

Served; June 12, 2000



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

Issued by the Department of Transportation  
on the 3rd day of May, 2000

Joint Application of

**UNITED PARCEL SERVICE CO.**  
and  
**CHALLENGE AIR CARGO, INC.**

for approval of a transfer of route authority  
under 49 U.S.C. § 41105 (U.S.-Latin America  
all-cargo service) and related authorities

Docket OST-99-6345 - 22

In the Matter of the Applications of

**CHALLENGE AIR CARGO, INC.**

for an exemption pursuant to 49 U.S.C.  
§40109 and allocation of frequencies (U.S.-  
Latin America all-cargo service)

Dockets OST-96-1379 - 8  
OST-98-4277 - 4  
OST-99-5046 - 5

**FINAL ORDER**

**SUMMARY**

By this order we make final our tentative decision in Order 2000-3-2 and approve the Joint Application of United Parcel Service Co. (UPS) and Challenge Air Cargo (Challenge) for the transfer to UPS of Challenge's certificate and exemption authorities to provide scheduled all-cargo foreign air transportation between the United States and various countries in the Caribbean, Central America and South America area (Latin America). We also grant Challenge temporary exemption authority to permit Challenge to continue its operations in these markets until UPS is able to begin its own service.

## **BACKGROUND**

UPS and Challenge filed a joint application for transfer of Challenge's U.S.-Latin America all-cargo route authority to UPS.<sup>1</sup> The Joint Applicants also requested that UPS be granted authority to integrate this Latin America authority with its existing certificate and exemption authority. In conjunction with their application, the Joint Applicants requested that Challenge be granted interim exemption authority to keep serving the markets until UPS can inaugurate its own service. By Order 2000-3-2, we tentatively approved the application. Objections to our tentative decision were due March 20, 2000 and answers to objections were due March 27, 2000.

## **RESPONSIVE PLEADINGS**

The Challenge pilots filed an objection to our tentative decision.<sup>2</sup> The Joint Applicants filed an answer to the objection and the International Brotherhood of Teamsters (IBT) submitted a comment. The Challenge pilots filed a further pleading.<sup>3</sup>

The Challenge pilots state that the tentative decision is based on the Department's understanding that Challenge will operate as a charter carrier after the transition period but there is considerable evidence that Challenge will not operate at all after the transition period. The pilots argue that if Challenge does not operate, then two important considerations for approval have been compromised, *i.e.*, the viability of Challenge and the impact on airline employees. The pilots state that all the pilots will be losing their employment and that the Department should recognize this special circumstance and require that UPS integrate the Challenge employees into their company. The pilots further argue that Challenge has failed to abide by its contractual obligation under the labor agreement to engage in good faith efforts to protect crewmembers' positions in connection with any sale or merger. In this regard, the pilots state that they have sued the IBT because their union has not adequately represented them in securing employment with UPS.

In their reply, the Joint Applicants state that the pilots have not questioned the considerable public interest benefits cited in the tentative decision and are not objecting to the route transfer itself, but rather want the Department to reverse UPS' decision not to hire them. The Joint Applicants state that UPS is hiring about 90% of Challenge's employees, and that the management for sound business reasons has decided not to hire the remaining employees. Furthermore, they state that the pilots want the Department to impose obligations beyond those negotiated between Challenge and the IBT, and that a recently concluded supplemental

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<sup>1</sup> The certificate authority at issue involves scheduled all-cargo routes between various points in the United States and Barbados, Belize, Bolivia, Brazil (Miami), Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guadeloupe, Guatemala, Grenada, Guyana, Haiti, Honduras, Jamaica, Martinique, Netherlands Antilles, Nicaragua, Panama, Paraguay, Peru, Surinam, and Trinidad and Tobago. The exemption authority at issue involves scheduled all-cargo routes between various points in the United States and Brazil (from Dallas/Ft. Worth) and Venezuela.

