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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 - 12

MOTION FOR LEAVE TO FILE AN OTHERWISE UNAUTHORIZED DOCUMENT AND AMENDMENT NO. 1 TO PETITION OF UNITED PARCEL SERVICE CO.

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Dated: November 26, 2002

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

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Subsequent to the filing of the Petition and Reply of United Parcel Service Co. ("UPS") in the above-captioned proceeding, additional information has become public which UPS requests be placed in the record. Specifically, the Chairman of the Senate Aviation Subcommittee, Senator John D. Rockefeller, IV, advised Department of Transportation Assistant Secretary Read Van de Water in a November 18, 2002 letter, of three key circumstances indicating control by non-U.S. citizens of DHL Airways that were heretofore unknown to UPS. Unlike typical Congressional correspondence expressing policy interest, the Chairman's expansive letter reflects deep concern arising from information contained in a briefing to his office by the staff of the Department's own Office of the Inspector General. In this extraordinary circumstance, the Chairman's letter should not only be incorporated in the docket, but the factual statements therein should be given full consideration in a public forum before an Administrative Law Judge.[1] A copy of the letter is attached.

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[1] The Department should have all relevant material in front of it before deciding this important case. The material presented herein is relevant to the Department's consideration of this proceeding, and receipt and consideration of this Amendment, although past the time allowed for amendments under Rule 302.5, would not unduly burden or delay the proceeding.

(Continued...)

Under previous Department precedent, the factors raised in the Chairman's letter regarding control of DHL Airways by non-U.S. citizens are highly relevant to the disposition of this docket. (*See generally* UPS Reply, Docket OST-2002-13089 (Sept. 17, 2002)).

First, based on information available to him, Senator Rockefeller states in his letter that DHL Airways' Board of Directors comprises one American citizen, who has had extensive previous relationships with foreign-owned DHL entities, two American business consultants to him, and a fourth and final board member who is an executive of a foreign-owned DHL entity. Second, the Senator's letter shows that 30% of DHL Airways' aircraft are owned by foreign interests. Third, the letter states that DHL Airways is prohibited in its contract with the foreign-owned DHL entities from carrying third-party traffic if such carriage interferes with traffic from the foreign-owned entities.

The latter information appears to be at odds with DHL Airways' assertion that it and DHL Holdings have a "non-exclusive contract [that] does not preclude Airways from seeking to expand its business with other customers." (DHL Airways Surreply, Docket OST-2002-13089, at 5, n.7 (Sept. 26, 2002)). In fact, DHL Airways has been relatively unsuccessful in this business expansion.[2]

(...Continued)
Accordingly, UPS requests that this Amendment No. 1 to its Petition be received as an otherwise unauthorized document. *See* 14 C.F.R. §§ 302.5, 301.11.

[2] *See Reports of Financial and Operating Statistics for Large Certificated Air Carriers*, filed by DHL Airways, Inc. on May 13, 2002 (for the period ending March 31, 2002) and on October 25, 2002 (for the period ending June 30, 2002). According to the Form 41 Reports, even if 100% of DHL Airways' charter traffic were conducted for non-DHL Holdings-related entities, the percentage of revenue derived from such charters would have amounted to approximately one and two percent of DHL Airways' total revenues, respectively, for the periods covered. Thus, essentially all of the traffic and revenue of DHL Airways appears to come from DHL Worldwide Express and DHL Holdings, both foreign citizens.

Chairman Rockefeller's information, coupled with the extensive information already provided to DOT by UPS, further demonstrates that, judged by the factors previously applied by the Department in such cases, DHL Airways can properly be found to be under foreign control. Regrettably, the fact that additional important and relevant pieces of information reflecting the DOT Inspector General's input have only become known by means of a Senatorial communication to the Department's Office of the Assistant Secretary for Aviation and International Affairs. This situation underscores the inadequacy of the piecemeal fact-gathering and analytic process involving the review of DHL Airways' citizenship issue to date. Indeed, it further underscores the need for the matter to be the subject of impartial and transparent public review by an Administrative Law Judge.

WHEREFORE, United Parcel Service Co. respectfully requests that the Department of Transportation not only include the attached letter in the docket in this proceeding, but also give it meaningful weight in determining DHL Airways' citizenship, and grant such other and further relief as may be deemed just and necessary.

Respectfully submitted,

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Counsel for
UNITED PARCEL SERVICE CO.

Date: November 26, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November 2002, a copy of the foregoing document was sent, via first-class mail, postage prepaid to the following:

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JOHN D. ROCKEFELLER IV
WEST VIRGINIA

United States Senate

WASHINGTON, DC 20510-4802

November 18, 2002

Read Van de Water
Assistant Secretary for Aviation and International Affairs
U.S. Department of Transportation
400 Seventh Street, SW
Washington DC 20590

Dear Assistant Secretary Van de Water,

Thank you for your letter of May 7, in which you explained that the Department of Transportation has concluded its investigation into the citizenship and control of DHL Airways. I have taken the time to be fully briefed on DOT's conduct of this complex case. I want you to know I am deeply troubled by the position your letter appears to set forth on this important and potentially precedent-setting citizenship review. I object to the lack of transparency in DOT's conduct of this review; and I urge you to refer the matter immediately to an Administrative Law Judge.

