

DEPT. OF TRANSPORTATION
DOCKET SECTION

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

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In the matter of the)
application of)
)
FLORIDA WEST)
INTERNATIONAL AIRWAYS, INC.)

for transfer of certificate)
and exemption authority)
pursuant to 49 U.S.C 41105)

Docket OST-95-418 //

MOTION FOR LEAVE TO FILE AND RESPONSE OF FINE AIRLINES, INC.
TO SUPPLEMENTS NOS. 1 AND 2 OF FLORIDA WEST INTERNATIONAL AIRWAYS

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Dated: December 7, 1995

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**MOTION FOR LEAVE TO FILE AND RESPONSE OF FINE AIRLINES, INC.
TO SUPPLEMENTS NOS. 1 AND 2 OF FLORIDA WEST INTERNATIONAL AIRWAYS**

Fine Airlines, Inc. ("Fine Air") hereby moves for leave to file the instant Response to Supplements Nos. 1 and 2 of Florida West International Airways ("FWIA").^{1/}

^{1/} These Supplements contain new information in defense of FWIA's original application for a transfer of certificate and exemption authority. The Department's procedural rules do not appear to contain any provisions governing the filing of supplementary information or answers thereto in such proceedings. Consequently, Fine Air moves for leave to file the instant response although it is unclear whether such a motion is in fact necessary. Fine Air contends that it, and the public more generally, deserve the right to comment on relevant new information presented in a continuing fitness investigation. Moreover, the public interest will be served by bringing to the Department's attention the points contained herein.

Procedural History

On August 18, 1995, FWIA filed with the Department an Application for Transfer of Certificate and Exemption Authority (“Application”).

On September 15, 1995, Fine Air filed an Answer opposing FWIA’s application on the grounds that FWIA does not satisfy the Department’s citizenship and fitness requirements. The Answer noted that FWIA’s application left open numerous questions about whether U.S. citizens exercised effective control over the reconstituted FWIA as required by Departmental regulations and precedent, in light of the significant participation of Fast Air, a Chilean carrier. Fine Air’s Answer also urged the Department to scrutinize the status and historical compliance disposition of Mr. Mansour Rasnavad, nominal owner of 70% of FWIA’s stock, in part because of Rasnavad’s relationship to Mr. Farhad Azima.

On September 22, 1995, in response to Fine Air’s Answer, FWIA filed a Motion for Leave to File an Otherwise Unauthorized Document and Reply. FWIA’s Reply took Fine Air to task for suggesting that there might exist a relationship between Rasnavad and Azima. Based on an affidavit submitted by Rasnavad as part of the Reply, FWIA informed the Department that “the two men are not related in any way, other than as employer and employee” and that “even the most cursory investigation would have disclosed this non-relationship.” Reply at 4. FWIA also challenged Fine Air’s assertion that Chilean citizens possess a substantial ability to influence FWIA’s activities and thereby compromise FWIA’s citizenship.

On September 29, 1995, Fine Air responded. First, Fine Air pointed out that research revealed that FWIA's Reply and Rasnavad's affidavit were deliberately misleading and deceptive. Fine Air submitted a copy of an obituary from the Kansas City Star reporting the death of a Mrs. Valieh Azima and noting that she was survived by four sons including "Farhad Azima...and Mansour Rasnavad. " Funeral home records, also submitted to the Department, go so far as to list one of Mrs. Azima's sons as "Mansour Azima." Thus, Fine Air pointed out, contrary to FWIA's contentions that Rasnavad and Azima "are not related in any way, other than as employer and employee," evidence strongly suggests that the two enjoy a relationship so close that the family described them as sons of a common mother in the mother's obituary and funeral records. Second, Fine Air reiterated its complaint that the reconstituted FWIA would not be under the actual control of U.S. citizens. It pointed out that Chilean carrier Fast Air owns the maximum voting equity in FWIA permitted under U.S. law (25%), exercises veto power over major FWIA management decisions, and has provided far in excess of 25% of FWIA's financing, when both equity and debt are taken into account. Moreover, Fine Air pointed out that FWIA appears to be bound to utilize Fast Air aircraft, and that there exist several other potential avenues of indirect Fast Air control over FWIA.

On November 17 and November 22, 1995, FWIA filed Supplements Nos. 1 and 2 to its Application for Transfer of its Citizenship and Exemption Authority. Fine Air now responds to these Supplements.

FWIA Has Offered No Explanation or Excuse for Rasnavad's Deceptive Affidavit and FWIA's Materially False Reply Based on that Affidavit.

