

**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)**

**PETITION FOR RECONSIDERATION AND CLARIFICATION AND
MOTION FOR LEAVE TO FILE AN OTHERWISE UNAUTHORIZED DOCUMENT**

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Dated: June 3, 2003

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NOTICE: Airways request expedited treatment of the Petition and Motion. Airways requests that any person wishing to support or oppose this Petition file an answer with DOT's Document Services Division by June 5, 2003 and that the Department issue its Ruling by June 9, 2003. A copy of such answer must be served upon Airways and its counsel and all persons listed on in the attached Service List.

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Pursuant to Rules 11 and 14 of the Rules of Practice of Department of Transportation (“Department” or “DOT”), 14 C.F.R. §§ 302.11, 302.14, DHL Airways, Inc. ("Airways") files this Petition For Reconsideration and Clarification and Motion for Leave to File an Otherwise Unauthorized Document, in the nature of a late filed Petition for Reconsideration. In its Motion and Petition, Airways requests that the Department reconsider and clarify and/or modify its Order Instituting Formal *De Novo* Review, served April 17, 2003 (the “Initiating Order” or “April 17 Order”), which directed a hearing in the above-referenced docket, in light of (1) a material change in the factual situation that formed the basis for the referral of this matter to the Chief Administrative Law Judge (“CALJ”) regarding the ownership of Airways, and (2) the fact that the Chief Administrative Law Judge has, we submit, misinterpreted both the DOT’s orders and the Department’s intent in connection therewith and hence is acting inconsistently with both the April 17 Order and the DOT’s subsequent May 12, 2003 Notice on Request for Extension of Time for Submission of Recommended Decision (“May 12 Notice”). These circumstances, we respectfully submit, are extraordinary in nature and support the Department’s granting of Airways’s Motion, and Petition for Reconsideration and Clarification. In accordance with the provisions of 14 C.F.R. §

302.14(b), we respectfully aver that the new circumstances discussed herein, namely the definitive agreement by the Dasburg group to own and control Airways, and certain rulings by the CALJ, could not have been known or discovered prior to May 21, 2003 (the date the acquisition transaction was submitted to the Department for review under 14 C.F.R. § 204.5) and May 27, 2003 (the date of the conference at which the rulings were made) because the parties did not complete their negotiations and reach definitive agreements until May 20, 2003 and the conference had not yet occurred.

Because we are seeking as a part of the relief requested herein a brief suspension of discovery, to avoid the needless expenditure of time and resources required to provide discovery relating to persons and events that, we respectfully submit, have become irrelevant in the light of the Dasburg acquisition, we request that the DOT require responses to this Motion and Petition by the close of business June 5, 2003, and that the DOT issue an Order by June 9, 2003, the day before discovery is due to commence.

Background

In May 2001 Airways completed a major reorganization as a result of which its majority shareholder became William A. Robinson, one of the original founders of the original DHL. Pursuant to that reorganization, Mr. Robinson, a citizen of the United States, acquired 75% of the voting interest in Airways, with DHL Holdings (USA), Inc., a Delaware corporation (“Holdings”) owning the remaining 25%. After reviewing the facts, including the composition of the Board of Directors and the managing officers of Airways, as well as the business relations between and among Airways, its principals, Holdings and other DHL-related entities, DOT concluded that Airways continued to be a U.S. citizen within the meaning of 49 U.S.C. § 40102(a)(15).

Despite DOT's conclusion, Federal Express Corporation ("FedEx") and United Parcel Services, Inc. ("UPS"), the dominant carriers in the overnight express delivery business, have continued to press the DOT to reverse itself and hold that Airways is not a U.S. citizen. If they were to be successful in this effort, FedEx and UPS would have eliminated a serious competitor and assured their continued dominance of the market.