<sup>2</sup> The Challenge pilots consist of all the pilots now employed by Challenge with the exception of one, as well as some retired pilots. Objection of Challenge pilots dated March 16, 2000, at 1.

<sup>3</sup> That pleading was filed after the comment period had closed and was not accompanied by a motion for leave to file an otherwise unauthorized document. In the interest of a complete record, we will accept the pleading.

agreement will provide approximately two million dollars more in separation pay to Challenge pilots. The Joint Applicants state that Challenge will be operating during the transition period while UPS seeks foreign government approvals to operate under the transferred authority, which could be a protracted period; and that Challenge had earlier stated that it had no specific plans for the period after the transition. Finally, they state that even if Challenge should cease service, the public interest requires approval of the transaction.

The IBT states that it has historically opposed the Department's policy to rely on collective bargaining rather than the imposition of labor protective provisions to remedy employee dislocations. Nevertheless, in this case, the IBT states that it has engaged in protracted negotiations to obtain protective conditions from Challenge and has obtained a significant protection agreement from Challenge to benefit the pilots, including a supplemental severance agreement. The IBT states that while it does not welcome any transaction that threatens employment dislocations, it is satisfied, given the specific circumstances present, that the above agreement will do much to alleviate the adverse effects of employment dislocations resulting from this transaction.

## **DECISION**

We have decided to make final our tentative decision in Order 2000-3-2 to approve the transfer of Challenge's Latin America authority to UPS and also to grant Challenge an interim exemption to permit it to continue operating its existing services until UPS is prepared to begin its own operations in the transferred markets.

The statute authorizing certificate transfers, 49 U.S.C. §41105, provides that no certificate may be transferred unless the Department approves the transfer as being consistent with the public interest. The Department has adopted as its public interest standard in such cases a policy of allowing proposed transfers, provided that they do not conflict with important international aviation policy objectives and are not otherwise inconsistent with the public interest.<sup>4</sup> In determining whether a transfer of route authority is consistent with the public interest, we must also consider three additional criteria: the effect of the transfer on the viability of each carrier; on competition in the domestic airline industry; and on the trade position of the United States in the international air transportation market.<sup>5</sup> Also, the Department has stated that it will carefully consider the impact of any proposed sale of route authority on airline workers.<sup>6</sup>

In our show-cause order, we tentatively found that the transfer of Challenge's Latin American route authorities met these criteria and would provide significant public benefits. We specifically noted that given UPS' more extensive route network and worldwide infrastructure, the

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<sup>4</sup> See, e.g., Joint Application of Northwest Airlines and Delta Air Lines, Order 95-4-41, p.3, Joint Application of Federal Express Corporation and Evergreen Airlines, Order 95-8-9, p. 4, and Joint Application of Federal Express Corporation and Florida West International, Order 97-10-23, p.4.

<sup>5</sup> The Department must also examine certificate transfer transactions to determine whether the parties to the transfer are U.S. citizens and are fit to hold their authority. *See* Federal Express, Order 89-3-21 at 7.

<sup>6</sup> *See, Initiative to Promote a Strong Competitive Aviation Industry*, January 1994.

introduction of UPS' services would provide valuable new service options to the public, and would provide more effective competition with U.S. and foreign carriers in the U.S.-Latin America market, and that these services would, therefore, more fully use valuable route opportunities under our bilateral aviation agreements with the countries involved. We also tentatively determined that the transfer would improve the viability of both carriers and would have an overall positive impact on airline employees due to the expansion of service at UPS that would result in additional job opportunities. In this regard, we noted that UPS planned to hire a number of the Challenge employees. In reaching this tentative conclusion, we fully considered the concerns raised by the Challenge pilots, including their request for the imposition of mandatory labor protective provisions (LPPs), and tentatively determined that approval of the application was warranted without the imposition of LPPs.

We have carefully considered the objections submitted and have concluded that they do not warrant modification of our tentative decision.

