

127689



Order 2001-4-32

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

Issued by the Department of Transportation
on the 20th day of April, 2001

Served: April 30, 2001

2000 U.S.-BRAZIL ALL-CARGO SERVICE CASE

Docket OST-2000-7559 - 82

FINAL ORDER

Summary

By this order, we make final our tentative findings and conclusions set forth in Order 2001-3-27 and award Atlas Air, Inc. certificate authority for scheduled all-cargo service between Miami and Brazil and allocate it 10 weekly frequencies for its services.¹ We also make final our tentative selection of Gemini Air Cargo, Inc. for backup authority.

Background

Under the Air Transport Agreement between the United States and Brazil, four U.S. carriers may be authorized to operate scheduled all-cargo services. These carriers collectively may operate a maximum of 24 round-trip all-cargo wide-body frequencies per week between the United States and Brazil.² The three air carriers now designated for all-cargo services hold 14 of the 24 frequencies. This proceeding was instituted to select the fourth designated carrier for U.S.-Brazil all-cargo service and to allocate the ten available frequencies for U.S.-Brazil service.

By Order 2001-3-27, we tentatively selected Atlas Air, Inc. (Atlas) for the primary award and Gemini Air Cargo, Inc. (Gemini) for the backup award. Answers to the Department's tentative decision were due April 9, 2001, and replies, April 16, 2001.

¹ The tentative decision incorrectly referred to Atlas as Atlas Air Cargo, Inc. This order correctly reflects the carrier's name as Atlas Air, Inc.

² The agreement provides that the number of flights are expressed as units representing wide-body freighters. One or more freighters may be substituted by narrow-body freighters in a ratio of two (2) narrow-body frequencies equal one (1) wide-body frequency. The agreement provides that designated airlines may operate from a point or points in the United States via intermediate points, to Manaus, Brasilia, Rio de Janeiro, Sao Paulo, Recife, Porto Alegre, Belem, Belo Horizonte, and Salvador de Bahia, and beyond Brazil to Argentina, Uruguay, Paraguay, and Chile.

Responsive Pleadings

Gemini filed an answer to the tentative decision stating that it did not agree with the decision and findings in the show-cause order and reiterating its previous arguments. Nonetheless, Gemini stated that it waives further procedural steps and does not object to the entry of an order finalizing the tentative decision set forth in Order 2001-3-27.

Atlas filed a reply stating that the Department's decision is thorough and well-reasoned and that the Department should make final its selection of Atlas in this proceeding as soon as possible.

Decision

We have decided to make final our tentative findings and conclusions set forth in Order 2001-3-27 and select Atlas Air as the fourth designated carrier to provide scheduled all-cargo services in the Miami-Brazil market and Gemini as its backup.

Designating a fourth U.S. carrier for scheduled all-cargo services and allocating frequencies for U.S. carrier service in the U.S.-Brazil market represent valuable rights obtained in exchange for rights to Brazilian carriers. As noted in our show-cause order, our award to Atlas will permit the introduction of substantial new scheduled all-cargo service, increased competition, and enhanced public benefits.

We note that no party presented any new arguments that would lead us to a different result and that no party opposed making final our selection of Atlas for the primary award and Gemini for the backup award or our allocation to Atlas of 10 weekly frequencies for U.S.-Brazil all-cargo service. We will, therefore, make those selections final and will award Atlas the necessary certificate authority and frequency allocation for its proposed services and will award Gemini the necessary authority for a backup award.

Economic Authority

As we stated in our show-cause order, we will issue Atlas a five-year experimental certificate of public convenience and necessity authorizing all-cargo services to the points specified in its proposal and will issue Gemini a contingent certificate of one year's effectiveness for points specified in its proposal. We will require Atlas to institute service within 60 days from the service date of this order, and should Gemini's backup award be activated, we will require that carrier to institute service within 90 days of the activation of its backup award.

The allocation of frequencies to Atlas and to Gemini, if its certificate should be activated, will be subject to our standard 90-day dormancy condition, whereby the frequencies will become dormant and will revert automatically to the Department if they are not used for a period of 90 days once service under this award is inaugurated. The frequencies awarded here are for weekly operations. Failure to use the frequencies on a weekly basis will result in the forfeiture of the unused frequencies. We will further require that the inauguration of the awarded frequencies must occur no later than the 90th day after the required startup date in the carriers' certificates. Should the carrier not implement all of the flights upon commencement of services, it must notify the Department as to the inauguration of each frequency. Any frequencies not inaugurated within 90 days from the required startup date would automatically revert to the Department for reallocation.

ACCORDINGLY,

1. We make final our tentative findings and conclusions set forth in Order 2001-3-27;³
2. We select Atlas Air, Inc., for award of primary authority and issue it a certificate of public convenience and necessity in the form attached to engage in foreign scheduled all-cargo transportation between the terminal point Miami, Florida, on the one hand, via the intermediate point Lima, Peru, and the coterminal points, Manaus, Rio de Janeiro, and Sao Paulo, Brazil, on the other hand, and beyond Brazil to Santiago, Chile;
3. We select Gemini Air Cargo, Inc., for backup authority and issue it a backup certificate of public convenience and necessity in the form attached to engage in foreign scheduled all-cargo transportation between the coterminal points Miami, Florida, and New York, New York, on the one hand, via the intermediate point Medellin, Colombia, and the coterminal points Manaus, and Sao Paulo, Brazil, on the other hand, and beyond Brazil to Santiago, Chile;
4. We allocate Atlas Air, Inc., ten weekly frequencies to perform its proposed operations; and Gemini Air Cargo, Inc. ten weekly frequencies, on a backup basis, should its backup certificate become activated;⁴
5. The frequency allocations in ordering paragraph 4, above, are effective immediately and will remain in effect indefinitely, *provided that* the holder continues to hold the necessary underlying authority to serve the markets authorized; and *provided further* that any unused frequencies will become dormant and will revert automatically to the Department if unused for a period of 90 days;⁵
6. To the extent not granted, we deny all requests in the captioned docket;
7. 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;⁶

