

**BEFORE THE  
U. S. DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

In re: Notice of Substantial Change in Ownership  
filed under 14 C.F.R. § 204.5 by

**ABX AIR, INC.**

Docket OST-2003-15863

**COMMENTS OF FEDERAL EXPRESS CORPORATION**

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**September 3, 2003**

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The Department has requested public comments on the procedures that the Department should use to review the effect of “[t]he proposed substantial change in ownership and operations” on the citizenship of ABX Air Inc. (“ABX”).<sup>1</sup> Federal Express Corporation (“FedEx Express”) welcomes the Department’s decision to involve the public in this important process. FedEx Express believes that the public interest requires vigorous and transparent enforcement of the U.S. citizenship rules for air carriers until and unless all governmental barriers to free competition in international air services have been removed.

The complex contractual arrangements between ABX and Airborne Express, Inc. (now a foreign-owned company) and the economic dependence on Airborne (soon to be DHL) traffic suggest that ABX is under the control of a foreign enterprise, despite its public ownership. And, the similarities between this transaction and the ASTAR-

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<sup>1</sup> Notice Requesting Comments on Procedures at 1 (Docket OST-2003-15863-1, Aug. 6, 2003).

Deutsche Post/DHL Worldwide Express transaction,<sup>2</sup> makes the suggestion of foreign control highly visible and controversial.

Against this background, the Department must adopt open, transparent fact-finding and decision-making based on a complete evidentiary record. Open procedures in contentious citizenship cases are necessary to ensure that Department review is “[i]mpartial and objective,”<sup>3</sup> and that U.S. citizenship laws are uniformly applied and properly enforced. FedEx Express asks that the Department take the following four steps to ensure that it evaluates ABX’s application objectively and impartially:

1. The Department should place all information relating to the restructuring of ABX in the docket, including summaries of informal discussions, materials provided informally, and any advice or view provided by Department staff to Airborne, ABX, or their representatives.<sup>4</sup>

2. To ensure that the Department can consider all matters relevant to ABX’s submission, the Department should extend to third parties a meaningful opportunity to review the information that ABX has submitted and to provide comments on it.

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<sup>2</sup> The DP/DHL network refers to the network operated by Deutsche Post A.G. (“Deutsche Post”) and DHL International, Ltd., including their U.S. subsidiaries DHL Holdings (USA), Inc. and DHL Worldwide Express, Inc. (collectively, the “DP/DHL network”).

<sup>3</sup> See Letter from Kenneth M. Mead to Congressman Don Young, Mar. 4, 2003 at 5-6 (as filed in Docket OST-2002-13089, Mar. 11, 2003) (stating that because the issues surrounding the citizenship of DHL Airways, Inc. were “[c]omplex, contentious and controversial” the Department should use a formal review in the proceeding).

<sup>4</sup> The August 6, 2003 Department notice directed ABX to file only the “public material” given to the staff in the docket. All material provided to the staff should be made available to interested persons, subject only to measures necessary to protect legitimately confidential materials.

3. The Department should reserve its final decision on the effect of the change in ownership until the current ASTAR proceeding is complete.<sup>5</sup>

4. The Department should use oral evidentiary hearing procedures before an administrative law judge, followed by an Initial Decision, to govern both fact-finding and analysis.

**I. Public Law 108-11 Requires Resolution of ABX's Citizenship By Oral Evidentiary Hearing.**

The Department is required by law to resolve the issues surrounding ABX's restructuring in an oral evidentiary hearing before an administrative law judge. ABX's submission confirms that a control relationship exists between ABX and Airborne, a subsidiary of the DP/DHL network. Such control was acceptable under U.S. law as both companies were U.S. citizens before the restructuring. With the purchase of the ground operations by a foreign interest, this relationship allows a foreign entity, the DP/DHL network, to control the supposedly independent U.S. air carrier ABX. Indeed, the submissions to date show that the relationship is substantially similar to the relationship between the network and the former DHL Airways, Inc., now known as ASTAR Air Cargo, Inc. ("ASTAR").<sup>6</sup> In fact, counsel for ASTAR testified that the ABX-Airborne agreement was the model for the ASTAR agreement, which is now the centerpiece of ASTAR's case pending before Judge Kolko in Docket 13089.<sup>7</sup>

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<sup>5</sup> Docket OST-2002-13089.

<sup>6</sup> In July 2003, DHL Airways, Inc. was restructured and renamed ASTAR Air Cargo, Inc. In August 2003, the DP/DHL network attempted to increase its efforts in the U.S. package market, and ABX, a supposedly U.S. air carrier, was spun off from Airborne. The entities that resulted from each of these separate transactions, ASTAR and ABX, are foreign entities.

<sup>7</sup> Docket OST-2002-13089, Klein deposition at 64, lines 6-14 (DHL asked "that we use, as the baseline document for our agreement the ABX/ACMI agreement".)

The effect of that relationship on ABX's citizenship was raised by evidence in Docket OST-2002-13089, which suggests that ABX's restructuring is an integral part of DP/DHL's most recent acquisition and restructuring of its U.S. operations. Yet Order 2003-4-14 mistakenly excluded consideration of the Airborne/ABX Air transaction in setting this case down for hearing pursuant to the Congressional mandate of § 2710 of Pub. L. 108-11.<sup>8</sup> The Department's rationale was that the acquisition of Airborne by the DP/DHL network was not before it at that time. However, that rationale was undermined when it became clear that repeated discussions between Department staff and persons representing the DP/DHL network and Airborne on the terms of the transaction had been held before the Instituting Order was issued.<sup>9</sup>

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<sup>8</sup> Wartime Supplemental Appropriations Act for the Fiscal Year 2003, Pub. L. 108-11, § 2710 (Apr. 16, 2003) (requiring the Department to use "an Administrative Law Judge in a formal proceeding to resolve docket number OST-2002-13089").

<sup>9</sup> According to the disclosures of Airborne, Inc. to the Securities and Exchange Commission:

- During the remainder of November 2002 through January 2003, the parties refined the proposed structure of the transaction and negotiated term sheets with respect to the merger, the capitalization of ABX Air and the various commercial agreements that would be required between Airborne, which would be indirectly wholly-owned by DHL immediately after the transaction, and ABX Air following the separation and merger . . . The parties decided to submit the negotiated term sheets to the DOT on an informal basis to obtain the DOT staff's views on areas of potential regulatory interest. During the last two weeks of January 2003, the parties and their legal counsel met with the DOT to discuss the terms of the proposed transaction.
- During February and March, Airborne and DHL and their respective legal and financial advisors had numerous meetings and conference calls to review and negotiate the terms of the merger agreement, the separation agreement and the various other agreements between the parties. The parties and their legal counsel also communicated with the DOT regarding the term sheets and the draft agreements, which also had been submitted to the DOT, along with certain financial information regarding ABX Air.
- From March 15 to March 24, the parties and their advisers communicated on a nearly daily basis to resolve the remaining outstanding issues . . . On March 21, 2003, the parties held a conference call with the DOT, during which the DOT offered comments after completing its informal review of the documents and information provided by the parties.

ABX Air, Inc., Amendment No. 3 to SEC Form S-4 at 44-45 (July 11, 2003) (as filed in Docket OST-2003-15863, (August 13, 2003)). ("Amendment 3").

## **II. The ABX Transaction Was Modeled on the July 14 Restructuring of DHL Airways.**

### **A. Financial Support**

In both the ABX and ASTAR restructurings, the DP/DHL network was intimately involved in procuring acquisition funding. ABX received direct funding from DHL Holdings (USA), Inc., a subsidiary of the DP/DHL network. More specifically, DHL Holdings made a loan to ABX of between \$75 million and \$175 million<sup>10</sup> so that ABX would have \$60 million in cash as of the separation date.<sup>11</sup> Similarly, in the ASTAR restructuring, ASTAR obtained third-party financing for the acquisition and for ongoing operations (*e.g.*, aircraft acquisition) only because of the strong credit position of the DP/DHL network.

In addition to the loan from DHL, Airborne and ABX must “cooperate to obtain a credit facility . . . for the benefit of ABX from a bank or other commercial lending institution” in an amount not less than \$25 million.<sup>12</sup> Like the loan, the credit facility is evidence that the DP/DHL network controls ABX.

### **B. Commercial Agreements**

**1. The ACMI Agreement.** Both the ABX and ASTAR restructurings include Aircraft, Crew, Maintenance, and Insurance (“ACMI”) Agreements with the DP/DHL

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<sup>10</sup> *Id.* at 78. The \$75 million loan is evidenced by a promissory note from ABX under which ABX makes interest payments over a 25-year term at a rate of 5% per annum. *Id.* at 91. Note that it appears that ABX is paying Airborne for Airborne’s interest in Wilmington Air Park LLC.

<sup>11</sup> *Id.* at 78.

<sup>12</sup> Master Separation Agreement Among Airborne, Inc., ABX Air, Inc. and Wilmington Air Park LLC (2003) (as filed in Docket OST-2003-15863, Aug. 13, 2003), § 3.1(k) at B-8.

network. In the past, Airborne has provided 98 percent of ABX's revenue.<sup>13</sup> The ACMI services are provided on a cost plus basis.<sup>14</sup> Further, the ACMI Agreement prevents ABX from obtaining any significant third-party services.

