



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

Issued by the Department of Transportation
on the **20th day of August, 2004**

Application of

BLUEBIRD CARGO LTD

for an exemption under 49 U.S.C. § 40109

**Served: August 20,
2004**

Docket OST-2003-16019

ORDER GRANTING EXEMPTION

Summary

In this order, we grant the request of Bluebird Cargo Ltd (Bluebird) for exemption authority to conduct scheduled and charter foreign air transportation of property and mail consistent with the provisions of the U.S.-Iceland Air Transport Agreement (the Agreement).

Application

By application filed August 25, 2003, Bluebird requests exemption authority to conduct scheduled all-cargo services (1) between any point or points in Iceland and any point or points in the United States; (2) between any point or points in the United States and any point or points in a third country or countries; and (3) all-cargo charters in accordance with Part 212 of our rules.¹ Bluebird states that initially it intends to conduct all-cargo charter services only.

In support of its request, Bluebird states that the authority requested is consistent with the Agreement; that it is substantially owned and effectively controlled by homeland nationals; and that it is licensed and designated by the Government of Iceland to perform the proposed services. Bluebird asks that we grant its request for at least two years.

¹ Bluebird contemporaneously filed an application for a foreign air carrier permit to conduct all-cargo services identical to those at issue here. See Docket OST-2003-16018, filed August 25, 2003.

Pleadings

Arrow Air, Inc., a U.S. certificated air carrier, filed a consolidated answer opposing Bluebird's exemption and permit applications. Arrow states that neither application provides sufficient information to allow us to grant the authority sought by Bluebird. Specifically, Arrow states that because Bluebird fails to describe the services it proposes to operate, the markets it proposes to serve, or whether the services will be third-, fourth-, fifth- or seventh-freedom flights, we lack sufficient information to determine whether the proposed services are consistent with the Agreement. Arrow also states that because Bluebird has not provided specific information on its proposed services we are unable to determine whether Bluebird's services will constitute a major regulatory action requiring an energy statement under 14 CFR Part 313.

Arrow states that Bluebird should supplement its application with traffic and financial results and that any authority granted Bluebird should be limited and conditioned consistent with the statutory policy provisions of 49 U.S.C. § 40101. Arrow argues that granting Bluebird unrestricted and unlimited-duration all-cargo authority will give Bluebird access to markets where no comparable benefit would be available to Arrow through access to Iceland and third countries, and will threaten all U.S.-flag all-cargo carriers through traffic diversion and a loss of profit potential. Arrow argues that a weakened U.S. all-cargo transportation system will ultimately degrade the military preparedness of U.S. cargo carriers. Finally, Arrow states that the adverse effects of the seventh-freedom authority sought by Bluebird cannot go unnoticed, adding that a number of foreign carriers already hold Department authority to conduct seventh-freedom cargo services and some of those carriers operate multiple frequencies without prior Department approval, proper safety oversight, or compliance with our reporting requirements.² Arrow states that the impact of these services is felt by Arrow through diversion of traffic from its Miami gateway.

Bluebird filed a reply stating that that it did not enumerate the routes it proposes to serve in its applications because initially it intends to conduct charter all-cargo services only; that its initial level of services will be limited to 2-3 flights per week between Iceland and points in the northeastern U.S.; that its aircraft fleet, which currently consists of two B-737 freighters, is no threat to Arrow's large fleet of narrow and wide-body freighter aircraft; and that Arrow's diversion argument is not supported because Arrow's gateway is Miami with services to points in the Caribbean and South America, while Bluebird's services will be between Iceland and northeastern U.S. points. Bluebird further states that the modest level of the U.S. services that it proposes to operate with its two B-737

² Arrow specifically cites foreign carriers from Ghana, Uzbekistan, and Peru.

freighter aircraft will fall far short of the ten million gallon threshold requiring evaluation under 14 CFR Part 313. Bluebird states that Arrow's argument that it is being harmed by foreign carrier seventh-freedom cargo services is misplaced, arguing that if Arrow opposes the grant of such authority available to designated carriers under a bilateral aviation agreement, Arrow should raise its concerns with the Departments of State and Transportation in the context of international aviation negotiations, not after the fact in the context of a legitimate request for bilaterally-agreed rights.

Decision

We have decided to grant the exemption request of Bluebird. We find that the authority requested is provided for in our bilateral aviation agreement with Iceland, and Bluebird is properly licensed and designated by the Government of Iceland to conduct the proposed services.³ The authority granted will be effective for a period of two years from the service date of this order.

We also find that Bluebird is substantially owned and effectively controlled by citizens of Iceland. Specifically, Bluebird is 76.28% owned by corporations and citizens of Iceland. The remaining 23.72% of Bluebird's stock is held by citizens of the British Virgin Islands (19.11%), Norway (3.22%) and Luxembourg (1.38%).⁴ In addition, Bluebird's board of directors and all of its key management personnel are citizens of Iceland.

