



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

Issued by the Department of Transportation on November 20, 2003

NOTICE OF ACTION TAKEN –
DOCKETS OST-2003-16272 and OST-2002-12683

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Application of Arrow Air, Inc. filed 10/3/2003 in Docket OST-2003-16272 for:

XX Exemption for two years under 49 U.S.C. §40109 to provide the following service:

Scheduled foreign air transportation of property and mail between a point or points in the United States and a point or points in Brazil, nonstop or via intermediate points, to Manaus, Brasilia, Rio de Janeiro, Sao Paulo, Recife, Porto Alegre, Belem, Belo Horizonte, Salvador de Bahia, Curitiba and Fortaleza, Brazil, and beyond Brazil to Argentina, Uruguay, Paraguay, and Chile. Arrow also requests the authority to integrate its exemption here with all of its existing certificate and exemption authority, consistent with the applicable bilateral agreements.

Applications of Arrow Air, Inc. filed 10/3/2003 in Docket OST-2003-12683 for:

XX Authorization to be designated as a U.S. scheduled all-cargo air carrier in the U.S.-Brazil market;

XX Allocation of four U.S.-Brazil all-cargo frequencies to operate its proposed services; and

XX Request for Clarification and Supplement to Order 2003-5-27:¹

By Order 2003-5-27, pursuant to the 2002 U.S.-Brazil All-Cargo Service Proceeding (Docket OST-2002-12683), the Department made final its decision to award Evergreen International Airlines primary authority and an allocation of four U.S.-Brazil frequencies to inaugurate scheduled all-cargo service in the U.S.-Brazil market, subject to a 90-day start-up condition. Order 2003-5-27 also awarded backup authority to Gemini Air Cargo in the event that Evergreen failed to inaugurate its proposed services.

On September 24, 2003, Evergreen filed a notice in Docket OST-2002-12683 that it did not intend to inaugurate its proposed services. Evergreen's U.S.-Brazil authority subsequently expired. The expiration of Evergreen's authority automatically activated the backup authority of Gemini Air Cargo under the terms of Order 2003-5-27.

In its Request for Clarification and Supplement, Arrow asks that the Department take steps to determine whether Gemini intends to implement its backup authority in a timely manner. Furthermore, Arrow urges the Department to grant Arrow's exemption application in the event that the Department determines that Gemini does not intend to start its proposed services. Finally, Arrow requests that its own U.S.-Brazil proposal be awarded backup authority (i.e., an authorization to be designated and an allocation of frequencies) in the event that Gemini does intend to implement its proposed services.

Gemini Air Cargo and Amerijet International filed answers. Arrow filed a reply and Gemini filed a Surreply.²

Arrow argues that Evergreen's failure to implement its proposed services fundamentally challenges the rationale on which Order 2003-5-27 was based. Furthermore, Arrow contends that the rationale for Gemini's backup proposal

¹Arrow's request for clarification was accompanied by a motion for leave to file an otherwise unauthorized document. We grant the motion.

²Amerijet's answer and Gemini's Surreply were accompanied by motions for leave to file otherwise unauthorized documents. We grant the motions.

has been similarly undermined as the entire existence of a viable U.S.-Brazil market has been put at issue by Evergreen's surrender of authority. According to Arrow, the Department is not merely faced with a situation calling for the substitution of the backup carrier in this case. Rather, Arrow alleges that Evergreen's surrender of authority raises a question of whether the proposals and forecasts on which the Department based its selection decision can be relied upon, and if not, what alternatives are available to the Department to ensure that the authority at issue is used in a manner that best serves the public interest.

Gemini states that it takes no position with respect to Arrow's request for backup authority. However, Gemini opposes Arrow's requests to the extent that Arrow seeks to replace Gemini as the carrier selected to inaugurate U.S.-Brazil services now that Evergreen has surrendered it award. Gemini maintains that it is currently taking the steps that are necessary, including obtaining authority from the Government of Brazil, to meet the 90-day start-up deadline established by Order 2003-5-27. Gemini states that it will promptly notify the Department in the event that Gemini determines that it will not exercise its backup award.

