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Order 2001-7-13



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

Issued by the Department of Transportation
on the 24th day of July, 2001

Served: July 24, 2001

Applications of

ATLAS AIR, INC.
and
POLAR AIR CARGO, INC.

for an exemption from 49 U.S.C. § 41101 (U.S.-Brazil
service)

Docket OST-2001-9776 - 7

Docket OST-2001-9829 - 4

ORDER

Summary

By this order, we grant Atlas Air, Inc. (Atlas) and Polar Air Cargo, Inc. (Polar) exemption authority to conduct scheduled all-cargo service between a point or points in the United States, via intermediate points, and points in Brazil and points beyond as permitted by the U.S.-Brazil aviation agreement.

Background

The aviation agreement between the United States and Brazil provides that airlines designated by the United States may operate all-cargo service from a point or points in the United States, via intermediate points, to Manaus, Brasilia, Rio de Janeiro, São Paulo, Recife, Porto Alegre, Belem, Belo Horizonte, and Salvador de Bahia, and beyond Brazil to Argentina, Uruguay, Paraguay, and Chile.

Atlas holds certificate authority to provide scheduled foreign air transportation of property and mail between the terminal point Miami, Florida, on the one hand, via the intermediate point Lima, Peru, and the coterminal points Manaus, Rio de Janeiro, and São Paulo, Brazil, on the other hand, and beyond Brazil to Santiago, Chile. (Order 2001-4-32)

Polar holds certificate authority to provide scheduled foreign air transportation of property and mail between the coterminal points Miami, Florida, and Los Angeles, California; the intermediate points Curaçao, Netherlands Antilles; Santiago, Chile; Barranquilla, Colombia; and Panama City, Panama; and the coterminal points Manaus, Rio de Janeiro, and São Paulo, Brazil. (Order 2001-4-15) Polar also holds exemption authority to serve Rio de Janeiro and São Paulo from Miami via Caracas, Venezuela. (Notice of Action Taken dated February 7, 2001)

Applications and Responsive Pleadings

Both Atlas and Polar have filed applications for exemption authority to expand their current U.S.-Brazil operating authority.

Specifically, Atlas seeks authority to provide foreign scheduled air transportation of property and mail between Miami, on the one hand, and Brasilia, Recife, Porto Alegre, Belem, Belo Horizonte and Salvador de Bahia, Brazil, on the other hand, and authority to combine services authorized by the exemption with its other exemption and certificate authorities. Atlas states that there has been a slowdown in the U.S.-Brazil market, and that in order for Atlas to be successful in the face of uncertain demand, it needs the flexibility to add new points in Brazil to its U.S.-Brazil schedules.

Polar seeks authority to engage in scheduled foreign air transportation of property and mail from a point or points in the United States, via intermediate points, to Manaus, Brasilia, Rio de Janeiro, São Paulo, Recife, Porto Alegre, Belem, Belo Horizonte and Salvador de Bahia, Brazil, and beyond Brazil to Argentina, Uruguay, Paraguay, and Chile. Polar also requests authority to integrate the services under this exemption with services Polar is authorized to provide under other certificates of public convenience and necessity and exemptions, consistent with all applicable international agreements. Polar states that when market conditions warrant, it anticipates inaugurating additional Brazilian services to U.S. points and seeks the additional authority consistent with the route description in the U.S.-Brazil aviation agreement to assure that it will have the flexibility to respond quickly should market conditions support the addition of new services.

Gemini Air Cargo (Gemini), Polar, and United Parcel Service (UPS) filed answers to the Atlas application, and Atlas and UPS filed answers to the Polar application. No replies were filed.

The responding carriers state that they have no objection to the respective applications, but make additional comments.

In its response to Polar's application, Atlas argues that in the interest of fairness, if the Department grants Polar's request for broad authority as set forth in the aviation agreement, it should award Atlas the same authority on its own initiative.

UPS states that while it has no objection to the applications, it would oppose any request by either carrier for a waiver of the dormancy provisions concerning frequency use and, in the case of Atlas, a request for a waiver in the startup date as well. It notes that Polar has not disclosed whether it is currently operating all frequencies in accordance with the dormancy conditions placed on its certificate authority, and argues that to ensure that no frequency in this limited-entry market goes unused, the Department should require Polar to make such disclosure prior to expanding its authority to serve additional cities in Brazil.

Gemini states that Atlas should receive the maximum route authority permissible under the bilateral and that in the event the Department in due course amends Atlas' temporary certificate to include additional Brazilian points, the Department should also amend Gemini's backup certificate in the same manner. Gemini also encourages the Department to continue its efforts to

liberalize the aviation agreement between the United States and Brazil with respect to air cargo services.

Polar has no objection to Atlas' application as long as the Department grants Polar's application at the same time.

Decision

We have decided to grant both Atlas and Polar broad exemption authority to serve Brazil consistent with the route description in the U.S.-Brazil aviation agreement and authority to integrate these services with their other certificate and exemption authorities.

Both carriers now offer scheduled all-cargo services in the Brazil market, and both now seek additional authority in order to better meet the demand for service as market conditions warrant. The authority granted is consistent with the U.S.-Brazil aviation agreement, and the award of broad authority as set forth in the agreement will afford both carriers maximum flexibility to respond to changing market conditions and consumer demand. We, therefore, find that award of broad authority to both carriers is consistent with the public interest.

