

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

**IN THE MATTER OF
DHL AIRWAYS, INC./ASTAR AIR CARGO, INC.**

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

**ASTAR AIR CARGO, INC.'S ANSWER TO
TO PETITION FOR DISCRETIONARY REVIEW**

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ASTAR Air Cargo, Inc. (“ASTAR”) submits this answer, pursuant to 14 C.F.R. 302.32(b), to the Petition for Discretionary Review of Federal Express Corporation and United Parcel Service Co., served January 23, 2004 (the “Petition” and jointly the “Petitioners”).

PRELIMINARY STATEMENT

Although the Department’s Rules expressly provide that a Petition for Discretionary Review should be specific and focus on a limited number of key issues to be reviewed,¹ Petitioners have totally ignored that mandate. Instead, taking advantage of every page of the 50-page limit granted to them, Petitioners have filed a shotgun pleading, which can best be summed up in two words -- sour grapes. Having obtained the unprecedented discovery and the extensive hearing they sought, and having correctly lost, Petitioners would now like to complain about virtually every holding and finding in the Recommended Decision of the Honorable Burton S. Kolko (the “Decision”), as well as any preliminary rulings of the ALJ, or the Department, that Petitioners did not like. That, of course, is not the basis for review.

Recognizing that the issue of whether to grant review of the Decision lies within the sound discretion of the Decisionmaker, see 14 C.F.R. 302.32(a)(1), ASTAR submits that the Petition should be denied because Judge Kolko’s Decision is clear, cogent and supported by the facts. Petitioners have provided no basis for review. As discussed in Point I below, to the extent they seek to argue that public policy implications, particularly competitive and international concerns, should be reviewed, these are the same issues Petitioners previously asserted were “irrelevant” and as to which they deliberately chose not to offer or rebut evidence. Nevertheless, there is record

¹ See 14 C.F.R. § 302.32(a)(3).

evidence on these issues, and that evidence shows very clearly why public policy considerations warrant acceptance of the Decision.

As discussed in Point II below, to the extent Petitioners attempt to raise procedural issues to suggest that they did not receive due process, the Department can, and should, lay that argument firmly to rest in the course of rejecting Petitioners' request for review. Petitioners were afforded every conceivable opportunity (and then some) to take full discovery, to have the public hearing they sought, and to require ASTAR to demonstrate (as it did) that it is a U.S. Citizen.

As discussed below in Point III, to the extent Petitioners have simply presented a rehash of the extensive hearing held before Judge Kolko, who had the benefit of seeing the witnesses, assessing credibility and weighing all the facts, they have presented nothing to support review. Petitioners not only failed to address the rationale behind the ALJ's findings, but they did not -- because they cannot -- dispute the overwhelming evidence supporting his Decision. Although the Petitioners apparently hope that they will have a better chance arguing their case to the Department from a cold record, the ALJ's well reasoned and fully supported conclusions foreclose any such effort.

Finally, ASTAR has been forced to live under a cloud brought on by Petitioners' citizenship attacks for a long time. The Decision lifted that cloud, and it is time to adopt the ALJ's findings and conclusions and let the parties compete in the marketplace. Since prolonging this meritless issue even one more day is an injustice, the Petition can and should be rejected. However, if the Department were to decide otherwise, we respectfully submit that review should be limited to two narrow issues:

1. The public policy implications of the Decision, including both competitive and international concerns; and
2. The procedural issues raised by Petitioners, to assure that due process was afforded to all parties.

We turn to each of these issues briefly below, simply to sharpen and delineate the focus of any such review, after which we show why the Department should reject the kind of nit-picking review of the ALJ's findings of fact requested by Petitioners.

I.

THE PUBLIC POLICY CONSIDERATIONS

While it is ironic that Petitioners would advance public policy concerns as a subject for review since they objected at every turn to any such evidence, nonetheless, if review were to be granted this is *the* area which calls for the Department's consideration and expertise. The record in this regard is clear and uncontroverted.

