

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

**IN THE MATTER OF
ASTAR AIR CARGO, INC.**

**SECTION 204.5 FILING
(UNDOCKETED)**

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

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

**MOTION OF ASTAR AIR CARGO, INC. TO THE DEPARTMENT OF
TRANSPORTATION TO DISMISS OR OTHERWISE TERMINATE
DOCKET OST-2002-13089;
MOTION OF ASTAR AIR CARGO, INC. TO THE DEPARTMENT TO
PROCESS ITS SECTION 204.5 APPLICATION AND TO DENY THE
CALJ'S ATTEMPT TO REPLACE THE ADMINISTRATIVE PROCESS**

Steven A. Rossum
Executive Vice President, General Counsel
& Head of Business Transactions
ASTAR AIR CARGO, INC.
One Biscayne Tower
2 South Biscayne Boulevard
Miami, FL 33131
(321) 662-1180
steve.rossum@astaraircargo.us

Sanford M. Litvack
Joanna R. Swomley
**QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP**
335 Madison Avenue, 17th Floor
New York, NY 10017
(212) 702-8100
(212) 702-8200 (fax)
sandylitvack@quinnemanuel.com

Stephen H. Lachter
Roxanne S. Clements
LACHTER & CLEMENTS LLP
1150 Connecticut Avenue, N.W., Suite 900
Washington, D.C. 20036
(202) 862-4321
(202) 835-3219 (fax)
lachter@starpower.net

Dated: July 22, 2003

Elliott M. Seiden
**GARFINKLE, WANG, SEIDEN &
MOSNER, PLC**
1555 Wilson Boulevard, Suite 504
Arlington, VA 22209
(703) 522-0967
(703) 522-0958 (fax)
emseiden@gwsmplc.com

Counsel for ASTAR AIR CARGO, INC.

ASTAR Air Cargo, Inc. (“ASTAR”) files this motion with the Department of Transportation (“DOT” or “the Department”) seeking an order (a) dismissing or otherwise closing Docket No. OST-2002-13089 on the ground that the predicate for the docket no longer exists in light of the purchase of DHL Airways, Inc. (“Airways”), now ASTAR, by a group of U.S. citizens with no ties to any foreign entity; (b) directing the Chief of the Air Carrier Fitness Division to process ASTAR’s filing, pursuant to 14 C.F.R. Section 204.5, due to the complete change in Airways’ ownership; and (c) denying the request by the administrative law judge previously assigned to this docket (the “CALJ”) to extend time and have the Department hand over to him the responsibility for, in effect, processing ASTAR’s Section 204.5 filing.¹

Federal Express Corporation (“FedEx”) and United Parcel Service (“UPS”) initiated this Docket in order to challenge the May 2001 reorganization of Airways. The effect of that reorganization on Airways’ citizenship was and is the only matter at issue in the Docket. Indeed, the legislation which caused the Department to refer the matter to an administrative law judge specifically directed the referral to “resolve” this Docket. The recent acquisition of Airways, now ASTAR, is not at issue. Indeed, that acquisition is the subject of a new section 204.5 filing and is squarely before the Department.

¹ In light of the truly extraordinary developments in this docket and consistent with the CALJ’s Order No. 13089-37, served July 18, 2003, stating that: “the Decisionmaker should address the question of process for this proceeding and Part 204 filings with respect to information concerning the facts as changed on July 14, 2003,” Department action is essential. Id. at 2. This Motion is directed to the Department only, as the CALJ recognizes that “process modification” is necessary to begin review of the new transaction. Id. at 2. Accordingly, leave to file is not necessary and is not sought for in this Motion. Also, this matter requires direct action by the Department, not the CALJ. While it has always been recognized that this proceeding would become moot upon consummation of the acquisition, Airways nonetheless initially thought that rather than dismissing the entire docket, it could somehow be limited to a consideration of the citizenship of the company in light of the acquisition. For reasons discussed herein, it is now obvious that this is not a viable option.

FedEx and UPS recognize that the recent acquisition is not part of this docket in their Motion to have the Department “defer” ASTAR’s recent application for the re-issuance of a certificate of public convenience and necessity pursuant to Section 204.5. See Joint Opposition to Application for Re-issuance of Certificates of Public Convenience and Necessity filed by FedEx and UPS on July 18, 2003 (the “Joint Opposition”). Further, the CALJ has himself stated that “the Decisionmaker should address the question of process for this proceeding and Part 204 filings with respect to information concerning the facts as changed on July 14, 2003.” Order No. 13089-37, served July 18, 2003, at 2. FedEx, UPS and the CALJ all hope to by-pass the Department’s established procedures and have the CALJ process ASTAR’s Section 204.5 filing and make a recommendation on ASTAR’s citizenship within this docket. That, however, would be totally inappropriate.

The issue of ASTAR’s citizenship involves an entity with different owners, different relationships and different contracts. Since the two citizenship matters are distinct and unrelated, since the CALJ is unable to separate the two, and since issues regarding prior citizenship are the subject of other dockets, this docket should properly be dismissed or otherwise terminated; Airways’ citizenship in light of the 2001 reorganization -- the only issue presently in this docket -- is moot and the Department must now proceed to process ASTAR’s Section 204.5 filing. Indeed, to do otherwise would present serious due process issues. ASTAR is entitled to be treated like any other carrier, in accordance with the Rules, by having its filing proceed in accordance with the prescribed DOT procedures under Section 204.5. If, and only if, the DOT were to determine that an administrative law judge is necessary, after the normal review, should a

new docket be opened. However, if that were to happen, for the reasons set forth herein, ASTAR's citizenship should not, and cannot, properly be referred to the CALJ.

