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

DEPT. OF TRANSPORTATION
DOCKETS

2003 MAR 14 P 4: 19

In the Matter of the)
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CITIZENSHIP OF DHL AIRWAYS, INC.)
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Docket OST-2002-13089-33

**CONTINGENT MOTION OF UNITED PARCEL SERVICE CO.
FOR LEAVE TO FILE AN OTHERWISE UNAUTHORIZED
DOCUMENT AND ANSWER OF UNITED PARCEL SERVICE CO.**

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Dated: March 14, 2003

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U.S. DEPARTMENT OF TRANSPORTATION
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**CONTINGENT MOTION OF FOR LEAVE TO FILE AN OTHERWISE
UNAUTHORIZED DOCUMENT AND ANSWER OF
UNITED PARCEL SERVICE CO.**

By this pleading, United Parcel Service Co. (“UPS”) requests that the Department of Transportation (the “DOT” or “Department”) release for public viewing all documents and other materials presented to the Department by DHL Airways, Inc. (“DHL Airways”) or any of its affiliated or parent companies in the course of any informal process that the Department may have used in reviewing the citizenship of DHL Airways or control of this carrier by foreign entities. In support of this Contingent Motion and Answer, UPS states as follows:

1. On March 5, 2003, the Department issued a Notice Requesting Comment in the captioned docket by which UPS was informed that DHL Airways has filed a request for confidential treatment of certain materials under 14 C.F.R. § 302.12 (“Rule 12”) of the Department’s regulations.¹ UPS requests that the Department receive this document as an

¹ See Notice Requesting Comments, Docket OST-2003-13089 (Mar. 5, 2003) (containing a redacted letter from the DOT Inspector General Ken Mead to The Honorable Don Young, Chairman of the House Transportation and Infrastructure Committee, dated March 4, 2003).

Answer to DHL Airways' Rule 12 motion.² In accordance with the Department's Notice, UPS will file comments pertaining to issues raised in the Inspector General's letter under separate cover.

2. UPS has not seen DHL Airways' Rule 12 motion, and, indeed, a search of the DOT docket reveals no such motion. Accordingly, UPS does not know when the motion was filed or whether this Answer is late. To the extent this Answer is late, UPS moves that the Department receive this Answer as an otherwise unauthorized document on the grounds that UPS did not know of, and had no way of knowing of, DHL Airways' motion.³

3. The Department has been conducting an informal review of DHL Airways' citizenship since before UPS filed its initial complaint regarding the foreign ownership and control of DHL Airways in January 2001.⁴ Assuming that this informal review began sometime in early- to mid-2000, UPS requests that the Department release for public viewing all documents and other materials presented to the Department by DHL Airways (or any of its affiliated or parent companies such as Deutsche Post) in the course of any informal review as of the first date any such information was submitted to the Department.

² See 14 C.F.R. § 302.11(c).

³ See 14 C.F.R. § 302.6(c). Receipt of this Motion would be in the public interest as it pertains to matters which are relevant to the Department in its consideration of issues in the instant proceeding. Similarly, it is in the public interest for the DOT to have before it the views of all interested parties in deciding this matter. As such, Answers to this heretofore unknown Rule 12 motion should be accepted. Receipt and consideration of this document would not result in any delay in this proceeding.

⁴ See Order Dismissing Third-Party Complaints, Docket OST-2001-8824, at 2 (May 11, 2001).

4. In its March 4, 2003 letter, the DOT Inspector General described certain “confidential” information that it chose to protect from general public viewing because of the Rule 12 motion at issue here. Interestingly, DHL Airways soon after requested that all of the information in the unredacted letter be released for general public consumption.⁵ By letter from its counsel, DHL Airways acknowledged that the protected information in the unredacted letter comes from a larger body of information that is the subject of a Rule 12 motion, but nonetheless now believes that it is in the public interest for the Department to “release immediately the full text of the Inspector General’s correspondence to the public.”⁶

5. UPS agreed with DHL Airways’ request that the unredacted letter be released without confidentiality restrictions, and in fact filed its own similar motion.⁷ Subsequently, the Department decided to release the unredacted version for general public viewing.⁸ The formerly protected information in the Inspector General’s letter pertains to the true ownership of DHL Airways, the substance of its ACMI agreement with DHL Holdings, chief shareholder Mr. William Robinson's investments and sale of past and current interests in DHL companies, covenants relating to third-party use of DHL Airways’ aircraft, bank guarantees and credit agreements facilitated by foreign DHL companies, as well as documents pertaining to the relationships among Mr. Robinson, other DHL Airways directors and other DHL past or present

⁵ See Letter of Steven Lachter, Counsel for DHL Airways to Department of Transportation, Docket OST-2003-13089 (Mar. 10, 2003).

⁶ *Id.* at 2.

⁷ See Motion of United Parcel Service Co., Docket OST-2002-13089 (Mar. 11, 2003).

⁸ See Notice, Docket OST-2002-13089 (posted Mar. 12, 2003).

employees. Presumably, the Inspector General portrayed information, taken from the Department-held underlying documents, which went directly to the issue of citizenship and control of DHL Airways—the focus of his letter to Congressman Young. Presumably, DHL Airways provided documents to the Department that were dispositive only of matters that bear on citizenship and control, since the purpose of the Department’s informal review was to determine whether DHL Airways is impermissibly owned by foreign entities or whether it is controlled by such foreign entities. Accordingly, the underlying documents should be released to the public.

