

Order 2003-7-36  
Served July 30, 2003



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

Issued by the Department of Transportation  
on the 30<sup>th</sup> day of July, 2003

In the matter of the citizenship of

DHL AIRWAYS, INC.

Docket OST-2002-13089

Under 49 U.S.C. §40102(a)(15)

ORDER

Summary

By this Order, we extend the deadline for the Recommended Decision in this case for 30 days. We also affirm the decisions of Chief Administrative Law Judge Ronnie A. Yoder ("Chief Judge") denying the Motion of ASTAR Air Cargo, Inc., formerly known as DHL Airways, Inc. ("ASTAR")<sup>1</sup> to terminate the proceeding in this docket, and denying the motion of DHL Holdings (USA), Inc. ("Holdings"), and DHL Worldwide Express, Inc. ("Worldwide Express") for a declaratory order finding this proceeding to be moot. Further, we defer consideration of the non-citizenship aspects of the continuing fitness of ASTAR under its new ownership until the conclusion of this proceeding. 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.

Background

By Order 2003-4-14, issued April 17, 2003 ("Instituting Order"), the Department instituted a *de novo* review of the current citizenship of DHL Airways before an Administrative Law Judge and directed the Law Judge to submit a Recommended Decision to the Department by September 2, 2003. On May 2, the Chief Judge issued a prehearing conference report, which included a request to the Decisionmaker for an extension of time. By Notice on Request for

<sup>1</sup> On July 14, 2003, DHL Airways notified the Department that it was changing its name to "ASTAR Air Cargo, Inc.," in connection with the acquisition of outstanding stock of DHL Airways by John Dasburg, Richard Blum, and Michael Klein (known collectively as BD Air Partners, LLC) ("BDAP Acquisition"), and applying for the re-issuance of its certificates of public convenience and necessity and exemption authority. On July 16, the Department's staff registered the name "ASTAR Air Cargo, Inc.," for use in DHL Airways' air transportation operations, effective immediately. The staff noted that reissuance of the carrier's certificates and other operating authority to reflect its new name would be handled separately. On July 18, Federal Express and UPS filed their Joint Opposition to DHL Airways' application for re-issuance of its certificates of public convenience and necessity but did not oppose the use of the name ASTAR Air Cargo, Inc.

Extension of Time for Submission of Recommended Decision, served May 12 ("Extension Notice"), the Department granted an extension for the Recommended Decision until October 31, 2003.

After the parties began discovery proceedings, DHL Airways' ownership changed. On July 16, ASTAR notified the Department pursuant to 14 CFR § 204.5 of a substantial change in ownership in connection with the BD Air Partners acquisition of the outstanding DHL Airways stock.

On July 18, the Chief Judge issued an Order of Chief Administrative Law Judge ("Chief Judge's Order") requesting the Department to remove the time limitation imposed on submission of a Recommended Decision or to extend it by at least 90 days, and to address the procedural issue of ASTAR's report of a substantial change in ownership under 14 CFR § 204.5. The Chief Judge asked for the extension based on several considerations, including discovery related to DHL Airways' change in ownership, the considerable number of pleadings filed and orders issued, and an upcoming reduction in the Chief Judge's staff. The Chief Judge also raised concerns about potential *ex parte* communications associated with the section 204.5 fitness review in light of the pending citizenship proceeding and related discovery.

On July 22, ASTAR filed a Motion with the Department ("ASTAR Motion") seeking an order (1) dismissing or closing Docket OST-2002-13089; (2) directing the Chief of the Air Carrier Fitness Division to process ASTAR's filing under 14 CFR § 204.5; and (3) denying the Chief Judge's request for an extension of time and for responsibility to process ASTAR's section 204.5 filing. ASTAR argued that the Department should dismiss or close this docket and proceed with the section 204.5 fitness review because the purchase of DHL Airways by BDAP mooted the issue of ASTAR's citizenship under its prior ownership. FedEx and UPS filed a motion with the Chief Judge on July 22 asking for an extension of time to respond to ASTAR's motion. On July 25, the Chief Judge issued an order finding ASTAR's pleading to be an unauthorized document, but concluding nonetheless that its request should be denied. In addition, on July 25, Holdings and Worldwide Express filed a Motion for Declaratory Order addressed to the Department, asking that the Department issue an order finding this case to be moot in view of the BDAP purchase of DHL Airways. On July 28, the Chief Judge issued an order denying the motion of Holdings and Worldwide Express, finding that neither are a party to this proceeding and thus lack standing to file such a motion. Moreover, he noted that the proceeding is not moot. On July 29, ASTAR filed a Document in further support of its Motion to dismiss.

We have decided to take review of the Chief Judge's July 25 and July 28 orders on our own initiative,<sup>2</sup> and to respond to his July 18 request for an extension. The public interest requires that we take action to address these matters quickly because of the need to bring to closure this long-pending case without prejudicing the parties' ability to obtain a hearing on the issues in this proceeding.

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<sup>2</sup> This action is taken in accord with 14 CFR § 302.11(h), which provides that "[t]he rulings of the administrative law judge on a motion may be reviewed by the DOT decisionmaker in connection with his or her final action in the proceeding or at any other appropriate time irrespective of the filing of an appeal or any action taken on it."

Although the ASTAR Motion also raises a number of issues with respect to the Chief Judge's conduct throughout the proceedings, the Department declines to address those issues in this interlocutory Order. Such matters are more appropriately raised by the parties in the context of any request for review of the Recommended Decision.<sup>3</sup> This Order will address only those procedural issues necessary to the advancement of this citizenship proceeding.

### Request for Dismissal

With respect to ASTAR's request to dismiss or terminate the docket, the Department recognizes the change in ownership interest as a result of the July 14 BDAP Acquisition of DHL Airways. However, the current citizenship of the carrier under that ownership change is still at issue. Moreover, the other issues relating to control of the airline still remain. Therefore, we affirm the Chief Judge's orders denying ASTAR's and Holdings/Worldwide Express' Motions to dismiss or terminate this proceeding.<sup>4</sup>

### Scope of Chief Judge's Review

In the Instituting Order and Extension Notice, the Department directed that this proceeding should consider only the current citizenship of DHL Airways, with discovery limited to facts directly relevant to the issue of the citizenship of the carrier at the present time.<sup>5</sup> What constitutes the current citizenship of DHL Airways substantially changed on July 14, 2003, with the BDAP Acquisition. To 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.

To the extent that the parties to this proceeding have attempted to probe into historical developments in the DHL Airways ownership structure, all participants are reminded that the Department has already found that historical ownership is not relevant to the current citizenship status of ASTAR. Our Instituting Order specifically stated that the past citizenship of this airline would be considered in the context of the pending formal enforcement complaints.<sup>6</sup> Historical ownership may be relevant to compliance disposition and perhaps other aspects of the continuing fitness of the carrier, but those issues are not before the Chief Judge in this proceeding. The Chief Judge's role is limited to determining the citizenship of ASTAR as it exists at this time.

In the Chief Judge's Order, he raised the issue of ASTAR's filing for a fitness determination under 14 CFR § 204.5, expressing concerns regarding *ex parte* prohibitions with respect to the pending citizenship proceeding and the need for further discovery. ASTAR's section 204.5 filing was proper; however, given the unique circumstances of this case, the Department will

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<sup>3</sup> This proceeding is conducted under Subpart A of 14 CFR Part 302, with review of the Recommended Decision governed by 14 CFR § 302.32.

<sup>4</sup> To the extent the motion of Holdings and Worldwide Express requesting that this proceeding be terminated may properly be considered a motion to the Department, apart from Docket OST 2003-13089, to interpret its order instituting this case, the motion is denied for the reasons stated above.

<sup>5</sup> See Order Instituting Formal *De Novo* Review, served April 17, 2003, at 2; Notice on Request for Extension of Time for Submission of Recommended Decision, served May 12, 2003, at 2.

<sup>6</sup> See Order Instituting Formal *De Novo* Review, served April 17, 2003, at n.4.

stay any consideration of non-citizenship fitness issues under 14 CFR § 204.5 pending consideration of the citizenship issue in this proceeding, because it is possible that the resolution of the citizenship issue here might render a determination regarding the other fitness issues moot.

#### **Request for Extension of Time**

Although ASTAR argued against granting the Chief Judge's requested extension of time in this case, the Department nonetheless has determined that the Chief Judge and the parties should receive some additional time in order to adequately consider the recent substantial change in the ownership of DHL Airways as a result of the BDAP Acquisition. The Department is granting a 30-day extension of time solely for the purpose of ensuring that the Chief Judge and the parties have an opportunity to review the citizenship of ASTAR following the BDAP Acquisition.

The Department considers the Chief Judge's requested 90-day extension unnecessary in order to properly conclude this case. The Chief Judge has already commenced discovery with respect to the recent BDAP Acquisition.<sup>7</sup> The Department believes 30 days is a sufficient extension, as long as the Chief Judge adheres to the scope of the case by considering only now existing citizenship, as directed by the Department in its previous Instituting Order, Extension Notice, and in this Order.

#### **ACCORDINGLY,**

1. The Chief Administrative Law Judge is hereby ordered and directed to conduct this proceeding in a manner consistent with the directions outlined above, limiting the scope of issues and discovery to the current ownership of ASTAR Air Cargo, Inc., by BD Air Partners, LLC.
2. We extend the deadline to submit a Recommended Decision to the Department to December 1, 2003.
3. We stay the determination of ASTAR Air Cargo, Inc.'s fitness under 14 CFR § 204.5 pending the consideration of citizenship issues in this proceeding.
4. We affirm the Chief Administrative Law Judge's order of July 25, 2003, denying the July 22, 2003, Motion of ASTAR Air Cargo, Inc., to dismiss or otherwise terminate this proceeding.
5. We affirm the Chief Administrative Law Judge's order of July 28, 2003, denying the July 25, 2003, Motion of DHL Holdings (USA), Inc., and DHI Worldwide Express, Inc., for a declaratory order finding this proceeding to be moot.

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<sup>7</sup> See Orders of Chief Administrative Law Judge, served June 20, 2003 (granting FedEx/UPS/Lynden's joint applications to depose John H. Dasburg, Michael R. Klein, and Richard Blum); and June 30, 2003 (granting the FedEx/UPS joint application to depose Vicki Brethauer).

6. We will serve a copy of this order on all parties in this docket, as well as on DHL Holdings (USA), Inc., and DHL Worldwide Express, Inc.

By:

**MICHAEL W. REYNOLDS**  
Acting Assistant Secretary for Aviation  
and International Affairs

*An electronic version of this document is available on the World Wide Web at:  
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