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Order 2004-10-8



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

Issued by the Department of Transportation
on the day of 13th day of October, 2004

Served: October 18, 2004

In the Matter of

**2004 Cargo Designation and 2004/2005
All-Cargo Frequencies (U.S.-China)**

Docket OST-2004-18468 - 151

FINAL ORDER

Summary

By this Order, we make final our tentative findings and conclusions set forth in Order 2004-9-4 and select Polar Air Cargo, Inc. (Polar) to serve the U.S.-China all-cargo market, and we allocate it nine weekly frequencies (six in 2004 and three in 2005) for its proposed services. We also allocate twelve weekly frequencies (six in 2004 and six in 2005) each to Federal Express Corporation (FedEx) and United Parcel Service Co. (UPS), and six weekly frequencies (three in 2004 and three in 2005) to Northwest Airlines Inc. (Northwest).

Background

Under the recently signed amendment to the air services agreement between the United States and the People's Republic of China (PRC), effective August 1, 2004, the United States may designate an additional carrier for scheduled all-cargo services in the U.S.-China market and may allocate 21 additional weekly frequencies for all-cargo services. In addition, effective March 25, 2005, the U.S. may allocate an additional 18 weekly frequencies for scheduled all-cargo services among the designated carriers.

By Order 2004-9-4, the Department tentatively selected Polar as the new designated all-cargo carrier and tentatively allocated Polar nine weekly frequencies (six in 2004 and three in 2005) for its proposed services. The Department also tentatively allocated twelve weekly frequencies (six in 2004 and six in 2005) each to FedEx and UPS and six weekly frequencies (three in 2004 and three in 2005) to Northwest Airlines (Northwest).

Objections to the Department's tentative decision were due September 10, 2004, and answers to objections were due September 16, 2004.

Responsive Pleadings

Arrow Air (Arrow), Evergreen International (Evergreen), Gemini Air Cargo (Gemini), and Northwest filed objections to the show-cause order; FedEx filed a reply, and UPS filed a response to the show-cause order. Polar and Northwest each filed an answer to the objections, Gemini filed a consolidated reply; UPS filed a reply to the objections; and FedEx filed an answer to the objections of Northwest. Gemini filed a surrepley.¹

Objections and Initial Responses

Arrow, Evergreen, and Gemini object to the Department's tentative decision of selecting Polar as the new entrant for all-cargo services in the U.S.-China market. Each maintains that its selection would provide greater benefits to the shipping public than would Polar's selection. Each argues its point-to-point service proposal has advantages over Polar's hub operations, and each can deal with directionality to its advantage.² Also, each requests the Department to reconsider its tentative decision of not selecting a backup carrier and maintains that it should be the recipient of such an award should the Department reconsider and decide to include backup authority.

Arrow argues that it has entered into a legally binding contract (a wet lease agreement) to use a B-747 aircraft that is available to implement the services it proposes in a timely fashion. It also states that it is a major scheduled all-cargo operator in numerous international markets, and that although it is not currently operating scheduled service in Asia, this fact should not adversely affect its application.³

Evergreen argues that the Department "failed to adequately account for Evergreen's extensive experience in Asia, and in the China market specifically"; that its "reputation as a reliable charter operator in the U.S.-China market is well-established and will enable Evergreen to build a sustainable scheduled presence in the market"; and that it has experience as a scheduled and charter operator in China, citing 2001 scheduled services between the U.S. and Asia.⁴ It also argues that the Department "failed to distinguish a hub from actual traffic" and that the Department "should closely look at the traffic expected to be generated by each proposal as well as the method in which the network is being used."⁵

¹ Gemini's surrepley was accompanied by a motion for leave to file an otherwise unauthorized document. In the interest of having a complete record, we will grant the motion.

² Directionality refers to the imbalance of trade between the U.S. and China. For example, the Department's 2003 T-100 data show that 29% of all cargo transported between the U.S. and China went westbound (from the U.S. to China), while the remaining 71% was transported eastbound.

