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Order 2002-5-7

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

SERVED: May 9, 2002

Issued by the Department of Transportation
On the 7th day of March, 2002

Application of

CARGOLUX AIRLINES INTERNATIONAL, S.A.

for renewal and amendment of foreign air carrier
permit under 49 U.S.C. § 41301

Docket OST-98-4605-4

ORDER ISSUING AMENDED FOREIGN AIR CARRIER PERMIT

Summary

In this order we are issuing Cargolux Airlines International, S.A. (Cargolux) an amended foreign air carrier permit to engage in scheduled and charter foreign air transportation of property and mail (and passengers on the upper deck of its freighter aircraft) between the United States and Luxembourg consistent with the U.S.-Luxembourg open-skies aviation agreement.

Application

By application filed October 20, 1998, as amended and supplemented, Cargolux requests that we renew its existing foreign air carrier permit, issued by Order 97-3-10, and amend that permit to enable Cargolux to conduct all-cargo services consistent with the provisions of the open-skies aviation agreement between the United States and Luxembourg (the Agreement).¹

¹ Cargolux's current foreign air carrier permit, issued by Order 97-3-10, authorizes Cargolux to engage in scheduled foreign air transportation of property and mail (and passengers on the upper deck of its freighter aircraft) from a point or points behind Luxembourg, via Luxembourg, and intermediate points, to a point or points in the United States, and beyond; and authority to perform all-cargo charters (with upper deck passengers) subject to 14 CFR Part 212. Cargolux also holds exemption authority to conduct (1) seventh freedom scheduled all-cargo services (consistent with the agreement); and (2) all-cargo charter services between the United States and any point or points. Cargolux also holds a waiver from the requirement of Part 212 that it obtain prior Department approval before operating Fifth Freedom cargo charter flights encompassed under the Agreement. See Notice of Action Taken, dated January 13, 2000, in Dockets OST-98-4606 and OST-98-4944. On January 9, 2002, Cargolux filed a timely renewal application in the referenced dockets and invoked the automatic extension provisions of 5 USC 558(c) to continue its exemption authority in effect pending final Department action on its renewal request.

In support of its application, Cargolux states that it has been licensed and designated by the Government of Luxembourg to perform the proposed services; that it is substantially owned and effectively controlled by citizens of Luxembourg; and that it is operationally and financially fit to perform the proposed services.

No answers were filed in response to Cargolux's permit amendment application.

Decision

We have reviewed the record in this case and have decided to grant the application using simplified Subpart B procedures.² The public was informed of the application by notice in the Federal Register and the Department's published weekly list of applications filed.³ The notice described the authority sought and gave interested persons an opportunity to submit evidence and objections to the award of the authority. Simplified procedures are appropriate in this case because there are no material determinative issues of fact requiring other procedures.

We find that grant of this foreign air carrier permit is in the public interest, and that Cargolux is qualified to conduct the proposed operations.

Public Interest Considerations

The June 6, 1995, open-skies agreement between the United States and Luxembourg provides broad rights for the designated carriers of each side. Subsequently, in 1998, the two sides further amended the Agreement to provide, among other things, seventh freedom rights for scheduled and charter all-cargo services. The open-skies agreement provides broad rights for the designated carriers of each side, and Cargolux seeks authority consistent with these rights.

Operational and Financial Fitness

We find that Cargolux is operationally and financially fit to conduct the operations at issue here. Cargolux was issued an initial foreign air carrier permit by the former Civil Aeronautics Board in 1979 to conduct nonscheduled all-cargo services between Luxembourg and the United States; and all-cargo charters subject to 14 CFR Part 212 (Order 79-6-74). Cargolux has held authority to serve the United States on a continuous basis since that time. In 1993, we granted Cargolux initial exemption authority to transport upper deck passengers on its freighter aircraft as part of its authorized cargo services (Order 95-1-3). Cargolux states that it currently operates a fleet of eleven B-747-400 freighter aircraft and has over 1200 employees worldwide. Cargolux's current foreign air carrier permit was issued by Order 97-3-10. Cargolux has experienced management,

² 14 CFR 302.210 (a)(2) and 302.213.