ASTAR established, through the testimony of Dr. Dorothy Robyn and Dr. Janusz Ordover, that ASTAR and DHL bring important pro-competitive benefits to the market. Dr. Robyn, an acknowledged expert in international aviation policy and former senior White House advisor, testified at length that decertification of ASTAR would have a negative impact on competition in the U.S. domestic express delivery market. (AS-T-6 at 12-18.) Dr. Ordover, a highly regarded economist and antitrust expert, agreed with Dr. Robyn, concluding that consumers benefit by the participation of ASTAR and DHL in the U.S. market. (Aug. 27 Hrg. Tr. at 311:21-312:7; AS-T-5 at 41-44.) No one testified otherwise and there is no contrary evidence in the record.

Indeed, this truth is self evident: Petitioners want to eliminate ASTAR and DHL (and the competition they provide) from the market so that Petitioners can

continue to maintain their cozy duopoly. In fact, other than occasionally trying to wrap themselves in the American flag, Petitioners have never contended otherwise. No one from FedEx or UPS took the stand to deny their obvious anticompetitive motive; in fact, no one from either company took the stand to testify about any issue. As the Decision noted, the weighing of the competition factor is for the Department, consistent with its prior precedent and established law. ASTAR submits that the record on this issue is clear and uncontested and does not warrant further review.

Similarly, the international ramifications of the Decision also are for the Department to assess. But, once again, the record is plain and unchallenged. Dr. Robyn, an expert in international aviation matters, set forth in great detail the international policy considerations at play. As she said:

In addition to reducing competition in the U.S. express delivery market, decertification of ASTAR could set back efforts to liberalize international aviation markets -- the Department's highest policy priority for more than a decade. . . . The danger is particularly acute at this moment [while the U.S. is engaged in] its first-ever comprehensive aviation negotiations with the European Commission.

(AS-T-6 at 18.) Indeed, Dr. Robyn's predictions have already started to come to pass.²

Petitioners, who now claim that there are indeed important foreign policy issues at stake, objected to Dr. Robyn's testimony by motion before she ever testified and

² UPS's relationship with Star Air, a Danish cargo carrier that leases and operates eight UPS-owned planes and engages almost exclusively in operations for UPS, recently became the subject of scrutiny in Denmark. See Tobias Buck and Uta Harnischfeger, EC Seeks UPS, Star Air Probe, FINANCIAL TIMES (London Edition), Oct. 7, 2003, available at 2003 WL 65441264. The protectionist and anti-competitive interpretation of DOT precedent advocated by Petitioners will only further imperil international relations on this important policy issue. (AS-T-6 at 19-20.)

then again when she was tendered as a witness.³ After the objections were overruled and she testified, Petitioners announced they would not cross examine her because, they said, her testimony was irrelevant. (Aug. 27 Hrg. Tr. at 356:12-15 (“Your Honor, our position is clear. [Dr. Robyn’s] testimony is not relevant. We have no questions about this area of irrelevancy. It’s a waste of our time.”).)

Now, since they lost before Judge Kolko, Petitioners have decided that this case raises “important” international concerns and, surprise of surprises, they all purportedly warrant rejection of the Decision. See Petition at 3-10. Of course, with no record to cite or rely upon, Petitioners simply make unsupported statements about what foreign countries or companies can or will do if the Decision were adopted by the Department. See id. While ASTAR would address these issues in more detail in the future, if necessary, one point is worth noting now. Petitioners’ claim that the Decision will result in “flag-of-convenience” foreign airlines that will plunge the aviation industry (and possibly the entire U.S. economy) into ruin, Petition at 7-9, fails the laugh test.⁴ The only competitive impact that will emanate from the Department adopting the Decision, as

³ See Joint Motion of Federal Express Corporation and United Parcel Service Co. in Limine to Exclude and Strike Testimony of Dr. Dorothy Robyn and Dr. Janusz Ordovery, filed August 5, 2003, OST-2002-13089-380 at 1-2 (“Neither competition in the express package delivery market nor the Department’s policy of liberalizing international aviation markets is relevant to the issue of whether DHLA is owned or controlled by, or subject to the control of, a foreign entity or entities.”).

