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Order 99-2-5



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

Issued by the Department of Transportation
on the 25th day of January, 1999

Served: February 10, 1999

Application of

CHEROKEE AIR, LTD.

for amendment of its foreign air carrier permit
under 49 U.S.C. section 41301

Docket OST 98-453 1-12

ORDER ISSUING AMENDED FOREIGN AIR CARRIER PERMIT

Summary

In this order we are issuing Cherokee Air, Ltd., a foreign air carrier of the Bahamas, an amended foreign air carrier permit under section 41301 of Title 49 of the U.S. code, to limit, at the carrier's request, its operations to those involving only small aircraft (i.e., aircraft designed to have a maximum passenger capacity of not more than 60 seats or a maximum payload capacity of not more than 18,000 pounds).

Background

Cherokee Air, Ltd. holds a currently-effective foreign air carrier permit, issued by Department Order 96-5-8, to conduct charter foreign air transportation of persons, property and mail, without limitation as to aircraft size, between any point or points in the Bahamas and any point or points in the United States. The permit is effective through May 6, 2001.

As a foreign air carrier which holds authority to conduct U.S. operations using any size aircraft, Cherokee Air was required under U.S. law (Public Law 105-148 (111 Stat. 2681), the Foreign Air Carrier Family Support Act), to develop and submit to the Department and the National Transportation Safety Board, no later than June 15, 1998, a plan to address the needs of families of passengers involved in aircraft accidents. This requirement

applies to all foreign carriers except those which have Department operating authority that limits operations to small-aircraft only.¹

Cherokee Air did not file the **required** family support plan. On October 1, 1998, the Department issued an Order to Show Cause (Order **98-10-3**) proposing to terminate the authority of Cherokee Air, and a number of other foreign carriers, because of their failure to file the required plans. That proceeding is awaiting final Department action.

Application

By application filed November 18, 1998, Cherokee Air requested the Department to amend its foreign air carrier permit to limit its operations to small aircraft only. That amendment, if approved by the Department, would have the effect of relieving Cherokee Air **from** the requirement to file a family support plan, under the exemption granted by Order 98-1-3 1.

In support of its request, Cherokee Air states that it conducts U.S. operations using only small aircraft, and that its Operations Specifications issued by the Federal Aviation Administration under 14 CFR Part 129 limit it to the use of such aircraft. It states that it did not believe that it needed to file a plan under the Foreign Air Carrier Family Support Act because it believed that the aircraft it operated qualified it, under the provisions of Order 98-1 -3 1, for the exemption from the filing requirement. It states that it now understands that in order for the exemption to apply to it, its foreign air carrier permit must contain a condition limiting it to the use of small aircraft, and **asks** that we amend its permit in this manner.

In addition, Cherokee Air states that all the evidentiary information contained in its application for its currently-effective foreign air carrier permit remains unchanged, and that it remains fit to conduct charter foreign air transportation between the **Bahamas** and Florida.

No answers were received to Cherokee's application.

¹ See Order 98-1-3 1, in which we exempted foreign air carriers which hold Department authority to conduct U.S. operations in foreign air transportation using only small aircraft (i.e., aircraft designed to have a maximum passenger capacity of not more than 60 seats or a maximum payload capacity of not more than 18,000 pounds), from the provisions of 49 U.S.C.41313.

Decision

We have reviewed the record and have decided to amend Cherokee Air's foreign air carrier permit in the manner it has requested, and to issue an amended permit using simplified Subpart Q **procedures**.² The public was informed of the application by a notice in the Federal Register and the Department's published weekly list of applications **filed**.³ The notice described the authority sought and gave interested persons an opportunity to submit evidence and objections to the award of the authority. Simplified procedures are appropriate in this case, because there are no material determinative issues of fact requiring other procedures.

