

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Application of

FEDERAL EXPRESS CORPORATION

for grant of an exemption or waiver pursuant
to 49 U.S.C. § 40109 (Brazil All-Cargo
Frequency Dormancy Condition)

:
:
:
:
:
:
:
:
:
:

Docket OST-96-1196

**REPLY OF
FEDERAL EXPRESS CORPORATION**

Communications with respect to this document should be sent to:

M. Rush O'Keefe, Jr.
V.P.-Regulatory Affairs
Sarah S. Prosser
Managing Director
David A. Glauber
Managing Attorney
Warren A. Goff
Senior Attorney

FEDERAL EXPRESS CORPORATION

1980 Nonconnah Blvd.
Memphis, TN 38132
901/395-5152
901/395-5166

Nathaniel P. Breed, Jr.
SHAW PITTMAN
2300 N Street, N.W.
Washington, D.C. 20037
202/663-8078 (tel.)
202/663-8007 (fax)

Attorneys for
FEDERAL EXPRESS CORPORATION

June 15, 2000

940343v2

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Application of	:	
	:	
	:	
FEDERAL EXPRESS CORPORATION	:	Docket OST-96-1196
	:	
for grant of an exemption or waiver pursuant	:	
to 49 U.S.C. § 40109 (Brazil All-Cargo	:	
Frequency Dormancy Condition)	:	
	:	

June 15, 2000

**REPLY OF
FEDERAL EXPRESS CORPORATION**

Pursuant to Rule 308 of the Rules of Practice of the Department of Transportation (the Department), Federal Express Corporation (Federal Express) hereby submits its Reply to the Answer of Atlas Air, Inc. (Atlas), filed in response to the application of Federal Express for grant of an exemption from, or waiver of, the applicability of the 90-day dormancy condition applicable to its allocation of ten (10) U.S.-Brazil all-cargo frequencies so as to authorize Federal Express to suspend its utilization of five (5) of those frequencies for one year, until June 1, 2001.

- 2 -

Atlas opposes the dormancy exemption application of Federal Express in part. Specifically, Atlas urges the Department to deny the application of Federal Express with respect to 2.5 of the total of five Brazil frequencies allocated to Federal Express which are the subject of the dormancy exemption application, and requests the Department to reallocate those 2.5 frequencies to Atlas. In a concurrent application, in Docket OST-00-7464, Atlas requests the Department to grant it U.S.-Brazil all-cargo exemption authority, and an allocation of seven U.S.-Brazil scheduled cargo service frequencies, to enable Atlas to provide B-747 freighter service in the U.S.-Brazil market seven days a week.

Atlas urges that the seven frequencies to be reallocated to Atlas should be drawn from a combination of 4.5 dormant Brazil frequencies initially allocated to American International Airways, subsequently acquired by Kitty Hawk International, Inc. (Kitty Hawk), and 2.5 Brazil frequencies currently allocated to Federal Express and not currently being fully utilized by Federal Express.

In response to Atlas, Federal Express states as follows:

1. Federal Express submits that it is wholly inappropriate for Atlas to presume to “select” the Brazil frequencies to be reallocated to Atlas on the basis of a “determination” by Atlas as to which Brazil cargo frequencies currently are, or soon may become, legally dormant and available for reallocation. Atlas has no authority to make such a determination, which is reserved exclusively for the Department.

- 3 -

2. Moreover, contrary to the assumption made by Atlas, the five Brazil cargo frequencies which are the subject of the dormancy condition exemption application of Federal Express in this proceeding are not currently dormant within the terms of the Department's standard 90-day dormancy condition applicable to those frequencies. As stated in the dormancy condition exemption application filed by Federal Express, Federal Express has operated all five of the Brazil frequencies at issue intermittently, but with a sufficient degree of regularity and frequency to satisfy the requirements of the 90-day dormancy condition applicable to each of the five frequencies at issue.

Federal Express fully expects and intends to expand the frequency of its U.S.-Brazil operations on a phased-expansion basis up to the level of ten roundtrip flights a week as growth in traffic demand permits the economically-justified introduction of additional flights.

3. At the present time, a total of 24 U.S.-Brazil widebody cargo service frequencies are available for U.S. carrier scheduled cargo operations between the U.S. and Brazil pursuant to the March 1989 U.S.-Brazil Bilateral Air Services Agreement, as amended by the October 24, 1996 Memorandum of Consultations between the U.S. and Brazil (the 1996 MOC).

- 4 -

By Order 97-2-20, served February 28, 1997, and various prior and subsequent authorizations, the Department has most recently allocated those 24 frequencies as follows:

<u>Carrier</u>	<u>No. of Freq.</u>	<u>In Use</u> ¹
AIA/Kitty Hawk	4.5	--
Challenge	4.5	2
Federal Express	10	5
Polar	5	3 ²

As indicated above, based on the June 2000 edition of the OAG Cargo Guide, it appears that only 10 of the total of 24 Brazil frequencies are currently in use, as published by the following carriers: Federal Express – 5 (DC-10); Challenge – 4 (B-757); and Polar – 3 (B-747).

