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Order 2001-4-3

Served: April 4, 2001



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

Issued by the Department of Transportation
on the 4th day of April, 2001

Fitness Determination of

SUNAIR EXPRESS, LLC

as a commuter air carrier under section
49 U.S.C. 41738

Docket OST-00-8015 - 5

**ORDER TO SHOW CAUSE
PROPOSING ISSUANCE OF COMMUTER AIR CARRIER AUTHORITY**

Summary

By this order, we tentatively find that SunAir Express, LLC is a citizen of the United States and is fit, willing, and able to provide interstate scheduled passenger operations as a commuter air carrier.

Background

Section 41738 of Title 49 of the United States Code ("the Statute") and section 298.21(d) of the Department's Aviation Economic Regulations direct us to determine whether companies proposing to provide scheduled passenger service as commuter air carriers are "fit, willing, and able to perform the service," and to ensure that all operations relating to this service conform to the safety standards established by the Federal Aviation Administration (FAA). In making fitness findings, the Department uses a three-part test that reconciles the Airline Deregulation Act's liberal entry policy with Congress' concern for operational safety and consumer protection. The three areas of inquiry that must be addressed in order to determine a carrier's fitness are whether the applicant: (1) will have the managerial skills and technical ability to conduct the proposed operations, (2) has sufficient financial resources to commence the operations proposed without posing an undue risk to consumers or their funds, and (3) will comply with the Statute and regulations imposed by federal and state agencies. We must also determine that the applicant is a U.S. citizen.

On September 25, 2000, SunAir filed an application in Docket OST-00-8015 for authority to provide interstate scheduled passenger operations as a commuter air carrier pursuant to section 41738 of the Statute. SunAir accompanied its application with the fitness information required by section 204.3 of our regulations.¹

No answers were filed to the application and no other issues regarding the applicant have come to our attention. Under these circumstances, we propose to decide the issue of the applicant's fitness on the basis of the written record. Upon review of the information in the application and the safety and compliance information on the carrier received from the FAA, we tentatively conclude that SunAir is a U.S. citizen and has met the fitness test to conduct commuter operations. We will, however, give interested parties an opportunity to show cause why we should not adopt as final our tentative determination that SunAir is fit, willing, and able to provide commuter service.

The Company

SunAir, based in Redding, California, was organized on August 9, 2000, as Mountain States Aviation, LLC. Its name was changed to SunAir Express, LLC on September 7, 2000. SunAir holds a Part 135 certificate from the FAA and proposes to provide service in Northern California, focusing on flights from its home base in Redding to the cities of Ukiah, Sacramento and Oakland. It currently serves these points on an intrastate basis using one 9-seat Cessna Caravan.² SunAir will use the same aircraft in its commuter operations. The company's founder is Mr. James Koenig, who holds a 40 percent ownership interest in the carrier. The other owners of SunAir are Mr. Gary Armitage (40 percent), a certified financial planner and Larkspur Fund, Inc. (20 percent), a computer technology R&D firm based in Reno and owned by Joseph and Debra Barrus. Both Larkspur and Mr. Armitage are passive investors and hold no positions or other relationships with SunAir.

FITNESS

Managerial Competence

Mr. James S. Koenig, SunAir's founder and Chief Executive Officer, also serves as Managing Member of the LLC. Although Mr. Koenig's aviation experience is limited, he has several years of business experience including real estate acquisition, development and financing. From 1992 to the present, he has held the positions of President at Danville Financial Group, Ashland Mortgage Corporation, Discovery Mortgage, and currently serves as President of Asset Marketing, a management

¹ SunAir filed information supplementing its application on several occasions, most recently on March 14, 19 and 20.

² As an *intrastate* carrier, SunAir is prohibited from conducting any *interstate* operations, even those as an on-demand air taxi operator.

consulting firm. From October 1997 to April 1998, he was self-employed at Koenig Financial Services.

Mr. Andrew Krochmalny joined SunAir as its President in January 2001. He graduated from the University of Arizona with a degree in Mechanical Engineering in June 1983. From June 1983 to August 1997, he held engineering positions with Garrett Turbine Engine Company and AlliedSignal. From August 1997 to May 2000, Mr. Krochmalny was self-employed as a financial advisor, and was Project Manager with Asset Marketing from May 2000 to January 2001.

Mr. Garry Pohrman has served as SunAir's Director of Operations since August 2000. After being discharged from the U.S. Army in June 1971, where he specialized in electronics, he held various retail management and electronics-related positions. From August 1993 until joining SunAir, he served as Director of Operations with Iasco Flight Center and Ascot Aviation, both Part 135 on-demand air carriers. Mr. Pohrman holds an FAA Airline Transport Pilot license and has logged over 3,200 flight hours.

