DHL AIRWAYS

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SERVED: December 19, 2003

UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, DC

2003 DEC 19 A 11:19

DHL AIRWAYS, INC. (ASTAR)

DOCKET NO. OST-2002-13089 - 594
(Citizenship Proceeding)

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE

Found: ASTAR Air Cargo, Inc. (formerly known as DHL Airways, Inc.) is a citizen of the United States.

I. INTRODUCTION

This month marks the centennial of the flights of Wilbur and Orville Wright. For those reading this decision who do not have a parochial interest in the fullness of its contents, better to commemorate December 17, 1903, by putting this down now, as the conclusion is already known from the finding above, and picking up to read "Fate Is The Hunter", by Ernest K. Gann, and "Wings: A History of Aviation from Kites to the Wright Brothers to the Space Age", By Thomas Crouch; or viewing "The Great Waldo Pepper", "Twelve O'Clock High", and "The Right Stuff". On those pages and in those frames, flight is fascinating.

We have come far since the early days of the barnstormers and the intrepid air mail pilots, they reminiscent of the spirit of the Pony Express, and the days when stories were told of struggling airlines rumored to be flying bricks in mail sacks around the Caribbean for the prized airmail subsidies; or of ace Eddie Rickenbacker, whose Eastern Air Lines' aircraft he reputedly ordered be flown high and fast for as long possible, making for steep ascents and descents, to save time and money. We are building a space station, which may become the overnight sorting hub of the future. We are not there yet. But while you are reading this, people in North America are placing on their tables roses that were picked in Ecuador yesterday afternoon. We are in the era of express package

delivery and the "just-in-time" inventory that it feeds. The Wright brothers, makers of bicycles, doubtless would have found this useful.

In this country, express package delivery has made Federal Express a household word, not unlike Railway Express of a bygone age. The United Parcel Service developed and honed ground package delivery to a fine art, and has taken that experience to challenge Federal Express in the air. To return the favor, Federal Express has expanded its ground delivery services. Attempting to take on these two giants is DHL, itself a giant of a force outside this country. Its competitive foray has prompted this inquiry, whether the company that operates the aircraft into which DHL pours its express packages, formerly DHL Airways, Inc. and now ASTAR, is a citizen of the United States. The proceeding has the trappings of a private lawsuit styled ASTAR v. FedEx/UPS for a declaratory order that ASTAR is a citizen of the United States, as this Department's public counsel did not participate. The record made, therefore, lacks the Department's own public policy perspective. Although the parties attempted to fill in that gap with their witnesses or in their briefs, I leave those "bigger fish to fry" to the Decisionmaker. I treat the record here as in a private lawsuit, analyzing only the received evidence in the light of the precedential cases (from the Civil Aeronautics Board and this Department) to determine what declaratory order should issue. From the record taken as a whole, I conclude that ASTAR is a citizen of the United States.

II. CITIZENSHIP STANDARDS: See Appendix

III. DISCUSSION

A. Scope of the Proceeding

To paraphrase Marlon Brando in "Guys and Dolls", the entity whose citizenship is here under review is not "the lady we came in with". When the Department instituted this case on April 14, 2003, the then-DHLA was under different ownership and was a party to different agreements than the now-existing carrier, ASTAR.

Here is what happened. On July 14, 2003, DHLA was acquired by BD Air Partners, LLC (BDAP), a Delaware limited liability company (Aug. 26 Tr. 90-91). BDAP then changed its own name to ASTAR Air Cargo Holdings, LLC (ASTAR

LLC) and DHLA's name to ASTAR Air Cargo, Inc (ASTAR, incorporated in Nevada.) [1] Thus was necessitated a rethinking of what to do in this proceeding.

In orders issued subsequent to that transaction, the Department stated—and then reiterated—that the scope of this case would be limited to "the citizenship of ASTAR under its BDAP ownership [now ASTAR LLC] in order to determine the citizenship of the airline *as it now exists*" (emphasis added) (Order 2003-7-36, July 30, 2003, p. 3; Order 2003-8-19, August 19, 2003, p. 3). Determination of ASTAR's current citizenship "should not include consideration of whether or not ASTAR's prior 'ownership' and actual control were by U.S. citizens," the Department added—"except to the degree that these circumstances, like any others, relate to ASTAR's present citizenship." (Order 2003-8-19, August 19, 2003, pp. 3-4).

Since the structure and relationships of DHLA (*i.e.*, the entity under review as it existed before July 14, 2003) and the circumstances leading up to the July 14, 2003, transaction may bear on ASTAR's citizenship today—as indeed is contended by Federal Express and United Parcel Service (the Joint Parties)—they are evaluated below.

