it would offer the best capacity for the U.S.-Ecuador market with its B-747-200 aircraft. Atlas questions whether Gemini's proposed DC-10 service will offer the capacity alleged by Gemini. Atlas maintains that it has proposed Bogota operations southbound to ensure economic viability of southbound operations, but argues that it can eliminate Bogota on southbound portions if Quito bound traffic demands full capacity.

Evergreen suggests that the Department allocate two frequencies to Evergreen and then allocate the remaining frequency to an incumbent. It argues that Gemini would have only 75% of the capacity of Evergreen; that Atlas intends to split its capacity between Colombia and Ecuador, with southbound stops in Bogota on flights between the U.S. and Ecuador, whereas Evergreen will dedicate flights exclusively for Ecuador service; and that only Evergreen proposes service to Latacunga and competition for Ecuatoriana by offering service between Ecuador and New York. Evergreen argues that it will promote this market in its own right, operating scheduled service in its own name to various points it is authorized to serve, and not (as is likely the case with Atlas or Gemini) on behalf of foreign carrier ACMI customers. Evergreen argues that the addition of a B-747 operator will add a new level of flexibility to the market and provide a mix of options that will benefit shippers. Finally, Evergreen maintains that the bilateral can be read to allow its proposed service as a means of using available frequencies and that with the Arrow/Fine merger the competitors in the market have been reduced to two and Arrow/Fine should not be allowed to further increase the frequencies it holds and that the Department's pro new-entrant policy should be applied.

Gemini argues that nothing in the Ecuador agreement allows frequencies not used in one week to be carried forward to the following or subsequent weeks. Gemini maintains that the one weekly flight that either Atlas or Evergreen would operate with a 747 aircraft will provide less cargo capacity in the U.S.-Ecuador market than the two weekly Gemini flights with its DC-10-30P aircraft. In addition, in using the B-747, Gemini argues, Atlas or Evergreen would either leave one frequency unallocated or would result in its allocation to an incumbent carrier that has applied for additional frequencies. Gemini notes that Atlas will use a significant portion of its southbound capacity to accommodate Colombia rather than Ecuador capacity. Gemini states that it operates extensive scheduled and charter flights in addition to its ACMI service; that scheduled service makes up a substantial and growing portion of its operations; that Gemini would add competition in the market and that it will offer services with its own aircraft.

Tentative Decision

We have tentatively decided to grant Gemini Air Cargo an exemption to operate all-cargo services in the U.S.-Ecuador market and to allocate it three weekly frequencies to perform such service.

As noted above, the U.S.-Ecuador bilateral agreement limits the number of frequencies that U.S. all-cargo carriers may operate. Thus, we must determine which of the proposals before us will maximize use of the available rights under the agreement while benefiting shippers and promoting competition.

We tentatively view Gemini's proposal as the one that best accomplishes these goals. Gemini proposes to offer the shipping public two weekly wide-body turnaround flights between Miami and the Ecuadorian points Quito and Guayaquil. Its proposed service will offer shippers a substantial degree of capacity on a weekly basis, will be dedicated to the U.S.-Ecuador market, and will introduce a new competitor in the U.S.-Ecuador market.

We tentatively find that none of the other applicants presents the same combination of advantages as Gemini. While Arrow would fully use the frequencies available, an award to Arrow would not maximize

competition. Rather, it would significantly increase the services of an incumbent carrier that already holds one-third of the overall available frequencies in the scheduled U.S.-Ecuador all-cargo market and would preclude a new U.S. carrier from entering that market. By selecting Arrow, we would be limiting the number of carriers to the existing incumbents, limiting the service options available to the shipping public, and avoiding an opportunity to enhance the beneficial effects of competition. We tentatively conclude that such a result would not be in the public interest.

