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April 24, 2003

Honorable Ronnie A. Yoder
Chief Administrative Law Judge
Department of Transportation
400 7th Street, SW
Washington, DC 20590

**Re: IN THE MATTER OF DHL AIRWAYS, INC.
DOCKET NO. OST-2002-13089 -54
(Citizenship Proceeding)**

Dear Chief Judge Yoder:

In response to the Order of the Chief Administrative Law Judge served April 21, 2003, the following constitutes the response of DHL Airways, Inc. ("Airways").

Preliminary Matters

For purposes of these proceedings, the principal trial counsel for Airways will be Sanford M. Litvack and Joanna R. Swomley of Quinn Emanuel Urquhart Oliver & Hedges, LLP, 805 Third Avenue, 11th Floor, New York, New York. Mr. Litvack's contact numbers and e-mail address are as follows: telephone 212-702-8146, telecopier 212-702-8200, e-mail sandylitvack@quinnemanuel.com. Ms. Swomley's contact numbers and e-mail address are as follows: telephone 212-702-8145, telecopier 212-702-8200, e-mail joannaswomley@quinnemanuel.com.

Trial Counsel will be assisted by Elliott M. Seiden of Garfinkle, Wang, Seiden & Mosner, PLC, 1555 Wilson Boulevard, Suite 504, Arlington, Virginia 22209, and the undersigned. Mr. Seiden's contact numbers are as follows: telephone 703-522-0967, telecopier 703-522-0958, e-mail emseiden@gwsmpc.com. My contact numbers are listed above and my e-mail address is lachter@starpower.net.

Confidential Treatment of Documents Previously Submitted

The Department's Order instituting this proceeding (Order 2003-4-14, April 17, 2003), affords interested parties prompt access to documents already in this docket that are covered by previously filed Rule 12 Motions. As best we can ascertain, those documents do not include the materials lodged by Airways with the Department in the context of the informal citizenship

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review commenced in September 2000 prior to implementation of the corporate reorganization. Therefore, simultaneously with this letter, we are providing Your Honor information, documents and materials relevant to that review accompanied by a Rule 12 Motion requesting continued confidential treatment of those documents.¹ (These materials and the Motion are also being filed in the docket.) However, in light of the Department's determination in the Instituting Order that material filed under Rule 12 should be available to parties who have filed affidavits agreeing to keep such material confidential, Airways will also make the material available to any person who has complied with the Department's Order, upon request.²

Background

The issues to be considered in this proceeding derive from the reorganization of Airways, the plans for which were reported to the Department in late 2000. At that time, in accordance with the requirements of 14 C.F.R. § 204.5, Airways provided to the Department documents and other information relating to the proposed transaction, and the Department, consistent with its longstanding practice, instituted an informal continuing fitness review of Airways' citizenship, a process that the Secretary has stated worked well in this case.³ In May 2002, the informal review culminated in a determination that Airways did, indeed, continue to meet U.S. citizenship requirements. That determination, which the Department has declined to rescind,⁴ is the starting point or baseline for the present proceeding—which was prompted by legislative intrusion into the workings of the executive branch of government. Specifically, in a wholly unrelated amendment to emergency supplemental war appropriations legislation, Congress “directed the

¹ In the Prehearing Order, Your Honor directed parties to designate by April 24, 2003, which previously submitted documents they intend to proffer for inclusion in the record. In light of our position that the complainants bear both the burden of going forward and the burden of proof on all issues, and the limited time available to respond to Your Honor's instruction, Airways is still reviewing which previously submitted documents it should designate for inclusion in the record. Airways will respond promptly.

² We are cognizant of the Judge's ruling in Discovery Airways, Inc. and Mr. Philip Ho, 1990 DOT Av. LEXIS 278 (1990), and will not object to parties incorporating in any exhibits filed in this proceeding or in briefs or reply briefs material from those submissions.

³ Letter from Secretary Norman Y. Mineta, Secretary of Transportation, to the Honorable Ernest F. Hollings, Chairman, Senate Committee on Commerce, Science and Transportation, Docket OST-2002-13089 (October 1, 2002) (hereinafter the “Mineta Letter”).

⁴ See Order 2003-4-14, served April 17, 2003, at 4, 5.