Mr. Larry Brown has served as SunAir's Director of Maintenance since August 2000. From June 1972 until December 1990, he was employed by Harrold Ford Company where he attained the position of Parts and Service Director. Since that time, his aviation-related experience has included self-employment as an aircraft mechanic (December 1993 to June 1994), owner of L. Brown Aircraft Repair (November 1998 to September 1999), and Director of Maintenance for Ascot Aviation (September 1999 to August 2000). Mr. Brown holds an FAA Airframe and Powerplant Mechanic certificate with Inspection Authorization.

Ms. Karen Casey, SunAir's Chief Pilot since August 2000, received her initial aviation training and FAA ratings at Air Gemini (August 1984 to November 1989) where she attained the position of Chief Pilot. She subsequently served with various air carriers including United Express, Pegasus Air, IASCO, Golden Eagle AirMed and Rocky Mountain Holdings as First Officer, Captain or Chief Pilot. She was also employed by the FAA as a Designated Pilot Examiner. She holds an FAA Airline Transport Pilot license and has logged over 7,400 flight hours.

As indicated above, although Mr. Koenig's aviation background is limited to his experience with SunAir, he possesses extensive business experience, and will devote approximately 10 percent of his time to the management of SunAir. Mr. Krochmalny has indicated that he will devote 100 percent of his time to SunAir. Although he does not have day-to-day airline operations experience, he has an extensive technical background and has worked with the FAA on the technical aspects of airline operations. Mr. Koenig states that he believes that the on-site management team is more than sufficiently capable of handling the day-to-day operations. Moreover, the FAA has

advised us that the carrier's key technical personnel are acceptable to it.³ Thus, we tentatively conclude that, taken as a whole, SunAir's management team will have the necessary managerial skills and technical capability to conduct the limited operations that it proposes.

Financial Condition and Operating Proposal

If granted the commuter authority it seeks, SunAir proposes to provide service in Northern California, focusing initially on flights from its home base in Redding to Ukiah, Sacramento and Oakland. It currently serves these points on an intrastate basis averaging two round trips per day using one leased Cessna Caravan which has a 15-passenger seat capacity, but is presently configured with 9 seats.

SunAir submitted a balance sheet as of February 28, 2001. The carrier has a current ratio of .8:1 with negative working capital of \$20,000. Although SunAir had a loss of \$173,000 for the two months of January and February, it had positive total equity of \$5,700.

SunAir has provided forecasts of its revenues and expenses for its first year of operations. The carrier will be using the same aircraft to provide its proposed commuter service that it is currently using to provide intrastate operations. SunAir estimates that it has, or will have, spent \$316,000 to cover expenses prior to commencement of actual commuter operations. SunAir projects first-year total operating revenues of \$1.246 million and total operating expenses of \$1.07 million based on a total of 150 hours of scheduled service per month. The carrier's estimates have been derived from information compiled by SunAir's management team using data from its current operations. We have reviewed SunAir's expense forecasts and find that they appear to be reasonable. Based on our analysis of its forecast, it appears that SunAir will need access to resources of at least \$603,000 to meet the Department's financial fitness criteria for its proposed commuter operations.⁴

The carrier has provided a letter from Asset Real Estate and Investment Co., which is owned by Mr. Koenig, pledging \$600,000 with no repayment required and no interest payments. This investment company has provided third-party verification from its bank

³ Before authorizing a carrier to conduct air transportation operations, the FAA also evaluates certain of the carrier's key personnel with respect to the minimum qualifications for those positions as prescribed in the Federal Aviation Regulations. The FAA's evaluation of these key personnel provides an added practical and in-person test of their skills and technical ability.

⁴ To meet the Department's financial fitness criteria, an applicant should have access to financial resources sufficient to cover its pre-operating expenses and the expenses that are reasonably projected to be incurred during three months of operations. The \$603,000 that SunAir requires was calculated based on one-fourth of the applicant's estimated total first year operating expenses (\$267,431) plus pre-operating costs of \$316,000. In addition, since SunAir's most recent balance sheet reflects a negative working capital balance of \$20,000, we have added that amount to the total required to meet our financial fitness criteria. In calculating available resources, projected revenues may not be used.

of the availability of the proposed funding.⁵ SunAir also has a line-of-credit of \$250,000 from the Redding Bank of Commerce.

In light of the above, we find that, if the proposed financing is received, SunAir will have access to resources sufficient to allow it to conduct the proposed commuter operations without posing an undue risk to consumers or their funds.

