



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

Docket: OST-2002-12683

Served: August 7, 2002

NOTICE

In the Matter of the 2002 U.S.-Brazil All-Cargo Service Proceeding

SUMMARY

By this Notice, we have decided to decline to require that incumbent U.S.-Brazil all-cargo carriers report on their U.S.-Brazil frequency utilization in the *2002 U.S.-Brazil All-Cargo Service Proceeding*, Docket OST-2002-12683.

DISCUSSION AND SUMMARY OF PLEADINGS

By Order 2002-6-20, the Department instituted the *2002 U.S.-Brazil All-Cargo Service Proceeding* to select a carrier for an authorization to be designated to serve the U.S.-Brazil all-cargo market and for allocation of four U.S.-Brazil all-cargo frequencies under the U.S.-Brazil aviation agreement. The instituting order established a procedural schedule for the submission of evidentiary material needed by the Department to make its selection(s), as follows: Applications by July 19, 2002; Direct Exhibits by August 2; Rebuttal Exhibits by August 16; and Briefs by August 30. Gemini Air Cargo, Evergreen International Airlines, and Amerijet International filed applications for the available authorization and an allocation of frequencies.

On July 31, 2002, Amerijet filed a letter in the above-captioned docket requesting that the Department require each all-cargo carrier currently designated to provide service in the U.S.-Brazil market (Federal Express, UPS, and Atlas/Polar) to submit, by no later than August 9, a complete description of their services in the U.S.-Brazil market for the period June 1, 2001 through May 31, 2002. In the alternative, Amerijet states that the incumbent carriers may agree to voluntarily submit the requested information for the record of the case.

By Notice dated August 1, 2002, in this Docket, we stated that we would treat Amerijet's letter as a motion, and we required that answers to Amerijet's letter be filed by August 5, 2002 and replies by August 6, 2002. Atlas/Polar and Evergreen filed answers. UPS, Amerijet, and Atlas/Polar filed replies.¹

¹On August 6, 2002, Amerijet filed a separate motion requesting that the Department issue an order directing Gemini and Evergreen to produce copies of their respective applications reportedly filed with the Air Transportation Stabilization Board seeking Federal loan guarantees pursuant to the Air Transportation Safety and System Stabilization Act, together with copies of all other related or supportive documents. Amerijet's motion requests that the Department shorten the answer period to its motion. Our regulations (14 CFR Part 302.11) would normally allow seven days for answers (*i.e.*, Thursday, August 15). However, to ensure that the issues raised by Amerijet's letter are addressed in an expedited manner, we will require that answers to Amerijet's motion be filed in the above-referenced docket by Friday, August 9, 2002. Any replies shall be filed by Monday, August 12, 2002.

In general, Atlas/Polar and UPS are opposed to Amerijet's request whereas Evergreen supports the request.

In its letter, Amerijet states that a relevant consideration in this or any other route proceeding is the degree to which incumbent carriers are and have been using frequencies allocated to them. Amerijet maintains that neither the Department nor the applicants in this case currently have access to that information, and that the T-100 reports do not allow the parties to determine completely and accurately the extent to which the incumbent carriers are and have been using their frequencies. Amerijet further indicates that dormancy information with respect to frequency utilization is unreliable.

Amerijet states that the Department's instituting order appears to have recognized this issue when it required that any incumbent carrier applicant include a complete description of its services in the market. In this regard, Amerijet notes that this information was not submitted since none of the incumbent carriers applied for additional frequencies. To help minimize any burden on the incumbent carriers, Amerijet requests that the incumbents submit the requested information by August 9, one week after directs and one week before rebuttals are due in this proceeding.

Atlas/Polar state that Amerijet's own letter indicates that the T-100 reports for the U.S.-Brazil market are available to all applicants in the proceeding, and that Amerijet has failed to specify the manner in which these T-100 reports are inadequate or how the information that Amerijet seeks would enhance the record of the proceeding. Moreover, Atlas/Polar contend that Amerijet's request expresses only a vague, general interest in determining U.S.-Brazil frequency usage, which does not validate the request for new information requirements.

Atlas/Polar further argue that incumbent carrier frequencies are beyond the scope of the proceeding. In this connection, Atlas/Polar state that this case arose because the Department decided to replace Polar's Brazil designation and reallocate its four frequencies. Atlas/Polar also note that the instituting order allowed for petitions for reconsideration, and none were filed.

UPS argues that Amerijet's request harkens back to the time of strict regulation when incumbents were required to provide extensive information about their existing services. UPS states that the burden of producing the data, when viewed in relation to its complete lack of relevance to the proceeding, warrants a denial of the request. UPS maintains that any information regarding frequency usage, aircraft routings, schedules, etc. has no bearing whatsoever on this proceeding since none of the applicants has requested any frequencies now held by incumbents. UPS also notes that it is too late in this proceeding for the requested information to be of use to the applicants, and that questions concerning confidentiality and business sensitive information need to be considered.