The Challenge pilots do not dispute any of the significant public benefits that we tentatively determined would result from the requested route transfer. Rather, they raise two arguments relating to the impact of the transfer on Challenge, and particularly on the Challenge pilots, that they believe justify reversal or modification of the Department's tentative decision.

First, the pilots argue that the Department's order errs in concluding that the transfer will have a positive impact on the viability of Challenge, maintaining that Challenge has effectively notified employees that the airline will not continue operations after the transitional service period, and, thus, that Challenge will no longer exist as an airline. The pilots have correctly noted that Challenge has not committed to any specific level of operations after the transfer of authority is completed. Indeed, we recognized that fact in our show-cause order. Specifically, we noted that Challenge had stated that it would continue to operate the Latin America routes during the transition period, and that upon consummation of the route transfer and UPS' commencement of service, it would consider at that time any plans for the scope of continued operations that it would conduct.<sup>7</sup> We also tentatively found that the transfer would significantly improve Challenge's overall financial condition, affording the carrier the ability to compete more effectively,<sup>8</sup> and the ability to restructure and to concentrate the scope of any operations.<sup>9</sup> These tentative findings, however, were not a determination on our part that Challenge would

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<sup>7</sup> See, **Supplement of Challenge**, dated November 8, 1999, at 4 and **Joint Answer of UPS and Challenge** dated March 27, 2000, at 5.

<sup>8</sup> We noted that Challenge states that it had current assets of \$19.7 million, current liabilities of \$35.5 million (for negative working capital of \$15.8 million, and a current ratio of 0.55:1), negative retained earnings of \$15.8 million and negative stockholder's equity of \$6.3 million, as of June 30, 1999. After completion of the transaction, Challenge stated that certain funds received will be used by Challenge to repay advances made by its owner, Mr. Peter Ullrich. Challenge forecasts that, upon completion of the transaction, it will have current assets of \$17.2 million, current liabilities of \$2.0 million (for positive working capital of \$15.2 million and a current ratio of 8.6:1), positive retained earnings of \$7.7 million, and total stockholder's equity of \$17.2 million. Order 2000-3-2, at 5 fn.8.

<sup>9</sup> Order 2000-3-2, at 5 and 6.

continue operations indefinitely, but rather that it would be in a stronger financial position to do so if it so chose. Nor were Challenge's continued operations a prerequisite for approval of the transfer. We based our tentative approval on the overall public interest of the transaction, of which the opportunity for Challenge to compete was one factor.<sup>10</sup> Even if the pilots are correct that Challenge will not continue operations after the transition period, we believe that the significant service and competitive benefits that would result from the transfer warrant approval of the carriers' applications.

Second, the pilots object to our tentative decision not to impose mandatory LPPs. They maintain that Challenge failed to negotiate in good faith with the pilots and that the pilot union, IBT, failed to represent their interests adequately with respect to employment issues in a sale/merger situation, and that these factors constitute special circumstances, justifying the imposition of LPPs in this case. The record in this proceeding shows that UPS is hiring 90% of the Challenge employees. Moreover, as we noted in our show-cause order, the expansion of UPS' services into Latin America will create jobs, having an overall positive impact on airline workers. Furthermore, it is clear from the record of this proceeding that collective bargaining provisions are in place to address employment issues and, as noted by the IBT, additional supplemental agreements also have been presented to the pilots relevant to these issues. In this regard, the IBT has stated that supplemental agreements provide an additional two million dollars in separation benefits.<sup>11</sup> While the Challenge pilots may not be satisfied with the provisions of these arrangements, we believe that the issues are more appropriately resolved through the collective bargaining process, not through our regulatory intervention.<sup>12</sup> We, therefore, affirm our decision not to impose mandatory LPPs in this case.<sup>13</sup>

Finally, we will make final our tentative decision in Order 2000-3-2 to award Challenge interim exemption authority to continue its Latin America operations for a period of six months while UPS obtains the necessary foreign government approvals to commence operations in its own right. This authorization will maintain U.S.-flag service in the markets and use valuable operating rights, pending commencement of UPS' service.<sup>14</sup>

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<sup>10</sup> See *American Airlines and Trans World Airlines U.S.-London Route Transfer*, Order 91-4-47 at 29, Docket 47320.