⁴ It is generally accepted that the “flag-of-convenience” problem arises where carriers in an industry (such as commercial shipping) opt to license themselves in a foreign country in order to take advantage of lower safety standards, less restrictive regulatory requirements, and less expensive labor costs. That is decidedly not the case here: ASTAR is a 100% U.S.-owned carrier that accounts for nearly 1,000 U.S. jobs, and is held to all of the same regulatory and safety requirements as any other U.S. carrier. The “flag-of-convenience” argument is based on an entirely flawed analogy, and is offered by Petitioners as a scare tactic intended to protect their market dominance, not the U.S. aviation industry.

it should, will be to potentially diminish Petitioners' duopoly control over the express package delivery market in the United States.⁵

It is hornbook law that when the agency applies its expertise, it applies it to the facts in the record,⁶ and Petitioners deliberately chose not to submit any evidence regarding the issues of competition and public policy. It is too late in the day for Petitioners to reverse their decision. There is a record, and that record establishes that competitive concerns and foreign policy interests support adoption of the Decision.

II.

THE PROCEDURAL ISSUES

Petitioners, who received the benefit of every doubt before both the CALJ and the ALJ, complain that they were hamstrung in presenting their case, that the proceeding was "abbreviated," that the burden of proof was wrongly imposed upon them, that the ALJ applied the wrong legal standards, and that Public Counsel should have been appointed. See Petition at 11-26. At the end, Petitioners seem to suggest they were somehow deprived of due process. Because nothing could be further from the truth, this

⁵ Petitioners' claim that the Decision will serve as a "template" for foreign countries wishing to create a captive airline in the United States is, at best, poor rhetoric. Petition at 4-7. Under the long line of citizenship cases relied upon by the ALJ and Petitioners, there is no citizenship "formula;" each case presents its own facts and must be considered under the "totality of the circumstances." See, e.g., In re Wrangler Aviation, Inc., Docket No. 49038, Order No. 95-7-31, 1995 WL 453183, at *3 (July 25, 1995) (endorsing "totality of the circumstances" test). See also In re Challenge Air Cargo, Inc., Docket No. 46489, Order No. 91-4-32, 1991 WL 248145, at *5 (April 22, 1991) ("the Department [has] specifically declined to establish a formulaic approach or bright-line test"); In re Pacific Express, 92 C.A.B. 470, 480-81 (C.A.B. 1981) ("each citizenship issue presents its own unique set of facts, and resort to past Board precedent is often only of limited value"). And there is no reason to believe that the Department will not continue to rigorously enforce the citizenship standards to which ASTAR has been held.

⁶ There is no mystery behind this rule: "it is unfair and irrational for the trier of fact to rely on evidence outside the [administrative] record Such evidence cannot be challenged by opposing counsel nor can it be reviewed by the [Agency] or [the courts.]" Dotson v. Peabody Coal Co., 846 F.2d 1134, 1138 (7th Cir. 1988) (citing 5 U.S.C. § 556(e)). See also Wright v. Southwest Bank, 554 F.2d 661, 663 (5th Cir. 1977) (accepting evidence outside record "is inherently unfair" because it deprives the "opponent the opportunity to test its validity").

matter should be put to rest by the Department right now. While formal review is not necessary, since it is so clear that there is no merit to Petitioners' claims, the Department should, in denying the Petition, lay this charge to rest.

A. The "Abbreviated Hearing"

First, it is important to note that before the hearing ever began, ASTAR was subjected to virtually unprecedented discovery. The company produced more than 30,000 pages of documents, answered 56 Requests for Information and responded to 28 Requests to Admit. In addition, every ASTAR witness Petitioners requested to examine was deposed before the hearing began. Not insignificantly, all this occurred while ASTAR was allowed *no* discovery.

Armed with all the pre-trial ammunition they had gained, the hearing Petitioners requested commenced on August 26, 2003, finally ending on October 15, 2003. During that time period Petitioners were allowed to call each and every witness they wanted and to cross-examine every ASTAR witness, virtually without limit.⁷

Moreover, Petitioners offered 147 exhibits into evidence. Although Petitioners try to make it seem like they were handicapped in some way, in truth 105 of 147 exhibits offered (71%) were received in evidence, *and* even those few that were not admitted were placed in a file so they could be reviewed later, if the Decisionmaker wished. Indeed, to the extent the ALJ rejected exhibits offered by Petitioners, he did not do so based on some "arbitrary" limitation imposed on the proceeding by the Department,

⁷ Petitioners' claim that they were not permitted to put on witnesses from DHL or Deutsche Post is simply not true. See Petition at 26. Instead, Petitioners chose not to call two of the most senior U.S.-based DHL executives, who had agreed to testify at the hearing, see infra at 10, and also chose not to try and enforce in Federal Court subpoenas to two foreign-based, senior Deutsche Post executives who challenged the propriety of those subpoenas (which were issued by the CALJ).

but instead upon Petitioners' inability to articulate how the exhibits related to ASTAR's current citizenship. (See, e.g., Aug. 26 Hrg. Tr. at 123:4-12 (ALJ Kolko: "My gut reaction is it's pretty tenuous [A]s I look at this particular document and I listen to your explanations of it and justifications for it, I can't say I'm terribly persuaded.").)

Yet, despite the extraordinary latitude Petitioners were allowed, they complain, not merely about Judge Kolko's rulings, but about those of the Department as well. In truth, Petitioners have *never* accepted the notion that the proceeding should focus on the *current* citizenship of ASTAR.⁸ Thus, in reality, by their Petition they are once again asking the Department to reverse its prior rulings and use this docket to retrace history in an effort to find some past wrong. See Petition at 20-25. As the Decisionmaker has said on at least three occasions, those matters are the subject of other dockets and will be dealt with there, if necessary.⁹

The hearing in this matter was in no way "truncated" or abbreviated. To the contrary, it focused on the only relevant question: is ASTAR currently a U.S. citizen? If ASTAR is a U.S. citizen, as Judge Kolko correctly held, then the question is answered; if there are issues regarding compliance in the past they will be dealt with by the

⁸ Petitioners have repeatedly challenged the Department's orders prescribing the proper scope of this proceeding. See, e.g., Petition for Reconsideration and/or Clarification, Motion for Immediate Stay of Order 2003-7-36, and Motion to Shorten Answer Period, filed August 4, 2003, Docket OST-2002-13089-378; Petition For Reconsideration And Application To Extend Deadline, filed September 30, 2003, Docket OST-2002-13089-530; Joint Emergency Motion To Decisionmaker To Expedite Consideration Of Request To Eliminate Deadline And Motion To Shorten Answer Period, filed October 6, 2003, Docket OST-2002-13089-535.

⁹ See Order No. 2003-4-14 at 2 (served April 17, 2003); Order No. 2003-7-36 at 3 (served July 30, 2003); and Order No. 2003-10-25 at 6 (served October 22, 2003).

Department in other dockets, and Petitioners will have whatever rights they are entitled to, if any, in those dockets.¹⁰

Finally, there is *no* merit to Petitioners' claim that they did not have all the discovery they wished from various foreign DHL entities, and that, as a result, this was less than a full hearing.¹¹ See Petition at 18-20, 38-39. Early on it became apparent to all but the most naïve that Petitioners were far more interested in complaining that DHL was not cooperating than they were in actually obtaining discovery from DHL. To the extent there were any doubts in that regard, they were laid to rest at the conclusion of the hearing.

Without attempting to detail all the battles between Petitioners (and their counsel) and the foreign-owned DHL entities (and their counsel) -- to which ASTAR was not a party -- it is sufficient to recount the charade over the DHL witnesses, John Fellows and William Roure. Petitioners subpoenaed these two senior U.S.-based DHL employees to testify at the end of the hearing as part of a "sur-rebuttal" case, which Judge Kolko said

¹⁰ Petitioners' repeated trumpeting of a legislative mandate with regard to the scope of this proceeding is entirely frivolous. The Congressional amendment that caused the Department to assign this Docket to an ALJ states only that "the Secretary of Transportation is directed to use an Administrative Law Judge in a formal proceeding to resolve docket number OST-2002-13089." Pub. Law 108-11, §2710 (April 16, 2003). Congress did not even attempt to prescribe the scope or timing of that hearing, and did not in any way direct the Department as to what matters should be resolved therein. In short, Congress' mandate has been fully carried out, and Petitioners' attempt to substitute their own agenda for that mandate should be ignored.

