

145536

Order 2001-12-15

Served: December 19, 2001



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

Issued by the Department of Transportation  
on the 19th day of December, 2001

Joint application of

**ATLAS AIR WORLDWIDE HOLDINGS, INC.,  
AIRLINE ACQUISITION CORP. I,  
ATLAS AIR, INC., and  
POLAR AIR CARGO, INC.**

for approval of a transfer of route authority under 49  
U.S.C. 41105

Docket OST-01-10239 - 28

**ORDER DETERMINING FITNESS  
AND  
PROPOSING TO GRANT *DE FACTO* TRANSFER OF ALL ROUTE AUTHORITY,  
EXCEPT BRAZIL**

**Summary**

By this order, we find that Atlas Air, Inc. (Atlas Air) and Polar Air Cargo, Inc. (Polar) continue to be fit to conduct the air transportation operations for which they hold economic authority. In addition, by this order, we direct all interested parties to show cause why we should not (1) with one exception, grant a *de facto* transfer under section 41105 of Title 49 of the United States Code (the Statute) of the certificate and exemption authority, together with related frequency allocations, held by Polar to Polar under the control of Atlas Air Worldwide Holdings, Inc. (AAWH), the holding company parent of Atlas Air; and (2) disapprove the *de facto* transfer of Polar's Brazil authority to Polar under the control of AAWH.

**Background**

On July 25, 2001, in accordance with the provisions of section 204.5 of our rules (14 CFR 204.5) that require air carriers to notify us of substantial changes affecting their operations, Atlas Air and Polar advised the Department that they had entered into an agreement whereby AAWH, the parent of Atlas Air, would acquire all of the outstanding stock of

Polar.<sup>1</sup> Also on July 25, 2001, Atlas Air and Polar, together with related parties,<sup>2</sup> jointly filed the subject application for a *de facto* transfer of Polar's authority to Polar under the control of AAWH.<sup>3</sup> The applicants note that while, upon consummation of the transaction, both Atlas Air and Polar will be subsidiaries of AAWH, each will remain separate airlines operated as such under separate brands.<sup>4</sup>

Answers to the *de facto* transfer application were received from Gemini Air Cargo, Inc., and Evergreen International Airlines, Inc.<sup>5</sup> A summary of these answers and the Joint Applicants' reply to each are set forth in the **Brazil Service Issues** section of this order.

On October 1, 3, 5, 9, and 10, and November 8, 2001, the Joint Applicants filed various material related to the continued fitness of Atlas Air and Polar.<sup>6</sup>

---

<sup>1</sup> This acquisition would be accomplished through Airline Acquisition Corp. I, a newly created subsidiary of AAWH.

<sup>2</sup> The related parties are AAWH and Airline Acquisition Corp. I. Together with Atlas Air, these parties are "the Atlas parties."

<sup>3</sup> The Atlas parties and Polar also filed an application (Docket OST-01-10238) for an exemption from section 41105 to the extent necessary to allow the acquisition of Polar to be completed prior to our action on the *de facto* transfer request. By Order 2001-9-16, issued on September 25, 2001, we granted the exemption, on condition that Atlas Air and Polar remain separate entities until our decision on the *de facto* transfer had been made. The Joint Applicants have advised us that the Polar acquisition was consummated on November 1, 2001, and that Polar is now a wholly-owned subsidiary of AAWH.

<sup>4</sup> The authority held by each of the carrier applicants is summarized in the **Fitness** section of this order.

<sup>5</sup> Gemini's answer was filed on August 9 and Evergreen's answer was filed on August 15. The Joint Applicants filed a reply to these answers on August 29. On October 18 and November 15, Evergreen filed motions for leave to file otherwise unauthorized documents. In these filings, Evergreen reiterated its opposition to the *de facto* transfer application. On November 29, the Joint Applicants filed a consolidated reply to Evergreen's October 18 and November 15 pleadings. This answer was accompanied by a motion for leave to file an otherwise unauthorized document.

