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Order 2001-5-10  
Served: May 11, 2001



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20590**

Issued by the Department of Transportation on the  
on the 11th day of May, 2001

**In the matter of**

Registration of DHL Worldwide Express, Inc.  
as a Foreign Air Freight Forwarder Pursuant  
to 14 C.F.R. Part 297

Docket OST-2001-8732 - 22

**FINAL ORDER**

**Summary**

By this order, we find that it is in the public interest to deny the United Parcel Service Co.'s (UPS) request to cancel the registration of DHL Worldwide Express, Inc. (DHLWE) to operate as a foreign air freight forwarder.

**Background**

"DHL" is an aggregation of companies operating an express package business worldwide under the "DHL" logo. These companies include (1) the foreign-based parent company, DHL International Limited; (2) DHL Worldwide Express, Inc. ("DHLWE"), a foreign air freight forwarder licensed to operate in the U.S.; and (3) DHL Airways, Inc., a U.S. airline licensed to provide direct air transportation services.

Deutsche Post AG is the German postal operator (a partially privatized company with a letter-mail monopoly), which is partly owned by the German government. Deutsche Post owns a part of DHL International Limited.

An air freight forwarder is a company which does not operate its own aircraft but is responsible for the transport of property. It is an indirect air carrier under the statute (49 U.S.C 40102 (a) (2), (21)). A foreign company can operate as an air freight forwarder in the United States if it registers under Part 297 of our regulations (14 C.F.R. Part 297). Upon approval of the registration, foreign air freight forwarders are exempt from certain provisions of the statute. If so authorized, they may transport property between two points in the United States

while utilizing, in whole or in part, the services of a U.S. air carrier authorized by the Department to operate aircraft.

On October 18, 2000, DHLWE filed an application for registration as a foreign air freight forwarder under Part 297. The application disclosed, in the manner prescribed by regulation,<sup>1</sup> that DHLWE's country of citizenship is "the Netherlands/Germany", and that its stock is 100%-owned by DHL Worldwide Express B.V. DHLWE further disclosed that its first-tier parent company is wholly-owned by DHL International Limited, a Bermuda corporation, which, in turn, was partly owned (25%) by Deutsche Post. Deutsche Post was identified as the future majority owner (51%), following a restructuring transaction. The application was placed in the public reading room for Part 297 filings on October 18, 2000. No objections were filed. On November 16, 2000, by assigned authority, the staff approved DHLWE's application.<sup>2</sup>

On January 18, 2001, UPS filed a Petition for Review of Staff Action<sup>3</sup> and Motion to File an Otherwise Unauthorized Document<sup>4</sup> challenging the approval of the registration of DHLWE as a foreign air freight forwarder. In response, answers in support of UPS's position were filed by Federal Express Corporation ("FedEx"); the International Brotherhood of Teamsters, the American Trucking Associations, Inc.; and the Transportation Trades Department AFL-CIO (hereinafter referred to as the "UPS Supporters"). DHLWE filed an answer on February 5, 2001. In response to the UPS Supporters, comments in support of DHLWE were filed by the Association for Postal Commerce (hereinafter referred to as "Postcom").<sup>5</sup>

Subsequently, on March 8, 2001, UPS filed a Motion to Stay Part 297 Authority of DHL Worldwide Express, Inc. pending the resolution of these proceedings. In this Motion, UPS requests an immediate stay of DHLWE's authority based on "the lack of proper publication and the opportunity for interested persons to be heard regarding DHL's registration application." UPS argues that the lack of notice violated its procedural rights and requests an immediate stay of DHLWE's authority. DHLWE subsequently filed a response opposing the motion. DHLWE argues, among other things, that UPS was on notice of its application for foreign freight forwarder authority as of at least January 18, 2001, when it filed its

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<sup>1</sup> To obtain approval, the foreign entity must disclose its country of citizenship, including the name of each person owning 10% or more of the applicant's stock, their country of citizenship, and the percentage of their ownership or voting interest. 14 C.F.R. § 297.20.

<sup>2</sup> See 14 C.F.R. § 385.12(h); 14 C.F.R. § 297.22 (approval of foreign air freight forwarders).

<sup>3</sup> See 14 C.F.R. Part 385, Subpart C (providing for the filing of a petition for review of staff action and procedures for disposing of such a petition).

<sup>4</sup> We granted UPS's Motion for Leave to File an Otherwise Unauthorized Document on March 1, 2001.

<sup>5</sup> Postcom's comments were accompanied by a request for leave to file out of time. No party has opposed this request. We will grant the request for leave to file an otherwise unauthorized document in the interest of a complete record.

petition. Also, DHLWE argues that UPS failed to demonstrate that it satisfied any of the criteria set forth by the Department to obtain a stay.

