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Order 2001-9-16

Served: September 25, 2001



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

Issued by the Department of Transportation  
on the 25th day of September, 2001

Joint application of

**ATLAS AIR WORLDWIDE HOLDINGS, INC.,  
AIRLINE ACQUISITION CORP. I,  
ATLAS AIR, INC., and  
POLAR AIR CARGO, INC.**

Docket OST-01-10238 - 5

for an exemption from the provisions of 49 U.S.C.  
41105

**ORDER GRANTING EXEMPTION**

**Summary**

By this order, we exempt Atlas Air Worldwide Holdings, Inc., Airline Acquisition Corp. I, Atlas Air, Inc. (collectively, the Atlas parties), and Polar Air Cargo, Inc. (Polar) from the provisions of section 41105 of Title 49 of the United States Code (the Statute), subject to certain conditions.

**Background**

Atlas Air has held certificate authority to engage in interstate and foreign scheduled air transportation of property and mail since March 1993 (*see* Order 93-3-7, served March 5, 1993).<sup>1</sup> It currently operates 36 B747 aircraft to over 100 cities in 46 countries. Polar also holds certificate authority to engage in interstate and foreign scheduled air transportation of property and mail (*see* Order 94-7-12, served July 12, 1994)<sup>2</sup> and currently operates 19 B747 aircraft to over 100 cities in 19 countries.

<sup>1</sup> The foreign certificate issued to Atlas Air by Order 93-3-7 for Route 637 has been modified since its initial issuance, most recently by Order 99-12-7, and currently authorizes Atlas Air to serve 156 countries. In addition, Atlas Air holds certificate authority for Route 801 (Brazil) issued by Order 2001-4-32. Atlas Air also holds exemption authority to serve additional countries.

<sup>2</sup> The foreign certificate issued to Polar by Order 94-7-12 for Route 651 has been modified since its initial issuance, most recently by Order 99-12-7, and currently authorizes Polar to serve 97 countries. In addition, Polar holds temporary certificate authority for Route 696 (Brazil and Colombia) issued by Order 2001-4-15, Route 705 (Thailand) issued by Order 96-9-16, and Route 727 (Japan) issued by Order 98-6-22. Polar also holds exemption authority to serve additional countries.

On July 25, 2001, in accordance with the provisions of section 204.5 of our rules (14 CFR 204.5) that require air carriers to notify us of substantial changes affecting their operations, Atlas Air and Polar advised the Department that they had entered into an agreement whereby Atlas Air Worldwide Holdings, the parent of Atlas Air, would acquire all of the outstanding stock of Polar.<sup>3</sup> At the same time, the Atlas parties and Polar jointly filed the subject application for an exemption from section 41105 to the extent necessary to allow the acquisition of Polar to be completed prior to the Department's action on a contemporaneously filed *de facto* transfer application.<sup>4</sup> In support of this exemption request, the applicants state that, upon consummation of the transaction while both Atlas Air and Polar will be subsidiaries of Atlas Air Worldwide Holdings, each will remain separate airlines operated as such under separate brands; and that grant of the exemption request would be consistent with the past practice of the Department.

On August 9, 2001, answers to the exemption application were received from Gemini Air Cargo, Inc., and Evergreen International Airlines, Inc.<sup>5</sup> The Atlas parties and Polar filed a reply to these pleadings on August 15, 2001.<sup>6</sup>

*Gemini's Answer*

Gemini states that it strongly opposes the joint applicants' exemption request, as well as their *de facto* transfer request, insofar as Atlas Air and Polar both seek to retain authority to operate scheduled all-cargo service to Brazil. Gemini asks that the Department immediately require Atlas Air to surrender its certificate to operate to Brazil and simultaneously activate the backup certificate issued to Gemini by Order 2001-4-32. The carrier argues that grant of the requested exemption, which would allow the Atlas parties to consummate the proposed *de facto* route transfer, would have an obvious and instantaneous negative effect on competition among U.S. carriers in the U.S.-Brazil market.

In support of its position, Gemini notes that the United States can only designate four carriers to operate scheduled all-cargo service to Brazil, and those four carriers can collectively operate only 24 round-trip all-cargo wide-body frequencies per week between the U.S. and Brazil. Gemini further states that, as Atlas Air currently holds ten of these frequencies and Polar holds four frequencies, the proposed common ownership of these carriers would be highly anticompetitive and would deprive the public of benefits of the

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<sup>3</sup> This acquisition would be accomplished through Airline Acquisition Corp. I, a newly created subsidiary of Atlas Air Worldwide Holdings.

<sup>4</sup> On July 25, 2001, concurrent with their exemption application in Docket OST-01-10238, the Atlas parties and Polar jointly filed an application in Docket OST-01-10239 seeking the Department's approval under section 41105 of the Statute of the *de facto* transfer of the economic authorities held by Polar to Polar under the ownership of Atlas Air Worldwide Holdings, the parent of Atlas Air.