Department to use an Administrative Law Judge . . . in a formal proceeding to resolve this docket, Docket OST-2002-13089.”⁵ While the Department has complied with that directive as evidenced by this proceeding, we must note that the legislative intrusion which occurred is very troubling. It creates the perception that the legislative branch is seeking to influence this proceeding, which would be wholly improper; such intrusion has been fueled by Airways’ competitors, who seek to prevent Airways and its principal freight forwarding customer from competing effectively in the domestic expedited freight and small parcel market.⁶

1. The Issues

The ultimate issue in this proceeding is whether Airways continues to be a “citizen of the United States” within the meaning of 49 U.S.C. § 40102(a)(15).⁷ An ancillary issue is whether it satisfies the “actual control” test that the Department has engrafted on to the statutory requirements.⁸

(A) Sub-issue: Whether Airways currently meets the statutory standards for citizenship.

We are aware of no legitimate basis for a dispute as to whether Airways meets the statutory criteria for citizenship, and we have proposed to United Parcel Service (“UPS”), Federal Express and Lynden that this fact be stipulated. In particular: (1) Airways is organized under the laws of the State of Nevada; (2) its president and at least two-thirds of its board of directors and other managing officers are citizens of the United States; and (3) 75 percent of the voting interest in Airways is owned by William A. Robinson who, as the Department observes, is “a U.S. citizen.”⁹ None has agreed to the proposed stipulation.

⁵ See *id.* at 2, citing P.L.108-11, § 2710.

⁶ We would note that the Congressional directive that has resulted in this proceeding may be constitutionally infirm on separation of powers grounds, and we reserve our right to pursue that argument at a later time if necessary.

⁷ Given the nature of this proceeding, we do not believe the IG’s letter is relevant to any issue.

⁸ Airways intends to address both sets of issues in this proceeding. It notes, however, that a decision the Supreme Court issued this week in a case involving the Foreign Sovereign Immunities Act of 1976 raises doubt about the lawfulness of applying the “actual control” test as an additional standard over and above the criteria specified in 49 U.S.C. §40102(a)(15). *Dole Food Co. v. Patrickson*, No. 01-593 (S. Ct. April 22, 2003), slip op. at 8.

⁹ See Order 2003-4-14 at 1 n.1.

(B) Sub-issue: Whether Airways currently satisfies the “actual control” test traditionally applied by the Department.

As we understand the complaints raised by UPS, Federal Express and Lynden, this sub-issue has two main components:

- First, whether contractual arrangements that Airways has with DHL Worldwide Express or other subsidiaries of Deutsche Post give Deutsche Post or its subsidiaries “actual control” over Airways. Our position is that these contractual arrangements do not give Deutsche Post “actual control” over Airways.
- Second, whether currently Deutsche Post “actually controls” Airways as a result of arrangements and relationships Mr. Robinson has with that company. Our position is that nothing in any relationship and/or arrangement Mr. Robinson may have with Deutsche Post gives Deutsche Post “actual control” over Mr. Robinson, and through Mr. Robinson control over Airways.

2. Statement of Known Disputed Facts

As far as we are aware, there are no disputed facts relating to sub-issue 1(A) above.¹⁰

There appear to be disputed facts—or at least, differing interpretations and views as to the implications and significance of various agreements, relationships, and arrangements—relating to the points identified in sub-issue 1(B) above. The documents that Airways submitted under Rule 12 in connection with the informal continuing fitness review relate to the matters identified in sub-issue 1(B). In addition, the pleadings filed by the various parties in this and related dockets where the complainants have challenged the Department’s citizenship determination with respect to Airways relate to these matters.

3. The Implications of P.L. 108-11

P.L. 108-11 has no relevance to the determination of citizenship in this proceeding. Section 2710 of that statute applies new criteria to the award of certain contracts by the Department of Defense. It is effective only for the remainder of the current fiscal year and does

¹⁰ Even though to Airways’ knowledge none of the three opponents has ever claimed that Airways does not satisfy the statutory criteria for citizenship, none was prepared to stipulate as such when requested to do so by counsel for Airways.

not supersede or otherwise affect the citizenship requirements of 49 U.S.C. § 40102(a)(15).