Lastly, on April 16, 2001, UPS filed a Motion for Leave to File and Submission of Supplement to Petition for Review.<sup>6</sup> UPS asks to supplement its pleadings with the European Commission's ("EC") Decision of March 20, 2001 regarding an investigation of Deutsche Post, and accompanying press release. On April 25, 2001, DHLWE responded that it does not intend to oppose the supplement filed by UPS, explaining that the EC decision relates to Deutsche Post's operations in the German domestic ground delivery market and has nothing to do with DHLWE, DHL, or any operations in or affecting the U.S. In addition, DHLWE asserts that the EC decision caused Deutsche Post to create separate legal entities and separate accounting systems for their letter-mail service and their commercial parcel service. This separation, according to DHLWE, ensures "'full transparency' and no danger of subsidization."

### **UPS Petition**

UPS's primary argument centers on the relationship of DHLWE to (1) its parent company located in the Netherlands, and (2) the parent company's largest shareholder, Deutsche Post. UPS argues that it is not in the public interest to grant DHLWE "unfettered access" to the domestic U.S. market because it is controlled by the German government and because comity and reciprocity does not exist in this situation. UPS believes that these considerations raise substantial and important questions of policy that were not considered by the staff and that require cancellation of DHLWE's Part 297 authority.

Specifically, UPS asserts that "ultimate control of [DHLWE] rests with the German Government." Further, UPS argues that the grant of a license effectively affords cabotage rights (the right to provide air service between two U.S. points by a foreign air carrier) "to a government-controlled foreign monopoly" which "contradicts the underlying statutory goal of promoting competition that exists free of government intervention."

Moreover, UPS claims that Deutsche Post, in particular, should not be permitted to enter the U.S. market because, among other things, it has been the subject of a European Commission investigation regarding "inappropriate use of state aid and monopoly/government subsidies."

Finally, UPS argues that true reciprocity does not exist in this case because UPS is prevented from competing with Deutsche Post in performing equivalent services in the German postal market.

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<sup>6</sup> No party has opposed UPS's request. We will grant the request for leave to file an otherwise unauthorized document in the interest of a complete record.

## Responsive Pleadings

The four UPS Supporters believe that cancelling DHLWE's authority based on its relationship with Deutsche Post is in the public interest. Specifically, the American Trucking Associations, Inc. claims that DHLWE's authority to operate in the U.S. market will harm the U.S. trucking industry. The International Brotherhood of Teamsters claims that its members, including 200,000 UPS employees, will be harmed when UPS jobs held by Teamsters are eliminated. Similarly, the AFL-CIO claims that "32 affiliated unions whose millions of members work in all segments of the transportation industry" will be harmed.

FedEx argues that DHLWE's authority should be cancelled because there is not adequate comity and reciprocity between the United States and Germany. FedEx asserts that DHLWE is able to cross-subsidize its services from Deutsche Post's monopoly revenues, enabling DHLWE to enjoy an "insurmountable competitive advantage" over U.S. air carriers. In addition, FedEx argues that DHL Airways, Inc., a licensed U.S. carrier operating under the same DHL logo, is not a *bona fide* U.S. carrier and, therefore, any increased business on DHL Airways should not be considered increased competition amongst U.S. carriers.

By contrast, Postcom argues that DHLWE's presence will provide increased competition in the delivery market, which is in the public interest, and, specifically, in the interest of the mailers and shippers it represents.

On February 5, 2001, DHLWE submitted an Answer to the UPS Petition for Review of Staff Action, the Motion to File an Otherwise Unauthorized Document, and the various statements in support of the UPS Petition.

DHLWE's Answer asserts that UPS's proposal to bar DHLWE from the U.S. market fails as a matter of law and policy. Specifically, DHLWE argues (1) that UPS's proposal to bar all foreign postal monopolies from holding freight forwarding authority is "irrelevant" because the applicant in this case is DHLWE; (2) that regulations and precedent demonstrate that foreign government ownership of the applicant is not disqualifying; and (3) that cancelling DHLWE's authority would violate U.S. international obligations, specifically the U.S.-Germany and the U.S.-Netherlands "open skies" services agreements.

In addition, DHLWE argues that there is true comity and reciprocity between the U.S. and Germany as well as the U.S. and Netherlands. Lastly, DHLWE argues that UPS lacks standing and has filed an untimely Petition.

## Decision

After careful consideration of the matter, including, in particular, the comments of all interested parties, we have decided to affirm the staff action.

The Department may reject DHLWE's application "for failure to comply with [Part 297], for reasons relating to the failure of effective reciprocity, or if the Department finds that it is in the public interest to do so." 14 C.F.R. § 297.22. Neither UPS nor the UPS Supporters have satisfied the conditions for rejecting DHLWE's application.

