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Order 96-2-17



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

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Issued by the Department of Transportation
on the 13th day of February, 1996

In the matter of

**U.S. -RUSSIA ALL-CARGO FREQUENCY
ALLOCATION CASE**

Docket OST-95-8771-20

OST-95-879-8
OST-95-880-8

Applications of

**EVERGREEN INTERNATIONAL
AIRLINES, INC.**

Dockets 49410149676

**for exemption authority under 49 U.S.C. section
40109**

FINAL ORDER ALLOCATING FREQUENCIES

Summary

By this order we modify our tentative decision in Order 95-11-9 and (a) allocate the sixteen weekly available frequencies for U.S.-Russia scheduled all-cargo service as follows: Polar Air Cargo-8 flights, Federal Express-5 flights, and Evergreen-3 flights, and (b) grant the necessary exemption authority to Polar Air, Evergreen International and Federal Express to conduct their proposed scheduled all-cargo service between the United States and Russia using their allotted frequencies.

Background

Under the Air Transport Agreement between the United States and Russia, three U.S. carriers may be designated to provide scheduled all-cargo service. Only two carriers may be designated to

¹ This case was originally docketed as Docket 50254. As a result of changes in our docket system, it has been assigned a new docket number, OST-95-877. Any further pleadings should refer to the new docket number.

provide such service in any one city-pair market. In addition, U.S. carriers are limited to operation of a total of 16 round-trip frequencies per week.

By Order 95-11-9, the Department proposed to grant exemption authority and to allocate the sixteen available frequencies among Polar Air Cargo, Evergreen International Airlines and Federal Express Corporation as follows--eight weekly frequencies to Polar Air Cargo and four weekly frequencies each to Evergreen International and Federal Express.² The Department also proposed to impose a 90-day dormancy condition on the frequency allocations such that each frequency allocation would expire automatically and the frequencies would revert back to the Department for reallocation if they were not used for a period of 90 days. The Department provided all interested parties an opportunity to file objections and answers to its tentative decision.

Objections/Answers to Show-Cause Order

Objections to the Department's Show-Cause order were filed by Federal Express and Evergreen; answers to the objections were filed by Federal Express, Evergreen, Polar and Northern Air Cargo.

Federal Express objects to the Department's tentative decision to allocate it only four of the five frequencies that it requested, arguing that five frequencies are critical to its ability to mount an effective express service in the market. Although Federal Express acknowledged that it had indicated that it would initiate service with two weekly flights and increase its service as the market developed, it now states that it is prepared to begin service at the full five-flight level.³ It further states that it uses the five weekly flight standard in all of its markets and that the Department's failure to grant its full application threatens to exclude express cargo services from this crucial market. Federal Express contends that Evergreen should not have been allocated four frequencies since it is not currently using its allocation and has not demonstrated firm plans to use its allocation. In this regard, Federal Express states that Evergreen has sold its China route to Federal Express and has not demonstrated that four weekly frequencies are necessary to use in conjunction with its Hong Kong services and, further, that Evergreen has a poor track record in successfully operating scheduled all-cargo services. In addition, Federal Express reiterates its request for an oral evidentiary hearing in this matter so that it may cross examine the other applicants in this case.

Evergreen objects to the Department's tentative decision only to the extent that the Department proposed a 90-day dormancy condition on the allocations. Evergreen maintains that a 90-day dormancy period is too brief to allow for seasonal fluctuations in demand and inappropriate considering the developmental nature of the market. Evergreen alternatively suggests a 180-day dormancy period. Evergreen objects to Federal Express' proposal that one of Evergreen's frequencies be reallocated to Federal Express. Evergreen maintains that it is currently serving Russia and will continue to do so in conjunction with its four weekly U.S.-Hong Kong flights, a

² See Order 95-11-9 for a description of the history of U.S.-Russia all-cargo frequency allocations and service.

³ November 24, 1995 Objection of Federal Express at 2.

scheduled all-cargo service that it has maintained for a number of years.⁴ It contends that Federal Express can and does use the services of Delta Air Lines and Aeroflot in the Russia market and could continue to do so for the one remaining frequency it contends is necessary for it to serve the Russia market effectively, and thus, that reallocation of Evergreen's frequencies is neither necessary nor warranted.

Polar Air urges the Department to finalize its decision with respect to Polar Air since no party has objected to its proposed allocation. Polar states that unlike Federal Express and Evergreen, it has immediate plans to use its frequencies and should not be delayed in its implementation pending resolution of the issues raised by Federal Express and Evergreen regarding their proposed allocations. Polar Air **also** states that it has no objection to the Department's proposed dormancy condition.

Federal Express objects to Evergreen's proposal for a longer dormancy period arguing that such a proposal demonstrates that Evergreen will not use and, therefore, should not be granted, its allocation of four weekly frequencies.