³ Arrow Objection at 4.

⁴ Evergreen Objection at 1-4.

⁵ *Id.* at 3.

⁷ Gemini Objections at 2.

Gemini argues that the Department did not specifically identify the “other important objectives” referenced in not awarding Gemini the twelve frequencies it had sought. It also argues that the Department did not “discuss the positive aspects of having more frequent service in high demand market segments”;⁷ that the Department should have given more weight to “more one-way ‘market trips’ between China and the U.S. markets of New York, Chicago, and Los Angeles than Polar would be able to provide with its nine frequencies”;⁸ and that network structure should not be an important decisional element.⁹ Gemini also contends that the Department gave undue emphasis to “the extent of Gemini’s experience in providing formal scheduled service,”¹⁰ and maintains that the “differences in how Polar and Gemini market their services are not of decisional significance in this proceeding.”¹¹

Northwest argues that the Department’s decision to allocate it only six of the 39 frequencies, in particular, only six in comparison to nine to the new entrant, does not comport with the record in this proceeding and would produce an outcome contrary to overall U.S. aviation policy and the public interest.¹² It maintains the Department failed to give proper weight to the fact that Northwest offers two distinct services and competes in two separate markets; that the conclusion on availability of belly capacity for general freight is contrary to the record; that awarding 24 frequencies for small package express service is contrary to the record; and that the decision is contrary to the Administrative Procedure Act (5 U.S.C. § 706) in that the Department ignored material facts, did not clearly explain the decision, and did not tie that decision to the record as a whole.¹³

FedEx supports the Department’s tentative decision. It states that even though it “did not receive all the frequencies it had requested, the amount of 12 new frequencies will permit the start-up of two major operations by FedEx Express, its round-the-world flights connecting the U.S., China, the Middle East, and Europe.” It further states that “the new flights will provide much-needed capacity to and from China, while strengthening FedEx Express’ global network.”¹⁴ FedEx, however, does not agree with the tentative decision in regard to the allocation of nine weekly frequencies to Polar, regarding that allocation as excessive, and states that it does not expect the Department to award even more frequencies to Polar in the new case just instituted (the *2005/2006 U.S.-China Air Services Case and Designations*, Docket OST-2004-19077).¹⁵

⁸ *Id.* at 2-3.

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² Objections of Northwest at 1, 4.

¹³ *Id.* at 7-8.

¹⁴ Reply of FedEx to Order to Show Cause at 1-2.

¹⁵ *Id.* at 5-6.

¹⁷ Response of UPS at 2.

UPS also supports the Department's tentative decision. Specifically, UPS appreciates the Department's focus on competition and on selections that will offer enhanced service options for shippers. UPS also supports the Department's "continued recognition that express carriers require six weekly frequencies" to address the express service demand of the shipping public.¹⁷ With regard to Northwest, UPS maintains that consideration of the belly capacity of combination carriers is appropriate in the evaluation of an air cargo market, as is consideration of Northwest's ability to convert frequencies — that both are important factors in evaluating Northwest's request for new all-cargo frequencies in China.¹⁸

Answers and Replies

Polar supports the Department's tentative decision selecting it as the new entrant to the U.S.-China all-cargo market and allocating it nine weekly frequencies. Polar requests that, should the Department perceive that the Presidential review process could delay the final order, the Department consider issuing temporary exemption authority, *sua sponte*, so that Polar can employ the new rights during the current peak cargo season.

