

BEFORE THE
U.S. DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
WASHINGTON, D.C.

In the matter of)
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 AIR CARGO SECURITY) Docket TSA-2004-19515
 REQUIREMENTS) January 10, 2005
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JOINT COMMENTS OF ATLAS AIR, INC. AND POLAR AIR CARGO, INC.

Communications with respect to this document should be served on:

John W. Dietrich
Sr. Vice President, General Counsel &
Chief Human Resources Officer
ATLAS AIR WORLDWIDE
HOLDINGS, INC.
2000 Westchester Avenue
Purchase, NY 10577-2543
(914) 701-8327 – Telephone
(914) 701-8333 – Fax
jdietrich@atlasair.com

Kevin P. Montgomery
POLAR AIR CARGO, INC.
1747 Pennsylvania Ave. N.W., Suite 875
Washington, D.C. 20006
(202) 828-1002 – Telephone
(202) 828-1003 – Fax
kevin.montgomery@polaraircargo.com

Gary Wade
Vice President, Security
ATLAS AIR, INC. and POLAR
AIR CARGO, INC.
2000 Westchester Avenue
Purchase, NY 10577-2543
(914) 701-8434 – Telephone
(914) 701-8440 – Fax
gwade@atlasair.com

Russell E. Pommer
Associate General Counsel &
Director of Regulatory Affairs
ATLAS AIR, INC.
1747 Pennsylvania Ave. N.W., Suite 875
Washington, D.C. 20006
(202) 822-9121 – Telephone
(202) 822-9152 – Fax
rpommer@atlasair.com

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Through Notice of Proposed Rulemaking, 69 Fed. Reg. 65258 (Nov. 10, 2004) (the "NPRM"), the Transportation Security Administration is proposing to adopt a comprehensive set of regulations designed to enhance air cargo security. Atlas Air, Inc. ("Atlas") and Polar Air Cargo, Inc. ("Polar") endorse the comments being submitted today by the Cargo Airline Association ("CAA"). Additionally, Atlas and Polar are members of the larger and more diverse Air Transport Association ("ATA"), which is submitting a separate set of comments on behalf of the overall ATA membership. Because TSA's final rules are likely to impact Atlas' and Polar's largely international operations, we also are providing these supplemental views.

While wholly owned by Atlas Air Worldwide Holdings, Inc., Atlas and Polar are separately certificated U.S. air carriers providing cargo air transportation throughout the globe with the world's largest commercial airline fleet of Boeing 747 freighter aircraft. Polar operates an extensive network of scheduled all-cargo services, widely held out to the shipping public, with a major presence in Europe, South America and the Asia/Pacific

region. Atlas offers some scheduled services but primarily operates dedicated cargo flights for other airlines and airfreight consolidators. Both airlines also conduct commercial charters and provide regular all-cargo services for the U.S. military.

The NPRM correctly articulates the two primary air cargo security threats facing the nation – the use of an all-cargo aircraft as a weapon and the concealment of an explosive or incendiary device in cargo in order to cause a catastrophic incident killing an aircraft’s occupants (plus, perhaps, collateral ground damage). As TSA also aptly observes, either a passenger or all-cargo aircraft can be used as a weapon, and the threat risk to each type of aircraft is roughly equal. In contrast, the risk of introduction of explosives or incendiaries through cargo is far greater for passenger than all-cargo aircraft. *See* 69 Fed. Reg. at 65261, 65264. Consistent with this threat analysis, the NPRM focuses the proposed regulations primarily on (1) preventing the introduction of explosive or incendiary devices into cargo transported on passenger aircraft and (2) keeping intruders off all-cargo aircraft to reduce the risk of hijacking.

By and large, the proposed regulations appear designed to accomplish these objectives. However, there is ambiguity in certain respects. When a regulation is susceptible to multiple interpretations, there is great danger it will be applied inconsistently and sometimes excessively when measured against what is reasonably necessary to achieve its declared purpose. In this particular instance, an overly broad reading of certain proposed regulations could have significant negative consequences for Atlas, Polar and other airlines. To prevent unintended and unwarranted disruption of air

cargo movements and commerce, TSA needs to provide more clarity the Final Rule.

1. Security Measures for Persons Who Board All-Cargo Aircraft

In proposed section 1544.202, TSA would require each all-cargo carrier to apply the security measures in its security program to “persons who board the aircraft, and their property.” According to the NPRM, section 1544.202 was drafted to ensure that security is not compromised when “persons who are not flight crew members or passengers . . . travel on an all-cargo aircraft, such as handlers escorting an animal being shipped via air cargo.” 69 Fed. Reg. at 65265 (emphasis added). The screening requirement specifically intended by the proposed provision is similarly directed to “individuals traveling on aircraft.” *Id.* However, proposed section 1544.202 can be read to apply far more broadly to persons who board the aircraft for any purpose. This would include persons servicing and loading cargo onto the aircraft in addition to those persons boarding the aircraft for the purpose of traveling on it. Because TSA has responsibility for security within the SIDA and proposed sections 1544.225 and 1544.228 apply, respectively, to aircraft security and persons with unescorted access to cargo, proposed section 1544.202 would be largely redundant unless limited explicitly to persons traveling on an aircraft.¹ TSA should ensure that the Final Rule limits the scope of 1544.202 to persons traveling on the aircraft, as intended. We suggest that TSA do so by inserting the phrase “for

¹ In any event, it would be virtually impossible to implement an effective screening program for service personnel who enter and exit the aircraft on multiple occasions. Where service on board the aircraft is performed within the SIDA, security ought to have been assured by TSA, which bears the legal responsibility.

transportation” after the phrase “for persons who board the aircraft.”