¹¹ One of Petitioners' sillier claims is their assertion that the failure to appoint Public Counsel impaired Petitioners' ability to take discovery, and therefore the absence of Public Counsel constituted prejudicial error. See Petition at 26. Petitioners devoted a not so small army of lawyers to developing the record in this proceeding (which was already extensive at the time the hearing was ordered by Congress), and expressly chose not to seek reconsideration of the Department's Initiating Order, despite being advised by CALJ Yoder that that was the proper course of action if Petitioners wished to have Public Counsel appointed. See Tr. of April 29, 2003 Pre-Hearing Conf. at 26:24-27:2 (CALJ Yoder: "so if any of you, including UPS, feels that public counsel should be in this case your route for redress of that issue is through a petition for reconsideration of the Initiating Order"). In that regard, Petitioners are not only asking the Decisionmaker to reverse the ALJ's Decision and several of the Department's orders, but to undue Petitioners own strategic decision not to challenge the Initiating Order at the beginning of the case (when they should have).

he would allow.¹² When DHL advised all parties that these witnesses were available and ready to testify, Petitioners did an about-face and expressly declined to call them (Sept. 8 Hrg. Tr. at 933:15-21; Sept. 9 Hrg. Tr. at 1142:15-18), even though they could have asked them all of the questions they now claim are unanswered. See Petition at 38-39.

In a similar vein, after DHL produced more than 10,000 pages of documents to Petitioners, and Judge Kolko agreed that Petitioners could seek to reopen the record to submit documents or take testimony, Petitioners made no effort to elicit any testimony.¹³ Indeed, they did quite the opposite, merely moving to admit a handful of documents, many of which they had for months and some of which were duplicative of what had already been offered and rejected at the hearing. Despite ASTAR's objections, Judge Kolko admitted those documents produced by DHL that he found relevant to the proceeding, and Petitioners freely relied on them to support their position. As such, there is simply no basis for Petitioners to complain.

One last comment on this issue: what is clear from their decision not to call the DHL witnesses who were available, is that Petitioners hoped to get more mileage, in this and other fora, from the alleged uncooperativeness of DHL's witnesses than they knew they would have obtained from the witnesses' testimony! Petitioners must now live with the consequence of that strategy. They cannot in good faith complain they were denied testimony they deliberately chose to avoid.

¹² John Fellows is the CEO, and William Roure is Treasurer, of DHL Worldwide Express, Inc., the DHL entity that is the other party to the ASTAR ACMI Agreement.

¹³ The sum total of Petitioners' effort was one sentence in their post-hearing motion to admit. See Motion to Admit Evidence, filed Oct. 29, 2003, Docket OST-2002-13089-569, at 14 (filed under Rule 12) ("Federal Express and UPS move that the documents detailed above be admitted into evidence, and that the record be reopened so that FedEx Express and UPS may orally examine witnesses from DHL regarding the information contained therein."). Petitioners made no attempt to persuade the ALJ that DHL testimony was necessary in light of the documents produced by DHL, or otherwise.

B. The Burden Of Proof

ASTAR objected from the outset at the burden of proof being placed upon it, citing Air Canada v. Department of Transportation, 148 F.3d 1142, 1155-56 (D.C. Cir. 1998). See Memorandum of Law Regarding Burden of Proof, dated May 13, 2003, OST-2002-13089-92. That argument was rejected by the CALJ, and was followed by Judge Kolko, who adopted all the prior orders as the “law of the case.” See Order No. 13089-1(K), served August 18, 2003. More importantly, it was in fact the way the proceeding was conducted.

For example, at the outset of the hearing, ASTAR gave its opening statement, followed by that of counsel for Petitioners. (Aug. 26 Hrg. Tr. at 28:1-7.) When these statements were concluded, ASTAR went forward with its case in chief, after which Petitioners presented their evidence. (Aug. 26 Hrg. Tr. at 34:19-35:2; Aug. 27 Hrg. Tr. at 370:4-371:7.) Once Petitioners had completed their presentations, consistent with its burden of proof ASTAR was permitted to proffer rebuttal witnesses; and the submission of post-trial briefs and proposed findings of fact followed the same pattern. (Oct. 8 Hrg. Tr. at 2104:12-19, 2105:8-12; Oct. 14 Hrg. Tr. at 2993:2-7.) Of course, none of this was a coincidence. The ALJ expressly stated, on more than one occasion during the hearing, that ASTAR had the burden of proof. (Oct. 14, 2003 Hrg. Tr. at 2952:8-10 (ALJ Kolko to ASTAR’s counsel: “Well, there are benefits to being assigned the burden of proof. You do get the last word.”); Oct. 15, 2003 Hrg. Tr. at 3039:10-11 (same).)

Despite the foregoing, Petitioners try seriously to suggest that the burden was somehow placed upon them. They divine this from a so-called “analysis of the reasoning[.]” Petition at 15. Their “analysis,” however, amounts to nothing more than an

argument that because the Decision “examines the arguments of [Petitioners]” first, the burden of proof was on Petitioners. Id. To call this contention silly is to flatter it. Indeed, it is truly difficult, if not impossible, to know how to respond to such a flawed contention. Perhaps the best answer is the obvious one: the burden of proof was set at the outset of the proceeding and the parties and case proceeded accordingly.¹⁴ Nothing in the decision or elsewhere suggests that the burden was ever shifted to Petitioners. Assignment of the burden of proof is not derived from the order in which the court addresses the parties’ arguments, as Petitioners must know.

C. The Decision Applies the Correct Legal Standards

Petitioners’ claim that the Decision incorrectly applies Department precedent, is as contrived and unfounded as their claim that they bore the burden of proof. See Petition at 12-14. One of the few issues that was not subject to dispute between the parties was that the ALJ and the Department would apply the “actual control” test, and that that test called for an examination of the totality of the circumstances. See ASTAR’s Post-Hearing Brief, filed Oct. 31, 2003, at 15 (“[T]he Department has established an ‘actual control’ test that examines the circumstances of each carrier to determine whether it is, in fact, controlled by United States citizens.”)¹⁵ Indeed, ASTAR expressly acknowledged that “actual control” includes the potential ability to exercise control. See ASTAR’s Post-Hearing Reply Brief, filed Nov. 17, 2003,

¹⁴ There can be no question that ASTAR carried the burden of proof in this proceeding -- from beginning to end. (See May 27, 2003 Pre-hearing Conf. at 100:13-16 (CALJ Yoder: “where as here we have a de novo review of the question of [DHL Airways’] citizenship, the burden of persuasion with respect to that question is on the carrier”); (Oct. 14, 2003 Hrg. Tr. at 2952:8-10 (ALJ Kolko noting that ASTAR has been “assigned the burden of proof”).)

¹⁵ Petitioners’ observation that Congress “recently codified the standards in DOT’s implementing statute[.]” to require that a carrier must be under the “actual control” of U.S. citizens, Petition at 1, adds nothing. That is the test to which everyone agreed and that Judge Kolko applied.

at 16 (sub-heading entitled “ASTAR Is Not Under the Actual or Potential Control of DHL or DP”). Despite this fact, Petitioners disingenuously contend that the ALJ has ignored the parties’ statements of the applicable law, and abandoned decades of DOT precedent. See Petition at 11-14. And what is the basis for this contention? The fact that the ALJ decided to set forth the Department’s citizenship standards in an Appendix to the Decision rather than the body of his discussion! See Petition at 13.

The fact of the matter is that the Decision cites the same cases and legal standards advocated by Petitioners. Compare Decision at 36-38 (“the control standard evaluates both actual and potential control [and the] circumstances affecting control must be evaluated as a whole”) (emphasis added) and Petition at 11-14 (same). And in applying those standards, the ALJ found, again and again, that there was no evidence of control.¹⁶ If Petitioners are complaining that the Decision did not provide some sort of “final score” on the totality of the circumstances, ASTAR can do so now: no evidence + no evidence + no evidence = no actual or potential control.

III.

FINDINGS OF FACT

Despite the fact that the Decision contains detailed, thoughtful, and well supported findings of fact, Petitioners find the nerve to complain, over and over, that the ALJ’s conclusions are without factual support, or are directly contradicted by the evidence adduced at the hearing. However, Petitioners’ challenge of the ALJ’s findings

¹⁶ Indeed, the ALJ’s findings leave no room for doubt. See Decision at 12 (“I find no merit in [Petitioners’] contention . . .”), 16 (“I find that nothing on the record supports a finding. . .”), 17 (“There is no evidence on the record . . .”), 18 (“This contention does not hold water.”), 19 (“The argument for actual control of the carrier on this ground fails.”), 20 (“I conclude, then, that there is no reason to find . . .”), 21 (“[T]he ACMI Agreement provides no credible threat of termination . . .”), 28 (“In these circumstances, DHLWE exercises no control over ASTAR.”).

does not pass muster. In fact, in their Petition they repeatedly fail to even address the rationale behind the ALJ's findings or to dispute the evidence supporting his conclusion.¹⁷ Three of Petitioners' claims make the point.