B. Pre-July 14, 2003

1. DHLA

When this proceeding was instituted in April 2003, DHLA's structure was governed by a transaction effective May 14, 2001. Under that structure, the parent of DHLA, DHL Holdings (USA), Inc. (DHLH), had sold 55 percent of DHLA's equity and 75 percent of its voting stock to William A. Robinson for $42 million. DHLH retained the remaining 45 percent of DHLA's shares and the remaining 25 percent voting interest (JT-301, pp. 4, 8, 23).

Robinson, who had been a minority shareholder and director of DHLH under DHLH's former name, DHL Worldwide Express, Inc.,[2] is a U.S. citizen.

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[1] AS-27; AS-33. More precisely, the acquiring entity was BDAP Acquisition Corporation (a Nevada corporation), which merged into DHLA. DHLA then changed its name to ASTAR Air Cargo, Inc., (ASTAR), a Nevada corporation, and the entity whose citizenship is under review. The ownership of ASTAR passed to BDAP. The latter then changed its name to ASTAR Air Cargo Holdings, LLC, which owns one hundred percent of the shares of the air carrier ASTAR. JT-91; AS-T-2, p. 1; JT-404, p. 19; AS-24, pp. 6-7; Aug. 26 Tr. 90-91.

DHLH was not. Although a Delaware corporation, DHLH is a foreign entity because it has been wholly owned (through intermediate companies) by DHL International Ltd. (DHLI), an entity incorporated in Bermuda. DHLI, in turn, has been wholly owned since December 2002 by Deutsche Post, AG, which operates Germany's national postal service, a partially privatized company with a letter-mail monopoly. Deutsche Post is a German company partially owned by the Government of Germany (Orders 2003-4-14, n. 1 on p. 1 and 2001-5-10, p. 1).

Deutsche Post had held a majority interest in DHLI since 2000. While it was buying up the rest, Robinson sold his minority interest in the "old" DHL Worldwide Express, Inc. to a Deutsche Post-controlled subsidiary, DHL Worldwide Express, B.V. (BV). His follow-up purchase of a majority ownership in DHLA—funded partly with an $8 million, non-interest bearing loan from BV—gained him a net profit of $26 million (JT-301, p. 4; JT-603, p. 40). From the ability to use the loan's proceeds, Robinson gained a benefit of an additional $1.75 million (JT-301, pp. 4, 23). Pursuant to his purchase, Robinson also was given a "call" option, under which DHLH held the right to buy his stock at a favorable rate of return to him, and a "put" option at a favorable rate of return as well. The put assured Robinson of liquidity and the concomitant ability to pay off BV's loan (JT-301, pp. 4, 19-21; JT-303, p. 7). DHLH also held veto power over certain business decisions, including recapitalizations, mergers, and a sale of substantially all assets (JT-303, p. 11). And DHLH, pursuant to a "keepwell" agreement, promised to assure maintenance of DHLA's aircraft (JT-303, p. 15).

Following the transaction by which Robinson became DHLA's majority owner and holder of three-quarters of its voting interest, he gained authority to appoint three of the four directors provided under the company's bylaws. He appointed brothers Roy Moulton, his attorney, and Todd Moulton, his financial advisor, plus DHLA's Chairman and Chief Executive Officer (CEO), Joseph O'Gorman. O'Gorman passed away in August 2002. Roy Moulton then became acting Chairman and Vicki Bretthauer, DHLA's Senior Vice President of Operations, became acting CEO. The fourth director, appointed by DHLH, was John Fellows, a citizen of Canada who is also the Chairman of the Board and CEO of DHLH. Robinson was not involved in DHLA's day-to-day operations. He delegated his responsibilities to the Moulton brothers (JT-301, p. 18; JT-603, p. 113).

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[2] Not to be confused with the current Part 297 foreign air freight forwarder by the same name, referred to in this Decision as DHLWE.

DHLA and minority owner DHLH became parties to a wet-lease agreement known in the industry as an "ACMI" agreement (for Aircraft, Crew, Maintenance and Insurance, *see* AS-26, p. 6).[3] Under this contract, DHLA promised to perform air transportation in the United States for DHLWE. The agreement provided that "the primary use" of DHLA aircraft leased to DHLH was to serve DHLWE. While flying these aircraft for third parties was permissible, such activities could not interfere with DHLA's obligations to DHLWE. In fact, over ninety percent of DHLA's business derived from flying for DHLWE. The ACMI agreement also directed DHLH to reimburse DHLA for specified operational costs of the leased aircraft when they were used for third party business. DHLH's parent issued a guaranty of DHLH's payments that it was required to make to DHLA. The guarantee assisted DHLA in obtaining a $60-million line of credit and other loans.