Even with that change, there will be confusion as to geographical scope of the requirement that persons traveling on the aircraft be screened. The provision can be read to apply to all flights performed by all-cargo carriers anywhere in the world. To reduce unnecessary conflicts with foreign government laws and regulations, the Final Rule should limit its application outside the United States to U.S.-destined flights.

2. Security Measures for Persons With Unescorted Access to Cargo

Proposed sections 1544.228(a) and (b) together require each all-cargo operator to ensure that no person gains unescorted access to cargo without first having undergone a criminal history record check (“CHRC”) or a Part 1540 Security Threat Assessment. These sections are overly broad as written and, unless modified, could have a severely adverse impact on all-cargo carriers like Atlas and Polar.

First, proposed sections 1544.228(a) and (b) might be interpreted to impose an impossible obligation on the carrier to perform CHRC’s or Security Threat Assessments on persons not within its control all the way up the supply chain.² When the Security Threat Assessment requirement is finalized, the Final Rule should specify that the carrier’s obligation to perform background checks on individuals with unescorted access to its cargo is limited to the time period in which the cargo is in its possession and

² Atlas and Polar object to the NPRM’s purported imposition of obligations on carriers to ensure that other entities perform CHRC’s or Security Threat Assessments or implement other security measures. If TSA wishes to impose security requirements on such entities, it should do so directly pursuant to its regulatory authority. Carriers should not be required to perform security-related functions on behalf of entities over which TSA either lacks or elects not to exercise such authority.

control. Stated in another way, the Final Rule should make clear that the carrier's security obligations begin when it accepts cargo from the tendering entity and ends when it tenders the cargo to the next entity in the transportation chain. The carrier should have no responsibility to perform background checks for individuals tendering cargo (such as employees of a trucking company hired by the shipper or a carrier's general sales agent), and, furthermore, no responsibility to "ensure" that such individuals have successfully completed background checks (*see* proposed section 1544.228(b)) other than by inspecting the badge, certificate or credentials provided by TSA to employees of TSA-regulated entities.³

Second, the Final Rule should eliminate the proposed \$39 fee requirement associated with the performance of a Security Threat Assessment. Under proposed section 1540.209, each individual undergoing a Security Threat Assessment (or his or her employer) would pay such a fee. Yet right now TSA conducts the very same terrorism-based threat assessments for air carriers under the Advance Passenger Information System ("APIS") program. Presumably, this is in recognition of the substantial expense that carriers incur in collecting and submitting the required data about crewmembers and passengers. After a Security Threat Assessment requirement is implemented for all persons with unescorted access to cargo, the scope of the required effort and the

³ One particularly ambiguous scenario should be addressed with specificity in the Final Rule. Like certain other all-cargo carriers, Atlas is in the business of wet leasing aircraft to other carriers, and those other carriers often use their own warehouses and ground personnel. In such instances, the wet lessee should have responsibility for security at the warehouse and while it has custody of the cargo during the course of

magnitude of the cost burden on carriers will increase exponentially. There is no reason given in the NPRM – and none apparent – for increasing the cost burden by imposing a charge for Security Threat Assessments when none is imposed for comparable APIS background checks.

Third, the NPRM is silent about the geographical scope of the CHRC or Security Threat Assessment obligation, and the Final Rule needs to specify where in each carrier's system such measures are required. Because of the international focus of the Atlas and Polar operations, and, in particular, the carriage of large volumes of cargo from one foreign country to another, it would be extremely burdensome to require CHRC's or Security Threat Assessments for all individuals handling cargo worldwide on all flights. Application of the background check requirement at foreign locations should be limited to individuals with unescorted access to cargo destined for the United States. The Final Rule, additionally, should provide a ramp-up period of at least 90 days.

3. Acceptance and Screening of Cargo

As the CAA comments explain, proposed section 1544.205 – placing limitations on the acceptance of cargo and codifying screening/inspection requirements – is quite confusing. For instance, there is no apparent difference between proposed subsections (a) and (b), and proposed subsection (b) can be read to require 100% screening of cargo, even when not intended for carriage on a passenger aircraft. Such a 100% screening requirement would be at odds with legal requirements and the NPRM's own recognition

being transported to the aircraft for loading. The wet lessor's security obligations should not attach until

that inspection of a portion of air cargo is necessary. 69 Fed. Reg. at 65266. Proposed subsections (a) and (b), moreover, leave questions about the extent of their geographic reach.⁴ TSA should state in the Final Rule that cargo screening requirements at foreign locations are limited to cargo destined to the United States.

