Order 2004-6-9
Served: June 8, 2004

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

Issued by the Department of Transportation
on the **8th day of June, 2004**

Application of **PLANET SERVICE, INC.** Administrative Service Provider for the Applicable Trust and Participating Teams for an exemption from 49 U.S.C. §41101	**DOCKET OST-98-3557**

ORDER CONFIRMING EXEMPTION

Summary

By this order, we confirm our oral action of January 9, 2004, granting an exemption from 49 U.S.C. §41101 and applicable Department regulations to a Trust formed by certain teams of the National Basketball Association (NBA) and one National Hockey League (NHL) team under common ownership with one of the participating NBA teams (Participating Teams) to the extent necessary to engage in an aircraft lease and air service arrangement, as described in this order, with Grand Holdings, Inc. d/b/a Champion Air and/or (upon written notice to the Department) another Department-licensed Part 121 air carrier.

Background

By Order 98-4-29, the Department granted an exemption from 49 U.S.C. §41101 and applicable economic regulations of the Department to the Trust of NBA and NHL teams to the extent necessary to engage in an aircraft lease and air services arrangement with General Electric Capital Corp. (GE Capital) and Northwest Airlines, Inc.[1] Under the exemption, the Trust leased five specially configured aircraft from GE Capital, which were to be operated by Northwest to transport the Participating Teams, their staff, and guests to NBA and NHL games during their respective seasons. No passenger was charged for carriage on any of the flights. Under the terms of the arrangement, the Trust served as the contracting party on behalf of the Participating Teams

[1] We also exempted the Trust from 14 CFR Part 207, now recodified into 14 CFR Part 212, to the extent necessary to implement that proposed arrangement.

and Planet Service provided all of the administrative functions for the Trust. During the period when aircraft were not being used by the Participating Teams, Northwest was permitted to use the aircraft for *ad hoc* charters for a fixed monthly rental under an operating agreement between Northwest and the Trust, which had been reviewed by the Department. The Department concluded that an exemption was necessary because, under the contractual arrangements between the parties, the Trust was procuring air transportation and reselling it through its arrangement with GE Capital during the time that the aircraft was not being used by the Participating Teams, actions that required Department authority. Specifically, 49 U.S.C. §41102(a)(2) provides that any person who engages directly or indirectly in air transportation is deemed to be an air carrier; 49 U.S.C. §41101 requires any air carrier providing air transportation to hold a certificate of public convenience and necessity from the Department.

Application

By application dated December 19, 2003, Planet Service requested approval to replace the services of Northwest under the exemption granted by Order 98-4-29 with services operated by Champion Air. Planet stated that Northwest had terminated the program covered by Order 98-4-29 and that Planet, the Participating Teams, and the Trust sought to enter into an analogous arrangement with another Part 121 air carrier, Champion, for three years with options to extend the arrangement for two additional one-year periods.

As under the previous program with Northwest, Planet stated that the proposed program would use dedicated aircraft that are specially configured for the Participating Teams' use. Further, the Trust would sublease the same five aircraft that were used in the Northwest program to Champion and enter into a charter/operating arrangement with Champion for the five leased aircraft and one additional Champion aircraft to provide transportation for the Participating Teams to NBA and NHL games during their respective seasons. Under the agreement, Champion would provide transportation services and maintenance and repair services using all six aircraft. The six aircraft would be placed on Champion's operating certificate, and Champion, at all times, would have operational control of all of the aircraft for safety and other DOT/FAA regulatory compliance matters.

Moreover, as under the prior program, Planet would continue to serve as the administrative service provider for the Trust and the Participating Teams. The proposed structure would place Participating Teams in a direct contractual relationship, through the Trust, with Champion. Planet stated that during in-season team operations, only members, staff and guests of the Participating Teams would be transported on the flights and that no passenger would be charged for carriage on these flights.

For in-season team operations, Champion would charge the Trust a fee for transportation, maintenance and repair, and all other services with respect to the aircraft based on a block hour charge. According to Planet's letter, such rates would approximate Champion's costs associated with operating and maintaining the aircraft (including insurance) and all other relevant services, and would provide compensation to Champion for performing such services. The Trust would also pay a monthly charge for the Champion aircraft, and reimburse Champion for certain induc-

tion expenses and other out of pocket expenses (such as Transportation Security Administration compliance costs).

