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**ORIGINAL**  
DEPT. OF TRANSPORTATION  
DOCKETS

**BEFORE THE  
DEPARTMENT OF TRANSPORTATION 02 OCT 18 PM 2: 27  
WASHINGTON, D.C.**

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Petition of )	
)	
<b>UNITED PARCEL SERVICE CO.</b> )	<b>Docket OST-2002-13089 -10</b>
(DHL Airways, Inc.) )	
)	
_____ )	

**OPPOSITION OF DHL AIRWAYS TO MOTION OF FEDERAL EXPRESS FOR  
LEAVE TO FILE AND CONTINGENT SURREPLY OF DHL AIRWAYS**

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October 18, 2002



The Federal Express Reply is a strange document. It contains no new relevant information or evidence to support the request for an oral evidentiary hearing and little, if anything, that responds to the points made in Airways' Consolidated Answer of September 6, 2002. Only by the loosest use of language can this document be termed a "Reply" at all. What it really amounts to is a spurious polemic against Airways—which Federal Express (reminiscent of Chicken Little) claims is about to transform the U.S. air cargo industry into a "flag-of-convenience" regime that will destroy the U.S. economy and pose a grave threat to our national security. Clearly, this filing -- which is short on information and long on obfuscation, misinformation, and misguided rhetoric -- is a continuation of Federal Express' determined (and increasingly desperate) efforts to eliminate a small domestic competitor by continuing to raise unfounded challenges to Airways' citizenship.<sup>2</sup>

The fact that the Department fully reviewed Airways' citizenship and concluded that it continues to satisfy the statutory citizenship requirements applicable to U.S. carriers is dismissed by Federal Express as irrelevant because, in Federal Express' view, the result of that review was communicated to Airways by the wrong official in the wrong way. As

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<sup>2</sup> See Dockets OST-02-13590 (in which Federal Express has filed a third-party complaint and request that DOT commence an enforcement proceeding to review Airways' citizenship); OST-02-13256 (in which Federal Express has raised the citizenship issue in objecting to the pending application of SNAS to display Airways' designator code on certain flights); OST-01-10052 (in which Federal Express also has raised the citizenship issue in objecting to Airways' pending application to renew and amend its U.S.-Mexico certificate).

shown below, Federal Express misses the mark on this point, as on most everything else in its "Reply."

### 1. The Ownership and Control Issue

Federal Express' Reply fails to rebut the facts and arguments contained in Airways' Consolidated Answer of September 6, 2002, which demonstrate that:

- Airways is a citizen of the United States within the meaning of the statute and regulations; and
- The Department's handling of the continuing fitness review of Airways was consistent with the statute,<sup>3</sup> the regulations,<sup>4</sup> and well-established practice and procedure.<sup>5</sup>

The Reply baldly asserts that "the evidence of record proves that DHL Airways is under the DHL network's control." Reply at 4. But it fails to identify any such evidence. For example, notwithstanding Federal Express' contrary view,<sup>6</sup> the facts relating to William Robinson's ownership of a 55% equity and 75% voting interest in Airways are straightforward and entirely credible. The Department's investigation included a thorough review of the operative corporate documents, the nature of the financial transactions, and

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<sup>3</sup> 49 U.S.C. § 41108(b) provides an opportunity for a public hearing in connection with an *application for a certificate of public convenience and necessity*, but not in connection with *continuing reviews of a carrier's fitness* once a certificate has been issued.

<sup>4</sup> 14 C.F.R. § 204.5(c) distinguishes between applications for new or amended certificate authority, on the one hand, and information filed in support of a certificated carrier's continuing fitness to operate under its existing authority, on the other.

<sup>5</sup> As far as we are aware, the Department has never held an on-the-record evidentiary hearing in connection with a fitness review stemming from reported changes in ownership, management, and operations.

<sup>6</sup> See Reply at 11.

the sources of funds for the purchase of Mr. Robinson's interest in Airways as a reorganized company—so the Department is well aware that Mr. Robinson made a large personal investment to become the majority shareholder of Airways and has a strong financial interest in its success.<sup>7</sup>

By the same token, the fact that Airways has entered into an "ACMI" contract with DHL Holdings does not indicate that Airways is controlled by the "DHL network"<sup>8</sup>—particularly since this is a long-term contract that Holdings cannot simply terminate at will. ACMI contracts, which limit an air carrier's risks as well as its upside profit potential, are a common industry practice.<sup>9</sup> Moreover, contrary to Federal Express' suggestion,<sup>10</sup> the contract does not preclude Airways from marketing its services to others, and that is precisely what Airways does now and will continue to do in the future.<sup>11</sup>

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<sup>7</sup> Despite Federal Express' insistence, the public does *not* have "a right to know the actual consideration Mr. Robinson, the DHL network, and DHL Holdings (USA) may have received for their investments in a U.S. air carrier." Reply at 13. While the Department had a legitimate interest in reviewing this sensitive information relating to a non-publicly held corporation, there is no reason why it should be spread across the public record in an evidentiary hearing to satisfy the interest of a competitor.

