ORDER: 89-12-41;
SEE DOCKET 2006 24485

ISSUED: DEC 21, 1989
(RESTRICTION ON MARKET & AIRCRAFT TYPE)

Order 89- 12-41

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

SERVED DEC 2 2 1989

Issued by the Department of Transportation
on the 21st day of December, 1989

Application of	:	
	:	
DISCOVERY AIRWAYS, INC.	:	Docket 46393
	:	
for a certificate of public convenience and necessity under section 401 of the Federal Aviation Act to engage in inter-state and overseas air transportation	:	

ORDER TO SHOW CAUSE

SUMMARY

By this order, we tentatively find that Discovery Airways, Inc. (Discovery) is fit, willing, and able to provide interstate and overseas scheduled air transportation and, subject to certain conditions, will meet the citizenship requirements of the Federal Aviation Act (the Act). Accordingly, we are proposing to issue it a certificate of public convenience and necessity under section 401 of the Act. On one material issue of fact, however, we believe that the lack of an adequate evidentiary record requires that it be set for hearing. Therefore, we propose to set for hearing before an Administrative Law Judge the question of control potentially exercised by Mr. Philip Ho as a result of his position as majority stockholder and his close connection with Nansay Corporation, a Japanese corporation and, through a Hawaii based subsidiary, the major preferred stockholder and debtholder of Discovery.

BACKGROUND

On July 14, 1989, Discovery filed an application in Docket 46393 for authority to provide interstate and overseas scheduled air transportation pursuant to section 401 of the Act. Accompanying its application was information required by section 204.5 of our rules for an examination of its fitness. Discovery supplemented this information on August 8, 1989.

The company requested that its application be processed under the non-hearing procedures of Subpart Q of the Department's Procedural Regulations (14 CFR 302).

Discovery is a corporation organized under the laws of the State of Hawaii. The company is newly formed and is not currently engaged in any air transportation operations. If awarded its requested certificate authority, Discovery proposes to provide scheduled service among the islands of the State of Hawaii. Initially, it plans to operate from Honolulu to Maui and Kona, using four leased 98-seat BAe 146 aircraft with future service from Honolulu to Hilo and Kauai, and between Maui and Kona.

Accompanying its certificate application, Discovery filed a Motion to Withhold from Public Disclosure certain exhibits.[1] Answers in opposition to the Motion were filed by Aloha Airlines, Inc. (Aloha); Hawaiian Airlines, Inc. (Hawaiian); the International Association of Machinists and Aerospace Workers (IAM); and the Air Line Pilots Association (ALPA).[2] The objectors argued, among other things, that the Motion does not comply with the requirements of Rule 39 of the Department's Rules of Practice; that the type of information requested to be withheld from public disclosure is usually made a part of the public record in fitness cases and should be made available for review by interested parties; and that the material contained information that would indicate the degree of foreign control or ownership of Discovery. With certain exceptions, Discovery subsequently agreed to the release of most of these documents.[3]

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[1] These exhibits (numbered 5 through 10) consist of a list of substantial stockholders, a non-interference agreement, detailed monthly forecasts of operations, cash flow projections and operating plan assumptions, a copy of a standard sublease, a narrative service proposal, and a service proposal map.

[2] ALPA's answer was accompanied by a motion for permission to file a document out of time. We will grant ALPA's motion.

[3] Discovery agreed to the public disclosure of all of the material in Exhibits 5 through 10, with the exception of material included in Exhibit 7 and marked "Discovery Airways, Inc., 1989-1993 Operating Plan Assumptions," page 1 and 2; "1991 and 1992 Monthly Forecast of Operations;" "1991 and 1992 Cash Flow Forecast;" and Exhibit 10. Release of the information was announced by the Department's Notice to All Parties dated August 8, 1989. We indicated that we would issue a final decision with respect to the confidentiality of the remaining material in a future order. See discussion in "Request for Confidential Treatment," infra, page 17.

By letter dated August 10, 1989, the Department deferred the processing of Discovery's application until it supplied the additional information requested in the letter. On September 11 and 22, 1989, Discovery provided the requested information.[4] It further supplemented and amended its application on November 3 and 27, 1989.

ANSWERS TO THE APPLICATION

Answers in opposition to the application were filed by Aloha, Hawaiian, IAM, and ALPA on August 11 and 18, 1989.[5] Each of the objectors requested that the Department hold an oral evidentiary hearing to determine whether Discovery is a U.S. citizen and is fit to hold a section 401 certificate. They each allege that a hearing is necessary to inquire into the substantial foreign control issues posed by Discovery's application that relate to its investors and stockholders. In addition, Hawaiian raises issues relating to the compliance disposition of Discovery's Chairman, Mr. Kenneth F. C. Char.

On August 29, 1989, Discovery filed a reply stating, among other things, that it does meet the statutory requirement as a U.S. citizen; that it has structured its financing instruments so that Nansay Hawaii, Inc., a major investor in the company and non-U.S. citizen under the Act, cannot exert any influence over the company; and that the Department should process its application without a hearing, because there are no material issues of fact that require resolution through an oral hearing, and because no one would be prejudiced by the requested expedited process.

On October 4, Discovery requested that the Department grant it permission to advertise, list schedules, accept reservations and issue tickets beginning on November 15, 1989. Answers opposing the request were filed by Aloha on October 6, Hawaiian on October 11, and by IAM and ALPA on October 16. Each of the objectors stated that there remained significant unanswered questions regarding the control of Discovery and reiterated their requests for an oral evidentiary hearing to resolve the issues. The answers addressed the supplemental information responses made by the applicant in September and raised new allegations as to the actual control of the company. These issues will be discussed below in the section on citizenship. Discovery filed a response to these answers on October 24.[6]

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[4] Discovery's September 22 answer was accompanied by a motion for Confidential Treatment of Information. See discussion in "Request for Confidential Treatment," infra, page 17.

[5] The Department's Notice to All Parties extended the answer period from August 11 to August 18, 1989.

[6] We will deal with Discovery's "pre-sale" request in our final order.

Supplemental responses were filed by Aloha on October 18 and October 30. These filings further addressed the citizenship and control issues and raised additional questions in this regard. Hawaiian and ALPA filed responses on October 25 in support of Aloha's October 18 supplemental response. Discovery filed an answer to Aloha's October 30 response on November 2.

On November 8, Aloha filed a supplemental response in which it advocates that the Department either dismiss the application or establish further procedures to allow for the development of a complete evidentiary record. IAM filed a reply in support of Aloha's response on November 13. On November 20, Discovery filed a Motion for Expedited Action and Agreement to Imposition of Conditions. Answers to this motion were filed by Aloha, Hawaiian and IAM on November 30, and by ALPA on December 6.[7]

After careful review of Discovery's request and the issues raised in the pleadings cited above, we have decided to process the application in part by show-cause procedures. With respect to the issues handled by the show-cause procedures, we find that there are no remaining material issues of fact that require an oral evidentiary hearing to resolve. Based on our tentative findings and conditions set forth below, we tentatively conclude that Discovery (1) is fit, willing, and able to provide the air transportation it proposes, and (2) subject to certain conditions, will be a U.S. citizen as required by the Act. The sole issues to be set for hearing are: (1) whether Discovery is controlled by or has the potential to be controlled by an entity that is not a citizen of the United States by virtue of the fact that Mr. Philip Ho is Discovery's majority holder of common stock, is its major investor (other than debentures funded by Nansay Hawaii), and has connections with Nansay Corporation, a foreign corporation and Discovery's major preferred stockholder and debtholder; and (2) if so, whether Mr. Ho should be required to divest some or all of his stock holdings in Discovery.

FITNESS

The Department uses a three-part fitness test that reconciles the Airline Deregulation Act's liberal entry policy with Congress' concern for operational safety and consumer protection. The three areas of inquiry that must be addressed in order to determine a company's fitness are whether the applicant (1) will have the managerial skills and technical ability, before beginning service, to conduct the operations proposed; (2) if not internally financed, has a plan for financing that, if carried out, will

[7] Several of the filings discussed above were accompanied by motions for leave to file otherwise unauthorized documents, which we will grant. See Appendix A for a list of these pleadings.

generate resources sufficient to commence operations without undue risk to consumers; and (3) will comply with the Act and regulations imposed by Federal and State agencies. We have examined Discovery to determine if it is fit, willing, and able to perform the service proposed in its application. On the basis of this examination, we tentatively conclude that it has met the fitness test for authority to operate interstate and overseas scheduled air transportation.

Management Capabilities

Mr. Don E. Straight will serve as Discovery's President and Director of Operations. He has over 38 years of aviation experience, of which 33 years were with Continental Air Lines, Inc. Beginning in 1950, Mr. Straight held a variety of positions at Continental including serving as Line Pilot, Captain, First Officer, Flight Manager, Director of Training, Director of Flying, and DC-10 Line Captain. In many of those capacities, he served as the liaison between the carrier and the FAA. From 1984 to 1985, he served as Line Captain with Air National, Inc. Between 1986 and 1988, he served with Mid Pacific Airlines as Senior Vice President of Flight Operations. After that, he served as President and Chief Executive Officer for Mid Pacific Air Corp., before accepting his current position with Discovery. He holds an Airline Transport Pilot certificate issued by the FAA with over 20,000 hours of flying experience.

The Vice President of Finance for Discovery will be Mr. Kenneth J. Liss. Mr. Liss received his BBA degree in Accounting from the University of Notre Dame in 1967 and his MBA degree in International Business from the University of California in 1968. He was employed by Continental Air Lines for 14 years, starting in 1968 as an Internal Auditor, progressing to Director of Accounting in 1972, and to Vice President/Controller in 1981. He subsequently became the President and Owner of Trad, Inc., an international consulting firm specializing in foreign exchange, banking, accounting, and merger issues.