Similar to the previous arrangement with Northwest, Planet stated that it did not expect to fully utilize the aircraft for in-season team operations. Accordingly, Champion planned to optimize aircraft downtime during the in-season and off-season period by pursuing "ad-hoc" chartering opportunities. To be consistent with Department policy and the public interest, Planet stated that all charter operations would be subject to certain conditions and restrictions that are substantially similar to those approved by the Department in Order 98-4-29. Either a charter broker engaged by Champion, or Champion itself, would be solely responsible for marketing the aircraft for *ad hoc* charters. Any charter broker engaged by Champion would act solely as agent for Champion, and charter agreements would be made between Champion, as air carrier, and the charterer. Neither the Trust, the Participating Teams, the NBA nor the NHL, nor any of their officers, directors or employees, would be involved, directly or indirectly, in offering or marketing these charter services. Planet stated that these conditions as well as those below would be incorporated into the underlying agreement between the Trust and Champion.

According to Planet's request, Champion's primary obligation under the proposed agreement with the Trust would be to provide transportation of the Participating Teams to and from NBA and NHL games, and both parties agreed that Champion could schedule *ad hoc* charters, so long as those services did not conflict with team transport operations. Under the agreement, Champion agreed to confer with the Trust to ensure that Participating Teams' operations were not adversely affected by any proposed *ad hoc* charters, and Champion would not schedule any *ad hoc* charters within three hours of the departure or arrival of an in-season team flight or that would otherwise interfere with the use of the aircraft on flights scheduled for the Participating Teams. In addition, the agreement would provide that neither the Trust nor the Participating Teams would be involved, directly or indirectly, in offering or providing charter services to the public.

Planet further stated that Champion would retain sole discretion in the setting of rates charged to any *ad hoc* charter customer, and in no event would the Trust be entitled, in any given charter operation, to greater than 100% of the fixed charter rent. Champion and the Trust were to agree on an hourly rental and demurrage charge ("Charter Rent") by which Champion would pay the Trust for use of the aircraft for *ad hoc* charters during downtime in the in-season and off-season period.

Decision

After careful consideration, we granted Planet the requested exemption from the statute and the Department's regulations to engage in the transportation services and operating arrangement described in this order. We orally granted this authority on January 9, 2004, and confirm it by this order.

In taking this action, we found that the proposed transaction was consistent with the public interest. The request by Planet and the Trust effectively constitutes only a change in air service provider for the needed services and the new air service provider, Champion Air, has agreed to abide by the conditions set forth in Order 98-4-29. As under the Department's determination in Order 98-4-29 with respect to the previous arrangement with Northwest, the current arrangement

involves only the Participating Teams, through the Trust, contracting with Champion to serve as the contractor to operate their air service for their (and their guests') air transportation. Furthermore, and importantly, the *ad hoc* charters conducted would provide additional service options to the public and would be provided in full accordance with Department regulations. Champion will remain in full operational control of the aircraft and will be solely responsible for holding out the transportation to the traveling public for the *ad hoc* charters. Under these circumstances, consistent with the Department's findings in Order 98-4-29, we found no basis to be concerned that the proposed arrangement would contravene any Department policies regarding fitness or consumer protection or would otherwise be contrary to the public interest.[2]

Finally, we also granted the Trust's request to permit it to replace, or also use the services of other properly licensed air service providers, provided that such arrangements are consistent with the arrangements described in this order, and provided further that Planet and the Trust provide written notification in advance to the Department in this docket.[3] In all other respects, the exemption confirmed by this order is limited to the transaction described above for which we have reviewed the underlying draft operating agreement. In addition, the exemption is limited to the current NBA teams and the one identified NHL team. In the event that the Trust desires to expand the arrangement beyond that described above, especially with respect to the addition of new commonly owned teams from the NHL, it must first obtain approval from the Department. As under the exemption granted by Order 98-4-29, the parties may add additional NBA teams to the program as Participating Teams or contract for addition aircraft to be operated by Champion without seeking additional approval. We require, however, that any such changes or additions be provided to the Department by letter addressed to the Chief of the Department's Special Authorities Division and filed in this docket (Docket OST-98-3557).