2. Matters Leading up to the July 14 Transaction

In the fall of 2002, not long after the death of DHLA's CEO Joseph O'Gorman, former airline executive John Dasburg was approached for the position (AS-T-3, p. 2). Dasburg had first-rate credentials. A lawyer and M.B.A. with a tax accounting background, he had held a high executive position at Marriott Corporation before assuming the CEO position at Northwest Airlines, Inc. Dasburg presided over Northwest for eleven years (AS-T-3, p. 2). Although primarily a passenger carrier, Northwest ran an impressively large cargo business (Aug. 26 Tr. 141). At the close of Dasburg's tenure the carrier was enjoying among the highest profits in the industry (AS-T-3, p. 2). Dasburg had left Northwest in 2001 to become President and CEO of Burger King. That was his position when a search firm acting on DHLA's behalf contacted him.

Dasburg told his recruiters that he would not be interested in DHLA, or any company position, unless he had the opportunity to acquire control (AS-T-3, p. 2). After a temporary hold, he was approached again early in 2003, when he reiterated his condition (AS-T-3, p. 3). Dasburg met or spoke with Fellows, DHLH's CEO, the Moulton brothers, who were representing the majority shareholder Robinson's interests, as well as Klaus Zumwinkel and Uwe Doerken, two principal officials of the DHL network who headed Deutsche Post and DHLWE, respectively (AS-T-3, p. 4; Aug. 26 Tr. 54, 76; JT-603, p. 56).

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[3] From the Department's strictures on pre-ASTAR agreements, this ACMI agreement is not in the record; it is summarized for the reader's general reference only.

As a result of these discussions, on March 18, 2003, Dasburg entered into an employment agreement with DHLA. The agreement specifically noted that it was Dasburg's intention, alone or with others, to purchase a controlling interest in the carrier (AS-29, pp. 1, 19; AS-T-3, p. 4). Pursuant to the agreement Dasburg also was granted five percent of DHLA's common stock (AS-29, p. 5; Aug. 26 Tr. 63). He assumed the position of DHLA chief executive officer on April 1, 2003 (AS-T-3, p. 4).

Negotiations to acquire control of the company began shortly after that. Dasburg, Richard Blum, a money manager and investor that Dasburg had invited to become a fellow purchaser, and Michael Klein, Blum's and BDAP's attorney in the negotiations, held at least three meetings with representatives of the sellers. These included, at various points, the Moultons (on behalf of Robinson), Doerken (Deutsche Post), and Fellows (DHLH). Klein joined the potential buyers during those negotiations (JT-404, p. 25). Eventually the two sides reached agreement (AS-T-3, pp. 3-6; Aug. 26 Tr. 92-93; Oct. 14 Tr. 2818, 2821).

On May 20, 2003, the parties executed a plan of merger (AS-24; JT-404, p. 66). Robinson and DHLH agreed to sell their DHLA shares—that is, the 95% of company shares not already owned by Dasburg—for $57 million. DHLA's total purchase price was $60 million.[4] Dasburg, Blum, and Klein, through their ownership of BDAP, paid $10 million of the total price, each putting up roughly equal portions.[5] The remaining $50 million was financed by a loan from Boeing Capital Loan Corporation (Boeing Capital) (AS-T-3, p. 8; AS-31 and -32; Aug. 26 Tr. 98; Oct. 14 Tr. 2781, 2796). The loan is being paid off by a DHLWE receivable already owed to DHLA/ASTAR, which was pledged as collateral for

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[4] The parties, then, had valued the five percent of the stock Dasburg already owned at $3 million. AS-T-3, p. 6; JT-403, p. 65; Aug. 26 Tr. 62-63. AS-T-3, p. 6; Aug. 26 Tr. 62-63, 95. Of the $57 million, Robinson received approximately $43.4 million (before repayment of his loan) and DHLH $13.6 million. JT-301, p. 27; *see also* JT-303, p. 24 n. 7 (stating that Robinson received approximately $43.6 million, which included accrued dividends). Eight million dollars of the purchase price was paid to BV in payment of its non-interest bearing loan to Robinson 26 months earlier. JT-403, p. 45.