³ We find that Atlas Air, Inc. and Gemini Air Cargo, Inc. are fit to provide the authorized services. Atlas and Gemini have previously been found to be citizens of the United States and fit, willing, and able to provide scheduled foreign air transportation of property and mail as certificated air carriers under section 41102 of Title 49 U.S.C. See, e.g. Order 99-12-7. We further find that issuance of the certificates granted will result in a near-term increase of annual fuel consumption in excess of ten million gallons. As a result, our action constitutes a "major regulatory action" under the Energy, Policy, and Conservation Act of 1975, as defined by section 313.4(a)(1) of the Department's regulations. We find, however, that the service provided under the authority granted and resulting public benefits outweigh any adverse effects that may be caused by the increased fuel consumption.

⁴ Should Gemini's certificate become activated, six frequencies would be allocated for Miami-Brazil service and four frequencies would be allocated for New York-Brazil service.

⁵ The 90-day dormancy period will begin upon the carrier's implementation of services, such implementation to be in accordance with the startup provisions of the carrier's certificate of public convenience and necessity. Each carrier must inform the Department in writing in this docket of the date its services will begin within five days of implementation of its services.

⁶ This order was submitted for section 41307 review on April 20, 2001. On April 27, 2001, we received notification that the President's designee under Executive Order 12597 and implementing regulations did not intend to disapprove the Department's Order.

8. We will not entertain petitions for reconsideration of this order; and
9. We shall serve this order on Atlas Air, Inc.; Evergreen International Airlines, Inc.; Gemini Air Cargo, Inc.; the Houston Parties; the Ambassador of Brazil in Washington DC; the Federal Aviation Administration, and the U.S. Department of State (Office of Aviation Negotiations).

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/reports/reports_aviation.asp



**Experimental Certificate of
Public Convenience and Necessity
for**

Route 796

This Certifies That

Atlas Air, Inc.

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 the Direction of the Secretary

**Issued by Order 2001-4-32
On April 20, 2001
Effective on April 27, 2001**

**Susan McDermott
Deputy Assistant Secretary for
Aviation and International Affairs**

Terms, Conditions and Limitations

Atlas Air, Inc. **Route 796**

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

Between the terminal point Miami, Florida, on the one hand, via the intermediate point Lima, Peru, and the coterminal points Manaus, Rio de Janeiro, and Sao Paulo, Brazil, on the other hand, and beyond Brazil to Santiago, Chile.

This authority is subject to the following terms, conditions, and limitations:

- (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.
- (2) The holder is not authorized to carry passengers (other than cargo attendants accompanying 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 orders 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 (FAA), and comply with all FAA requirements concerning security.

*This certificate is being issued to reflect award of new scheduled all-cargo authority to serve Brazil.

- (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 Federal Aviation Act 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 acknowledges that this certificate 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 low-priced air transportation it proposed in its application authority.
- (11) The holder may combine services authorized by this certificate with all services authorized by other Department of Transportation certificates or exemptions; provided that such operations are in compliance with the provisions of all 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 us 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 this certificate by virtue of the route integration authority **granted here**, but not being used, the holding of such authority by route integration will not be construed 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.

This certificate shall become effective April 27, 2001. It shall expire June 26, 2001; provided, however, that if the holder inaugurates service under this certificate on or before that date, the authorization will continue in effect until April 27, 2006, unless the Department earlier suspends, modifies, or deletes the authority.



**Experimental Certificate of
Public Convenience and Necessity
(Backup Award)
for**

Route 797

This Certifies That

Gemini Air Cargo, Inc.

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 the Direction of the Secretary

**Issued by Order 2001-4-32
On April 20, 2001
Effective on (See Attached)**

**Susan McDermott
Deputy Assistant Secretary for
Aviation and International Affairs**

Terms, Conditions and Limitations

Gemini Air Cargo, Inc. **Route 797**

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

Between the coterminal points Miami, Florida, and New York, New York, on the one hand, via the intermediate point Medellin, Colombia, and the coterminal points Manaus and Sao Paulo, Brazil, on the other hand, and beyond Brazil to Santiago, Chile.

This authority is subject to the following terms, conditions, and limitations:

- (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.
- (2) The holder is not authorized to carry passengers (other than cargo attendants accompanying 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 orders 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 (FAA), and comply with all FAA requirements concerning security.

*This certificate is being issued to reflect award of backup authority to serve Brazil.

- (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 Federal Aviation Act 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 acknowledges that this certificate 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 low-priced air transportation it proposed in its application authority.
- (11) The holder may combine services authorized by this certificate with all services authorized by other Department of Transportation certificates or exemptions; provided that such operations are in compliance with the provisions of all 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 us 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 this certificate by virtue of the route integration authority **granted here**, but not being used, the holding of such authority by route integration will not be construed 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.

This certificate shall not become effective until the certificate authority of Atlas Air, Inc. in the Miami-Brazil market has expired or has been deleted or suspended, and it shall expire April 27, 2002; provided, however, that if this authority becomes effective before that date, it shall not expire until April 27, 2006, unless the holder fails to inaugurate service within 90 days of that effective date, in which case this certificate will expire on the 91st day.