The April 17 Order And Subsequent Notice Response

The April 17 Order set forth some of the prior history of this docket and directed the CALJ to conduct a hearing, within a specified time period to focus on a single issue, the "current citizenship of DHL Airways only" (emphasis in original). The Order went on to specify that the CALJ's recommendation was to be issued by September 2, 2003. To give full force and effect to its determination to limit the issues to be considered in this case to current citizenship only, the DOT did more than just underline the word "current"; it specifically ruled that issues concerning DHL Airways's past compliance with statutory citizenship requirements were beyond the scope of this proceeding, because they "are the subject of separate third-party enforcement complaints and will be considered by the Assistant General Counsel for Aviation Enforcement and Proceedings in a separate proceeding pursuant to rules applicable to such complaints." April 17 Order at 2 & n. 4.

At the initial pre-hearing conference held on April 29, 2003, the CALJ set forth his view of the task before him as follows:

[O]ne of the forces behind the setting of this hearing is the recognition by some people at least that it's important in determining U.S. citizenship to have an open adjudicatory proceeding. Now it used to be that whenever a citizenship question arose it would generally be assigned to an administrative law judge for an adjudicatory proceeding. And then there came a time when the Civil Aeronautics Board disappeared and when those proceedings were generally not referred for adjudicatory proceedings. They were done administratively.

More recently, for reasons that I don't need to recount, some people have had occasion to be concerned about whether it's a good idea for non-citizens to be operating U.S. carriers. I could mention some names, which would spring to the mind of everyone, who could in fact be in control of any noncitizen operator functioning in the United States. . . . And I'm sure we would all agree that kind of access to U.S. air carrier status is not something that would widely be regarded as desireably [sic] in the present international climate. So, there is an interest here that goes beyond this case. There's an interest in the openness of such determination, so that the citizens who use U.S. airways, and the citizens, who live beneath them, as they fly over, whether in skyscrapers or on the ground, can have some assurance that those air carriers are, in fact, operating and controlled by U.S. citizens.

April 29, 2003 Hearing Transcript, at 96-97.

After that initial pre-hearing conference, the CALJ adopted a proposed schedule for future proceedings and issued a number of rulings. In addition, given the scope of the issues the CALJ envisioned, he requested that the September 2 date be extended to November 24, 2003. See Prehearing Conference Report, Order And Request To The Decisionmaker For Extension Of Time at 5 (May 2, 2003).

On May 12, 2003, DOT issued its Notice in response to the CALJ's request. In the May 12 Notice, DOT reluctantly extended the date for the CALJ's recommendation until October 31. However, in so doing, the DOT observed, again, that the only issue was the "current citizenship" of Airways, that a wealth of material had already been produced in the record, and that the parties (including FedEx and UPS, who had provoked the docket in the first place) were fully familiar with the issue. Accordingly, DOT stated that while "some limited discovery may be justified" it should be focused on the limited issue of the "current citizenship" of Airways. May 12 Notice at 1-2.

The May 16 Rulings

Pursuant to the CALJ's direction at the initial April 29 Pre-Hearing conference, the parties served Requests for Information and Requests for Documents and Things. FedEx, UPS and Lynden served one set of demands which totaled 169 requests (two of those requests contained over 20 subparts each) and sought effectively, a complete review of every aspect of Airways's business.¹

The requests from FedEx and UPS sought virtually every piece of paper in Airways's files for the past five years. Thus, they demanded every letter, memorandum, agreement, contract and other document regarding every aspect of Airways's business, its relations with any other DHL- or Deutsche Post-related entity and even its relations with every other non DHL- and Deutsche Post-related entity, including consultants, lawyers, etc. Although DOT directed that the only issue was Airways's current citizenship, FedEx and UPS sought to troll the waters back to 1998 to see if there was anything they could dredge up which might assist them in their effort to destroy a competitor.²

Airways objected to the obvious fishing expedition, pointing out that not only was the time period excessive, the scope of what was sought had no reasonable limits or relationship to the sole issue – Airways current citizenship.