<sup>5</sup> Gemini and Evergreen have also filed answers in Docket OST-01-10239, the joint applicants' *de facto* transfer application.

<sup>6</sup> On August 29, the joint applicants filed a reply to the pleadings made by Gemini and Evergreen in the related *de facto* transfer application (Docket OST-01-10239).

competition that would be produced in this market by four independent U.S. scheduled airlines. In addition, Gemini argues that grant of the requested exemption, which would allow the immediate transfer of Polar's authority to Atlas Air, would effectively leave only one airline--Atlas Air/Polar--operating scheduled transportation of general cargo as Federal Express and UPS, the other two carriers with Brazil scheduled all-cargo authority, focus more on the expedited small package market than on general cargo.

Evergreen's Answer

In its filing, Evergreen states that it does not object to the Department's granting the exemption request, provided that, in doing so, such action does not prejudice the Department's later action on the parties' concurrently filed *de facto* transfer application with respect to the duplicative rights that would be held by Atlas Air and Polar in the U.S.-Brazil air cargo market.

Joint Applicants' Reply

On August 15, the joint applicants filed a consolidated reply to Gemini's and Evergreen's answers to their exemption request. In this reply, the joint applicants note that Evergreen does not object to the requested exemption so long as the Department follows its usual course of refusing to consider the exemption grant as a factor favoring the ultimate approval of the *de facto* route transfer.

With respect to Gemini's expressed opposition to the exemption request, as well as to the *de facto* route transfer, the joint applicants argue that while they strongly disagree with Gemini's characterization of the Brazil competitive ramifications of the common ownership of both Atlas Air and Polar, the deciding factor here should be that grant of the requested exemption is consistent with longstanding Departmental policy and precedent. This policy is to grant temporary exemptions from route transfer approval requirements in order to avoid delaying market transactions where the acquired carrier will be operated separately and the Department, therefore, would remain able to decide subsequently not to approve some part of the underlying route transfer.

**Decision**

We have carefully reviewed the arguments made by Gemini and Evergreen in their answers, particularly with respect to issues raised by the proposed *de facto* transfer of Polar's authority to serve Brazil. The position taken by Evergreen is consistent with the Department's past practice of granting exemptions to prevent undue interference with market forces while preserving our ability to make reasoned determinations on whether the permanent transfer of certain authority should be allowed. Any questions of competitive market structure are appropriately addressed on a factual record developed in the transfer proceeding. Moreover, nothing in Gemini's arguments has convinced us that our grant of the instant exemption would cause irreversible harm to Gemini or any other U.S. air carrier. Therefore, we will grant the applicants' request for an exemption from the provisions of section 41105 until we have ruled on the *de facto* transfer request. The joint applicants correctly noted that our grant of exemptions in cases such as this is contingent on the carriers involved--that is Atlas Air and Polar--remaining separate and independently

operated corporations until a ruling has been made in the underlying *de facto* transfer case. As we have previously held,<sup>7</sup> requiring the postponement of scheduled market transactions until the applicable regulatory process has been completed is not necessarily in the public interest and can be unjustly punitive. As long as Atlas Air and Polar remain separate entities, as is the applicants' intent, Atlas Air's parent could divest itself of Polar should we disapprove the proposed transfer either in whole or in part. Therefore, permitting the applicants to close on the acquisition pending an expeditious ruling on the *de facto* transfer will enable them to proceed with their merger plans yet avoids an irreversible situation.

The Atlas parties are cautioned, however, that any decision they make to proceed with the Polar acquisition is at their own risk. The joint applicants should not construe our grant of this exemption as a decision to approve the related *de facto* transfer application or any aspect of that application.

**ACCORDINGLY,**

1. We exempt Atlas Air Worldwide Holdings, Inc., Airline Acquisition Corp. I, Atlas Air, Inc., and Polar Air Cargo, Inc., from the provisions of section 41105 of the Statute, subject to the condition that Atlas Air, Inc., and Polar Air Cargo, Inc., shall be maintained as separate corporations.
2. This authority shall be effective until 90 days after the Department issues its final order on the joint application of Atlas Air Worldwide Holdings, Inc., Airline Acquisition Corp. I, Atlas Air, Inc., and Polar Air Cargo, Inc., in Docket OST-01-10239 for approval of a transfer of route authority under section 41105 of the Statute.
3. We may amend, modify, or revoke this order at any time and without hearing.
4. We will serve a copy of this order on the persons listed in Attachment A.

By:

**SUSAN MCDERMOTT**

Deputy Assistant Secretary for Aviation  
and International Affairs

(SEAL)

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<sup>7</sup> See Order 89-1-60, p. 4, Order 97-9-3, p. 3, Order 97-11-8, p. 5, and Order 99-4-5, p. 4.

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