A. Operational and Administrative Relationships

One excellent example of Petitioners' flawed approach is their argument that ASTAR is, in fact, subject to control by DHL by virtue of the companies' operational and administrative relationships. Citing a "laundry list" of "findings" regarding common interactions between ASTAR and DHL that purportedly show control, Petitioners complain that the "ALJ's conclusions simply do not logically follow from [his] findings."¹⁸ Petition at 38. But Petitioners somehow "forget" the ALJ's express discussion of his rationale for reaching his conclusion and his reasons for rejecting the very arguments advanced in the Petition. Thus, the Decision states: "But it would be [a] mistake[] to infer from these [routine interactions] that DHL[] is in 'actual control' of ASTAR." Decision at 30 (emphasis added). Instead, the ALJ relied upon his findings that, among other things:

- "[ASTAR's] day-to-day contact with DHL[] was mostly advisory, [concerning] issues that might affect operations"
- "The structure of ASTAR is consistent with an independent enterprise."

¹⁷ While one ground for seeking discretionary review is the assertion that "[a] finding of material fact is erroneous[.]" 14 C.F.R. § 302.32(a)(2)(i), in order to secure review Petitioners must make some showing as to why the finding is in error. Simply restating their argument without addressing the ALJ's findings or rationales does not suffice. See, e.g., In re Pan Aviation Fitness Investigation, Order No. 86-9-30, Docket No. 43006, 1986 WL 70382, at *1 (Sept. 19, 1986) (noting that Department allowed Recommended Decision to become final in proceeding where "petition [for discretionary review] largely restated arguments the carrier made in an earlier motion to the Judge, which were rejected").

¹⁸ ASTAR will not attempt to correct the record as to the numerous mischaracterizations made by Petitioners, but suffice it to say that the ALJ's findings regarding the day-to-day interactions are consistent with nothing more than what one would expect from a normal customer/supplier relationship. See Decision at 29-30.

- “[ASTAR] controls all employment decisions.”
- “[ASTAR] decides its fleet mix.”
- “[ASTAR] also controls its financial operations.”
- “Only ASTAR makes strategic decisions.”

Decision at 30-31. In short, after hearing the evidence and observing the witnesses, the ALJ concluded that there was no suggestion of control through ASTAR’s routine interactions with DHL, and instead found a wealth of evidence supporting ASTAR’s operational and administrative independence. See Decision at 29-31. Petitioners do not even address these findings and conclusions, but rather hope to sweep the ALJ’s whole analysis under the rug. This stratagem will not work.

B. The Cap-Ex “Receivable”

Similarly, Petitioners claim that there are no “substantial facts in evidence” that substantiate the Pre-Effective Time Maintenance CapEx (“CapEx”) stream of \$61 million, and they argue that the existence of that obligation prior to June 14, 2003 is “contradicted by evidence in the record.” Petition at 42-43. These assertions are nothing more than wishful thinking, as Petitioners simply ignore the ALJ’s conclusions and the wealth of evidence supporting them.

Completely absent from the Petition is any acknowledgement of one of the ALJ’s most significant conclusions on the CapEx issue: that there is no evidence in the record to support Petitioners’ spurious accusation that DHL “creat[ed the CapEx] receivable for the sole purpose of funding the ASTAR Transaction.” Decision at 16.¹⁹ And, indeed, Petitioners fail to dispute the wealth of evidence to the contrary: ASTAR’s

¹⁹ This should not be confused with the burden of proof issue -- ASTAR proved that the CapEx obligation existed before the sale; what ASTAR did not do, and need not have done, is address every silly argument or theory Petitioners could concoct.

three owners testified as to the nature, origin, and substance of the CapEx payment stream (Aug. 26 Hrg. Tr. at 67:9-68:20; 77:15-78:4, 175:14-176:16; Oct. 14 Hrg. Tr. at 2733:9-2734:12, 2737:18-2741:8, 2742:3-15, 2744:19-2745:12, 2767:6-2768:1, 2769:6-10;); ASTAR's accounting expert, Dr. Roman Weil, explained the accounting principles that led to the existence of the CapEx obligation (Oct. 9 Hrg. Tr. at 2353:1-14); and ASTAR produced numerous documents (including its independently audited financial statements) supporting the accounting treatment and existence of the CapEx obligation prior to July 14, 2003.²⁰ (JE-53 at 12; JE-119 at A017677 n.3; JE-128 at DHLA90269, DHLA90271 (Notes 2 and 4) (2001 financial statements audited by PricewaterhouseCoopers); Exh. No. 3 to Supplemental Joint Motion to Admit, filed Nov. 20, 2003, at A028249, A028253 (Notes 2 and 5) (2002 financial statements audited by PricewaterhouseCoopers).) So much for Petitioners' argument that there are no substantial facts in evidence supporting the CapEx obligation!

