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

Petition Of United Parcel Service Co. To Institute A Public Inquiry Into The **Citizenship and Foreign Control** **Of DHL Airways, Inc.**

Docket OST-2002-13089

COMMENTS OF FEDERAL EXPRESS CORPORATION

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On March 5, 2003, the Department of Transportation issued a Notice Requesting Comments on a March 4, 2003 letter from the Inspector General of the Department of Transportation to Congressman Don Young, Chairman of the House Transportation and Infrastructure Committee. The letter sets forth certain conclusions and observations of the Inspector General relating to both the process and rationale used by the Department to review the citizenship of DHL Airways. Federal Express Corporation (FedEx Express) hereby files its comments in response to the Department's Notice.

FedEx Express is an air carrier domiciled in the United States that operates a worldwide, integrated network of air express/cargo services. It markets its air carrier services, both domestic and international, directly to the public. FedEx Express pays U.S. taxes on its worldwide income. It competes vigorously with foreign and other U.S. air carriers in the global marketplace for air express/cargo services. FedEx Express supports liberalization of the international framework governing these services, including citizenship requirements.

March 19, 2003

The objective of liberalization is to develop fair and equal competitive opportunities to benefit both the providers and users of air transport services. However, relaxation of U.S. requirements for foreign carriers without reciprocal opportunities does not represent meaningful liberalization. Further, when such relaxation is conducted on a case-by-case basis in informal, non-transparent proceedings, the U.S. administrative law system is itself undermined.

Currently, most nations — and the European Union[1] — require their carriers to be "effectively controlled" by their nationals. That requirement is also reflected in many air services agreements, including the recently concluded Multilateral Agreement on the Liberalization of Air Transportation, to which the U.S. is party.[2] This requirement is also consistent with U.S. law. As the Inspector General has observed, U.S. aeronautical authorities "quite correctly" have interpreted U.S. statutory requirements to require that a certificate holder be under the actual control of U.S. citizens.[3] Since creative organizational structures can be used to meet technical ownership requirements, the "actual" or "effective" control test has become one of the most important ways for a government to ensure that its air service rights are used only by its nationals (the so-

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1 Council Regulation (EEC) No. 2407/92, 23 July 1992, Articles 4(2) and 2(g).

2 Multilateral Agreement on the Liberalization of Air Transportation, Articles 3(a)(2), and 4(1)(a).

3 Letter dated March 3, 2003 from DOT Inspector General to Congressman D. Young.

called "right of establishment"), especially in air cargo services.[4]

Until such restrictions can be removed on a reciprocal basis, the Department must strictly enforce the citizenship rules, which define access to U.S. air service markets and to U.S. rights under bilaterals. Strict enforcement is the only way to ensure that foreign governments and carriers that prefer protected markets have an incentive to change their positions in order to gain access to the huge U.S. air service market.

For these reasons, the Department must use fair, consistent, and transparent procedures in administering these requirements. As the Inspector General has concluded, the Department did not meet those standards in its review of the citizenship of DHL Airways. Instead, it applied informal continuing fitness procedures to determine complex and contested questions of statutory interpretation that have broad precedential significance. In doing so, the Department appears to have reached unsupportable conclusions on both the materiality and significance of important and disputed factual questions. In this respect, the Department's review lacked the basic procedural guarantees of notice and public participation established by the Administrative Procedure Act. The review process also lacked the indicia of fundamental fairness that must govern all administrative proceedings in the United States.

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[4] Unlike combination services, some liberalized agreements omit the requirement for a "home-country connection" in granting rights for all-cargo services, thereby effectively granting so-called seventh-freedom traffic rights. Multilateral Agreement, *supra*, at Article 2(3). Right of establishment restrictions and the "effective control" test become critical under such liberalized frameworks.

Finally, the Department has not complied with its own rules in conducting its fitness review of DHL Airways. It permitted its staff to engage in *ex parte* communications after the docketed filing of written oppositions without issuing the waiver required by its own regulations.[5] Nor did it initiate a show-cause or formal proceeding in the manner contemplated in its rulemaking documents accompanying the waiver regulation.[6] Instead, it wrongfully dismissed some,[7] but not all,[8] of the written oppositions in what would appear to be a misguided effort to continue to conduct informal, *ex parte* proceedings as if no oppositions had been filed.[9]

FedEx Express intends to reserve its comment on the lawfulness of the actual ownership structure of DHL Airways until the Department establishes procedures that are appropriate for addressing this issue. At this time, FedEx Express lacks access to the information submitted by DHL Airways and reviewed by the Inspector General.[10] From

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5 14 C.F.R. § 300.2(c)(10).