Polar argues that none of the other new entrant applicants currently offers scheduled service in the Asia-Pacific region. Polar asserts that Arrow failed to (1) respond to concerns raised regarding the availability of aircraft; (2) provide market data in support of its proposal; and (3) address its lack of scheduled service experience in Asia.¹⁹ Polar submits that Evergreen and Gemini cannot compete effectively in the scheduled market because they provide charter, rather than scheduled service, and do not demonstrate experience in the Asia market.²⁰

Regarding Gemini's assertion that Polar's service through Incheon will diminish capacity available to U.S. shippers, Polar argues that operations via its Incheon hub "improve the chances of initiating and sustaining service in competition with incumbent carriers that similarly operate via Asia hubs," and that "carriers operate in this fashion in order to compete in third, fourth and fifth freedom markets, achieve a mix of cargo and yields, offer a service to individual customers in multiple markets, and improve overall economic performance of operations."²¹ Polar argues that "Gemini would have to operate a near-empty aircraft to China," whereas "Polar could support these westbound flights with business from the U.S. to countries throughout the region (served through Incheon) and between these countries themselves."²²

Regarding the incumbents in the market, Polar argues that Northwest and FedEx object to the number of frequencies tentatively allocated to Polar without explaining how that

¹⁸ *Id.* at 3.

¹⁹ Answer of Polar at 5-6.

²⁰ *Id.* at 6-9.

²¹ *Id.* at 9.

²² *Id.*

allocation undermines the Department's goal of enhancing competition.²³ Polar also argues that Northwest cannot complain about lack of capacity when it has the largest allocation of frequencies of any U.S. carrier and has more flexibility on how it can use the frequencies. Polar argues that the Department correctly acknowledged that the new entrant would be faced with competition from U.S. incumbents, as well as from foreign carriers, and that the new entrant should have enough frequencies to introduce, develop and maintain operations. To this extent, Polar also notes that Chinese all-cargo carriers and third-country carriers are also seeking an increase in rights and that its proposed service pattern of nine frequencies will "permit a defensible level of service in view of the current market situation."²⁴

On reply, FedEx argues that Northwest does not acknowledge that it, at the end of this proceeding, will have received 13 of the latest available U.S.-China frequencies from new opportunities for 2004 and 2005 and that, if the show-cause order is finalized, Northwest will have more total U.S.-China frequencies than any other U.S. carrier. Moreover, FedEx argues that Northwest does not acknowledge its right to shift up to 16 frequencies between combination and all-cargo service — that it is Northwest that chooses to compete in both combination and all-cargo markets and that Northwest has the choice to give up a frequency. Also, FedEx challenges Northwest's assertion that belly capacity is effectively irrelevant. Citing an analysis of the freight forwarder community, FedEx states that, "50 percent of the world's freight ton-miles is carried in the belly compartment of passenger aircraft."²⁵ FedEx argues that "the record establishes that belly capacity in combination aircraft is fully competitive with all-cargo capacity," noting that "Polar demonstrated that belly capacity on Northwest's passenger aircraft produced 30 percent of its overall freight revenues in 2003."²⁶ FedEx states that Northwest, in criticizing the Department for allegedly allocating too many frequencies to the express sector as opposed to the general freight sector, fails to recognize that FedEx and UPS provide both express and general freight services. FedEx does, however, agree with Northwest that the Department awarded too many frequencies to Polar.

On reply, Gemini states that it has no objection to the allocation to a particular incumbent carrier so long as the overall total for FedEx, UPS, and Northwest does not exceed 27; reiterates its position that Gemini should be awarded the new entrant authority; and states that the Department gave insufficient weight to benefits of Gemini's proposed service and gave undue weight to aspects of Polar's proposal.²⁷

²³ *Id.* at 11, 14.

²⁴ *Id.* at 12.

²⁵ September 16 Answer of FedEx at 4, *citing* Air Cargo Management Group ("ACMG"), INTERNATIONAL AIR FREIGHT AND EXPRESS INDUSTRY PERFORMANCE ANALYSIS 2003 at 16; *see also* August 9 Consolidated Reply of FedEx at 29.

²⁶ *Id.* at 4.

²⁷ Consolidated Reply of Gemini at 1-4.

²⁹ Answer to Objections of Northwest at 2.