The authority is effective immediately and will remain in effect for a period of two years, subject to our standard conditions on exemption awards and route integration requests. Furthermore, as the services of both carriers are subject to frequency limitations, any services operated by the carriers using the exemption authority awarded here must be operated within the frequencies allocated to each carrier.¹

We see no need to impose a special reporting requirement on Polar as UPS requests. Under the terms of Polar's frequency allocation, any frequency not used for a period of 90 days automatically reverts to the Department (as would any frequency under Atlas' frequency allocation). Should Polar or Atlas seek to retain an unused frequency beyond the 90-day period, the carrier in question would first need to secure a dormancy waiver from the Department. To the extent that Polar or Atlas may seek a dormancy waiver (or Atlas a waiver from the startup provisions) with respect to any of the allocated frequencies, UPS would be served with such an application and would be free at that time to file comments to such a request.²

On the basis of data officially noticeable under Rule 24(g) of the Department's regulations, we find that the applicants are qualified to provide the services authorized. We also find that grant of this authority is consistent with Department policy and is consistent with the public interest

¹ As we are not here amending Atlas' certificate authority, we need not address Gemini's comments concerning certificate authority. Should Atlas seek to amend its certificate authority, Gemini would be free to comment on such an application at that time. To the extent that Gemini urges liberalization of the agreement for all-cargo services, we have noted Gemini's concerns and will continue our efforts to expand rights for U.S. carriers.

² Order 2001-4-32 allocated Atlas ten weekly frequencies for its Brazil service in accordance with the certificate issued by that order. Under the provisions of the order, inauguration of the awarded frequencies must occur no later than the 90th day after the required startup date of its certificate, and the carrier is required to notify the Department as to the inauguration of each frequency. The required startup date for services was June 26, 2001, and Atlas began using three of its ten frequencies prior to that date. The balance of its frequencies must be implemented no later than September 24, 2001.

and that grant of the authority would not constitute a "major regulatory action" under the Energy Policy and Conservation Act of 1975.

ACCORDINGLY,

1. We grant Atlas Air, Inc., an exemption to conduct foreign scheduled air transportation of property and mail between a point or points in the United States, via intermediate points, to Manaus, Brasilia, Rio de Janeiro, São Paulo, Recife, Porto Alegre, Belem, Belo Horizonte, and Salvador de Bahia, and beyond Brazil to Argentina, Uruguay, Paraguay, and Chile;
2. We grant Polar Air Cargo, Inc., an exemption to conduct foreign scheduled air transportation of property and mail between a point or points in the United States, via intermediate points, to Manaus, Brasilia, Rio de Janeiro, São Paulo, Recife, Porto Alegre, Belem, Belo Horizonte, and Salvador de Bahia, and beyond Brazil to Argentina, Uruguay, Paraguay, and Chile;
3. We grant Atlas Air, Inc. authority to integrate the authority in ordering paragraph 1 above with its authorized services under other certificates of public convenience and necessity and exemptions, subject to the condition that any service provided under this exemption shall be consistent with all applicable agreements between the United States and the foreign countries involved. Furthermore, (a) nothing in the award of the route integration authority requested should be construed as conferring upon Atlas rights (including fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless Atlas notifies the Department of its intent to serve such market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use the limited-entry route rights that are included in Atlas' authority by virtue of the route integration exemption granted here, but that are not then being used by Atlas, the holding of such authority by route integration will not be considered as providing any preference for Atlas in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue;
4. We grant Polar Air Cargo, Inc. authority to integrate the authority in ordering paragraph 2 above with its authorized services under other certificates of public convenience and necessity and exemptions, subject to the condition that any service provided under this exemption shall be consistent with all applicable agreements between the United States and the foreign countries involved. Furthermore, (a) nothing in the award of route integration authority requested should be construed as conferring upon Polar rights (including fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless Polar notifies the Department of its intent to serve such market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use the limited-entry route rights that are included in Polar's authority by virtue of the route integration exemption granted here, but that are not then being used by Polar, the holding of such authority by route integration will not be considered as

providing any preference for Polar in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue;

5. The exemption authority granted in ordering paragraphs 1 and 2 above is effective immediately and will remain in effect for a period of two years from the date of service of this order;
6. To the extent not granted, we deny all other requests in these dockets;
7. We may amend, modify, or revoke this order at any time without hearing; and
8. We shall serve this order on Atlas Air, Inc., Polar Air Cargo, Inc., Gemini Air Cargo, Inc.; United Parcel Service Co.; the Ambassador of Brazil in Washington DC; the Federal Aviation Administration; and the U.S. Department of State (Office of Negotiations).

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 ten (10) days after the date of service of this order. The filing of a petition for review of a particular action shall affect this order only as it concerns that action.

These actions are effective immediately and the filing of a petition for review will not alter their 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.dot.gov/reports/reports_aviation.asp*

Attachment

U.S. CARRIER
Standard Exemption Conditions

In the conduct of operations authorized by the attached order, the applicant(s) shall:

- (1) Hold at all times effective operating authority from the government of each country served;
- (2) Comply with applicable requirements concerning oversales contained in 14 CFR 250 (for scheduled operations, if authorized);
- (3) Comply with the requirements for reporting data contained in 14 CFR 241;
- (4) Comply with requirements for minimum insurance coverage, and for certifying that coverage to the Department, contained in 14 CFR 205;
- (5) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (6) Comply with the applicable requirements of the Federal Aviation Administration Regulations, including all FAA requirements concerning security; and
- (7) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department of Transportation, with all applicable orders and regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

The authority granted shall be effective only during the period when the holder is in compliance with the conditions imposed above.