

**U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.**

**IN THE MATTER OF
DHL AIRWAYS, INC.**

**DOCKET NO. OST-2002-13089
(Citizenship Proceeding)**

**MOTION TO THE DEPARTMENT TO STAY PROCEEDINGS AND
MOTION FOR LEAVE TO FILE**

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DATED: June 4, 2003

Notice: Airways requests immediate Department action on this Motion.

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Pursuant to Rules 6 and 11 of the Rules of Practice of the Department of Transportation (“Department” or “DOT”), 14 C.F.R. §§ 302.6(c), 302.11, DHL Airways, Inc. (“Airways”) files this Motion For Leave to File an Otherwise Unauthorized Document requesting the Department to: (a) stay further proceedings before the Chief Administrative Law Judge in this docket, pending a ruling by the Department on Airways’ Petition and Motion filed yesterday, June 3, 2003; and (b) vacate the most recent order of the Chief Administrative Law Judge (“CALJ”) dated June 3, 2003 (the “Order”).¹ That Order, among other things, requires Airways to file, on a continuing basis, every document, or draft, prepared by anyone with respect to on-going financing negotiations² and the finalization of closing documents and schedules for the acquisition of Airways.

¹ While ordinarily Airways would first ask the CALJ to vacate the Order, under the time constraints of the Order and the CALJ’s view of discovery generally, that route is not practical.

² While financing negotiations are on-going, financing is not a condition precedent to the closing since the investors have access to sufficient capital to finalize the acquisition without external financing.

Not only does the CALJ require that every document drafted during these on-going proceedings be furnished to him, and Airway's competitors, Fed Ex and UPS, but he wants each one filed within 24 hours after it is prepared. The Order is, by any measure, unreasonable and misguided; it is however consistent with the CALJ's view of his mandate in this docket and his prior orders. It also appears to be based upon the CALJ's erroneous view that Airways did not live up to a commitment "that any change in any submission, any submitted fact in those documents . . . will be submitted to [the CALJ] and all parties." However, Airways did, in fact, live up to its undertaking. As the transcript makes clear, counsel and the CALJ were discussing the likely Dasburg acquisition, and Airways agreed that "The second it [the Dasburg acquisition] happens, assuming it does, we will of course notify Your Honor and all the parties of that fact." (Tr. of April 29, 2003 Prehearing Conference at 85.) Airways did precisely that on May 21, 2003.

Moreover, it must be noted that the Department has yet to determine how it proposes to process the Dasburg acquisition. Airways' has asserted in filings transmitting the initial transaction documents that many of the issues in this docket will be rendered moot upon consummation of the acquisition and that the Department has broad authority, even given the unique congressional intervention, to fashion procedures it believes necessary to review the acquisition.

Background and the CALJ's Latest Order

On June 3, 2003, in light of a material change in the facts, Airways filed a Petition and Motion asking the DOT to reconsider and clarify its April 17 Order. Airways pointed out in its Petition and Motion that (1) three American citizens, John

Dasburg, Richard Blum and Michael Klein, had reached agreements to acquire 100% of the stock of Airways, thereby removing even the minority interest of DHL Holdings (USA), Inc.; (2) the acquisition by the group should lead the CALJ to focus on this new ownership to ascertain the *current* citizenship of Airways; and (3) the CALJ has a different, and vastly more expansive, view of his task; thus, the Petition pointed out, the CALJ believes, and has ordered discovery accordingly, that every aspect of Airways' business back to January 1, 2000 is relevant to this proceeding. Without belaboring or repeating the point set forth in the June 3 Petition and Motion, the CALJ was quite clear in stating that the Dasburg acquisition did not change anything, except to add another avenue of discovery for Fed Ex and UPS. (Transcript of May 27, 2003 Hearing at 79-83.)

No sooner had Airways filed its June 3 Petition and Motion than it received the CALJ's latest Order. In this Order, which was not responsive to any motion by Fed Ex, UPS,³ or anyone else, and without any notice to Airways, the CALJ has decreed that Airways must produce by the end of the day on June 5 (48 hours later) "all existing documents, including drafts of such documents prepared . . . in connection with the merger agreement or the new ACMI Services Agreement." (June 3, 2003 Order of the Chief Administrative Law Judge.)

The Order then unaccountably goes on to require Airways to provide an "identification of any [such] document prepared for [Airways] by or on behalf of Deutsche Post or an affiliate of Deutsche Post" Finally, not satisfied, the CALJ has

³ On June 2, Fed Ex and UPS did file requests for 16 new items of information or documents regarding the Dasburg group's acquisition (as the CALJ had given them leave to do) but they did not file any motion seeking any relief. Moreover, the time for Airways to even respond to those requests has not yet occurred.

directed Airways to provide any “new documents” to him -- and Airways’ competitors -- “within 24 hours of their creation.” *Id.*

Reasons To Grant This Motion

There are two reasons to grant this Motion. First, it is essential to preserve the *status quo* and prevent more and more unnecessary, burdensome, discovery on irrelevant matters; second, the CALJ’s Order, which (as noted) was issued *sua sponte*, impermissibly and inexplicably inserts the CALJ (and Airways’ competitors) into the middle of the negotiations of the Dasburg group. By requiring the submission of all negotiating documents, including drafts, within 24 hours of their creation, as the negotiations go on, the CALJ has assured that (1) incredible resources would have to be expended, and diverted from other business needs, to keep the CALJ (and Fed Ex and UPS) “up to speed,” on a daily basis, and (2) Airways cannot possibly comply with this latest directive.