[5] Klein put up $3 million for himself and $200,000 on behalf of his children, and Blum paid $3 million for himself and $300,000 for his children. Aug. 26 Tr. 95-96. Dasburg contributed $3 million, and smaller amounts were also paid in by other individuals associated with the principals. JT-403, p. 65; Oct.14 Tr. 2793-96.

the loan.[6] Additionally, Deutsche Post provided a guarantee to Boeing Capital assuring the payments and performance of its ultimate subsidiary, DHLWE, under the ACMI agreement that was to be executed simultaneously with the transaction (AS-27).

On July 14, 2003, the transaction closed (the ASTAR Transaction or the July 14 Transaction). DHLA formally changed hands and was renamed ASTAR Air Cargo, Inc., and BDAP was renamed ASTAR Air Cargo Holdings, LLC.[7] ASTAR LLC's three members became ASTAR's board of directors (JT-91) and Dasburg became ASTAR's chief executive officer (Oct. 14 Tr. 2779). Since then, Dasburg became president of both ASTAR and ASTAR LLC (Oct. 14 Tr. 2778, 2991-92).

C. The ACMI Agreement

ASTAR and the foreign air freight forwarder DHLWE entered into an "ACMI Service Agreement" (AS-28; AS-T-3, p. 6). The ACMI essentially governs the relationship between these entities (AS-T-2, p. 9). It is a non-exclusive contract under which ASTAR has agreed to provide lift to DHLWE within the United States and DHLWE has agreed to utilize ASTAR's services (ACMI §§2.1, 2.2 and 2.4(b), at AS-26, pp. 8, 9; JT-403, pp. 50-51; AS-T-2, p. 4).

The ACMI's provisions are central to the contentions of the Joint Parties that ASTAR is under the actual control of a foreign entity and thus is not a citizen under 49 U.S.C. §40102(a)(15). As such, the ACMI holds particular decisional significance.

1. Major Operating Provisions

Under the ACMI, ASTAR has agreed to dedicate the great majority of its aircraft—currently 38 of its 40 owned or leased planes—to DHLWE's freight forwarding operations (Aug. 26 Tr. 69; Oct. 8 Tr. 2167, 2230; Oct. 9 Tr. 2420). ASTAR has also agreed to operate the aircraft at the times and places requested by DHLWE (ACMI §2.3, at AS-26, p. 9). In this connection, the ACMI directs DHLWE to provide ASTAR with a forecast of its operating requirements 120 days prior to each fiscal year. The signatories also have quarterly consultations

[6] JT-31; AS-T-3, p. 8; AS-RT-4, p. 18; Aug. 26 Tr. 100-02; Oct. 10 Tr. 2781-82. The receivable is discussed in greater detail below.

[7] One hundred percent of the shares ASTAR Air Cargo, Inc. are held by ASTAR LLC.

respecting operational planning and aircraft maintenance (ACMI §6.3, at AS-26, p. 15; Oct. 8 Tr. 2137-39).

The ACMI is basically a "cost-plus" contract with a minimum guarantee (Oct. 10 Tr. 2712). In return for ASTAR's services, DHLWE has guaranteed the carrier a minimum annual payment of $15 million.[8] This guarantee remains a DHLWE obligation whether it uses ASTAR's lift or not (ACMI §6.1, at AS-26, p. 14; JT-404, p. 129). DHLWE also has promised to pay specified ASTAR costs and expenses associated with the dedicated aircraft.[9] And while reimbursable costs and expenses generally must stem from the furtherance of DHLWE's business, the air freight forwarder has nonetheless promised to pay the compensation of certain senior ASTAR executives without regard to whether those executives are working on DHLWE's business.[10] ASTAR may earn more than the guarantee. DHLWE has promised to pay ASTAR 7% of the carrier's first $250 million of reimbursable costs and expenses ($17.5 million) and 1% of any amount above that (together, the "base markup") (ACMI §10.1(a) and (b), at AS-26, p. 25; JT-403, p. 105; Oct. 10 Tr. 2630). DHLWE will also prepay two-weeks' worth of ASTAR's estimated recoverable costs and expenses (ACMI §10.5(a), at AS-26, p. 35; Sept. 8 Tr. 1104). The air freight forwarder may inspect ASTAR's books and records in order to verify amounts the carrier claims to be subject to prepayment (ACMI §10.6(b), at AS-26, p. 36; Oct. 10 Tr. 2554).