Gemini argues that Arrow's filings amount to a petition for reconsideration. In this connection, Gemini states that Order 2003-5-27 did not provide for petitions for reconsideration, which Gemini maintains is a well-founded policy to ensure the finality of the Department's decisions. According to Gemini, Arrow has provided no justifiable reason for the Department to reconsider Order 2003-5-27 to require Gemini to make the type of declaration that Arrow seeks. Finally, Gemini points out that Order 2003-5-27 already requires the selected carrier to start services within 90 days and file a written notice 30 days prior to the actual start date.

Amerijet argues that it would be unfair, inappropriate, and in violation of the spirit of the *Ashbacker* doctrine for the Department to do anything other than dismiss Arrow's application without prejudice to refile at the appropriate time.³ Amerijet maintains that this is not the place to engage in a comparative evaluation of competing service proposals. However, Amerijet states that it shares Arrow's skepticism about Gemini's willingness and ability to use its Brazil service award. In this connection, Amerijet argues that if Gemini unreasonably delays acting, one way or the other, the Department should intervene and require a decision from Gemini. Nonetheless, Amerijet states that it is not convinced that such a decision should be required at this time. According to Amerijet, Arrow has not introduced any evidence or argument to show that such an action is necessary. Amerijet notes that Gemini's backup authority has been activated, and that Gemini has affirmed that it is taking the necessary steps to commence its services in a timely manner.

Applicant rep: **Lawrence D. Wasko (202) 862-4370** DOT Analyst: **Michael D. Bodman (202) 366-9667**

DISPOSITION

XX **Dismissed, without prejudice** (see remarks below).

The above action was effective when taken: **November 20, 2003.**

**Action taken by: Paul L. Gretch, Director
Office of International Aviation**

Remarks: We have dismissed, without prejudice, Arrow's request for exemption authority, frequency allocation, and authorization to be designated in the U.S.-Brazil all-cargo market. We have also dismissed the relief sought by Arrow in its Request for Clarification and Supplement to Order 2003-5-27. Specifically, we will not modify the terms of Order 2003-5-27 to require Gemini to immediately declare its intentions with respect to its U.S.-Brazil backup authority, and we will not grant U.S.-Brazil backup authority to Arrow at this time.

By Order 2003-5-27, the Department made final its decision to award Gemini Air Cargo backup authority in the event that the primary carrier (Evergreen) defaults on its proposed U.S.-Brazil services. Evergreen failed to implement its proposed services, and Gemini's backup authority has been activated.⁴

³Ashbacker Radio Corp. vs. FCC, U.S. 327 (1945).

⁴Gemini's backup authority was activated automatically under the terms of Order 2003-5-27 when Evergreen allowed its certificate authority to expire by not starting its proposed services.

Final Order 2003-5-27 made clear that the selected backup carrier, if and when its authority is activated, is required to start its proposed services within 90 days. The 90-day start-up condition is consistent with our standard practice. We find that Arrow has not presented any persuasive reason to deviate from our standard practice here. The 90th day is December 24, 2003. The 30th day before that latest possible start-up date is November 24, 2003. Thus, Gemini is already under an obligation to advise us no later than November 24, 2003 regarding its service plans. Against this background, we have decided to dismiss Arrow's request for authority to serve Brazil, without prejudice to refile at a later date.

Under authority assigned by the Department in its regulations, 14 CFR Part 385, we found that (1) our action was consistent with Department policy; and (2) dismissal of the exemption authority was consistent with the public interest. To the extent not granted or dismissed, we denied all requests in the referenced Docket.

Persons entitled to petition the Department for review of the action set forth in this Notice under the Department's regulations, 14 CFR §385.30, may file their petitions within seven (7) days after the date of issuance of this Notice. This action was effective when taken, and the filing of a petition for review will not alter such effectiveness.

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