On May 16, the CALJ ruled on Airways's objections to the discovery sought. While trimming the time period to “only” three and one-half (3 ½) years (i.e., back to January 1, 2000), the

¹ FedEx had previously served a document and information demand with over 100 requests on April 24, so the May requests were not unexpected. Airways propounded its own requests, designed to show that FedEx and UPS conduct similar businesses and operate in similar foreign networks and that they have admitted that, in virtually identical circumstances to those presented here, no foreign “control” is being exercised. See DHL's First Set of Requests for Information, Documents, Admissions and Deponents, Request for Information Nos. 9, 24-25, 31-34, Request for Documents and Things Nos. 9, 13, 17-32, 36, 40-42.

² For example, FedEx sought all documents relating to all of Airways's fixed assets, including communications systems, office buildings, airplanes, etc. – a stunning amount of material relevant to nothing. FedEx also sought – without any limitation – to go fishing through all of Airways's “accounting” documents and all communications with Airways's primary customers.

CALJ overruled almost every objection Airways had made. Under the CALJ's May 16 ruling, virtually every document in Airways's files was required to be searched and produced. At the same time, the CALJ sustained virtually all FedEx's and UPS's objections to Airways's discovery requests.

The May 21 Change In Circumstances And The May 27 Conference

On May 21, 2003, Airways announced that its Chairman and Chief Executive Officer, John H. Dasburg, along with two other U.S. citizens (Messrs. Richard Blum and Michael Klein) had reached agreements to purchase 100% of the stock of Airways. The acquisition, which is scheduled to be closed on or before June 30, 2003, was submitted to the DOT on May 21 pursuant to 14 C.F.R. § 204.5. Believing that the announced transaction materially changed the citizenship determination, the CALJ was also advised of the agreement (as he had requested to be) at the same time and all parties were served with a copy of this submission.

However, at the Pre-Hearing Conference on May 27, the CALJ made it clear that he believed that Airways had improperly communicated with the DOT by its May 21 letter.³ He iterated and re-iterated his belief that Airways and its counsel acted in violation of the Department's Rules of Conduct, 14 C.F.R. § 300.2(a). (See May 27, 2003 Prehearing Conference Transcript ("Transcript") at 30 ("you also sent it to the decisionmaker which is expressly prohibited by 300.2A"); see also *id.* at 31 (Part 300 "prohibits communication. It doesn't say that communication is okay if you subsequently provide a copy of it to the Judge."), *id.* at 229 ("I'm just trying to

³ The CALJ also scolded Airways's counsel for letters written to the CALJ by certain of Airways's pilots which the CALJ felt criticized him, despite the fact that the letters were written without the knowledge of counsel, and despite the fact that Airways's General Counsel promptly wrote all company personnel instructing them not to communicate with the CALJ. (Transcript at 16-20.) Indeed, the *New York Times* has observed that the CALJ repeatedly "scolded" Airways's counsel and spoke "crossly" of Airways's personnel which led the "lawyers and lobbyists for FedEx and U.P.S. [to grin] and gloat in the spectators seats." Andrew Ross Sorkin, *Three's A Crowd To Air Cargo Giants*, N.Y. TIMES, June 1, 2003, at Bu3, Bu10.

indicate to you that I take Part 300 seriously, and everybody here should too”).⁴ Given Airways’s firm belief that the May 21 change was material to the proceedings in this docket, Airways urged the CALJ to focus on the current citizenship issues in light of the May 21 change only, as the DOT had previously directed. When the CALJ raised the possibility that the acquisition might not be finalized, Airways suggested that the CALJ adjourn the proceedings to permit the ownership change to occur and then consider the current citizenship issue in that light. The CALJ refused Airways’s request but he noted that Airways could seek to file a "Motion for Reconsideration . . . with a Motion to Late File” with DOT to reconsider and modify the Initiating Order. (Transcript at 75.) Mindful of the CALJ’s admonitions regarding communications with the Decisionmaker but as a result of his suggestion, Airways has filed this Motion and Petition.

The Instant Motion And Petition

By this Motion and Petition, Airways requests DOT to modify the April 17, 2003 Order so as to clarify the issues to be considered in the hearing in this docket in light of both the current facts and the proceedings before the CALJ. Specifically, Airways requests that the DOT order the following, for the reasons set forth below:

1. The broad ranging information and document requests ordered by the CALJ to be answered by June 10, should be stayed immediately, so that the acquisition of Airways as set forth in the May 21 filing can be accomplished and a truly massive and wasteful expenditure of resources can be avoided.