It would not be an overstatement to say that, although the Department assigned this matter to an administrative law judge ("ALJ") with a straightforward directive – to make a recommendation to the Department regarding Airways' citizenship as of April 17, 2003, in light of a 2001 reorganization in which Airways was split off from a larger company – the proceeding has turned into a Kafka-esque nightmare, just as Airways' competitors, FedEx and UPS, had hoped. Despite the DOT's clear direction that the proceeding warranted only "limited" discovery because past issues of citizenship were the subject of other dockets, the CALJ, who assigned himself to this matter, has not only permitted, but encouraged, FedEx and UPS to conduct a scorched earth campaign designed to harass Airways and force it to spend an exorbitant amount of money defending itself, all with the obvious ultimate goal of eliminating Airways as a competitor.

As set forth in detail below, the CALJ exhibited a bias against Airways and prejudged the matter before him from the outset. He has permitted a stunning amount of discovery (and it is not close to being finished as he continues to grant virtually every bit of discovery FedEx and UPS seek), going back to the year 2000 (a time period nowhere in issue), into companies and individuals, once tangentially, and now not at all, related to ASTAR. He has also issued orders that are unprecedented – including purporting to subject two non-U.S. residents who conduct no business in the United States to personal jurisdiction in Washington, D.C. so that their depositions may be taken. And, when counsel for the two individuals objected, the CALJ threatened

Airways (which did not even arguably control the individuals or their employers) with “adverse inferences” if the individuals did not appear.

Inexplicably, instead of recognizing the significance of the acquisition of Airways by three prominent U.S. citizens who have had no ties whatsoever to Deutsche Post (“DP”) or the DHL network of companies, and who have eliminated any meaningful relationships with DP and/or its affiliates except as a customer,² the CALJ has used the acquisition as an occasion to deepen the morass he has already created. In the CALJ’s unique view, the past is relevant because, depending on past compliance, “a different level of scrutiny” might be required in determining citizenship. (2 PHC Tr. at 76.) That is nonsensical. ASTAR’s citizenship rises and falls on the facts pertinent to it, not on facts pertinent to prior ownership. The level of scrutiny does not vary based on history.

Given that (1) issues of Airways’ past compliance with citizenship requirements are the subject of other dockets and the Department has expressly directed that those matters should be considered in other dockets, not this one; and (2) the company’s ownership structure has changed dramatically, so as to moot the issues in this docket, the CALJ’s distorted view and actions are especially inappropriate. In his one-sided approach to the proceeding, the CALJ has denied virtually every motion made by Airways (some without FedEx or UPS having to put pen to paper)³ and has granted virtually every request made by FedEx and UPS. As a result, Airways has been forced to

² The only relationship with the DHL group of companies is through four pre-existing aircraft leases, some old guarantees dating back to the 1990’s for A-300 and DC8 Aircraft, and a new ACMI agreement, the performance of which is guaranteed by DP.

³ In a new twist on an old theme, on July 21, the CALJ granted an application (filed late on Friday, July 18 by FedEx and UPS) to compel William Robinson, a former shareholder of Airways, to testify at a deposition. He granted the application without giving anyone the opportunity to respond to it. Having ordered that responses to motions must be filed within one business day, the CALJ acted before even a day could lapse.

spend millions of dollars to comply and otherwise respond to his Orders – 46 to date. (This amount will only continue to grow if left unchecked.) That is a shocking expense and heavy burden under any circumstance, but it is particularly outrageous here where the Department contemplated and focused the hearing on an assessment of the citizenship of Airways as of April 2003, in light of the 2001 reorganization, and intended that only “limited” discovery take place in view of the extensive record already developed.

With completely new owners, who are indisputably U.S. citizens eager to compete with FedEx and UPS, the citizenship of ASTAR must be treated in the normal manner, not shoe-horned into this docket where it does not fit and does not belong. The issue in this docket, the citizenship of Airways in light of the May 2001 reorganization, is now moot and must be dismissed.

History And Background

While the history and background of this proceeding are well known to the Department and to the public generally (*see, e.g.*, Andrew Ross Sorkin, *Three’s A Crowd to Air Cargo Giants*, The N.Y. Times, June 1, 2003, at B1; Stephen Power and Rick Brooks, *Air-Cargo Fight Has Big Cast*, The Wall Street Journal, July 18, 2003, at A4) it is useful, nonetheless, to summarize them briefly:

1. In September 2000, DHL Worldwide Express, Inc., a company which operated in the United States by providing both the ground and air portions of the express delivery network operating worldwide under the tradename “DHL,” advised the Department that it intended to initiate a major change in the control of the U.S. air carrier portion of its business. Specifically, DOT was advised that the air portion of the U.S. delivery system would be sold and become a completely separate entity, Airways.

2. Airways, the DOT was advised, would be owned by Mr. William A. Robinson, a U.S. citizen, who would own and control 55% of the equity and 75% of the voting stock of Airways. The balance of the equity and voting rights were to be owned by DHL Holdings (USA) Inc.