On September 22, 1995, Mansour Rasnavad submitted to the Department a notarized affidavit containing the following untempered statement: "I am in no way related to Farhad Azima." Rasnavad Affidavit #1. Based on this assertion, FWIA's Reply of that same date contained the following statements:

- "Fine Air makes much of the 'fact' that Mansour Rasnavad is Farhad Azima's brother. Fine Air states that because of the close 'family relationship' between the two men, the Department should investigate Mr. Azima, Florida West and Mr. Azima's alleged ties to Florida West. Fine cites Department precedent concerning control in cases involving 'close personal relationships' in support of its argument that Mr. Azima has obtained control of Florida West through his 'brother,' Mansour Rasnavad. . . . There is . . . [a] very significant problem with Fine's argument -- Mansour Rasnavad is not Farhad Azima's brother." FWIA Reply at 3-4.
- "In fact, the two men are not related in any way, other than as employer and employee." FWIA Reply at 4.

“In addition to the fact that the two men are totally unrelated, Mr. Rasnavad has never discussed with Mr. Azima his investment in Florida West, any matters related to his investment or the management of Florida West.” Id.

On September 29, 1995, Fine Air presented the Department with probative evidence that, contrary to Rasnavad’s affidavit and FWIA’s Reply, Rasnavad and Azima share a close relationship. In light of this evidence, it is now clear that Rasnavad and Azima are not “totally unrelated,” that there did exist a close “family relationship” and a close “personal relationship” between the two men, and that they were related to a far greater extent than simply “as employer and employee.” FWIA is now forced to admit “that [Rasnavad] and Mr. Farhad Azima’s families have known each other for years and that Mr. Rasnavad and Mr. Azima have been business partners for more than fifteen years.” FWIA Supplement #1 at 14. A new affidavit submitted by Rasnavad goes still further:

I have known Farhad Azima’s family, including his mother, for most of my life since our families both came from the same city, Rezayieh, in Iran. On various occasions, his mother would refer to me as “son” because of the longstanding relationship between our families. I, in turn, had great affection for Farhad Azima’s parents. As the affidavit of Farzin Azima (also being submitted today) acknowledges, the inclusion of my name in the obituary notice and in the funeral chapel record was a result of Farzin Azima’s desire to acknowledge my longstanding relationship with his parents and absolutely nothing more than that.

Supplement #1, Exhibit H (Rasnavad Affidavit #2 at 1). Farzin Azima's affidavit corroborates:

At that time [of Mrs. Azima's death], I advised the Kansas City Star and the funeral home that Mansour Rasnavad was one of my mother's sons because of the mutual respect and affection between my parents and Mansour Rasnavad. Mansour Rasnavad's family came from the same city in Iran, Rezayieh, as did our family. My brother and I have known Mansour Rasnavad for most of our lives and, one of my brothers, Farhad Azima, has been a business associate of Mansour Rasnavad's for more than fifteen years.

Supplement #1, Exhibit H (Azima Affidavit at 1).

There can be no doubt that on September 22, FWIA, presumably at Rasnavad's direction,^{2/} made representations to the Department regarding the nature of the relationship between Rasnavad and Azima that Rasnavad knew were materially misleading and untrue. FWIA and Rasnavad have offered no explanation, excuse or apology for their attempt to mislead the Department.

The fact that Rasnavad's initial response to potentially embarrassing revelations of close ties between him and Azima was far less than forthcoming must seriously impact the Department's determination of whether a reorganized FWIA with Rasnavad as its controlling shareholder can be deemed fit. First, the incident alone (even if never to be repeated) adversely impacts FWIA's application.

^{2/} Lest Rasnavad or FWIA be tempted to respond that the discussion of this relationship was a minor oversight, it should be noted that the bulk of FWIA's Reply was devoted to disproving the existence of any relationship between Rasnavad and Azima and that the sentence "In fact, the two men are not related in any way, other than as employer and employee" is the consummation of FWIA's argument on this point.

The fact that the misrepresentation occurred in the context of a continuing fitness proceeding -- a proceeding in which the Department relies on applicants to be absolutely truthful and forthcoming -- makes the incident all the more serious. Deterring future misrepresentation by FWIA and/or other carriers demands a stern Departmental response. Second, the incident offers the Department significant reason to doubt Rasnavad's disposition to comply with DOT regulations in the future.