<sup>6</sup> This material included copies of (a) AAWH's July 12, 2001, Form 8-K filing with the Securities and Exchange Commission (SEC), (b) the parties July 11, 2001, stock purchase agreement, and (c) the Hart-Scott-Rodino (HSR) documents filed by the applicants, or related entities, with the Federal Trade Commission (FTC); in addition, information on the ownership, senior management and key technical personnel, financial condition and operating plans, and compliance disposition of Atlas Air and Polar were contained in these submissions. A substantial portion of this information was filed with a request for confidential treatment pursuant to Rule 12 (14 CFR 302.12). On October 11, Gemini filed a motion seeking limited access to various documents that the Joint Applicants had submitted under seal. On October 15, the Joint Applicants responded to Gemini's motion, stating that, subject to certain conditions, they would not object to the Department granting the requested access. Evergreen's comments in its October 18 filing are incorporated in our **Brazil Service Issues** discussion elsewhere in this order. By Notice dated October 19, 2001, we granted limited access to certain of the confidential documents to Gemini and Evergreen. Evergreen's November

After reviewing all of the documents filed and other information available to us, as more fully discussed below, we find Atlas Air and Polar fit. Moreover, with the exception of Polar's Brazil authority, we tentatively believe that the *de facto* transfer sought by the Joint Applicants is in the public interest. Therefore, we propose to deny the *de facto* transfer of Polar's Brazil authority and grant the *de facto* transfer of all other authority held by Polar. We will provide a 7-day answer period to our proposed *de facto* transfer decisions.

## FITNESS OF ATLAS AIR AND POLAR

### Ownership

#### Atlas Air

Atlas Air currently holds certificate authority for both interstate and foreign scheduled air transportation of property and mail. Its foreign route authority is contained in its certificates for Route 637, which currently authorizes Atlas Air to serve 156 countries, and Route 801, which currently authorizes Atlas Air to serve Brazil.<sup>7</sup> In addition, Atlas Air holds exemption authority to serve additional countries. It currently operates 36 B747 aircraft to over 100 cities in 46 countries.

Atlas Air is wholly owned by AAWH. AAWH is controlled by the Estate of Michael Chowdry, which holds approximately 47 percent of the company's shares.<sup>8</sup> The proposed acquisition of Polar by Atlas Air's parent will have no impact on the ownership of Atlas Air, or that of its parent.

#### Polar

Polar also holds certificate authority to engage in interstate and foreign scheduled air transportation of property and mail. Its foreign route authority is contained in its permanent certificate for Route 651, which currently authorizes Polar to serve 97 countries, and in its temporary certificates for Route 696 (Brazil and Colombia), Route 705 (Thailand), and Route 727 (Japan).<sup>9</sup> In addition, Polar holds exemption authority to serve additional

---

15 answer was filed in response to its review of the confidential documents and, as a result, was accompanied by a request for confidential treatment.

<sup>7</sup> For Route 637, *see* Order 93-3-7, served March 5, 1993, and Order 99-12-7, served December 13, 1999. For Route 801, *see* Order 2001-4-32, served June 5, 2001.

<sup>8</sup> Linda Chowdry, John S. Blue, and the Wells Fargo Bank, N.A., are the Estate's personal representatives. In addition to shares held individually by these representatives, the Estate has power over the shares issued to Chowdry, Inc. (23.1 percent) and the Chowdry Limited Partnership (18.5 percent). In total, the shares controlled by the Estate total 47 percent of the shares issued. The remaining issued shares are split between several individuals/companies, all of who hold less than a 10 percent interest.

<sup>9</sup> For Route 651, *see* Order 94-7-12, served July 12, 1994, and Order 99-12-7, served December 13, 1999. For Route 696, *see* Order 2001-4-15, served April 18, 2001. For Route 705, *see* Order 96-9-16, served September 19, 1996. For Route 727, *see* Order 98-6-22, served June 25, 1998.

countries. Under its various authorities, Polar currently operates 18 B747 aircraft to over 100 cities in 19 countries.

Prior to November 1, Polar was wholly owned by GE Capital Aviation Services (GECAS) and/or its affiliates. The November 1 acquisition of Polar's stock by Airline Acquisition Corp. I resulted in Polar becoming a wholly owned subsidiary of AAWH and, hence, both Atlas Air and Polar are under common control.