⁴ The CALJ also questioned whether Airways’s counsel would have discussions with the Air Carrier Fitness Division following up on the Part 204 submission by Airways, as well as whether counsel knew “whether those people are, are barred from participation in the decision in this case,” whether, if they called counsel on the phone “are you going to talk with them?” and whether he was “aware of anyone in the Department that has recused themselves with respect to the consideration of this case?” (Transcript at 33-35.)

2. When the acquisition has been completed,⁵ the CALJ should refocus and limit discovery solely to that which is at issue: (a) the citizenship of the individuals making the acquisition (if FedEx or UPS seriously challenge their citizenship); and (b) agreements between the new owners of Airways and another DHL-related company. The relevant time period should be from the date of the Dasburg acquisition to the time of discovery.
3. The limited discovery set forth in (2) above could be completed in two weeks, i.e., by the current July 18 discovery cut-off date, and the balance of the schedule easily could be met.

Reasons For Granting This Motion And Petition

The Motion and Petition are designed to save the parties and the DOT the expenditure of inordinate time and resources in what is a diversion from the real issue, as well as an unnecessary and unproductive effort. This is especially true in light of the acquisition of Airways by the Dasburg group. As a result of this, even the possible “shadow of foreign influence” has been eliminated.⁶ (Transcript at 88.) The group is comprised wholly of U.S. citizens, the board of directors will consist only of U.S. citizens and all of the managing officers are U.S. citizens. All of the voting interest will be owned and controlled by U.S. citizens. There is no linkage to any DHL company except by virtue of the ACMI agreement which is a normal commercial relationship in this industry. If the docket is to proceed in accordance with the CALJ’s view of his mandate under the April 17

⁵ In the extremely unlikely event the acquisition is not completed, the matter can still proceed with only about three weeks having been lost. This is a relatively short period of time, especially in light of the time and energy saved if this Motion and Petition are granted and the acquisition is finalized.

⁶ The concern about the “shadow of substantial foreign interest,” which emanates from Uraba, Medellin and Central Airways, Inc., 2 C.A.B. 334, 337 (D.O.T. 1940), has been mentioned several times by the CALJ. While this may be a legitimate concern in some circumstances, it is not here and certainly not after the Dasburg acquisition.

Order, Airways will be forced to spend enormous, precious, resources attempting to comply with the wide-ranging discovery into a plethora of issues that are irrelevant to the current ownership and citizenship of Airways.⁷

Operating under his view of the April 17 Order, the CALJ has declared that:

1. It is essential to inquire into facts and documents for the past three and one-half (3 ½) years, going back to January, 2000, despite the fact that Airways was completely reorganized as of May, 2001 and will undergo a complete change of ownership in less than one month (See Transcript at 74-76; see also Order of the Chief Administrative Law Judge, served May 16, 2002);
2. Every conceivable issue, including every single one conjured up by FedEx and UPS, must be fully explored and thus broad ranging, virtually unlimited discovery into Airways files has been ordered:

“Where we are procedurally is that this case has been referred to us for a hearing and ... we’re going to look ... at whatever facts we think are appropriate to make a decision based on the totality of the circumstances. And, the totality of the circumstances may include a lot of things, Mr. Litvack, including things that used to occur and used to be and how those things have been changed. . . . A situation in which [Airways] is under the control of foreign citizens and then enters into a new agreement may call for a different level of scrutiny.” (Transcript at 75-76.)⁸

⁷ While we believe the issue here is truly best suited to the normal informal review policy DOT has employed for the last several years, we recognize that events and other forces have compelled a hearing before an administrative law judge. Although some have suggested that the DOT’s informal process is inappropriate and that only a proceeding before an administrative law judge can properly determine citizenship, the DOT consistently has preferred the informal process for a variety of weighty policy reasons, that apply fully here. See Letter from Norman Y. Mineta to Hon. Earnest F. Hollings, Sept. 25, 2002.