<sup>11</sup> See *Comment of IBT dated March 27, 2000*, at 2.

<sup>12</sup> In regard to the pilots' assertions concerning IBT's representation, we point out that we are not the proper forum to address this type of issue. In this connection, we note that the pilots have stated that they have already filed suit against the union on the labor representation issues. See, the *Objections of the Challenge pilots*, dated March 16, 2000, at 5. We note that the IBT states that it has participated in collective bargaining with Challenge on certain protective conditions for the pilots.

<sup>13</sup> See, *Order 2000-3-2*, at 6, fn. 12.

<sup>14</sup> As we stated in the show-cause order, should UPS need additional time implement its service, we would be prepared to entertain a request for extension of the transitional service authorization.

**ACCORDINGLY,**

1. We make final our tentative findings and conclusions in Order 2000-3-2;
2. We grant United Parcel Service Co. a certificate of public convenience and necessity, in the form attached, to reflect the transfer of the requested certificate authorities;
3. We cancel the certificates of public convenience and necessity issued to Challenge Air Cargo, Inc., for Routes 353, 626 and 711;
4. We transfer to United Parcel Service Co. the exemption authority and frequency allocations previously granted to Challenge Air Cargo by the Notice dated June 7, 1994, as amended by Order 97-8-20 (Ecuador frequency allocation) and the following Notices of Action Taken: June 24, 1998, Docket OST-96-1379 (Miami/San Juan-Caracas, Miami-Valencia/ Maracaibo),<sup>15</sup> August 14, 1998, Docket OST-98-4277 (Brazil frequency allocation), and May 5, 1999, Docket OST-99-5046 (Dallas/Ft. Worth-Venezuela/Brazil);<sup>16</sup>
5. We grant United Parcel Service Co. authority to integrate the above certificate and exemption authorities with its other certificate and exemption authority;
6. We grant Challenge Air Cargo interim exemption authority under 49 U.S.C. § 40109 to continue to provide scheduled all-cargo service between Miami, Florida, on the one hand, and Bolivia, Brazil, Colombia, the Dominican Republic, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru, and Venezuela, on the other, for a period of six months from the service date of this order;
7. We allocate on an interim basis 4.5 weekly widebody frequencies and 7 weekly narrowbody frequencies to Challenge Air Cargo to operate U.S.-Brazil and U.S.-Ecuador all-cargo flights, respectively, for a period of six months from the service date of this order;
8. The frequency allocations granted in ordering paragraphs 4 and 7 shall be subject to the condition that they will expire and the frequencies will revert automatically to the Department if they are not used for a period of 90 days;<sup>17</sup>

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<sup>15</sup> Challenge submitted an application on April 14, 2000 to renew its authority to serve Venezuela (Docket OST-96-1379). It also stated its intention to rely on 5 U.S.C. § 558(c), as implemented by Part 377 of the Department Regulations, to continue in effect its authorization to operate this service pending a final determination on this renewal application.

<sup>16</sup> Challenge was granted 4.5 weekly widebody frequencies for U.S-Brazil service (Notice of Action Taken dated August 14, 1998, Docket OST-98-4277). It was also granted 7 weekly narrowbody frequencies for U.S.-Ecuador service (Notice signed by the Director, Office of International Aviation, dated June 7, 1994 and Order 97-8-20).

<sup>17</sup> This condition is effectively immediately with respect to Challenge and shall become effective for United Parcel Service when it begins service in each respective market.