Mr. Norman Dargie is Discovery's Senior Vice President of Maintenance and Engineering. Immediately prior to joining Discovery, he held the same position with Evergreen International Airlines for eighteen months. During the period of May 1986 to January 1988, Mr. Dargie served as Vice President and General Manager for World Airways, Inc. Before that, he formed Norm Dargie Associates, which performed various consulting assignments for Transamerica Airlines; Pacific Southwest Airlines, Inc.; Avitas; and Admark. Between 1975 and 1985, he served as President of Pacific Southwest Airmotive, a wholly owned subsidiary of Pacific Southwest Airlines, that provided jet engine maintenance and overhaul services, and concurrently served as Vice President of Maintenance and Engineering for the parent company. From 1964 to 1975, he served as Vice President of Maintenance and Engineering for World Airways and during this time established and developed World Air Center, an aircraft overhaul complex, a wholly

owned subsidiary of World Airways. Mr. Dargie holds an Airframe and Powerplant Mechanic license from the FAA.

Mr. Karl S. Freienmuth will serve as the applicant's Director of Maintenance. He began his aviation career of over 17 years with the United States Air Force serving as an Aircraft Maintenance Technician, Flight Engineer, and Flight Simulator Instructor (July 1972-July 1980). Between July 1980 and March 1985, he served as Group Supervisor and as Maintenance and Price Estimator for Lockheed Aircraft Service Company. After that, between March 1985 and May 1988, he was employed with Pacific Southwest Airmotive, initially as Maintenance Programs Administrator, progressing to Manager for PSA's San Diego Maintenance Base. As Manager, he was responsible for maintaining MD-80, DC-9, and BAe 146 aircraft. During the past eighteen months, he was employed as Senior Service Engineer for Rohr Industries. He holds an Airframe and Powerplant Mechanic license and a commercial and private pilot license.

Mr. Thomas A. Likos, Jr., Chief Pilot for Discovery, brings more than 11,000 hours of flying experience to his position, including over 8,300 hours as pilot-in-command. He holds an Airline Transport Pilot license and is type-rated in a variety of multi-engine jet aircraft. Mr. Likos has more than 17 years of aviation experience and has served as a Check Pilot, Simulator Instructor, Ground Instructor, and Manager of Flight Standards and Training for Mid Pacific Air; as Chief Pilot for Scenic Tours; and as Transport Pilot, DC-6 Simulator Instructor, and Check Pilot in the U.S. Navy.

Mr. Kenneth F. C. Char will serve as the applicant's Chairman of the Board of Directors. He is a former President and Vice Chairman of Aloha Airlines. He also served as the National Chairman of the Association of Local Transport Airlines.

In addition to Mr. Char, Franco Mancassola, Randy M. Rogers, Philip Y. Ho, Lee M. Hydeman, Darryl H. W. Johnston, and Barbara J. Tanabe were named to serve on Discovery's seven-member Board of Directors. Mr. Rogers is currently an Executive Vice President of Finance and Administration at the Hemmeter Corporation. He has more than eleven years of prior experience in various finance and accounting roles with major airlines and travel agencies. Mr. Hydeman has an extensive background in aviation law, including fifteen years as principal outside counsel for Continental Air Lines. As indicated below, Messrs. Ho and Johnston and Ms. Tanabe will be replaced.

In addition to the key personnel listed above, Discovery submitted the resumes of George E. Adams and James E. Edmonds, who will hold the positions of Director of Technical Services and Chief Inspector, respectively. Both of these individuals have extensive aviation experience which would qualify them to hold the proposed positions with Discovery.

Taking into consideration the experience of the carrier's personnel, and the fact that the FAA must also review the qualifications of certain of these individuals to determine if they meet the requirements for their positions.[8] We tentatively conclude that Discovery has assembled a qualified staff that possesses the necessary managerial and technical capability to conduct the proposed certificated operations.

Operating Proposal and Financial Plan

If granted the section 401 authority requested, Discovery plans to provide inter-island service throughout the Hawaiian Islands from a hub at Honolulu International Airport. Initially, it plans to provide service from Honolulu to Maui and Kona, with a complement of four aircraft, leased from British Aerospace, Inc. It intends to increase its fleet to twelve BAe 146 aircraft by mid-1991. The company is in the process of negotiating interline agreements with several of the international carriers that serve the Hawaiian Islands.

Because Discovery is a newly formed corporation, it has no current or historical operating profit or loss data. It has, however, submitted a balance sheet as of September 1, 1989, pro forma balance sheets at the commencement of its proposed operations and after one year of operations, and forecast income and cash flow statements for the first full year of operations.

Financing for the carrier's start-up is to be provided by Nansay Hawaii, Mr. Philip Y. Ho, and BAe. Specifically, Nansay Hawaii will purchase $8 million in debentures and $7,500 in preferred stock, BAe will provide $2 million for aircraft "integration" financing, and Mr. Ho will invest $1 million to acquire common stock.[9] The pre-operating balance sheet for the applicant as of September 1, 1989, shows total assets of $5,897,364, total liabilities of $5,062,328, including $5 million of the subordinated debentures, and net stockholder's equity of $835,035, including the $7,500 in preferred stock purchased by Nansay Hawaii and $1 million in common stock purchased by Mr. Ho.

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[8] Before authorizing a carrier to conduct certificated operations, the FAA evaluates the carrier's directors of operations and maintenance and chief pilot with respect to the minimum qualifications for those positions as prescribed in Part 121 of the Federal Aviation Regulations.

[9] We have a letter from Nansay Hawaii's bank indicating a willingness to lend it up to $12 million in connection with transactions with Discovery. The company has also provided financial statements for Nansay Hawaii and for Mr. Ho showing that each has sufficient net worth to provide the investment that it has committed.

The applicant has projected approximately $10.6 million in pre-operating costs and normal operating expenses for the first three months of operations. It anticipates incurring a $1.5 million loss in the first year of operations. The carrier's revenue forecast is based on an average 56 percent load factor. The applicant based its forecast of direct operating costs on actual costs associated with similar type aircraft operated by other companies as well as information developed by members of the company's management team during their experience with similar aircraft while employed at other carriers. We have reviewed these cost estimates and the methods used by Discovery, and based on this review, it appears that the carrier's estimated costs are reasonable.

When making a determination that a carrier meets our financial fitness standard, the Department generally requires that the carrier have available to it financing which, at a minimum, is sufficient to cover its forecast pre-operating costs plus forecast expenses for at least three months of its proposed operations without consideration of revenues. Based on Discovery's forecast expenses, it will need start-up funding for its scheduled operations of approximately $10.6 million to meet this standard. The company has obtained commitments for about $11 million.

While this amount meets our standard based on the company's revenue and expense projections, there is some indication that Discovery may significantly overrun its pre-operating expense projections. Expenses through October 1989 were projected to be $1.4 million. In its November 2, 1989, filing, however, the company indicated that it had already expended more than $2 million - over $600,000 more than projected. Because actual expenses during a company's development phase are difficult to forecast with precision, it is not unusual for a company's financial position at start-up to be different from the estimates upon which we base our fitness findings. For this reason, it is our practice to require companies to provide information on changes in their financial position at the time they present us with evidence of their FAA authority. Consistent with this policy, we will require Discovery to provide a statement of unexpended funds that remain available to it at the time it submits its FAA documents together with a statement showing any changes in its projected expenses through the first three months of its operations. A verification statement from the company's bank or other source of funding should be submitted at this time, confirming the amount of funds on deposit and the unused amounts of any lines-of-credit or other available funds. If additional debt or equity funding has been obtained, a full description of the amount, type, source and conditions should be provided. Discovery's certificate will not be made effective until we have received information demonstrating that the company meets our financial fitness standard.

On the basis of the above, we tentatively conclude that Discovery's financial and operating plans meet the Department's fitness requirement. We believe the carrier has developed a reasonable operating proposal and will have the resources necessary to provide the operations proposed without undue risk to consumers. If the information concerning financing actually obtained raises questions about the carrier's financial sufficiency to commence the proposed operations, we intend to stay the effectiveness of Discovery's authority until such time as we are satisfied that it has obtained sufficient funds.

Compliance Disposition

Discovery states that there are no actions or judgments currently outstanding against it, its key personnel, or persons having a substantial financial interest in the company. The applicant further states that, during the past 10 years, there have been no formal complaints filed or orders issued, nor have any charges of unfair, deceptive or anti-competitive business practices, or of fraud, felony or antitrust violations been brought against it, any of its key personnel, or persons having a substantial financial interest in the company. Finally, since the applicant has never operated, it has not been involved in any accidents or incidents.

We have checked the Department's records and, with one exception, found no compliance actions or consumer complaints against the company or any of its key personnel. In addition, a review of the Securities and Exchange Commission (SEC) files for the period January 1, 1979, through March 31, 1989, produced no record of any litigation, actions, or proceedings involving the company or any of its key personnel. The SEC further advised that, since April 1, 1989, there have been no convictions or investigations of the company or its key personnel.

The single enforcement action against a key employee of Discovery involved its Chairman, Mr. Kenneth F. C. Char, and occurred in 1976. At that time, Mr. Char was President and a Director of Aloha. By Order 76-10-4, October 1, 1976, the Civil Aeronautics Board approved a Stipulation of Facts and Consent to the Entry of an Order to Cease and Desist entered into by Aloha, Mr. Char, and two other officers of Aloha. The parties stipulated that, between 1967 and 1975, Aloha maintained cash funds not reflected on its general books of account or reflected in its reports filed with the Board. Payments into these funds came from corporate resources and withdrawals from the fund were used, at least in part, for unlawful purposes. It was further stipulated that Mr. Char actively participated in the transactions.[10] Although

[10] On July 22, 1976, Mr. Char plead nolo contendere before the U.S. District Court for the District of Hawaii to a misdemeanor violation of 18 U.S.C. Section 610 in a matter involving disbursement of a campaign contribution from these funds. Mr. Char was fined $1,000.

enforcement action was taken against Mr. Char, we note that the CAB did not find that his continued involvement with Aloha would affect that carrier's fitness. Thirteen years have now passed without further blemish to Mr. Char's compliance record. Therefore, we find no reason to believe that he will not perform his duties in compliance with the law and state and federal regulations.

