

**U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.**

**IN THE MATTER OF
DHL AIRWAYS, INC.**

**DOCKET NO. OST-2002-13089
(Citizenship Proceeding)**

**ASTAR AIR CARGO, INC.'S OPPOSITION TO FEDERAL
EXPRESS CORPORATION'S AND UNITED PARCEL SERVICE
CO.'S PETITION FOR RECONSIDERATION AND/OR CLARIFICATION**

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Federal Express Corporation (“Fed Ex”) and United Parcel Service Co. (“UPS”) (collectively, “Petitioners”) have petitioned for “Reconsideration and/or Clarification” of the Department of Transportation’s (the “DOT’s” or “Department’s”) very clear Order No. 2003-7-36, served July 30, 2003 (the “July 30 Order”). That Petition is not only offensive and shrill, but it is wholly off-base on the merits. Accordingly, ASTAR submits this response.

The Petition seems to be predicated on three hypotheses: (1) a claim that the Department is powerless to direct the Chief Administrative Law Judge (“CALJ”) regarding the issues to be considered in this docket. Specifically, according to petitioners, the CALJ is a free agent and he, and he alone, determines the issues (Petition at 1-6); (2) the Department has wrongly focused the hearing on ownership, rather than current citizenship (Petition at 1, 4, 13-14), despite the fact that the Department has explicitly stated that the issue is ASTAR’s citizenship; and (3) Petitioners can show that ASTAR’s predecessor DHL Airways, Inc. (“Old Airways”) was under the control of foreign interests and, thus (although they cannot really articulate a cogent explanation as to why it is the case) ASTAR must also be under foreign control (Petition at 7-17). This three-legged stool is a fiction, as set forth below.

However, as an initial matter, it is important to bear in mind the fact that the only issue in this proceeding, as the Department (and the case law) have consistently held, is the carrier’s *current* citizenship. Thus, for instance, in its order initiating this proceeding, DOT directed the CALJ to examine the *current* citizenship of Old Airways in light of a 2001 reorganization. In the July 30 Order, the DOT directed the CALJ to examine the *current* citizenship of ASTAR in light of the July 14, 2003 reorganization.

Each order concerns the pertinent entity's citizenship in light of its new ownership and the relevant, existing agreements. The only difference between the two orders is that two different entities are involved.

In arguing that the DOT has ignored the need to examine the "totality of the circumstances" when assessing ASTAR's citizenship, both the CALJ and Petitioners misconceive the test to be applied and go astray in reading the word "totality" to be unlimited as to time. As discussed below in point three (3), the Department's orders and the case law regarding citizenship make it crystal clear that it is the totality of *existing* circumstances that are relevant to the citizenship. Events which are over and are in the past, are simply not pertinent factors. It speaks volumes that FedEx, UPS and the CALJ do not want to look at the present, but instead are desperate to rely on past events. Whether ASTAR is a U.S. citizen now must stand, or fall, on the present, operative facts.

1. The Department Has The Authority And The Obligation To Delineate The Issues

Administrative Law Judges are arms of the agencies they serve. *See, e.g.*, 5 U.S.C. § 557(b). They are not final decisionmakers and they are not free agents. They operate under the aegis of the agency and (absent special circumstances) it is only agency action that is reviewable by the courts. *See* 49 U.S.C. § 46110. This is no less true at the DOT than at any other agency and this is no less applicable to the CALJ than to any other ALJ. While an administrative law judge can "rule upon offers of proof" and "receive relevant evidence," 14 CFR 302.17(a); 5 U.S.C. 556(c)(3), he has no independent power to determine the scope of the issues assigned to him. As discussed below, that function is performed by the agency.

Nonetheless, Petitioners argue that in this case the CALJ has a wide berth and that the Department, in essence, has no role to play in this proceeding, in part because of the legislation which spawned the appointment of an administrative law judge. (Petition at 1, 4.) Although petitioners may fervently wish that were true, it is not.

First, it is well settled that agencies have full control over their own calendars and that they enjoy broad discretion in determining how best to handle the issues before them, including which issues to address and in what manner. *See, e.g., Croplife America, et al. v EPA*, 329 F.3d 876, 882 (D.C. Cir. 2003) (ALJs may not rule on an issue that has been foreclosed by the agency); *Mobil v. FERC*, 498 U.S. 211, 230 (1991) (agency has broad discretion in determining how to handle issues); *ECEE v. FERC*, 645 339, 349-50 (5th Cir. 1981) (agency may address only those issues it considers most important); *City of San Antonio v. Civil Aeronautics Board*, 374 F.2d 326, 329 (DC Cir. 1967); *National Airlines, Inc. v. Civil Aeronautics Board*, 392 F.2d 504, 509, (DC Cir. 1968). *See also Air Canada v. Dep't of Transportation*, 148 F.3d 1142, 1147 (D.C. Cir. 1998) (recognizing that the Department limited the scope of a proceeding by framing the issue(s) for the administrative law judge). Thus, Petitioners are simply wrong in contending that the agency is somehow limited in specifying the issues it wishes the administrative law judge to hear.