3. The various agreements between and among the parties were furnished to and vetted by the Department, including specifically (a) an ACMI agreement between Airways and Holdings, pursuant to which Airways would transport packages and cargo for its largest customer, DHL Worldwide Express, Inc., (“Worldwide”); (b) a Shared Services Agreement pursuant to which Airways and Worldwide would share certain services they had previously shared, while they were a combined business, until Airways was able to provide those services on its own; (c) a Stockholders’ Agreement pursuant to which Mr. Robinson’s voting control was firmly established; (d) a credit agreement with the Bank of America with a “keep well” and a “no offset” letter from Holdings and DHL International Inc. to the Bank of America; and (e) certain lease agreements and other related documents.

4. After discussions with the Department, the change in ownership, along with the implementation of the related agreements, became effective May 14, 2001.

5. Commencing at least in January 2001, FedEx, later joined by UPS and Lynden Air Cargo, Inc. (“Lynden”), an Alaska-based company, initiated a series of proceedings with the DOT designed to challenge Airways’ citizenship and to eliminate Airways (and hence DHL) as a competitor in the United States.⁴ After their Complaints were dismissed, they embarked on a new tack: now they asserted that they no longer

⁴ Docket Numbers OST-2001-8736 and OST-2001-8824 were opened by FedEx and UPS, respectively, in January 2001 to challenge the proposed change in ownership that was consummated in May 2001.

necessarily believed that Airways was not a U.S. citizen, but they had “questions” and “reservations” about whether it was; thus, they requested that the DOT conduct a hearing into the matter using an administrative law judge.

6. After the DOT found that Airways satisfied U.S. citizenship requirements and failed to order the hearing demanded by FedEx and UPS, Congress inserted, into the wholly unrelated Emergency Wartime Supplemental Appropriations Act of 2003, a direction to the DOT to use an Administrative Law Judge to “resolve” this particular docket (which had already been opened at the urging of FedEx and UPS to consider the 2001 transaction described previously). See Public Law No. 108-11 § 2710.

7. On April 17, 2003, in light of the legislative directive, the Department issued the Order Instituting Formal De Novo Review, Order No. 2003-4-14 (the “April Initiating Order”) providing for the assignment of an ALJ to conduct a hearing and make a recommendation as to the “current citizenship of Airways only,” i.e., the citizenship that existed as of April 17, 2003, as a result of the 2001 reorganization in which one of its shareholders was DHL Holdings, Inc. Id. at 1-2 (emphasis in original). By Notice of April 21, 2003, Chief ALJ Ronnie Yoder assigned the proceeding to himself.

8. In drafting the April Initiating Order, the Department was careful to provide a specific focus and timetable for the proceeding it expected the CALJ to conduct. Specifically, the April Initiating Order provides that:

- (a) the hearing was to address the current (April 2003) citizenship only, noting in particular that Holdings owned a minority interest in Airways and that, based on congressional requests, the Inspector

General had issued a report on the issue (which, in turn, had identified two issues relating to that ownership interest and certain contracts between Robinson and DHL companies);

- (b) issues regarding past compliance would be dealt with in the other pending dockets; and
- (c) given the history of the proceedings, the “substantial amount of relevant information” already in the docket, and the parties’ familiarity with the issues, public counsel was not necessary and the hearing should take place *expeditiously* with the ALJ to render his recommendation by September 6, 2003.⁵ *Id.* at 2.

9. While the personal views of an ALJ do not generally have any bearing on a proceeding, they take on a special significance here. The CALJ has been a public critic of informal agency decision making and a vocal proponent of the greater use of ALJs. Thus, in assessing the proceedings to date, one must recall his statements in a speech he delivered at the annual meeting of the National Association of Administrative Law Judges in 1998. Speaking of administrative agencies and hearing officers, the CALJ asserted: “Agencies are what? Bureaucracies! If they can’t undermine the independence of the adjudicator, such agencies will do everything possible to avoid using independent adjudicators.” R. Yoder, *Judicial Independence – Vignettes, Templates, and Cases, Judges or Bureaucrats*, edited version of remarks made at NAALJ Annual Meeting in Portland, Oregon on October 13, 1998 (available at <http://www.faljc.org/faljc3.html>).

⁵ This date was reluctantly extended by the Department on May 12, 2003 (*see* Notice on Request for Extension of Time for Submission of Recommended Decision) to October 31, 2003. In that Notice, the Department stated that “some limited discovery may be justified” but that “the process of discovery should take considerably less time than it might have if this issue were new to the parties” and that it saw “no reasons why this case cannot be completed on time if the Instituting Order is complied with” *Id.* at 1-2.

10. Resentful of the Department's informal processes because they do not utilize ALJs, the CALJ has declared that there are "bureaucratic adjudication[s]" — those "resolved each day by bureaucratic fiat, by negotiation, by mediation, or through a bureaucratic hearing process reflecting some of the attributes of adjudication, but without the independent hear-and-decide authority and responsibility which are the 'sine qua nons' of an administrative judicial system." Id. Contrasted with that, in the CALJ's view, there is only one legitimate adjudication — that which comes from a decision rendered by an "independent" ALJ. Declaring, "I am certainly no less a judge than an independent traffic court judge[.]" the CALJ concluded his speech to his colleagues with a Lincolnesque prayer for "a new birth of freedom, and that administrative decisions of the judges, by the judges, and for the people shall not perish from the earth. God bless the administrative judiciary and this honorable Conference." Id.

11. With his contempt for "bureaucratic" reviews and his resentment over the fact that an ALJ was not utilized previously to consider this issue,⁶ the CALJ embarked upon his self-appointed assignment with relish. Of course, if the adjudicatory proceeding he conducts were to reach the same conclusion as the prior "bureaucratic" review (determining that Airways continued to be a U.S. citizen in light of the 2001 reorganization), then this "adjudicatory proceeding" would simply have been an unnecessary waste of time and resources. In those circumstances, the CALJ would hardly have advanced either his own cause or that of ALJs generally which he has undertaken.

⁶ As the CALJ has observed, continuing fitness proceedings were "generally not referred for adjudicatory proceedings [but] were done administratively." (1 PHC Tr. at 96.)

12. On April 29, 2003, the CALJ held his first pre-hearing conference in a standing room only area packed with reporters. Right at the outset, he took a swipe at the Department, which had refused to turn the matter of Airways' citizenship over to an ALJ prior to the legislation which purported to require it: "[O]ne of the forces behind the setting of this hearing is the recognition by some people at least that it's important in determining U.S. citizenship to have an open adjudicatory proceeding." (1 PHC Tr. at 96, emphasis added.) He then went on to make a xenophobic speech in which, as two journalists recently reported in The Wall Street Journal, he "appeared to link the ownership dispute to the Sept. 11, 2001, attacks and the war on terror." Stephen Power and Rick Brooks, *Air-Cargo Fight Has Big Cast*, The Wall Street Journal, July 18, 2003, at A4. Despite the fact that the planes of two U.S. air carriers, United Air Lines and American Airlines, were used to fly into the World Trade Center and the Pentagon, the CALJ expressed his concern that some foreign interest might be controlling Airways and that American lives were somehow in jeopardy:

More recently, for reasons that I don't need to recount, some people have had occasion to be concerned about whether it's a good idea for non-citizens to be operating U.S. carriers. I can mention some names, which would spring to the mind of everyone, who could in fact be in control of any noncitizen operator functioning in the United States And I'm sure we would all agree that kind of access to U.S. air carrier status is not something that would be widely regarded as desireably [sic] in the present international climate. So, there is an interest here that goes beyond this case. There's an interest in the openness of such determination, so that the citizens, who use U.S. airways, and the citizens, who live beneath them, as they fly over, whether in skyscrapers or on the ground, can have some assurance that those air carriers are, in fact, operating and controlled by U.S. citizens.

(1 PHC Tr. at 96-97.)

13. To equate Airways, DHL or Deutsche Post with Osama bin Laden was outrageous, but revealing. At that hearing the CALJ foreshadowed his rulings against Airways on a host of procedural and other issues that would tie Airways' hands firmly behind its back while providing FedEx and UPS with a panoply of weaponry. See, e.g., 1 PHC Tr. at 76 ("so you're going to reflect on how you're going to accept what I take to be your burden [of proof]").

14. At the April 29 pre-hearing conference, Airways' counsel advised the CALJ and the other participants in the proceeding that it was likely the company would be acquired by a group of U.S. citizens led by its Chairman and CEO, John H. Dasburg. The CALJ stated then that he would deal with that when and if it came to pass.

15. On May 21, 2003 Airways announced that John Dasburg, and two other U.S. citizens had entered into an agreement to acquire 100% of the stock of Airways. That agreement, along with a draft of a proposed new ACMI agreement were submitted to the DOT pursuant to 14 C.F.R. § 204.5 on May 21, 2003, with a copy being provided to the CALJ at the same time.

16. At the second pre-hearing conference held on May 27, 2003 the CALJ "scolded" Airways' counsel (see Andrew Ross Sorkin, *Three's A Crowd to Air Cargo Giants*, The N.Y. Times, June 1, 2003, at B1) for writing to the DOT and admonished against any further communication with the Department regarding the Section 204.5 filing.⁷ See 2 PHC Tr. at 32 (CALJ: "Well, I hope you understand the way

⁷ In a similar vein, the CALJ has laced his orders with sarcasm, pettiness and an inappropriate judicial demeanor. As but one example, in no fewer than three of his more recent Orders (June 13, July 9 and 18), the CALJ has repeatedly asserted that Airways "has still not provided any document to show that the acquisition was scheduled to occur on June 30, 2003, or any other date, despite its promise to do so." The Orders go on to cite a letter from Airways' counsel which states, in part, "we have been unable to locate any [documents setting the precise date] today but will provide them as soon as they are located." In fact, (a) Airways told the CALJ that the acquisition was scheduled to close on June 30 and that was true;

I've left it is, it is inappropriate for anyone who is involved in any way in this proceeding, including their employees, designees, et cetera, to communicate directly with anybody in the Department except pursuant to the Rules which require a filing under Part 204.”).

17. As a result of the CALJ's vocal position, see Order No. 13089-37, served July 18, 2003, at 2, DOT staff has been unwilling to engage in the normal dialogues attendant to such a filing and to the best of ASTAR's knowledge, no steps have been taken by the Department to process that filing.