Compliance Disposition

SunAir appears to have a favorable compliance disposition. With one exception, our search of the Department's enforcement files found no record or problems involving this company, its owners, or its key personnel. In this regard, in conducting our review of the carrier's fitness, it was noted by Department staff that SunAir had placed on its Internet website statements leading readers to believe it would accept interstate air transportation contracts. According to the Department's Office of Aviation Enforcement and Proceedings, its review of the issue revealed that the information had been placed on the website in error. The Enforcement Office closed its investigation of the matter with a warning and has advised us that it knows of no reason why the company should not be found fit. The applicant states that there are no actions or outstanding judgments against it, its owners, or its key personnel, nor have any charges of unfair, deceptive or anti-competitive business practices, or of fraud, felony or antitrust violations been brought against any of these parties in the past ten years. SunAir further states that there have been no formal complaints filed in the past five years or orders issued in the past ten years finding it, its key personnel, or persons having a substantial interest in it to be in violation of the Statute or of the Federal Aviation Regulations.

The FAA has advised us that it is awaiting a favorable fitness determination prior to issuing Operations Specifications to SunAir to provide *interstate* scheduled passenger service. The FAA further indicates that it foresees no problem in issuing such authority to SunAir. In fact, the FAA has advised that SunAir has been doing a good job in its training and intrastate operations.

Based on the above, we tentatively conclude that SunAir has the proper regard for the laws, rules and regulations governing its proposed operations to ensure that its aircraft and personnel will conform to applicable safety standards and that acceptable consumer relations practices will be followed.

CITIZENSHIP

49 U.S.C. 41102 requires that authority to engage in air transportation be held only by citizens of the United States as defined in 49 U.S.C. 40102(a)(15). That section

⁵ Prior to making the company's authority effective, SunAir must provide third-party verification that it has, in fact, received the necessary funds to meet our financial fitness test.

requires that the president and two-thirds of the Board of Directors and other managing officers be U.S. citizens and that at least 75 percent of the outstanding voting stock be owned by U.S. citizens. We have also interpreted the Statute to mean that, as a factual matter, the carrier must actually be controlled by U.S. citizens.

All of the members of SunAir's Limited Liability Company are U.S. citizens. All of its key personnel are U.S. citizens. Moreover, SunAir has provided an affidavit attesting that it is a citizen of the United States within the meaning of the Statute and that it is actually controlled by U.S. citizens. Our review of the applicant has uncovered no reason to suggest that control of SunAir rests with non-U.S. citizens.

Based on the above, we tentatively conclude that SunAir is a citizen of the United States and is fit, willing, and able to provide the scheduled passenger service it proposes as a commuter air carrier.

OBJECTIONS

We will give interested persons 14 days following the service date of this order to show cause why the tentative findings and conclusions set forth here should not be made final; answers to objections will be due within 7 days thereafter. We expect that persons objecting to our tentative findings and conclusions will support their objections with relevant and material facts. We will not entertain general, vague, or unsupported objections. If no substantive objections are filed, we will issue an order that will make final our tentative findings and conclusions with respect to SunAir's fitness and commuter authority.

EFFECTIVE COMMUTER AUTHORIZATION CONDITIONS AND LIMITATIONS

In the event that we find SunAir fit, willing, and able to conduct the proposed commuter service, we will issue to it a Commuter Air Carrier Authorization. However, that authorization will not become effective until the carrier has fulfilled all requirements for effectiveness as set forth in the Terms, Conditions, and Limitations attached to its authorization.⁶ Among other things, this includes our receipt of evidence that the carrier has been issued Operations Specifications by the FAA authorizing scheduled passenger service under Part 135 of the Federal Aviation Regulations, evidence of liability insurance coverage that meets the requirements of Part 205 of our rules for commuter air carriers, and evidence that SunAir continues to have adequate financial resources available to it.

Moreover, given the relatively limited scope of SunAir's proposed operations and the somewhat limited aviation experience of its top management personnel, we will impose

⁶ We also reserve the right to stay the effectiveness of SunAir's authority if any new information becomes available to us that warrants such action.

certain limitations on SunAir's authorization to provide commuter air transportation. Also, our findings regarding the adequacy of SunAir's financial resources may not hold true if the company were to substantially change the scope of its operations. Thus, should SunAir propose to operate any aircraft with a seating capacity of more than 30 passenger seats, it must first be found fit by the Department to do so.

Furthermore, we remind SunAir of the requirements of 49 U.S.C. 41110(e). Specifically, that section requires that, once a carrier is found fit initially, it must remain fit in order to hold its authority. To be assured that commuter air carriers continue to be fit after effective authority has been issued to them, we require that they supply information describing any subsequent substantial changes they may undergo in areas affecting fitness. In this regard, should SunAir propose any substantial changes in its ownership, management, or operations, it must first comply with the requirements of section 204.5 of our rules.⁷ The compliance of the company with this requirement is essential if we are to carry out our responsibilities under the Statute.⁸

ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order finding that SunAir Express, LLC is fit, willing, and able under 49 U.S.C. 41738 to provide scheduled passenger service as a commuter air carrier.
2. We direct any interested persons having objections to the issuance of an order making final any of the proposed findings, conclusions, or the award of authority set forth here to file them with Department of Transportation Dockets, 400 Seventh Street, SW, Room PL-401, Washington, D.C. 20590, in Docket OST-00-8015, and serve them upon all persons listed in Attachment A no later than 14 calendar days after the service date of this order; answers to objections shall be filed no later than 7 calendar days thereafter.