We find that grant of the amended authority sought by Cherokee Air is in the public interest. As noted above, by Order 98-1-3 1 we exempted those foreign air carriers holding our authority to operate using only small aircraft **from** the requirement that they file family support plans under the Foreign Air Carrier Family Support Act. We took this action because the Aviation Disaster Family Assistance Act of 1996, which requires family assistance plans of U.S. carriers, limited the scope of its coverage to certificated U.S. air carriers, thus excluding, as a class, U.S. air taxi operators. The Foreign Air Carrier Family Support Act of 1997, however, made no distinction as to the size of aircraft operated by affected foreign carriers, thus technically requiring compliance **from** all such carriers, including those operating only **small**, air taxi-sized aircraft. However, the clear intent of the Foreign Air Carrier Family **Support** Act was to extend the coverage of the Aviation Disaster **Family** Assistance Act to comparably situated foreign air carriers, and not to expand that coverage to include an additional class of carrier that operates only small aircraft.

Cherokee Air, which operates only small aircraft, would have been covered by the exemption we granted in Order 98-1-3 1 but for the fact that, in obtaining its initial Department operating authority, it requested (and we granted) authority to operate without limitation as to **aircraft** size. By granting Cherokee Air the amended permit authority it requests here, we will conform that authority to the small-aircraft operations the carrier is actually conducting, and will enable it to take advantage of exemption relief we previously granted to this class of foreign air carriers.

Finally, we find that Cherokee Air remains operationally and financially fit to conduct the proposed operations, and substantially owned and effectively controlled by citizens of the Bahamas; and that adequate comity and reciprocity and our overall aviation relationship with the Bahamas support favorable action on Cherokee Air's request.

In view of the above, and all facts of record, we find and conclude that:

² 14 CFR §302.1701 et. *seq.* Under Rule 29 (b), we may, in our discretion, omit a tentative decision in proceedings under Subpart Q and proceed directly to a final decision.

³ 63 FR 66625, December 2, 1998.

1. It is in the public interest to issue Cherokee Air an amended foreign air carrier permit in the form attached;
2. Cherokee Air remains fit, willing and able properly to perform the foreign air transportation described in the attached permit and to conform to the provisions of the Act, and to our rules, regulations, and requirements;
3. The public interest requires that the exercise of the privileges granted by the permit should be subject to the terms, conditions, and limitations contained in the attached permit, and to such other reasonable terms, conditions, and limitations required by the public interest as we may prescribe;
4. The issuance of this amended foreign air carrier permit will not constitute a “major regulatory action” under the Energy Policy and Conservation Act of 1975, as defined in section 313.4(a)(1) of our Regulations;⁴ and
5. The public interest does not require an oral evidentiary hearing on the application.

ACCORDINGLY,

1. We issue, in the form attached, an amended foreign air carrier permit to Cherokee Air, Ltd., authorizing it to engage in foreign air transportation of persons, property, and mail between any point or points in the Bahamas and any point or points in Florida, using only small aircraft (i.e., aircraft designed to have a maximum passenger capacity of not more than 60 seats or a maximum payload capacity of not more than 18,000 pounds);
2. The exercise of the privileges granted above are subject to Cherokee Air’s compliance with the conditions listed in Attachment A;
3. To the extent not granted, we deny all requests for relief in Cherokee Air’s request in Docket OST 98-453 1;
4. Unless disapproved by the President of the United States under section 41307 of Title 49 of the U.S. Code, this order and the attached permit shall become effective on the 61 st day **after** 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**;⁵ and

⁴ This finding is based on the fact that the grant of this permit will not result in a near-term increase in **fuel** consumption in excess of 10 million gallons.

⁵ This order was submitted for section 41307 review on **January 25, 1999**.

On February 8, 1999, we received notification that the President's designee, under Executive Order 12597 and implementing regulations, did not intend to disapprove the Department's order.

5. We will serve a copy of this order on Cherokee Air, Ltd., the Ambassador of the Commonwealth of the Bahamas in Washington, D.C.; the Department of State; and the Federal Aviation Administration.

