



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
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2002 U.S.-Ecuador All-Cargo Service Case

Docket OST-2002-12503

FINAL ORDER

Summary

By this order we make a final award of 15 weekly frequencies to U.S. carriers for scheduled U.S.-Ecuador all-cargo services, as follows: Atlas Air, Inc. (Atlas)-6; Florida West International Airlines, Inc. (Florida West)-5; Evergreen International Airlines, Inc. (Evergreen)-2; and Arrow Air, Inc. (Arrow)-2. We also award the requisite underlying exemption authority and certain route integration authority to Atlas and Evergreen for their proposed services. In addition, we grant the motion of Custom Air, Inc. (Custom Air) to withdraw its application in this proceeding.

Background

Pursuant to the Air Transport Agreement between the United States and Ecuador, there are no limitations on the number of U.S. all-cargo carriers that may provide scheduled all-cargo service in the U.S.-Ecuador market. However, there are limitations on the number of weekly frequencies that can be operated.

On May 30, 2002, delegations of the United States and the Republic of Ecuador signed "Minutes of the Meeting" to extend the application of the Air Transport Agreement of 1986 with certain modifications. Pursuant to these minutes, U.S. all-cargo carriers may now operate a total of 30 weekly frequencies in the U.S.-Ecuador market, and the former aircraft substitution formula is no longer applicable.¹ Currently, 15 weekly all-cargo U.S.-Ecuador frequencies are allocated, as follows: United Parcel Service Co. (UPS)-7, Arrow Air, Inc. (Arrow)-5, and Gemini Air Cargo,

¹ Under the Air Transportation Agreement of 1986, the use of wide-body aircraft required more frequencies than the use of narrow-body aircraft.

Inc. (Gemini)-3. Thus, there are 15 additional frequencies available for U.S. carrier scheduled all-cargo service, with no aircraft size limitations.²

By Notice dated June 14, 2002, the Department (1) instituted the instant proceeding to select a carrier or carriers to operate the additional 15 U.S.-Ecuador all-cargo frequencies; and (2) established a procedural schedule for the case. We stated that we intended to allocate the available opportunities based on the applications and responsive pleadings filed. We also stated that we intended to make our decision using written, show-cause procedures in accordance with Part 302 of our regulations (14 CFR Part 302).

Atlas, Custom Air, Evergreen, Florida West, and Arrow each filed an application for use of the available frequencies between the United States and Ecuador.³ Each would serve the general airfreight market. Atlas, Custom Air, Evergreen, and Florida West would be new-entrant carriers in the scheduled all-cargo U.S.-Ecuador market.⁴ Arrow, a scheduled all-cargo incumbent, would be expanding its current services.⁵

Atlas applied for six frequencies, proposing six weekly roundtrip flights over a Miami-Quito-Guayaquil-Miami routing, using B-747-200 aircraft. Custom Air applied for three frequencies, proposing three weekly roundtrip flights over a Miami-Quito-Guayaquil-Miami routing, using B-727-200 aircraft. Evergreen applied for two frequencies, proposing twice-weekly roundtrip flights over a New York-Miami-Quito-Guayaquil-Miami routing, using B-747-100 or B-747-200 aircraft.⁶ Florida West applied for five frequencies, proposing five weekly roundtrip flights over a Miami-Quito-Guayaquil-Miami routing, using B-767-300 aircraft.⁷ Arrow applied for five additional frequencies, proposing to use the additional frequencies, along with its current five

² Existing U.S.-Ecuador all-cargo frequencies may now be used for either wide- or narrow-body aircraft service.

³ Atlas, Custom Air, and Evergreen each also sought the requisite underlying exemption authority to provide the proposed services; and Atlas and Evergreen sought authority to combine that exemption authority with their other exemption and certificate authorities. Arrow and Florida West already hold the requisite underlying authority to conduct the operations proposed. Specifically, Arrow holds exemption authority to conduct U.S.-Ecuador all-cargo service by Notice of Action Taken dated September 25, 2000, Docket OST-95-229. Arrow filed a timely renewal application to keep its authority in effect pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. 558(c), pending action on the renewal application. The renewal application remains pending at this time and will be handled by separate order or notice. Florida West holds certificate authority to conduct U.S.-Ecuador all-cargo services (see Route 599 issued by Order 99-12-7, in Docket OST-98-4793).

⁴ Atlas and Florida West currently operate charter services between the United States and Ecuador.

⁵ Arrow currently uses its five frequencies to provide Monday, Tuesday, Thursday, Friday, and Sunday scheduled service between Miami and Quito/ Guayaquil. Arrow supplements this scheduled service with charter flights on Wednesday and Saturday.

⁶ Evergreen states that the point Latacunga, Ecuador, might be substituted for Quito depending upon cargo demand.

