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Order 2002-10-13



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

Issued by the Department of Transportation  
on the **9th day of October, 2002**

**Served: October 9, 2002**

Application of

**ANTONOV DESIGN BUREAU**

for an exemption under 49 U.S.C. section 40109(g)

Docket **OST-2002-13523**

**ORDER GRANTING EXEMPTION**

**Summary**

This order grants Antonov Design Bureau (Antonov) exemption authority to operate cargo charter flights carrying emergency cabotage traffic.<sup>1</sup>

**Application**

By application filed October 3, 2002, Antonov Design Bureau requested exemption authority pursuant to 49 U.S.C. section 40109(g) to permit it to operate a maximum of 20 one-way cargo charter flights from Seattle, WA, to Columbus, OH, during the period October 4-20, 2002, using its AN-124 aircraft, for Active Aero Charter, Inc., a forwarding agent acting on behalf of Honda Motors Ltd. and Honda of America (Honda), to transport shipping containers holding motor vehicle parts and components. Antonov states that it has been requested to position an aircraft in Seattle as soon as possible to operate up to 20 flights, each transporting six containers, with each container measuring approximately 40x8x8 feet and weighing approximately 20 metric tons.

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<sup>1</sup> Antonov is a Ukrainian foreign air carrier which holds exemption authority to operate all-cargo charter service between the Ukraine and the United States, and other charters pursuant to 14 CFR Part 212 of the Department's regulations (*see, e.g.*, Notice of Action Taken dated August 26, 2002, in Docket OST-96-1454).

In support of its application, Antonov states that the lockout at U.S. West Coast seaports has seriously interrupted the delivery of critical parts and components to Honda's assembly facilities in Ohio, Alabama, South Carolina and North Carolina, and that Honda urgently needs Antonov's services to deliver the cargo at issue immediately once the lockout is resolved.<sup>2</sup> It states that because Honda's plants operate on a "just-in-time" supply system, failure to deliver production parts and components could result in imminent suspension of plant operations. It states that the containers involved are normally transported to Ohio by rail, but, even assuming sufficient rail capacity is available once the lockout ends, rail transportation would not be timely enough to meet Honda's immediate and urgent production needs. It also states that if Antonov is not permitted to transport the containers, each container would need to be unloaded and the contents reorganized and repackaged in Seattle, resulting in additional time which would negatively impact Honda's manufacturing schedules, expose the cargo to the risk of unnecessary damage, and increase the possibility of delivery errors.

Antonov further states that the charterer has advised that, because of size and weight of the containers, they cannot fit in any other aircraft operated by U.S. carriers, other than a nose-loading B-747 aircraft, and that no U.S. carriers are available to accommodate the cargo in accordance with the shipper's requirements. Antonov also attached a letter from Honda confirming its characterization of the situation and supporting its request.

### **Answers**

Answers to Antonov's application were filed by Atlas Air, Inc., Northwest Airlines, Inc., Arrow Air, Inc., the Airline Pilots Association (ALPA), the National Air Carrier Association (NACA), and Gemini Air Cargo, Inc.

Atlas filed an answer in opposition, stating that the application meets none of the requirements of 49 U.S.C. § 40109(g), particularly because the traffic in question can be accommodated by at least one U.S. carrier. Atlas states that it has a large fleet of B-747 aircraft, including nose loaders, with ample lift available to accommodate the shipments. It further states that, while the sea/rail containers in which the parts and components are now packed apparently cannot be accommodated on Atlas aircraft, there is no demonstrable reason why the contents cannot be removed from the containers and palletized for loading.

Northwest agrees with Atlas regarding Antonov's failure to support its application or to establish grounds for grant of this extraordinary relief, and objects to the vague nature of Antonov's application. Northwest states that it has a fleet of nose-loading B-747 freighters that are capable of accommodating 40x8x8 foot containers, and that neither the shipper nor the charterer had contacted Northwest as of the date of its pleading.

Arrow asserts that after the lockout is over there is no justification to authorize a foreign air carrier to operate cabotage cargo flights within the United States, that the containerized cargo

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<sup>2</sup> To meet the shipper's requirements, Antonov proposed to position on AN-124 aircraft in Seattle, which would be on stand-by reserve so that Antonov could immediately commence flights delivering the cargo as soon as the lockout is resolved.

can move via rail or truck as originally intended by the shipper or repackaged at Seattle for transshipment by air using authorized U.S. carriers.

ALPA submitted an answer in opposition, stating that the proposed operation does not meet the basic requirement for emergency cabotage exemptions as set forth in 49 U.S.C. § 40109(g), and that at least two U.S. air carriers have stated that they can accommodate the traffic.

NACA filed an objection, stating that the proposed operations do not qualify as an emergency and should be denied, and questioning the safety of the AN-124 aircraft.

Gemini states that it concurs in the points made by Atlas and Northwest, and that Gemini's DC-10-30F and MD-11F aircraft are capable of transporting the automobile parts in question.