By :

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation and
International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
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SUMMARY
FOREIGN AIR CARRIER PERMIT APPLICATION
Docket OST 98-453 1

Cherokee Air, Ltd.

Flag: The Bahamas.

Federal Register Notice: 63 FR 66625, December 2, 1998.

Filing Date: November 18, 1998.

Authority Sought: Amendment of carrier's currently-effective foreign air carrier permit to limit its operations to those involving only small aircraft (i.e., aircraft designed to have a maximum passenger capacity of not more than 60 seats or a maximum payload capacity of not more than 18,000 pounds).

Pleadings: No answers were filed in response to Cherokee Air's application.

Public Interest: We find that the relief sought by Cherokee Air is warranted in the public interest, as it will conform its permit authority to the small-aircraft operations the carrier is . actually conducting, and will enable it to take advantage of relief we previously granted certain foreign air carriers (Order 98-1-3 1) **from** the requirement that they file family support plans under the provisions of the Foreign Air Carrier Family Support Act (49 U.S.C. 413 13).

Fitness: Cherokee Air has been in continuous operation since February, 1987, and has provided charter services between the Bahamas and the United States since 1990 (see Order 90-1 1-28). Cherokee Air's current foreign air carrier permit was granted by Order 96-5-8, and is effective through May 6, 2001, and the applicant has asserted that all the evidentiary information contained in its **application** for this permit (Docket 49 103) remain unchanged. The amendment at issue here would only have the effect of limiting the size of aircraft the carrier may operate under its currently effective authority.

DOT verifies compliance with 14 CFR Parts 203 (Warsaw liability waiver), 205 (insurance requirements), and 129 (FAA operations specifications).

Ownership and Control: Cherokee Air remains substantially owned and effectively controlled by citizens of the Bahamas.

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

*Permit to Foreign Air Carrier
as amended*

Cherokee Air, Ltd.

A Flag Carrier of the Bahamas

is authorized, subject to the following provisions, the provisions of Title 49 of the U.S. Code, and the orders, rules, and regulations of the Department of Transportation, to engage in charter foreign air transportation of persons, property and mail as follows:

Between any point or points in the Bahamas and any point or points in Florida.

The holder shall also be authorized to engage in other charter trips in foreign air transportation, subject to the terms, conditions, and limitations of the Department's regulations governing charters.

This permit and the exercise of the privileges granted in it shall be subject to the terms, conditions, and limitations attached, and to the following:

1. In the conduct of the operations authorized, the holder shall use only small aircraft (*i. e.*, aircraft designed to have a maximum passenger capacity of not more than 60 seats or a maximum payload capacity of not more than 18,000 pounds);
2. This permit shall be subject to all applicable provisions of any treaty, **convention**, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the holder's homeland are or shall become parties; and
3. This permit shall be subject to the condition that in the event any practice develops which the Department of Transportation regards as inimical to fair competition, the holder and the Department of Transportation will consult and will use their best efforts to agree upon modifications satisfactory to the Department of Transportation and the holder.

This permit shall be effective on February 8, 1999, and shall terminate May 6, 2001. However, this permit shall terminate upon the dissolution or liquidation of the holder to **which it was issued**. Authority under this permit shall be subject to termination at any time **if** the authority to conduct flight operations to and from the holder's homeland to any U.S. carrier authorized by the United States is denied, canceled, or unreasonably restricted; *provided, however*, that if during the period this permit is effective, the operation of the foreign air transportation authorized becomes the subject of any treaty, convention, or agreement to which the United States and the holder's homeland are or shall become **parties**, this permit shall continue in effect during the period provided in such treaty, convention, or agreement.

The Department of Transportation has executed this permit and affixed its seal on February 8, 1999.

By;

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation and
International Affairs

(SEAL)

FOREIGN AIR CARRIER CONDITIONS OF AUTHORITY

In the conduct of the operations authorized, the holder 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;
 - (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, comply (except as otherwise provided in the applicable bilateral agreement) 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 (formerly the Federal Aviation Act of 1958, as amended).