⁸ In the April 17 Order, the DOT expressly stated that issues involving Airways’s prior ownership were not in issue in this docket: “This proceeding is being instituted to consider *de novo* the current citizenship of DHL Airways only. Other issues will not be made a part of this proceeding.... Issues involving DHL Airways’s past compliance with statutory citizenship requirements are the subject of separate third-party formal enforcement complaints

“We’re here to talk about a whole panoply of factors that may bear on the question of whether the air carrier is or is not subject to foreign control.” (Id. at 99.)

The CALJ believes the issues to be decided at a hearing are every one of the issues that FedEx and UPS proffered, as well as every issue the Inspector General identified (including those as to which the Inspector General found there was no issue). (See id. at 84-90.)

Thus, the CALJ would have the parties explore every aspect of Airways’s business because “you look at the totality of the circumstances. It’s not a question of not looking at a great variety of matters to determine whether or not there is the factor of control.” (Id. at 90.)

“We’re examining [Airways] and we’re examining it in connection with a, a great many surrounding circumstances.” (Id. at 78.)

Thus, the CALJ believes the April 17 Order encompasses at least **21** issues. We do not believe that is what the DOT intended. We accordingly urge the DOT to clarify the April 17 Order to prevent a massive and wasteful effort spent on a series of irrelevant issues far beyond what the DOT intended, and intruding precisely into issues of “past compliance” which the DOT ruled would be considered separately in enforcement dockets, not in this proceeding.

3. As discussed previously, the CALJ, has determined that the “totality of the circumstances” are relevant to ascertaining DHL Airways’s current citizenship. This determination has led him to rule that DHL Airways must produce old memoranda, letters, e-mails, contracts, agreements and other

and will be considered by the Assistant General Counsel for Aviation Enforcement and Proceedings in a separate proceeding” April 17 Order at 2 & n.4 (emphasis in original).

documents relating to everything from “fixed assets” owned by Airways to a litany of topics (over 150 discovery requests) including why Airways decided to move its headquarters from Chicago to Miami, Florida (where Mr. Dasburg lives). And it has led the CALJ to permit inquiry into various individuals who have acted as “consultant, advisor, sales or marketing agent, legal counsel or representative” to Airways for the prior three and one-half years, the purpose of their engagement and compensation information. All of this, the CALJ has ruled, is necessary to resolve the issue whether DHL Airways continues to be a U.S. citizen within the meaning of the statute. (Transcript at 75-76, 135-36, 198-99). Indeed, even information regarding and including the serial numbers of aircraft owned or operated by Airways is relevant according to the CALJ: “Well, it’s not the single things that tell whether it can be ... controlled. It is not the individual items of information but the totality of circumstances. So, that’s overruled. (Id. at 116 (emphasis added).) In short, under the CALJ’s view, there seems to be no information that does not bear on the control issue, even when Airways agreed to stipulate to underlying facts.⁹

Indeed, the CALJ has shifted the burden of “fixing” FedEx’s and UPS’s objectionable requests to Airways if it wished to have any objections sustained: we “will look to the people who suggested tailoring to suggest the nature of tailoring.” (Id. at 95; see also id. at 112-13)

⁹ For example, even though it is not in issue that 90% of Airways revenue comes from a single source, the CALJ is requiring Airways to produce detailed information and documents relating to Airways’s revenue and other

4. Moreover, despite the DOT's May 12 Notice expressly stating that discovery should be limited given the narrow issue presented and the wealth of information already in the public record, the CALJ has determined that is nugatory because the DOT is powerless to place any limits on discovery ordered by the CALJ. (Transcript at 97-98.) Specifically, when Airways's counsel cited to the CALJ the DOT's instruction to limit the issues to current citizenship, and similarly to limit discovery "only to the facts relevant to the issue of the current citizenship of DHL Airways," May 12 Notice at 2, the CALJ disagreed that the DOT had directed, or could direct, that discovery herein be limited:

[I]n looking at the decision maker's reference May 12, I find a reference of limited discovery but I don't really find the direction. . . . Indeed, the decision maker in referring this matter over pointed out that the Judge will determine what documentation is relevant and necessary to determine the sole issue in this proceeding. And, indeed it is appropriate that she would observe that because the powers of the Judge in an Administrative Procedure Act case are derived directed [sic] from the APA. They do not come from the Agency. . . . [T]he Agency is without power to withhold those powers from the Judge." (Id. at 97-98.)