ASTAR may use the aircraft dedicated to DHLWE for third parties under certain conditions. The aircraft may be so used as long as (1) they are not already being used for DHLWE (Aug. 26 Tr. 69, 208), and (2) such usage does not involve services for major competitors FedEx and UPS.[11] The carrier is not restrained

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[8] Less fifty percent of any profit from third-party services using dedicated aircraft, up to a maximum of $2 million. ACMI §6.1, at AS-26, p. 14; *see also* Oct. 9 Tr. 2364; Oct. 10 Tr. 2627-28.

[9] ACMI §§10.1 and 10.2, at AS-26, pp. 25-33. An exception is made for costs and expenses associated with operating dedicated aircraft on behalf of third parties, known as supplemental flying. ACMI §4.1(b), at AS-26, p. 13; Sept. 12 Tr. 1972.

[10] Oct. 10 Tr. 2535. These executives include the chief executive officer, chief operating officer, chief financial officer, chief legal officer, and chief marketing officer.

[11] Aug. 28 Tr. 578. The actual contract language pertaining to this condition reads, "so long as (ii) such usage does not involve ASTAR's providing air transportation services to major integrated international air express delivery companies with annual revenues in excess of $5 billion (other than the United States Postal Service or any Affiliate of Worldwide [*i.e.*, DHLWE])." ACMI §4.1(a), at AS-26, p. 13. Apparently, the only companies meeting that description are FedEx and UPS. *See* AS-RT-1, p. 4.

from deploying its non-dedicated aircraft in any manner it wishes. However, ASTAR may operate non-dedicated aircraft for third parties only "at the incremental cost and expense thereof" (ACMI §4.2, at AS-26, pp. 13-14; Aug. 27 Tr. 331; Oct. 9 Tr. 2319. Nothing in the ACMI prevents ASTAR from operating other types of businesses (Aug. 26 Tr. 279; Oct. 9 Tr. 2421).

2. Termination

The term of the ACMI is eleven years (ACMI §11.1, at AS-26, p. 38; AS-T-3, p. 7). The agreement allows a party to terminate under certain conditions. DHLWE may terminate upon a change of control of ASTAR, if in connection with that change UPS or FedEx acquires stock in the carrier or a nominee of either becomes an ASTAR director or officer. DHLWE also may terminate in the event that a *force majeure* continues for at least/more than 30 days. A *force majeure* is an act that a party bound to perform cannot control. It is defined as including weather, war, the failure of public utilities, and labor strikes (ACMI §§1.1 and 12.2(c), at AS-26, pp. 5 and 39; Aug. 29 Tr. 855-56).

DHLWE also is permitted to terminate the ACMI upon an ASTAR "Event of Default." ACMI §12.2, at AS-26, p. 39. An ASTAR event of default includes (1) the carrier's failure to maintain an on-time rate (defined in §1.1, at AS-26, p. 7, as arrival within 30 minutes of scheduled arrival) of at least 95.2% during three consecutive calendar months (only delays attributable to mechanical failures or crew or dispatch delays are considered the responsibility of ASTAR); (2) an ASTAR bankruptcy, dissolution, liquidation, or similar event; (3) the occurrence of any "change of control" of ASTAR (as defined in §1.1, at AS-26, pp. 3-4), unless DHLWE is notified beforehand and has been given the opportunity to discuss the terms of the change; and (4) the loss of ASTAR's operating certificate from a Department determination that the carrier is not a U.S. citizen (ACMI §13.1, at AS-26, pp. 41-42; Oct. 8 Tr. 2221).

ASTAR is permitted to terminate the ACMI following a DHLWE default. DHLWE defaults include failure to make required payments to ASTAR, and the bankruptcy, dissolution, liquidation, or similar event affecting DHLWE. ACMI §13.2, at AS-26, pp. 42-43. The carrier may also terminate following a *force majeure* lasting at least 30 days, unless DHLWE elects to continue paying ASTAR its recoverable costs and expenses and the base markup. ACMI §12.1, at AS-26, p. 39.

However, only certain default-triggering events permit the non-defaulting party simply to walk away without an attempt at cure or (in some instances) some form of consultation. DHLWE may "walk" only following ASTAR's bankruptcy (or similar event) or an ASTAR change of control without notifying DHLWE (Aug. 26 Tr. 52, 284-85). And ASTAR may terminate in the event of a DHLWE bankruptcy or similar event. ACMI §13.3(a), at AS-26, p. 43. All other instances of "events of default" require an opportunity for cure. The defaulting party may opt for a minimum of 30 days for cure, and an additional 30 days if it is making reasonable efforts at cure. ACMI §13.3(b), at AS-26, p. 43. But in the case of an ASTAR default because of the carrier's on-time performance, the ACMI provides for more elaborate and time-consuming efforts at cure. These efforts must be allowed to continue for at least 90 days; and if the parties still cannot reconcile, the agreement invokes dispute resolution procedures—and binding arbitration beyond that (ACMI §§13.3(c) and 17.1, at AS-26, pp. 43 and 47; Aug. 27 Tr. 324-26).

