UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: FEDERAL EXPRESS CORPORATION
FAA Order No. 2003-2

Docket No. CP99SO0037
DMS No. FAA-2000-6732[1]

Served: May 6, 2003

ORDER DENYING RECONSIDERATION[2]

Complainant has filed a petition for reconsideration of FAA Order No. 2002-20. This order denies Complainant's petition for reconsideration.

I. Interline Agreement

Complainant contends that the Administrator erred in declining to consider its interline argument. According to Complainant, there was an interline agreement between Federal Express and American Airlines, and therefore, Federal Express was acting as an air carrier even though it did not operate the flight that transported the package of hazardous materials. As Complainant's argument continues, if Federal Express was acting as an air carrier, then it was subject to the duty of care specified in the Federal Aviation Act for air carriers – *i.e.*, the "highest possible degree of care." Previous cases have held that air carriers may not delegate their duty of care to independent contractors.

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[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the following Internet address: http://dms.dot.gov.

[2] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are on the Internet at the following address: http://www.faa.gov/agc/cpwebsite. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and WestLaw. For additional information, *see* the website.

See, e.g., In the Matter of Empire Airlines, FAA Order No. 2000-13 (June 8, 2000) (holding that Empire Airlines could not disclaim responsibility for an improper repair to one of its aircraft on the ground that an independent contractor, Conair Aerospace, performed the repair). Thus, Complainant argues, Federal Express could not delegate its hazardous materials responsibilities in this case to Scharff, its independent contractor.

In FAA Order No. 2002-20, the Administrator, citing Procter & Gamble v. Haugen, 222 F.3d 1262 (10th Cir. 2000), declined to consider the interline argument because Complainant raised it for the first time on appeal, and its proper resolution was not certain. Complainant argues in its petition for reconsideration, however, that it could not bring up the interline argument sooner because Federal Express did not argue that it was not acting as an air carrier until the appeal.

Contrary to Complainant's argument, Federal Express did raise before the ALJ the issue of whether it acted as an air carrier. Federal Express introduced testimony that it did not operate any of its aircraft into Peru. (Tr. 63.) In addition, Complainant itself introduced testimony that American Airlines rather than Federal Express operated the airplane. (Tr. 17.) Thus, Complainant is not justified in failing to raise the interline argument at the hearing level.

Complainant argues further, citing Procter & Gamble, that the Administrator should still consider the interline argument, even if Complainant did not raise it below, because it implicates the public interest. In Procter & Gamble, the court said, as Complainant points out:

> "We will consider matters not raised or argued in the trial court only in 'the most unusual circumstances,'" as when "*public interest is implicated*, . . . or manifest injustice would result." Smith v. Rogers Galvanizing Co., 128 F.3d 1380, 1386 (10th Cir. 1997) (quoting Rademacher v. Colorado

> Ass'n of Soil Conservation Dist. Med. Benefit Plan, 11 F.3d 1567, 1572 (10th Cir. 1993)).

222 F.3d at 1271 (emphasis added). The court also indicated, however, that it would not consider such a matter unless the proper resolution of the matter was certain or beyond doubt. The court stated:

> Where the issue "is purely a matter of law . . . and . . . its proper resolution is *certain*," however, we may consider it. Ross v. United States Marshal, 168 F.3d 1190, 1195 n.5 (10th Cir. 1999) (citing Stahmann Farms, Inc. v. United States, 624 F.2d 958, 961 (10th Cir. 1980); Singleton v. Wulff, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976)); *see also* Petrini v. Howard, 918 F.2d 1482, 1483 n.4 (10th Cir. 1990) (holding that an issue would be considered where proper resolution was *beyond doubt* and injustice would otherwise result).

Id. (Emphasis added.)

In the present case, the proper resolution of the interline issue is not certain. Even if one assumes that there was, factually and legally, an interline agreement between Federal Express and American Airlines, it is still unclear what the effect of such an agreement would be.

Complainant cited three cases to support its interline argument -- Laker Airways v. British Airways, 182 F.3d 843 (11th Cir. 1999) (an anti-trust suit in which the plaintiff argued that the defendant had improperly refused to enter into interline ticketing and baggage agreements with it); Continental Air Lines v. Department of Transportation, 843 F.2d 1444 (D.C. Cir. 1988) (a challenge to a Department of Transportation order permitting an interlining air carrier to fly into Love Field); and Julius Young Jewelry Manufacturing Co. v. Delta Air Lines, 414 N.Y.S.2d 528 (1979) (a case addressing whether a baggage handling company could assert, as a defense, the air carrier liability limits of the Warsaw Convention). None of these cases, however, addresses whether the

effect of an interline agreement is to make an air carrier that operates one leg of a trip responsible for violations committed by an independent contractor on a leg operated by another air carrier.

It may be that an interline agreement existed between Federal Express and American Airlines, and that the effect would be to hold Federal Express responsible for the violations that occurred in this case, but the resolution of the issue is not certain. As a result, it would be imprudent to consider and decide the issue for the first time on appeal. Complainant is correct that the issue implicates the public interest. But that is all the more reason that the issue should have been developed properly in the record and that the Administrator should have had the benefit of the ALJ's reasoning on the matter before deciding it.

II. Apparent Authority

Complainant argued that Federal Express was responsible for its independent contractor's regulatory violations under a theory of apparent authority. Under this theory, courts may find an employer vicariously liable for an independent contractor's negligence if the employer has held out the independent contractor as the employer's agent.

In FAA Order No. 2002-20, the Administrator relied on Wilson v. Good Humor, 757 F.2d 1293, 1301 (D.C. Cir. 1985) for the proposition that before finding apparent authority, courts generally require a showing of "reasonable reliance on the business reputation or good name of the employer doing business with the independent contractor." The Administrator went on to hold that Complainant's apparent authority

argument failed in this case because Complainant did not prove that American Airlines relied on Federal Express when it accepted the package from Scharff.

In its petition for reconsideration, Complainant offers new material relating to its apparent authority argument. Under the Rules of Practice, if a petition for reconsideration is based on new material, the party must explain, in detail, why the party did not discover the new material through due diligence before the hearing. 14 C.F.R. § 13.234(c)(2). Complainant's new material is an affidavit from the Manager of the Dangerous Goods and Cargo Security Division, Office of Civil Aviation Security, which indicates that FAA policy at the time permitted American Airlines to accept packages from other U.S. air carriers without inspecting them. This new material goes to the issue of whether American Airlines relied on Federal Express in accepting the package.

According to Complainant, it did not discover the new material relating to its apparent authority argument before the hearing because the agency attorney specialized only in hazardous materials, and the new material was sensitive security information that the agency did not disseminate beyond those FAA employees who worked directly on security matters. Complainant has not explained, however, why it did not obtain evidence directly from American Airlines regarding whether its personnel relied on Federal Express in accepting the shipment. Thus, Complainant has failed to show due diligence, and its new material will not be considered.

III. Peculiar Risk and Inherent Danger

Complainant also argues that Federal Express should be held responsible under the peculiar risk and inherent danger doctrines, even though Complainant admits that it raised these arguments for the first time in its petition for reconsideration. These

arguments will not be considered so late in the proceedings, after both the ALJ and the Administrator have issued their decisions. Complainant has failed to show, or even argue, that there is justification for considering these arguments so late in the proceedings.

IV. Degree of Care

Federal Express did not file a petition for reconsideration of its own. In its reply to Complainant's petition for reconsideration, however, Federal Express argues that the Administrator should have held that "the higher (non-delegable) standard of care to which air carriers are subject under the Federal Aviation Act does not apply to this proceeding because the Complainant charged Federal Express with violations of the Hazardous Materials Transportation Act and implementing regulations." (Reply to Petition for Reconsideration at 1.) It was unnecessary, however, to rule on the appropriate standard of care for *air carriers* under the Hazardous Materials Transportation Act, given that there was insufficient proof that Federal Express was acting as an air carrier in this case. That issue will be saved for another day.

V. Conclusion

For the reasons stated above, Complainant's petition for reconsideration is denied.

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 2nd day of February, 2003.