Northwest argues that if the show-cause order is affirmed, Northwest will hold fewer total frequencies than any U.S. passenger or all-cargo incumbent, and it urges the Department to reconsider allocation of nine frequencies to Polar, arguing that “it is inexplicable why Polar uniquely requires nine weekly frequencies to ‘introduce, develop and maintain a workable, competitive operation.’”²⁹ Northwest urges the Department to award Northwest at least nine frequencies.³⁰

UPS disagrees with Northwest’s assessment that the evidence of the record does not support the Department’s order, and UPS further states the Department adequately considered the proposals of each applicant and issued a decision supported by the record. Indeed, it argues that Northwest “completely ignored UPS’ substantial general freight service.”³¹

On surreply, Gemini argues that Polar misstated Gemini’s operations and that “Polar, like Gemini, operates plane-load charters and that Gemini, like Polar, operates scheduled service.”³²

Decision

We have decided to make final our tentative decision in Order 2004-9-4. Specifically, we are awarding Polar certificate authority to operate in the U.S.-China market, and we are allocating it nine weekly frequencies (six in 2004 and three additional in March 2005). We also are allocating FedEx and UPS twelve weekly frequencies each (six in 2004 and six in March 2005) and Northwest six weekly frequencies (three in 2004 and three in March 2005) for services in the U.S.-China market.

New Entrant Selection and Allocation of Frequencies for the New Entrant

In reaching our tentative decision to select Polar for the new U.S.-China all-cargo designation, we said our new agreement with China offers us the opportunity to enhance competition significantly in the U.S.-China air cargo market. We tentatively believed that Polar would provide the greatest public benefits in this case because Polar is in the best position to compete with well-established incumbents in the market, and because it would provide significant service benefits. We said that Polar had an advantage stemming from the facts that it is the only new carrier applicant with extensive operations and resources in the region (including a hub), the only applicant with demonstrated broad experience in scheduled cargo services in the transpacific and intra-Asia markets, and the only applicant that demonstrated it has a road feeder service in the U.S. to provide shippers access to multiple interior points in the U.S. In short, we said that in the circumstances presented, Polar was the applicant that best demonstrated it has the resources to provide vigorous competition to the strong competitors already in the market. None of the new

³⁰ *Id.*

³¹ Reply of UPS to Objections at 2.

³² Surreply of Gemini at 3.

designation applicants has presented evidence that would persuade us to alter our tentative findings in favor of Polar.

Arrow, Evergreen, and Gemini all cite aspects of their past or present operations that they would have us accept as equating with or surpassing Polar's experience. However, the fact remains that Polar, and only Polar, has an established system of Pacific-Asia scheduled all-cargo services that are held out, marketed, and operated under the carrier's own name, thereby making it the most viably competitive new entrant applicant for U.S.-China operations. We regard this factor as critical to meeting the public interest objectives of this proceeding.

Gemini insists that it now provides scheduled service. The record shows, however, that Polar is far more experienced at providing the category of service at issue in this proceeding, considering that Gemini does not provide any individually air way billed traffic services, that its operations consist predominantly of wet leases to other carriers, and that it does not compete today in any scheduled service market.³³

Arrow and Evergreen, in their arguments, want the Department to consider their experience. We have in fact done so. Arrow is not currently operating scheduled service in Asia, and has not presented evidence in this proceeding that it has ever provided scheduled service in that region. Furthermore, it has not presented information that satisfies our serious reservations about whether it will have the aircraft needed to operate its proposed service. In its response to our tentative decision, it states that it has entered into a "legally binding contract, a wet lease agreement, to utilize a B-747 aircraft."³⁴ We note that Arrow proposed to use, and needs to have, at least two large aircraft to operate its proposed service. As to Evergreen, we find a carrier that provides charter service rather than scheduled service, and has offices in Beijing and Hong Kong.³⁵ We are not convinced that these two elements render it superior to Polar, which offers a range of advantages including active, ongoing Asia-Pacific scheduled service experience.