Second, the DOT is well within its discretion to address issues of past compliance in a separate docket or proceeding. *See Mobil*, 498 U.S. at 231 (upholding agency decision to address related issues in separate proceedings; “an agency need not solve every problem before it in the same proceeding”); *Assoc. of Mass. Consumers, Inc. v. SEC*, 516 F.2d 711, 714 (D.C. Cir. 1976) (upholding agency decision to address related

issues in separate proceedings). This is especially true in this case where the DOT has not ignored or dismissed the issue Petitioners and the CALJ are so anxious to delve into (Old Airways' citizenship), but instead has directed that it be heard in another docket. There cannot be any serious doubt that the Agency has the power to decide what shall be heard in what docket. *See Mobil*, 498 U.S. at 229-31; *Croplife America*, 329 F.2d at 882.

Third, the DOT, as the Decisionmaker, not only has the right to specify the issues it wishes to be heard, but as a practical matter it has the obligation to do so. Otherwise the parties will be wasting time and expending energies and resources on matters which the Decisionmaker does not deem pertinent to a particular issue. That would make no sense. The fact that this proceeding is before an administrative law judge as a result of Congressional intervention – after extensive lobbying by FedEx and UPS – does not alter this plain fact. In P.L. 180-11, Congress did not define the issue in the docket, nor could it have done so. Any attempt by Congress to dictate how the Department should define the issue or otherwise conduct its own affairs and calendar would be an unconstitutional intrusion on the executive branch. *See Consumer Energy Council, et al., v. FERC*, 673 F.2d 425, 472 (DC Cir 1982) (striking down a statute that unconstitutionally interfered with agency discretion). Moreover, Petitioners' assertions notwithstanding, by defining the issue to be determined in this docket as the current citizenship of ASTAR, the Department has acted consistently with PL 108-11, as well as its prior precedents.

* * *

In this case the DOT has made it clear from the outset that the only issue is the current citizenship of the air carrier. The agency has never wavered from that

position (see Order No. 2003-4-14, served April 17, 2003, Notice on Request for Extension of Time, served May 12, 2003, and Order 2003-7-36, served July 30) but the CALJ has, just as consistently, refused to follow the Department's direction. Although the Department has stood aside while the CALJ has authorized the most far reaching discovery imaginable (despite the DOT's direction that only "limited" discovery was necessary), that does not mean that the DOT cannot now step in and re-direct the proceeding to the pertinent issue. That is what it has properly done here.

Finally, a brief comment about Petitioners' coy suggestion that the CALJ is to *decide* this matter, not simply to make a recommendation as the Department has directed.¹ Putting aside the fact that the time to object to that issue was in April when the Initial Order was issued and putting aside the fact that Petitioners' zest to have the CALJ "decide" every issue is very revealing, Section 2710 of Pub.L. 108-11 (upon which Petitioners rely) does not require that the ALJ "decide" anything. The use of the term "resolve" does not mandate that the DOT turn over even the initial decision making to the ALJ. Indeed, as noted above, if Congress purported to do that it would raise serious Constitutional issues.

¹ Petitioners argue that PL 108-11 requires the ALJ to make an initial decision, "rather than a mere recommended decision." Petition at 10. To the extent they are suggesting the CALJ can or should make a final decision on the issue of ASTAR's current citizenship, Petitioners are wrong. As a holder of regulatory authority authorizing foreign air transportation, the proper vehicle for ALJ consideration of such authority is a Recommended Decision. *See* 14 C.F.R. 302.31(a)(2). Regardless of whether the CALJ makes an initial decision or a recommended decision, it is subject to review by the Department. *See* 14 C.F.R. 302.31(d); 302.217. In any case, DOT regulations expressly permit the Department to direct an ALJ, as it did here, to render a recommended decision. *See id.* § 302.31(a).

2. The Issue Has Been Properly Framed

In its July 30 Order the DOT set forth the issue in language which could not be more explicit:

We also make clear that the scope of this proceeding, including discovery, and the relevance of facts involved therein, is to be limited to the current citizenship of ASTAR as it now exists.

July 30 Order at 1.

Despite this clear statement Petitioners argue (as does the CALJ) that the DOT has somehow, wrongly, transformed the traditional test of citizenship (from meeting statutory requirements and having actual control rest with U.S. citizens) to one focusing on ownership only. (Petition at 1, 4, 13-14.) That is not only untrue, but it requires a tortured and selective reading of the July 30 Order to even pass the “red face” test.

Apart from the statement quoted above, the July 30 Order also stated that the DOT was staying determination of ASTAR’s fitness under 14 CFR § 204.5 “pending the consideration of *citizenship issues in this proceeding.*” (July 30 Order at 4) (emphasis added). Thus there is no question but that the issue is the current citizenship of ASTAR, in light of its new ownership and new agreements. That is all the July 30 Order provides; it does not equate or purport to equate citizenship to ownership. It simply directs the CALJ and the participants to focus the evidence on the issue of ASTAR’s current citizenship in light of the ownership and the existing facts resulting from the changes which occurred on July 14, 2003. No matter how hard it may try to twist the facts, FedEx cannot make more out of the Order than it is.

