



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

Order 99-3-21

Served March 23,

1999

Issued by the Department of Transportation  
on the 23<sup>rd</sup> day of March, 1999

Application of

**AIR ARUBA, N.V.**

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

Dockets OST-96-1250  
OST-96-1146  
OST-95-110

## ORDER

### Summary

In this order we are reissuing the exemption authority held by Air Aruba, N.V. to conduct scheduled combination services between Aruba and the United States consistent with the bilateral aviation agreement between Aruba and the United States. We are taking this action in response to anticipated changes in Air Aruba's ownership and control.<sup>1</sup>

### Background

Air Aruba was formed in 1986 by the Government of Aruba, and has held Department authority since 1990.<sup>2</sup> In 1988, the Government of Aruba sold all of its interest in Air Aruba to local investors, but reacquired a two-thirds majority of the carrier in 1993. Most recently, on February 27, 1998, we granted Air Aruba exemption authority, for a period of two years, to engage in scheduled foreign air transportation of persons, property and mail consistent with our open-skies aviation agreement with Aruba.<sup>3</sup> At the time of our last renewal of Air Aruba's

<sup>1</sup> See July 22, 1997, Air Transport Agreement between the United States and Aruba, in force provisionally (the Agreement).

<sup>2</sup> See Order 90-5-3.

<sup>3</sup> Air Aruba holds Department exemption authority to engage in scheduled foreign air transportation of persons, property and mail from points behind Aruba via Aruba and intermediate points to a point or points in the United States and beyond; charter foreign air transportation pursuant to the Air Transport Agreement between the United States and Aruba; and other charters subject to Part 212 of our rules. See Order 98-3-16.

exemption authority, the Government of Aruba continued to own approximately two-thirds of the outstanding shares of Air Aruba.

## **Application**

By application filed February 10, 1999, Air Aruba seeks reissuance of its exemption authority to serve the United States, in view of the Government of Aruba's agreement to sell a major portion of the airline to private investors (the Investor Group). Air Aruba states that a condition of the sale is confirmation by the Department that closing of the transaction will not result in loss of Air Aruba's Department authority to serve the United States as a designated carrier of Aruba.

## **The Investor Group**

Air Aruba states that since 1993, the Government of Aruba has sought to recapitalize the airline through the sale of shares to private investors while giving top priority to preserving Air Aruba's status as the national carrier of Aruba. To that end, on October 27, 1998, the Government of Aruba and Air Aruba signed a Participation Agreement with Aserca C.A., a Venezuelan corporation and two Aruban corporations (ASSA Capital Services N.V. and ASSACA Investments N.V., collectively referred to as the Investor Group) which provided for the three companies to invest in Air Aruba.<sup>4</sup> Under the proposed arrangement, the Investor Group will collectively purchase Class B shares representing 70% of Air Aruba's equity capital. ASSA and ASSACA will each hold approximately 30% of the shares, and Aserca 10%. (Freedom Aviation Services Ltd., a British Virgin Island company, and Aserca affiliate, is also party to the agreement but will not hold any shares in Air Aruba.) The remaining 30% of the authorized share capital will be held in Class A shares principally by the Government of Aruba. Air Aruba states that the bylaws of Air Aruba will provide that the Board of Supervisory Directors will be comprised of 5 directors, 2 of whom are nominated by Class A shareholders and 3 by Class B shareholders.

Air Aruba states that despite the proposed sale of shares to the new investors, it is the position of Air Aruba and the Government of Aruba that Air Aruba will remain substantially owned and effectively controlled by homeland nationals. In support of its position, Air Aruba states that the Government of Aruba insisted on a number of conditions to the proposed arrangement which will provide the government with substantial control of the airline's corporate structure. Specifically, the Articles provide that holders of Class B shares can only be the Government of Aruba and/or corporations which Class A shareholders determine to be reputable aviation companies. The Articles also provide the government with a right of first refusal on any sale of Class B shares. Air Aruba states that the aforementioned provisions will allow the Government

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<sup>4</sup> Aserca is owned 5% by Simeón García, a Venezuelan citizen; and 95% by Migdalia García, a Venezuelan citizen, and sister of Simeón García. The two Aruban corporations (ASSA and ASSACA) are both wholly owned by Simeón García.

of Aruba to retain control over the ownership of Class B shares and the right to block disposition of such shares to persons it does not approve as reputable aviation companies.

Air Aruba further states that the Investor Group has agreed to retain the national character of the airline; Air Aruba will maintain Aruba as its principal place of business; and, as an Aruban-licensed carrier, Air Aruba's "operations will be performed in its own aircraft with its own crews under direct supervision and control of the Department of Civil Aviation of Aruba."

Air Aruba adds that should we conclude that a waiver of our ownership and control policy is warranted, it believes that the aviation relationships which exist between the United States and Aruba/Venezuela support such a waiver and that the Department should reissue Air Aruba exemption authority consistent with the Agreement. Air Aruba adds that in spite of the Venezuelan investment in Air Aruba by a Venezuelan airline, both companies will continue to be separate and independent companies, there are no plans to merge the companies, and Aserca cannot utilize Air Aruba "directly or indirectly" to conduct U.S. services that Aserca itself is not authorized to conduct.