C. Third-Party Business

Finally, Petitioners take the same tack in claiming that there is “no evidence” that ASTAR has an incentive to build its third-party business. According to

²⁰ Unable to cite any evidence, or dispute the wealth of evidence submitted by ASTAR, Petitioners march out two of its most tired arguments. First, Petitioners complain that ASTAR promised to produce John Dasburg to testify about the CapEx obligation, but instead produced Michael Klein (who they claim was not qualified to testify on the issue). See Petition at 42. Of course, the only reason Mr. Dasburg did not testify was because Petitioners refused to adjust one of their counsel's schedule to accommodate Mr. Dasburg's availability (Oct. 10 Hrg. Tr. at 2623:7-2625:6); and Mr. Klein's testimony on the subject (as the principal negotiator of the issue) could not have been more clear, credible or informed. (Aug. 26 Hrg. Tr. at 85:22-86:16; Oct. 14 Hrg. Tr. at 2733:6-2741:8; JE-404 at 78:1-2.). Petitioners' additional complaint that there is no evidence of the “receivable” in ASTAR's accounting records disregards the uncontroverted evidence: the CapEx obligation was treated as a receivable as part of the sale of the airline, and was previously accounted for and documented in ASTAR's accounting records (including its independently audited financial statements for 2001 and 2002) as an asset. (Oct. 14 Hrg. Tr. at 2742:16-2746:7; JE-53 at 12; JE 128 at DHLA90269, DHLA90271 (Notes 2 and 4) (2001 financial statements audited by PricewaterhouseCoopers); Exh. No. 3 to Supplemental Joint Motion to Admit, filed Nov. 20, 2003, at A028249, A028253 (Notes 2 and 5) (2002 financial statements audited by PricewaterhouseCoopers).)

Petitioners, the “uncontroverted evidence” is that “ASTAR’s overwhelming economic interest” is to increase its business with DHL. Petition at 47-48. But, once again, that is not what the record shows, nor what the ALJ concluded relying upon that record.

For example, the ALJ concluded that the “air cargo business is healthy” and that the “testimony uniformly suggested that recovery [from the recent downturn] will occur in the near term.” Decision at 25 (citing AS-T-5; Sept. 11 Hrg. Tr. at 1907-08; and AS-66). What do Petitioners say to these hard factual findings? They cite a document not offered at the hearing and then have the nerve to whine that the ALJ’s “finding is entirely speculative and not supported by any evidence in the record” Petition at 46-47. But, that claim requires them to ignore, among other things, the Decision’s detailed discussion of why ASTAR has a strong economic incentive to pursue third-party business. As the ALJ found: “ASTAR’s low one percent profit margin for reimbursable costs and expenses over \$250 million also demonstrates a ‘very strong incentive’ for the carrier to look for third-party business after achieving \$250 million in business from [DHL].” Decision at 26 (citing Oct. 10 Hrg. Tr. at 2641; AS-26 at §10(b) (ACMI Agreement); AS-28 at 25). That finding is grounded in the factual record, and if Petitioners want to demonstrate that review is appropriate, they must show why the finding was in error. Having failed to do so, no review should be granted.

* * * *

To summarize with respect to the Findings of Fact, the Petition to Review is long on rhetoric but short on facts. Absent a showing of factual errors which require review, the Decision must stand and review is unnecessary.

CONCLUSION

The Petition to Review presents nothing which mandates review by the Decisionmaker because it merely (1) attempts to rehash all the arguments made before the ALJ, while presenting no evidence of any serious error, and (2) seeks review on policy or procedural issues which can be adequately dealt with in an order denying review.

If, however, the Decisionmaker believes some review is necessary, it should be limited, we submit, to (a) the policy and competition issues and (b) the claim of procedural errors which allegedly impacted due process. Such a review can, and should, be expeditiously concluded.

Respectfully submitted,

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