Further, the FAA has advised us that Discovery is in the process of obtaining its Part 121 operating certificate, and that it knows of no reason why we should act unfavorably on this application.

Based on this information, we tentatively conclude that Discovery has the proper regard for the laws, rules, and regulations governing its services to ensure that its aircraft and personnel conform to applicable safety standards and that acceptable consumer relations practices will be followed, and that the company is fit, willing, and able to operate interstate and overseas scheduled air transportation.

CITIZENSHIP

The Federal Aviation Act requires that certificates to engage in air transportation be held only by citizens of the United States as defined in section 101(16) of the Act. That section requires that the president and two-thirds of the board of directors and other managing officers be U.S. citizens and that at least 75 percent of the outstanding voting stock be owned by U.S. citizens. We have also interpreted section 101(16) to mean that, as a factual matter, the carrier must actually be controlled by U.S. citizens.

The primary issue in controversy in this case is the question of foreign control. The relevant facts are complex and controverted by the parties: there has been a deluge of pleadings from parties containing numerous allegations of foreign control. With the exception of the one issue we propose to set for hearing, we find the record adequate to reach tentative conclusions on the remaining issues.

Facts

Discovery has a seven-member Board of Directors. Of the seven directors, four are alleged to be foreign citizens or so connected with foreign entities that they effectively represent these entities' interests. The first, Franco Mancassola, an Italian citizen, is Vice Chairman of the Board and the Board's representative to management. The second, Philip Ho, a U.S. citizen, is the President and Treasurer of Nansay Hawaii, a wholly owned subsidiary of Nansay Corporation, a Japanese corporation. Mr. Ho is also a director of Nansay Corporation, a Vice President and Director of Nansay Micronesia and Vice President and Director

of Nansay Guam.[11] Two others, Darryl H.W. Johnston and Barbara Tanabe, U.S. citizens, apparently have professional connections with Mr. Ho and Nansay Hawaii respectively. Contesting parties have argued that because of these professional relationships with Mr. Ho and Nansay Hawaii, these two directors will be subject to the control of Nansay Hawaii. Nansay Hawaii counters this argument stating that both Nansay Hawaii and Nansay Corporation have signed a non-interference agreement with Discovery. The four officers of Discovery identified in its application are all U.S. citizens. There have been no allegations of any connections between the officers of Discovery and any foreign citizens or entities.

Discovery has two classes of stock, voting common stock and nonvoting participating preferred stock. The 1,000,000 shares of common stock currently issued have a par value of $1.00 per share. Philip Ho is the majority shareholder of this class of shares, owning 75 percent of the common shares. Mr. Ho invested $1,000,000, purchasing 750,000 shares of stock at a price of $1.33 1/3 per share.[12] The remaining 250,000 shares of common stock are owned by Franco Mancassola (14.85%), Randy Rogers (9.5%), and Don Straight (.65%). The purchase price of this stock was $.0004 per share. It is unclear from the record whether Messrs. Mancassola, Rogers, and Straight actually paid this amount for their shares of common stock.

Nansay Hawaii is the majority shareholder of the second class of stock, nonvoting participating preferred stock. Nansay Hawaii owns 7,500,000 shares or 75 percent of this class of stock and paid $.001 per share ($7,500). The remaining outstanding 2,500,000 shares are owned by Franco Mancassola (14.85%), Randy Rogers (9.5%), and Don Straight (.65%), proportions identical to their ownership of the common stock. Discovery's Articles of Incorporation provide that the preferred shares are not redeemable by the corporation and not convertible or exchangeable into any other security of the corporation. Preferred shareholders are given limited voting rights under Hawaiian law, and contesting parties argue that these limited voting rights prevent Discovery from meeting its statutory citizenship requirement; Discovery disagrees.

The majority of Discovery's capitalization, approximately $8,000,000 out of a total of $9,010,000, consists of debt. The

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[11] In addition to his professional connections with Nansay Corporation, there have been allegations of a familial relationship between one of the directors of Nansay Corporation and Mr. Ho. This allegation has been denied by Discovery.

[12] Parties opposing Discovery's application have alleged that Nansay Hawaii provided Mr. Ho with the funds to purchase these shares. Discovery asserts that Mr. Ho used his personal money in making the purchase.

$8,000,000 debt is in the form of unsecured 10 percent subordinated convertible debentures due June 30, 2009. Nansay Hawaii is proposing to fund these debentures with $5,000,000 scheduled to be funded immediately and the additional $3,000,000 to be funded at a later date. Nansay Hawaii will borrow the money to finance the debentures from Mitsui Bank, Los Angeles, California. The interest and principal for the debentures are to be paid from earnings, refinancing, or sale of equity securities.[13]

Discovery's Articles of Incorporation initially listed Franco Mancassola as President.[14] He has been subsequently replaced by Don Straight, a U.S. citizen. As noted above, Mr. Mancassola currently owns 14.85 percent of both the voting common stock and the nonvoting participating preferred stock. Additionally, Mr. Mancassola is the Vice Chairman of the Board of Directors and acts as the Board's "representative to management." Contesting parties have alleged that Mr. Mancassola is really running the day-to-day operations of the company, based upon Mr. Mancassola's position as a founding member of the company, as the Board's representative to management, and as the second largest shareholder. Although Discovery admits that Mr. Mancassola will provide a tremendous amount of expertise to the company, it denies that Mr. Mancassola is either a legal or *de facto* officer of the company.

Discovery plans to lease its aircraft from BAe. The exact terms of Discovery's aircraft leases are unknown because Discovery has not yet submitted a signed lease. Our findings are therefore based upon our examination of the unsigned lease and additional facts as set forth in Discovery's pleadings. Pursuant to Discovery's agreement with BAe, the latter will provide "integration" funding in the amount of $2,000,000 to Discovery with respect to the four aircraft to be delivered prior to March 15, 1990. Additionally, BAe has agreed to provide lease financing on six of the twelve aircraft that Discovery will ultimately lease. Contesting parties have alleged that these favorable lease terms, coupled with BAe's close relationship with

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[13] Contesting parties have alleged that the unsecured nature of the debentures and their below-market return necessarily suggest that Nansay Hawaii receives additional consideration for its investment. This allegation has been denied by Discovery.

[14] The precursor of Discovery was Sun Air, a business venture put together by Mr. Mancassola that sought to establish an Hawaiian inter-island carrier, and that (like Discovery) involved leasing aircraft from BAe. Contesting parties have argued that the Sun Air business plan is relevant to Discovery's application because of Franco Mancassola's substantial involvement in Sun Air and his continued involvement in Discovery. Although Discovery acknowledges Mr. Mancassola's involvement in Discovery, it states that the Sun Air proposal is not relevant to the instant application.

Mr. Mancassola, give BAe the opportunity to exercise control over Discovery. Discovery denies this allegation and states that the lease terms, although favorable, are not unusual within the aircraft industry. Finally, an article in Discovery's Articles of Incorporation requires the approval of the majority of the common shares to acquire aircraft that are not BAe 146 series aircraft and to begin service to an airport outside Hawaii.

Even leaving aside the contested facts, there clearly are three separate foreign control issues. The first involves the relationship between the applicant and Nansay Hawaii, Nansay Corporation, and Philip Ho, a director and principal shareholder in Discovery, and other principal directors. A second issue is the role of Franco Mancassola as Vice Chairman of the Board, the Board's "representative to management", and the second largest shareholder in the daily operations of Discovery. The third issue is the possible control exerted by BAe over Discovery as the result of favorable lease financing and lease terms involving capital infusion.

Tentative Decision

In its written submissions to the Department, Discovery has offered to accept the imposition of several conditions in response to allegations of impermissible control. Although these conditions resolve some of our concerns, we believe that additional measures are needed to deal effectively with the control problems raised in this case.

1. Nansay Hawaii

Of particular concern is the possibility of Nansay exerting control over the operations of Discovery through Philip Ho. This concern arises out of the close professional relationship between Mr. Ho and Nansay Hawaii and from a number of unresolved issues associated with that relationship. These issues include whether the funds Mr. Ho used to make his investment in Discovery's common stock were originally his own or have been provided by Nansay Hawaii; whether Mr. Ho is related to any of Nansay Hawaii's other owners or officers; and whether Mr. Ho, as President of that company, may have a fiduciary duty to promote its interests. Since these questions are ones of material fact and since the current record does not provide an adequate evidentiary basis for resolving them, we have tentatively decided to set the matter for hearing. The hearing will consider, *inter alia*, the direct or indirect source of Mr. Ho's funds, his financial or other interest in the Nansay companies, and his responsibility to Nansay Hawaii. If it is determined that Nansay Hawaii exercises control over the operations of Discovery through Mr. Ho, the hearing will also consider remedial actions, including whether Mr. Ho should be required to sell all or some of his stock.

We do not believe that it is either necessary or desirable for our investigation into this matter to prevent the inauguration of

Discovery's proposed service. Discovery has offered to have Mr. Ho's stock placed in a voting trust to be voted by an independent trustee acceptable to us. We have generally approved the use of voting trusts as a temporary device to allow a company to functio while it executes permanent changes in its capital structure.[15] We have tentatively decided to require Mr. Ho to place this stock in a voting trust as Discovery has proposed pending completion of the hearing. However, we do not believe that the voting trust provides a long-term solution to any control problem that may arise here because it is unclear whether, even with a voting trustee in charge of his stock, Mr. Ho's continued status as the beneficial owner of the majority of the company's stock will allow him to influence Discovery's decision-making.The establishment of a voting trust for Mr. Ho's stock or divestiture by Mr. Ho alone would, of course, leave substantial links between Nansay Hawaii and Discovery. Nansay Hawaii would still have Mr. Ho, as well as two other representatives, on Discovery's board of directors, and would still be providing the bulk of the carrier's financing. With regard to the former, Discovery has offered to remove from the board any members with a past or present affiliation with Nansay Hawaii. We tentatively adopt the suggestion to require Discovery to remove these three members (Messrs. Ho and Johnston, and Ms. Tanabe) and not to replace them with persons associated with any of the Nansay companies.

