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Order 2000-10-19



**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 October, 2000

Served: October 23, 2000

In the Matter of

U.S.-Ecuador All-Cargo Frequency Allocation

Docket OST-2000-7513 - 28

FINAL ORDER

Summary

By this order, we make final our tentative findings and conclusions set forth in Order 2000-9-23, and grant Gemini Air Cargo, Inc., an exemption to conduct scheduled all-cargo services in the U.S.-Ecuador market and 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. The three remaining frequencies are unallocated and are the subject of this proceeding.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, Manta 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 (L-1011, 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).

By Order 2000-9-23, the Department 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. Objections to the Department's order were to be filed by October 5, 2000, and replies thereto by October 12, 2000.

Responses to Order 2000-9-23

Evergreen filed an objection to the Department's tentative decision, urging the Department to vacate its decision and to award the exemption and related frequencies to Evergreen instead of Gemini. Evergreen questions whether Gemini will serve Ecuador in its own right or rather on behalf of some foreign carrier with which Gemini might have an ACMI agreement. Evergreen says that before the Department awards Gemini authority, it should require assurances from Gemini that it will in fact provide the service as a U.S.-flag carrier in its own name. Evergreen also asserts its belief, notwithstanding the tentative decision's conclusion that Evergreen's proposal was extra-bilateral, that Ecuadorian aviation authorities nevertheless would accept Evergreen's service proposal. Finally, Evergreen argues that its proposal was superior to Gemini's in that Evergreen proposed to serve the New York market in addition to Miami and would also provide service as needed to Latacunga in Ecuador.

Gemini answered Evergreen's objection, pointing out that less than half of its aircraft are used for ACMI operations, that the remainder are used for Gemini's own operations, and assuring the Department that Gemini will seek and accept cargo on its U.S.-Ecuador flights from any qualified shippers. It argues that Evergreen offers no basis for the unsupported assertion that Ecuador would accept Evergreen's novel reading of the U.S.-Ecuador agreement and that Evergreen's arguments regarding the superiority of its proposal are based on a false premise, given the limitations on the frequencies Evergreen could operate under the bilateral with its B-747 aircraft.

Decision

We make final our tentative findings and conclusions in Order 2000-9-23, and grant Gemini Air Cargo an exemption to perform scheduled all-cargo services between the United States and Ecuador and allocate Gemini three weekly frequencies for its scheduled all-cargo services.

We stated in our tentative decision that Gemini's proposed service would best maximize the available rights under the agreement while benefiting shippers and promoting competition. We stated that of the new entrants, only Gemini would provide weekly service and would offer shippers a substantial degree of capacity on a weekly basis, dedicated to the U.S.-Ecuador market. We also noted that by selecting Gemini we would introduce a new competitor in the marketplace. No one has presented evidence that would alter our tentative findings.

While Evergreen has questioned the relative merits of Gemini's proposal as well as Gemini's method of operation, Evergreen has not overcome the flaw in its own proposal, namely, that its proposal, unlike Gemini's, is outside the prescribed terms of our bilateral agreement with Ecuador. As we said in Order 2000-9-23, at 5, we have no need to test the Ecuadorian willingness to permit Evergreen to operate as proposed in circumstances where another applicant, Gemini, has presented a proposal within the bilateral that promises a result that would serve the public interest. Against this background, and taking into consideration the statements and assurances provided by Gemini in its October 12 submission, we have decided to make final our tentative decision and to award Gemini the three available frequencies for all-cargo service to Ecuador.

ACCORDINGLY,

1. We (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 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, and subject to a 90-day startup condition as well as a 90-day dormancy condition;³
2. The exemption authority granted in ordering paragraph 1 above shall be effective for a period of two years from the service date this order and the frequency allocation in ordering paragraph one shall 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 deny the applications of Arrow Air, Atlas Air, Inc., and Evergreen International Airlines, Inc. in Docket OST-2000-7513; and
4. 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*

³ The carrier will be required to begin services within 90 days from the service date of this order. The dormancy period will begin upon Gemini's inauguration of service. The carrier should inform the Department in writing in this docket of the date it will inaugurate its services in the U.S.-Ecuador market.