Evergreen states that it supports Amerijet's request, and that information concerning existing services could prove useful to the Department and the parties in this proceeding. Evergreen maintains that specific issues such as the need for service to intermediate points and interior U.S. points justify the filing of the requested information even though incumbents do not seek to increase Brazil service. Evergreen urges the Department to require incumbents to provide operational information by month and by direction and to identify all Brazilian, U.S., and third-country points

in their single-plane, U.S.-Brazil scheduled services for the period June 1, 2001 to May 31, 2002. Evergreen indicates that the Department required similar information by its June 21, 2000 Notice in the last U.S.-Brazil all-cargo proceeding.

In its reply, Atlas/Polar state that Evergreen's support of Amerijet's request similarly makes no claim that incumbent operational data would affect the applicants' service proposals or the Department's decision in any way. While the Department required the submission of U.S.-Brazil all-cargo frequency utilization data two years ago, Atlas/Polar maintain that that precedent is not relevant here because there has been no suggestion (let alone proof) that the incumbents have not been using their frequencies, as was the case two years ago. Atlas/Polar note that the Department has already determined that Polar's designation and four frequencies will be the issue of the current Brazil proceeding.

In its reply, Amerijet states that historical precedent shows that in virtually every proceeding where the issuance of additional certificates is at issue, the incumbent carrier(s) are called upon to provide data with respect to the market(s) at issue. Amerijet maintains that if, as Atlas/Polar suggest, the T-100 reports are sufficient, then incumbent carriers would never be called upon to submit market information in route proceedings. According to Amerijet, it and the other applicants in this case must be able to examine market information in the possession of Atlas/Polar, FedEx, and UPS in order to best determine the nature of the need for additional service in the relevant market and sub-markets. Amerijet states that if, for example, the wide-body operators in the market are not and have not been fully utilizing frequencies, it is far more likely that the Department would support the selection of a carrier such as Amerijet, which would not simply add new additional capacity between major terminals, but would expand its base scheduled system in the region into Brazil.

DECISION

This proceeding began shortly after the Department approved a *de facto* route transfer between Atlas and Polar, but did not approve the transfer of Polar's Brazil designation and four frequencies.² The Department found that the transaction with respect to Polar's Brazil authority would not be consistent with the public interest, as it would have resulted in half of the four available designations for all-cargo service and over half of the 24 available frequencies in the U.S.-Brazil market being under single corporate control. Against this background, the Department subsequently instituted the *2002 U.S.-Brazil All-Cargo Service Proceeding* in this docket to select a carrier for an authorization to be designated to serve the U.S.-Brazil all-cargo market and for allocation of four U.S.-Brazil all-cargo frequencies under the U.S.-Brazil aviation agreement.

The scope of the authority at issue was already well known at the time we instituted this case. In the circumstances presented, the instituting order did not include a general requirement that incumbent U.S.-Brazil all-cargo carriers report a complete description of their services in the market. Such a requirement would apply only to incumbents choosing to apply for an allocation of additional frequencies. Clearly, the Department would want to know how such an applicant had been using its own allocation before deciding on whether to award that applicant additional frequencies. However, each applicant in this case (Gemini, Evergreen, and Amerijet) is a non-incumbent carrier applying for the available designation and an allocation of frequencies. Neither

²See Order 2002-5-24. Atlas and Polar had reached an agreement under which the two carriers would be owned by the same company but continue to operate as separate airlines.

Amerijet nor Evergreen has presented any persuasive reason why it needs incumbent carrier data in order to make its affirmative case in this proceeding. Indeed, Amerijet's own request only contemplated that the incumbent carrier data be submitted one week *after* the direct exhibits in this case were due.

In these circumstances, we are not persuaded that the Department should require incumbent U.S.-Brazil all-cargo carriers to report on their current services in the market. We believe that such a requirement is unnecessary in this case, and we continue to believe that the applicants and the Department have access to the relevant information needed for, respectively, prosecuting and deciding this proceeding. For these reasons, we have decided that the public interest would be best served here by declining to require that incumbent carriers report on their U.S.-Brazil frequency utilization in this docket.

We will serve this notice on Gemini Air Cargo, Inc.; Evergreen International Airlines, Inc.; Amerijet International, Inc.; Federal Express Corporation; United Parcel Service Co.; and Atlas Air, Inc./Polar Air Cargo, Inc.

By:

Paul L. Gretch
Director, Office of International Aviation

(Seal)

Dated: August 7, 2002

*An electronic version of this order is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp*