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Order 2003-10-25
Served October 22, 2003

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 22th day of October, 2003

In the matter of the citizenship of

DHL AIRWAYS, INC.

Under 49 U.S.C. §40102(a)(15)

Docket OST-2002-13089 - 562

ORDER

Summary

By this Order, we grant the Petition for Reconsideration filed by Federal Express Corporation (“FedEx”) and United Parcel Service Co. (“UPS”) on September 30, 2003, which was partially endorsed by Administrative Law Judge (ALJ) Burton J. Kolko in this proceeding, and grant the FedEx/UPS Motion for Leave to File Late. We extend the deadline for the Recommended Decision in this case for one month, as recommended by the ALJ, to January 2, and deny the relief otherwise requested by the petition. This extension will give the parties adequate time to address all of the relevant factual and legal issues without unduly delaying the completion of this proceeding. We will not entertain petitions for reconsideration of this Order.

Background

The Department instituted a formal hearing proceeding to conduct a *de novo* review of the current citizenship of DHL Airways (“DHLA”).¹ The citizenship standard for U.S. carriers requires any such carrier to comply with the specific requirements set forth in 49 U.S.C. § 40102(a)(15) and to be under the actual control of U.S. citizens.

While the proceeding was under way, the ownership of DHL Airways changed. The carrier’s outstanding stock was acquired by BD Air Partners (“BDAP”) and the carrier’s name was changed to ASTAR Air Cargo, Inc. (“ASTAR”).² On July 30, 2003, the Department issued

¹ Order 2003-4-14, issued April 17, 2003.

² BDAP’s acquisition of DHL Airways became final on July 14, 2003.

Order 2003-7-36, which, among other matters, denied a motion of ASTAR to terminate this proceeding in light of the acquisition, reiterated the defined scope of issues in this proceeding as being only the citizenship of ASTAR, formerly known as DHLA, under its current ownership, and extended by 30 days the deadline for the ALJ to submit a Recommended Decision.

On August 19, in response to requests from the ALJ and the parties to clarify Order 2003-7-36, the Department issued Order 2003-8-19, again reiterating the scope of issues in this proceeding as being ASTAR's citizenship as it currently exists; clarifying that the Department did not rule in Order 2003-7-36 on the relevance of evidence with respect to the delineated issues before the ALJ in this proceeding; stating that such determinations of relevance are to be made by the ALJ; and remanding to the ALJ the issue of requiring testimony concerning the current citizenship of ASTAR from William Robinson, who had been the principal shareholder of DHLA before its acquisition by BDAP.³

On September 24, FedEx/UPS filed a motion with the U.S. District Court for the District of Columbia ("District Court") to compel DHL Worldwide Express, Inc. and DHL Holdings (USA), Inc. ("DHL companies") to comply with subpoenas issued by the ALJ requesting documentation. ASTAR is not a subject of the subpoenas. On October 3, the Magistrate Judge issued a Memorandum Order compelling the DHL companies to comply and expanded the scope of the subpoenas. On October 9, the DHL companies received a stay of the Memorandum Order pending a motion for reconsideration before the District Court. At the ALJ's instance, FedEx/UPS, the DHL companies, and ASTAR met and resolved issues relating to the scope of the subpoenas, and their agreement was memorialized by the ALJ in Order 13089-9(K).⁴

On September 30, 2003, before the parties had reached any agreement on the scope of the subpoenas, FedEx/UPS filed a Motion for Leave to File and Motion to Shorten Answer Period, and a Petition for Reconsideration, Application to Extend Deadline and Motion to Shorten Time ("Petition").⁵ The Petition seeks withdrawal of Orders 2003-7-36 and 2003-8-19 on four grounds. The Petition states that the Department should: (1) examine the relationship between the DHL companies (including DHL Worldwide Express and its parent, Deutsche Post) and DHLA and its successor, ASTAR, before and after the July 14, 2003, transaction by which BDAP acquired DHLA; (2) require the cooperation of the "allegedly

³ Order 2003-7-36 also deferred consideration of the non-citizenship aspects of the continuing fitness of ASTAR under its new ownership until the conclusion of this proceeding.

⁴ See note 8, *infra*.

⁵ The filings were styled as a Petition for Reconsideration with a motion for leave to file out of time and motions asking to shorten the time for answering both documents. Under 14 C.F.R. §§ 302.6(c), 302.9, and 302.10(a), these motions properly belong before the ALJ for his decision to grant or deny. The Petition is also successive in its requests to the Department. 14 CFR § 302.14(c) discusses successive motions. "A successive petition for rehearing, reargument, reconsideration filed by the same party or person, and upon substantially the same ground as a former petition that has been considered or denied will not be entertained." We note that this petition covers substantially the same ground that was addressed in Orders 2003-7-36 and 2003-8-19. We are, nonetheless, granting the motion for leave to file out of time as to those matters endorsed by the Judge in Order 13089-8(K). The requests to shorten answer dates are now moot.

divesting company” with the proceeding; (3) consider past instances where the DHL parties allegedly circumvented the Department’s citizenship requirements and other legal requirements; and (4) afford the ALJ sufficient time to conduct a thorough review of the new structure in light of these factors.⁶ They argue that these actions are necessary because Orders 2003-7-36 and 2003-8-19 are keeping the ALJ from examining evidence and issues that are relevant to determining ASTAR’s citizenship. According to FedEx/UPS, the DHL parties’ conduct before ASTAR’s acquisition of DHLA is crucial to the citizenship issue. Additionally, petitioners assert that the DHL companies are using the Department’s rulings on the scope of this case as a pretext not to cooperate with the proceeding. Limiting the scope of the proceeding is allegedly unnecessary because the ALJ is aware that he is not responsible for enforcement matters; and the limits on the proceeding’s scope have led to the creation of a massive “rejected” exhibits file that contains material relevant to the citizenship issue.