## **Reply**

Antonov submitted replies to answers to its application. It states that the requested authority is in the public interest and urgently needed to prevent disruption of Honda's U.S. production lines which are threatened because of the highly unusual and severely crippling lockout that has shut down all U.S. West Coast seaports. Antonov points out that the unpredictable nature of the situation makes it impossible for Antonov or its customer to know precisely when the containers will be off-loaded from the ships and available for air transport. It also points out Atlas' admission that its aircraft cannot accommodate the containers, and asserts that unpacking and repacking these critical shipments would add time and expense and risk of loss and damage, as Honda explained in its supporting letter. It states that, as soon as the strike is over, the AN-124 can accept the fully loaded containers in their original condition and immediately offload and tender them at Columbus for seamless containerized surface transport to their original intended destinations, allowing Honda to make up lost time and damage done by the lockout.

It states that all of the Department's key statutory requirements for granting this emergency exemption under 49 U.S.C. § 40109(g) are met: (1) Antonov's special services are needed to respond to an "emergency created by unusual circumstances not arising in the normal course of business," (2) "all possible efforts have been made to accommodate the traffic by using the resources of [certificated] carriers," but no U.S. carrier can accommodate the container shipments in accordance with Honda's requirements, and (3) the exemption is necessary to avoid unreasonable hardship to Honda in preventing parts shortages at its U.S. manufacturing facilities, because Honda's containerized distribution system "cannot be accommodated by the air carriers."

Antonov further states that its application was duly served on Northwest which initially responded with a non-objection. It points out that, while Northwest asserts that it has aircraft capable of accommodating the containers, Northwest also states that it is "impossible to state that without qualification its aircraft will be available..." Antonov attached an email quote received from Northwest confirming that "NWA Cargo does not have availability at this time" for the series of proposed charter flights. It states that as a result of the lockout, the market demand for heavy cargo lift is high and U.S. carriers are almost fully booked.

It finally states that the West Coast port lockout is a national emergency of enormous proportions, one in which President Bush has deemed it necessary to intervene, and that the Department has a public interest responsibility to avoid unreasonable harm to the shipper and act in a manner consistent with the President's desire to minimize injury to the U.S. economy.

### **Additional Pleadings**

Northwest filed a surreply stating that it was in the final stages of negotiations with Active Aero, the freight forwarder, with respect to the shipments at issue, but then supplemented its submission to say that the negotiations had concluded without agreement.

Atlas, wanting to facilitate a prompt return to normalcy now that the court has intervened in the West Coast ports shutdown, withdrew its previously filed answer and attendant objection to Antonov's application.

### **Statutory Standards**

Under 49 U.S.C. section 40109(g), we may authorize a foreign air carrier to carry commercial traffic between U.S. points (*i.e.*, cabotage traffic) under limited circumstances. Specifically, we must find that the authority is required in the public interest; that because of an emergency created by unusual circumstances not arising in the normal course of business the traffic cannot be accommodated by U.S. carriers holding certificates under 49 U.S.C. section 41102; that all possible efforts have been made to place the traffic on U.S. carriers; and that the transportation is necessary to avoid unreasonable hardship to the traffic involved (an additional required finding, concerning emergency transportation during labor disputes, was not relevant here).<sup>3</sup>

### **Decision**

We have decided to grant Antonov's request to conduct its proposed emergency cabotage flights. We find that our action is consistent with the relevant criteria of 49 U.S.C. section 40109(g) for the grant of exemptions of this type, and that the grant of this authority is required in the public interest.

The lockout which shut down all West Coast ports has been an extraordinary event, resulting in action by the President to have the lockout enjoined under the provisions of the Labor Management Relations Act of 1947 ("Taft-Hartley" Act). This event has given rise to unanticipated and unusual circumstances, specifically a serious backlog of freight destined for West Coast ports, including containerized freight intended for delivery to Honda manufacturing facilities. Honda's critical need to move containerized cargo to its U.S. manufacturing facilities in order to maintain production, the critical need to move the containers as loaded, the fact that no U.S. carriers had aircraft available to accommodate the cargo in the manner and at the times required by Honda, and the negative impact of further delivery delays, constitute an emergency not arising in the normal course of business.

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<sup>3</sup> For examples of earlier grants of authority of this type, *see, e.g.*, Order 2001-5-23.

While the U.S. carriers have stated that they have aircraft that may be capable of transporting the cargo and have been in negotiations with the shipper to do so, there is nothing in the record to indicate that any U.S. carrier is in a position at this time to operate the subject flights in the manner required by Honda (i.e., transporting the cargo in the original shipping containers). In view of the very serious nature of the freight backlog at the West Coast ports, and the very real risk that Honda might have to shut down U.S. assembly plants if it cannot immediately be assured that air transportation services meeting its needs can deliver the parts in question without delay, we find that none of the U.S. carrier respondents has shown that it is, in fact, able to accommodate the traffic within the meaning of 49 U.S.C. 40109(g).

**ACCORDINGLY,**

1. We grant Antonov Design Bureau exemption authority pursuant to 49 U.S.C. section 40109(g) to perform its proposed emergency cabotage flights;
2. In the conduct of the authorized operations, we require Antonov to comply with the conditions of Attachment A and FAA-approved flight routings; and
3. We will serve this order on Antonov Design Bureau, the Department of State (Office of Aviation), and the Federal Aviation Administration (AFS-200).

By:

**Read C. Van de Water**  
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, and with all applicable U.S. Government requirements concerning security;
- (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, except as otherwise provided in the applicable aviation agreement, comply 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).