## **Responsive Pleadings**

On February 24, 1999, Aeropostal Alas de Venezuela, C.A. (Aeropostal), a foreign air carrier of Venezuela, filed an answer in response to Air Aruba's request. Aeropostal states that, because it has a pending request with the Department to conduct certain reciprocal code-share operations with American Airlines in the U.S.-Venezuela market,<sup>5</sup> we must consider Air Aruba's request in the context of Air Aruba's relationship with Continental Airlines, and also the relationship it states exists between Continental Airlines and Aserca.<sup>6</sup> In that regard, Aeropostal states that because the Air Aruba/Continental code-share is "presumably" one aspect of a Continental/Aserca relationship, which Aeropostal alleges may in fact be a de facto code-share, we should not approve Air Aruba's instant application until we approve the Aeropostal/American code-share request. To support that view, Aeropostal provided solicitation material which Aeropostal believes demonstrates that Aserca, in conjunction with

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<sup>5</sup> See Docket OST-98-4911, filed December 14, 1998, containing the docketed request of American to conduct scheduled combination services between the United States and specified points in Venezuela. See, also, undocketed joint application of American and Aeropostal for statements of authorization to implement reciprocal codeshare services on routes between the United States and Venezuelan gateways and beyond the gateways to interior points in both countries.

<sup>6</sup> On February 12, 1999, Continental Airlines, Inc. and Air Aruba filed an undocketed application under Part 212 of our rules to conduct reciprocal code-share operations (99-78). Specifically, Continental seeks to place Air Aruba's designator code on Continental flights between Boston, Chicago, Honolulu, Las Vegas, Los Angeles, Montreal, San Francisco, Toronto and Washington, D.C., on the one hand, and Houston and Newark, on the other hand, and between Houston, on the one hand and Aruba, on the other. Air Aruba proposes to place Continental's code on Air Aruba flights between Aruba, on the one hand and Miami, Newark, Tampa and Caracas, on the other.

Air Aruba, is holding out Venezuela-U.S. service without the benefit of any Department authority.

On March 8, 1999, we received replies to Aeropostal's answer from Air Aruba and the Hillsborough County Aviation Department (the Tampa Parties).<sup>7</sup>

Air Aruba states that, contrary to Aeropostal's assertions, the issues raised by Aeropostal relate to Aeropostal's pending code share with American for services in the Venezuela-U.S. market, and have nothing to do with the efforts of Air Aruba and its government to privatize Air Aruba. Air Aruba further states that the solicitation material included in Aeropostal's answer does not demonstrate that Aserca is holding out U.S.-Venezuela service without the benefit of Department authority, but rather advertises Air Aruba's own Caracas-Miami service which Air Aruba has been performing for many years and for which it has Department authority.

The Tampa Parties support Air Aruba's requests for reissuance of its exemption authority as well as its proposed code share with Continental, and state that the continuation of Air Aruba's service in the Tampa-Aruba market is of utmost importance to the Tampa Bay community.

## **Decision**

We have decided to reissue Air Aruba's exemption authority, last granted February 27, 1998, and confirmed by Order 98-3-16, to engage in: scheduled foreign air transportation of persons, property and mail from points behind Aruba via Aruba and intermediate points to a point or points in the United States and beyond; charter foreign air transportation pursuant to the Air Transport Agreement between the United States and Aruba; and other charters subject to Part 212 of our rules. This reissued authority will be effective upon receipt of written notification to the Director, Office of International Aviation, that the transaction described above has been finalized.<sup>8</sup> The reissued authority will remain in effect through February 27, 2000 (coextensive with the term of Air Aruba's current exemption authority in Order 98-3-16). We find that our action here is consistent with the public interest.

As an initial matter, we note that in this application Air Aruba is not seeking operating authority beyond that which it already holds, and which we have already determined to be consistent with the open-skies aviation agreement between the United States and Aruba.<sup>9</sup>

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<sup>7</sup> The Tampa Parties' consolidated reply to the Air Aruba request in the above referenced dockets and the pending undocketed request of Continental and Air Aruba for code-share authority included a motion to file an otherwise unauthorized document. We will grant the motion.

<sup>8</sup> Pending that occurrence, Air Aruba's previously awarded exemption authority, *i.e.*, that granted Air Aruba on February 27, 1998, and confirmed by Order 98-3-16, shall remain in effect. It shall expire on the effectiveness of the reissued authority.

<sup>9</sup> See Order 98-3-16.