On October 6, FedEx/UPS filed a Joint Emergency Motion to the Decisionmaker to Expedite Consideration of the Request to Eliminate the Deadline and Motion to Shorten the Answer Period, as well as a Supplement to the Joint Emergency Motion. On October 8, FedEx/UPS filed a Renewed Emergency Motion to Eliminate the Deadline.⁷ The motions reiterate the arguments raised in the Petition, especially those relating to the actions of the DHL companies.

On October 2, ASTAR filed an Opposition to the Motion for Leave to File and Motion to Shorten the Answer Period, and on October 7, filed its Opposition to the Petition. On October 9, ASTAR filed its Opposition to the Renewed Emergency Motion to Eliminate the Deadline. On October 14 and 17, ASTAR filed its Motions for Leave to File and Supplemental Opposition to Renewed Emergency Order to Eliminate the Deadline. ASTAR’s responses to the Petition and Renewed Emergency Motions argue that the FedEx/UPS Petition has mischaracterized testimony; that FedEx/UPS have failed to explain how the Department erred in its clarifying Order; that the evidence that has been rejected by the Judge would be available to the Department on review if it reverses the ALJ rulings on relevance because all of the material he has ruled irrelevant is available to the Department in a “rejected exhibits” file accompanying the record; and that issues currently before the District Court do not warrant the elimination of a deadline for the Recommended Decision.⁸ Instead, ASTAR asserts that a two-week extension is an appropriate amount of time.

⁶ FedEx/UPS Petition for Reconsideration, Application to Extend Deadline and Motion to Shorten Time, at 4-5.

⁷ These motions were not filed with the ALJ as required by 14 C.F.R. §§ 302.6 and 302.10(a), but were addressed again to the Department.

⁸ The DHL companies, however, have begun to comply with the subpoena. See DHL Worldwide Express, Inc.’s and DHL Holdings (USA), Inc.’s Motions for Confidential Treatment Under 14 C.F.R. § 302.12, at OST-2002-13089-547, -548, -553, -554, -560, and -561. The DHL companies believe they will produce over 7000 pages of documentation in responding to the subpoena *duces tecum*. Oct. 15, 2003 Hrg. Tr. at 3006:12-15. As of October 21, 2003, the DHL companies have submitted over 9700 documents. See Motion for Confidential Treatment, OST-2003-13089-561.

By Order 13089-8(K), served October 14, 2003, the ALJ has endorsed FedEx/UPS's request that the Decisionmaker extend the deadline to either January 2, 2004, or until some time later to allow for the District Court to conclude the matters before it.

Decision

Request for Extension of Time

In the Petition, FedEx/UPS assert that an open-ended deadline is appropriate because DHLA/ASTAR reorganized itself after the proceeding was instituted, thereby generating an entirely new series of documents for analysis, and because the DHL companies have obstructed discovery. We cannot conclude that an open-ended deadline is needed here, even though the DHL companies apparently have not yet complied fully with subpoenas issued in this case. There are documents remaining that have been submitted in compliance with the contested subpoenas,⁹ which may, or may not, be admitted into evidence. The additional documents that may be produced as a result of the subpoenas may or may not require a reopening of the hearing, depending on determinations by the ALJ. At this point in time, however, the parties have already made their closing arguments, and the hearing has been completed.¹⁰ Finally, whether ASTAR is complying with the citizenship requirement is an important issue that should be resolved without undue delay. Given these considerations, it is not in the public interest to extend the deadline indefinitely.

On the other hand, we are sympathetic with the ALJ's situation because he was appointed to this proceeding only a matter of days before the hearing began on August 26, 2003. Thus, even though we have already extended the deadline twice since issuing the Instituting Order,¹¹ we wish to give the ALJ sufficient time to deal with the latest set of documents and to prepare his Recommended Decision.¹² ASTAR itself does not object to a short extension for the ALJ to submit his Recommended Decision.¹³ We therefore grant the request of the ALJ for a one-month extension to January 2, 2004.

Cooperation of Divesting Companies¹⁴

⁹ The parties have come to an agreement as to the scope of the subpoena. Order 13089-9(K).

¹⁰ Closing arguments occurred the afternoon of October 14, 2003. *See* Oct. 12, 2003 Hrg. Tr. at 2580:7-2976:4.