DHLWE and UPS are members of the international aviation industry. One of the major principles regulating the industry is that no service can be provided unless two or more nations agree to it. The United States trades in aviation services with many nations that permit governmental entities to own and control their national air carriers. While we strongly prefer private enterprise, and we are encouraged with the progress that has been made towards privatization in the industry, we must also respect the different views of other nations so as to ensure our airlines' access to the world's aviation markets.

In these circumstances, we have granted operating authority to many foreign air carriers with strong government ties, including international air freight forwarders.<sup>7</sup> These include a foreign air freight forwarder partly owned by foreign postal monopolies.<sup>8</sup> This liberal entry approach has promoted our international aviation objectives to the benefit of our airlines and our consumers and there is no evidence on the record that there has been any unfair competition in the U.S. market by these foreign air freight forwarders. In fact, there is no evidence that over these past 20-plus years any of these foreign air freight forwarders has achieved a significant market share, unlike UPS and FedEx, which hold approximately 53% and 26% of the domestic market, respectively.<sup>9</sup> Moreover, our strongly pro-competitive "open skies" aviation relations with Germany and the Netherlands have helped to provide UPS with the opportunity

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<sup>7</sup> See Answer of DHL Worldwide Express, Inc., at 10-115; Part 297 Registration Approval No. 111-A (Mar. 3, 1980) of Schenkers & Co. GmbH. (wholly-owned by the German Federal Railroad); Part 297 Registration Approval No. 293-A (Feb. 10, 1987) of KLM-Express (whose parent company was partly-owned by the Netherlands government); Part 297 Registration Approval No. 352 (Oct. 29, 1991) of Sodetair Co. Air France (whose parent company was majority-owned by the French government).

<sup>8</sup> See Answer of DHL Worldwide Express, Inc., at 10; Part 297 Registration Approval No. 120-D (May 12, 1992) of TNT Skypak, Inc. (partly owned by G.D. Net B.V., a company in which the five postal authorities of Canada, Sweden, France, Germany, and the Netherlands held interest).

<sup>9</sup> DHLWE is estimated to have a market share of 0.6%. See Answer of DHL Worldwide Express, Inc., at 5.

to serve those countries.<sup>10</sup> Today, both countries afford UPS and other U.S. forwarders open access to their freight forwarding markets.

Under our regulations, foreign citizens may be licensed to provide not only foreign indirect air transportation, but also interstate indirect air transportation. If so authorized by the Department, they may undertake to transport property from one point in the U.S. to another point in the U.S., but only if transported on a U.S. direct air carrier. The regulations permitting foreign air freight forwarders to operate in the U.S. were created to "eliminate the citizenship barrier to entry, promote competition among indirect air carriers, increase business on U.S. air carriers, and reaffirm the U.S. commitment to promote competition in the air transportation industry."<sup>11</sup>

These considerations provide a solid basis for the staff's determination that DHLWE's request for Part 297 authority is supported by effective reciprocity with Germany and the Netherlands. That UPS may not be able to provide postal service within those countries does not require a different determination because that service is not comparable to the common carriage at issue here.

These considerations also reinforce our long-standing view that an application for authority under Part 297 should not be rejected solely because the applicant is not privately owned.

Nonetheless, we took review of this case to consider UPS's serious allegations that the specific air carrier-government relationship at issue here is anticompetitive and otherwise not consistent with the public interest. We agree with UPS that there is a risk of market distortion and unfair trade activity when a government-owned entity seeks to compete against private entities. However, UPS has not shown that DHLWE's relationship with Deutsche Post has turned those risks into a reality here. Specifically, UPS has presented no evidence that Deutsche Post is subsidizing DHLWE's operation or otherwise diverting its assets to DHLWE to provide it with an unfair competitive advantage over U.S. carriers. It is also significant that UPS has presented no evidence to support its allegation that DHLWE's relationship with Deutsche Post is distorting competition. Indeed, the evidence of record does not support UPS's allegations. It shows that DHLWE's share of the domestic parcel and express market is about one half of one percent, and that UPS's share of the market is roughly one hundred times greater than DHLWE's.<sup>12</sup>

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<sup>10</sup> In particular, UPS has been operating in Germany and the Netherlands for over 20 years and has established a European hub in Cologne, Germany.

<sup>11</sup> Proposed Rule to Allow Foreign Indirect Air Carriers To Organize Charters and Consolidate Freight in Interstate and Overseas Markets, 46 Fed. Reg. 35664, 35665 (1981).

<sup>12</sup> See Answer of DHL Worldwide Express, Inc., at 5.

In addition, UPS's suggestion that competition between private firms and Deutsche Post is necessarily unfair is contrary to the experience in our own country. UPS and FedEx have long competed with the United States Postal Service and have done so successfully.