18. Also at the second pre-hearing conference, the CALJ scolded Airways and its counsel because, unbeknownst to the company or its counsel, certain pilots employed by Airways had written directly to the CALJ regarding the matter. Upon learning of the situation, Airways' counsel had written directly to all Airways' employees thanking them for their support but cautioning against writing to the CALJ because it violated the Department's rules. The CALJ was furious at Airways' counsel, as The New York Times prominently reported. Indeed, as The Wall Street Journal recently reported, when Airways' General Counsel began to speak, the CALJ sarcastically stated: "I'm glad to meet the fellow who thinks it's a good idea to send ugly letters to the chief judge." Power and Brooks, *Air Cargo Fight Has Big Cast*, at A4 (quoting 2 PHC Tr. at 51). The CALJ made this statement despite the fact that counsel did not even know about the letters before they were written. Nonetheless, without even a semblance of judicial temperament, this judge was angered because, in the letter to all employees, the company

(b) no one ever told the CALJ or anyone else that there was a document which set a June 30 (or any other) date; (c) there was no document which set June 30 as a closing date; (d) the transaction in fact did not close on June 30; and (e) as most people know, "closing dates" are often scheduled – as in this case – based on oral conversations and expectations. "Expected closing dates" and "wishful closing dates" even when they appear in drafts of documents often never become closing dates. They come and they go. No one knew until the transaction actually closed when it would close. The date kept moving back in time. And yet, even now, the CALJ takes every opportunity to point to this perceived personal slight.

thanked them “for their support.” In the mind of the CALJ that somehow amounted to an endorsement of the content of one of the letters which accused him of being “near-sighted.” This reaction, while strange for most people, is, unfortunately, reflective of the tone of the proceeding.

19. At this same hearing, the CALJ also ruled that (a) Airways had the burden of proving a negative – that it was not controlled by non-U.S. citizens and that no non-U.S. citizens even potentially had the ability to control Airways; (b) everything and anything was relevant to that determination and certainly everything identified by FedEx and UPS was relevant (some 21 “control” issues!), even though there was not one scintilla of evidence that most of the “issues” were really issues in dispute; (c) FedEx and UPS were entitled to conduct a fishing expedition into Airways’ (their competitor’s) business and files; and (d) Airways was not entitled to any discovery of FedEx or UPS – regarding statements their representative have made or about the manner in which they do business in other countries (where they use the same type of agreements that they attacked Airways for in this country).⁸ Indeed, while tying Airways hands behind its back, the CALJ permitted FedEx and UPS to comb through everything in Airway’s files and the files of a myriad of other companies.

20. As but one example of the absurdity of what has been allowed, the CALJ has held that even the serial numbers of aircraft owned or operated by Airways was relevant because “[i]t’s not the single things that tell whether it can be ... controlled. It is not the individual items of information but the totality of the circumstances.” (2

⁸ The specter of a holding that certain types of agreements raise citizenship concerns, although they are used around the world by a myriad of companies, including FedEx and UPS, presents a serious public policy concern. If the United States is to do a total about-face and apply an ethnocentric test to citizenship, the international ramifications are potentially enormous.

PHC Tr. at 116, emphasis added.) Taking this to its illogical extreme, in the CALJ's view there is nothing too small, too remote or too irrelevant, to be ignored. As a result, the CALJ has allowed FedEx and UPS to roam through nearly every aspect of Airways' business on the pretense that it could bear on a control issue, past, present or future,⁹ even when Airways agreed to stipulate to the underlying facts.¹⁰ Unfortunately, these rulings do not stand alone. Other rulings from this hearing have been the subject of prior filings with the Department, and the CALJ's predisposition can be gleaned by any fair minded person from perusing the transcript of the hearings. Suffice it to say that The New York Times aptly captured the direction of the proceeding, even at its earliest stage, when it wrote: "While the D.H.L. Airways lawyers squirmed, lawyers and lobbyists for FedEx and U.P.S. grinned and gloated in the spectator seats. 'This round is going to us,' one whispered." Sorkin, Three's A Crowd to Air Cargo Giants, at B1.

21. Events since the May 27 hearing have been equally troublesome. FedEx and UPS have propounded seemingly endless requests for depositions of (mostly) non-Airways' personnel. When counsel for those parties objected they were, of course, overruled, often on bases that were truly astounding. In what is perhaps the most glaring example, the CALJ ruled that Klaus Zumwinkle and Uwe Doerkin, citizens of Germany, "are responsible for complying with subpoenas in this proceeding." Order No. 13089-30, served July 9, 2003, at 4. Failure of the two to show up, he threatened, could result in an

⁹ While noting his uncertainty that the acquisition would ever take place, the CALJ nonetheless allowed discovery into every aspect of that acquisition and every document regarding the planned acquisition. See 2 PHC Tr. at 79-80.

¹⁰ For example, even though it was not in issue that 90% of Airways' revenue comes from a single source, the CALJ required Airways to produce detailed information and documents relating to Airways' revenue and other financial information, transportation of cargo and other items. Id. at 151-53.

adverse inference being drawn against Airways, see id. at n.13, despite the fact Airways had no control whatsoever over these individuals. Rather, the converse has been asserted.

22. While the DOT rules permit depositions only under certain limited circumstances,¹¹ and those circumstances are not present here, the CALJ has nonetheless granted the taking of virtually every deposition requested by FedEx and UPS to date.¹² And, since the CALJ has extended the discovery cut-off date, they are far from done. At the same time, and despite the fact that FedEx and UPS officials have made public statements that Airways, and now ASTAR, are not U.S. citizens, and despite the fact that FedEx and UPS operate in Germany and elsewhere using the same type of arrangements as are at issue here, the CALJ has denied Airways any discovery at all of UPS or FedEx.