There similarly is ambiguity in proposed section 1544.205(e), which would limit cargo acceptance to “cargo from the shipper, or from an aircraft operator, foreign air carrier or indirect air carrier operating under a security program under this chapter with a comparable security program” As the CAA and ATA comments explain, this provision would appear to prohibit the carriage of freight from a variety of important sources.

Of great concern is freight tendered to Atlas, Polar and other carriers at foreign locations. Assuming that section 1544.205(e) is intended to apply to such freight,⁵ there is a substantial probability that much will be tendered by entities that are neither shippers nor “indirect air carriers,” which proposed section 1540.5 explicitly limits to persons or entities engaging in specified activities “within the United States.” Lacking security

the wet lessor takes physical custody of the cargo at the aircraft. The Final Rule should make that clear.

⁴ Proposed section 1544.205(f), requiring each aircraft operator “to carry out the requirements of its security program” when cargo is loaded outside the United States, does not provide the needed elucidation.

The quoted phrase is vague and, in any event, without meaning because each aircraft operator always is obligated to act in accordance with its security program.

⁵ Once again, the Final Rule needs to address the issue of geographical scope with specificity. Proposed section 1544.205(e) speaks of acceptance of cargo for “air transportation,” a term defined in 49 U.S.C. §10102 to include “foreign air transportation.” The term “foreign air transportation,” in turn, is limited by the same statutory provision to transportation between the United States and foreign countries; it excludes transportation exclusively between foreign points.

programs as indirect air carriers under 49 C.F.R. Part 1540, all entities outside the United States other than “shippers” presumably would be prohibited from tendering freight to all-cargo carriers. While U.S. integrators may obtain substantial amounts of freight directly from shippers, Atlas and Polar receive much of their freight from companies in the business of consolidating cargo tendered to them by freight forwarders and shippers. We doubt TSA intends to eliminate a substantial portion of the Atlas and Polar business but are concerned that promulgation of proposed section 1544.205(e) unintentionally could have that effect.

Even if the above were not a problem, we would be quite troubled because many Atlas and Polar customers do not appear to satisfy other “indirect air carrier” prerequisites. As indicated above, Atlas and Polar obtain considerable business from entities that themselves would not logically be classified as shippers. They solicit and accept freight from large logistics companies in the business of consolidating freight from multiple sources. In addition, Atlas and Polar regularly rely on production from charter brokers, which tender freight collected from a variety of shippers and freight forwarders and typically receive a pre-agreed percentage of revenues. All-cargo carriers like Atlas and Polar also regularly rely on general sales agents, which receive compensation from the carrier based on revenue production. Under proposed section 1540.5, Department of Transportation regulations in 14 C.F.R. Parts 296 and 297 (dealing with U.S. and foreign indirect air carriers, respectively) and longstanding DOT precedent, the term “indirect air carrier” is limited to an entity that holds out air transportation to the public in its own

name through use of another carrier's aircraft, which usually involves some assumption of economic risk. Under this construct, a charter broker, general sales agent or similar entity acting on behalf of the carrier or a group of shippers may be something other than an indirect air carrier. *See, e.g., Application of Gemini Air Cargo LLC*, DOT Order 96-1-39 at 2 (differentiating broker from indirect air carrier). Proposed section 1544.205(e) needs to be rewritten and the Final Rule needs to make clear that Atlas, Polar and other carriers will still be able to accept freight from all of their current production sources.⁶

Much of the adverse impact stemming from the ambiguities discussed above will be eliminated if proposed section 1544.205(f) is rewritten, as the Cargo Airline Association suggests, to apply only to cargo intended for transportation on passenger flights. Because the explosives-related threat addressed by that section is primarily one to passenger aircraft (*see* 69 Fed. Reg. at 65264), that ought to be consistent with the underlying TSA intent.

The NPRM affirms the current prohibition of the placement of freight tendered by unknown shippers on passenger aircraft, even after physical inspection. 69 Fed. Reg. at 65267. Atlas and Polar hope TSA will reconsider that prohibition because it prevents all-cargo carriers from accepting shipments from unknown shippers intended to be interlined with passenger carriers. So long as the all-cargo carrier inspects a shipment received

⁶ Yet additional confusion is caused by proposed section 1544.205(e)'s qualification that cargo can be accepted only from "an aircraft operator, foreign air carrier, or indirect air carrier operating under a security program under this chapter with a comparable cargo security program" (emphasis added). The phrase seems redundant because, presumably, all such entities have TSA-approved cargo security programs. If a further limitation is intended, it should be stated far more precisely.

from an unknown shipper, it should be permitted to tender the shipment to another carrier for placement on a passenger flight.

Conclusion

Because of the importance of having a coherent set of regulations governing the important topic of air cargo security, Atlas and Polar are pleased that the rulemaking has progressed to the NPRM stage. We hope a Final Rule can be issued promptly – but only after due consideration is given to the problems addressed in these comments as well as those of the Cargo Airline Association and the Air Transport Association.

Respectfully submitted,

/s/

Kevin P. Montgomery
For Polar Air Cargo, Inc.

/s/

Russell E. Pommer
For Atlas Air, Inc.

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