



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

98-034

JAN 28 1998

Ms. Sheryl R. Israel
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Shaw, Pittman, Potts & Trowbridge
2300 N Street N.W.
Washington, D.C. 20037

Dear Ms. Israel:

Summary

In this letter we confirm our oral action (1) denying a request by Antonov Design Bureau for a statement of authorization under Part 212 to perform three one-way Fifth Freedom cargo charter flights between Houston, Texas, and Iquitos, Peru, and, (2) on review, and based on hardship considerations, granting the request of Antonov to operate the subject flights.

Application

By application filed January 20, 1998, Air Foyle Limited, a foreign air carrier of the United Kingdom, acting as agent for Antonov Design Bureau (Antonov), a foreign air carrier of Ukraine, requested a statement of authorization under Part 212 to perform three one-way Fifth Freedom cargo charter flights between Houston and Iquitos, January 20-30, 1998, transporting a total of 600,000 pounds of oil well supply pipes on behalf of Petroleum Representations of Texas. In support of its request, Antonov stated that the pipes were urgently needed in Iquitos and that the airport in Iquitos was not equipped to off-load conventional freighter aircraft. Antonov proposed to conduct the charter operations with a Ukrainian-registered AN-124 aircraft.

Pleadings

Southern Air Transport, Inc. (SAT), a U.S. certificated air carrier, filed an answer opposing Antonov's request. SAT stated that Antonov places undue reliance on Fifth Freedom services vis-à-vis Third and Fourth Freedom operations, noting that since April 1997, the Department has granted Antonov authority to operate approximately 33 one-way Fifth Freedom cargo flights versus three one-way Third

and Fourth Freedom cargo charter flights. SAT further stated that it had two L-100 Hercules freighter aircraft positioned and available to transport the pipes during the same ten day period sought by Antonov. SAT further stated that its L-100 aircraft are equipped to handle pipe loading and unloading and as such are capable of transporting the pipes per the charterer's request.

Additional responsive pleadings were filed by Antonov and SAT.

Antonov stated that we should reject SAT's argument that Antonov places undue reliance on Fifth Freedom operations. Antonov stated that the AN-124 has unique capabilities which are not available on other commercial aircraft and that the vast majority of its Fifth Freedom flights involved "outsized" cargo and that only a "handful" involved general cargo for which no alternate lift was available.

Antonov further stated that although its original request sought authority to transport the pipe from Houston to Iquitos between January 20 and 30, this ten day window was sought to avoid any unforeseen delays which might have affected the shipper's ability to have the pipe in Iquitos by January 26, and on the drill site by the end of the month. Antonov stated that after arriving in Iquitos the pipe would be placed on a river barge for a 4-5 day trip to the drill site. Antonov further stated that failure to get the pipe to the job site on time could force the capping of the well which would result in significant standby costs until the pipe arrived on site. Antonov stated that SAT had not provided the shipper with a viable alternative and that we should promptly approve its request.

SAT stated that it opposed Antonov's request based on Antonov's original application and discussions with the shipper during which the shipper said it sought to complete the pipe shipment of 600,000 pounds to Iquitos by January 30. SAT stated that after submitting its proposal to the shipper, a proposal which SAT stated satisfied the shipper's original description of the movement, the shipper changed the parameters of the movement by stating that the shipment involved 660,000 pounds of cargo which had to be in Iquitos by January 26th.

No other comments were filed in response to Antonov's request.

On January 21, 1998, we orally denied Antonov's request. We took this action based on Antonov's undue reliance on Fifth Freedom operations and the fact that alternate lift was available to meet the needs of the shipper as originally requested.

Under Part 212 we will grant a foreign air carrier a statement of authorization to conduct Fifth Freedom charters if the proposed operations meet the requirements of that part and are in the public interest. In considering the public interest, we

look at a broad range of factors, including reciprocity on the part of the applicant's homeland. In addition, it has been long-standing U.S. aviation policy that foreign air carriers must place substantial reliance on Third and Fourth Freedom operations, with Fifth Freedom operations taking a secondary, supportive role (see, for example, Orders 92-4-42, 89-3-7 and 86-2-45).

We have made exceptions to this policy where required by the public interest; for example, where a unique capability of a foreign carrier warranted grant of authority notwithstanding its excessive reliance on Fifth Freedom operations. Thus, for example, even though Antonov has clearly not placed substantial reliance on its homeland-U.S. operation, we have continued to approve its Fifth Freedom charter requests where there was no alternative lift available to the shippers involved.

