

NEW



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

NOTICE OF ACTION TAKEN

September 8, 1998

This serves as interim notice to the public of the action described below, taken orally by the Department official indicated; the confirming order or other decision document will be issued as soon as possible.

Application of **Polar Air Cargo, Inc.**, filed **3/19/98** in Docket **OST-98-3652** for:

XX Exemption for two years under 49 U.S.C. §40109 to provide the following service:

Scheduled foreign air transportation of property and mail between points in the United States, and Jeddah, Saudi Arabia, via Ostend, Belgium, and Shannon, Ireland, and beyond Saudi Arabia to Johannesburg, South Africa; Harare, Zimbabwe; and Nairobi, Kenya. Polar also requests integration of its Saudi Arabia authority with its existing exemption and certificate authority. Polar states that it intends to serve Johannesburg and Nairobi on a blind-sector basis only until such time as service with full traffic rights is permitted under the U.S.-Saudi Arabia aviation agreement.

XX Allocation of two weekly U.S.-Saudi Arabia frequencies to perform the above service.

Federal Express filed an answer stating that the Department should defer action on Polar's application until the Department can determine whether Saudi Arabia will relax the existing frequency restriction of six weekly flights in the bilateral to permit Federal Express and Polar to operate collectively eight weekly flights.¹ Federal Express stated that it has been the only designated carrier for nine years and contends that it holds a de facto "grandfather" allocation, based on its historic and current operations. It stated that it currently does not need a frequency allocation since it is not serving the market with its own aircraft but that it plans to begin such service in the relatively near future, and that if Saudi Arabia is unwilling to permit more frequencies, then the Department should institute a proceeding to allocate the frequencies.

Polar replied that there is no reason to defer action on its application since it has immediate plans to serve the market and that Federal Express wants to control all the available frequencies even though it only serves Saudi Arabia via an interline connection at Dubai with a foreign carrier. While supporting a more liberal frequency regime, Polar maintains that the availability of additional frequencies should not be a prerequisite for granting its application. Finally, Polar states that its application is not mutually exclusive with Federal Express's existing service or any pending application

Applicant rep: **Jeffrey A. Manley (202) 637-9057** DOT Analyst: **Gerald Caolo (202) 366-2406**

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¹ Federal Express' pleading dated April 20, 1998, was accompanied by a motion for leave to file an otherwise unauthorized document. We granted the motion.

DISPOSITION

XX Granted (subject to conditions, see below)

The above actions were effective when taken: **September 8, 1998**. The exemption authority will remain effective through **September 8, 2000**; the frequency allocation will remain effective indefinitely provided that Polar continues to hold the necessary underlying economic authority to serve the U.S.-Saudi Arabia market.

XX Under assigned authority (14 CFR 385) by:

Paul L. Gretch, Director
Office of International Aviation
 (Petitions for review may be filed from now until
 10 days after the confirming order/letter issues.
 Filing of a petition shall not stay the effectiveness of
 this action.)

XX The authority granted is consistent with the aviation agreements between the United States and Saudi Arabia, the United States and Ireland, the United States and South Africa, and with the overall state of aviation relations between the United States and Zimbabwe, and between the United States and Kenya.

Except to the extent exempted or waived, this authority is subject to the terms, conditions, and limitations indicated:

XX Holder's certificate of public convenience and necessity
XX Standard Exemption Conditions (attached)

Conditions: Consistent with our standard practice, the frequency allocation awarded for Saudi Arabia service is subject to the condition that it will expire automatically and the frequencies will revert to the Department if they are not used for a period of 90 days.

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

Remarks: We were not persuaded by Federal Express' comments to withhold approval of Polar's application. The U.S.-Saudi Arabia aviation agreement specifically provides for Polar's proposed operations and Polar has firm plans to use the frequencies requested. Federal Express does not currently hold an allocation of frequencies either explicitly or on a "de facto" basis, and has not provided any recent direct service in the market. Should Federal Express develop firm plans to serve the market and seek a frequency allocation, we will consider its application at that time, including the issue of additional frequencies for its services, if necessary. In the meantime, it is not the

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Department's policy to let valuable, limited route opportunities go unused when a U.S. carrier has firm plans to use them. Federal Express has not persuaded us to deviate from that policy here. In these circumstances, we concluded that it was in the public interest to approve the bilaterally authorized operations, subject to our standard dormancy condition.

*An electronic version of this document is available on the World Wide Web at:
<http://dms.dot.gov/general/orders/aviation.html>*

U.S. CARRIER
Standard Exemption Conditions

In the conduct of operations authorized by the attached order, the applicant(s) shall:

- (1) Hold at all times effective operating authority from the government of each country served;
- (2) Comply with applicable requirements concerning oversales contained in 14 CFR 250 (for scheduled operations, if authorized);
- (3) Comply with the requirements for reporting data contained in 14 CFR 241;
- (4) Comply with requirements for minimum insurance coverage, and for certifying that coverage to the Department, contained in 14 CFR 205;
- (5) Comply with the requirements of 14 CFR 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (6) Comply with the applicable requirements of the Federal Aviation Administration Regulations; and
- (7) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department of Transportation, with all applicable orders and regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

The authority granted shall be effective only during the period when the holder is in compliance with the conditions imposed above.