Motion for Confidential Treatment

Planet Service filed a motion under Part 302, specifically 14 CFR 302.12, requesting that the Sublease and Charter Agreement and the February 24, 2004, Side Letter, as well as a Depository Agreement provided to the Department in conjunction with its exemption request be withheld from public disclosure. Planet states that the document contains sensitive commercial information, has not been disclosed to the public, and is not of a nature that ordinarily would be disclosed publicly, and that public dissemination of the document could adversely affect Planet

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[2] Planet's December 19, 2003, request also sought relief from the advance payment provisions of Part 212. Section 212.3(e) requires charterers to pay for charter transportation prior to provision of the air transportation. Planet had sought the relief from this provision to permit Champion to transport the Participating Teams, staff, and guests (primarily for playoff games) without the Trust making advance payment for the flights. Our oral award of January 9 deferred a decision on this portion of Planet's request. By letter dated April 15, Planet withdrew this request and confirmed that all payments for the Trust to Champion (including for playoff flights) would be made in accordance with the requirements of Part 212. Therefore, we will dismiss this portion of Planet's request.

[3] The notification should be in the form of a written letter addressed to Chief of the Department's Special Authorities Division and filed with the Department's Docket Operations and Media Management office, M-30, Room PL-401, in Docket OST-98-3557. Such notification should be made at least seven business days in advance of completing such additional arrangements and should include the name of the carrier and confirmation that the arrangements do not deviate from those under this authorization.

Service, the Trust and Champion, while providing unwarranted commercial advantages to third parties. Planet maintains that the document is exempt from disclosure under the Freedom of Information Act, (5 U.S.C. §552(B)(4)) and the Department's own regulations (49 CFR 7.13(c)(4)).

Rule 12 requires the Department to evaluate requests for confidential treatment in accordance with the standards of disclosure in the Freedom of Information Act. By this standard, information may be withheld from disclosure if it is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential." We have reviewed the documents and, with the exception of the Depository Agreement, find that they meet the standards for confidential treatment under the governing statute and our regulations. We therefore will grant Planet's motion with respect to those documents. We will dismiss Planet's request with respect to the Depository Agreement. That document is already a public document on file with the Department.

ACCORDINGLY,

1. We confirm our oral action of January 9, 2004, granting a Trust, formed by certain teams of the National Basketball Association and one National Hockey League team under common ownership with one of the participating NBA teams, an exemption from the requirements of 49 U.S.C. §41101 and applicable economic regulations of the Department to the extent necessary to engage in an aircraft lease and air services arrangement with General Electric Corp. and Grand Holdings, Inc. d/b/a Champion Air, as described in this order, or any other properly Department licensed Part 121 air carrier, *provided that* in the event of the latter, Planet has provided (i) confirmation that that the services of any other properly licensed carrier conform in all respects to the arrangement between the Trust and Champion Air approved by this order and those imposed by Order 98-4-29, and (ii) Planet and the Trust have provided written notification in advance of its arrangements with other Part 121 carriers;

2. We dismiss the December 19, 2003, request of Planet Service, Inc. for an exemption from the provisions of 14 CFR 212.3(e) of the Department's Economic Regulations;

3. We reserve the right to amend, modify, or revoke this authority at any time, at our discretion, without notice or hearing;

4. Planet Service, Inc, and the Trust must notify the Department as described in this order of significant changes in the program, including, but not limited to, additions or deletions of Participating Teams or the number of aircraft leased from GE Capital and/or Champion to be operated by Champion;

5. We grant the motion of Planet Service, Inc. under 14 CFR 302.12 for confidential treatment of the Sublease and Charter Agreement between the Trust and Champion Air and the February 24, 2004, Side Letter and dismiss its request for confidential treatment of Champion Air's Depository Agreement provided to the Department in conjunction with Planet's December 19, 2003, application; and

6. To the extent not granted or dismissed by this order, we deny all requests by Planet Service, Inc. in its request dated December 19, 2003.

Persons entitled to petition the Department for review of this action under Part 385 of the Department's regulations may file such petitions within seven (7) days of the date of service of this order. The authority confirmed by this order was effective when taken and the filing of a petition for review will not alter such effectiveness.

By:

RANDALL D. BENNETT
Director
Office of Aviation Analysis

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