Northern Air Cargo supports the Department's proposed decision to limit the authorizations for a period of one-year and to subject the allocations to a 90-day dormancy condition. NAC, which holds authority to provide all-cargo service in the Russia market and had held a frequency allocation for such service, reiterates its interest in serving the market in the **future** and states that the Department's decision to ensure that dormant authority would be readily available to other carriers will ensure that other carriers, including NAC, would have the opportunity to serve should the plans of these carriers not be implemented.

Decision

We have decided to modify our tentative decision in Order 95-1 1-9 and will allocate the 16 available frequencies for U.S.-Russia all-cargo service as follows: eight weekly frequencies to Polar Air Cargo, five weekly frequencies to Federal Express and three weekly frequencies to Evergreen International. We will also grant each of the carriers the necessary exemption authority to conduct its proposed U.S.-Russia services with its allocated frequencies.⁵ The authorities granted will be effective immediately and will remain in effect for a period of one year from the date of service of this order.

In our show-cause order, we recognized that the market is a developmental one, in which, with the exception of Evergreen's intermittent once-weekly service to Khabarovsk, no U.S. carrier had

⁴ Evergreen also responded to statements in the Department's show-cause order that indicated that Evergreen had ceased operating its once-weekly flight in the market (Order 95-1 1-9 at 6 n.9). Evergreen states that it originally served Khabarovsk as a technical stop and that when there is no freight it continues to use it a technical stop, but that not all personnel may be aware that the carrier now has scheduled authority to serve Khabarovsk.

⁵ Based on data officially noticeable under rule 24(n) of our regulations, we find that all three carriers are qualified to provide these transportation services. All three have previously been found to be citizens of the United States and fit to provide scheduled foreign air transportation of property and mail. See, Order 95-1-4 1 for Polar, 95-6-26 for Federal Express, and Order 93-1-13 for Evergreen,

instituted regular all-cargo service since the rights became available in 1990. In these circumstances, we tentatively concluded that the market was best served by authorizing a variety of services and letting the market determine what services best meet demand. Given Polar's proposal to begin service immediately in conjunction with its currently operated flights, we tentatively found that its proposal would make effective and immediate use of the frequencies thereby ensuring that these valuable rights would not continue to be wasted. Therefore, we concluded that its request for allocation of eight of the weekly frequencies should be granted. Evergreen and Federal Express did not have as firm plans for implementation of their services. However, we concluded that both should be given the opportunity to test the market since both are experienced all-cargo carriers and both have experience in serving the Russia market--Federal Express through its **freight** forwarding (indirect air carrier) operations and Evergreen with its once-weekly cargo service in the Khabarovsk market. We tentatively found no basis to conclude that either carrier's proposal was superior to the other's and, thus, we tentatively determined that the remaining eight **frequencies** should be allocated equally between the two carriers,

The comments in this proceeding persuade us that our assessment of the market is correct and that our proposed allocations, with one exception, should be made final. Specifically, we are persuaded by Federal Express's arguments that we should revise our proposed allocations to award it five weekly frequencies and Evergreen three weekly flights. The Russia all-cargo market has been essentially unserved for a number of years. The record in this proceeding has demonstrated that the lack of service may have resulted from a number of obstacles that have militated against the operation of all-cargo services in the past. Indeed, both Federal Express and Evergreen have held frequencies that have not been used. However, it appears from the proposals in this proceeding that the operating environment in Russia has improved and will now support commencement of all-cargo services. Because of these changes, we believe that it is important that our allocations maximize the likelihood that the frequencies will now be used. Federal Express has proposed to offer the market express service, and has stated that this service requires more frequent operations to meet the needs of customers. It has also stated that whereas it once envisaged entering the market with fewer frequencies, it is now prepared to commence these operations at this five-flight level, and, indeed, could not otherwise provide the proposed express service. The other two applicants in this proceeding, Polar and Evergreen, would offer services directed more toward large shippers. Given our desire to offer a variety of service in the market? we are persuaded that Federal Express should be afforded the opportunity to implement its full proposal with an allocation of five weekly flights, thereby facilitating its ability to introduce express services in the Russia market,

We are unpersuaded by Evergreen's arguments that Federal Express should use the services of combination carriers in the market for the remaining frequency included in its service proposal. While the services of these carriers may be available to Federal Express, they would not afford the carrier sole control over its operations as would service with its own aircraft. ⁶

⁶ We will deny Federal Express's renewed request for an oral evidentiary hearing in this case. Federal Express has presented no basis for such a request other than its desire to cross examine witnesses for the other applicants. All of the parties to this case have had numerous opportunities during the application and show-cause proceeding to respond fully to comments and evidence presented by the other parties. Federal Express has presented no

Having determined that we will allocate five weekly flights to Federal Express, we must now determine how best to allocate the remaining eleven weekly frequencies between Polar Air and Evergreen. In our show-cause order, we concluded that Polar's proposal to implement its proposed services immediately, while Evergreen had indicated that it would phase in its operations, offered greater public benefits and should be granted in full. Indeed, no party objected to our tentative findings or opposed that proposed allocation. While Evergreen now states that it would offer Russia service on all of its Hong Kong or China flights (whichever it is flying at the time), we are not persuaded that Evergreen's proposal warrants modification of our proposed and uncontested award to Polar. In these circumstances, taking into account our dual objectives to make full and effective use of the available frequencies and to ensure a variety of service options to the shipping public, and all of the facts of record in this case, we find that the public interest is best served by allocating eight weekly frequencies to Polar Air Cargo, five weekly frequencies to Federal Express, and three weekly frequencies to Evergreen.