³ 63 FR 58807-58808.

and has had no safety violations, fatal accidents or tariff violations in the last five years.⁴ Cargolux holds effective authority from its homeland to conduct the proposed operations.⁵ As noted above, Cargolux holds exemption authority to conduct all-cargo services identical to those at issue here. By memorandum dated February 20, 2001, the Federal Aviation Administration advised us that it knows of no reason why Cargolux's request for an amended foreign air carrier permit should not be approved. Finally, we have verified Cargolux's compliance with 14 CFR Parts 203 (Warsaw liability waiver), 205 (aircraft accident liability insurance requirements) and 129 (FAA Operations Specifications).

Cargolux has provided financial information which indicates that it can conduct the proposed services without jeopardizing shipper funds. Specifically, for the year ending December 31, 1999, Cargolux reported total assets of approximately \$1.4 billion, total liabilities of \$1.2 billion, and owners' equity of approximately \$239 million. For the year ending December 31, 1999, Cargolux reported an operating profit of approximately \$10 million. For the year ending December 31, 2000, Cargolux reported total assets of approximately \$1.4 billion, total liabilities of \$1.1 billion, and owners' equity \$272 million. For the year ending December 31, 2000, Cargolux reported an operating profit of approximately \$36 million.

Ownership and Control

Cargolux states that as of June 29, 2001, it was owned 66.3% by citizens of Luxembourg.⁶ Sair Lines, a citizen of Switzerland, owns the remaining 33.7% of Cargolux's stock. Cargolux has twelve members on its Board of Directors of which seven are citizens of Luxembourg. The remaining five directors are from Switzerland (2), Germany (2) and Belgium (1). The record in this case does not permit us to make definitive findings that Cargolux is substantially owned and effectively controlled by homeland citizens. We find, however, that it is consistent with the public interest to use our discretion and to waive our ownership and control standard in this instance. There is no evidence that the ownership and control of Cargolux would make grant of this authority inimical to U.S. aviation policy or interests.

In view of the foregoing, and all the facts of record, we find and conclude that:

1. It is in the public interest to reissue Cargolux an amended foreign air carrier permit in the form attached;

⁴ Cargolux states that in April 2000 it paid a compromise civil penalty of \$25,000 to the FAA for allegedly transporting improperly labeled hazardous materials. Cargolux further states that the settlement order specifically did not constitute an admission of any wrong-doing by Cargolux and that the matter has been completely resolved to the satisfaction of Cargolux and the FAA.

⁵ By diplomatic note dated November 5, 1998 (reference: hk-12260), the Government of Luxembourg designated Cargolux to conduct the services at issue here.

⁶ The majority Luxembourg stockholder of Cargolux is Luxair with 34.9 % of Cargolux's stock. Four Luxembourg financial institutions and three individuals own the remaining approximately 31.4% of Cargolux's stock that is held by Luxembourg citizens.

2. Cargolux is fit, willing and able properly to perform the foreign air transportation described in the attached permit and to conform to the provisions of the Act, and to our rules, regulations, and requirements;
3. The public interest requires that the exercise of the privileges granted by the permit should be subject to the terms, conditions, and limitations contained in the attached permit, and to such other reasonable terms, conditions, and limitations required by the public interest as we may prescribe;
4. The issuance of this foreign air carrier permit will not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975, as defined in § 313.4(a)(1) of our Regulations;⁷ and
5. The public interest does not require an oral evidentiary hearing on the application.