<sup>8</sup> *See id.* at 5.

<sup>9</sup> Federal Express' contention that Airways "is nothing more than a wet lessor to a foreign air carrier that is operating illegally in the United States" (Reply at 7) is both scurrilous and misleading. Airways' contract is with a non-air carrier, DHL Holdings, a U.S. company that is foreign owned. There is nothing underhanded or surprising about this. If anything, it means that Airways could be said to be exporting services in exchange for payments from abroad that contribute favorably to the U.S. trade balance.

<sup>10</sup> *See* Reply at 6.

<sup>11</sup> Federal Express' reply is replete with false statements about Airways, including an erroneous claim that Airways "has a fleet of over 100 transport category aircraft." Reply at 11 n.17. In fact, Airways' fleet currently consists of 37 aircraft (including Airbus A300s, Boeing 727s and DC-8s). In addition, Airways is due to take delivery of two aircraft before the end of the year. Contrary to Federal Express' assertion that Airways lacks, and does not seek, third-party business, those new aircraft are being added to the fleet specifically to serve non-DHL Network customers.

Similarly, Federal Express' complaint about the application for code sharing between Airways and SNAS Trading & Contracting (see Reply at 7-8) does not in any way demonstrate that Airways is controlled by non-U.S. citizens. Federal Express itself relies on airlift provided by foreign air carriers under contract to support its global network. Indeed, a number of U.S. carriers, most notably Atlas Air, provide cargo airlift for foreign carriers under ACMI contracts. These arrangements do not indicate that the U.S. carrier is under foreign control. The argument being made by Federal Express in this regard is disingenuous at best, and, if followed to its logical conclusion, could have a serious adverse effect on a number of smaller U.S. cargo carriers, potentially forcing them to alter their businesses, while allowing Federal Express to continue to benefit from arrangements with foreign carriers for its own convenience.<sup>12</sup>

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<sup>12</sup> In its Reply, Federal Express repeats its unfounded accusation (initially raised in Docket OST-02-13256) that Airways is attempting to violate the FAA prohibition on U.S. carriers wet leasing aircraft from foreign carriers in order to facilitate the carriage of U.S. government and military cargoes. See Reply at 7-8. As Airways demonstrated in its reply in that proceeding, the application by SNAS, a Saudi Arabian carrier, to display Airways' designator code on flights operated by SNAS on a wet-lease basis on behalf of DHL International E.C. is non-controversial and consistent with U.S. law and DOT precedent. See Reply of SNAS Trading & Contracting, September 20, 2002, at 6 & n.7 (Docket OST-02-13256) (citing numerous cases in which DOT has approved similar code-share arrangements between U.S. and foreign carriers for the carriage of mail and other cargo); see also Notice of Action Taken dated August 28, 2002 (Docket OST-02-13215) (approving a similar mail code-share arrangement between Air New Zealand and Continental; Air New Zealand also has a pending application to further expand the scope of its carriage of such cargo on a code-share basis through an arrangement with another U.S. carrier, Alaska Airlines (Docket OST-02-13609)). Moreover, Federal Express' baseless attack on the SNAS/Airways code share is hypocritical because Federal Express itself serves various points in the Middle East from Dubai using a foreign carrier, Falcon Express (see *infra*, note 22). (Both SNAS/DHL and Falcon Express/Federal Express serve the Al Kharij airbase in Saudi Arabia, which may explain why Federal Express would like to undermine Airways' ability to transport U.S. military cargo on a code-share basis with SNAS.) Federal Express also uses similar arrangements with other foreign air carriers elsewhere around the globe. For example, Federal Express recently filed a pending application to display its designator code on flights operated by Nippon Cargo Airlines (Docket OST-02-13489).