23. Not only did the CALJ order one-sided discovery, but he has prevented or precluded any review of his rulings or conduct by the DOT. Motions that were addressed to the Department were intercepted and denied by the CALJ, even though they were not addressed to him and he had no authority to do so. To the extent Airways sought permission to appeal, that, of course, was denied. By so doing, the CALJ has sought – successfully to date – to keep the matter solely before him, thereby preventing

¹¹ Department of Transportation Rule 26 permits depositions only if: “(1) [t]he person . . . would be unavailable at the hearing, (2) [t]he deposition is deemed necessary to perpetuate the testimony of the witness, or (3) [t]he deposition is necessary to prevent undue delay and excessive expense” and “will not result in an undue burden to other parties or undue delay.” 14 C.F.R. § 302.26(a). Given these narrow criteria, “only rarely are depositions taken in any [DOT] proceedings.” Air Transport Association v. City of Los Angeles, Docket No. 50176, Order 95-4-5, 1995 WL 144644 (DOT) at *23 (April 3, 1995).

¹² Until July 21, 2003, the only depositions that the CALJ had refused to order were those requested by Airways. By Order No. 13089-43, served July 21, 2003, the CALJ denied FedEx’s and UPS’s joint applications to depose John Fellows, Victor A. Guinasso, Jed T. Orme and William M. Smartt on the ground that the joint applications were untimely (they were filed on July 16, only two days before the original discovery deadline). Had the applications for these depositions been made in a timely fashion, however, there is every reason to believe that they too would have been granted by the CALJ, and Order No. 13089-43 does not suggest otherwise.

any review by the Department of the manner in which he has conducted these proceedings to date.

24. In sum, to characterize the proceedings before the CALJ as one-sided and surreal would be to grossly understate the matter. Virtually every ruling, including those requiring ASTAR to produce 12 boxes of documents (over 22,000 pages) and answer 56 requests for information, while requiring FedEx and UPS to provide nothing, has been decided in favor of FedEx and UPS. Indeed while the CALJ has claimed otherwise, the record reflects both a pre-determination of the issue before him and a bias against ASTAR, so that neither ASTAR nor the public can have any confidence in the impartiality of the CALJ's recommendation.

Recent Developments

25. On July 14, 2003 the acquisition by Mr. Dasburg and others was completed and the name of the company was changed to ASTAR Air Cargo, Inc. All parties including the CALJ have been so advised.

26. ASTAR has entered into a new, non-exclusive, long term, cost-plus, financially lucrative ACMI agreement with Worldwide which locks Worldwide into the terms of the agreement for 11 years and requires Worldwide to pay ASTAR'S costs plus a profit and make minimum payments to ASTAR even if Worldwide were to decide never to utilize ASTAR's services (which would make no sense given the cost structure), the performance of which is guaranteed by Deutsche Post. In short, there is no possible means through which Worldwide or any of its corporate affiliates could conceivably control ASTAR. ASTAR has the upper hand in the arrangement: a guaranteed revenue stream that Worldwide and its guarantors cannot walk away from providing.

27. ASTAR has replaced the debt held by Bank of America, which FedEx and UPS had argued (incorrectly) somehow gave DP-related entities control over Airways because they had, in effect, guaranteed that debt. ASTAR repaid the balance owing, and cancelled the line of credit with Bank of America and obtained new financing with Boeing Credit. The only guaranty by DP or any DP-related entity is of the obligations of Worldwide Express under the ACMI agreement. Nonetheless, and predictably, Boeing is the latest target of an application for a subpoena. We are unaware of any claim that Boeing is not a U.S. citizen, so how its loan to ASTAR would implicate foreign control is beyond the imagination of reasonable people. This latest request for a subpoena is indicative of the length to which FedEx is prepared to go to harass a company that would deign to do business with ASTAR.

28. In addition to being wholly owned by U.S. citizens, ASTAR has a new board of directors comprised entirely of U.S. citizens. Likewise, its president and all its managing officers are Americans.

29. The issue now, and the predicate for this motion, is to address further proceedings in light of the current ownership and citizenship of ASTAR. While the company believes Airways has always been a U.S. citizen, and the only reason things have gone this far is the blank check given FedEx and UPS to try to put this company out of business, ASTAR's new owners are nonetheless anxious to move forward with the task of competing with FedEx and UPS and growing their own business without having the "citizenship" cloud hanging over it. Thus, ASTAR requests the relief set forth below.

Requested Relief

A. Dismissal Of This Docket; Processing Of Section 204.5 Submission

The taint which has attached to what may fairly be termed an inquisition, and not an inquiry, is palpable and known to all who have observed, participated in, or heard of the “hearings” held herein. If there were any doubt, a review of the transcripts and the CALJ’s orders in this matter, would remove it. But for the events of July 14, which, as set forth below, have legally and practically mooted the issue of the prior citizenship of ASTAR (which is now undeniably 100% owned, controlled and operated by U.S. citizens), the stain on the Department and the administrative process generally would be indelible.

The primary relief sought herein, as stated at the outset, is an Order dismissing the current docket and directing the Chief of the Air Carrier Fitness Division to proceed with a consideration of ASTAR’s filing pursuant to Section 204.5. The relief is proper and appropriate because:

1. The current docket was opened to consider the citizenship of Airways as of April 17, 2003, in light of the change in the ownership which occurred in May 2001. Pursuant to a Congressional directive DOT has designated an ALJ to hold a hearing to consider *that issue*.

2. *That issue* -- the only issue presented in this docket -- is now moot. There has been a complete change in the ownership of Airways, including the name. ASTAR is owned 100% by American citizens; both *de jure* and *de facto* control of ASTAR lies with John Dasburg, his fellow shareholders and his management team.