A "change of control" (as defined) nullifies DHLWE's obligation to pay the guarantee (ACMI §6.1, at AS-26, p. 14). But termination—for any reason—does not extinguish DHLWE's obligation to reimburse ASTAR for a certain former DHLA receivable left with ASTAR. The receivable is known either as (depending on its timing) the pre-effective or post-effective time maintenance CapEx (*i.e.*, capital expenditure) (ACMI §§12.3(a) and (b), at AS-26, pp. 39-40; JT-303, pp. 23-24; Aug. 27 Tr. 326-27; Oct. 9 Tr. 2386, 2388, 2438; Oct. 14 Tr. 2740-41, 2798-2800). The pre-effective receivable—so called because it was on DHLA's books at the time of closing—represents money spent on dedicated aircraft for maintenance-related expenses which had been capitalized but not yet amortized. The balance at closing was calculated at $60.975 million (ACMI §1.1, at AS-26, p. 6 (definition of "Maintenance CapEx"); Aug. 26 Tr. 77-78; Oct. 9 Tr. 2366; Oct. 10 Tr. 2742, 2766, 2769). The signatories set up the receivable's amortization to track and cover the amortization of the principal of ASTAR's loan from Boeing Capital (JT-403, p. 161; JT-303, p. 23; ACMI Schedule 10.2(a)(i)(B); Aug. 26 Tr. 67-68; Aug. 27 Tr. 401; *see* Oct. 9 Tr. 2391-92, 2396-99). Deutsche Post, as the guarantor of all DHLWE payments and performance due ASTAR, stands behind the amortization of this receivable as well.[12]

[12] JT-403, p. 70; AS-T-5, p. 16; Aug. 26 Tr. 100, 176. Deutsche Post also guarantees payments for seven aircraft under pre-July 14, 2003 leases. AS-T-2, p. 13; AS-T-5, p. 16.

Last, the parties agree that "irreparable damage" would occur in the event that any provisions of the ACMI were not performed in accordance with its terms. The parties also do not relinquish any remedy they may have at law or in equity (ACMI §17.14, at AS-26, p. 50; Oct. 10 Tr. 2707).

D. ASTAR'S Citizenship

1. Technical Requirements

ASTAR has shown, and no party disputes, that it complies with the technical requirements for U.S. citizenship under 49 U.S.C. §40102(a)(15). ASTAR is organized under the laws of the State of Nevada, and its president, directors and other managing officers are U.S. citizens (AS-T-1 and -T-3, p. 9; AS-12). Further, its voting shares are 100% owned by citizens of the United States (AS-T-1, AS-T-3, pp. 9-10; AS-1, -3, -4, and -5).

2. Actual control

Based upon the entire record, I find that a preponderance of reliable, credible, and probative evidence exists to support that, under the totality of circumstances, ASTAR is actually controlled by U.S. citizens.

a) Summary of Opponents' Arguments

The Joint Parties make several contentions in support of their conclusion that ASTAR is actually controlled by foreign interests in contravention of Departmental standards under 49 U.S.C. §40102(a)(15) and, thus, is not a U.S. citizen. Their arguments are broadly summarized below.

The Joint Parties contend that the transactions creating ASTAR and defining its relationship to DHLWE constitute in relevant respects a continuation of the arrangements that the pre-July 14, 2003 air carrier, DHLA, maintained with DHLWE and DHLH. Under the pre-July 14 scenario—including DHLA's ACMI agreement with DHLH—they assert that DHLA was under the actual control of the foreign DHL entities and thus was not a U.S. citizen. Since, the opponent carriers continue, the July 14, 2003 "restructuring" (as they term it) creating ASTAR and its ACMI agreement with DHLWE did little more than to substitute ASTAR for DHLA, ASTAR may not be held to be a U.S. citizen.

