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

In re Compliance with U.S. Citizenship Requirements of DHL Airways, Inc. Third-Party Complaint	Docket OST-2002-13590
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
Applications of SNAS TRADING & CONTRACTING DHL AIRWAYS, INC. for route authorities	Docket OST-2002-13256 Docket OST-2001-10052

REPLY AND MOTION TO DEFER ACTION PENDING
THIRD-PARTY COMPLAINT PROCEEDING

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In re

**Compliance with U.S. Citizenship
Requirements of DHL Airways, Inc.**

Third-Party Complaint

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Docket OST-2002-13256
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THIRD-PARTY COMPLAINT PROCEEDING

DHL Airways' Answer to Federal Express Corporation's ("FedEx Express") Third-Party Complaint confirms the need to assign this matter to an Administrative Law Judge ("ALJ"). Specifically, DHL Airways' representations on the critical issue of its connection to the foreign-owned DHL network demonstrate that an oral evidentiary hearing before an ALJ is the only appropriate way to examine DHL Airways' relationship with the DHL network. Therefore, FedEx Express requests that the Department defer action on any and all motions or requests pending in Docket OST-2002-13089, Docket OST-2002-13256, and Docket OST-2001-10052 until final resolution of the Third-Party Complaint proceeding, currently before the Department in

Docket OST-2002-13590. Further, FedEx Express renews its request for an oral evidentiary hearing.

I. THE THIRD-PARTY COMPLAINT PROCEEDING IS THE PROPER VENUE TO DETERMINE THE CITIZENSHIP STATUS OF DHL AIRWAYS.

The issue of whether DHL Airways, Inc. ("DHL Airways") can meet the U.S. citizenship requirements of 49 U.S.C. § 40102(a)(15) is central to the proper resolution of the above-referenced dockets. The Department must be apprised of and evaluate all of the available evidence to determine whether DHL Airways can satisfy its burden of proof that it is free from the foreign influence and control of the DHL network and its owner Deutsche Post. This must be done in a public proceeding, not behind closed doors.

With the passage of time, the evidence available in the earlier dockets does not reflect the most current information regarding the citizenship of DHL Airways. The Third-Party Complaint contains recently uncovered evidence regarding the ownership status of DHL Airways — information that is not included in the other dockets and that directly questions the credibility of DHL Airways. Only in an oral evidentiary hearing can those questions be resolved appropriately and a factual record developed upon which the Department can base its determination. The Department has previously relied on an administrative law judge to resolve factual and credibility issues regarding DHL's citizenship,¹ and the time has come to conduct a new proceeding.

¹ Recommended Decision Of Chief ALJ Rodriguez, *U.S.-Japan Small Package Service Proceeding*, Docket 44016, 1987 DOT Av. LEXIS 871 (March 3, 1987).

Moreover, a decision in the Third-Party Complaint proceeding will undoubtedly streamline the efforts needed to resolve the other dockets, thus preserving scarce Department resources. Accordingly, FedEx Express is requesting that no action be taken on the other dockets until a decision has been rendered in the Third-Party Complaint proceeding.

A. The Third-Party Complaint Shows that DHL Airways Has Made Inconsistent Representations in Various Dockets.

In its Answer to the Third-Party Complaint, DHL Airways makes a new representation regarding its connection to the foreign-owned DHL network. Specifically, DHL Airways now claims that its “sole relationship to the ‘DHL Network’ is its contract to provide lift to [DHL Worldwide Express] to facilitate the latter’s activities in the United States as a foreign air freight forwarder.”² That representation, however, directly contradicts statements contained in the previously filed application of SNAS Trading & Contracting³ and in the application of European Air Transport N.V. filed just last week.⁴ In both cases, foreign airlines that do not serve the United States seek

² See Answer of DHL Airways to Third-Party Complaint of Federal Express at 7, ¶ 2 (Docket OST-13590-3; Nov. 8, 2002)(hereafter “DHL Answer”).