Deutsche Post, Germany's government owned postal monopoly, has made repeated public statements that it is acquiring all the shares of DHL International and integrating DHL into its global delivery network. Indeed, a recent Deutsche Post presentation noted that in the U.S., Deutsche Post and DHL International had "restructured DHL's ownership for better industrial control." In view of these unambiguous statements, I do not understand how one can endorse the dubious assertion that DHL Airways -- a U.S. certificated air carrier which previously had operated as an integrated component of DHL's U.S. operations -- has now been restructured into an independent company, with no more than a minority shareholding held by its previous corporate parent (DHL's U.S. holding company). I am deeply disappointed that your letter did not lay out in any detail how the Department reached this counter-intuitive conclusion.

The foreign ownership of DHL Airways may -- just -- meet one of the statutory requirements that foreign entities may own no more than 25 percent of the voting stock and 49 percent of the equity in a U.S. certificated carrier (although I understand it has recently come to light that foreign controlled entities for some period of time held over 50 percent of the equity of DHL Airways -- a troubling revelation that calls into question whether the current certificate for DHL Airways has in fact been invalidated). But as I'm sure you're aware, there has also evolved over time a series of actual control tests to measure whether a "minority" foreign owner actually exercises de facto control over an American carrier. Based on the available information, I believe many of these actual control tests raise very serious concerns about whether DHL Airways is actually controlled by the German parent company that claims to be a minority shareholder:

Pre-existing business relationships: the mandatory U.S. ownership of 75 percent of DHL's voting stock is held by a single American citizen, who had apparently previously earned a $25 million financial windfall from the German parent (by selling his stake in DHL's U.S. holding company to Deutsche Post). The mandatory 75 percent American representation on DHL Airways' Board of Directors is comprised only of that one American citizen and two American business consultants to him (the fourth and final board member is an executive from the German owned parent);
Negative control: the Aircraft, Crew, Maintenance and Insurance (ACMI) agreement between DHL Airways and its German owned parent assigns the rights to the DHL name, brand and logo to the German owned parent, giving the German owned parent an effective veto over any decisions by DHL Airways.
Credit agreements: the German owned parent pays for all the maintenance, insurance, fuel and crew costs for DHL Airways; and owns 30 percent of the aircraft operated by DHL Airways;
Dominant foreign customer: virtually all of DHL Airways business is with its German owned parent; contracts with third parties represent a negligible share of DHL Airways' business; and DHL Airways' contract with the German-owned parent specifies that third party traffic cannot be permitted to interfere with traffic from the German-owned parent.

My office has been briefed by the Department's Office of Inspector-General, which was asked by the House Transportation Committee to review the process used by the Department for conducting citizenship reviews, and the DHL case in particular. The OIG team found that this case was handled in an ad hoc and informal way; that the policy-level leadership of the Department was not intimately involved in the decisions regarding this case; and that the input from, and information to, other affected parties to this case was limited at best. I understand the Inspector-General will ultimately be recommending that DOT create a more formal mechanism for considering citizenship reviews, and embark upon a rule-making so that the process can be handled in a more transparent, fair and rules-based manner.

While I support those recommendations for future action, they do not address how to rectify the handling of the DHL citizenship review. This important case involves a massive transaction: the acquisition by Europe's largest postal monopoly, Deutsche Post, of the world's largest air express company, DHL. It involves a parent company, Deutsche Post, that has been found in repeated violation of fair competition and subsidy laws in its home market. It involves a foreign government-owned enterprise that uses the financial benefits stemming from its governmental ownership and monopoly profits to enhance its competition with genuine commercial enterprises. It involves a foreign postal monopoly that is seeking to engage in business practices in the U.S. that the U.S. Postal Service itself does not engage in -- precisely because American regulators believe that commercial enterprises shouldn't have to face competition from state monopolies. Finally, it involves a exceedingly complex ownership arrangement for DHL Airways that appears to be intended to create the appearance of corporate independence while strengthening effective control by the German parent. If Deutsche Post's efforts are successful, it will defy the intent of America's aviation citizenship laws, and create a dangerous precedent for other state-owned companies to circumvent U.S. law to obtain control of U.S. carriers.

It is long past due for this DHL Airways citizenship review to be handled with the transparency that we seek for all important matters of public policy. Under U.S. law, you, in your official capacity, are responsible for deciding how a substantial change in ownership of a U.S. airline is reviewed by the government. It is within your authority to refer such a matter to an Administrative Law Judge for review. In view of the many serious policy and procedural concerns raised by the handling of this case so far, I urge you to exercise your statutory authority and refer this matter to an Administrative Law Judge to determine the facts. Doing so will allow the public to participate meaningfully in this important process. And it will ensure that the decision eventually reached will be a credible and sustainable one, which reflects all interested viewpoints rather than simply those who had privileged access to an informal process.

Sincerely,

John D. Rockefeller IV