### **Management**

It is the intent of AAWH to maintain Atlas Air and Polar as separate carriers, independent of each other.<sup>10</sup> After the acquisition, Polar underwent a change in its Board of Directors with Mr. Richard Shuyler, Mr. Fred L. deLeeuw, Mr. Thomas G. Scott, Mr. Douglas A. Carty, Mr. William S. Allen, and Mr. James R. Jensen replacing Polar's prior board.<sup>11</sup> In addition, Polar underwent several changes in its officers, the most notable being the replacement of Mr. Michael Snyder as its President, Chief Executive Officer, and Chief Operating Officer.<sup>12</sup> The applicants state that no other changes in Atlas Air's or Polar's current senior management and key technical personnel team are planned. Each carrier's current team is noted below.<sup>13</sup>

#### Atlas Air

Chief Executive Officer--Richard Shuyler  
 Chief Operating Officer & President--James Matheny  
 Sr. Director of Quality Assurance--James M. Phoenix  
 Director of Maintenance--Markus Schleich  
 Director of Operations--Mike Citrano  
 Sr. Director of Safety--Bill Kelley  
 Chief Pilot--Michael Bryant

---

<sup>10</sup> AAWH notes that while it may streamline certain administrative functions of Atlas Air and Polar, no final decisions on the combination of these functions have been made.

<sup>11</sup> With the exception of Mr. Jensen, Polar's new Chief Operating Officer and President, each of these individuals is currently an officer and/or director of AAWH and/or Atlas Air. With the exception of Mr. Carty, each of these individuals is a citizen of the United States.

<sup>12</sup> In addition to Mr. Snyder, four other former Polar officers---Michael Bell (CFO), Alfred Eichenlaub (General Counsel), Ira Gershkoff (Chief Information Officer), and Tom Koch (Vice President of Human Resources)---have left the company.

<sup>13</sup> Excluded from the senior management and key technical personnel lists are several officers who hold positions that report to the Chief Executive Officer and/or President, but do not hold FAA required key technical positions.

Polar

Chief Executive Officer--Richard Shuyler  
 Chief Operating Officer & President--James Jensen  
 Director of Quality Assurance--Norman K. Krengel  
 Director of Operations--Richard R. Walters  
 Sr. Director of Maintenance--Ahmad R. Zamany  
 Director of Safety--Stanley R. Danielson  
 Chief Pilot--Daniel C. Wells

With the exception of Mr. Jensen, Polar's President and Chief Operating Officer, all of the individuals noted above are experienced in overseeing operations of the carrier applicants. Further, in approving these individuals for their current positions with Atlas Air and Polar, the FAA has reviewed their experience and background and found them to be satisfactory.<sup>14</sup> Immediately prior to joining Polar, Mr. Jensen served for three years as Sr. Vice President of Maintenance & Engineering at TWA. Prior to that time, Mr. Jensen had over 30 years of aviation maintenance experience, most in supervisory management positions.<sup>15</sup> Therefore, we conclude that both carriers have demonstrated that, post-acquisition, they continue to have the management skills and technical ability to conduct the all-cargo operations authorized by their respective certificates.

**Operating Plans and Financial Condition**

The Joint Applicant's have stated that the Polar acquisition is not expected to result in any changes in Atlas Air's operations. However, it is expected that AAWH will resize Polar's fleet and discontinue service to the South Pacific. The fleet resizing will result in Polar cutting its current aircraft fleet significantly. After resizing, it is intended that Polar will have at least five aircraft in operation (four B747-400s and one B747-200), providing its U.S.-Japan and related Asia services, as well as service between the U.S. and Europe and South America.

---

<sup>14</sup> Resumes for these individuals were contained in various supplements to this application or were otherwise on file with the Department. Our review of the qualifications of these individuals to hold the positions noted found that each possessed the appropriate experience and, if necessary, the required FAA licenses, to perform his duties with Atlas Air or Polar. Moreover, we note that the FAA evaluates certain of an air 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.

<sup>15</sup> Specifically, Mr. Jensen joined TWA in 1966 as an engineer and progressed through increasingly responsible positions until 1992 when he left TWA after having served for the last two years as its Sr. Vice President of Maintenance & Engineering. From 1992-1996, Mr. Jensen served as a Vice President with Douglas Aircraft Co. From 1996-1998, he was employed by AirTran Airlines as its Sr. Vice President of Maintenance & Engineering and after a brief stint with The Boeing Company, Mr. Jensen returned to TWA.

Summarized below is each carrier's current financial condition. Post-acquisition, Polar's overall financial health experienced a significant improvement due to the elimination of most of its debt.<sup>16</sup> AAWH anticipates that its rightsizing of Polar's fleet will enable the company to become profitable. Further, AAWH states that the acquisition of Polar will strengthen the overall financial position of both carriers, thereby enhancing their long-term prospects, due to certain synergies that will be realized.