Finally, aside from its debt investment, Nansay Hawaii holds 75 percent of Discovery's preferred stock, representing a modest investment of $7,500, but providing the lion's share of the proceeds in the event of liquidation. To offset Nansay Hawaii's potential financial incentive to compel such a liquidation, we have tentatively decided to require Discovery to clarify Article VIII, section 8.7 of its Articles of Incorporation, to the effect that such a liquidation can only be initiated with the consent of a majority of the U.S. citizen shareholders of each class of stock.[16]

These measures will allow Nansay Hawaii to maintain its investment in Discovery under circumstances that should prevent it from controlling Discovery, directly or indirectly, with the possible exception of Mr. Ho's stock interest.

2. Mr. Mancassola

The primary issue posed by Mr. Mancassola, an Italian citizen, is the possibility that effectively he may be performing the role of

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[15] See, e.g., Application of Airwest International, Order 85-8-90, served September 6, 1985, at 8; Application of Premiere Airlines, 95 C.A.B. 101, at 103, 112-16 (1982).

[16] At present, that provision forbids such action "without the concurrence of the holders of a majority of each class of shares held by persons who are citizens of the United States of America."

President, an office specifically reserved by section 101(16) to a citizen of the United States. In an earlier phase of Discovery's development, he apparently was the President, and he still plays a significant role in the airline's functions as a director and as "board representative" to management. To address this problem, Discovery has suggested that the board form an executive committee to establish policy between board meetings and to ensure that the company's President "has all the power and authority required to perform the responsibilities of his office." We tentatively adopt this condition, with the additional proviso that Mr. Mancassola will not serve on the executive committee and will no longer perform his liaison function. This should remove any possibility that Mr. Mancassola will be Discovery's *de facto* President.

3. British Aerospace

BAe intends to provide Discovery's fleet of aircraft on terms that the opponents in this case identify as unusually favorable and suggestive of potential control by BAe. This issue is difficult to resolve in the absence of a final, signed lease agreement between BAe and Discovery. We are disturbed, however, by the possibility of restrictions imposed by BAe on Discovery's use of its aircraft and on the scope of its operations. As currently drafted, the two provisions that appear in Article V of Discovery's Articles of Incorporation do not raise problems, since there has been no showing that BAe controls the majority of the common shareholders (which itself would render Discovery a non-citizen), and since that majority interest can simply indicate its wishes to overcome the limitation.

A restriction of this type without such an override mechanism, however, would raise control issues, whether it appeared in the Articles of Incorporation, in a lease agreement, or any other legally binding document. Such a restriction on Discovery's choice of aircraft would place it at the mercy of BAe as its sole supplier. We would also find an absolute restriction on Discovery's operations outside Hawaii unduly restrictive. Accordingly, we have tentatively decided to require that Discovery's choice of aircraft and the scope of its operation be subject to no absolute restriction.

This resolution leaves BAe's sizable "integration" allowance of $500,000 for each of four aircraft, as well as the terms of "lease financing" on six of the twelve aircraft, as a possible source of control. Certainly $2 million will represent a substantial infusion of additional capital for Discovery. We do not, however, have any grounds at present to determine that either of these circumstances will give rise to control of Discovery by BAe. To ensure that any such problems will be brought to light, we have tentatively decided to require Discovery to file with us any final lease agreements and other arrangements specifying the terms of its relationship with BAe.

Based upon these tentative findings, and subject to the conditions set forth above, including our tentative decision to have an ALJ consider whether any long-term remedial action is necessary with regard to Mr. Ho's stock, we tentatively conclude that Discovery will be a United States citizen as defined in the Act and will actually be controlled by United States citizens.

CONTINUING FITNESS CERTIFICATE CONDITIONS

Once a carrier is found fit initially, section 401(r) of the Act requires that the company remain fit in order to hold its certificate authority.

In order that we may assure the continuing fitness of air carriers, certificate holders must bear the responsibility of providing us with information regarding any substantial changes in areas affecting fitness. It is our experience that important changes often occur between the time when the Department first issues a fitness determination to a company and the time when that company receives the necessary FAA operating authority to have its economic authority made effective.

We will, therefore, direct Discovery to provide us, following its receipt of FAA authority, a statement describing any changes which it may have undergone subsequent to the issuance of this order, including any changes in its key personnel, compliance history, operating plans, financial posture, or citizenship. Evidence of all steps taken to comply with conditions or requirements relating to the company's citizenship and financial posture should be included.[17] The authority tentatively granted here will not become effective until the Department has received that statement along with evidence of insurance coverage meeting the requirements of Part 205 of our rules.[18]

In addition, once Discovery is issued an effective certificate, we remind it that should it propose substantial changes in its operations, including major changes in its ownership or management team, we require that it first file with the Department the information set forth in section 204.4 of our regulations.

Finally, we remind Discovery of the requirements of section 204.8 of our rules. This section provides, among other things, that: (1) the authority granted to a carrier shall be revoked if the

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[17] As noted previously, the company must also provide third-party verification of its available funding at that time. If this information does not indicate that the company has available sufficient funding to meet our financial fitness standard, we will stay the effectiveness of its authority.

[18] We also reserve the right to stay the effectiveness of Discovery's authority if any new information becomes available to us that warrants such action.

carrier does not commence actual flying operations under that authority within one year of the date of the Department's determination of its fitness; (2) if the carrier ceases the operations for which it was found fit for any reason, it must file a notice of its intent to resume operations at least 45 days prior to said resumption;[19] and (3) if the carrier does not file the required notice and resume operations within one year of its cessation, its authority shall be revoked for dormancy.

PUBLIC CONVENIENCE AND NECESSITY

No finding of consistency with the public convenience and necessity is required for the award of authority for interstate and overseas scheduled air transportation of persons, property, and mail under section 401(d)(1) of the Act. That is the only authority Discovery seeks in its application in Docket 46393.

REQUEST FOR CONFIDENTIAL TREATMENT

In its two motions filed July 14 and September 22, Discovery requested under Rule 39 of the Rules of Practice, 14 CFR § 302.39, confidential treatment of operating plan assumptions, monthly operating forecasts, cash flow projections, a map of its service proposal, and personal financial statements of two of its investors. Rule 39 instructs us to evaluate requests for confidential treatment in accordance with the standards of disclosure found in the Freedom of Information Act (5 U.S.C. § 552). By this standard, information may be withheld from disclosure if it is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential."[20]

It is not disputed that the information sought to be withheld from public disclosure is financial or commercial in nature and that it was obtained from a person outside of government. The only question is whether the information is privileged or confidential -- whether "disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from

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[19] This notice shall contain updated fitness information. The carrier cannot resume operations until its fitness has been redetermined.

[20] Gulf and Western Industries, Inc. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1979) (citations omitted).

whom the information was obtained."[21] Furthermore, to be privileged or confidential, the information should not be of the type that is usually released to the public.[22]

In support of its request to withhold from public disclosure its 1989-1993 operating plan assumptions, 1991-1992 detailed monthly operating and cash flow projections, and its service area map, Discovery states that it would not ordinarily have released this information to the public because its competitive position could be harmed if this information was made publicly available. Furthermore, it states that due to the proprietary nature of the information, the release of it will not create any offsetting public benefits.

Discovery has not satisfied the statutory requirement for confidential treatment of its service proposal map contained in Exhibit 10. This type of information is required by section 201.4 (c)(4) of our regulations and is usually a part of the public record of fitness determination cases. No convincing argument was presented in support of the applicant's concerns over competitive harm, and we therefore will deny Discovery's request for confidential treatment of this service proposal map. However, the company's detailed operating plan assumptions contained in Exhibit 7 of its application, together with detailed monthly operating and cash flow projections for periods beyond the first year of operation, contain information that is not required by our rules and could cause the company severe competitive harm. Therefore, we have decided to grant the carrier's request for confidentiality for that material.

Discovery also requests that the personal financial statements of Nansay Hawaii and Mr. Philip Ho be withheld from public disclosure on the grounds that the information contained in them is private and confidential; that the data contained in the statements are not otherwise available to the public; and that release of the information would cause substantial harm to their competitive positions. The Department has granted confidential treatment to similar information provided by other applicants.[23] Under these circumstances, we agree with the applicant's claims and will grant its request for confidential treatment of these financial statements.

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[21] National Parks and Conservation Association v. Morton, 498 F. 2d. 765, 770 (D.C. Cir. 1974) (footnote omitted).

[22] Gulf and Western Industries Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979).

[23] See Order 85-9-5.

OBJECTIONS

We will give interested persons 10 days following the service date of this order to show cause why the tentative findings and conclusions made here should not be made final; answers to objections will be due within 5 days thereafter. We expect such persons to direct their objections, if any, to the application and points at issue and to support such objections with detailed economic analyses. If an oral evidentiary hearing or discovery procedures are requested on any issue in addition to the one we propose to set for hearing, the objector should state in detail why such a hearing or discovery is considered necessary, and what material issues of decisional fact the objector would expect to establish through such a hearing or discovery that cannot be established in written pleadings. The objector should consider whether discovery procedures alone would be sufficient to resolve material issues of decisional fact. If so, the type of procedure should be specified (see Part 320, Rules 19 and 20); if not, the reasons why not should be explained. We will not entertain general, vague, or unsupported objections.

If no substantive objections are filed, we will issue an order that will make final our tentative findings and conclusions with respect to fitness and citizenship and will issue a certificate of public convenience and necessity to Discovery. Also, we will institute a hearing on the issue of Mr. Ho's control over Discovery in our final order.

