

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

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

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

**ASTAR AIR CARGO, INC.'S OPPOSITION TO FEDERAL EXPRESS
CORPORATION'S AND UNITED PARCEL SERVICE CO.'S
MOTION TO REFER THE RECORD TO THE INSPECTOR GENERAL**

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ASTAR Air Cargo, Inc. (“ASTAR”) submits this opposition to the latest motion filed by Federal Express Corporation and United Parcel Service Co. (jointly “FedEx”). This time FedEx is asking the Chief Administrative Law Judge (“CALJ”) (1) to delay all proceedings and toll all deadlines in this docket, and (2) take all the documents (some 30,000 produced by ASTAR alone) and all the submissions (probably 60 or 70 briefs) in this docket and transmit them to the Inspector General to conduct a “review” to accomplish heaven knows what. While there seems to be no end to FedEx’s efforts to stall a hearing on ASTAR’s current citizenship, which the Department of Transportation (the “DOT” or “Department”) has ordered, ASTAR responds, once again, urging the CALJ to reject this latest ploy for the following reasons:

1. The request to further stall and delay this proceeding should be denied because (1) the DOT has already ruled what the issue is in this docket (*see* July 30 Order) and, absent some stay from the DOT, everyone is bound to act in accordance with that Order; and (2) in any event, there is no reason to delay any longer and no harm to FedEx from moving forward, since it claims that it “can prove that [ASTAR] is not a citizen of the United States, no matter what the relevant time for that analysis may be.” (Answer and Motion at 4.) In light of that claim what possible harm can there be to proceeding with the hearing the CALJ ordered months ago? ASTAR is ready to proceed with the “Congressional mandated hearing” that FedEx so earnestly sought. Now, stated in plain English, it is time for FedEx “to put or shut up.” Their desire to stall is telling but obvious.

2. Consistent with its request to “defer” action in this proceeding, FedEx has another idea as to how to burden ASTAR and avoid full competition in the

market. In an act of desperation, FedEx would now like to open a second front to distract ASTAR and draw attention away from FedEx's inability to show ASTAR is not a U.S. citizen by having the Inspector General investigate libelous allegations of unlawful conduct by Old Airways. The suggestion that the CALJ should join FedEx in its efforts by referring all "documents and submissions" in this docket to the Inspector General is totally baseless for at least the following reasons:

- (a) The role of the Inspector General is to consider whether the DOT is doing its job properly or whether there has been any wrongdoing within the agency; it is not to "assume an agency's regulatory compliance function . . ." *Burlington Northern Railroad Co. v. Office of Inspector General, Railroad Retirement Board*, 983 F.2d 631, 642 (5th Cir. 1993); see *Truckers United for Safety v. Mead*, 251 F.3d 183, 189 (D.C. Cir. 2001) ("The IG has authority to investigate the DOT's administration of programs and operations. . . . The IG, however, is not authorized to conduct investigations as part of enforcing [] regulations -- a rule which is central to the basic operations of the agency" (citations omitted)). The idea that the Inspector General is part of the U.S. Attorney's Office or the Criminal Division of the Department of Justice is plainly wrong. To call this request "a stretch" is to flatter FedEx.
- (b) In any event the alleged "crimes" committed by ASTAR are a figment of FedEx's imagination. For example, the first "impropriety" cited by FedEx is the claim that ASTAR's

predecessor, Old Airways, unlawfully colluded with DHL Worldwide Express (“Worldwide”) to bilk the U.S. out of \$4,860,962 (p. 10).

How did Old Airways commit this “crime”? According to FedEx since Old Airways had a cost-plus agreement with Worldwide (which is no longer in effect) it could not have incurred any losses as a result of the tragedy of September 11, 2001. But, FedEx knows full well, as do the CALJ and the DOT, that Old Airways did sustain losses -- in excess of \$14.8 million in reality -- because it granted a concession to Worldwide that, given the tragedy and its devastating financial impact, Old Airways would reduce the amounts to be received from Worldwide for a short 90-day period in the aftermath of September 11.

Old Airways’ application was completely scrutinized and ultimately accepted by the DOT’s staff. Indeed, the DOT allowed only a portion of the claim. It disallowed other portions based on a full assessment of the facts. Since Old Airways’ disclosed all facts in great detail to the DOT and never hid anything from anyone, what does FedEx propose the Inspector General investigate? In reality, nothing. But, FedEx hopes it can put off the day of reckoning in which it has to finally admit that the claim that ASTAR is not a U.S. citizen is part of a big ruse to eliminate

competition and thereby continue to dominate the market. FedEx cannot seriously believe that this ploy is not obvious to the CALJ.

The other “crime” is the assertion that Old Airways offered “U.S. to Iraq” service to the U.S. military in May of 2003. Again, as FedEx knows, Old Airways never flew to Iraq, any more than FedEx did. Old Airways flew, with DOT permission, to Bahrain; that is all it did and there is nothing to investigate.

- (c) Finally, the real reason for this request to the CALJ is revealed by FedEx when, in a rare moment of candor, it confesses that it is frustrated because the Department has not accepted its baseless claims. As FedEx put it, “[t]he Department has indicated on several occasions that these matters may be appropriate for enforcement action, but no such action has ever been taken.” (Answer and Motion at 10.) But the Department has already stated that it will turn to any appropriate remaining issues after the citizenship issue has been resolved. Putting aside the lack of merit to the FedEx claim, if it has a problem with Department action or inaction there are prescribed avenues to seek relief -- using the CALJ is *not* one of those avenues. FedEx’s attempt to entice the CALJ into this arena is ill-advised.

Conclusion

The motion to “defer” all proceedings should be denied because (a) the DOT Order is clear and in effect; and (b) FedEx has admitted it is prepared to go ahead,

consistent with the DOT's Order, and show ASTAR is not a U.S. citizen. As such, there is no reason to delay.

Similarly, the motion to refer all the "documents and submissions in this docket" to the Inspector General is legally flawed and factually baseless. It too should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served, as indicated, copies of the ASTAR Air Cargo, Inc.'s Opposition to Federal Express Corporation's and United Parcel Service Co.'s Motion to Refer to the Inspector General, this 7th day of August, 2003 to all persons named on the Service List.

/s/ Kommala Keovongphet

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