#### Atlas Air

Atlas Air's Form 41 reports indicate that as of June 30, 2001, it had current assets of \$437.15 million and current liabilities of \$134.94 million, for a positive working capital position of \$302.21 million and a current assets to current liabilities ratio of 3.24:1. In addition, Atlas Air reported retained earnings of \$196.32 million and positive stockholders' equity of \$502.62 million.

Overall, Atlas Air has historically been profitable with an annual net income of \$85.06 million during calendar year 2000. Thus far in 2001, its operating results have been down significantly with the company reporting a net loss of \$33.65 million during the first six months of calendar year 2001, compared to the net profit of \$30.83 million it earned during the same period of calendar year 2000.

#### Polar

Unlike Atlas Air, Polar's operations have historically been unprofitable. During calendar year 2000, Polar reported a net loss of \$11.06 million. For the first six months of calendar year 2001, Polar has lost \$59.92 million compared to a much smaller loss of \$18.11 million during the same period of calendar year 2000. These losses have left Polar in poor financial health overall. Specifically, as of June 30, 2001, Polar reported current assets of \$44.8 million and current liabilities of \$158.32 million, for a negative working capital position of \$113.52 million and a current assets to current liabilities ratio of only 0.28:1. In addition, Polar reported negative retained earnings of \$120.9 million and negative stockholders' equity of \$111.27 million.

Nothing in our review of the overall financial condition of Atlas Air or Polar indicates that, post-acquisition, they will not continue to be financially fit to conduct the operations authorized by their respective certificates.<sup>17</sup>

---

<sup>16</sup> Polar's long-term debt was eliminated, together with a significant portion of its current liabilities.

<sup>17</sup> In addition, AAWH is, like Atlas Air, in sound financial condition and appears able to undertake the acquisition of Polar without jeopardizing its overall financial health. Specifically, as of June 30, 2001, AAWH had current assets of \$437.15 million (of which \$299.94 million was in the form of cash or cash equivalents) and current liabilities of \$131.49 million, giving it positive working capital of \$305.66 million.

**Compliance Disposition**

Both Atlas Air and Polar have historically conducted their operations without any unusual compliance-related problems. While each has been the subject of various FAA enforcement investigations, neither has been the subject of certificate actions. Further, neither carrier is the subject of any pending DOT or FAA enforcement actions that would be likely to result in a significant action against the authority they hold and both are currently performing in a satisfactory manner.

Further, no information has come to our attention that would indicate that either carrier, or AAWH, are the current subject of any charges of unfair, deceptive or anti-competitive business practices, or of fraud, felony or antitrust violations, other than those that result in the ordinary course of business.<sup>18</sup> More importantly, nothing in the acquisition of Polar by AAWH would result in our finding that these carriers no longer possess a satisfactory compliance disposition.

**Citizenship**

49 U.S.C. 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 specifies 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.

AAWH became the parent of both Atlas Air and Polar upon completion of the Polar acquisition. AAWH did not, itself, undergo any change in ownership in order to effectuate its acquisition of Polar. As noted earlier, the only party controlling 10 percent or more of AAWH's stock is the Estate of Michael Chowdry, with a 47 percent interest. The shares held by the Estate are administered by U.S. citizens on behalf of Linda Chowdry and her children, each of whom is a U.S. citizen. We have previously found Atlas Air to be a U.S. citizen under this same ownership and find nothing in the subject acquisition that would lead us to conclude that control of Atlas Air no longer rests with citizens of the United States. Further, there is nothing on the record that would indicate that Polar does not meet our citizenship requirements under this same ownership and control.

In view of the foregoing, we conclude that Atlas Air and Polar are U.S. citizens and that Atlas Air and Polar continue to be fit, willing, and able to provide the interstate and foreign air transportation service for which they hold authority.

---

<sup>18</sup> We consider the legal action filed against Atlas Air by the Air Line Pilots Association in May 2000 to be in the ordinary course of business.