We recognize, however, that all of the services we are authorizing are developmental and that it is unclear how many of the authorized services will be successful. For this reason, we have limited our awards here to a period of one year and are fully prepared to reevaluate all of the allocations at the end of the one-year period. Moreover, we will finalize our proposal, which was unopposed, to subject all of the allocations to dormancy conditions, thereby ensuring that the frequencies can not be held if not used. Thus, should one or more of the carriers awarded frequencies here not implement its proposal, additional frequencies will be available to incumbent carriers to augment their services or to other carriers for new services.

In this regard, we are not persuaded by Evergreen's suggestion that we modify our proposed dormancy condition to extend the dormancy period from 90 to 180 days. The frequencies for U.S.-Russia all-cargo service represent valuable operating rights for U.S. carriers. We believe that the public interest warrants ensuring that these rights be readily available for carriers that are prepared to use them. The carriers being allocated frequencies here are free to seek relief from this condition to the extent that they believe circumstances warrant retention of their frequency allocations. However, we believe that the public interest is better served by considering such requests on a case-by-case basis rather than by a uniform extension of the dormancy period. In this manner the carriers allocated flights will have a full opportunity to serve the market; the Department, in turn, retains the important ability to authorize new services quickly should those services not materialize.

ACCORDINGLY,

1. We (a) renew the exemption authority of Evergreen International Airlines in Dockets 49410/49676 to provide scheduled foreign air transportation of property and mail (i) between Anchorage, Alaska and China via Khabarovsk and Petropavlovsk, Russia (without local traffic

evidence to demonstrate that these procedures have not produced an adequate record for our decision or that there are any material issues of fact that require an oral evidentiary hearing.

rights between China and Russia)⁷ and (ii) between Anchorage and Hong Kong via Khabarovsk and Petropavlovsk, Russia (without local traffic rights between Russia and Hong Kong) and (2) amend the number of weekly round-trip frequencies allocated Evergreen International from four to three weekly frequencies to operate the Anchorage-Russia service;

2. We grant Polar Air Cargo (a) exemption authority to provide scheduled foreign air transportation of property and mail (i) between New York, New York and Moscow, Russia via Prestwick, Scotland and (ii) between Anchorage and Khabarovsk via Seoul, Taipei, and Hong Kong and, (b) the authority to integrate the above service with the service authorized by its certificate of public convenience and necessity to the extent consistent with the relevant bilateral aviation agreements, and (c) an allocation of eight weekly round-trip frequencies to operate the above United States-Russia service;

3. We (a) grant Federal Express exemption authority to provide scheduled foreign air transportation of property and mail between the coterminal points New York, New York, and Memphis, Tennessee, on the one hand, and Moscow, Russia, on the other, via Paris, France and Frankfurt, Germany; and (b) amend the number of weekly round-trip frequencies allocated to Federal Express by Order 90-11-54 from six to five weekly round-trip frequencies to operate the above U.S.-Russia services;

4. Each of the frequency allocations granted by this order is subject to the condition that it will expire automatically and the frequencies will revert back to the Department for reallocation if they are not used for a period of 90 days;

5. The authorities and allocations granted above are effective immediately and will expire one year from the date of service of this order;

6. We revoke the allocation of one weekly frequency granted Northern Air Cargo, Inc., by Order 91-1-37;

7. We deny the request of Federal Express Corporation for an oral evidentiary hearing in Docket OST-95-877;

8. Except to the extent granted or otherwise denied, we deny all remaining requests in the captioned dockets; and

⁷ The Department has approved the transfer of Evergreen's U.S.-China operating authority to Federal Express (Order 95-S-9). Pending approval by the Chinese government of Federal Express's operations, the Department has extended Evergreen's U.S.-China operating authorities (Order 95-8-9, at 7), and Notice of Action Taken dated February 5, 1996. Should Federal Express commence U.S.-China operations the exemption authority awarded here would become moot.

9. We will serve this order on Evergreen International Airlines, Inc.; Federal Express Corporation; Northern Air Cargo, Inc.; Polar Air Cargo, Inc.; the Ambassador of Russia in Washington, D.C.; the United States Department of State (**Office** of Aviation Negotiations); and the Federal Aviation Administration.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at
<http://www.dot.gov/dotinfo/general/orders/aviation.html>.*