Finally, a material misrepresentation of this sort -- particularly when combined with, as discussed below, (i) supermajority voting provisions the Department has already identified as impermissible, (ii) Fast Air's heavy investment in FWIA, (iii) Fast Air's remaining ability to exercise veto power over major FWIA management decisions, (iv) FWIA's dependence on Fast Air aircraft, and (v) still unanswered questions about investor contributions benefitting FWIA and Fast Air influence over day-to-day decision making at FWIA -- should be treated as compelling evidence of an intent to circumvent the fitness requirements of U.S. law. Given that evidence, the Department has an obligation to apply the highest possible standard of care in its further scrutiny of the instant application. Mere representations by the applicant, cynically designed to furnish the Department with "what it wants to hear," should not suffice to discharge this applicant's burden of demonstrating its compliance with the Department's regulations -- a burden that should now be heavier in view of the history of this case thus far.

U.S. Citizens Do Not Retain Effective Control Over Reorganized FWIA

From FWIA's application and Supplements, the following is incontrovertible:

- **Fast Air controls 25% of the voting equity -- the maximum permitted under U.S. law -- of the reconstituted FWIA.**
- **Fast Air controls over 38% of FWIA's debt.**
- **Fast Air has the right to appoint one of the four FWIA board members.**
- **Fast Air possessed the right to veto management decisions regarding capital expenditures, debt, the issuance of stock and/or stock options, and amendments to the by-laws. It has apparently surrendered these rights, after DOT informed it that such provisions were "unacceptable." See DOT Information Request, September 11, 1995. However, Fast Air retains a veto power over any decision regarding any corporate merger or dissolution, any bankruptcy filing, and any "fundamental change in or cessation of any part of the corporation's existing business." FWIA By-laws, Art. II(10).**

- **Fast Air has provided, according to FWIA’s most recent figures,^{3/} 37% of the carrier’s “actual capitalization.”**
- **FWIA will obtain its aircraft from Fast Air. FWIA has yet to disclose the terms under which it will acquire the aircraft**
- **Fast Air is controlled by a single Chilean family which also owns and controls Chilean carriers Ladeco and LanChile. This Chilean consortium operates air cargo services between the United States and points in Latin America -- i.e., the same markets in which FWIA seeks to operate.**

Moreover, the full extent of Fast Air’s involvement in FWIA may still not be fully disclosed. For example, it is unclear whether, and to what extent, Fast

^{3/} Just who has contributed to FWIA, and the form of the investment, appear to be constantly moving targets. The original FWIA application states that “[t]he FWIA ownership group will collectively contribute funds amounting to \$2.4 million”: Rasnavad’s “equity and working capital investment” was “to exceed \$1 .0 million”; Fast Air was to contribute \$150,000 in equity capital and make available a \$1 ,000,000 line of credit; and Mr. Richard Haberly was to make a \$30,000 equity investment. FWIA contended that “the totality of [this] new investment in FWIA would satisfy [the three-month, no revenue test, which] FWIA calculates is a \$2 million threshold.” FWIA App. at 5-6.

FWIA’s Supplement #1 now offers a revised “actual capitalization” of \$2.71 million. Rasnavad is allegedly providing \$420,000 of this in equity, and \$1.26 million in debt; Fast Air is providing \$150,000 in equity, and \$850,000 in debt (of which \$600,000 is in the form of assets purchased by FWIA, presumably leased to FWIA (it is unclear whether, because the \$600,000 is loaned in the form of assets, this \$600,000 is primary to the other debt incurred by FWIA); Haberly’s contribution remains \$30,000.

Air contributed to the \$3.5 million reportedly paid for the assets of Florida West Airlines, Inc. ("FWA"),^{4/} pursuant to the assets purchase plan approved by the Bankruptcy Court on June 30, 1995. FWIA's financial statements do not appear to reflect funds paid by FWIA's investors in the bankruptcy for FWA assets, or the satisfaction of FWA liabilities. Certainly it would appear that FWIA's total capitalization of \$2.71 million does not include funds paid in the bankruptcy; FWIA's original application suggests that this new investment is on hand and capable of satisfying the Department's "three month-zero revenue test." See footnote 3 supra. Should it turn out that, in addition to its \$1 million investment in FWIA, Fast Air also paid funds in the bankruptcy to the benefit of FWIA, it would suggest still further that FWIA is dependent on Fast Air. FWIA should be required by the Department to file a full accounting of who has paid funds to the FWA bankruptcy, who has taken ownership of the FWA assets, what these assets consist of, their value, and whether any of these assets are being used by FWIA.