### **DE FACTO TRANSFER**

While no actual transfer of economic authority is taking place in connection with the acquisition of Polar by Atlas Air's parent, under prior Department precedent, when two or more carriers each with international route authority come under common control, a *de facto* transfer of authority has taken place under section 41105 of the Statute (49 U.S.C. 41105).<sup>19</sup>

Under section 41105 the Department must determine whether the transfer is consistent with the public interest. In determining whether a transfer is generally consistent with the public interest, we must find that it will not conflict with important international aviation policy objectives and is not otherwise inconsistent with the public interest. In this latter regard, we must determine whether the acquiring entity is a U.S. citizen and will be fit to hold the certificate authority.<sup>20</sup> Moreover, section 41105(b) requires the Department to analyze the impact of the transfer on the viability of the carrier applicants, competition in the domestic airline industry, and the trade position of the United States in the international air transportation market. Also, the Department has stated that it will carefully consider the impact of any proposed sale of route authority on airline workers.<sup>21</sup>

By this order, we find that both carrier applicants involved in the transaction will continue to be fit and meet the citizenship requirements of the Statute. Further, we tentatively find that the transaction will improve the viability of Polar, the acquired carrier, and have no negative impact on the viability of Atlas Air.<sup>22</sup>

We believe that, overall, the impact of this transaction on Polar's workers and its viability will be positive. Absent its acquisition by AAWH, it is unlikely that Polar could continue in operation for any significant period of time.

The only questions that remain, therefore, are (1) whether the *de facto* transfer of Polar's route authority would conflict with our international aviation policy objectives, and (2) the impact of the transaction on competition and the U.S. trade position. Overall, we believe that the *de facto* transfer would have no negative impact on competition or the U.S. trade position in international markets. Both carriers plan to continue operations, with Polar doing so in a more positive financial position. Moreover, with the exception of Brazil, the carriers do not have overlapping route networks in limited-entry markets that would raise concern about the impact of the transaction on competition. Thus, the carriers' operations in their respective markets would benefit shippers, competition, and the U.S. trade position.

---

<sup>19</sup> See Order 90-2-1, January 24, 1990; Order 89-3-21, March 8, 1989; and Order 85-8-25, August 9, 1985.

<sup>20</sup> See Federal Express, Order 89-3-21.

<sup>21</sup> See *Initiative to Promote a Strong Competitive Aviation Industry*, January 1994.

<sup>22</sup> See the **Operating Plans and Financial Condition** section of this order.

However, as discussed more fully below, we also believe that common control of Polar and Atlas Air with respect to their U.S.-Brazil authorities would reduce competition among U.S. air carriers in that market, contrary to our international aviation policy objectives. Therefore, we have tentatively decided to deny the *de facto* transfer of Polar's U.S.-Brazil authority.

### **Brazil Service Issues**

#### *Gemini's Answer*

Gemini states that it opposes the Joint Applicants' *de facto* transfer request insofar as Atlas Air and Polar both seek to retain authority to operate scheduled all-cargo service to Brazil. The carrier argues that grant of the *de facto* route transfer would have an obvious and instantaneous negative effect on competition among U.S. carriers in the U.S.-Brazil market. In addition, Gemini argues that the proposed transfer would have an adverse effect upon the trade position of the United States in the U.S.-Brazil air transportation market.

In support of its position, Gemini notes that the United States can designate only four carriers to operate scheduled all-cargo service to Brazil, and that those four carriers collectively can operate only 24 round-trip all-cargo wide-body frequencies per week between the U.S. and Brazil. Gemini further states that, as Atlas Air currently holds ten of these frequencies and Polar holds four frequencies, the proposed common ownership of these carriers would be highly anticompetitive and would deprive the public of benefits of the competition that would be produced in this market by four independent U.S. scheduled airlines. Further, Gemini argues that Atlas Air and Polar cannot claim that there would be competition between them in the Brazil market, noting that the Joint Applicants argue that the proposed transaction will enhance the ability of Atlas Air and Polar to compete against *other* cargo airlines.

Finally, Gemini argues that the *de facto* transfer of Polar's Brazil authority would be inconsistent with U.S. aviation policy for limited-entry markets (either due to restrictions on the number of carriers that may be designated in a particular market or due to limitations on the number of frequencies available) where additional entry authority is not likely to be made available in the near future.

However, rather than asking the Department to deny the *de facto* transfer of Polar's authority, Gemini requests that we require Atlas Air to return its Brazil authority for immediate and simultaneous activation of the backup certificate issued to Gemini by Order 2001-4-32 in the *U.S.-Brazil All-Cargo Service Proceeding* (Docket OST-2000-7559). Gemini states that it seeks the surrender of the Atlas Air certificate to Brazil because such surrender would lead to the immediate activation of the Gemini backup certificate. However, Gemini notes that it would not object if Polar were the carrier that surrenders its certificate, instead of Atlas Air, so long as the Gemini backup certificate and backup frequency allocation (ten frequencies) are activated.