ACCORDINGLY,

1. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions stated above and award a certificate to Discovery Airways, Inc., authorizing it to engage in interstate and overseas scheduled air transportation of persons, property, and mail;

2. We direct any interested persons having objections to the issuance of an order making final any of the proposed findings, conclusions, or the certificate award set forth here, to file them with the Documentary Services Division, Department of Transportation, 400 Seventh Street, S.W., Washington, D.C. 20590 in Docket 46393, and serve them upon all persons listed in Appendix B no later than 10 days after the service date of this order; answers to objections shall be filed no later than 5 days thereafter;

3. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action;

4. In the event that no objections are filed, we will consider all further procedural steps to be waived and we will enter an

order making final our tentative findings and conclusions set out here[24] and we set the remaining issue for hearing;

5. We grant the motion filed by ALPA to file a document out of time;

6. We grant the motion for confidentiality with respect to the detailed operating plan assumptions, detailed monthly operating and cash flow projections contained in Exhibit 7 and the personal financial statements of Nansay Hawaii and Mr. Philip Ho;

7. We deny the motion for confidentiality with respect to the service proposal map (Exhibit 10);

8. We grant the Motions for Leave to File Otherwise Unauthorized Documents as specified in Appendix A;

9. We will serve a copy of this order on the persons listed in Appendix B; and

10. We will publish a summary of this order in the Federal Register.

By:

JEFFREY N. SHANE
Assistant Secretary for Policy
and International Affairs

(SEAL)

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[24] Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.

APPENDIX A

DATE	FILING
10/18/89	Aloha's Motion for Leave to File Late Filed Document and Supplemental Response
10/25/89	Hawaiian's Motion for Leave to File an Otherwise Unauthorized Document and Answer in Support of Supplemental Response of Aloha
10/25/89	ALPA's Motion for Leave to File an Otherwise Unauthorized Document and Answer in support of Supplemental Response of Aloha
10/30/89	Aloha's Motion for Leave to File an Otherwise Unauthorized Document and Further Response
11/2/89	Discovery's Supplemental Response and Motion to File an Otherwise Unauthorized Document
11/8/89	Aloha's Supplemental Response to Supplemental Response and Motion to File an Otherwise Unauthorized Document
11/13/89	IAM's Motion For Leave to File an Otherwise Unauthorized Document and Reply in Support of Aloha's Supplemental Response filed on November 8, 1989
11/20/89	Discovery's Motion to File an Otherwise Unauthorized Document and Motion for Expedited Action and Agreement to Imposition of Conditions
11/30/89	IAM's Motion for Leave to File an Otherwise Unauthorized Document and Reply to Discovery's Motion filed on November 20, 1989
12/6/89	ALPA's Motion to File an Unauthorized Document and Reply to Discovery's Motion for Expedited Action

APPENDIX B

SERVICE LIST FOR DISCOVERY AIRWAYS, INC.

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Discovery Airways, Inc.
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Mr. Curtis M. Coward
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Tysons Corner
McLean, Virginia 22101

Mr. A. Maurice Myers
President & Chief Executive
Officer Aloha Airlines, Inc.
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Mr. Marshall S. Sinick
Squire, Sanders & Dempsey
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Operating Officer
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Mr. Robert S. Clayman
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Flight Standards District Office
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American Association of Airport
Executives
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Alexandria, Virginia 22302

Mr. Robin A. Caldwell
Director, Office of Aviation
Information Management, DAI-1
Department of Transportation
400 7th Street S.W.
Washington, D.C. 20590

Mr. Richard A. Nelson
Official Airline Guide
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Mr. William C. Williams, Jr.
Flight Standards Division,
AWP-200
Federal Aviation Administration
P.O. Box 92007
Los Angeles, California 90009

The Honorable Charles S. Robb
United States Senate
Washington, D.C. 20510

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OST-2006-24485-50

Order 90-1-60

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

SERVED JAN 30 1990

Issued by the Department of Transportation
on the 29th day of January, 1990

Application of DISCOVERY AIRWAYS, INC. for a certificate of public convenience and necessity under section 401 of the Federal Aviation Act to engage in interstate and overseas air transportation	:	Docket 46393
In the Matter of DISCOVERY AIRWAYS, INC.and MR. PHILIP HO	:	Docket 46760

FINAL ORDER

By this order, we are making final our tentative findings and conclusions in Order 89-12-41.[1] In that show-cause order, we tentatively decided to grant Discovery Airways, Inc. a certificate of public convenience and necessity to engage in interstate and overseas air transportation and to set for hearing the specific issue of whether the Nansay family of companies (which are not citizens of the United States as defined by the Federal Aviation Act) are in a position to exercise control over Discovery through Mr. Philip Ho, who is himself a U.S. citizen. For the reasons set out below, we make those conclusions final without significant change.

[1] Served December 22, 1989.

I. Background

Since July 14, 1989, when Discovery filed its original application, this proceeding has been fully contested. Aside from various amendments and additional information filed by the applicant, four opponents of Discovery's certification[2] have filed numerous pleadings, which the applicant has answered in turn. The issues relating to Discovery's citizenship have thus been thoroughly aired, providing us with a sound basis for Order 89-12-41. The only issue that we believed to require further fact-finding procedures is the ability of the Nansay companies to exercise control over Discovery through Mr. Philip Ho, the majority U.S. citizen shareholder in Discovery. We tentatively found satisfactory resolutions of other citizenship concerns — including other avenues of Nansay influence, as well as possible control by two other non-U.S. citizens Franco Mancassola or British Aerospace, Inc. (BAe) — and also tentatively adopted the applicant's suggestion that Mr. Ho's stock be placed in a voting trust. Accordingly, we saw no reason to delay the applicant's inauguration of service pending the outcome of the hearing on Mr. Ho's status.

We have received objections from the four contesting parties, as well as an answer from Discovery. On January 8, Aloha filed a reply to Discovery's answer, covered by a motion for leave to file, which we will grant. These pleadings are summarized below along with our decision on their merits.

II. Decision

A. Past Precedent

Contesting parties argue vigorously that the Department has departed from its own precedent by issuing the instant show cause order. Aloha argues that the Department's order indicates that it is willing to accept a nominal U.S. investment and carefully structured foreign investment as a substitute for U.S. citizenship.[3] Hawaiian argues that finalization of Order 89-12-41 would constitute an abrupt and unwarranted departure from long-established precedent.[4] ALPA echoes Hawaiian's arguments, alleging that the

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[2] Aloha Airlines, Inc. ("Aloha"), Hawaiian Airlines, Inc. ("Hawaiian"), the Air Line Pilots Association ("ALPA"), and the International Association of Machinists and Aerospace Workers ("IAM").

[3] Aloha also asserts that the Department's decision to allow Discovery to commence service is nothing less than finding that a carrier with "just 2/100's of one percent of its total funding provided by U.S. citizens is not otherwise beholden to foreign interests." Objections of Aloha Airlines, Inc. ("Aloha Obj") at 2-3. We dispute Aloha's characterization of the percentage of funding provided by U.S. citizens. The placement of Mr. Ho's stock in a voting trust ensures that 75 % of Discovery's common stock is owned and controlled by U.S. citizens. Thus, over 99% of the carrier's equity funding comes from U.S. citizens.

[4] Hawaiian argues that the Department's review to date fails to account for the actual control that will be effected by foreign interests if the Order is finalized.

application of the *Northwest/Wings* test (Order 89-9-51, served Sept. 29, 1989) to the facts of this case leads to the rejection of Discovery's application, or at a minimum, a more encompassing evidentiary proceeding than the one proposed by the Department.

Discovery rejects the assertion that the Department's Show Cause Order constitutes a radical departure from the Department's long-held position on foreign control. Discovery contends that it meets the statutory test of citizenship and, therefore, it maintains the presumption of citizenship established by Department precedent. Discovery acknowledges that, in addition to meeting the numerical standards of the Federal Aviation Act, it must also ensure that it is not subject to foreign control in fact. With respect to the three potential control issues identified by the Department,[5] Discovery argues that because the issue will be set for an oral evidentiary proceeding, it removes the issue as a basis for any objection to the order. It also asserts that the restrictions proposed to be imposed are adequate to ensure that Discovery is not subject to foreign control in fact.

None of the pleadings raise significant new points of fact or substantive law, and they do not persuade us to alter our tentative conclusions. Their arguments show, as did our tentative response, that this is indeed a close case. We believe that, with the imposition of the proposed conditions, the hearing, and the subsequent reporting requirements, U.S. citizens will in fact be in control. The objectors' arguments go to the same issues that were discussed at length in the show-cause order: Nansay's potential control, Mr. Mancassola's role, and BAe's involvement. The objectors cite, in particular, the *Northwest* and *Intera* cases. The *Northwest* decision[6] was similar to this case, in that it was also a complex transaction involving significant foreign equity investment that required us to find ways to eliminate the means by which foreign control could potentially be exercised. Moreover, as here, the *Northwest* case involved a large amount of foreign debt per se; however, as here, we found that the debt involved standard variety covenants, common in the industry, and did not place foreign creditors in a position to exercise control. Also, as with *Northwest* , we are here using the mechanism of conditions to ensure the carrier's citizenship while preserving legitimate foreign investment.

Intera [7] involved a radically different situation than that presented here. *Intera* had a degree of concentrated and pervasive foreign control nowhere

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[5] The Department has identified three potential control issues: (1) the influence of the Nansay companies; (2) the role of Mr. Franco Mancassola; and (3) the influence of British Aerospace, Inc. Order 89-12-41. served December 22, 1989.

[6] *See In the Matter of the Acquisition of Northwest Airlines by Wings Holding, Inc.*, Order 89-9-51, served September 29, 1989.