³ Application of SNAS Trading & Contracting for an Exemption and Statement of Authorization, Docket OST-2002-13256 at 2, ¶ 3, and Exh. 2 (Aug. 27, 2002). The SNAS application makes clear that SNAS is firmly under the control of (although not owned by) the DHL network. Indeed, DHL International employs all key management personnel, except for SNAS’s general manager. They work for SNAS under a management assistance agreement. Application of SNAS Trading & Contracting.

⁴ Application of European Air Transport N.V. for Renewal of An Emergency Exemption And Statement Of Authorization, Docket OST-2002-12903-5 at 4 (Dec. 3, 2002). According to its

authority to wet lease freighter aircraft to DHL International E.C. on flights bearing the code of DHL Airways. In support of their applications, the applicants state that DHL Airways has entered into a code-share arrangement with DHL International E.C. whereby it is DHL International E.C. that provides lift to DHL Airways — the exact opposite of DHL Airways' representation in the Third-Party Complaint proceeding.⁵ Obviously both representations cannot be correct, raising serious questions about the credibility of DHL Airways. It is therefore logical that this issue first be resolved in the Third-Party Complaint proceeding before addressing the issues contained in the other dockets.

B. The Third-Party Complaint Proceeding Contains Evidence Showing DHL Airways' Past Misrepresentations to the Department.

Equally disturbing are the citizenship-related representations DHL Airways previously made to the Department to obtain its certificate authority. Before its reorganization, DHL Airways consistently maintained that it was owned and controlled by U.S. citizens. Yet, as has been recently uncovered, those past representations are at best suspect, and at worst fraudulent. We now know, for example, that before the DHL reorganization, 52% of the equity of DHL Airways was owned by DHL International Ltd. ("DHL International") — a foreign entity.⁶ Departmental policy has never permitted

original application, EAT is 99.98% owned by DHL Aviation, N.V., which itself is 100% owned by DHL Worldwide Express BV. Application, Docket OST-2002-12903-1 at 2 ¶ 1 (July 19, 2002).

⁵ SNAS Application at 2, ¶ 3, and Exh. SNAS-2; Application of European Air Transport N.V. for An Emergency Exemption And Statement Of Authorization, Docket OST-2002-12903 at 1 (Dec. 3, 2002).

⁶ See Deutsche Post AG Global Offering, dated Nov. 18, 2000, at 2, available in Exh. 3 to the Third Party Complaint. Department precedent allows for total foreign equity investment,

foreign equity ownership to exceed 49%. A policy such as the acceptable level of foreign ownership is fundamentally important to all sectors of the industry. U.S. law does not allow it to be changed without notice to the public and an explanation of the Department's reasons for the change.⁷

Moreover, the reorganization of DHL Airways was instituted by DHL International and Deutsche Post — both of which are foreign entities.⁸ There can be no doubt that the power to restructure a company is the power to control that company. Even DHL Airways itself asserts that its reorganization marked the “outset of its independent existence.”⁹ Therefore, DHL Airways' prior representations to the Department that it was a U.S. citizen were false. Only in the Third-Party Complaint proceeding can the Department examine this relevant evidence.

both voting and nonvoting, in a U.S. carrier of up to 49%, provided that the total foreign voting equity is less than 25%. *In re Acquisition of Northwest Airlines, Inc. by Wings Holding, Inc.*, Order 91-1-41.

⁷ *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001) (holding that a substantive change in policy requires an agency to submit rule for notice and comment under Administrative Procedure Act); *Alaska Professional Hunters Ass'n v. Federal Aviation Admin.*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (holding that “[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, which requires notice and comment”).

⁸ DHL Airways was forced to admit this fact in its Answer. *See* Answer, ¶ 19.

⁹ *See* Motion of DHL Airways for Leave to File an Otherwise Unauthorized Document and Surreply, at p.5 n.7, Docket OST-2002-13089-7 (Sept. 26, 2002).