Evergreen's Answer

In its filing, Evergreen states that it does not object to the Department's granting the *de facto* transfer of Polar's routes except to the extent that the Joint Applicants propose the transfer of Polar's authority to serve the highly restricted U.S.-Brazil air cargo market.

Evergreen argues that it is contrary to the public interest, and to U.S. international aviation policy favoring competition among U.S. carriers, to allow over half of the frequencies, and half of the available designations, for Brazil to be concentrated in the hands of a single, commonly-controlled entity.<sup>23</sup> Therefore, Evergreen asks that the Department (1) require that Polar surrender its Brazil authority as a condition for approving the transfer application, and (2) initiate an appropriate proceeding to select a fourth U.S. carrier for the available all-cargo designation and frequencies.

In support of its position, Evergreen argues that while the Joint Applicants may maintain their separate brand identity, and operate under separate authority, they will be commonly-controlled,<sup>24</sup> and thus, for all practical purposes, will be a single airline and should be treated as such in the context of a limited-entry market like Brazil. Further, Evergreen states that the proposed transfer would serve to reduce competition between U.S. carriers by resulting in one fewer carrier competing for U.S.-Brazil freight and precluding other interested, non-designated carriers from the market.

While agreeing with Gemini that the proposed transfer of Polar's Brazil authority would not be in the public interest, Evergreen disagrees with Gemini's proposed solution to the proposed transfer, arguing that Gemini's suggestion that Atlas Air be divested of its Brazil authority and Gemini's backup authority activated without any further Department proceedings is flawed. Evergreen notes that the transfer application at issue in this docket involves the transfer of Polar's authority, not Atlas Air's authority, as Polar is the carrier being acquired. Hence, Evergreen notes that the question pending before the Department is whether Atlas Air should be allowed to obtain Polar's route authority via a *de facto* transfer and states that, in this context, Gemini's backup authority is not implicated. Evergreen further notes that, the Department's order awarding Atlas Air its Brazil authority clearly stated that the backup authority of Gemini would only be activated should Atlas Air not

---

<sup>23</sup> Evergreen states that the current U.S. bilateral with Brazil contemplates that there will be four U.S. carriers competing with one another and with Brazilian carriers and that, were the Atlas/Polar route transfer allowed with respect to Brazil, the United States effectively would have designated only three carriers, and vested one of those three (the Atlas/Polar combination) with well over twice as many frequencies as the U.S. airline holding the next largest share.

<sup>24</sup> In its November 15 filing, Evergreen notes that, post-acquisition, Polar's Chief Executive Officer is now the same individual who serves as Atlas Air's Chief Executive Officer and that Polar's Board is now comprised of many of the same persons who are officers of Atlas Air. In addition, Evergreen argues that the Joint Applicants' claims that Brazil is an important component of what attracted Atlas Air to Polar are undermined by various confidential documents filed by the Joint Applicants.

implement and maintain its proposed services. Evergreen notes that any failure by Atlas Air to implement its U.S.-Brazil service pursuant to this award is not at issue in the pending transfer proceeding and, as a result, any surrender of Polar's authority that the Department might require in this proceeding would not be an event that would trigger the activation of Gemini's backup certificate.

Joint Applicants' Reply

On August 29, the Joint Applicants filed a consolidated reply to Gemini's and Evergreen's answers. In this reply, the Joint Applicants ask that the Department approve the *de facto* route transfer in its entirety. They note that neither Gemini nor Evergreen objects to the transfer of Polar's authority in the vast majority of the covered international markets and, thereby, implicitly suggest that, overall, the proposed transaction will produce significant public benefits. The Joint Applicants reiterate their position that the acquisition of Polar by AAWH will strengthen Polar financially and improve its long-term prospects, as well as improve Atlas Air's operating efficiency and significantly enhance each carrier's ability to satisfy the service needs of its own customers and to compete more vigorously.