We find that the advantages presented by Polar's Incheon hub and its networking make it the compelling choice. These advantages, the record demonstrates, should strengthen its ability to be a competitive presence in the market by providing it with a valuable resource to reduce adverse impacts of seasonality and directionality in the market, while continuing to provide shippers with the options they need.³⁶ Although Gemini says that there is no proof that Polar's hub is entitled to decisional weight in this proceeding, the record shows that FedEx, Northwest, and UPS have Asian cargo hubs, and that these incumbents make extensive use of those hubs to serve China.³⁷ In these circumstances,

³³ Polar Answer of July 6, at 3, 11.

³⁴ Arrow Objection at 3.

³⁵ Evergreen Objections at 2, 4.

³⁶ Polar Answer to Objections of July 6, at 9; Polar Supplemental Information of August 2, Exhibits PO-3 – PO-5.

³⁷ Application of FedEx, Exhibits FX-1 – FX-3; UPS Consolidated Answer of July 6, Exhibits 2, 3; Northwest Submission of August 2, Exhibits NW-12–14, NW-21, NW-26.

an award to a new entrant that will also use its hub to serve China should improve that new entrant's chances of initiating and sustaining competitive service in a market where hubs have proven to be significant.

While the other applicants, especially Evergreen and Gemini, reassert the merits of their own proposals, they fail to demonstrate convincingly why those particularized attributes should outweigh the entire range of elements that, based on the circumstances presented, favor the selection of Polar. Gemini focuses much of its argument on capacity, citing its own 12 MD-11 flights, and alleging that Polar's B-747 U.S.-China capacity will be diluted by its traffic from the Incheon hub. We find nothing in the record persuasively demonstrating that Polar's capacity would not be sufficient to address shipper needs. Based on this record, we continue to believe that an award to Polar represents the best use of this additional all-cargo designation.

Therefore, we reaffirm our decision to select Polar and conclude that none of the other applicants for the new authority for scheduled operations to China have provided evidence that persuades us to alter our decision that Polar is the best applicant to provide new scheduled service in the U.S.-China market. We will issue Polar an experimental certificate of public convenience and necessity for scheduled foreign air transportation in the U.S.-China market.

We also affirm our decision to allocate Polar nine weekly frequencies for its services in the U.S.-China market, six weekly frequencies now, for 2004 services, and three additional weekly frequencies effective March 25, 2005. As noted in our tentative decision, we believe this number of frequencies is appropriate for this award, given the fact that a new entrant will be faced with enhanced competition from U.S. incumbents as well as substantial competition from foreign carriers.³⁸

The incumbent carriers have not persuaded us differently. While each notes that it began U.S.-China services with fewer frequencies, the market now is decidedly different with more competition from not only U.S. carriers but foreign ones as well. In the context of this proceeding, where 39 all-cargo frequencies are at issue, we do not view an award of nine frequencies, to be introduced over the course of two phases, as excessive. On the contrary, we affirm our view that giving a new entrant nine frequencies for operation of all-cargo service – less than one-seventh of the overall total of 59 frequencies for U.S. all-cargo services in the U.S.-China market – provides the carrier with needed resources to introduce, develop, and maintain a workable, competitive operation.³⁹ In so doing, the award will promote the public interest by introducing a viable new competitor to the all-cargo market.

³⁸ Order to Show Cause, OST-2004-18468 at 10.

³⁹ We need not address FedEx comments to the effect that we should not award additional frequencies to Polar in the recently announced 2005/2006 proceeding. We will make our determination on 2005/2006 allocations based on the record before us in the pending 2005/2006 proceeding.

Backup Award

While each of the other applicants for new authority argues that we should select a backup carrier in this proceeding, we are not persuaded to do so. Our standards in arriving at an appropriate backup selection are not necessarily identical to those that guide a primary selection. For example, for a backup award a carrier's ability to enter a market quickly and provide the type of service at issue with a minimum of preparation and modification to its existing pattern of operations can take on considerably greater weight. Thus, the absence of current scheduled Asia-Pacific all-cargo operations, already significant in the primary award context, becomes even more important here. Against this background, we do not find on the record before us a sound public interest basis to select any of the remaining applicants for a backup award.