The carriers further contend that the favorable deal the buyers received on July 14th itself shows that ASTAR is under the "actual control" of the DHL network. They also assert that many of the provisions of the ASTAR-DHLWE ACMI agreement, individually and/or collectively, show the ability of DHLWE and its ultimate parent, the German postal monopoly Deutsche Post, to influence ASTAR significantly. As such, the Joint Parties contend, ASTAR is not a U.S. citizen. We discuss these arguments in the remainder of this decision.

b) The ASTAR Transaction

The Joint Parties generally assert that the July 14, 2003 transaction was merely a restructuring of DHLA, and that the indicia of control they allege existed prior to July 14, 2003 continue to exist. According to the Joint Parties, ASTAR was "created wholly at the instance of" the DHL network, and thus, is actually controlled by the DHL network. In particular, the Joint Parties argue that BDAP received a "sweetheart deal" on the DHLA purchase price, and as a result, ASTAR LLC and ASTAR are beholden to the DHL network. The Joint Parties further contend that the DHL receivable used as collateral to the Boeing Capital loan was manufactured, indicating that the DHL network actually controls ASTAR.

(1) Continuum of Control

The Department has closely scrutinized transactions financed by foreign entities. *See, e.g., Wrangler Aviation, Inc.*, Order 93-7-26 (July 15, 1993). It is clear that a foreign entity's involvement in or control of such a transaction may raise the specter of potential control. However, merely because the foreign entity may be found to have controlled the transaction or restructuring does not necessarily mean that the foreign entity controls the resulting air carrier. It only provides reason to conduct a review.

I find no merit in the Joint Parties' contention that a continuum of control exists. The various agreements between DHLA and the DHL network that have since been terminated have no relevance to the current control of ASTAR. Further, most of those agreements, such as the "put-call" agreement between Robinson and the DHL network, have no comparable existing agreement. Other now-terminated agreements, such as the ACMI agreements, have only superficial, irrelevant similarities to comparable existing agreements. In any event, any similarity of those agreements to the currently existing agreements would have no relevance in this proceeding, because ASTAR's current citizenship has to stand on

its own, as the Department ruled in shaping this case; thus, those agreements were not admitted into evidence. Accordingly, there is nothing in the record indicating a continuum of control.

(2) Terms of Sale

The Joint Parties contend that DHLA was purchased on the cheap. The buyers, they imply, got such a "phenomenally good deal" that they must have ceded independence and control in return (JT-303, p. 24; *see* AS-RT-5, p. 15; Sept. 9 Tr. 1176, 1216). I reject this view.

The Joint Parties point to valuations of DHLA well above its $60 million purchase price. The Joint Parties' expert witness John Finnerty, a professor of finance and an economics and management consultant (JT-301, p. 1), asserted that on the day of the sale the value of DHLA's equity was significantly greater than the sale price. He used either of two generally-accepted methods of valuation. Based on the comparable publicly-traded companies approach, Professor Finnerty calculated that DHLA was worth between $93.2 and 111.7 million on the day of sale, and between $128.4 and 157.6 million based on the discounted cash flow method (JT-301, p. 17; Sept. 9 Tr. 1150, 1218-19, 1301, 1403). Representatives of William Robinson, the 55% owner of DHLA prior to its sale to ASTAR, also had contended that the company was worth much more than $60 million (Aug. 26 Tr. 64). Finally, the Joint Parties note that the Raymond James investment banking firm had estimated that as of February 27, 2003, the then-DHLA was worth over $100 million—in the range of $104-118 million.[13]

However, ASTAR's expert witness Roman Weil, an accounting professor, persuasively challenged Professor Finnerty's conclusions. The fact that the ranges Professor Finnerty identified from his two approaches were so far apart from each other suggests that the validity of each method is dubious, Professor Weil testified. He explained that different methods used to compute the value of an enterprise normally are expected to confirm one another. When, as here, they do not, the assumptions underlying each approach must be called into doubt (AS-RT-5, p. 17). Further, Professor Weil criticized Professor Finnerty's use of only two companies for his comparables approach as thin and, therefore, lacking a certain comfort level. Even then, Professor Finnerty failed to use the same time span to

[13] JT-119; Aug. 26 Tr. 65, 168; Sept. 9 Tr. 1173-74. JT-119, the exhibit setting out the Raymond James valuation, has been granted confidential status under Rule 12 and thus is not available for public inspection. Sept. 9 Tr. 1202.

compare key variables. The periods he used to evaluate cash flow and market valuation were different, therefore also throwing the resulting calculations into doubt (Oct. 9 Tr. 2344-45).

