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Order 2001-2-14



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC**

Served: February 14, 2001

Issued by the Department of Transportation
on the 14th day of February, 2001

U.S.-Brazil All-Cargo Charters

Undocketed

FINAL ORDER

SUMMARY

By this order we make final our tentative decision in Order 2001-2-1 and establish procedures for allocation of the U.S.-Brazil all-cargo charters available for the balance of the charter year (March through June 2001).

BACKGROUND

Under the U.S.-Brazil Air Transport Agreement both parties are entitled to operate 750 round-trip all-cargo charters per year (July through June). Under procedures established in Orders 98-4-19 and 98-6-14, and by Notice dated April 13, 2000, we allocated a portion of the available charters in advance to U.S. carriers based on their historic operations and reserved the balance in a charter pool for distribution on a first-come, first-served basis.

By January 2001, all carriers with advance allocations had either used their allocations or confirmed to the Department that the charters remaining in their allocations were committed for use over the course of the charter year, and approximately 100 charters remained in the charter pool for the operation of U.S.-Brazil charters for the balance of the charter year (February through June).

By Order 2001-2-1 we tentatively established procedures for distribution of the remaining available charters for the period March-June.¹ Specifically, we proposed to make a *pro rata* portion of the remaining charters available each month; to distribute those flights by dividing them equally by the number of applicants to the extent the distribution is equal to or fewer than requested, and to distribute the remaining flights using a round-robin procedure on a first-come, first-served basis.

Objections to the show-cause order were due February 6, 2001. Answers to the objections were due February 9, 2001.

RESPONSIVE PLEADINGS

Express One International, Atlas Air, Inc., and Emery Worldwide Airlines filed comments to the Department's tentative decision.² Atlas and Gemini Air Cargo filed replies.

Express One and Emery urge the Department to modify the tentative procedures to set aside two charters each month for *ad hoc* use. Express One explicitly seeks the set aside for emergency or new entrant opportunities. Emery argues the set aside should be available to any carrier not holding scheduled U.S.-Brazil authority or an advance charter allocation. If those opportunities are not used in the month for which they were set aside, they could be distributed in the next month. For the last month all remaining frequencies would be distributed and no new entrant set aside would be available.

Atlas and Gemini do not object to the Department's proposed procedures but request that the Department clarify the eligibility of UPS to apply for charters. Atlas states that the Department approved the transfer of the scheduled rights of Challenge Air Cargo to UPS, and granted Challenge an exemption to continue operation of those routes pending UPS' receipt of foreign government approvals. Atlas further states that although UPS does not yet hold U.S.-Brazil scheduled authority in its own name, Challenge is offering U.S.-Brazil scheduled service for the benefit of UPS, at the same time that UPS has been applying for and obtaining permits for Brazil cargo charters.

¹Because of the need to take prompt action, by Notice dated January 25, 2001, we made available 21 charters for use by U.S. carriers in February and invited interested carriers to file applications by January 29, 2001. We also stated that we would propose procedures for the balance of the charter year by separate order. In addition to the 21 charters available, a total of 25 charters distributed for January charters were returned to the Department and added to the number available for February flights. Pursuant to the procedures established in our January 25 Notice we distributed 23 charters to Atlas, 20 to Gemini, and 3 to UPS.

²Emery's pleading was accompanied by a motion for leave to file an otherwise unauthorized document. In the interest of a complete record, we will grant the motion.

Atlas and Gemini oppose Express One's suggestion that the Department set aside two frequencies for *ad hoc* use. They state that the public interest is best served by insuring full and effective use of the frequencies by following the procedures established in Order 2001-2-1. Atlas suggests that the Brazilian government would give sympathetic consideration to emergency charters on an occasional basis. Gemini maintains that the Department should not withhold any flights from the limited number available for each month, especially when possible use of such a contingent allocation is very speculative. Gemini also urges the Department to continue efforts to obtain additional charters from Brazil for the balance of this charter year.

FINAL DECISION

We have decided to make final the procedures proposed in Order 2001-2-1 for distribution of the U.S.-Brazil all-cargo charters available for the balance of the charter year (March through June 2001).

No party has opposed the need for special procedures or our decision to pro rate the number of charters available and to distribute them equitably among interested carriers. Rather, the commenters have sought certain modifications and clarification to the proposed procedures.

We are not persuaded that we should set aside two frequencies each month for emergency and *ad hoc* requests. Where charter rights are so limited as here, it is imperative that full, effective use be made of the available charter opportunities. While we would like to accommodate all contingencies as Express One and Emery suggest, there have been very few *ad hoc* requests to use the charter pool this charter year. At the same time, there has been a consistent and regular demand on the part of certain carriers to use charters from the pool to support ongoing charter programs. Given the limited number of pool charters available and the specific circumstances before us, we are not persuaded that withholding flights from carriers with firm plans to use them for possible use by other carriers best serves the public interest in this case. That said, should requests for *ad hoc* charters be filed, we are prepared to seek sympathetic consideration from Brazil for operation of such flights.