As stated above, to preserve the *status quo* so that the Department may consider Airways’ June 3 Petition and Motion, it is imperative that the proceedings before the CALJ be stayed pending a ruling on the Petition and Motion. Otherwise, Orders from the CALJ, such as the June 3 Order, may exacerbate the very problem which Airways has called to the Department’s attention and has led it to request that the Department clarify and refocus the proceedings before the CALJ. Thus, a short stay is essential to effectuate the purpose of the Petition and maintain, for the DOT, all its options as it considers the Petition.

Furthermore, the June 3 Order is additional evidence of the CALJ’s misguided view of the task entrusted to him by the April 17 Order and hence it should be

vacated. The CALJ has now apparently decided that the Dasburg acquisition requires that the complainants (Fed Ex and UPS) and the CALJ should have ongoing, day to day, access to all discussions and negotiations preceding the closing. Therefore, he has required all documents, even drafts, be furnished within 24 hours after they are created. The CALJ gives no hint as to the relevance of drafts -- which may or may not ever become agreements -- or as to the reason why he, Fed Ex and UPS should become part of the negotiating process. Nor does the CALJ take account of the fact that it is impossible to comply with his Order. Multiple drafts (and e-mail, riders and inserts) relating to the financing negotiations and finalization of schedules are exchanged -- and in the normal course of events often discarded -- constantly. To issue an order requiring that everything reduced to writing relating to ongoing and fluid discussions be saved and provided within 24 hours to the CALJ and Airways' competitors is so burdensome that compliance is impossible. To do so would require counsel to stay in touch, every day with every lawyer (and non-lawyer) who may draft anything to make sure it was obtained and filed within 24 hours. Such an Order is, within counsels' experience, unprecedented. Moreover, such an order threatens to affect dramatically the negotiation process because of the chilling effect of such an order as the parties realize that all drafts or related documents -- whether or not finalized -- will become known to Airways' competitors.

Finally, one must ask why anyone needs the information ordered. Of what use or relevance is the information? Airways has agreed to provide copies of all finalized documents promptly upon their execution. That, we submit, is more than anyone legitimately would need to assess citizenship.

Moreover, since Airways has every intention of complying with every order or request issued by the CALJ, it is particularly disturbing to be faced with an order with which it simply cannot comply. Since the failure to comply could have serious consequences for Airways, the Order raises questions of fundamental due process and fairplay. Airways cannot and should not be placed in the box of either responding to an order with which it is impossible to comply, or facing the potential of an adverse recommendation to the Department. This process threatens to deprive Airways of its basic rights without due process.

Equally strange and troubling is the suggestion in the Order that the CALJ believes, without any evidence before him, that some documents “prepared for Airways” were prepared “by or on behalf of Deutsche Post or an affiliate of Deutsche Post.” Although it is hard to know what the Order means, if it means documents prepared by, say, DHL Holdings (the seller) for submission to Airways, then it would seem simply to call for any and all communications; if it means to suggest that Deutsche Post (or its affiliate) is preparing documents on behalf of Airways (*i.e.*, Deutsche Post is acting as a puppeteer) then -- while there are no such documents -- the Order may suggest a bias or pre-disposition that is, at best, puzzling (since there has been no such evidence) and, at worst, very troubling as Airways seeks a fair determination of the citizenship issue.

Finally, it is disturbing that the CALJ simply assumes, without asking any questions or receiving any evidence, that Airways had failed to comply with a prior order. The fact is the materials the CALJ cites as missing from the “exhibits and schedules in the attached ACMI Services Agreement,” do not currently exist, as all counsel were advised when Fed Ex counsel raised the same issue with counsel for Airways on May 30,

2003. If the CALJ had inquired (or if he considered that the documents might not exist) Airways would have advised him, as it did Fed Ex, that the ACMI Services Agreement was furnished because all the terms and conditions were set forth as an exhibit to the Agreement of Merger and the various disclosure schedules have not yet been prepared, which is quite usual in such transactions.

Conclusion

To preserve the *status quo* while the Department considers Airways' Petition and Motion for Reconsideration and Clarification, a brief suspension of all proceedings is necessary. Furthermore, the CALJ's recent order is so misguided that it should be vacated. Accordingly, Airways respectfully requests that the DOT stay further proceedings in this docket, pending a ruling by the Department on Airways' June 3 Petition and Motion and vacate the June 3 Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served by messenger and/or overnight as indicated, copies of the Motion to the Department to Stay Proceedings and Motion for Leave to File, this 4th day of June, 2003 to all persons named on the Service List.

/s/ Kommala Keovongphet

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