



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

SERVED: July 26, 2002

Issued by the Department of Transportation
on the 26th day of July, 2002

Application of

UKRAINIAN CARGO AIRWAYS

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

Docket OST-2001-9937

ORDER GRANTING EXEMPTION

Summary

In this order we grant Ukrainian Cargo Airways, a foreign air carrier of Ukraine, an exemption from 49 U.S.C. § 41301 to conduct all-cargo charter foreign air transportation between Ukraine and the United States; and other all-cargo charters subject to the Department's rules.

Application

By application filed June 14, 2001, UCA requests an exemption from 49 U.S.C. § 41301 to engage in all-cargo charter foreign air transportation between Ukraine and the United States; and other all-cargo charters in accordance with the Department's rules.¹

In support of its application, UCA incorporates by reference the evidentiary information contained in its foreign air carrier permit application and states that (1) it is a government-owned enterprise of the Ukrainian Ministry of Defense; (2) it is wholly-owned and effectively controlled by Ukrainian nationals; (3) the authority it seeks is provided for in the bilateral aviation agreement in force between the United States and Ukraine, and (4) it is licensed and designated by its government to perform the proposed services.²

¹ UCA contemporaneously filed an application for a foreign air carrier permit to conduct the services at issue here in Docket OST-2001-9936. That application is pending.

² By diplomatic note dated January 22, 2001, Ukraine's Ministry of Transport (State Department of Aviation Transport) designated UCA to perform the services at issue here under Annex II of the June 5, 2000, Air Transport Agreement between Ukraine and the United States (the Agreement).

Responsive pleadings

Lynden Air Cargo, LLC., a U.S. certificated all-cargo carrier, filed an answer stating that it does not oppose UCA's request provided that UCA's charter operations are conducted in accordance with the numerical limitations of the governing bilateral aviation agreement and with noise compliant aircraft.³

UCA filed a reply stating that Lynden's opposition to UCA's request for extrabilateral authority is unfounded in view of the fact that UCA's request is only for rights provided for under the Agreement. UCA adds that to the extent that UCA might seek extrabilateral authority at a future date the Department will be in the position of considering such requests on a case-by-case basis. As to the aircraft operational issues raised by Lynden, UCA states that it is fully aware of the FAA's noise rule and states that the FAA's rule does not prohibit Stage 2 commercial aircraft operations outside the 48 contiguous United States. UCA further adds that one of its aircraft types, the AN-12 turboprop, is not affected by the FAA's noise rule.

Request for additional information

By letter dated June 25, 2001, we asked UCA to respond to a number of questions concerning its relationship with the Ukrainian military. We requested the information from UCA for the purpose of determining whether or not UCA is sufficiently independent of the Ukrainian military to warrant grant of the requested authority.⁴ The United States has long held that military aviation should not be permitted to compete with commercial airlines, because of the pervasive, undue competitive advantages enjoyed by a military organization.

By letter dated April 26, 2002, UCA responded to our request for additional information.⁵ UCA states, among other things, that while it is a state-owned enterprise of the Ukrainian Ministry of Defense, it remains financially independent of the state and receives no subsidies from its government. UCA further states that Ukrainian law, with some exceptions designed to protect state assets, prohibits government agencies from interfering in the business activities of independent enterprises such as UCA. UCA states that its directors have complete authority to conclude commercial arrangements with other commercial enterprises and with foreign governments; all of its employees are civilians, paid from revenues generated from UCA's commercial activities; all of its aircraft are civilian-registered; and, it only uses Krivyi Rig and Melitopol military airports for the storage of its non-use aircraft and does so on commercial terms available to other carriers which wish to store aircraft.

³ Lynden filed its answer on June 29, 2001, and amended it on July 1, 2001.

⁴ A copy of our June 25, 2001, letter was served on all parties to the case and was placed in Dockets OST-2001-9936 and 9937.

⁵ A copy of UCA's response was served on all parties and filed in Dockets OST-2001-9936/37.

Decision

We have decided to grant UCA an exemption from 49 U.S.C. § 41301 to conduct all-cargo charter services between Ukraine and the United States; and to perform other all-cargo charters in accordance with Part 212 of our rules. The authority granted will be effective for one year from the service date of this order.

Aviation relations between the United States and Ukraine are governed by a bilateral aviation agreement.⁶ However, since UCA filed its application on June 14, 2001, the Annexes to the Agreement, which serve as the basis for the all-cargo charter authority sought by UCA, have expired.⁷ While the Annexes have yet to be formally extended, both parties have been continuing to observe their provisions during the renewal process on a comity and reciprocity basis. Therefore, we believe that sufficient reciprocity exists with Ukraine to warrant grant of the requested authority.