[7] Order 87-8-43, issued August 18, 1987; Order 87-3-32, served March 9, 1987.

indicated in this case. Among other things, *Intera* involved an enterprise the primary impetus of which, particularly initially, was foreign in origin; while it has been argued that Discovery had its origins in a joint venture by BAe and Mr. Mancassola, we do not perceive that background to be as central to the overall creation and structuring of Discovery as was *Intera's* history of formation. Finally, these decisions are necessarily made on a case-by-case basis, with no result in one case dictating the outcome of another.[8]

B. **The Scope of the Evidentiary Hearing**

All of the contesting parties advocate an expanded evidentiary hearing over that proposed in Order 89-12-41. Hawaiian claims that Mr. Ho is not the only vehicle through which foreign interests can exert control over Discovery. Instead, Hawaiian urges that the scope of the hearing be sufficiently broad to obtain and address all information relating to the potential for foreign influence on Discovery.

Aloha also argues the need to expand what it claims to be an *ex post facto* hearing to examine the entirety of Nansay interests (including the relationship between Mr. Philip Ho and Discovery), as well as Mr. Franco Mancassola's and BAe's "pervasive relationships" with Discovery.[9] Aloha alleges that the following "relevant factors" involving Nansay's interests remain undisclosed: Nansay's objectives in making the investment; any assurances it received as to how its investment would be protected; the extent of Mr. Ho's past and prospective relationship with the various Nansay corporations and their respective principals; the security pledged by Nansay for the Mitsui Bank loan; and any restrictions placed by Mitsui Bank on Nansay or Discovery in relation to the loan. Aloha further argues that the issues surrounding Mr. Franco Mancassola, his role in founding Discovery and securing the agreements with BAe and Nansay, and the influence that he will have on the daily operations of Discovery, are well-suited for an oral evidentiary hearing because of the necessity for testimony of Mr. Mancassola.

Discovery argues strenuously against expanding the scope of the evidentiary hearing. Discovery contends that the objections filed by the contesting parties cited no new facts, but were instead "merely rehashed versions of the same arguments made in the multiplicious and redundant pleadings" filed by the contesting parties.[10] Discovery further argues that the conditions imposed by the Department obviate any reasonable concern over the roles of Mr.

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[8] *See In the Matter of the Acquisition of Northwest Airlines by Wings Holding, Inc.*, Order 89-9-51, served September 29, 1989, at 4-5 (analysis of control issues on case-by-case basis).

[9] ALPA and IAM have also stated that the issues of actual control by Nansay, Mr. Mancassola and BAe should be fully explored in an evidentiary hearing.

[10] Discovery alleges that these filings represent an effort to destroy a potential competitor to Aloha and Hawaiian.

Mancassola and BAe, and thus, there is no reason to expand the hearing as requested by the contesting parties.[11] Discovery states that it filed no objections to Order 89-12-41 and is prepared to abide by each and every requirement of the order.[12] Therefore, Discovery requests the Department to enter a final order in conformance with Order 89-12-41 and to authorize the carrier to commence advertising its proposed services.

The objectors are correct in arguing that a number of factual issues remain unresolved; they are mistaken, however, in their characterization of the procedural consequences. We need not resolve an issue of material fact if the applicant agrees to accept conditions imposed on the assumption that the factual issue would be decided against the applicant. It is well established that a hearing need not be held where there is no material factual issue of substance. *E.g., Veg-Mix, Inc. v. Dep't of Agriculture*, 832 F.2d 601, 607-08 (D.C. Cir. 1987). This has been held to be true even where parties argue the existence of such a factual issue, but where the agency decides that no actual dispute exists. *Cerro Wire & Cable Co. v. F.E.R.C.*, 677 F.2d 124,128-19 (D.C. Cir. 1982) (informal conference rather than formal hearing held). More generally, the Supreme Court has noted that specific due process needs require consideration of three factors -- the private interest affected; the risk of deprivation of that interest and the value of additional procedural safeguards; and the Government's interest, including the fiscal and administrative burdens entailed by additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). In light of these decisions, we find here that no hearing is necessary, where the only party that would be prejudiced by our construction of the facts has essentially agreed to that construction to facilitate a resolution of the case.

Faced with a choice between accepting such conditions or going to a hearing on *all* the controverted factual issues, Discovery has opted for the former, and no other party is thereby prejudiced. We find that our conditions are adequate to preserve Discovery's U.S. citizenship even if the objectors' allegations are true; if this analysis were incorrect, the error would be one of law rather than fact. This conclusion underlies our decision not to broaden the scope of the hearing, as all four objectors have requested. Had we decided that these issues required such resolution, a hearing on all issues might well have been required; however, we need not reach that issue. Discovery's willingness to accept conditions indicated by the facts as argued by the opponents has rendered such a hearing unnecessary.

C. Effectiveness of Voting Trust/Removal of Mr. Philip Ho

The contesting parties have also raised the issue of whether the voting trust and the removal of Mr. Philip Ho as a director, either together or separately,

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11 Discovery contends that there is no reason to impose the added cost and burden of an expanded hearing on the parties when no good purpose would be served.

12 Discovery Reply at 6.

will adequately address the foreign control issue. Aloha argues that a voting trust will be ineffective because Mr. Ho and Nansay will still be able to influence individuals associated with Discovery other than the independent trustee, because they are Discovery's principal source of capital.[13] Aloha argues that the Department should give specific voting instructions to the trustee, because Aloha alleges that to grant the trustee complete discretion to vote the shares runs the risk of making the trustee more vulnerable to influence from Mr. Mancassola and BAe. IAM also states that the use of the voting trust may enhance Mr. Mancassola's influence as the second largest stockholder, and that any condition of the voting trust that ties the vote of the trust to the vote of the majority of stockholders will effectively tie the voting of the trust of 75 percent of the stock to Mr. Mancassola's majority of the remaining shares.[14] To ensure that the independent trustee will in fact be independent, Aloha suggests that the trustee be prohibited from communicating with Mr. Ho and Mr. Mancassola on any matters subject to a shareholder vote.

In its reply, Discovery argues that the "contrived scenarios" put forth by the contesting parties regarding the control of Mr. Ho's stock are rebutted by the fact that his stock will be in a voting trust and the control of the majority interest will be in the hands of a U.S. citizen approved by the Department.[15] Discovery contends that the only evidence before the Department with respect to Mr. Ho is: that he is a U.S. citizen; that his investment is entirely his own; and that Mr. Ho is willing to place his stock in a voting trust with an independent trustee to vote the stock as if it were his own. Discovery also contends that Mr. Ho has already made clear his intention to abide by whatever conditions the Department may impose. Finally, Discovery argues that the requirement for an oral evidentiary proceeding on the issue of Mr. Ho's autonomy completely removes it as a basis for any objection to the Order.

Aloha's arguments regarding the voting trust appear to reflect more concern with potential control by BAe or Mr. Mancassola, or by Nansay through other means than Mr. Ho, than with the inadequacy of the voting trust itself. We recognize the potential problem if the conditions of the voting trust were to tie the vote of the trust to the vote of the majority of shareholders, and therefore, we will direct that the voting trustee must vote independently and not automatically in concert with any other shareholder or shareholders.

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[13] On the issue of control exercised by Nansay over Discovery, Hawaiian contends: "it would be naive to assume that Discovery's principal creditor and owner of 75 percent of its preferred shares will be unable to find some other way to influence Discovery's management, should it so choose." Hawaiian Obj. at 6.

[14] Aloha also contends the the Department's usual approach of requiring a trustee to vote proportionately will not work unless Mr. Mancassola's stock is excluded from the voting computation.

[15] Discovery states that it is unaware of any other airline that is so tightly controlled by the Department in this way.

However, we do not find it necessary, for example, to give the voting trustee explicit voting instructions to frustrate possible attempts at influence by BAe or Mr. Mancassola; we have not been shown how or why a independent voting trustee would be vulnerable to such influence. Finally, we find that the removal of Mr. Ho as a director of Discovery, the placement of his stock in a voting trust, and the institution of a hearing on the autonomy of Mr. Ho effectively eliminates any short term influence of Mr. Ho pending the ultimate resolution of this case. In the long term, however, a hearing is necessary to ensure that this relationship will not give rise to foreign control by Nansay.

D. Nansay

The contesting parties allege that the Department has failed to address the separate foreign control issues arising from Nansay Hawaii's debt investment in Discovery. IAM recognizes that Nansay Hawaii has an interest in ensuring reliable inter-island air service to its commercial developments on the islands; however, IAM argues that Nansay Hawaii cannot protect its interest in access to its holdings unless it has achieved some measure of control over Discovery's operations.

Aloha has a list of factors involving Nansay's interests that it argues is "relevant" to the issue of foreign control. Aloha alleges that the circumstances surrounding Nansay's subordinated debentures in fact make these debentures functionally and legally equivalent to cumulative preferred stock, and Aloha argues that therefore the Department's decision is inconsistent with its past precedent. Aloha further argues that the hearing should include the issue of whether these subordinated debentures are indeed *de facto* instruments of equity rather than debt and, if so, what remedial measures, if any, should be taken. Aloha urges that as a precondition to the hearing, Nansay should be required to certify that it accepts the conditions of the Order.

In addition, Hawaiian argues that the ALJ should investigate whether the transaction between Nansay and Discovery was truly an arms length transaction, and if not, Hawaiian contends that Discovery should have the burden of proof to demonstrate why the Department should not assume that any unusually favorable financing terms reflect a "hidden *quid pro quo*."[16] Hawaiian also argues that the favorable financing offered by a foreign "lender," such as Nansay, would adversely affect competition by providing foreign controlled "U.S." carriers with access to foreign capital on terms not otherwise available to U.S. carriers.

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[16] Hawaiian Obj. at 8-9.

With respect to the issue of the influence of Nansay Corporation, Discovery states that both Nansay Hawaii and Nansay Corporation have entered into a Non-Interference Agreement assuring Mr. Ho's autonomy. Discovery also argues that the Department's decision to hold an evidentiary hearing on the issue of Mr. Ho's autonomy was based in part on the incorrect assertion that Mr. Ho is a director of Nansay Corporation; Discovery alleges that he is not. Discovery rejects the precondition to the hearing urged by Aloha arguing that Nansay Hawaii, Inc. has "clearly evidenced its understanding and acceptance of severe control restrictions under the terms of its investment."[17]

We find the arguments relating to Nansay unpersuasive. Nansay's potential influence may be through Mr. Ho or through various other links. The issue of Mr. Ho has been addressed above. As to potential influence via other means, we find that our conditions will prevent Nansay from exercising control by any of these means.