⁷ Florida West states that it will operate its five frequencies year-round and will supplement the scheduled frequencies with additional charter operations during peak holiday periods.

frequencies to provide daily roundtrip service in the Miami-Quito market, using B-747-200 and DC-10-30 aircraft; and to provide three times weekly roundtrip service in the Miami-Guayaquil market, using DC-8-62 or DC-8-63 aircraft.⁸

By Order 2003-8-11, the Department tentatively decided to award the 15 weekly U.S.-Ecuador all-cargo frequencies as follows: Atlas-5; Florida West-5; Custom Air-3; and Evergreen-2. We also tentatively decided to award the requisite underlying exemption authority to Atlas, Custom Air, and Evergreen to provide the services proposed, and to award Atlas and Evergreen the route integration authority requested. Objections to the Department's tentative decision were due no later than August 22, 2003, with replies due no later than August 29, 2003.

Responsive Pleadings

Arrow filed an objection to our tentative findings. Atlas, Custom Air, Evergreen, and Florida West each filed a response to Arrow's objection and Arrow filed a reply to the responses.⁹ As noted below, Custom Air subsequently filed to withdraw its application.

In its objection, Arrow stated that it is "unconscionable for the Department to deny Arrow's application in its entirety" and argued that the Department should at least accord Arrow enough frequencies for it to offer scheduled daily service.¹⁰ Arrow argued that our tentative decision not to award it additional frequencies was based on the fact that Arrow is an incumbent scheduled carrier in the market and currently holds five weekly U.S.-Ecuador frequencies; and that the Department's tentative decision violates the requirements of *Ashbacker Radio Corp. v. F.C.C.*, 327 U.S. 327 (1945) that mutually exclusive licensing applications must be accorded comparative consideration.

Arrow maintained that the Department ignored its obligation to maximize the public benefits that would result from an award of authority here and did not consider which applicants would most likely offer and maintain the best service for the shipping public. Arrow stated, further, that the Department did not consider the effects of the new entrant applicants' proposals on the overall market structure and the level of competition in the U.S.-Ecuador market or other relevant markets; whether the presence of the new entrants would adversely effect Arrow and other incumbents; or whether the new entrants would operate at a profit or loss. Arrow argued, further, that it has been unfairly treated because Florida West was considered a "new entrant" in this proceeding, notwithstanding the fact that Florida West currently holds authority to provide scheduled all-cargo service to Ecuador and operates a "volume of all-cargo charter services" in the U.S.-Ecuador market.

⁸ The 10 Arrow frequencies (five existing and five requested here) would be operated as follows: three flights on a Miami-Guayaquil-Miami routing; three flights on a Miami-Caracas-Quito-Bogota-Miami routing; three flights over a Miami-Caracas-Quito-Guayaquil-Miami routing; and one flight over a Miami-Quito-Guayaquil-Miami routing.

⁹ Arrow accompanied its reply with a motion for leave to file an otherwise unauthorized document. We will grant the motion.

¹⁰ Arrow objection, at 4 and 5.

Arrow maintained that the tentative decision in this case, if finalized, would cause it significant harm, stating that the Miami-Ecuador market is of major importance to Arrow, accounting for over 19% of its total revenues. Arrow argued that it could be driven from the market by new “reckless aggressive services that would be at best of temporary benefit to shippers, but in the longer run, cause chaos and harm in the provision of stable, competitive, reliable, safe all-cargo service to Ecuador.”¹¹

In their answers, Custom Air, Evergreen, and Florida West urged the Department to finalize its tentative decision, stating that the Department’s decision to allocate new service opportunities to new entrants is well-reasoned and amply supported by the record, and that the Department gave Arrow full consideration in this proceeding. In its answer, Atlas stated that it takes no position on the merits of Arrow’s objection but states that, if the Department does award frequencies to Arrow in this proceeding, the Department should not reduce the number of frequencies it proposes to award to Atlas here.

Florida West stated that the Department’s decision will more than double the number of U.S. carriers providing U.S.-Ecuador all-cargo service, providing for a significant and long-awaited injection of new all-cargo competition in the highly restricted U.S.-Ecuador all-cargo market. Custom Air and Florida West both maintained that, with respect to Arrow’s “harm” arguments, the marketplace, not the Department, is the principal determinant of which carriers provide service desired by shippers and consignees. Custom Air acknowledged that, while Arrow might well be driven from the market by aggressive competition, as might any of the other carriers in the market, this “is the nature of competition, which is exactly what the Department is seeking to stimulate to the extent possible under a limited regime.”¹² In this regard, Florida West stated that no carrier, whether incumbent or new entrant, is deserving of, nor should expect, government protection.

In its reply to the answers filed, Arrow reiterated its claim that the Department did not consider its application on its merits and that it should not have been denied any frequencies in this proceeding merely on the basis that it is an incumbent; and that its proposal is superior to those of the other applicants. Arrow argues that the Department’s tentative decision to grant authority only to new-entrant carriers creates a situation of mutual exclusivity, effectively denying Arrow comparative consideration. Arrow argued, further, that Florida West is incorrect to say that the marketplace, rather than the Department, is the principal determinant of which carriers provide service desired by shippers and consignees. In this regard, Arrow stated that this is a carrier selection case where the Department, and not market forces, determines who will fly and how many flights will be operated, and reiterated that the *Ashbacker* Doctrine is applicable to this proceeding.

¹¹ Arrow objection, at 7.

¹² Custom Air reply, at 4.

Subsequent Events

On September 12, 2003, Custom Air filed a motion to withdraw its application in this proceeding. In its motion, Custom Air stated that it reluctantly decided that it would not be able to implement its proposed Ecuador service on a timely basis, and, that the Department should award its tentatively-allocated three frequencies to another applicant or applicants in the Department's final order in this matter. No party filed a response to the motion.¹³

Decision

After careful review of the record, and in light of the fact that Custom Air has withdrawn its request for three frequencies in this proceeding, we have decided to make final our tentative decision in Order 2002-8-11, with certain modifications, to award the subject 15 weekly frequencies to U.S. carriers for scheduled U.S.-Ecuador all-cargo services, as follows: Atlas-6; Florida West-5; Evergreen-2; and Arrow-2. We will also award the requisite underlying exemption authority and certain route integration authority to Atlas and Evergreen for their proposed services. In addition, we will grant the motion of Custom Air to withdraw its application in this proceeding.

In our show-cause order in this proceeding, we recognized that the doubling of available frequencies (and the potentially even greater capacity expansion possible, in light of the elimination of the wide-body counting formula) presented a genuine market-opening opportunity. We stated that this opportunity is all the more meaningful given the long history of our restrictive bilateral relationship with Ecuador. Against this background, we tentatively concluded that the public interest was best served by allocating frequencies to the new-entrant applicants in this proceeding. We stated our belief that this approach would best promote competition, while providing a broad combination of service to shippers and significantly expanding the use of our bilateral rights.

¹³ On February 6, 2004, Amerijet International, Inc. (Amerijet), not previously a participant here, citing the Custom Air withdrawal of last September, filed an application in this proceeding for an exemption and allocation of three frequencies to permit it to provide U.S.-Ecuador all-cargo services. Arrow, Atlas, Florida West, and TradeWinds Airlines, Inc. (TradeWinds, also a non-party), filed answers to the application. Amerijet, Florida West, and TradeWinds filed replies to the answers. Arrow, Atlas, and Florida West opposed Amerijet's late-filed application and urged that it be denied in this proceeding, and TradeWinds, Atlas, and Florida West offered varying suggestions for handling the allocation of the three frequencies previously sought by Custom Air. We will dismiss Amerijet's application. The record in this proceeding has long been complete and ripe for decision. No arguments presented by Amerijet, or any of the other parties, have convinced us that the public interest would be better served by following a course other than prompt resolution of this case as discussed in the Decision section below.

No party has presented any evidence to persuade us that our approach is invalid. We continue to believe that the public interest is best served by awarding the available authority to the new-entrant carriers for U.S.-Ecuador all-cargo services to the extent consistent with their proposals. Atlas (with the request of one additional frequency), Florida West, and Evergreen have urged the Department to finalize its tentative decision in this case. In light of these circumstances, and in light of the fact that Custom Air has withdrawn its application for three of the subject frequencies, we have decided to finalize our tentative award of five weekly frequencies to Atlas, and to modify our tentative award to Atlas by adding one more weekly frequency allocation, for a total of six. Atlas will now be in a position to implement, in full, the new U.S.-Ecuador all-cargo service it proposed in this proceeding. We will also finalize our tentative award of five weekly frequencies to Florida West, and two weekly frequencies to Evergreen.

In allocating the frequencies in this manner, two weekly frequencies remain available for allocation. Arrow, in its objection to our show-cause order, asks the Department to reconsider its tentative decision and to award it at least the two additional frequencies it would need to provide scheduled daily service. Under the circumstances presented, we believe that it is consistent with the public interest to allocate to Arrow the two weekly frequencies for U.S.-Ecuador all-cargo service that it has requested. With Arrow's existing allocation of five frequencies, and this new allocation of two additional frequencies, Arrow will be able to implement a daily scheduled all-cargo service in the U.S.-Ecuador market, thereby enhancing competition and expanding options for shippers.¹⁴

ACCORDINGLY,

1. We make final our tentative findings and conclusions in Order 2002-8-11, with certain modifications, as discussed in the text of this order and as reflected below;¹⁵
2. We allocate the available 15 weekly U.S.-Ecuador scheduled all-cargo frequencies at issue in this proceeding as follows:

Atlas Air, Inc. – 6 weekly frequencies for any of the services it proposed in this proceeding.