Federal Express' final argument purporting to show that Airways is controlled by non-U.S. citizens is predicated on a Tax Court decision finding that DHL Corporation and DHL International were commonly controlled from 1990 through 1992. See Reply at 11-12. A more frivolous argument could hardly be imagined. The decision to which Federal Express refers is peculiarly opaque, but it appears to find that both those entities were under the control of U.S. citizens. That Tax Court decision has no bearing on the present matter since Airways was not a party to the case; the entities that were the subject of that case are clearly distinct from Airways.<sup>13</sup>

## **2. The May 1, 2002 Letter from the Assistant General Counsel**

Federal Express repeatedly alleges that the Department has not determined that Airways is a U.S. citizen.<sup>14</sup> Yet it cannot deny that a letter dated May 1, 2002 from Donald H. Horn, the Department's Assistant General Counsel for International Law, stated the Department's determination that "DHL Airways continues to satisfy the citizenship requirements applicable to U.S. carriers."<sup>15</sup> Consequently, in a display of disrespect for the Department's senior staff, Federal Express argues that Mr.

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<sup>13</sup> Although not bearing directly on the ownership and control issue, Federal Express falsely alleges that Airways has violated 14 C.F.R. § 399.82 because "the most prominent name on a DHL Airways air waybill is DHL Worldwide Express, a trademark owned by DHL International and used by the entire network." Reply at 10. Apparently Federal Express fails to understand—or chooses to ignore—the fact that the air waybill to which it refers is *not* that of Airways, but rather of the *ground (freight forwarding) company*, DHL Worldwide Express.

<sup>14</sup> See, e.g., Reply at 16 ("DHL Airways repeatedly but wrongly asserts the Department has approved its corporate reorganization.").

<sup>15</sup> See *Consolidated Answer of DHL Airways*, September 6, 2002, Exhibit 1.

disrespect for the Department's senior staff, Federal Express argues that Mr. Horn's letter is not relevant, because "the only actual review has been made at the staff level, and that review neither binds the Department nor constitutes its decision."<sup>16</sup>

Federal Express' argument reflects a fundamental misunderstanding of the informal continuing fitness review process—which the Department has established pursuant to and consistent with the applicable statute and regulations—and which it has implemented in literally hundreds of cases over many years. In this case, Airways notified the Department of its restructuring plans, met with Department officials on numerous occasions, and provided relevant documents containing confidential information concerning the restructuring. Consistent with Department policy, numerous Department staff from various offices participated in the review process, including staff from the Office of Aviation Analysis (particularly the Air Carrier Fitness Division), the Office of International Aviation, and the Office of the General Counsel. The purpose of the informal review was to determine whether Airways, following its restructuring, would continue to comply with applicable air carrier fitness requirements, including the U.S. citizenship requirement. Of course, if the Department had concluded otherwise Airways, under Department precedent, would have been afforded

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<sup>16</sup> Reply at 3.

an opportunity to cure any defects in its structure or the Department could have initiated formal enforcement action.

The Department concluded that Airways continued to be a U.S. citizen; therefore no enforcement action was warranted. Having decided not to initiate enforcement action, the Department was not required (by statute, regulation, policy or precedent) to issue any formal, public order or other written notice of its decision to terminate the fitness investigation. Nonetheless, the Assistant General Counsel, as he has in numerous other cases in the past, sent a letter informing Airways of the outcome of the review and the Department's decision to take no action. The Department's letter does not constitute a formal, written decision of the Department (because no such form of decision is required); rather, the letter merely served to inform Airways of the decision.

On September 25, 2002, Secretary Mineta publicly released a letter that provides a succinct account of the Department's handling of Airways' continuing fitness review. Secretary Mineta described the conclusion of that review as follows:

In May 2002, based on the information received, the Department found that DHL Airways was actually controlled by U.S. citizens and met all statutory tests. The Department notified DHL Airways and terminated the informal enforcement investigation of its citizenship. Since formal enforcement action was not necessary, there was no public proceeding, and DOT did not notify competing carriers, who had provided us with information, of the outcome of that investigation. Congressional staff,

however, were notified because of congressional interest in this matter.<sup>17</sup>

Secretary Mineta elaborated on the reasons why the Department does not issue a written decision when, as in Airways' case, it concludes a continuing fitness review with a finding that no enforcement action is warranted:

Under the statute, an air carrier's certificate remains valid unless and until the Department revokes it through a public proceeding. Therefore, in these informal [14 C.F.R.] Part 204 investigations, when the Department has decided not to take formal action because no present or prospective compliance issue has been found, it does not issue a public order or conduct a public proceeding.<sup>18</sup>

Secretary Mineta's letter makes it abundantly clear that the Department's review of Airways' citizenship and fitness was conducted in complete accordance with all statutory and regulatory requirements as well as longstanding Department policy and precedent. In fact, Secretary Mineta even cited the review of Airways as evidence of the effectiveness of the Department's informal continuing fitness review process.<sup>19</sup>

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<sup>17</sup> Letter of Norman Y. Mineta, Secretary of Transportation, to the Hon. Ernest F. Hollings, Chairman, Senate Committee on Commerce, Science, and Transportation, dated September 25, 2002, at 2 (placed in Docket OST-02-13089 on October 1, 2002).