While it may be true, as the IAM argues, that Nansay Hawaii has an interest in asserting influence over Discovery, this goes only to motive; the *means* of exerting such influence is effectively removed by our conditions. Motive to exercise influence may occasion close scrutiny of a foreign investor's power to control, but it is no substitute for means of control where the latter have been neutralized.[18] We also do not find the distinction between subordinated debentures and cumulative preferred stock to be crucial here. The line between these types of instruments may be a fine one or even overlap, depending on the characteristics of the particular obligations; we are less interested in the documents' labels than in the rights and obligations that they create. Unlike the Nansay preferred stock, we do not perceive the subordinated debentures as presenting a control question.

We also see nothing in the record to suggest the existence of a hidden "*quid pro quo*" that would give Nansay means to control Discovery. As for unfair competition, we disagree with Hawaiian's argument. Hawaiian itself is 20-percent owned by a foreign entity, and we regard the free flow of investment capital as a vital force in the international business environment. We will impose conditions only to the degree necessary to uphold the law, as we are doing in this case.

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[17] Discovery Reply at 11. Aloha urges that the Department adopt a similar precondition to the hearing with regards to Mr. Ho. This argument is also rejected by Discovery. We agree with Discovery that this objection is purely speculative. Therefore, we find no need to require either Mr. Ho or Nansay to certify that each is willing to comply with the condition contained in this Order or any future conditions which may be imposed by the judge. Moreover, we have ample means at our disposal to enforce our conditions.

[18] *See In the Matter of the Acquisition of Northwest Airlines by Wings Holding, Inc.*,Order 89-9-51, served September 29, 1989, at 8 (discussion of KLM's status as competitor of Northwest)

We reject Discovery's argument that the Department's decision to hold a hearing is based on an erroneous assumption regarding Mr. Ho's business relationship with Nansay Corporation. Although Mr. Ho. may not be a director of Nansay Corporation, he is an officer and director of several sister corporations of Nansay Hawaii, and as a result, Mr. Ho is closely tied to the interests of Nansay Corporation. It is this close relationship, in addition to Mr. Ho's position in Discovery, his ownership of 75 percent of the common stock and the structure of the subordinated debentures which served as a basis for the Department's decision to hold an evidentiary hearing on the issue of Mr. Ho's autonomy.

E. **Mr. Franco Mancassola**

Aloha questions what influence Mr. Mancassola will have on the the daily operation of Discovery as a result of his position as the Vice Chairman of the Board of Directors and his position as the most senior official with sales and marketing expertise.[19] Both ALPA and IAM argue that the Department's prohibition of Mr. Mancassola from serving a liaison function between Discovery's Board and management, and the prohibition of Mr. Mancassola from serving on the executive committee, do not go far enough to ensure that Mr. Mancassola will not serve as Discovery's *de facto* president. IAM alleges that Mr. Mancassola can continue to remain the linchpin between the Board and management even if one of his titles is eliminated, because Mr. Mancassola retains the means to exercise his influence as a director and the second largest stockholder. IAM further argues that Mr. Mancassola's influence as a director may be increased because the Department's order removes three members of Discovery's Board of Directors without specifying any terms of replacement while Mr. Mancassola will continue to be one of the four remaining directors.[20]

In reply, Discovery argues that by establishing an executive committee of the Board of Directors, on which Mr. Mancassola may not serve, and by requiring the President to report to the executive committee, the Department has eliminated any means by which Mr. Mancassola could exercise control over Discovery.[21]

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[19] Other "relevant" factors include: the role Mr. Mancassola played in founding Discovery and securing its agreements with BAe and Nansay, and what assurances, if any, Discovery might have provided to BAe and Nansay regarding Mr. Mancassola. Aloha raises the issue of Mr. Donald Straight's allegedly "limited expertise" to support its argument for the necessity of determining the breadth of Mr. Mancassola's influence over the daily operation of Discovery.

[20] IAM also argues that the terms of the voting trust may enhance Mr. Mancassola's influence as Discovery's second largest stockholder. *See supra* at --.

[21] Discovery states that Mr. Mancassola is pursuing U.S. citizenship. Discovery Reply at 9. We place no weight on Discovery's representation. We have not been told at what stage this process stands, and in the absence of clear evidence to the contrary, we must assume that Mr. Mancassola is still not a U.S. citizen.

One of the issues surrounding Mr. Mancassola is his potential ability to control Discovery by virtue of his expertise in the field; to the degree that such expertise is shared by no other officer of Discovery, this risk deserves consideration. We find that the adjustments to Discovery's managerial structure proposed in the show-cause order should be adequate to prevent such undue influence. First, we will require the three directors to be replaced — by U.S. citizens without affiliation with Messrs. Ho or Mancassola, BAe, or Nansay — instead of just removed. Mr. Mancassola will thus be one of seven rather than one of four directors. We also note that it is not essential that Mr. Mancassola have *no* say in the affairs of the company; he simply cannot be so essential to it that his cooperation can be conditioned upon Discovery automatically doing his bidding. His past role is relevant to this inquiry, but not dispositive; the preventive measures should preclude Mr. Mancassola from dictating to the company even if he were originally its sole founder. We agree with Discovery's position that establishing a line of authority from board to operating officers that explicitly excludes Mr. Mancassola should accomplish this end.

F. **British Aerospace,Inc.**

Aloha argues that the aircraft financing agreement between Discovery and BAe gives BAe "life or death" control over Discovery. In addition, Aloha contends that "so far as can be determined" the total amount of integration payments by BAe to Discovery could reach $6 million for 12 aircraft and is not limited to a total of $2 million as the Department's order indicates. Hawaiian argues that the relationship between Discovery and BAe should be further explored by an ALJ to determine if there is any "hidden *quid pro quo*."[22] Because of the possibility that the final leases may contain surprises or undesirable modifications, IAM argues that the final and executed financial arrangements between Discovery and BAe should be examined before and not after certification is granted. Finally, both Aloha and ALPA argue that the Department should inquire as to what explicit or implicit commitments exist between BAe and Discovery, including a possible agreement with respect to a BAe employee or representative assuming a position as director or employee of Discovery.

Discovery contends that the lease it submitted shows that the transaction between Discovery and BAe is an arms-length one. Discovery attempts to correct what it believes are two mistaken inferences or presumptions contained in the Department's Order. First, Discovery states that the "integration funds" provided to Discovery by BAe are not cost free, but are in fact built into the aircraft financing and will be repaid through leases. Second, Discovery states that the restrictive provisions with respect to type of aircraft

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22 Hawaiian Obj. at 8-9.

and scope of service in Discovery's Articles of Incorporation were drafted at the request of Discovery's management and not for the benefit of BAe. Finally, Discovery argues that the issue of potential control by BAe is obviated by the Department's requirement that the restrictive section of Discovery's Articles of Incorporation be deleted and that all documentation between Discovery and BAe be reviewed prior to the effectiveness of a final Order.[23]

We remain convinced that any potential control of Discovery by BAe will be revealed by the documents that we already have tentatively required the carrier to file with us; we now confirm that decision. The objectors are correct that the contents of the lease agreement and of any other arrangements between BAe and Discovery are essential to resolving this question. Assuming those documents contain nothing untoward, however, we do not perceive BAe's relationship with Discovery as amounting to actual or potential control. In reaching this conclusion, we note that BAe's mission, while not itself a decisional factor, is presumably to market its aircraft, not to involve itself at length in the operations of its customers. Accordingly, we find that, with the measures already proposed in place, BAe does not present a control problem. Finally, we find that the requirement contained in the Order that all the documentation between BAe and Discovery be reviewed prior to the effectiveness of the final Order adequately addresses the question of the final lease agreement.

G. **Procedure**

The contesting parties had various comments with regard to the procedure to be used by the Department to decide this case. Hawaiian argues that it is "absolutely necessary" for an ALJ to be appointed in this proceeding.[24] Hawaiian also argues that Discovery must be required to make available witnesses from Nansay Corporation, Nansay Hawaii, BAe and Mitsui Bank, and if Discovery fails to do so, for whatever reason, then Hawaiian argues that the Department should presume those witnesses would testify or produce documents that are contrary to Discovery's position and resolve the issue against Discovery. Hawaiian has attached a list of documents it believes Discovery should be required to produce.[25] Aloha argues that the contesting parties should be afforded all the financial and other information which the Department has directed Discovery to provide, if necessary, subject to confidentiality measures, prior to the Department issuing any final decision. Aloha has suggested that BAe and the Nansay companies, or at least some of

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[23] Discovery Reply at 10.

[24] Hawaiian Obj. at 13. If an ALJ is not appointed, Hawaiian advocates a rule that any party instructing a witness not to answer or not to produce documents bears the risk, including costs, if the instruction is not upheld on review.

[25] Hawaiian further argues that Discovery should be required to provide certified translations for those original documents that are not written in English.

them, should be made parties to this proceeding, to ensure that all evidence relating to these concerns' relationships to Discovery is produced. Alternatively, Aloha suggests that Discovery's exemption be conditioned to lapse if the Judge concludes that either the Nansay interests or BAe has failed to produce such evidence.

Discovery argues in reply that the Department's procedure has been excessively permissive in favor of the contesting parties and that the Order provides more opportunities for these parties to participate in the Department's proceedings through the oral evidentiary hearing.

The objectors have argued that we should at most award Discovery exemption rather than certificate authority. We reject this argument. The outcome of the hearing will not determine whether Discovery should cease to be certificated, but rather whether Mr. Ho's complete removal from the company's affairs is necessary. The hearing thus is not directed at the threshold issue of Discovery's citizenship, but instead, at what conditions are necessary to preserve that citizenship. If Mr. Ho's removal proves necessary, we are prepared to proceed on the assumption that Discovery will make whatever adjustments are necessary; if it declines to do so, further sanctions are available even if the carrier holds certificate rather than exemption authority.