The principal issue before us here is the question of Air Aruba's ownership and control. In this regard, for many years, the United States government has followed a general policy, reflected in our bilateral aviation agreements, of requiring that substantial ownership and effective control of foreign air carriers operating to this country be vested in nationals of their home countries (see Article 3(2)(a) of the Agreement). At the same time, we have been prepared to waive that policy in specific cases where we have been able to find that the proposed non-homeland ownership and control would not be inimical to U.S. aviation policy or interests. While it appears that the Government of Aruba has taken steps to ensure that Air Aruba remains the flag carrier of that country, it is clear that Venezuelan interests will exercise considerable control over the day-to-day operations of the carrier. However, after giving careful consideration to all of the facts of this case, and taking into account our overall aviation relationships with Aruba and Venezuela, we have concluded that there is nothing in the proposed ownership and control of Air Aruba which would be inimical to U.S. aviation policy or interests. Therefore, we believe that to the extent a question exists regarding non-Aruban ownership and control of the airline, it is in the public interest to waive our ownership and control standards in this case and to reissue Air Aruba exemption authority consistent with the Agreement.

Having made the finding that nothing in the proposed ownership and control of Air Aruba would be inimical to U.S. aviation policy or interests, the fact remains that the primary investor in Air Aruba will be a foreign airline of another country with which we have a less liberal aviation relationship than we have with Aruba. While at this point we see no evidence of Aserca's ownership in Air Aruba resulting in the transfer of benefits to a Venezuelan airline which would otherwise not be available to a Venezuelan carrier under the U.S.-Venezuela bilateral aviation agreement, it is our intention to monitor Air Aruba's services to the United States. Should we subsequently determine that the Venezuelan involvement in Air Aruba is raising concerns that need to be addressed, we reserve the right to review the situation and take appropriate action. Indeed, we specifically point out that our decision here is subject to our standard proviso that "we may amend, modify or revoke this authority at any time without hearing."

We find that Air Aruba remains operationally and financially qualified to conduct the proposed services. Notwithstanding the changes in Air Aruba's ownership, nothing in the record suggests that Air Aruba will undergo significant changes which might otherwise affect Air Aruba's operational qualifications. Air Aruba will continue to be based in Aruba, and licensed by the government of Aruba which will be responsible for the safety oversight of Air Aruba operations.<sup>10</sup> Air Aruba states that its U.S. operations will be with Aruban-registered aircraft which will be maintained by Aruban personnel, and flown by Aruban flight crews. With respect to Air Aruba's financial qualifications, we believe that the new investors should bring

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<sup>10</sup> Aruba is a Category 1 country under the FAA's International Aviation Safety Assessment Program (IASA).

added financial strength to Air Aruba which will allow the carrier to continue its existing operations and to expand those services in the future.

Aeropostal has raised several issues regarding Air Aruba's request. Some of those issues relate to the pending Continental/Air Aruba code-share application. We note that Aeropostal has filed in response to that application, and we intend to address its comments in the context of that proceeding. We do not regard the matters it has raised in connection with the Continental/Air Aruba code share request as a basis to withhold action in the Air Aruba application before us here.

Nor are we persuaded by Aeropostal's view that the solicitation material discussed in its answer demonstrates that Aserca is holding out service to the United States without appropriate authority. The material indicates that the service described will be solely on Air Aruba, under a single Air Aruba flight number, and will stop in Aruba on the Caracas-Miami segment. Under its existing authority, Air Aruba is authorized to serve behind Aruba via Aruba and intermediate points to a point or points in the United States. Against this background, we do not regard the solicitation material as a basis to deny Air Aruba's application here.

In view of the above, we find that grant of the authority described above is consistent with the public interest and that our action our action does not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975.

**ACCORDINGLY,**

1. We reissue Air Aruba, N.V. exemption authority under § 40109 of Title 49 of the U.S. Code to engage in scheduled foreign air transportation of persons, property and mail from points behind Aruba via Aruba and intermediate points to a point or points in the United States and beyond; charter foreign air transportation pursuant to the Air Transport Agreement between the United States and Aruba; and other charters subject to Part 212 of our rules;
2. The authority granted in ordering paragraph 1 shall become effective upon receipt of written notification to the Director, Office of International Aviation (X-40) (with service on all parties to this proceeding and a copy transmitted to the DOT Docket Section), that the closing of the transaction described above has occurred; the authority will remain in effect through February 27, 2000;
3. The exemption authority granted Air Aruba on February 27, 1998, and confirmed by Order 98-3-16, shall expire upon effectiveness of the authority granted in ordering paragraph 1 above, or upon the effective date specified in the grant of February 27, 1998 (*i.e.*, February 27, 2000), whichever occurs first;

4. The authority granted in ordering paragraph 1 above is subject to the attached conditions and the July 22, 1997, Air Transport Agreement between the United States and Aruba, in force provisionally;
5. We grant the motion of the Hillsborough County Aviation Department to file an otherwise unauthorized document;
6. To the extent not granted, we deny any additional requests for relief in Dockets OST-96-1250, OST-96-1146, and OST-95-110;
7. We may amend, modify or revoke this authority at any time and without hearing; and
8. We will serve a copy of this order on Air Aruba, N.V.; Aeropostal Alas de Venezuela, C.A.; the Royal Netherlands Embassy in Washington, D.C.; the Government of Aruba; The Hillsborough County Aviation Department; the Department of State (Office of Aviation) and the Federal Aviation Administration (Miami-IFO).

By:

A. BRADLEY MIMS  
Acting Assistant Secretary for Aviation  
and International Affairs

(SEAL)

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