⁷ The carrier may contact our Air Carrier Fitness Division to report proposed substantial changes in its operations, ownership, or management, and to determine what additional information, if any, will be required under section 204.5. Moreover, by notice dated July 21, 1998, the Department requested air carriers to provide a 30-day advance notification of any proposed change in ownership, restructuring, or recapitalization. If the carrier fails to file the information or if the information fails to demonstrate that the carrier will continue to be fit upon implementation of the substantial change, the Department may take such action as is appropriate, including enforcement action or steps to modify, suspend, or revoke the carrier's commuter authority.

⁸ We also remind SunAir about the requirements of section 204.7 of our rules. This section provides, among other things, that (1) the commuter authority granted to a company shall be revoked if the company does not commence actual flying operations under that authority within one year of the date of the Department's determination of its fitness; (2) if the company commences operations for which it was found fit and subsequently ceases such operations, it may not resume commuter operations unless its fitness has been redetermined; and (3) if the company does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

3. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action.⁹
4. In the event that no objections are filed, we will consider all further procedural steps to be waived, and we will enter an order making final our tentative findings and conclusions set out here and awarding SunAir Express, LLC a Commuter Air Carrier Authorization, subject to the attached specimen Terms, Conditions, and Limitations.
5. We will serve a copy of this order on the persons listed in Attachment A.
6. We will publish a summary of this order in the Federal Register.

By:

SUSAN MCDERMOTT
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

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

⁹ Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.



Specimen
Terms, Conditions, and Limitations

SUNAIR EXPRESS, LLC

is authorized to engage in scheduled passenger air transportation operations as a commuter air carrier.

This authority is subject to the following provisions:

- (1) The authority to conduct scheduled passenger operations will not become effective until six (business) days after the Department has received the following documents; provided, however, that the Department may stay the effectiveness of this authority at any time prior to that date:
 - (a) A copy of the holder's Air Carrier Certificate and Operations Specifications authorizing such operations from the Federal Aviation Administration (FAA).
 - (b) A certificate of insurance on OST Form 6410 evidencing liability insurance coverage meeting the requirements of 14 CFR 205.5(b) for all of its aircraft.
 - (c) A statement of any changes the holder has undergone in its ownership, key personnel, operating plans, financial posture, or compliance history, since the date of the Show Cause Order in this case.
 - (d) A revised list of pre-operating expenses already paid and those remaining to be paid, as well as independent verification that the holder has available to it funds sufficient to cover any remaining pre-operating expenses and to provide a working capital reserve equal to the operating costs that would be incurred in three months of operations.
- (2) Pending receipt of effective authority, the holder may not accept payment of any kind (i.e., cash, check, or credit card) or issue tickets for interstate scheduled passenger operations, and any advertisement or listing of flights by the holder must prominently state: "This service is subject to receipt of government operating authority."
- (3) The holder shall at all times conduct its operations in accordance with the requirements of 14 CFR Part 298 and any other regulations prescribed by the Department of Transportation for the services authorized here, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.

- (4) *The holder may not operate aircraft designed to have a maximum passenger capacity of more than 30 seats. In the event that the holder wishes to institute operations with aircraft having a larger capacity, it must be determined fit for such operations.*
- (5) *The holder's authority is effective only to the extent that such operations are also authorized by the FAA, 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 this authority ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this authority.*
- (8) *The holder shall maintain in effect at all times with the Department of Transportation current information on OST Registration Form 4507.*
- (9) *In the event that the holder receives effective scheduled passenger authority, the following additional conditions will apply:*
- (a) *The holder may reduce or terminate service at any point or between any two points, subject to compliance with the provisions of 49 U.S.C. 41734 and all orders and regulations issued by the Department of Transportation under that section.*
 - (b) *The holder may not provide scheduled passenger air transportation to or from Dallas (Love Field), Texas, except within the limits set forth in section 29 of the International Air Transportation Competition Act of 1979, as amended by section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998.*
- (10) *Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(l)), it must first comply with the requirements of 14 CFR 204.5.*
- (11) *In the event that the holder does not commence actual flying operations as a commuter air carrier under this authority within one year of the date of the Department's determination of its fitness, its commuter authority shall be revoked for dormancy. Further, in the event that the holder commences but subsequently ceases all scheduled passenger operations, the authority granted here 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 such operations within one year of its cessation, its commuter authority shall be revoked for dormancy.*

ATTACHMENT A

SERVICE LIST FOR SUNAIR EXPRESS, LLC

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