Not only will ABX be beholden to the foreign-owned network, ABX has no chance of expanding its customer base. According to the agreement, it can provide ACMI and other services to third parties only if "[t]he provision of such services does not interfere in any material respect with ABX Air's performance of the ACMI services for Airborne."<sup>15</sup> But ABX will have no aircraft with which to serve third parties: the ACMI Agreement covers 100% of ABX's current aircraft, and Airborne initially accounts for "[n]early all of ABX Air's revenue."<sup>16</sup> Moreover, the agreement prohibits ABX from providing air cargo transportation to major integrated international air express delivery companies with annual revenues of more than \$5 billion (excluding the United States Postal Service or an affiliate of Airborne or DHL).<sup>17</sup> Accordingly, if Airborne were to terminate this agreement, ABX would have no customers. As a sister corporation, this was not a problem; as a supposedly separate business, this is a major threat.<sup>18</sup>

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<sup>13</sup> Amendment 3 at 121.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 85.

<sup>16</sup> *Id.* at 116-17.

<sup>17</sup> *Id.* at 85.

<sup>18</sup> *Id.* at 32 warning that:

- "there can be no assurance that the ACMI agreement will be renewed upon its expiration in seven years";
- "a significant reduction in the scope of services under the ACMI agreement . . . would have a material adverse effect on its results of operations";

Thus, the DP/DHL network's control of ABX through the ACMI agreement is similar to the DP/DHL network's control of ASTAR through the same mechanism. For example, under ASTAR's ACMI Agreement, DHL was to provide 90% of the revenue, the services were to be provided on a cost-plus basis, and there are limited opportunities for third-party services.<sup>19</sup>

**2. The Transition Services Agreement.** Under the separation plan, ABX lost the capability of providing a wide range of administrative and support services, including financial, accounting, tax, travel, human resources, and technology support services. Airborne has stepped in to provide these services for at least a year, but this period can be extended by agreement.<sup>20</sup>

**3. The Hub Services Agreement.** In addition to being ABX's principal customer for its air services, Airborne is the principal customer for ABX's hub services. Through this agreement between ABX and Airborne, ABX provides staff to Airborne to conduct hub, line-haul and airport, equipment and facilities maintenance services.<sup>21</sup> ABX also provides staff to Airborne for package sorting and handling services, warehousing

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- if the ACMI agreement or the hub services agreement "were terminated early pursuant to its [sic] terms, it would have a material adverse effect on ABX Air's results of operations".
  - "should Airborne become insolvent or bankrupt after the merger, ABX Air's business would be adversely effected" [sic].

<sup>19</sup> See generally ACMI Service Agreement between DHL Worldwide Express, Inc. and ASTAR Air Cargo, Inc. (July 14, 2003). (DHLA90470-90545, produced by ASTAR counsel on July 16, 2003).

<sup>20</sup> Amendment 3 at 3 and 91. In May 2001 Deutsche Post reorganized DHL Airways, Inc. in an attempt to establish a U.S. operation. In this restructuring, the DP/DHL network provided transition services to DHL Airways, Inc. See generally Operating Protocol Agreement between DHL Airways, Inc., DHL Holdings (USA), Inc., and DHL Worldwide Express, Inc. (Jan. 1, 2001). (DHLA00596-00599, produced by DHLA/ASTAR counsel on Apr. 24, 2003). See also Services Agreement between the same parties (Jan. 1, 2001) (DHLA00600-00606, produced by DHLA/ASTAR counsel on Apr. 24, 2003).

<sup>21</sup> Amendment 3 at 3 and 117.

and line-haul logistics services.<sup>22</sup> The term of the Hub Services Agreement is for three years, with one-year automatic renewals (unless ninety days of advance notice are given).<sup>23</sup> Like the ACMI agreement, the fact that the hub services are provided on a cost plus basis strongly suggests that the agreement is not at arms length.<sup>24</sup> Further, ABX is constrained from seeking new investors, because certain change-of control events would give Airborne a termination right under the Hub Services Agreement.<sup>25</sup>

### CONCLUSION

ABX's independence going forward is rooted in the past. ABX, like ASTAR, is a former in-house airline, now claiming to be independent of its former control relationship. The "controller" is now foreign-owned, still supplying 98% of ABX's business. ABX investors have already been warned that a significant reduction in the scope of services under the ACMI agreement "would have a material adverse effect" on ABX's results.<sup>26</sup> It is now up to the Department to determine in an open and transparent manner whether the separation of these sister companies will create a company that is able to operate independently.

The Department should set the issue of ABX's compliance with U.S. citizenship laws before an Administrative Law Judge for an oral evidentiary hearing to ensure its review of ABX's citizenship is comprehensive. All information relevant to the

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<sup>22</sup> *Id.* at 117.

<sup>23</sup> *Id.* at 89.

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.* at 31.

<sup>26</sup> *Id.* at 32.

Department's review should be placed in the public docket. Further, the Department must examine ABX's citizenship in the context of its relationship to the DP/DHL network. To this end, FedEx asks that the Department reserve its final determination on ABX's citizenship until the review of ASTAR's citizenship is complete.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Comments of Federal Express Corporation have been served upon ABX Air, Inc., this 3rd day of September, 2003, by U.S. mail, postage prepaid and by email, at the addresses below.

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