4. Based on the foregoing information, it appears that a total of 14 Brazil widebody frequencies are not currently being utilized for regularly-scheduled service. As noted above, however, the five frequencies held by Federal Express which are the subject of the exemption application in this proceeding are

¹ Kitty Hawk has filed a Chapter 11 bankruptcy petition, has suspended all of its Latin American operations, and has announced that it does not intend to resume those operations in the foreseeable future. Challenge operates four weekly B-757 flights which require only two widebody frequencies under the 1996 MOC (Annex I, Section III(4)). The 8 weekly DC-10 and B-747 flights currently operated by Federal Express and Polar utilize a total of 8 widebody frequencies.

² Federal Express understands that Polar operates its two additional Brazil frequencies on a seasonal basis.

- 5 -

being utilized to an extent which is in compliance with the Department's dormancy condition, and, therefore, are not legally dormant. In addition, the two Brazil frequencies operated by Polar on a seasonal basis may not be legally dormant. That leaves at least seven (7) remaining frequencies which appear to be dormant and which, therefore, have expired and reverted to the Department for reallocation. That total is adequate to permit the level of widebody service proposed by Atlas, without recourse to any of the five Brazil frequencies allocated to Federal Express which are the subject of the dormancy exemption application at issue.

5. Accordingly, Federal Express urges the Department to determine whether a total of at least seven (7) U.S.-Brazil cargo frequencies are currently dormant, and have therefore expired and reverted to the Department for reallocation. If that number of cargo frequencies is found by the Department to be available for reallocation, those frequencies would be sufficient to provide the number of frequencies sought by Atlas. While Federal Express takes no position on the merits of the Atlas application for seven Brazil cargo frequencies, Federal Express would not object to the allocation of seven Brazil frequencies to Atlas, provided that none of those frequencies are taken away from the current Brazil frequency allocation held by Federal Express.

- 6 -

6. On that basis, Federal Express urges the Department to act immediately to grant its pending Brazil frequency dormancy condition exemption or waiver application, and to take such further action with regard to the U.S.-Brazil application of Atlas in Docket OST-00-7464 as the Department may find to be warranted by the public interest.

WHEREFORE, Federal Express hereby requests the Department to grant Federal Express an exemption from, or waiver of, the 90-day dormancy condition applicable to its allocation of ten (10) U.S.-Brazil all-cargo frequencies so as to authorize Federal Express to suspend its utilization of five of those frequencies for a period of one year, until June 1, 2001.

Of Counsel:
M. Rush O'Keefe, Jr.
Vice President-Regulatory Affairs
Sarah S. Prosser
Managing Director
David A. Glauber
Managing Attorney
Warren A. Goff
Senior Attorney
FEDERAL EXPRESS CORPORATION

Respectfully submitted,

Nathaniel P. Breed, Jr.
SHAW PITTMAN
Attorneys for
FEDERAL EXPRESS CORPORATION

- 7 -

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply of Federal Express Corporation by messenger, telecopier transmission or United States mail, properly addressed and with postage prepaid, upon each of the persons listed in the Service List attached hereto.

Doreen S. Hughes

Washington, D.C.
June 15, 2000

SERVICE LIST (U.S.-Brazil Cargo)

Guillermo J. Cabeza
President & CEO
ARROW AIR, INC.
P.O. Box 026062
Miami, FL 33102-6062

Allan W. Markham
ALLAN W. MARKHAM, P.C.
2733 36th Street, N.W.
Washington, D.C. 20007-1442

Thomas G. Scott, Sr.
Sr. Vice President & General Counsel
ATLAS AIR, INC.
538 Commons Drive
Golden, CO 80401

William C. Evans
Russell E. Pommer
VERNER, LIIPFERT, BERNHARD,
McPHERSON AND HAND, CHARTERED
901 15th Street, N.W., Suite 700
Washington, D.C. 20005

B.F. Spohrer
President
CHALLENGE AIR CARGO, INC.
P.O. Box 523979
Miami, FL 33152

William H. Callaway, Jr.
ZUCKERT, SCOUTT &
RASENBERGER
888 17th Street, N.W., Suite 600
Washington, D.C. 20006

M. Rush O'Keefe, Jr.
V.P.-Regulatory Affairs
FEDERAL EXPRESS CORPORATION
1980 Nonconnah Blvd.
Memphis, TN 38132

Nathaniel P. Breed, Jr.
SHAW PITTMAN
2300 N Street, N.W.
Washington, D.C. 20037-1128

J. Frank Fine
President
FINE AIRLINES, INC.
1640 N.W. 62nd Avenue
Miami, FL 33152

Pierre Murphy
Elizabeth C. Collins
One Westin Center
2445 M Street, N.W., Suite 260
Washington, D.C. 20037