5. The test or standard to establish citizenship would be higher for Airways if it was "at one time," not a U.S. citizen so that discovery into Airways's past is relevant to the issue of Airways's current citizenship (Id. at 76). This approach is directly inconsistent with the DOT's determination that this proceeding not delve into potential past violations of citizenship requirements, which the DOT has reserved for separate enforcement proceedings.

6. The test of citizenship is, according to the CALJ, whether a non-U.S. citizen has the potential to control a carrier and not whether the carrier is actually being controlled (Id. at 71; see also id. at 95). The CALJ, citing the 1987 order in In re Intera Arctic Services, Inc., Order 87-8-43, has stated his belief that “substantial business relationships” by themselves can create substantial “citizenship concerns.” (Id. at 71.) Thus, as his pre-trial rulings to date demonstrate, the CALJ believes that there is no aspect of Airways’s business that should not be examined – by giving access to all of Airways’s information to FedEx and UPS, Airways’s competitors. The CALJ has further determined that the burden of disproving this potential – proving a negative – falls upon Airways. (Id. at 91-92.) Thus, Airways must convince the CALJ that a myriad of factors do not give rise to even a potential for control, despite the fact that UPS and FedEx initiated this docket and are acting every bit the part of complainants herein
7. The CALJ has ordered Airways to produce a record of all communications with the DOT, including any information that DOT “suggested [the May 2001] reorganization or any part of it[,]” made recommendations with respect to it, including any recommendations with respect to third party income. (Id. at 206.)
8. The CALJ will not permit any discovery regarding FedEx or UPS’ practices- the two dominant air cargo airlines in the world- offered to show (a) general industry practice utilizing networks, and (b) admissions that the arrangements FedEx and UPS are attacking (e.g., ACMI agreements) are similar to

agreements that they have in other countries which have comparable citizenship and control requirements to the United States and which FedEx and UPS admit do not confer “control” on their local air lift suppliers. (Id. at 184-89 (“At such time as I am asked to do an inquiry into the state of the industry I will be happy to do that.”)) This, despite the teaching in In re Acquisition of Northwest Airlines, Inc. by Wings Holdings, Inc., Order 91-1-41, Docket No. 46371 (Jan. 23, 1991), that the control test needs to “reflect more accurately today’s complex, global corporate and financial environment.” In the CALJ’s view, since this hearing is only about Airways’s citizenship, anything related to FedEx or UPS – including the fact they have entered into precisely the same type of arrangements they attack Airways for – is irrelevant.

Conclusion

To avoid the stunning breadth of the discovery ordered and the scope of the proceedings contemplated by the CALJ under his expansive view of the April 17 Order, the DOT should act now, particularly in light of the upcoming change in ownership, to (1) clarify and/or modify its April 17 Order as requested herein (see pages 7-8 supra); (2) refocus the inquiry on the limited issue of current citizenship presented after the Dasburg acquisition; (3) clarify that the issue is to be limited to the statutory requirements of citizenship and any contractual relations between the new owners or Airways, on the one hand, and any non-U.S. citizens on the other, which reflect or demonstrate actual control over Airways; and (4) specify precise steps to be taken by the CALJ to respond to the DOT’s order of reference, without creating an unnecessary and unduly prolix,

complicated and extraordinarily burdensome record of, what, at the end of the day, are complete irrelevancies.

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 Petition for Reconsideration and Clarification and Motion for Leave to File an Otherwise Unauthorized Document, this 3rd day of June, 2003 to all persons named on the Service List.

/s/ Kommala Keovongphet

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