4. Statement Concerning Burden of Proof

The complainants here -- Federal Express, UPS and Lynden -- bear the burden of proof on all issues and sub-issues in this proceeding.

It is well settled as a matter of administrative law that in proceedings subject to the requirements of the Administrative Procedure Act ("APA"), executive departments and agencies are to follow the Act's burden of proof provisions.¹¹ Those provisions specify that "the proponent of a rule or order has the burden of proof[,]" unless otherwise provided by statute, which is not the case here.¹²

In this proceeding, Federal Express, UPS, and Lynden are asking the Department to reverse itself and rule that Airways is not currently a U.S. citizen because of the company's restructuring in May 2001. The Department itself has already reviewed that restructuring and determined that Airways continues to be a citizen,¹³ a determination that it specifically declined to rescind just one week ago when it instituted this proceeding.¹⁴ The complainants seek to reopen that determination through pleadings they have filed in numerous dockets, including docket OST-2002-13089. Accordingly, they must bear the burden of proof associated with changing the current lawfully-made determination of Airways' citizenship status. Moreover, Airways has relied on the Department's determination. Indeed, had the Department not determined that Airways would continue to be a citizen, the company's current shareholders would not have agreed to go forward with the restructuring. Thus, apart from considerations of administrative law, the shareholders have a reliance interest in the Department's citizenship determination that is entitled to repose unless the complainants carry the burden of showing that the reorganized company does not meet applicable citizenship requirements.

In sum, considerations of fundamental fairness and due process,¹⁵ as well as the basic

¹¹ See Director OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

¹² 5 U.S.C. § 556(d). No provision of the Transportation code provides that Airways should bear the burden of proof in this proceeding.

¹³ See Mineta Letter. ("In May 2002 . . . 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.")

¹⁴ See Order 2003-4-14 at 4, 5.

tenets of administrative law, require that Federal Express, UPS and Lynden, as the parties now seeking to disturb the status quo, bear not only the ultimate burden of proof on all issues and sub-issues in the proceeding, but also the burden of going forward.¹⁶

Assigning the burden of proof to the complainants also accords with the terms of the Transportation Code's citizenship provisions. Under that statute, an air carrier's certificate remains valid unless and until the Department revokes it through a public proceeding.¹⁷ As proponents of a revocation of Airways' license and a change in the status quo, UPS, Federal Express and Lynden must bear the burden of proof in this case.

5. Proposed Stipulations

Airways proposes that the parties stipulate that Airways currently meets the statutory definition of citizenship set forth in 49 U.S.C. §40102(a)(15)(c).

6. Proposed Grouping of Parties

¹⁵ See Order 97-3-26 at 17. ("An important factor in our decision on the burden of proof is that our ruling will cause no unfairness . . .").

¹⁶ Assigning the burden of proof to complainants is supported by the Department's decision in the Miami International Airport Rates Proceeding, Order 97-3-26, March 19, 1997, a 15-17. In that case, a group of air carriers challenged, in U.S. District Court, the reasonableness of fees imposed by Dade County to cover the cost of airport renovations. The district court ruled that this issue should be decided at the agency level and granted the county's motion to refer the determination of reasonableness to the Department. At the administrative hearing, the carriers argued that the county had the burden of proving reasonableness because the county had requested that the Department rule on its airport fees. On appeal, the Department disagreed and held that the carriers should bear the burden of proof. In the Department's view, it was the carriers who first initiated a legal dispute in U.S. district court, and thus it was the carriers who should bear the burden of proof. See also Air Canada, et al. v. DOT, 148 F.3d 1142 (D.C. Cir. 1998). Similarly, in the current proceeding, Airways would not now be before the Department but for the numerous filings and third party complaints filed by Federal Express, UPS and Lynden requesting such a hearing. Viewed in this light, Federal Express, UPS and Lynden are the parties that first initiated this legal dispute and should, therefore, be the parties that bear the burden of proof.

¹⁷ See 49 U.S.C. §41110(a)(1)(A) ("Each certificate issued under section 41102 of this title is effective from the date specified in it and remains in effect until the Secretary of Transportation suspends or revokes the certificate . . .").

Airways proposes that Federal Express, UPS and Lynden be grouped together as parties and required to proceed as if a single complainant.