We also find that Bluebird is financially and operationally qualified to conduct the proposed services. The carrier has experienced management, and we have confirmed Bluebird's compliance with our aircraft liability insurance requirements. In addition, by memorandum dated July 16, 2004, the Federal Aviation Administration advised us that it knows of no reason why we should act unfavorably on Bluebird's request.

We disagree with Arrow that Bluebird's application is materially deficient, or that in the context of this proceeding we need additional evidentiary information to determine whether the foreign air transportation contemplated by Bluebird is consistent with the public interest. That Bluebird is properly designated is uncontroverted. Section 41302 of Title 49 provides that provision for authority in an air transport agreement is evidence that grant of the authority would be in the public interest. We also believe that in granting

³ Bluebird provided a copy of its Air Operator's Certificate (IS-020), issued March 21, 2002, by Iceland's Civil Aviation Authority, Flight Safety Division. On March 21, 2003, Iceland's Ministry of Foreign Affairs designated Bluebird to perform scheduled and charter all-cargo operations consistent with the Agreement.

⁴ Citizens of Iceland are major stockholders in two of the three British Virgin Island corporations holding Bluebird's stock.

Bluebird the authority at issue here we have acted consistent with our statutory responsibilities under 49 U.S.C. § 40101 by encouraging the development of an air cargo system responsive to the needs of shippers and one which relies on competitive market forces to decide the extent, quality and price of services provided.⁵

In the context of the exemption application at issue here, which seeks rights available under an open-skies agreement, and which contains information generally consistent in substantive detail with such submissions from other exemption applicants of open-skies countries, we see no reason to require Bluebird to file additional evidentiary information on future services for the award of this authority. We see no reason, nor has Arrow presented one in the context of this proceeding, to withhold from Bluebird rights available to it under the Agreement.

With regard to the fifth- and seventh-freedom flight issues raised by Arrow, the question is whether the Agreement provides for such rights. In this case it does, and Arrow has not demonstrated that we should prevent Bluebird from exercising bilaterally-agreed authority.⁶

As to Arrow's concerns that Bluebird failed to provide information necessary to enable us to determine whether the proposed services will constitute a major regulatory action within the meaning of Part 313, we note that 14 CFR § 313.4(b)(1) provides that temporary exemptions not exceeding 24 months are not deemed to be a major regulatory action requiring an energy statement. Moreover, we also note that the applicant indicates that initially its services to the United States will be limited to 2-3 flights per week between Iceland and the points in the northeastern U.S. with B-737 freighter aircraft. As noted above, and consistent with our usual practice in conferring exemption authority to a designated carrier from an open-skies country, we are granting Bluebird's request for a period of two years.

In view of the above, and acting under authority assigned by the Department in its regulations, 14 CFR Part 385, we find that grant of this authority is consistent with the

⁵ There is no evidence on the record that our action here would in any way degrade the military preparedness of U.S. cargo carriers or impede the Department of Defense's ability to obtain cargo lift from U.S. carriers if required.

⁶ We note that such rights are also provided for in our Agreements with Ghana, Peru and Uzbekistan, three countries mentioned by Arrow as having carriers that conduct seventh-freedom all-cargo services to and from the United States. We disagree with Arrow that carriers from these countries are conducting operations without safety oversight or are not in compliance with our reporting requirements. As to the matter of safety, each of the three countries mentioned is currently listed as Category 1 under the FAA's International Aviation Safety Assessment (IASA) program (complies with International Civil Aviation Organization (ICAO) standards). Moreover, whether these carriers are filing traffic statistics is not relevant to the issue of granting Bluebird authority to which it is entitled under our agreement with Iceland.

public interest, and that our action here does not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975.

ACCORDINGLY,

1. We grant the request of Bluebird for an exemption from 49 U.S.C. § 41301 to engage in scheduled foreign air transportation of property and mail (1) between any point or points in Iceland and any point or points in the United States; and (2) between any point or points in the United States and any point or points in a third country or countries,
2. We grant Bluebird authority to conduct all-cargo charters in accordance with 14 CFR Part 212 of our rules;
3. The authority granted in ordering paragraphs 1 and 2 above will be subject to the conditions set forth in Attachment A to this order;
4. The authority granted above will be effective for a period of two years from the service date of this order;
5. To the extent not granted or deferred, we deny all requests for relief in Docket OST-2003-16019;
6. We may amend, modify, or revoke this order at any time and without hearing; and
7. We shall serve a copy of this order on Bluebird Cargo Ltd, Arrow Air, Inc., the Ambassador of Iceland in the United States, the Federal Aviation Administration (New York IFO), and the Department of State (Office of Aviation Negotiations).

By:

KARAN BHATIA
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/reports_aviation.asp*

Attachment

In the conduct of the operations authorized, the foreign carrier applicant(s) 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, including, but not limited to, 49 CFR Part 1546 or 1550, as applicable. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) from a foreign airport that would be the holder's last point of departure for the United States, contact its International Principal Security Inspector (IPSI) to advise the IPSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served;
- (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.

05/2004