Furthermore, Fine Air believes that the full extent of Fast Air's involvement in the day-to-day operations of FWIA has yet to be plumbed. In this context, Fine Air understands that Ernesto Ramirez -- a Fast Air employee, a close associate of the Cueto family (which controls the Fast Air/LanChile/Ladeco consortium), and Fast Air's representative on FWIA's Board of Directors -- is frequently present on FWIA premises and involved in day-to-day decisionmaking at

^{4/} See Alison Turner, New Owners Take Airline out of Chapter 11, South Florida Bus. J., July 7, 1995 (attached hereto).

FWIA. Fine Air urges the Department to investigate fully the nature and depth of Mr. Ramirez's involvement.

In any event, a grant of FWIA's application in light of the facts clearly established would constitute a major departure from the Department's precedent barring foreign effective control of U.S. carriers. In its previous filings, Fine Air has already provided the Department with numerous citations to DOT and CAB precedent holding that foreign citizens cannot possess a substantial ability to influence the activities of U.S. carrier, regardless of how they may possess that ability. See Fine Air Answer at 3-5. Fine Air Reply at 8-1 2. DOT has voiced concern regarding the ability of foreign citizens to exercise veto rights over major management decisions and, to the best of Fine Air's knowledge, has never permitted a foreign carrier to possess the right to veto decisions concerning "fundamental changes" in the U.S. carrier's business.⁵¹ DOT has repeatedly ruled that U.S. citizenship is placed at risk when a U.S. carrier's economic viability is clearly dependent upon foreign-held debt or equity."⁵² DOT has prohibited a U.S.

^{51/} See, e.g., Paae Aviet, Citizenship, Orders 83-7-5 and 82-8-41; Silvas Airlines, Inc., Order 80-1-103. In Acausition of Northwest Airlines Bv Wings Holdina, Inc., KLM possessed certain veto rights over the issuance of new preferred stock. These rights combined with the amount and kind of equity interest were deemed "unacceptable." Order 89-9-51 at 4. See also Order 93-1 - 11 at 17 (DOT finds Northwest a U.S. citizen because "foreign interests do not have veto control").

^{52/} See, e.a., Unicorn Air Ltd., Fitness Investigation, Order 85-9-24 (actual control by non-U.S. citizen because of his indispensability to the airline's financing); In re The Acausition of Northwest Airlines bv Wings Holdinas, Inc., Order 89-9-51 ("[I]t is clear from our precedent that a large share in a carrier's
(continued...)

carrier from having on its Board a representative of a foreign carrier, who can vote on all Board decisions affecting the U.S. carrier's operations." And DOT has held that a U.S. carrier's operational viability cannot depend on a foreign citizen.^{6/} In the instant case, DOT is presented with all four factors: a foreign citizen possesses veto rights over any FWIA decision to change its business, FWIA is clearly financially dependent on this foreign citizen, this foreign citizen has appointed one of FWIA's four directors who is able to participate in all decisions affecting FWIA, and FWIA is apparently bound to obtain its aircraft from this foreign citizen. Even more importantly, this foreign citizen is not merely a passive investor, but rather is a foreign air carrier, operating in the same market as FWIA, and clearly interested in FWIA's activities as a potential competitor.

In that connection, while the Department is correct to treat the instant application in accordance with its normal procedure for evaluating the continuing fitness of a U.S. airline, it is clear that the instant proceeding also raises a broader issue.

^{6/}(...continued)
equity poses citizenship problems, even where the interest does not take the form of stock. . . . A conversion of part of [KLM's] investment to debt would not allay our citizenship concerns. Debt interests raise many of the same control concerns as equity interests.")

^{7/} In re Acquisition of Northwest Airlines by Wings Holdinas. Inc., Order 89-9-51. The requirement that KLM-appointed directors recuse themselves from a variety of NW board decisions was abandoned only after conclusion of an Open Skies bilateral agreement between the U.S. and the Netherlands. See Order 93-1-11.

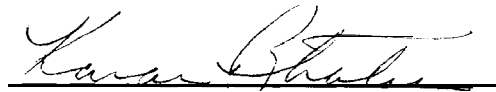
^{8/} See Pan Aviation Fitness Investigation, Order 86-8-65.

Despite U.S. efforts to establish a more liberal and open market for air services in the hemisphere, most important U.S. aviation relationships with countries in Latin America remain highly restricted. Only through effective government-to-government negotiations can opportunities in the region for U.S. airlines be improved. If the ownership and control requirements that distinguish the international airline industry from most others have any continuing justification, it is that they enable U.S. negotiators to bargain more effectively in pursuit of those opportunities, because foreign carriers know that they cannot merely “buy” access to the U.S. market.