7. Preliminary requests for information and admissions

None

8. Chronology

See Appendix A Attached hereto

9. Proposed Procedural Schedule

See Appendix B attached hereto

10. Proposed Amendments

None.

11. Preliminary Witness List

Since we believe the complainants bear the burden of proof, we are unable to submit a complete list of witnesses at this time. In any event, we would expect to call Mr. John H. Dasburg, among others to be determined, if necessary, as witnesses for Airways.

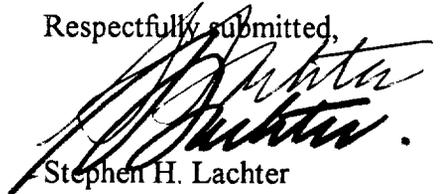
12. Prospect of Settlement

Consistent with Your Honor's Prehearing Order, counsel for Airways contacted representatives of Federal Express, UPS and Lynden and inquired whether they would be prepared to withdraw their objections to Airways' citizenship if Mr. Robinson's shares in Airways were acquired by Mr. Dasburg and other U.S. citizen investors associated with him, as is contemplated, and whether there was any other basis on which they would be prepared to settle this matter. Federal Express and UPS responded that they did not believe the acquisition of Mr. Robinson's interest in Airways by Mr. Dasburg formed the basis for a settlement, but that they would consider whether they had any other settlement proposals to put forward. Counsel has not yet heard back from either of them.

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Copies of this letter and attachments have been filed with the Docket Section and served upon all parties listed on the attached service list by messenger today.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S. Lachter", is written over the typed name.

Stephen H. Lachter
LACHTER & CLEMENTS LLP

COUNSEL FOR DHL AIRWAYS, INC.

Attachment A

CHRONOLOGY

CHRONOLOGY OF EVENTS RELEVANT TO ISSUES

9/12/2000

DHL Airways ("Airways") notifies Department regarding proposed restructuring of Airways.

11/28/2000

Airways submits redrafted copies of reorganization documents to Department.

November 2000-December 2000

DOT staff suggests changes to reorganization documents.

12/4/2000

Airways submits additional documents to Department.

12/6/2000

Airways explains the nature of the financing to the Department and submits financing documents.

12/12/2000

Airways submits further information and documents.

12/20/2000

Airways provides Department with "Present Corporate Structure" and press reports concerning Deutsche Post.

1/19/2001

Federal Express files third-party complaint and request to commence enforcement proceeding to investigate Airways' citizenship (Docket OST-2001-8736).

1/19/2001

Federal Express files Formal Complaint with FAA and requests a fact-finding investigation regarding Airways' citizenship (Docket FAA 13-01-01).

1/30/2001

UPS files third-party complaint and request to commence enforcement proceeding (Docket OST-2001-8824).

1/30/2001

UPS files Formal Complaint with FAA and requests a fact-finding investigation regarding Airways' citizenship (Docket FAA 13-01-01).

2/9/2001

Department renews Airways' exemption authority to operate cargo service between the US and Kuwait. Docket OST-2000-6937.

3/9/2001

Federal Express files petition seeking review of Department renewal of DHL exemption authority. Docket OST-2000-6937.

April-May 2001

Airways meets with Department staff concerning "residual" citizenship concerns.

5/3/2001

Airways submits changes to the corporate documents. Airways also submits ACMI agreement and additional financing documents.

5/4/2001

Airways submits Operating Protocol Agreement and Services Agreement incorporating additional staff changes.

5/11/2001

Department dismisses third-party complaints filed by Federal Express (Docket OST-2001-8736) and UPS (Docket OST-201-8824).

5/11/2001

Department dismisses petition of Federal Express for review of Notice of Action dated 2/9/01. Docket OST-2000-6937.

7/3/2001

Airways files to renew and amend its certificate to provide scheduled foreign air transportation of property and mail between points in the US and points in Mexico. Docket OST-2001-10052.

7/11/2001

Federal Express files Opposition to Airways Application to renew and amend its certificate. Docket OST-2001-10052.

7/24/2001

UPS files Opposition to Airways Application to renew and amend its certificate. Docket OST-2001-10052.