ACCORDINGLY,

1. We issue, in the form attached, an amended foreign air carrier permit to Cargolux authorizing it to engage in (1) scheduled foreign air transportation of property and mail (and passengers on the upper deck of its freighter aircraft) from points behind Luxembourg via Luxembourg and intermediate points to a point or points in the United States, and beyond; and (2) scheduled all-cargo foreign air transportation between the United States and any point or points;
2. Cargolux is also authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations of the Department's regulations governing charters;
3. We grant Cargolux a waiver under 14 CFR § 212.12 from the requirement of 14 CFR § 212.9(b)(1) that the carrier obtain prior Department approval before operating Fifth Freedom cargo charter flights encompassed under the Agreement;
4. The exercise of the privileges granted above are subject to Cargolux's compliance with the conditions listed in Attachment A;
5. To the extent not granted, we deny all requests for relief in Docket OST-98-4605;
6. Unless disapproved by the President of the United States under § 41307 of Title 49 of the U.S. Code, this order and the attached permit shall become effective on the 61st day after its submission for § 41307 review, or upon the date of receipt of advice from the President or his

⁷ This finding is based on the fact that the grant of this permit will not result in a near-term increase in fuel consumption in excess of 10 million gallons.

designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove the Department's order under that section, whichever occurs earlier;⁸ and

7. We will serve a copy of this order on Cargolux International Airlines, S.A.; the Ambassador of Luxembourg in the United States; the Department of State; and the Federal Aviation Administration (New York-IFO).

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/reports/reports_aviation.asp*

⁸ This order was submitted for § 41307 review on March 7, 2002. On May 8, 2002, we received notification that the President's designee under Executive Order 12597 and implementing regulations did not intend to disapprove the Department's order.

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

PERMIT TO FOREIGN AIR CARRIER
(as renewed and amended)

Cargolux International Airlines, S.A.

A Flag Carrier of Luxembourg

is authorized, subject to the following provisions, the provisions of Title 49 of the U.S. Code and the orders, rules, and regulations of the Department of Transportation, to engage in scheduled foreign air transportation as follows:

- A. Of property and mail (and persons on the upper deck of its freighter aircraft);
 from points behind Luxembourg via Luxembourg and intermediate points to
 a point or points in the United States and beyond.
- B. Of property and mail;
 between the United States and any point or points.

The holder shall also be authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations of the Department's regulations governing charters.

In the conduct of charter operations authorized above, the holder may, without prior Department approval, carry charter traffic between the United States and a third country point, provided that, except with respect to cargo charters, such charter traffic is carried on a flight that serves Luxembourg for purposes of carrying traffic between the United States and Luxembourg.

This permit and the exercise of the privileges granted in it shall be subject to the terms, conditions and limitations in both the order issuing this permit and the attachment to this order, and to all applicable provisions of any treaty, convention or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the holder's homeland are or shall become parties.

This permit shall be effective on May 8, 2002. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention or agreement, this permit shall terminate (1) upon the dissolution or liquidation of the holder to whom it was issued; (2) upon

the effective date of any treaty, convention, or agreement or amendment, which shall have the effect of eliminating the bilateral right for the service authorized by this permit from the service which may be operated by airlines designated by the Government of Luxembourg (or, if the right is partially eliminated, then the authority of this permit shall terminate in like part); (3) upon the effective date of any permit granted by the Department to any other carrier designated by the Government of Luxembourg in lieu of the holder; or (4) upon the termination or expiration of the applicable air services agreement between the United States and Luxembourg. However, clause (4) of this paragraph shall not apply if prior to such termination or expiration, the foreign air transportation authorized herein becomes the subject of another treaty, convention or agreement to which the United States and Luxembourg become parties.

The Department of Transportation has executed this permit and affixed its seal on March 7, 2002.

By:

READ C. VAN DEWATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

FOREIGN AIR CARRIER CONDITIONS OF AUTHORITY

In the conduct of the operations authorized, the holder shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
 - (2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36;
 - (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
 - (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
 - (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
 - (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
 - (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are:
 - (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or
 - (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States.
- In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;
- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
 - (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
 - (10) If charter operations are authorized, comply (except as otherwise provided in the applicable bilateral agreement) with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
 - (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.
- This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code (formerly the Federal Aviation Act of 1958, as amended).