C. An Oral Evidentiary Hearing In The Third-Party Complaint Proceeding Would Prevent The Appearance That DHL Airways' Citizenship Determination Has Been Prejudged.

Deferral pending resolution of the Third-Party Complaint is especially appropriate here. A disciplined review by an administrative law judge could counteract the appearance that the question of whether DHL Airways is a citizen of the United States may have been improperly prejudged. For example, a letter of September 25, 2002 filed in Docket OST-02-13089 suggests that the question of DHL Airways' ownership and control, and its compliance with federal aviation law, may have already been decided. However, FedEx Express specifically contested these issues in opposing a DHL Airways application to renew U.S.-Mexico authority and no decision has been issued.¹⁰ The press has characterized the September 25 letter as reflecting the Department's conclusion that the complaints against DHL are "without merit."¹¹ If this characterization were accurate, the letter would violate both due process and Department standards.

¹⁰ Docket OST-2001-10052-2. The Department has not yet acted on the application. FedEx Express has also filed identifiable written opposition to the application of SNAS Trading & Contracting to operate while carrying DHL Airways' code in Docket OST-2002-13256-4. Department rules prohibit substantive communications with non-DOT employees on the merits of an application after the filing of an identifiable written opposition. 14 C.F.R. § 300.2(a).

In this regard, DHL contended in its November 8, 2002 Answer to FedEx Express' Third-Party Complaint that DOT ethics rules do not apply to the September 25 letter. Docket OST-2002-13590-3 at 15 n. 20. This is wrong. The letter is not a "status report." It provides the Department's views on the key issue in the case. DOT's rules against substantive communications apply in public proceedings like SNAS and the U.S.-Mexico applications.

¹¹ POSTCOM BULLETIN 41-02 at 11 (Oct. 4, 2002).

D. The Third-Party Complaint Proceeding is the Best Forum for Determining Whether the Reorganization of DHL Airways Transformed it into a U.S. Citizen.

FedEx Express expects to establish in the Third-Party Complaint proceeding that DHL International's attempt to restructure DHL Airways in form has not transformed DHL Airways' citizenship in substance. The mandatory U.S. ownership of 75% of DHL Airways' voting stock is currently held by a single American citizen, who is in fact a long-time DHL network insider. Further, as currently structured, DHL Airways has leased its aircraft fleet on an ACMI basis to the foreign-owned DHL network. Thus, there is no undertaking by DHL Airways to provide air express services — that undertaking is made by a non-U.S. citizen, the DHL network. Because of the many relationships between DHL Airways and the DHL network, including stock ownership and contractual relationships, and because the DHL network is DHL Airways' predominant customer, its claim of "independence" lacks credibility on its face.

II. POLICY CONSIDERATIONS DO NOT EXCUSE THE QUESTIONS SURROUNDING DHL AIRWAYS' CITIZENSHIP.

DHL Airways suggests that the Department should disregard questions about its citizenship because it has only a small presence in the U.S. market and that presence is a pro-competitive force in that market. This suggestion is disingenuous for three reasons.

First, DHL Airways does not compete in the integrated air express/cargo service market, except with respect to U.S. government cargoes. Instead, it provides lift to a competitor in that market, DHL Worldwide Express, Inc. Any U.S. air carrier could provide that lift to DHL Worldwide Express, absent an exclusive arrangement with DHL Airways.

Second, the air express/cargo services market is highly competitive and requires no government intervention. As the Department has previously found, "the air cargo industry is the most dynamic and fastest changing sector of air transportation."¹² The market includes many participants engaged in a wide variety of air express/cargo services. Unlike passenger air services, no one has ever expressed any concern about a lack of competition in U.S. domestic air cargo services. The 1977 deregulation of cargo services unleashed vigorous competition, which continues to this day. In the air express market, FedEx Express competes not only with United Parcel Service Co. and DHL Worldwide Express, Inc., but also with such express service providers as Airborne, Inc. and its subsidiaries, ABX Air, Inc., Airborne Express, Inc., and Sky Courier, Inc., Emery Forwarding and its sister company Menlo Worldwide Expedite!, Bax Global, Inc., TNT USA, Inc., the United States Postal Service, and the other 270 members of the Air Courier Conference of America.