Allocation of Frequencies Among Incumbents

We also affirm our decision to allocate twelve weekly frequencies each (six in 2004 and six in March 2005) to FedEx and UPS and to allocate six weekly frequencies (three in 2004 and three in March 2005) to Northwest.

As noted in our tentative decision, the U.S. all-cargo market is comprised of two distinct sectors — general air freight and express services — each with needs to be addressed. We said that with the frequencies that remained available we could address various carrier needs and the overall needs of the U.S.-China shipping public, as well as promote enhanced competition in each cargo sector. With that in mind, we tentatively awarded twelve frequencies each (six in each year) to FedEx and UPS. We noted that express carrier services typically require six weekly frequencies to meet the needs of the express cargo shipper and that both FedEx and UPS proposed new service options and additional capacity to and from the most important cargo gateways linked to their broader regional and global networks. We tentatively gave the remaining six frequencies to Northwest (three in each year). In doing so, we said that these frequencies, when combined with those allocated to Polar, would appreciably enhance U.S. carrier services in the general freight segment of the market. In allocating Northwest fewer than the 10 frequencies it requested, we said that we were cognizant of Northwest's ability to carry belly cargo in its scheduled combination services, as well as its ability to convert some combination frequencies to all-cargo frequencies.

FedEx and UPS support our awards to them, and Northwest objects to receiving only six frequencies.

We have seen nothing in Northwest's submissions following our show-cause order that would persuade us to change our proposed allocation. While Northwest argues that its allocation here would leave it as the U.S. carrier with the fewest weekly frequencies in the U.S.-China market, in fact it would be the carrier with the most at 29 frequencies. While a number of these frequencies are now being used for combination as opposed to

all-cargo services, we, contrary to Northwest, see these combination frequencies as decisionally significant. Indeed, we find material in the record that directly challenges Northwest's assertion that belly cargo capacity is effectively irrelevant.⁴⁰ Indeed, evidence in the record argues that Northwest's belly capacity is a competitive advantage that other all-cargo carriers do not have.⁴¹ Notwithstanding limitations on the availability of belly cargo capacity, we find that given the extent of Northwest's U.S.-China combination services, it still has significant cargo-carrying opportunities not available to the other all-cargo applicants in this proceeding. Similarly, Northwest has the ability to convert some combination services to all-cargo, another element not available to the other all-cargo applicants. In viewing the U.S.-China all-cargo market as a whole and weighing the relative merits of the applications before us for allocations, we therefore see the particular characteristics of Northwest's operating capabilities as entirely relevant to our determination. We are similarly unpersuaded by arguments that the proposed decision would allocate too many frequencies to the express cargo sector at the expense of general freight. We believe that the record supports the balance that we propose, especially when bearing in mind that UPS and FedEx can and do compete actively in the general freight market. We conclude that the allocation to Northwest of six frequencies is consistent with our objective in this proceeding of enhancing both general and express freight operations. Northwest further argued that nine weekly frequencies are too many to grant the new incumbent. As we said above, the Department holds that the allocation of nine weekly frequencies to Polar is also consistent with its objectives in this proceeding. Accordingly, the public interest calls for finalizing our tentative frequency allocations.

Miscellaneous

As noted above, we will issue Polar a certificate of public convenience and necessity which will be in the form of a five-year experimental certificate. As Polar has indicated it will begin services within 90 days of receipt of the authority, its certificate will include a condition that requires Polar to commence services no later than 90 days from the service date of the order issuing the certificate. With regard to Polar's request for *sua sponte* exemption authority pending issuance of our final decision, we do not regard such an exemption as necessary at this point in light of our intent to seek expedition in issuing this final decision.