A finding that FWIA has satisfied applicable citizenship requirements, despite all the indications in the record before the Department that FWIA is being established as a beachhead in the U.S. for Fast Air/LanChile/Ladeco, would represent a troubling but significant new precedent. Arguably, it would represent such a serious departure from existing doctrine that the public should be given a full opportunity to comment on the new interpretation and its implications for U.S. international aviation policy before any final decision is rendered.

Fine Air urges a simpler course, however: Based on the evidence currently available -- characterized by a transparent effort to vest effective control of FWIA in Fast Air as well as statements in a sworn affidavit that were obviously intended to mislead the Department -- the Department should find that, as currently organized and capitalized, FWIA does not satisfy the Department’s citizenship requirements.

WHEREFORE, Fine Airlines, Inc. urges the Department to grant its motion for leave to file the instant response, and to deny FWIA's application currently pending before the Department in this docket.

A handwritten signature in cursive script, appearing to read "Karan Bhatia", is written over a horizontal line.

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South Florida Business Journal
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Friday, July 7, 1995

v15, n46, Section A

New owners take airline out of Ch. 11
 By Alison Turner

Miami, FL, US --

MIAMI--Florida West Airlines is back in business--for the third time.

Last week, a **bankruptcy** court judge approved the \$3.5 million sale of the cargo carrier to a consortium led by Richard Haberly, the company's chief executive officer.

The other members of the consortium are. LAN Chile S.A., Fast Air Carrier S.A. and Alexander Cargo Inc. The all-cash sale is expected to close July 12.

Haberly, a former president of Arrow Air Inc., took over as president and chief executive of **Florida West** in June 1994 after Maury Joseph and Allen Beni, the company's chairman and president, resigned.

Florida West, which opened in 1982, provides charter air cargo transportation, aircraft maintenance and aircraft sales leasing from Miami International Airport.

The company, which once claimed it was the sixth-largest cargo carrier in Miami, filed for Chapter 11 **bankruptcy** protection last October, listing assets of \$14.7 million and liabilities of \$19.2 million, according to **bankruptcy** court records. **Florida West** continued to operate during its **bankruptcy** proceedings, although it laid off 54 employees last September.

Its **bankruptcy** filing followed a slew of troubles that started in April 1994, when the airline failed to tell shareholders that one its jets was seized after cocaine was discovered on board during a drug raid in Ecuador.

Weeks later, shareholders filed a lawsuit and company auditors resigned. Meanwhile, CNBC-TV reporter Dan Dorfman said that **Florida-West's** stock was too high and its prospects as a business were

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overblown.

The airline's stock, traded on Nasdaq under the symbol FWST hit nearly \$16 in February, but dropped to less than a dollar before the company filed **bankruptcy**.

Annual and quarterly filings with the SEC were delayed, which in turn sparked an SEC investigation into the volatility of the stock.

Florida West's October **bankruptcy** filing was the second time the airline has filed Chapter 11. The airline previously filed Chapter 11 in 1992 and emerged in July 1993 after Allen **Beni** and Maury Joseph bought out creditors for \$4.2 million and took the airline public.

Joseph sent a letter to bankruptcy trustee, Kenneth Welt, on the eve of last week's sale. He apparently expressed concern on how the court was handling the sale, indicating that the court might collect more money if the airline was broken up and sold in parts.

The letter was discussed during a court hearing last week. "I don't want to see anything unless it has a copy of a cashier's check for more than \$3.5 million," said Judge A. Jay Cristol in court. "I am not impressed with people writing letters on the eve of the sale."

Haberly wants to expand **Florida West's** operations in Latin America and double the size of its fleet, but was unavailable to comment on those plans.

---- INDEX REFERENCES ----

KEY WORDS: AIRLINE INDUSTRY; MANAGEMENT BUYOUTS; BANKRUPTCY;
CONSORTIA; CHIEF EXECUTIVE OFFICERS; SOUTH ATLANTIC;
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RICHARD HABERLY

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Motion for Leave to File and Response of Fine Airlines, Inc. on all persons listed on the service list below by causing a copy to be sent via first class mail, unless otherwise indicated.



Karan Bhatia

Dated: December 7, 1995

FLORIDA WEST INTERNATIONAL AIRLINES

DOCKET OST-95418

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