Florida West International Airlines, Inc. – 5 weekly frequencies for any of the services it proposed in this proceeding.

¹⁴ Since we are allocating frequencies to Arrow in accord with the number it has said it could accept, we do not reach the arguments it has raised concerning competitive harm or disparate treatment of Arrow vis a vis any other applicant. Saying this, however, we note that our long-standing policy of taking account of incumbency and other factors as part of our overall competitive analysis to encourage competition does not exclude incumbent carriers from consideration, and is in no way inconsistent with the Ashbacker doctrine.

¹⁵ We find that our action here would not constitute a “major regulatory action” under the Energy Policy and Conservation Act of 1975, as defined by section 313.4(a)(1) of the Department’s regulations.

Evergreen International Airlines, Inc. – 2 weekly frequencies for any of the

services it proposed in this proceeding.

Arrow Air, Inc. – 2 weekly frequencies for any of the services it proposed in this proceeding.

3. We grant the requests of Atlas Air, Inc., and Evergreen International Airlines, Inc., for exemption authority to provide the proposed scheduled foreign air transportation services in the U.S.-Ecuador market;^{16 17}

4. We grant the requests of Atlas Air, Inc., and Evergreen International Airlines, Inc., for authority to integrate the authority awarded here with their existing certificates and exemptions, and the authority is subject to the following condition;

The route integration authority granted is subject to the condition that any service provided 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 granted should be construed as conferring upon Atlas or Evergreen rights (including fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless Atlas or Evergreen, as applicable, notifies the Department of its intent to serve such a 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 the Atlas or Evergreen authority by virtue of the route integration exemption granted here, but that are not then being used by Atlas or Evergreen, the holding of such authority by route integration will not be considered as providing any preference for Atlas or Evergreen in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

5. The authorities granted to Atlas and Evergreen in paragraphs 3 and 4, above, are effective for two years from the service date of this order;

¹⁶ Based on officially noticeable data, we find that Atlas and Evergreen are qualified to provide the proposed services. Both carriers have been found fit to provide scheduled foreign air transportation services of property and mail. (See Order 2001-4-32 for Atlas, and Order 2003-5-27 for Evergreen.) No information has come to our attention that leads us to question the qualifications of Atlas and Evergreen to provide the proposed foreign scheduled all-cargo services at issue here.

¹⁷ Florida West and Arrow already hold the requisite underlying authority to provide the services proposed in this proceeding. (See Route 599, Order 99-12-7, in Docket OST-98-4793, for Florida West; and Notice of Action Taken, dated September 25, 2000, in Docket OST-95-229, for Arrow. Arrow filed a timely renewal application to keep its authority in effect pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. 558(c), pending action on the renewal application. The renewal application remains pending at this time and will be handled by separate order or notice.

6. The frequency allocations in ordering paragraph 2, above, are effective immediately and will remain in effect indefinitely, *provided that* the holder continues to hold the necessary underlying authority to serve the markets authorized and institutes the proposed services within 90 days from the date of issuance of this final order; and *provided further* that the frequencies will become dormant and will revert automatically to the Department if they are not used for a period of 90 days (once inaugurated) except where service in the market is seasonal;¹⁸ ¹⁹
7. We grant the motion of Custom Air Transport, Inc., to withdraw its application in the *2002 U.S-Ecuador All-Cargo Service Case*, Docket OST-2002-12503;
8. We dismiss the application of Amerijet International, Inc., in the 2002 U.S-Ecuador All-Cargo Service Case, Docket OST-2002-12503;
9. We grant the motion of Arrow, Air, Inc., for leave to file an otherwise unauthorized document in the *2002 U.S-Ecuador All-Cargo Service Case*, Docket OST-2002-12503;
10. To the extent not granted or dismissed, we deny all other requests in the captioned proceeding;
11. We may amend, modify, or revoke the authority granted by this order at any time at our discretion without notice or hearing; and
12. We will serve this order on all parties to this proceeding; the Ambassador of Ecuador in Washington, D.C.; the U.S. Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration.

By:

SUSAN McDERMOTT
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

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¹⁸ Where seasonal services are at issue, however, a carrier must notify the Department that its operations are of a seasonal nature, otherwise the dormancy condition would apply.

¹⁹ As we have stated, the frequencies allocated represent valuable rights obtained in exchange for rights to Ecuadorian carriers. Accordingly, we remind the selected carriers that the frequencies are for weekly operations. A scheduled carrier may not bank frequencies from one week to another, and failure to use the frequencies on a weekly basis will result in the forfeiture of the unused frequencies.