To ensure that Northwest and UPS have the requisite underlying authority to use their frequencies over the routings they proposed, we will issue an exemption to Northwest for services between Anchorage and Shanghai as well as between Guangzhou and Anchorage, and we will issue an exemption to UPS for services between Anchorage and Guangzhou.

⁴⁰ See, e.g., August 9 Polar Consolidated Response at 19, PO-R-4; September 16 Answer of FedEx at 4.

⁴¹ Answer of FedEx to Objections of Northwest at 4; Consolidated Response of Polar at 19.

Consistent with our standard practice, we will require that the services using the frequencies awarded in this proceeding that are immediately available (August 1 frequencies) be instituted within 90 days from the date of service of the final order. We also will require that each of the 2005 frequencies issued in this proceeding be instituted no later than April 5, 2005.⁴² We also will require that the frequencies allocated in this proceeding be subject to our standard 90-day dormancy condition, wherein any frequency not operated for a period of 90 days (once inaugurated) would be deemed dormant.⁴³ Under the dormancy condition, if any of the frequencies allocated are not used for a period of 90 days (once inaugurated), the frequency allocation with respect to each frequency will expire automatically and the frequency will revert to the Department for reallocation. The dormancy condition applicable to the frequencies allocated here will begin on the required startup date, or in the case of the 2005 frequencies, the date the frequencies become available.⁴⁴

ACCORDINGLY,

1. We select Polar Air Cargo, Inc. to provide scheduled foreign air transportation of property and mail between a point or points in the United States, via any intermediate point, to a point or points in China open to scheduled international operations, and beyond to any points outside of China, with full traffic rights and issue Polar a certificate of public convenience and necessity in the form attached;
2. We allocate Polar nine weekly frequencies (six weekly frequencies for 2004 services and three weekly frequencies, effective March 25, 2005) for its proposed services, subject to the startup conditions and 90-day dormancy condition set forth in the body of this order;
3. We allocate twelve weekly frequencies to Federal Express Corporation (six weekly frequencies for 2004 services and six weekly frequencies effective March 25, 2005); twelve weekly frequencies to United Parcel Service Co. (six weekly frequencies for 2004 services and six weekly frequencies effective March 25, 2005); and six weekly frequencies to Northwest Airlines, Inc. (three weekly frequencies for 2004 services and three weekly frequencies effective March 25, 2005) — all subject to the startup conditions and 90-day dormancy condition set forth in the body of this order;

⁴² Absent good cause shown, should carriers fail to implement services by the dates specified, their frequencies will revert to the Department for reallocation. The 2005 frequencies become available March 25, 2005. Allowing carriers until April 5, 2005, to implement services with each of the frequencies allocated for March 2005 should give the carriers sufficient time to implement their proposed services with those frequencies.

⁴³ As all of the carriers in this proceeding have proposed year-round services, we have not included our dormancy condition proviso regarding seasonal service.

⁴⁴ We remind the carriers that the frequencies allocated represent valuable rights obtained in exchange for rights to Chinese carriers. Accordingly, the frequencies are allocated 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 forfeiture of the unused frequencies.

4. We grant Northwest Airlines, Inc. an exemption to provide scheduled foreign air transportation of property and mail between Anchorage, Alaska, and Shanghai, China and between Anchorage, Alaska and Guangzhou, China via intermediate points;
5. We grant United Parcel Service Co. an exemption to provide scheduled foreign air transportation of property and mail between Anchorage, Alaska and Guangzhou, China;
6. To the extent not granted, we deny all requests in the captioned docket;
7. Unless disapproved by the President of the United States under 49 U.S.C. 41307, this order and the attached certificate shall become effective upon the 61st day after its submission for section 41307 review, or upon the date of receipt of advice from the President or his designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove the Department's order under that section, whichever occurs earlier;⁴⁵
8. We will not entertain petitions for reconsideration of this order; and
9. We will serve this order on the parties to the captioned docket in this order; the Ambassador of the People's Republic of China in Washington, D.C.; the U.S. Department of State (Office of Aviation Negotiations), and the Federal Aviation Administration.