<sup>18</sup> *Id.* at 1. Although the Department has, on occasion, issued orders formalizing its conclusions in such cases, the Department's issuance of letters signed by members of the staff performing functions under delegated authority and in consultation with senior Department officials is a common practice. Nothing unorthodox or abnormal occurred in this case, and Federal Express' suggestion that the conclusion of a Department investigation needs to be finalized with a formal order is incorrect. *See Mineta Letter*, at 2. Airways has not taken a position on the procedures used by the Department to terminate the investigation, but Airways would not oppose the issuance of an order summarily dismissing the endless filings challenging the same conclusion by the complainants in this and other dockets, if only to put an end to this misguided, offensive and abusive assault on the Department and on Airways and its ability to participate in the domestic air freight market.

<sup>19</sup> *Id.* at 3. Federal Express and UPS have complained that the Department's informal review process did not afford them an opportunity to be heard. While they are not entitled to be heard as a matter of law,

In sum, Federal Express' assertion that the Department has not reached a decision regarding Airways' continuing fitness is wrong, as is its contention that the Assistant General Counsel lacks authority to "bind the Department." A fitness review to determine whether enforcement action is warranted amounts to a "U.S. air carrier citizenship interpretation" that involves a question falling squarely within the responsibilities of the General Counsel's Office of International Law.<sup>20</sup>

### 3. The "Flag-of-Convenience" Diatribe

Finally, the so-called "Reply" raises a new, theoretical, and entirely irrelevant argument involving the international ocean shipping industry. In fact, the paper is more of a polemic than an argument. While undoubtedly designed for use by Federal Express in its ongoing political campaign against Airways, this diatribe about "flag-of-convenience" regimes in ocean shipping is devoid of substantive relevance to U.S. aviation law or Departmental policy and precedent. The assertion that somehow the history of the international ocean shipping industry is relevant to the citizenship of Airways

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Secretary Mineta disclosed that, during the course of the Department's informal review of Airways, "DOT officials . . . met and talked with competing carriers (UPS and FedEx) to receive information that they deemed relevant to DOT's informal investigation." *Id.* at 2. Surprisingly, Federal Express has failed to disclose in this docket that it held any such meetings with DOT staff to discuss matters pertaining to Airways. Even more surprisingly, in another docket, Federal Express has claimed that the Secretary's letter contains "apparent inaccuracies" because "[n]o FedEx Express representative met with DOT officials to provide information relevant to DOT's informal investigation." *Third-Party Complaint of Federal Express Corp.*, October 11, 2002 (Docket OST-02-13590), at 15 & n.34. In any event, Federal Express and UPS by now have had endless – too many we assert – opportunities to make their positions known to the Department.

<sup>20</sup> See 49 C.F.R. § 1.23(c) (making the DOT General Counsel the "final authority within the Department on questions of law"); *id.* § 1.157a(a) (delegating to the Deputy General Counsel authority "to initiate and carry out enforcement actions"); DOT Office of International Law Web site at: <http://www.dot.gov/ost/ogc/org/international/index.html>.

is absurd.<sup>21</sup> In any event, the unstated factual predicate for this assertion simply does not exist.

Unlike “flag-of-convenience” operations in international ocean shipping, Airways is a U.S. air carrier, under U.S. citizen ownership, with U.S. management and employees, operating a U.S.-registered fleet in accordance with U.S. law, and paying U.S. taxes. As Federal Express should know, “flag-of-convenience” ocean shipping companies—for reasons too numerous to go into here (and, of course, irrelevant to any issues in this proceeding)—are foreign-flag operators, using foreign-registered vessels, employing foreign nationals, and operating under foreign laws.

The “flag-of-convenience” rhetoric that suffuses the Reply is a barely disguised plea for government intervention to protect Federal Express, a market leader, from competition. What’s more, it is sharply at odds with Federal Express’ professed support for deregulated global competition. Federal Express claims that it supports international air transport liberalization and fair competition, but its efforts in this and multiple other Department proceedings to use the regulatory process to hamstring a smaller market rival suggest that such support is merely public relations rhetoric.