3. If there is a *legitimate* issue regarding ASTAR's citizenship it can, will and should be determined by the normal processes of the DOT pursuant to Section 204.5.

4. Where, as here, the only issue presented in a docket has become moot, the docket should be dismissed. See Emergency Wartime Supplemental Appropriations Act, Public Law 108-11, § 2710 (directing use of an administrative law judge to "resolve" this docket); April Initiating Order at 2 (to consider citizenship of Airways in light of 2001 reorganization; "[o]ther issues will not be made a part of this proceeding"). Since the citizenship of Airways in light of the 2001 reorganization is irrelevant to whether ASTAR presently satisfies 49 U.S.C. Section 40102(a)(15), neither the agency nor a party is required to go through an academic exercise that would be a waste of valuable resources.¹³

5. Further, DOT is required to follow its administrative procedures as they are set forth in the Rules of Practice, including Rule 204.5. The CALJ has chilled this process and led DOT staff members to be concerned about fulfilling their responsibilities. Indeed, as recently as Friday, July 18, 2003, the CALJ noted that Section 204.5 filings "would normally be followed by further requests for information from the Chief, Air Carrier Fitness Division. Such communications raise problems concerning ex parte prohibitions in the context of the pending proceeding and the need for further discovery." Order No. 13089-37, served July 18, 2003. The CALJ's obvious

¹³ While Airways was at all times a U.S. citizen, to the extent there is some legitimate question in that regard, it can be referred to the other dockets initiated by FedEx and UPS as noted in the April Initiating Order at note 4 ("Issues involving Airways' past compliance with statutory citizenship requirements are the subject of separate third-party formal enforcement complaints and will be considered by the Assistant General Counsel for Aviation Enforcement and Proceedings in a separate proceeding pursuant to rules applicable to such complaints, 14 C.F.R. Section 302.400, *et seq.*").

solution – refer the entire matter to him – is worse than the alleged problem. The CALJ has no proper jurisdiction over the citizenship of ASTAR because (a) he has stated that the normal process involves communications between the Department and ASTAR, (b) it is undisputed that no such communication has occurred, and (c) there is no doubt but that the CALJ deliberately chilled those communications and ASTAR’s rights are being impacted. This cloud must be removed immediately with the Air Carrier Fitness Division being directed to proceed, as it normally would, to process the information provided and satisfy itself as to ASTAR’s fitness as contemplated by the Rules.

6. The only issue of pertinence now is the citizenship of ASTAR after the acquisition by the Dasburg group: any inquiry regarding that matter must focus on *its* ownership, *its* management and *its* agreements. Those that preceded it may be pertinent to possible prior violations (of which we believe there are none) but not to the going forward issues at hand. Unless the DOT *specifically* discharges its responsibility of processing the Section 204.5 application, dismisses this Docket and refers any open issues to a new or pending dockets, the CALJ clearly intends to re-live history starting with at least January 1, 2000 (before even the 2001 reorganization) and continuing to the date of the hearing in his quest to ferret out the non-existent “shadow of foreign influence.”

7. As stated previously, to the extent there is any issue, which we dispute, regarding foreign influence under the May 2001 structure, that issue must be considered in a separate enforcement proceeding. However, given the CALJ’s obvious bias that docket should be considered by another ALJ.

Finally, we respectfully request that the Department proceed expeditiously to address this matter. The Chief of the Air Carrier Fitness Division was notified on May 21, 2003 of the impending acquisition by the Dasburg group. In the normal course of events there would have been a dialogue between the staff and the carrier regarding this change. However, because of the CALJ and this docket there has been none. Indeed, despite requests from Airways on two prior occasions, the DOT has taken no action at all; instead the CALJ has proceeded to take over, intercept motions to the Department and purport to rule upon them. That is neither appropriate nor sufficient. A responsible agency must act when confronted with facts that mandate action.

B. If, In The Course Of Processing ASTAR's Section 204.5 Filing, the DOT Determines To Utilize The Services Of An ALJ, It Cannot Be The CALJ And The Department Must Set Forth Precise Parameters For Any Such Hearing

If, as we believe unnecessary, the DOT decides that the issue of ASTAR's citizenship does require a hearing, it should not be before the CALJ. First, he has made it clear that he is unwilling to look only at the present facts to reach a determination of a company's "current" citizenship. Indeed, the CALJ is of the stunning view that the test or standard to establish citizenship would be higher for ASTAR if it had not been a U.S. citizen at some point in the past; as a result, he has ruled that discovery into Airways' past is relevant to the issue of ASTAR's current citizenship. See Order No. 13089-42, served July 21, 2003 ("In order to determine the current citizenship of [Airways] we must review the totality of the circumstances, including [Airways'] past reorganizations.") (emphasis added); see also 2 PHC Tr. at 76. Thus, even though ASTAR has completely new owners and completely new agreements, according to the CALJ, Airways' past would somehow affect the citizenship determination as to ASTAR. Not only does this conclusion defy logic, but it reflects a bias and predisposition.