We find that UCA is properly licensed and designated by the Government of Ukraine to perform the proposed services. Moreover, we find, based on the record before us, that UCA is sufficiently independent of the Ukrainian military to warrant grant of the requested authority. As noted above, UCA is a state-owned company, financially independent from the Government of Ukraine. UCA does not receive, or expect to receive, financial subsidy from its government. All of UCA's personnel, including its president, Andrey F. Kukin, are civilians. UCA states that the services it offers its government it also offers to other commercial enterprises doing business in Ukraine at comparable commercial rates.

Ownership and Control

The record in this proceeding supports a finding that UCA is substantially owned and effectively controlled by citizens of Ukraine. Specifically, UCA is a government-owned enterprise of the Ukrainian Ministry of Defense. All of UCA's key management personnel are citizens of Ukraine.

Financial and Operational Qualifications

We find that UCA is financially and operationally qualified to conduct the proposed services.⁸ The carrier has experienced management and appears financially sound. We have confirmed UCA's compliance with our aircraft liability insurance requirements.

⁶ See Air Transport Agreement between the United States and Ukraine, entered into force June 5, 2000.

⁷ The Annexes to the Agreement expired on December 31, 2001.

⁸ By memorandum dated June 10, 2002, the Federal Aviation Administration's Flight Standards Service, International Liaison Staff (AFS-50), notified us that it knew of no reason why we should act unfavorably on UCA's request.

Operational Conditions

In the conduct of the services authorized above, UCA must adhere to the conditions attached to this order, and must comply with FAA-approved flight routings for its cargo charter operations. To facilitate the establishment of satisfactory flight routings for UCA's charter operations, we will require that UCA obtain our prior approval under 14 CFR 212.9(d)(1) & (e) of our rules before conducting any charter operations authorized by this order. Finally, in the conduct of charter operations authorized by this order, UCA shall comply with all other applicable provisions of 14 CFR Part 212.

Concerns Raised by Lynden Air Cargo

Lynden raises concerns about possible charter operations beyond the numbers specified in the Annexes to the Agreement. As indicated above, the parties are continuing to observe the provisions of the Annexes, pending the renewal process, on a comity and reciprocity basis, and this would apply as well to the numerical charter limits. Charters outside the terms of the Annexes would be governed by comity and reciprocity in any event. Consequently, we will have the opportunity to assess the public interest merits of all UCA charter requests, and the extent of Ukrainian reciprocity, on a case-by-case basis. Lynden, along with other interested parties, will have the opportunity to comment on any such requests. As to the matter of aircraft noise compliance, this issue falls within the jurisdiction of the FAA, and the FAA will determine whether or not specific aircraft types UCA proposes to operate are suitable for operations to and from the United States.

In view of the above, and acting under authority assigned by the Department in its regulations, 14 CFR Part 385, we find that grant of this authority is consistent with the public interest, and that our action here does not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975.

ACCORDINGLY,

1. We grant Ukrainian Cargo Airways an exemption from § 41301 of Title 49 of the U.S. Code to permit it to conduct all-cargo charter foreign air transportation between Ukraine and the United States; and other all-cargo charters in accordance with Part 212 of our rules;
2. The authority granted above shall be effective for one year from the service date of this order;
3. In the conduct of the charter services authorized above, Ukrainian Cargo Airways must adhere to the conditions attached to this order, and FAA-approved flight routings,

4. We notify Ukrainian Cargo Airways, in accordance with §§ 212.9(d)(1) & (e) of the Department's rules, that it shall not perform any charter(s) unless specific authority in the form of a statement of authorization for such charter(s) has been granted by the Department;
5. Applications for statements of authorization required above shall be filed in accordance with the procedures set forth in § 212.10;
6. Copies of all applications filed in accordance with the authority granted above shall be simultaneously served on the Department of State and the Federal Aviation Administration (AIA-100);
7. To the extent not granted or deferred, we deny all requests for relief in this Docket;
8. We may amend, modify, or revoke this order at any time and without hearing; and
9. We shall serve a copy of this order on Ukrainian Cargo Airways; Lynden Air Cargo, LLC.; the Ambassador of Ukraine in the United States; the Federal Aviation Administration (New York IFO and Alaska Field Office); and the Department of State.

By:

READ C. VAN DE WATER
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*

FOREIGN AIR CARRIER CONDITIONS OF AUTHORITY

In the conduct of the operations authorized, the holder shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36 and with all applicable U.S. Government requirements concerning security;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are:

(a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or

(b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States.

In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;

(8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;

(9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;

(10) If charter operations are authorized, comply (except as otherwise provided in the applicable bilateral agreement) with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and

(11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code (formerly the Federal Aviation Act of 1958, as amended).