By:

KARAN K. BHATIA
Assistant Secretary
for Aviation and International Affairs

(SEAL)

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http://dms.dot.gov/reports/reports_aviation.asp*

⁴⁵ This order was submitted for section 41307 review on October 13, 2004. We have received notification that the President's designee under Executive Order 12597 and implementing regulations did not intend to disapprove the Department's order.



**Experimental Certificate of Public
Convenience and Necessity
for**

Route 820

This Certifies That

Polar Air Cargo, Inc.

is authorized, subject to the provisions of Subtitle VII of Title 49 of the United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in foreign air transportation of property and mail.

This Certificate is not transferable without the approval of the Department of Transportation.

By Direction of the Secretary

**Issued by Order 2004-10-8
On October 13, 2004
Effective on October 18, 2004**

**Karan K. Bhatia
Assistant Secretary for
Aviation and International Affairs**

Terms, Conditions, and Limitations

POLAR AIR CARGO, INC.

for Route 820

is authorized to engage in scheduled foreign air transportation of property and mail:

Between a point or points in the United States, via any intermediate points, to a point or points in China open to scheduled international operations, and beyond to any points outside of China, with full traffic rights.

This authority is subject to the following conditions:

- (1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.
- (2) The holder is not authorized to carry passengers (other than cargo attendants accompanying freight shipments).
- (3) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department of Transportation issued under them. To the extent that the holder has authority to serve more than one country or points in more than one country on the same route segment, that authority does not confer upon the holder any additional rights (including fifth-freedom intermediate and/or beyond rights) in limited-entry markets unless the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights. In such cases, the fact that the carrier may hold authority to serve the countries (points) at issue on the same segment will not be considered as providing any preference to the holder in a carrier selection proceeding.
- (4) The authority granted to serve intermediate and beyond points on this certificate is limited to countries with which the United States has signed open-skies agreements and/or countries for which the carrier holds authority to serve under certificates or exemptions issued by the Department, and for which it holds route integration authority under this certificate or by virtue of some other action of the Department.
- (5) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.

(6) The holder's authority under this certificate is effective only to the extent that such operations comply with all applicable requirements of the Federal Aviation Administration and with all applicable U.S. Government requirements concerning security, including, but not limited to, 40 CFR Part 1544. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) to or from a foreign airport, 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.

(7) The holder shall at all times remain a "Citizen of the United States," as required by 49 U.S.C. 40102(a) (15).

(8) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of 49 U.S.C. or the Department's regulations shall be sufficient grounds to revoke this certificate.

(9) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(l)), it must first comply with the requirements of 14 CFR 204.5.

(10) In the event the holder ceases all operations for which it was found "fit, willing, and able," its authority under this certificate shall be suspended under the terms of 14 CFR 204.7 and the holder may neither commence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

(11) The holder acknowledges that this certificate is granted to determine if the holder's projected services, efficiencies, methods, rates, fares, charges, and other projected results will, in fact, materialize and remain for a sustained period of time, and to determine whether the holder will provide the innovative and low-priced air transportation it proposed in its application for this authority.

(12) The holder may combine services authorized by this certificate with all services authorized by other Department of Transportation certificates and exemptions; provided that such operations are in compliance with the provisions of all applicable bilateral aviation agreements, and provided further that (a) nothing in the award of the route integration authority requested should be construed as conferring upon the holder additional rights (including fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless the holder first 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 this certificate by virtue of the

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route integration authority granted here, but that are not then being used by the holder, the holding of such authority by route integration will not be construed as providing any preference for the holder in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

This certificate shall become effective October 18, 2004. It shall expire January 16, 2005; provided, however, that if the holder inaugurates service under this certificate on or before that date, the authorization will continue in effect until January 16, 2010, unless the Department earlier suspends, modifies, or deletes the authority.

*This certificate is being issued to reflect award of new scheduled all-cargo authority to serve China.