9. The frequency allocations granted in ordering paragraph 4 to UPS and in ordering paragraph 7 to Challenge will remain in effect, provided that these carriers continue to hold the necessary underlying authority to provide all-cargo service in these markets;

10. The authority granted in ordering paragraph 5 shall be subject to the terms, conditions and limitations in United Parcel Service's certificate of public convenience and necessity, including the route integration condition, and the authority granted UPS in ordering paragraph 4 and to Challenge in ordering paragraph 6 shall be subject to the attached Standard Exemption Conditions;

11. 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;<sup>18</sup>

12. To the extent not granted, we deny all requests in the captioned dockets; and

13. We will serve this order on all parties to the captioned dockets, the Ambassadors of Belize, Bolivia, Barbados, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guadeloupe, Guatemala, Grenada, Guyana, Haiti, Honduras, Jamaica, France (Martinique), Netherlands Antilles, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, and Venezuela in Washington, D.C.; the United States Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration (AFS-200).

By:

**A. BRADLEY MIMS**  
Deputy Assistant Secretary for  
Aviation and International Affairs

(SEAL)

*An electronic version of this notice is available on the World Wide Web at  
[http://dms.dot.gov/reports/reports\\_aviation.asp](http://dms.dot.gov/reports/reports_aviation.asp)*

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<sup>18</sup> This order was submitted for section 41307 review on May 3, 2000. On June 7, 2000, we received notification that the President's designee under Executive Order 12597 and implementing regulations did not intend to disapprove the Department's order.



**Certificate  
of Public Convenience and Necessity**

**For Route**

**795**

**This Certifies That**

**United Parcel Service Co**

**is authorized, subject to the provisions of Subtitle VII of Title 49 of 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 2000-6-7  
On May 3, 2000  
Effective on June 7, 2000**

**A. Bradley Mims  
Deputy Assistant Secretary for  
Aviation and International Affairs**

Terms, Conditions and Limitations

United Parcel Service Co., for **Route 795**

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

1. Between a point or points in the United States and:

Barbados	Guyana
Belize	Haiti
Bolivia	Honduras
Chile	Jamaica
Colombia	Martinique
Costa Rica	The Netherlands Antilles
Dominican Republic	Nicaragua
Ecuador	Panama
El Salvador	Paraguay
Grenada	Suriname
Guadeloupe	Trinidad and Tobago
Guatemala	

2. Between the coterminial points Miami, Florida, and Los Angeles, California; via intermediate points in Colombia, Ecuador, and Panama; and the coterminial points Manaus, Brasilia, Rio de Janeiro, Sao Paulo, Recife, Porto Alegre, Belem, Belo Horizonte, and Salvador, Brazil.

3. Between the coterminial points Houston, Texas, and Miami, Florida, and the coterminial points Lima and Iquitos, Peru.

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.

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\*This certificate is issued to reflect the transfer of various U.S.-Latin America route authorities on routes 353, 626, and 711 from Challenge Air Cargo to United Parcel Service.

- (2) The holder is not authorized to carry passengers (other than cargo attendants accompanying the 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 order 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 and has notified the foreign country(ies) involved that any such selected carrier(s) has the required authority. 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 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.
- (5) The holder's authority is effective only to the extent that such operations are also authorized by the Federal Aviation Administration, and comply with all FAA requirements concerning security.
- (6) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).
- (7) 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.
- (8) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.
- (9) In the event that 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 recommence 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.

(10) The holder may combine services on this certificate with all services authorized by other Department of Transportation certificates or exemptions, provided, that such operations are consistent with the 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 the holder's authority by virtue of the route integration authority granted here, but not being used, the holding of such authority by route integration will not be considered 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.

(11) The holder acknowledges that the authority granted on segment 2 and 3 above 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's authority on segment 2 shall expire on December 8, 2002, unless the Department earlier suspends, modifies, or deletes the authority.

(13) The holder's authority on segment 3 shall expire on October 2, 2001, unless the Department earlier suspends, modifies, or deletes the authority.

This certificate shall become effective June 7, 2000.

APPENDIX A

**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) Except as specifically exempted or otherwise provided for in a Department Order, 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, including all FAA requirements concerning security; 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.