6 *See* Notice of Proposed Rulemaking, 58 FR 516, Jan. 16, 1993; Final Rule, 60 FR 10310, Feb. 24, 1995. In fact, the commenters in that rulemaking were concerned principally about the potential abuse of *ex parte* communications in undocketed continuing fitness reviews of carriers where citizenship was at issue. The DHL Airways fitness review vindicates those concerns.

7 Order 2001-5-11. For reasons that are still not clear, the Department even failed to docket the May 7, 2002 letter to DHL Airways from the Assistant General Counsel for International Law, concluding the informal review described in the Order.

8 *See* Docket OST-2001-10052-2 (U.S.-Mexico authority).

9 *See* Third Party Complaint and Request of FedEx Express at 15 (Oct. 11, 2002).

10 In this regard, UPS has filed a request to release all documents and other materials presented to the Department by DHL Airways or its affiliates in the course of the Department's citizenship review. Contingent Motion For Leave To File An Otherwise Unauthorized Document And Answer of United Parcel Service Co., filed March 14, 2003. FedEx Express strongly supports the need to disclose these materials in the Department's further proceedings.

the evidence that is available, however, it is impossible to conclude that the corporate structure and contractual arrangements described by the Inspector General do not leave DHL Airways firmly under the control of foreign-owned corporations in the DHL network.[11]

The burden is on DHL Airways to establish that it meets the requirements of U.S. law to hold an air carrier certificate.[12] It currently is operating without an authoritative ruling by the Department that it does.[13] Under these circumstances, the Department must establish, at a minimum, the following procedures:

First, DHL Airways must file an application to the Department for a determination that it meets the citizenship requirements of U.S. law, both before and after its reorganization. That application must be accompanied by all relevant documents pertaining to the ownership and control of DHL Airways, authenticated and accompanied by verified statements that the documents are complete and that there are no other arrangements, express or implied, relevant to DHL Airways' ownership and control.

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11 Nor would these arrangements qualify under EU law. Article 2(g) of EU Regulation 2407/92 *supra*, note 2, defines "effective control" as a relationship "constituted by rights, contracts or any other means" which, either separately or jointly "confer the possibility of directly or indirectly exercising a decisive influence" over an air carrier, citing in particular the right to use all or part of the assets.

12 Order 95-6-9, requiring DHL Airways to remain a U.S. citizen at all times as a condition of its certificate for Route 692. *See also*, 49 U.S.C. § 41110(e)(1) (requiring an air carrier to continue to be fit, willing and able to comply with U.S. aviation laws); 49 U.S.C. §§ 41101(a)(2) and 40102(a)(2)(requiring an air carrier to be a citizen of the United States).

13 Economic regulatory actions of the airline industry are the responsibility of the Assistant Secretary for Aviation and International Affairs. *See, e.g.,* 49 C.F.R. §§ 1.23(e), 1.54(b)(9) and 1.56a(f). *See also* discussion in Motion and Reply of FedEx Express at 16, Docket OST-13089-6 (Sept. 24, 2002).

Second, the application must be assigned to an Administrative Law Judge to conduct an on-the-record, oral evidentiary hearing. Thereafter, the Administrative Law Judge should issue an initial or recommended decision on the application.

Third, to the extent that there is any further review of the decision of the Administrative Law Judge, the Department must take all necessary steps to ensure that no informal, or off-the-record, communications or evidence influence the decisionmakers and their advisors. Of course, this includes any communications that took place relevant to these issues during the Department's informal review.

Fourth, the Department must defer action on all pending requests for operating authority, including requests for exemptions or statements of authorization, that involve the certificate authority of DHL Airways, pending a final determination by the Department in its formal review of DHL Airways' citizenship.

FedEx Express will participate in this proceeding and will provide whatever additional evidence and argument that may be necessary to help ensure that DHL Airways meets the requirements applicable to all other holders of air carrier certificates.

Respectfully Submitted,

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Certificate of Service

I hereby certify that I have this 19th day of March, 2003, caused the foregoing Comments of Federal Express Corporation to be mailed to each party listed below by first class mail, postage prepaid.

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