Richard Haberly
President
FLORIDA WEST INTERNATIONAL
AIRLINES, INC.
7500 N.W. 25th Street
Miami, FL 33122
Alfred J. Eichenlaub

Marshall S. Sinick
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Kevin Montgomery

SERVICE LIST (U.S.-Brazil Cargo)

Sr. V.P. & General Counsel
POLAR AIR CARGO, INC.
100 Oceangate – 15th Floor
Long Beach, CA 90802

Vice President – Government Affairs
POLAR AIR CARGO, INC.
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Ana M. Guevara
Steven R. Okun
UNITED PARCEL SERVICE CO.
316 Pennsylvania Ave., S.E., Suite 304
Washington, D.C. 20003

David L. Vaughan
KELLEY DRYE & WARREN
1200 – 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Arnold J. Grossman
V.P. – International Affairs
AMERICAN AIRLINES, INC.
P.O. Box 619616, MD5635
DFW Airport, TX 75261

Carl B. Nelson, Jr.
Associate General Counsel
AMERICAN AIRLINES, INC.
1101 17th Street, N.W. - Suite 600
Washington, D.C. 20036

Rebecca G. Cox
V.P. Government Affairs
CONTINENTAL AIRLINES, INC.
1350 I Street, N.W.
Washington, D.C. 20005-3389

R. Bruce Keiner, Jr.
CROWELL & MORING LPP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595

John J. Varley
Assistant General Counsel
DELTA AIR LINES, INC.
1030 Delta Blvd., Dept. 986
Atlanta, GA 30320

Robert E. Cohn
SHAW PITTMAN
2300 N Street, N.W.
Washington, D.C. 20037-1128

Shelley A. Longmuir
Senior V.P.-International Affairs, et al.
UNITED AIR LINES, INC.
P.O. Box 66100 WHQ1Z
Chicago, IL 60666

Jeffrey A. Manley
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420

Guillermo J. Cabeza
President & CEO
ARROW AIR, INC.
P.O. Box 026062
Miami, FL 33102-6062

Allan W. Markham
ALLAN W. MARKHAM, P.C.
2733 36th Street, N.W.
Washington, D.C. 20007-1442

B.F. Spohrer
President
CHALLENGE AIR CARGO, INC.
P.O. Box 523979
Miami, FL 33152

William H. Callaway, Jr.
ZUCKERT, SCOUTT &
RASENBERGER
888 17th Street, N.W., Suite 600
Washington, D.C. 20006

Jed T. Orme, Jr.
Senior V.P. & General Counsel
DHL Airways, Inc.
333 Twin Dolphin Drive
Redwood City, CA 95065-1496

R. Tenney Johnson
2121 K Street, N.W., Suite 800
Washington, D.C. 20037-1801

M. Rush O'Keefe, Jr.
V.P.-Regulatory Affairs
FEDERAL EXPRESS CORPORATION
1980 Nonconnah Blvd.
Memphis, TN 38132

J. Frank Fine
President
FINE AIRLINES, INC.
1640 N.W. 62nd Avenue
Miami, FL 33152

Pierre Murphy
Elizabeth C. Collins
One Westin Center
2445 M Street, N.W., Suite 260
Washington, D.C. 20037

Richard Haberly
President
FLORIDA WEST INTERNATIONAL
AIRLINES, INC.
7500 N.W. 25th Street
Miami, FL 33122

Marshall S. Sinick
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Alfred J. Eichenlaub
Sr. V.P. & General Counsel
POLAR AIR CARGO, INC.
100 OceanGate – 15th Floor
Long Beach, CA 90802

Kevin Montgomery
Vice President – Government Affairs
POLAR AIR CARGO, INC.
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Ana M. Guevara

David L. Vaughan

SERVICE LIST (U.S.-Brazil Cargo)

Steven R. Okun
UNITED PARCEL SERVICE CO.
316 Pennsylvania Ave., S.E., Suite 304
Washington, D.C. 20003

KELLEY DRYE & WARREN
1200 – 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Arnold J. Grossman
V.P. – International Affairs
AMERICAN AIRLINES, INC.
P.O. Box 619616, MD5635
DFW Airport, TX 75261

Carl B. Nelson, Jr.
Associate General Counsel
AMERICAN AIRLINES, INC.
1101 17th Street, N.W. - Suite 600
Washington, D.C. 20036

Rebecca G. Cox
V.P. Government Affairs
CONTINENTAL AIRLINES, INC.
1350 I Street, N.W.
Washington, D.C. 20005-3389

R. Bruce Keiner, Jr.
CROWELL & MORING LPP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595

John J. Varley
Assistant General Counsel
DELTA AIR LINES, INC.
1030 Delta Blvd., Dept. 986
Atlanta, GA 30320

Shelley A. Longmuir
Senior V.P.-International Affairs, et al.
UNITED AIR LINES, INC.
P.O. Box 66100 WHQ1Z
Chicago, IL 60666

Jeffrey A. Manley
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420