3. Petitioners Are Free To Attempt To Show, If They Can, That ASTAR Is Controlled By Non-U.S. Citizens

Nothing in the July 30 Order or any other order precludes those asserting that ASTAR is not currently a U.S. citizen from attempting to demonstrate that fact. Although Petitioners devote three pages of their Petition to touting their claim that ASTAR is not a U.S. citizen, they do so by pointing to “facts” relating to events two and three years old, most of which seem to relate to DHL Worldwide Express or its affiliates, and not to Old Airways in any event. (*See* Petition at 7-9.) Why do they so desperately need to rely on the past? Why do they focus on contracts, relationships and ownership which have changed so completely? The fact that Petitioners must do so speaks volumes about their ability to make out a “case” against ASTAR’s citizenship based on existing facts.²

However, and importantly, to the extent Petitioners have evidence showing that ASTAR is currently under the control of any non-U.S. citizen, nothing in the Order prevents or precludes such evidence. They are free, under the DOT’s Order, to introduce existing agreements and relationships and make their arguments based on extant facts. The only thing they may not do, is focus on expired or terminated agreements, prior ownership and historical relationships which are no longer in effect. When assessing a carrier’s citizenship, the Department is concerned only with existing

² While, tempted, ASTAR will not here refute Petitioners’ outrageous misstatements of fact as they relate to Airways – with the exception of one point Petitioners make not once, but *three times* (*see* Petition at 5-6, 7, 15-16). Petitioners assert that ASTAR is under common control with DHL Worldwide Express, Inc. (“Worldwide”) because Worldwide leveled that claim (together with a claim that Airways controlled Worldwide!) in a labor matter where Worldwide was trying to convince the National Mediation Board that, because its employees interfaced with Airways’ employees, it, like Airways, was covered by the Railway Labor Act. Petitioners fail to mention this context, and Worldwide’s motives, in their discussion of Worldwide’s contention. More importantly, however, Petitioners also fail to mention *that the NMB flatly rejected the fatuous common control argument and found to the contrary!*

facts, in other words the present. *See, e.g., Tie Aviation, Inc. d/b/a Trans International*, Order 99-2-17 (D.O.T. 1999) (finding airline was controlled by United States citizens even though, prior to restructuring, it appeared to be under foreign control). In fact, in two cases cited by the CALJ in his “Certification” regarding the July 30 Order, the carriers had initially failed to pass muster as U.S. citizens but after some restructuring were found to be U.S. citizens. If looking to the past as part of the "totality of the circumstance" were correct, an airline would never be able to expunge a prior "taint." That would make no sense and indeed run counter to the dictates of 49 U.S.C. § 41110(a)(3). The “totality of the circumstances,” then, relates to the totality of *existing* circumstances, not circumstances which no longer exist and thus are, by definition, irrelevant.³

One final point is worth noting for the Department. Since its July 30 Order, the Petitioners have (1) “supplemented” their experts’ statements; (2) amended and extended their pre-hearing brief; (3) insisted on listing scores of witnesses; (4) added 30 more exhibits (they now have 211 exhibits), many of which relate to events of years ago; and (5) contemptuously insisted that they will not revise in any way their evidentiary

³ Petitioner’s (and the CALJ’s) argument that ASTAR’s *past* citizenship is somehow important to determining its *current* citizenship (Petition at 6) appears to come from a misreading of a single case, *Willye Peter Daetwyler d.b.a. Interamerican Airfreight Co.*, 58 CAB 118 (1971). In that case, the CAB clearly looked *solely* to existing circumstances in determining citizenship, including the structure of a reorganization. There, the carrier, Interamerican Freight, was structured by a Swiss national for the dual purpose of carrying on his business in a corporate capacity and providing an equity interest to his American business associates, while meeting the Board’s citizenship requirement. The CAB found, based on an examination of *current* facts, that while Interamerican Freight met the statutory requirements, there were “close personal relationships” between the Swiss national, who both owned a minority stock interest in, and represented one-third of the board of directors of the air carrier, and the carrier’s remaining stockholders and officers. *Id.* at 120. Furthermore, the remaining U.S. stockholders and officers were employees of other companies also owned by the Swiss national and depended on him for their salaries. *Id.* The Board found that the newly created corporation was therefore controlled by a non-citizen. Not only are these facts far removed from the recent ASTAR transaction, but it no way stands for the proposition that past, inoperative facts are relevant to a determination of citizenship.

submissions to conform to the DOT's July 30 Order. If ever evidence were needed to confirm the wisdom of the July 30 Order by focusing the participants on *the* issue, Petitioners' conduct has supplied that evidence. The time has come, we submit, to move on. The Petition should be denied, a fair hearing directed to the specified issue should be held, a recommendation made and a decision rendered, so that ASTAR can get on with its task of beating Petitioners in the marketplace.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served, as indicated, copies of the ASTAR Air Cargo, Inc.'s Opposition to Federal Express Corporation's and United Parcel Service Co.'s Petition for Reconsideration and/or Clarification, this 6th day of August, 2003 to all persons named on the Service List.

/s/ Kommala Keovongphet

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