Nor is there any justification for DOT to intervene in this market by establishing more liberal citizenship rules for this particular carrier. There are reports that DHL Airways' efforts to broaden its customer base may be in response to concerns expressed by the Department that it must obtain additional business to establish an independence from the DHL network that it cannot demonstrate today. DHL Airways apparently acquired an aircraft precisely for this purpose in the process of competing for

¹² Statement of U.S. International Air Cargo Policy, 54 Fed. Reg. 27086 (1989).

a new military contract.¹³ If this action was taken in response to the recommendations that were made by the Department in the course of its informal review of DHL Airways, then the Department should consider carefully the effects of its action on other competitors in the industry.

Third, DHL Airways is not a small competitor. Rather, DHL Airways is part of the worldwide DHL network, which claims to have a 40 percent share of the worldwide market.¹⁴ DHL Airways does not contest these facts; indeed, the DHL network marketing materials tout them.

The Department's responsibility in this context is to strengthen the competitive position of U.S. carriers in international air transportation.¹⁵ As noted, the DHL network is a significant player in international air cargo transportation. At the same time, it is a flag-of-convenience operator with major affiliates and operations located in tax haven countries. It also receives substantial support from its postal monopoly parent, Deutsche

¹³ In re Compliance with U.S. Citizenship Requirements of DHL Airways, Inc., Dockets OST-2002-13590 and OST-2002-13089, *Answer of DHL Airways to Motions of Lynden Air Cargo*, Dec. 4, 2002, at 4-5.

¹⁴ Although DHL Airways, Inc., the purported U.S. air carrier, is not as large as either FedEx or UPS, no rational competitive analysis would compare only the DHL network's U.S. operations with the global operations of FedEx and UPS. According to the DHL network's own website, the network has an estimated 40% market share of international air express traffic and DHL ships more than FedEx, UPS and Airborne combined. <http://www.dhl-usa.com/aboutdhl>; http://www.dhl-usa.com/press_display/1,3574,21,00.html. See also, Air Cargo Management Group, "International Air Freight and Express Industry Performance Analysis 2001" at 49 (November 2001) (hereafter the "Express Industry Performance Analysis") (estimating DHL's international share at 37%, FedEx's at 20%, UPS's at 15%, and TNT's at 12%).

¹⁵ 49 U.S.C. § 40101.

Post. Indifference to these policy challenges presents a very real risk to the competitive opportunities of U.S.-flag carriers in international markets.

The Department's functions, as they apply to domestic air cargo transportation, are essentially enforcement functions. The Department cannot and should not foster or protect any player through selective and discriminatory enforcement of the statutes it administers.

III. CONCLUSION

DHL's filings to date raise critical and unresolved factual issues that support overwhelmingly the need for an ALJ to engage in a formal and public fact-finding analysis that will enable him or her to resolve factual issues that are relevant to a determination of who owns and controls DHL Airways, and the nature of its relationship with the DHL network. FedEx Express finds it extremely difficult to understand what interest the Department is trying to protect in refusing to expose DHL's citizenship claims to public scrutiny.

For all of these reasons, FedEx Express respectfully requests that the Department defer ruling on all pending motions in Docket OST-2002-13089, Docket OST-2002-13256, and Docket OST-2001-10052 until there is a final resolution of the Third-Party Complaint proceeding.

Respectfully Submitted,



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Certificate of Service

I hereby certify that I have this 11th day of December, 2002 caused this Reply and Motion to Defer Action Pending Third-Party Complaint Proceeding of Federal Express Corporation to be mailed to each party listed below by first-class mail, postage prepaid.



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