In fact, the major international express delivery service providers already are competing with each other on a global basis—as Federal Express

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<sup>21</sup> In at least one modest respect, Federal Express’ maritime discourse is relevant to this proceeding. According to one of the sources cited by Federal Express, “DHL Airways, Incorporated, . . . is as American as FedEx or UPS.” Charles Lewis, Bill Allison, and the Center for Public Integrity, *THE CHEATING OF AMERICA*, at 201 (William Morrow 2001) (quoted in *Federal Express Reply*, at 2 & n.2).

is well aware because it exemplifies this trend. Federal Express—like each of its main competitors, including DHL—has developed a global express delivery network which involves marketing its services under its own brand, but operating those services using a combination of its own resources<sup>22</sup> and cooperative arrangements with other air carriers,<sup>23</sup> cargo agents and freight forwarders<sup>24</sup> around the world. Airways, having been found fit to continue to hold an air carrier certificate of public convenience and necessity, must be allowed to exercise its right to operate its services pursuant to that certificate authority—without persistent, onerous, yet substantively frivolous harassment from its two largest competitors.

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<sup>22</sup> For example, Federal Express recently announced the launch of a “world class . . . new Canadian hub facility[, which] creates a vital trade link between Canadian businesses and global markets.” “FedEx Canada Launches World Class Hub Facility,” *FedEx Corporation Press Release*, September 24, 2002. See also “FedEx Express Doubles Capacity on Europe/Asia Lane Segment,” *FedEx Corporation Press Release*, September 23, 2002 (announcing new services to connect Federal Express’ Asian hub at Subic Bay, the Philippines, to its European hub at Charles de Gaulle, Paris). The development by Federal Express and other U.S. carriers of such hubs outside the United States is predicated on a liberalized international air transport services environment, yet Federal Express, contrary to its public statements, seeks to undermine such international liberalization by espousing protectionism and regulatory harassment of a *bona fide* competitor.

<sup>23</sup> See *supra* note 11. Federal Express has implemented cooperative arrangements with various foreign air carriers around the world, including Falcon Express, a flag carrier of the British Virgin Islands that operates services on behalf of Federal Express in the Middle East. Federal Express has never disclosed detailed information about its relationship with Falcon Express, but Airways assumes that, given Federal Express’ professed antipathy for “flag-of-convenience” arrangements, Falcon Express’ reliance on the flag of the British Virgin Islands is not merely a matter of convenience, even though Falcon Express’ “principal offices” are located in Dubai and Falcon Express operates only “small aircraft cargo charter flights . . . utilizing 4,000 pound payload Beech-1900 aircraft” on behalf of Federal Express in the Middle East. *Supplement No. 1 to Application of Federal Express Corp. For Renewal of Exemption*, October 10, 1997, at 2 (Docket OST-95-657); see also Letter of Federal Express Corp. to Ms. Linda Lundell, DOT, dated May 14, 2001, at 2-3 (Docket OST-95-657).

<sup>24</sup> See “FedEx Trade Networks Announces Alliance with Frans Maas,” *FedEx Corporation Press Release*, January 3, 2002 (announcing an alliance between Federal Express and Koninklijke Frans Maas Groep N.V., a Dutch company that is “a leading European provider of international freight forwarding and logistics services[,] . . . [to] operate door-to-door air and ocean forwarding transportation services between Europe and North America”).

**Conclusion**

Federal Express has further burdened the Department and harassed Airways by submitting yet another unauthorized filing contesting the Department's determination that Airways continues to meet U.S. citizenship requirements. Apparently in concert, Federal Express and UPS have filed duplicative "petitions" designed to upset this determination, but have failed to provide any substantive or procedural basis for the Department to grant them the unprecedented relief they seek. Federal Express' latest unauthorized pleading contributes no relevant facts or arguments to the record. It merely demonstrates the bankruptcy of Federal Express' position, while displaying an arrogant disregard for an unambiguous determination of both the Assistant General Counsel for International Law and the Secretary of Transportation himself.

Federal Express cannot seriously believe that its petition has any merit as a matter of law or policy. Evidently, however, the company has calculated that there is some political and commercial value in continuing to file further nuisance pleadings containing false allegations and frivolous and irrelevant arguments about Airways. Presumably, Federal Express hopes that such harassment will raise questions (no matter how unfounded) in the minds of politicians and Airways' customers about Airways' right and ability to operate in the United States. Federal Express should not be permitted to continue to abuse the Department's procedures as a tool in this campaign of

harassment. Its motion to file an unauthorized Reply should be denied, and the consolidated Federal Express/UPS "petitions" in this docket should be rejected.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S. Lachter", with a period at the end.

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October 18, 2002

## CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Opposition of DHL Airways to Motion of Federal Express for Leave to File and Contingent Surreply of DHL Airways this 18<sup>th</sup> day of October, 2002 by first class mail, postage prepaid to all persons on the attached Service List.



Kammala Keovongphet

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