3/7/2002

Airways submits resumes and press materials describing senior management team.

3/13/2002

Airways submits executed copies of the Operating Protocol Agreement and Services Agreement.

3/14/2002

Airways submits additional documents.

5/1/2002

Department informs Airways that based upon the Department's review Airways meets the citizenship requirement.

5/7/2002

Department informs Senator Rockefeller that based upon the Department's review Airways meets the citizenship requirement.

7/22/2002

Representative Don Young (Chrmn House Cmte on Transportation and Infrastructure) requests that the IG investigate the process used by the Department to determine Airways citizenship and the Department's rationale for determining that Airways meets the citizenship requirement.

8/7/2002

Federal Express files a "Petition for Reconsideration or for Review of Staff Action" requesting a hearing to resolve the citizenship of Airways. Docket OST-2001-8736.

8/9/2002

UPS files a "Petition To Institute a Public Inquiry" requesting a hearing to resolve the citizenship of Airways. Docket OST-2002-13089.

8/13/2002

Senator Ernest Hollings (Chrmn Senate Cmte on Commerce Science and Transportation) sends letter to the Department expressing concern over Airways' citizenship and informal process used by the Department to examine issues and requests to be advised regarding progress of IG investigation.

8/16/2002

Department consolidates complaints and petitions filed by Federal Express (Docket OST-2001-8736) and UPS (Docket OST-2002-13089).

August 2002

Current CEO of Airways, Joseph O'Gorman, dies suddenly.

9/25/02

Department (Secretary Mineta) responds to Hollings letter stating that it has reviewed Airways citizenship in the normal course of an informal continuing fitness review and found Airways to satisfy the citizenship requirement.

10/11/2002

Federal Express files a Third-Party Complaint and Request to Commence Enforcement Proceeding Before an ALJ. Docket OST-2002-13590.

11/5/2002

Lynden Air Cargo files a Motion to Join the Federal Express Third-Party Complaint and Request to Commence Enforcement Proceeding Before an ALJ. Docket OST-2002-13590.

11/6/2002

UPS files a Third-Party complaint and Request to Commence Enforcement Proceeding against Airways. Docket OST-2002-13787.

12/11/2002

Federal Express moves to defer Department action in Dockets OST-2002-13089, OST-2002-13256, and OST-2001-10052 pending a final resolution in the Third-Party Complaint Proceeding, Docket OST-2002-13590.

12/11/2002

Airways files Application to renew exemption authority to operate cargo service between the US and Kuwait. Docket OST-200-6937.

2/4/2003

Department renews Airways' exemption authority to operate cargo service between the US and Kuwait. Docket OST-2000-6937.

3/4/2003

IG responds to Representative Don Young's request that it investigate the Department's fitness review of Airways' citizenship.

3/5/2003

Department issues Notice requesting comments on the IG letter.

3/18/2003

John Dasburg named CEO of Airways.

3/19/2003

Airways, Federal Express, UPS and Lynden file comments on the IG letter.

4/16/2003

Congress passes P.L. 108-11.

4/17/2003

Department issues order instituting formal de novo review of the current citizenship of Airways before an ALJ.

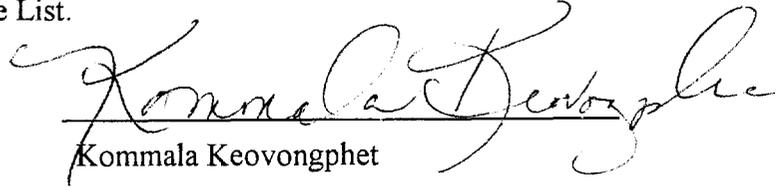
ATTACHMENT B

Proposed Procedural Schedule

Pre-hearing Conference	-	April 29, 2003
Discovery Concluded	-	May 12, 2003
Direct Exhibits	-	May 26, 2003
Rebuttal Exhibits	-	June 2, 2003
Hearing	-	June 9 – June 13, 2003
Briefs to the Judge	-	June 30, 2003
Reply Briefs to the Judge Case Submitted	-	July 10, 2003
Recommended Decision	-	September 2, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have served by hand, copies of the foregoing letter, this 24th day of April, 2003 to all persons named on the Service List.


Kommala Keovongphet

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