With respect to Atlas' request regarding the eligibility of UPS to apply for charters, it is our understanding that UPS is in the process of obtaining scheduled authority from the Brazilian Government, and expects this process to be completed by February 20, 2001. Rather than ruling now on UPS' eligibility, we will consider any request by UPS to use charters from the charter pool based on the circumstances present at that time.

Based on the above, the following procedures will apply for distribution of Brazil all-cargo charters for the period March-June. We will make available a *pro rata* portion of the total charters still undistributed for each remaining month of the charter year.³ We will distribute the available flights each month by dividing the number of available flights equally by the number of eligible applicants to the extent that such allocations are equal to or fewer than requested, and distribute the remaining flights using a round-robin procedure on a first-come, first-served basis. Carriers awarded flights each month will be required to report the number of flights used no later than the tenth of the following month. Any flights returned will be available for the charters that can be applied for in the month of the return.⁴

Because of the limited number of charters available for the remainder of the charter year, a carrier with an advance charter allocation will not be eligible to apply for additional charters under the procedures set forth in this order until it has used all of the charters in its advance allocation. In addition, those U.S. carriers holding scheduled combination or all-cargo service authority to serve Brazil will be excluded.

Eligible carriers can apply for up to ten charters for each calendar month. Charter applications will need to specify the number of flights requested; the points to be served; the type of aircraft to be used; the type of cargo; dates of the proposed flights; and will need to be accompanied by a copy of the signed charter contract for the flights proposed. Applications for charters above that number will need to be accompanied by a request for waiver of the ten-charter limit and served on all carriers that have operated charters in the U.S.-Brazil market this charter year. Charter applications can be filed no earlier than two weeks in advance of the beginning of each calendar month. To facilitate as prompt a distribution of these flights as possible, the cut-off dates for such applications will be as follows:

| | |
|-------------------|--------------------|
| February 15, 2001 | for March charters |
| March 15, 2001 | for April charters |
| April 16, 2001 | for May charters |
| May 15, 2001 | for June charters |

We will issue a Notice of Consistency each month to the eligible carriers receiving flights from the charter pool. As normally provided in those Notices, we will require each

³ Due to an amended report filed for the month of December, there were 103 charters to distribute over a five-month period instead of 105 as stated in our show-cause order. Since we have already used 21 as the *pro rata* portion for February, 82 charters are now available for the remaining four months. A *pro rata* portion for each remaining month would be 20 charters with a balance of 2. We will add one of these charters to those available for March and one to the April distribution, *i.e.*, for March and April we will distribute 21 charters; for May and June we will distribute 20 charters.

⁴ For example, reports for charters distributed in March will be due by April 10. Under our procedures, applications for charters to be operated in April will be due by March 15. Thus, any charters distributed for March operations and returned in April will be added to the number of charters available for distribution for May services.

carrier granted charters to notify the U.S. Air Carrier Licensing Division (X-44), Office of International Aviation, no later than the tenth day of each month of the number of Brazil all-cargo charters operated during the preceding month, together with additional operational information related to these flights established in Order 98-6-14.⁵ We remind carriers of the importance of returning charters promptly at any time should plans on which the flights were distributed not materialize. These reports are especially important in a situation where the charters available are so limited, and the information is critical to carriers in preparing their applications under the application procedures in this order. Therefore, we expect carriers to ensure that these reports are filed on a timely basis.

We believe that the procedures we have established here will ensure the availability of charters throughout the balance of the charter year and will enable the carriers with an historic interest in the market to continue to serve, while giving any other eligible carriers that want to serve a fair opportunity to do so.

ACCORDINGLY, acting under authority assigned in Order 98-6-14,

1. We make final our tentative findings and conclusions in Order 2001-2-1 and establish procedures for distribution of Brazil all-cargo charters as described in this order;
2. We grant the motion of Emery Worldwide Airlines for leave to file an otherwise unauthorized document; and
3. We will serve this order by facsimile on all U.S. certificated carriers operating large aircraft, the Air Transport Association, and the National Air Carrier Association.

Persons entitled to petition the Department for review of this order under the Department's regulations, 14 CFR 385.30, may file their petitions within 10 days of the service date of this order. This order is effective immediately, and the filing of a petition for review will not alter such effectiveness.

By:

PAUL L. GRETCH
Director
Office of International Aviation

(SEAL)

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

⁵ Order 98-6-14 at 5, ordering paragraph 7.