The record amply demonstrates that if the CALJ were to be assigned to consider ASTAR's citizenship, there would simply be more of the same. ASTAR and countless other companies would continue to be subject to extensive, expensive and irrelevant searches for documents and representatives to depose. For instance, despite being advised that the Dasburg Transaction had been completed on July 14, the CALJ granted FedEx's motion to compel the Bank of America (who, as noted above, was paid in full in connection with the Dasburg Transaction and who has no further connections to ASTAR) and Deutsche Bank (which merely leases a handful of aircraft to ASTAR), to comply with subpoenas for documents that have no conceivable relation to ASTAR's citizenship. Indeed, the CALJ also extended the discovery period and likely will permit FedEx and UPS to subpoena witnesses at the hearing, in order to accommodate FedEx and UPS. See Order Nos. 13089-39, 13089-38 served on July 18, 2003 (granting motions to compel as to Bank of America and Deutsche Bank); and Order No. 13089-37 (requesting the Decisionmaker remove all time limitations on the proceedings so that additional discovery concerning ASTAR's reorganization could be accomplished).

Finally, if there were any doubt about the course the CALJ would like to steer, it was laid to rest in Order No. 130898-37, served July 18, 2003, where he suggested the Department either remove any time limit on his ability to continue with this matter or at least extend his time another 90 days so that FedEx, UPS and he could more fully examine ASTAR's citizenship. In short, given his wish, this docket will become an interminable proceeding in which FedEx, UPS and the CALJ will continue to impede ASTAR's ability to compete in the market by forcing it to respond to daily rulings and to

deal with an unending stream of costly and useless discovery requests which are simple harassment.

Therefore, in the event the Department determines that an administrative law judge is needed to assist it in determining ASTAR's fitness, it should make certain that there is no repeat of the current fiasco, by spelling out even more clearly than it did the last time the parameters of such a proceeding. The CALJ either did not comprehend the word "current" or deliberately ignored it. That should not be allowed to happen with a new ALJ, if one is ultimately assigned. We submit that any referring order should also spell out that "limited" discovery means limited discovery. It does not mean that FedEx and UPS may take each and every deposition they can conceive of taking and request every document they can conceive of requesting. There must be some legitimate basis – not just the desire to rifle through your competitor's files – for seeking and obtaining what limited discovery (if any) might be warranted.

The administrative process in this docket has gotten way out of hand. As the late Judge Gurfein once put it, it is time to apply that old doctrine of "enough is enough." Broder v. Pfizer, Inc., Pro se 72 Civ. 2571 and Pro Se 72 Civ. 4315, 1972 WL 648 (Nov. 28, 1972 S.D.N.Y.).

The CALJ's, Fed Ex's And UPS' Drive To Have The CALJ Consider The Section 204.5 Filing Should Be Rejected Out Of Hand

For precisely the reasons set forth above, the requests of the CALJ, FedEx and UPS (see Order No. 13089-37, served July 18 and FedEx's and UPS's July 18 Joint Opposition), to have the CALJ process ASTAR's Section 204.5 filing should be denied.

* * *

Accordingly, and in sum, we respectfully request the Department to rule promptly dismissing this docket. Everyone knows, as The New York Times and The Wall Street Journal have each separately observed, that FedEx and UPS would like to eliminate ASTAR, and hence DHL, as a competitor in this country. However, if they are to be successful (and they do not want to leave that to the marketplace), they must find some other vehicle; they cannot use the “citizenship card” as their justification because that will not work, and they cannot use the Department as their executioner because that is unsupportable and unthinkable.

Respectfully submitted,

QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
/s/ Sanford M. Litvack

By: _____
Sanford M. Litvack
Joanna R. Swomley

335 Madison Avenue, 17th Floor
New York, NY 10017

ASTAR AIR CARGO, INC.
Steven A. Rossum
One Biscayne Tower
2 South Biscayne Boulevard
Miami, Florida 33131

LACHTER & CLEMENTS LLP
Stephen H. Lachter
1150 Connecticut Avenue, N.W., Suite 900
Washington, D.C. 20036

GARFINKLE, WANG, SEIDEN &
MOSNER, PLC
Elliott M. Seiden
1555 Wilson Boulevard, Suite 504
Arlington, Virginia 22209

June 22, 2003

Counsel for ASTAR Air Cargo, Inc

CERTIFICATE OF SERVICE

I hereby certify that I have served, by e-mail, copies of the foregoing Motion of ASTAR Air Cargo to the Department of Transportation to Dismiss or Otherwise Terminate Docket OST-2002-13089; Motion of ASTAR Air Cargo, Inc. to the Department to Process its Section 204.5 Application and to Deny the CALJ's Attempt to Replace the Administrative Process, this 22nd day of July, 2003 to all persons named on the Service List.

/s/ Kommala Keovongphet

Kommala Keovongphet

United Parcel Service Co.
c/o David L. Vaughan
Michael J. Francesconi
Kelley Drye & Warren LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

R. Jeffrey Kelsey
Legal Department
Federal Express Corporation
3620 Hacks Cross Building, B-3d Fl.
Memphis, TN 38125

Lynden Air Cargo, LLC
c/o Pierre Murphy
Law Offices of Pierre Murphy
1201 Connecticut Avenue, NW
Suite 550
Washington, DC 20036

US DOT Dockets
US Department of Transportation
400 Seventh Street, SW, Rm. PL-401
Washington, DC 20590

Warren Dean
Counsel for Federal Express Corporation
Thompson Coburn LLP
1909 K Street, NW, Suite 600
Washington, D.C. 20006

The Honorable Ronnie A. Yoder
Chief Administrative Law Judge
Office of Hearings, M-20
Room 5411
US Department of Transportation
400 Seventh Street, SW
Washington, DC 20590
Tel: (202) 366-2132
Fax: (202) 366-7536