The contesting parties have requested that they be given access to all documents filed by Discovery with the Department and an opportunity to comment before the effective date of the final Order. We direct that all materials filed in response to the conditions contained in this Order be placed in the Docket and be made available for public inspection.[26] In addition, the parties will have access to and an opportunity to comment on whatever information is filed in connection with the evidentiary hearing subject to any Rule 39 motions.

Finally, we find the suggestion that BAe and the Nansay companies be made parties to the evidentiary proceeding premature. Most proceedings are conducted without the need to bring other parties into it solely to ensure the production of evidence; that responsibility is and will remain Discovery's, regardless of the party status of other persons. It is true that various procedures, mainly relating to the production of evidence, are more streamlined where the entity involved is a party. It has not been shown, however, that this distinction is so crucial here as to justify mandating party status for BAe or any of the Nansay concerns, at least at this point. We regard this decision as well as other procedural matters, as most appropriate ones for the judge; should the judge decide that any other entity merits party status,

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[26] If this material is accompanied by a Rule 39 motion, its availability for public review will be subject to the Department's determination.

procedures are available to make the appropriate request to the Department. Likewise, the judge can order depositions, document productions, translations, and inspections as deemed necessary to fully adjudicate the issues. Moreover, any failure by Discovery to ensure the cooperation of its investors, debtholders, and their affiliates in the development of a complete record under the directions of the judge will lead to negative inferences regarding its citizenship.

III. Conclusion

We will accordingly make final our tentative findings and conclusions in Order 89-12-41, complete with the various conditions proposed in that order. Moreover, we see no other issues relating to the carrier's fitness, and therefore will make final our tentative decision that Discovery is fit.

The issue of Nansay's possible control of Discovery through Mr. Ho will be set for oral evidentiary hearing before an administrative law judge in a separate docket. We expect the Judge to examine every aspect of this issue, regardless of which Nansay company or personnel function may act as the conduits or sources of control. The Judge is to have a free hand in determining appropriate measures to prevent or neutralize such control. These may include continuation of the voting trust, the complete divestiture of Mr. Ho's stock, or whatever other restrictions or conditions may be necessary.

Finally, the question remains of Discovery's request to advertise and issue tickets. We find that the normal interim restrictions and permissions set out in section 201.6 of our regulations (14 C.F.R. 201.6) should govern this situation. That section states that an applicant may advertise, list schedules, and accept reservations, with a notice "subject to government approval," once its application has been approved,[27] but may not accept payment or issue tickets until its certificate becomes effective or a notice is issued authorizing sales. We find that this strikes a reasonable balance between the carrier's interest in initiating operations, the public's need for protection, and our need to ensure in this case that the various conditions we are imposing here are satisfied before air transportation is actually sold. We will accordingly deny Discovery's request to the extent that it seeks authority beyond that accorded by section 201.6.

ACCORDINGLY,

1. We find that, subject to the provisions contained herein, Discovery Airways, Inc., is fit, willing, and able to engage in interstate and overseas air transportation of persons, property, and mail between all points in the United States, its territories, and possessions and will be a citizen of the United States;

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[27] This Order constitutes such approval.

2. We issue a certificate to Discovery Airways, Inc., authorizing it to engage in interstate and overseas air transportation of persons, property, and mail, subject to the conditions contained in this order;

3. The authority granted here shall not become effective until the carrier has filed: (a) evidence in this docket demonstrating that it has satisfied the conditions set out in ordering paragraph 4 below, (b) a copy of the applicant's Air Carrier Operating Certificate and Operations Specifications from the Federal Aviation Administration authorizing such operations, and (c) updated fitness information including the specific financial information set forth in Order 89-12-41 evidencing that it continues to meet the Department's fitness standards;[28]

4. The carrier is directed to:

a. Require Mr. Philip Ho to place all of his voting stock in Discovery in a voting trust, the terms of which are acceptable to the Department, and which is to be administered by an independent voting trustee approved by the Department;

b. Replace Mr. Ho, Mr. Johnston, and Ms. Tanabe as members of its board of directors with three new members, who are to be U.S. citizens and are to be unaffiliated with any Nansay enterprise, Mr. Ho, Mr. Mancassola, or British Aerospace;

c. Clarify section 8.7, Article VIII of its Articles of Incorporation to permit a liquidation of the company only with the consent of a majority of the U.S.-citizen shareholders of each class of stock;

d. Appoint an executive committee to which the President reports, upon which Mr. Franco Mancassola may not serve, to function as liaison between the board of directors and management, to direct corporate policy between board meetings, and to ensure that the President of the company has the ability to fully exercise the powers and responsibilities of that position;

e. Terminate Mr. Mancassola's function as liaison between the board of directors and management; and

f. File in this docket copies of all leases and other agreements[29] between Discovery and British Aerospace that are or will be in effect as of start-up;

5. We grant the motion of Aloha Airlines, Inc. for leave to file an otherwise unauthorized document;

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[28] These latter documents shall be sent to the Department, Attention: Chief, Air Carrier Fitness Division. When the certificate has become effective, we will issue a notice to that effect, with a copy of the certificate, including its effective date, attached. At the time it submits its Operations Specifications, Discovery shall also submit a statement of any changes (including those executed to comply with this order and the terms of its certificate) it has undergone in its key personnel, compliance history, operating plans, or financial posture since its application was reviewed by the Department in Order 89-12-41. Full details on any changes shall be provided to enable the Department to determine Discovery's fitness in light of these changes. Moreover, we will not issue the carrier an effective certificate until we have received evidence of passenger liability insurance meeting the requirements of Part 205 of our regulations.

[29] This is to include summaries of any oral agreements.

6. We grant the motion of Discovery Airways, Inc. for expedited action and agreement to imposition of conditions to the extent consistent with this order;

7. We institute a proceeding, *In the Matter of Discovery Airlines, Inc. and Mr. Philip Ho* , Docket 46760 , which will be set for oral evidentiary hearing before an Administrative Law Judge of the Department at a time and place to be designated;

8. We make the Office of Aviation Enforcement and Proceedings of the Office of General Counsel a party to *In the Matter of Discovery Airlines, Inc. and Mr. Philip Ho* , with dedicated investigative assistance from the Office of Aviation Analysis;

9. The proceeding instituted in paragraph 7 shall consider the issues of whether any of the Nansay companies are in a position to control Discovery through Mr. Philip Ho, and of what corrective action, if any, (including the placement of terms conditions and limitations on Discovery's certificate) is necessary to resolve any control problem discovered; and

10. We deny Discovery's request of October 4, 1989, for authority to advertise and issue tickets for air transportation, except to the extent permitted by 14 C.F.R. 201.6.

11. We will serve a copy of this order on the persons listed in attachment A.

By:

JEFFREY N. SHANE
Assistant Secretary for Policy and
International Affairs

(SEAL)

Certificate of Public Convenience and Necessity for Interstate and Overseas Air Transportation

This certifies that
DISCOVERY AIRWAYS, INC.

is authorized, subject to the provisions of Title IV of the Federal Aviation Act of 1958, as amended, the orders, rules, and regulations issued thereunder, and the attached terms, conditions, and limitations, to engage in interstate and overseas air transportation of persons, property and mail.

This certificate is not transferable without the approval of the Department of Transportation.

By Direction of the Secretary

Issued by Order 90-1-60
On January 29, 1990
Effective on (SEE ATTACHED)

Jeffrey N. Shane
Assistant Secretary for Policy and International Affairs

OST F 6402 (9/85)

Terms, Conditions, and Limitations

DISCOVERY AIRWAYS, INC.

is authorized to engage in interstate and overseas air transportation of persons, property, and mail between all points in the United States, its territories, and possessions.

This authority is subject to the following provisions:

(1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate.

(2) The holder may reduce or terminate service at any point or between any two points, subject to compliance with the provisions of sections 401(j) and 419 of the Act, and all orders and regulations issued by the Department of Transportation under those sections.

(3) The holder shall not provide scheduled passenger air transportation to or from Dallas (Love Field), Texas, and one or more points outside of Texas except that:

(a) The holder may provide charter air transportation not to exceed ten flights per month;

(b) The holder may provide scheduled passenger air transportation between Love Field and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico and Texas, if, in connection with the service:

(i) the holder does not offer or provide any through service or ticketing with another air carrier or foreign air carrier; and

(ii) the holder does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside Texas or the four contiguous states.

(4) The exercise of the privileges granted by this certificate is subject to such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.

(5) The holder shall maintain in effect liability insurance coverage as required under Part 205 of the Department's regulations (14 C.F.R. Part 205). Failure to maintain such insurance coverage renders a certificate ineffective and this or other failure to comply with the Federal Aviation Act or the Department's regulations shall be sufficient grounds to revoke this certificate.

(6) This authority shall remain effective only as long as:

(a) Any equity interest held by Mr. Philip Ho remains in a voting trust acceptable to the Department, to be voted by an independent voting trustee appointed with the Department's approval;
(b) The seats on Discovery's board of directors originally occupied by Messrs. Ho and Johnston and Ms. Tanabe are held by three directors without any affilation to any Nansay Company, to Mr. Philip Ho, to British Aerospace, or to Mr. Franco Mancassola;
(c) Mr. Franco Mancassola does not serve on Discovery's executive committee and performs no liaison function between the board of directors and the company's management; and
(d) Copies of all lease and other agreements between British Aerospace and Discovery are filed with the Department.

(7) The authority granted here shall become effective in accordance with the terms of ordering paragraph 3 of Order 90-1- 60 .

ATTACHMENT A

SERVICE LIST FOR DISCOVERY AIRWAYS, INC.

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The Honorable Charles S. Robb
United States Senate
Washington, D.C. 20510