¹¹ *See* Order 2003-4-14 Instituting Formal *De Novo* Review, served April 17, 2003, at 5 (Recommended Decision due September 2, 2003); Notice on Request for Extension of Time for Submission of Recommended Decision, served May 12, 2003 (Recommended Decision due October 31, 2003), at 2; Order 2003-7-36, served July 30, 2003, at 4 (Recommended Decision due December 1, 2003).

¹² The Judge has set a briefing schedule for the parties where the final reply brief of ASTAR is due November 10, 2003. ASTAR Air Cargo, Inc.'s Motion for Leave to File and Supplemental Opposition to Renewed "Emergency" Motion to Eliminate Deadline, at 1.

¹³ ASTAR Air Cargo, Inc.'s Opposition to Petition for Reconsideration, Application to Extend Deadline, and "Emergency" Motion, at 17-18.

¹⁴ Although not approved by the ALJ for submission to us, we nonetheless have decided to address the remaining issues in the petition in the interest of bringing this proceeding to a timely conclusion.

We are aware of the current proceeding before the District Court concerning the production of documents required by FedEx/UPS subpoenas served on the divesting companies.¹⁵ In footnote 8 of the Petition, FedEx/UPS stated that:

[T]he Department has plenary authority over DHLWE, a registered foreign air freight forwarder, by virtue of its Part 297 exemption authority, which it holds so long as it is in the public interest to do so. DHLWE should not be permitted to continue to hold this authority while it defies lawful orders of the presiding ALJ in this proceeding in an obvious effort to wind down the clock and obstruct this hearing.¹⁶

Subsequent to this Petition, by Order 13089-9(K), the ALJ memorialized an agreement between the parties concerning the scope of the subpoenas, and we understand that the DHL network companies have produced documents to FedEx/UPS.¹⁷ Moreover, the enforceability of these subpoenas and the compliance with them continue to be litigated before the District Court, which is now the appropriate forum for these issues.¹⁸ We thus see no need to intervene.

Examining the Relationship of the Parties Before and After the July 14, 2003 Transaction

We emphasize again that the issue in this proceeding is the current citizenship of ASTAR. The Department has the authority to limit the scope of the issues in a proceeding set for hearing before an ALJ.¹⁹ The administrative law judge has the authority to determine the relevance of the evidence in the proceeding.²⁰ The ALJ's relevance determinations, however, must reflect the scope of the issues before him, as established by the Department. He has ruled on evidentiary matters on a case-by-case basis and will continue to do so. In Order 2003-7-36, the Department stated that “[t]o remove any uncertainty or ambiguity regarding the intended scope of this proceeding, the Chief Judge is directed to examine only the citizenship of ASTAR under its BDAP ownership in order to determine the citizenship of the airline as it now exists.”²¹ We reaffirmed this in Order 2003-8-19, stating:

We clarify that the scope of this proceeding to determine the current citizenship of ASTAR should not include consideration of whether or not ASTAR's prior ‘ownership’ and actual control were by U.S. citizens, except to the degree that these circumstances, like any others, relate to ASTAR's present citizenship.²²

¹⁵ See Proof of Service, OST-2002-13089-303, filed July 21, 2003.

¹⁶ FedEx/UPS Petition for Reconsideration, Application to Extend Deadline and Motion to Shorten Time, at 4.

¹⁷ Order 13089-9(K), served Oct. 16, 2003. See also note 8, *supra*.

¹⁸ On October 14, 2003, the divesting companies requested confidential treatment under 14 CFR § 302.12 for documents produced pursuant to the above-mentioned subpoenas. See notes 8-9, *supra*.

¹⁹ Congress has given the Department the discretion to determine how proceedings should be conducted. 49 U.S.C. § 46102(a).

²⁰ See 14 CFR § 302.17(a)(1)(v).

²¹ Order 2003-7-36, at 3.

²² Order 2003-8-19, at 4.

In arguing that they should be allowed to introduce evidence on the past conduct of DHLA and the DHL companies, FedEx/UPS incorrectly suggests that this case should be treated like an initial licensing case, where compliance disposition is a key issue.²³ This is a citizenship proceeding, however, not a fitness proceeding to determine whether a certificate should be issued under 49 U.S.C. § 41108.

As for those specific pieces of evidence that the ALJ ruled irrelevant and did not admit into the record, we take no action as to their relevance here. Such issues are not yet properly before us. Any question of admissibility may, of course, be brought before the Department on a petition for discretionary review of the ALJ's Recommended Decision.

The issues that FedEx/UPS have raised regarding alleged past instances of illegal operation of ASTAR as a certificated air carrier are potential enforcement issues, and as we have already discussed, a citizenship proceeding is not the proper forum for these issues to be addressed.

²³ FedEx/UPS Petition at 8, 10-11.

²⁴ See OST-2003-15678.

²⁵ See OST-2003-15971.

ACCORDINGLY,

1. We grant the FedEx/UPS motion for leave to file late.
2. We extend the deadline to submit a Recommended Decision to the Department in this proceeding to January 2, 2004.
3. We deny all other relief requested by the Petition.
4. We reaffirm the scope of the issues as described in Orders 2003-7-36 and 2003-8-19.

By:

MICHAEL W. REYNOLDS
Acting Assistant Secretary for Aviation
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