6. It is also now obvious from the nature of the formerly confidential information contained in the unredacted letter that the underlying material submitted under a Rule 12 motion by DHL Airways should not be afforded confidential treatment. The types of material that are ordinarily afforded confidential treatment are trade secrets and business confidential information—which, if released, would cause competitive harm to a carrier. The summary information in the Inspector General’s letter demonstrates that the underlying materials contain no such information. Now, it is time for the Department to take the next logical step and release the documents underlying the Inspector General’s letter and any other materials presented to it by DHL Airways in the course of its citizenship review.

7. Under the Department’s rules, DHL Airways’ Rule 12 motion should contain an index listing all of the documents or materials sought to be withheld from general public viewing, complete with identifying number, title, description and number of pages. The motion should also contain a statement explaining why the information falls into one or more of the Exemptions provided under the Freedom of Information Act (“FOIA”). Finally, the motion should include a statement explaining how the release of such “confidential” information would

adversely affect DHL Airways and how the information is not required in the interest of the public.⁹

8. Since UPS does not have access to DHL Airways' Rule 12 motion, it cannot accurately rebut the required statements. However, assuming that DHL Airways is intent on protecting the materials underlying the substance of the Inspector General's March 4, 2003, letter, UPS argues that no protections should be afforded to the underlying materials because the supposed need to protect the formerly redacted information does not meet the standards to which the FOIA Exemptions were designed.¹⁰

9. The FOIA Exemptions do not protect DHL Airways from the necessary public review of documents germane to a determination of foreign citizenship and control. The formerly confidential information in the unredacted Inspector General's letter clearly indicates

⁹ See 14 C.F.R. § 302.12(d).

¹⁰ Under Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)), information in agency records may be withheld if it is specifically exempted from disclosure by a statute, provided that the statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding, or refers to particular types of matters to be withheld." If this Exemption is claimed by DHL Airways under 49 U.S.C. § 40115—stating that release of the information would "adversely effect the competitive position of any carrier in foreign air transportation"—such claim should be denied because the information has no competitive value whatsoever. The newly-released information from the Inspector General's letter goes only to ownership and foreign control matters, not market share, revenue, sales, customer information or any other competitively sensitive information. The underlying materials now held by the Department will likely address the same matters. Further, under Exemption 4 of the FOIA (5 U.S.C. 552(b)(4)), information in agency records may be withheld if it is "commercial or financial information obtained from a person and privileged or confidential." As above, the information addresses only ownership and foreign control matters. The description of the "confidential" information in the Inspector General letter makes clear that the information pertains to matters, the public release of which would not be harmful to DHL Airways—except to the extent to which they forward the proposition that DHL Airways is owned or controlled by non-U.S. citizens.

that these materials do not fall within the categories of information normally granted protection. The information in the letter simply describes various business/commercial agreements and relationships—not customer lists, rates, or profits. The underlying documents now held by the Department, from which the letter’s information came, will be no different. No interested party would gain any competitive or commercial advantage over DHL Airways if this underlying information were made public.

10. As a general rule, the Department must start with the presumption that the public is entitled to know the bases for its decisions. This rule grows out of basic concepts of administrative fairness and the notion that the open process is more likely to lead to correct and accurate decision-making than closed-door decisions based on undisclosed or partially disclosed evidence.

11. The types of material that are ordinarily afforded confidential treatment are trade secrets, business confidential information—which, if released, would cause competitive harm to a carrier. The Inspector General’s description of DHL Airways’ “confidential” information clearly indicates that these materials do not fall within these categories. The information simply describes various business/commercial agreements and relationships to show who owns and controls DHL Airways. No other party would gain any competitive or commercial advantage over DHL Airways if this information were made public. Accordingly, UPS requests that all documents that the Department may have in its possession as a result of any informal process used in reviewing DHL Airways’ citizenship, be placed on the public record in this proceeding.

12. Further, if the Department believes that certain documents that the Department possesses from its informal review should be kept confidential, UPS requests that immediate

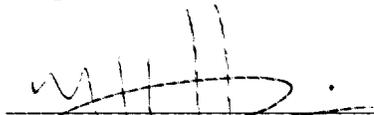
interim access to these documents be given to its counsel and outside experts, subject only to the requirement that they maintain confidentiality affidavits with the DOT in accordance with DOT past practices.

13. UPS respectfully requests that the Department deny DHL Airways the confidentiality protections of a Rule 12 Motion. UPS requests that the DOT make public and place in the docket in this proceeding all documents presented by DHL Airways to the Department in the course of any informal process that the Department may have used in reviewing the citizenship of DHL Airways—which would necessarily include all of the underlying documents reviewed and used by the Inspector General in the drafting the March 4, 2003 letter.

14. The public interest in this proceeding clearly lies in a full airing of all relevant facts and circumstances. Following the release of the unredacted version of the Inspector General's letter, the public release of these documents would be the next logical and proper step in having an appropriate level of transparency in the review of DHL Airways' citizenship and control.

WHEREFORE, United Parcel Service Co. respectfully requests that the Department of Transportation deny the Rule 12 motion of DHL Airways; and to make public all documents and other materials presented to the Department in the course of any informal process that the Department may have used in reviewing the citizenship of DHL Airways. UPS also requests that the Department grant such other and further relief as may be deemed just and necessary.

Respectfully submitted,



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Date: March 14, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March 2003, a copy of the foregoing document was sent, via first-class mail, postage prepaid to the following:

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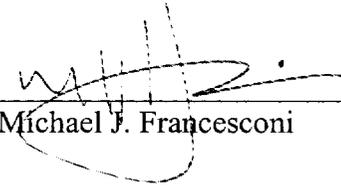
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