



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

Issued by the Department of Transportation on July 16, 2004

NOTICE OF ACTION TAKEN -- UNDOCKETED

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).

BACKGROUND

On June 18, 2004, the United States and the People's Republic of China (PRC) initialed a protocol amending the U.S.-PRC aviation agreement. The amended agreement greatly expands the opportunities for the air carriers of both countries, including the opportunities for charters. In this regard, (among other things) under the new agreement, each Party shall approve applications by the airlines of the other Party for 75 one-way charter flights annually from August 1 of each year, between points in China Zone 1¹ and U.S. points on city pairs served by Chinese carriers' scheduled services of the same type (combination or all-cargo) as the proposed charter flight, and 75 one-way charter flights annually from August 1 of each year, between points in China Zone 2² and U.S. points on city pairs served by Chinese carriers' scheduled services of the same type (combination or all-cargo) as the proposed charter flight.

XX Request of Kalitta Air, Inc., for allocation of 29 U.S.-China all-cargo charter frequencies

By letter of June 28, 2004, Kalitta Air requested an allocation of 29 all-cargo charters to provide service over the routing Shanghai – (Khabarovsk, Russia) – (Anchorage) – Chicago. Kalitta proposes to operate these charters between August 11 and November 24, 2004. These flights would fall under the annual 75-flight limitation for China Zone 1.

Evergreen filed a response, stating that because procedures are not in place for allocation of charters, it believes that it is inappropriate for the Department to approve Kalitta's request, and that it is necessary for the Department to provide interested carriers with advance notice of what procedures will be established to distribute the available charters for Zones 1 and 2.

Kalitta responded, stating that its application was served on interested parties and no carrier (including Evergreen) has requested a specific charter allocation or stated how it would be prejudiced by an award of 29 charters to Kalitta. Kalitta maintains that Evergreen knows that a procedural delay will force the shipper to opt for alternative lift from another carrier. Kalitta states that it made a decision not to apply for the newly-available all-cargo designation in the market, and would concentrate on charter operations; that, in contrast, Evergreen is seeking such scheduled designation; and that it was clear during the U.S. China negotiations that expanded charter opportunities would be agreed, and on that basis Kalitta sought out the customer for the flights for which it seeks authority here.

Evergreen responded, stating that it has a history of operating charters in the U.S.-China market; that if Kalitta's request is granted, other carriers will lose the chance to conduct those operations; that Evergreen expects to operate 25 charters in the market in the coming year; and that demand from other carriers may cause the frequency caps to be reached quickly, requiring an allocation mechanism. Evergreen states that its seeking of scheduled rights in the U.S.-China market is not relevant to this proceeding; that the

¹ China Zone 1 consists of Shanghai, Beijing, and Guangzhou.

² China Zone 2 consists of Anhui, Fujian, Guangdong (except Guangzhou), Hebei, Henan, Hubei, Hunan, Jiangsu, Jiangxi, Shandong, Shanxi, Tianjin, and Zhejiang.

Department needs to establish formal procedures for the allocation of these charters under the *Ashbacker* doctrine;³ and that we should not grant a large number of flights to Kalitta without further consideration of this matter. Evergreen suggests that we allocate the available charters on a monthly basis to assure an equitable distribution.

Applicant rep: Mark W. Atwood (202) 463-2512 DOT Analyst: Sylvia Moore (202) 366-6519

DISPOSITION

XX Granted (See Remarks)

The above action was granted on July 16, 2004 and will be effective August 1, 2004, through November 28, 2004

Action taken by: Karan K. Bhatia
Assistant Secretary for Aviation
and International Affairs

Remarks: We have decided to grant Kalitta the charter frequencies it seeks for its Shanghai-Chicago service. It is our policy to ensure that the operating rights available to U.S. carriers are fully utilized. Significantly, Kalitta is the only carrier with demonstrably firm plans to use any of the available U.S.-China charter opportunities at this time. While Evergreen has stated that it “expects to operate approximately 25 charter flights from China during the next 12 calendar months...”⁴ it has presented neither an application nor firm plans for any such flights, nor has it persuasively demonstrated that the granting of Kalitta’s request, which would still leave a pool of 46 available charters, would preclude Evergreen’s plans. No other carrier responded to Kalitta’s request.⁵ Against this background, we find that, under the circumstances presented, the public interest supports a decision to approve Kalitta’s request now. Saying that, we nevertheless appreciate Evergreen’s desire for some greater degree of procedural guidance on future awards of U.S.-China charters. Thus, we intend, on an expedited basis, to address by subsequent separate action the question of procedures for allocating the remaining numerically limited charter opportunities available under the U.S.-China agreement. While we have not yet decided on what those procedures might be, if comparative procedures should need to be employed, we intend to take into consideration the award we have made here to Kalitta.

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

³ *Ashbacker Radio Corp. vs. FCC*, 326 U.S. 327 (1945).

⁴ Letter of Evergreen International Airlines to Paul L. Gretch, Director, Office of International Aviation, dated July 13, 2004, at 2.

⁵ Thus, contrary to Evergreen’s assertions, we do not see an *Ashbacker* problem in proceeding on Kalitta’s request.