In the case before us here, however, the record contained statements that alternative lift was available, and denial was therefore warranted because of the serious imbalance in Antonov's ratio of Fifth Freedom operations to its Third and Fourth Freedom operations. While the L-100 flights proposed by SAT would have taken more time to complete the job than the three one-way flights proposed by Antonov, neither the applicant nor the shipper persuasively demonstrated in the context of the request as originally formulated the type of exigent circumstances that would make such additional time decisionally determinative. Moreover, while the shipper noted a price differential, the existence of such a differential as a matter of general policy has not served to override the public policy factors supporting denial of applications that fail to meet the substantial reliance test, and we saw no persuasive reason to deviate from that approach here.

Antonov's Petition

On January 22, Antonov filed a petition requesting review and reversal of the staff action. Antonov stated that our conclusion that alternate lift was available was in error, and that only Antonov had the operational capability to meet the needs of the shipper. Antonov stated that the pipe was needed on the drill site by January 30th and had to be delivered to Iquitos by January 26 in order to arrive at the job site by the end of the month. Antonov's petition included a letter from the shipper, Quintana Minerals Corporation (QMC), in which QMC stated that it had experienced unexpected problems drilling its well in a remote jungle area of Peru and that failure to deliver the pipe and ancillary equipment to site as required could result in "serious injury, loss of human lives, and irreparable damage to the environment." QMC further stated that although SAT offered the use of three L-100 aircraft with a capacity of 20 metric tons per flight, it would take SAT fourteen separate flights to move the shipment to Iquitos, and that SAT itself stated

that it could not meet the January 26 completion requirement. According to Antonov and QMC, SAT's proposal was not acceptable, and therefore there was no alternative lift available.

On January 22, SAT answered, stating that we should deny Antonov's petition and affirm our denial of its request. SAT argued that the hardship alleged by Antonov in its petition was a direct result of the shipper's and/or broker's conduct, and that only after SAT filed its opposition did the parties identify the necessary flight dates. SAT further stated that a representative of QMC introduced a commercial threat into this proceeding by telling SAT that it was in jeopardy of losing future business unless it withdrew its opposition to Antonov's request.

On January 22, 1998, in recognition of the hardship case that had been presented, we decided to reverse our action of January 21, 1998, and to grant Antonov's application. We did so based solely on our desire to avoid potential harm to workers and the environment which might result from a possible well blowout. In our view, Antonov presented compelling evidence, confirmed by the shipper and not refuted by SAT, that the cargo involved was required in Iquitos by January 26, and that no alternate means of transportation, including that proposed by SAT, would achieve that result. In light of these circumstances, we found that grant to Antonov of the requested statement of authorization was warranted in the public interest on a hardship basis. We instructed Antonov to report to us by January 31, 1998, that all three authorized flights had indeed been performed, that all 600,000 pounds (or 660,000, as the case may be) of pipe had been delivered to Iquitos (and the date that the shipment was completed), and the date that the pipe actually reached the well site.

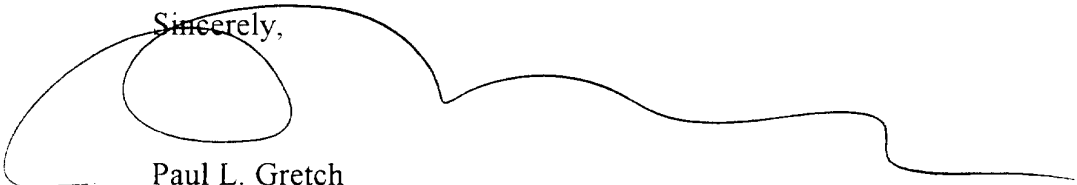
As a final matter, we remind Antonov that in the future it must make every effort to present with its initial applications for statements of authorization all relevant information that would bear on the public interest determination we must make in acting on such applications.

In view of the above, and acting under assigned authority, 14 CFR Part 385, we (1) confirm our oral action denying a request by Antonov Design Bureau for a statement of authorization under Part 212 to perform three one-way Fifth Freedom cargo charter flights between Houston, Texas, and Iquitos, Peru, and, (2) on review, grant the request of Antonov to operate the subject flights.

In addition to the reporting requirement described above, we required Antonov to comply with an FAA-approved flight routing for the authorized flights.

Persons entitled to petition the Department for review of this action under the Department's regulations, 14 CFR § 385.50, may file their petitions within ten days of the date of this letter. This action is effective immediately, and the filing of a petition for review will not alter its effectiveness.

Sincerely,



Paul L. Gretch
Director
Office of International Aviation

cc: Mr. Pierre Murphy
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