The parties further state that Gemini's and Evergreen's objections to the transfer of Polar's Brazil authority are not, in fact, based on public interest issues; rather they are designed to promote those companies' private corporate interests. The Joint Applicants argue that, even in these terms, the objections raised are based on a fundamental misconception of U.S.-Brazil airfreight competition and overlook both the limited scope of the Department's *de facto* transfer review under section 41105 and the strong U.S. public interest in favor of Polar's retention of its U.S.-Brazil authority as an integral part of its established Asia/Europe-U.S.-South America route network. They argue that the issue before the Department is not whether the *de facto* transfer of Polar's Brazil authority is in the public interest, but whether the entire transaction is in the public interest.<sup>25</sup>

The Atlas parties emphasize that in making its decision to acquire Polar, AAWH was attracted by the expected added value of operating an airline with a global scheduled route network; a value that would be enhanced by the preservation of Polar's separate operation and distinct brand on a global basis, including its South America route network of which Polar's Brazil authority is an important component.<sup>26</sup>

---

<sup>25</sup> The Joint Applicants cite our decisions in, among others, the *Joint Application of Fine Air Services Corp. and Arrow Air, Inc.* (Order 2000-8-5); *Joint Applications of American Airlines, Inc. et al* (Order 91-8-1); and *Joint Application of Northwest Airlines, Inc. and Hawaiian Airlines, Inc. (Honolulu-Fukuoka)* (Order 92-9-59), as support for this position.

<sup>26</sup> The Joint Applicants note that Brazil is an integral component of Polar's South America route network and that, absent the Brazil rights, there likely would be insufficient traffic to support other Polar services to/from South America. Further, in their November 29 reply, the Joint Applicants dispute Evergreen's argument that Polar's Brazil rights were an unimportant part of the acquisition. In this regard, they emphasize that one of the reasons Polar's Japan rights were believed to have value to the Joint Applicants is because the rights provided access to Japan-originating traffic to South America.

Further, the Joint Applicants state that by confining their discussion of the competitive impact of the transfer to the U.S. carrier side of the equation, Gemini and Evergreen paint an incomplete picture because the relevant U.S.-Brazil market is far broader than that served solely by U.S. freighter aircraft. The parties state that “properly defined, the market consists of U.S.-Brazil airfreight, which can move on U.S. freighter aircraft, foreign freighter aircraft, U.S. combination aircraft and/or foreign combination aircraft,” and note that the combined Atlas Air/Polar share of this market would be only 21 percent. They argue that this share would be below that of Varig, a competitor in the U.S.-Brazil airfreight market, and the positive impact of the acquisition on Polar’s financial condition would make it pro-competitive by enhancing the U.S.-flag competitive presence, which in turn would lead to more effective use of bilateral rights.<sup>27</sup>

### Decision

It is uncontested that the ability of U.S. all-cargo carriers to serve the U.S.-Brazil marketplace is highly restricted under our current bilateral aviation agreement with Brazil. Only four U.S. carriers may provide all-cargo service, and collectively they can operate a maximum of 24 weekly frequencies. Polar and Atlas together hold half of the available designations and over half of the available frequencies. As a result, it is clear that the designation and frequencies held by Polar represent a substantial operating right. While the Joint Applicants are correct that the acquisition of Polar by AAWH will strengthen Polar financially, thereby improving its viability and ability to compete against other carriers serving this market (whether it is a U.S. or foreign carrier engaging in all-cargo or combination services), the public interest test in cases where a single entity will gain control over a significant portion of such limited rights is much broader. Specifically, in such cases, we must consider whether the transfer of such rights would conflict with our international aviation policy objectives.

Our international aviation policy objectives include seeking to ensure that in limited-entry markets, all available authority is fully allocated among competing U.S. carriers. Such an allocation will generally result in the greatest degree of competition and in the greatest benefit to travelers and shippers and to the U.S. trade position. While the Joint Applicants argue that Polar and Atlas Air will be maintained as separate companies, we cannot tentatively conclude that, in this highly restricted market, the public interest would be better served by having two of the four designated airlines under single corporate control serve a market previously served by four unrelated airlines.

---

<sup>27</sup> The Joint Applicants argue that this consideration, like carrier viability, is one on which the Department has regularly relied in approving route transfers (*Federal Express/Florida West*, Order 97-10-23). They note not only that the *de facto* transfer of Polar’s authority would enhance Polar’s viability, and therefore improve competition in the domestic airline industry, but also that it would strengthen the U.S. trade position in the U.S.-Brazil market as a financially stronger Polar would be better able to compete for traffic in this market.