UPS has specifically asked the Department to cancel DHLWE's air freight forwarder license on the grounds that Deutsche Post will unfairly cross-subsidize DHLWE's operations with revenue obtained as a government-owned postal monopoly.<sup>13</sup> UPS argues that we may reject DHLWE's application if we find "that it is in the public interest to do so." 14 C.F.R. § 297.22(b). We do not find that it is in the public interest to keep DHLWE from entering the U.S. market based on speculation about what might possibly happen in the future. DHLWE's entry promises public benefits by adding competition and providing consumer choice. It is for this reason that DHLWE's application is supported by Postcom, a trade association of companies and non-profit organizations such as AOL-Time Warner, Lands' End, and L.L. Bean that use the Postal Service, UPS, FedEx, and firms like DHLWE for the delivery of catalogs and other written material on their products and services. Postcom states, "The preservation and enhancement of competition offered by entrants such as the DHL companies accrues to the benefit of Postcom members and to the consumers both here and abroad that these direct marketers serve."<sup>14</sup>

We have also carefully considered UPS's contention that circumstantial evidence requires denial of DHLWE's application, including the fact that Deutsche Post has been the focus of numerous investigations. Specifically, UPS asserts that the European Commission's March 2001 decision and continuing investigation of Deutsche Post for abuses of a dominant market position in the European Union indicates that Deutsche Post, DHLWE's ultimate owner, will engage in unfair competitive practices in the United States. However, UPS has failed to provide any information showing that those investigations involve DHLWE and, as just noted, that DHLWE has benefited from improper state aid and cross-subsidization. In addition, we are reluctant to restrict competition based on a speculation that Deutsche Post may cause DHLWE to act in such a manner in the United States. There is no evidence on the record to establish that Deutsche Post or DHLWE (or its predecessor company) have engaged in unfair competitive practices in the United States. Nor is there any evidence on the record which demonstrates that DHLWE's U.S. competitors have been or will be harmed by DHLWE's very small presence in the market (0.6%).

Thus, while we are concerned about the impact of those considerations raised by UPS on competition in general, UPS has failed to demonstrate that those concerns warrant a denial of DHLWE's application in this docket. Nonetheless, if

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<sup>13</sup> Deutsche Post is partly owned by the German government, but it is in the process of being privatized. See Answer of DHL Worldwide Express, Inc., at 9.

<sup>14</sup> Postcom Comments, at 2-3.

in the future there are specific allegations of unfair competition against DHLWE, there are sufficient specific statutory remedies available through this Department or the Department of Justice, as well as private lawsuits, to address any such alleged abuses.

FedEx's argues that DHL Airways, Inc. is not a *bona fide* U.S. direct carrier (which implies that DHLWE's and DHL Airway's joint-participation in the U.S. market includes cabotage in violation of the statute). We have already begun to conduct a review of the citizenship of DHL Airways in an informal continuing fitness review proceeding.<sup>15</sup> The Assistant General Counsel for Aviation Enforcement and Proceedings is contemporaneously dismissing, without reaching their merits, FedEx's and UPS's Third-Party Enforcement Complaints, by Department order in the dockets OST-2001-8736 and OST-2001-6937.

Finally, we dismiss UPS's motion for a stay, as the issuance of this order renders the motion moot. We note, however, that DHLWE has demonstrated, among other things, that UPS cannot show that it would suffer irreparable injury, since the registration allowed DHLWE to carry on its existing forwarder business and since DHLWE has had a very small share of the parcel and express delivery market, while UPS has a share of more than fifty percent.

Therefore, in light of the above, we believe that it is in the public interest to affirm the decision of the staff to grant DHLWE Part 297 authority.

**ACCORDINGLY,**

1. The Department grants the United Parcel Service Co. Petition for Review of Staff Action in granting DHL Worldwide Express, Inc. authority to operate as a foreign air freight forwarder and, upon review, affirms the action of the staff;
2. The Department dismisses as moot the United Parcel Service Co. Motion for Stay of DHL Worldwide Express, Inc.'s authority to operate as a foreign air freight forwarder;
3. The Department grants all motions for leave to file otherwise unauthorized documents in the captioned docket;

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<sup>15</sup> Consistent with long-standing policy, we informally review compliance with the statutory requirement that all U.S. air carriers be U.S. citizens. 49 U.S.C. § 41102.

4. The Department will serve a copy of this order on DHL Worldwide Express, Inc.; United Parcel Service Co.; Federal Express Corporation; International Brotherhood of Teamsters; the American Trucking Associations, Inc.; the Transportation Trades Department, AFL-CIO; and the Association for Postal Commerce; and

5. We will not entertain petitions for reconsideration of this order.

**By:**

**SUSAN McDERMOTT**  
Deputy Assistant Secretary for Aviation  
and International Affairs

**(SEAL)**

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