As regards Atlas and Evergreen, we tentatively find, as the applicants themselves have recognized, that their proposals do not fall within the terms of the bilateral agreement since the agreement provides for a set number of frequencies per week and not for accumulation of frequencies from one week to another. We would consequently have no assurance of Ecuadorian willingness to permit either carrier to operate as proposed. We tentatively conclude that we have no need to test such willingness in circumstances where another applicant, Gemini, has presented a proposal clearly within the bilateral that promises a result that would fully serve the public interest. While Atlas and Evergreen have suggested that we could award them two frequencies instead of three and thereby permit a once-weekly wide-body operation within the limits of the bilateral (with the remaining narrow-bodied frequency going to an incumbent), we tentatively find that the twice-weekly operations of Gemini's wide-body service would better use the bilateral rights by affording the shipping public with more service options and a greater weekly capacity and by better ensuring a viable market presence for the new entrant carrier *vis-a-vis* the established incumbents.

We have, therefore, tentatively decided that Gemini's proposed U.S.-Ecuador operations will provide the most benefits to the shipping public through the introduction of competitive new-carrier service under the terms of the U.S.-Ecuador bilateral and that Gemini should be awarded the three available frequencies for scheduled all-cargo service to Ecuador.

Conditions:

Consistent with our practice with respect to awards in limited-entry markets, we propose to subject Gemini's award in this case to a 90-day startup condition, whereby it will be required to institute service within 90 days of a final award in this proceeding.

We also tentatively propose to allocate the frequencies at issue here for an indefinite period as long as the carrier continues to hold the underlying economic authority to conduct the operations.

Finally, limited frequencies for U.S. carrier service are extremely valuable rights under the bilateral and we do not intend that they should be wasted. It has been our normal practice to subject frequency allocations in limited-entry markets to a 90-day dormancy condition. Consistent with our standard practice, we propose to subject the frequency allocation awarded here to the condition that it will expire automatically and the frequencies will revert back to the Department if they are not used for any 90-day period.⁸

ACCORDINGLY,

1. We tentatively (a) exempt Gemini Air Cargo Inc from the provisions of 49 U.S.C. 41102 to the extent necessary to engage in scheduled foreign air transportation of property and mail between Miami, Florida, on the one hand, and Quito and Guayaquil, Ecuador, on the other hand; and to

⁸ The dormancy period will begin upon the selected carrier's inauguration of service.

integrate these services in order to provide the all-cargo services described in this order; and (b) allocate Gemini Air Cargo, Inc. three weekly frequencies (narrow-body aircraft or wide-body equivalent) to conduct the authorized services, effective upon a final order in this proceeding, and subject to a 90-day dormancy condition;

2. We tentatively conclude that the exemption authority in ordering paragraph 1 above be effective for a period of one year from the service date of a final order in this proceeding and that the frequency allocation in ordering paragraph one be effective for an indefinite duration, subject to a 90-day dormancy provision, so long as Gemini holds the underlying economic authority for U.S.-Ecuador operations;
3. We tentatively deny the applications of Arrow Air, Atlas Air, Inc., and Evergreen International Airlines, Inc. in Docket OST-2000-7513;
4. We direct any interested parties having objections to our tentative decisions in this order to file their objections with the Department, Dockets, Attention: Docket OST-2000-7513, U.S. Department of Transportation, 400 7th Street SW, Washington DC 20590, no later than 10 calendar days from the date of service of this order; answers thereto shall be filed no later than seven calendar days thereafter;⁹
5. 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;¹⁰
6. If no objections are filed, we will deem all further procedural steps to be waived and will proceed to a final order;
7. We dismiss the application of Fine Air Services, filed in Docket OST-2000-7513; and
8. We will serve this order on Amerijet International, Inc.; Arrow Air, Inc.; Atlas Air, Inc.; Evergreen International Airlines, Inc.; Fine Air Services, Inc.; Gemini Air Cargo, Inc.; Kitty Hawk International, Inc.; Polar Air Cargo, Inc.; the Ambassador of Ecuador in Washington DC; and the United States Department of State (Office of Aviation Negotiations).

By:

SUSAN MCDERMOTT
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports/report_aviation.asp*

⁹ The original submission is to be unbound and without tabs on 8½" x 11" white paper using dark ink (not green) to facilitate use of the Department's docket imaging system

¹⁰ As we are providing for the filing of objections to this tentative decision, we will not entertain petitions for reconsideration of this order