Therefore, we tentatively find that it is in the public interest to require Polar to relinquish its designation and frequencies as a condition to approval of AAWH's acquisition of Polar.<sup>28</sup> The Department would then be in a position to reallocate the rights to another airline, and to ensure the maximum range of competitive services available to the public.

**ACCORDINGLY,**

1. We find that Atlas Air, Inc., and Polar Air Cargo, Inc., continue to be fit, willing, and able to engage in the interstate and foreign air transportation for which they hold authority.
2. We direct all interested persons to show cause why we should not, except as noted in Ordering Paragraph 3 below, grant the request of Atlas Air Worldwide Holdings, Inc., Airline Acquisition Corp. I, Atlas Air, Inc., and Polar Air Cargo, Inc., for approval, under 49 U.S.C. section 41105, of the *de facto* transfer of the certificate and exemption authority, together with related frequency allocations, held by Polar Air Cargo, Inc., to Polar Air Cargo, Inc., under the ownership of Atlas Air Worldwide Holdings, Inc.
3. We direct all interested persons to show cause why we should not deny the *de facto* transfer of Polar Air Cargo, Inc.'s U.S.-Brazil route authority (including the attendant designation and four weekly all-cargo frequencies contained in Route 696) to Polar Air Cargo, Inc., under the ownership of Atlas Air Worldwide Holdings, Inc., for reallocation in a new proceeding.
4. We direct interested persons having objection to the Department's tentative decisions set forth in ordering paragraphs 2 and 3 above to file such objections within seven calendar days of the date of this order.
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.<sup>29</sup>
6. In the event that no objections are filed, we will consider all further procedural steps to be waived, and we will enter an order making final our tentative findings and conclusions set out here and (1) granting the *de facto* transfer of the certificate authority held by Polar Air Cargo, Inc., for Routes 651, 705, 727, and that portion of Route 696 that grants authority to serve Colombia, to Polar Air Cargo, Inc., under the ownership of Atlas Air Worldwide Holdings, Inc.; (2) denying the *de facto* transfer of the certificate authority held by Polar Air Cargo, Inc., for that portion of Route 696 that grants authority to serve Brazil; and (3) establishing by separate order a new *U.S.-Brazil All-Cargo Service Case* to

---

<sup>28</sup> In light of our tentative decision here, we need not address Gemini's arguments for activation of its backup award to Atlas Air's Brazil authority.

<sup>29</sup> Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.

reallocate the Brazil authority currently held by Polar Air Cargo, Inc., to another U.S. certificated air carrier.

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

By:

**READ C. VAN DE WATER**  
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>*

---

**SERVICE LIST FOR DOCKET OST-01-10239**

ALFRED J EICHENLAUB  
SR VP & GENERAL COUNSEL  
POLAR AIR CARGO INC  
100 OCEANGATE #15-FLR  
LONG BEACH CA 90902

RICHARD P TAYLOR  
DAVID H COBURN  
COUNSEL FOR EVERGREEN INTL  
STEPTOE & JOHNSON LLP  
1330 CONNECTICUT AVE NW  
WASHINGTON DC 20036

BRUCE H RABINOVITZ  
JEFFREY A MANLEY  
COUNSEL FOR POLAR AIR CARGO  
WILMER CUTLER & PICKERING  
2445 M STREET NW  
WASHINGTON DC 20037-1420

THOMAS G SCOTT SR  
SR VP & GENERAL COUNSEL  
ATLAS AIR INC  
2000 WESTCHESTER ROAD  
PURCHASE NY 10577-2543

RUSSELL E POMMER  
ASSOC GENERAL COUNSEL &  
DIR OF REGULATORY AFFAIRS  
ATLAS AIR INC  
901 15<sup>TH</sup> STREET NW STE 400  
WASHINGTON DC 20005

MOFFETT B ROLLER  
ROLLER & BAUER PLLC  
COUNSEL FOR GEMINI AIR CARGO INC  
1020 NINETEENTH STREET NW STE 400  
WASHINGTON DC 20036

THOMAS V LYDON  
DIR OF GOVT AFFAIRS  
EVERGREEN INTL AIRLINES  
1629 K STREET NW STE 301  
WASHINGTON DC 20006

ANTHONY BAUCKHAM  
PRESIDENT  
EVERGREEN INTL AIRLINES  
3850 THREE MILE LANE  
MCMINNVILLE OR 97128