Moreover, Professor Finnerty overlooked critical inputs. Because DHLA was a privately-held concern, a liquidity discount should have been factored in under either method of valuation, but was not.[14] This discount generally reduces a concern's value by 10-30%. Professor Finnerty also did not properly provide for the risk—essentially unquantifiable—that ASTAR could lose its certificate as a result of the instant proceeding.[15] Finally, Professor Finnerty failed to account for the entity's capitalized expenditures. Thus, he overstated cash flow from operations in DHLA's early years (Oct. 9 Tr. 2346-47, 2350-52, 2355; *see also* Oct. 14 Tr. 2732-33, 2762). Professor Weil concluded that the valuation evidence does not substantiate any value for ASTAR as of July 14, 2003 (AS-RT-5, p. 17). But, he added, Professor Finnerty's failure to account for the mentioned elements in his analysis suggests that Professor Finnerty's valuation of DHLA on the date of sale "is on the order of double what it should be."[16]

Additionally, since the price paid by BDAP for DHLA constitutes a sunk cost—money already spent—it would not affect the owners' incentives to maximize profits in the future. Sunk costs are not relevant to owners' decisions going forward (Sept. 9 Tr. 1205-07).

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[14] Sept. 9 Tr. 1411. A liquidity discount, as Professor Finnerty explained, "arises from an inability to turn an asset into its full value in cash immediately." It attempts to quantify "the implicit cost of trying to market [the entity] and find a buyer." Sept. 9 Tr. 1410-11.

[15] AS-RT-5, pp. 18-19; Oct. 9 Tr. 2355-56. Professor Finnerty countered that this risk was "minimal," but nonetheless reflected in his overall discount rate of ten percent. Sept. 9 Tr. 1417-18. He did consider the liquidity discount and the risk of certificate loss, Professor Weil acknowledged, but only in the context of suggesting that the "control premium"—the imputed gain in a company's value on account of skilled management (Oct. 9 Tr. 2357)—washed it out. Yet, as Professor Weil noted further, Professor Finnerty performed no analysis to generate that conclusion. Since the control premium is generally accepted to be just three-four percent, it could not "wash out" the liquidity discount and the discount quantifying the risk of certificate loss. Oct. 9 Tr. 2357. Professor Weil rejected Professor Finnerty's analysis as "too slapdash" (Oct. 9 Tr. 2358).

[16] Oct. 9 Tr. 2358. It is also worthy of note that the Joint Parties' expert Dr. Brian Campbell, although an aviation consultant and not a valuation expert, combined features of Professor Finnerty's valuation methods and his own calculations and arrived at a value for DHLA/ASTAR in 2003 of $68.25 million, near its actual sale price of $60 million. Sept. 10 Tr. 1544-48, 1550.

In any event, the evidence as a whole demonstrates that the sale of DHLA to BDAP was simply an arm's-length transaction (AS-RT-4, pp. 8, 22). It reflected the state of the market at that point—no more, no less. The only witnesses actively involved in the negotiations who testified, the ASTAR principals Dasburg, Klein, and Blum, offered testimony in support of that conclusion. They emphasized that the negotiations leading up to the sale were protracted and sometimes contentious. They featured hard bargaining (Aug. 26 Tr. 48, 86, 168). Each of these witnesses was credible and no reason exists to doubt their accounts.

Klein, who led the negotiations for the ASTAR principals, testified that he seized advantages when he could (AS-RT-3, p. 4; Oct. 14 Tr. 2757). One dealt with the unknowable, but not insignificant, risk that DHLA/ASTAR would fail to be found a U.S. citizen. In view of the DHL network's large investment in U.S. operations—over a billion dollars, according to Klein (Oct. 14 Tr. 2758)—a finding of non-citizenship would undoubtedly trigger for the network serious financial ramifications (AS-RT-3, p. 4; AS-RT-5, p. 14). Klein used that cloud over the bargaining to maximum advantage (AS-RT-3, pp. 4-5). Additionally, the timetable of this case may have pressed the then-owners into selling a bit more hastily than they would have liked—a buyer advantage Klein also exploited (AS-RT-3, p. 4; AS-RT-5, p. 14).

Even if Deutsche Post (through DHLH) "gave away" upwards of $40 million, it was arguably worth at least that much to gain access to the U.S. market by way of an able team of U.S. citizens headed by a proven airline executive. The DHL delivery network is worldwide. It is worth billions (AS-RT-5, p. 15; Oct. 10 Tr. 2467). But without a viable U.S. foothold, its value is much less—"if not," in the words of Professor Weil, "nearly worthless." (AS-RT-5, p. 15; AS-RT-3, p. 4; Oct. 9 Tr. 2428). By selling to BDAP, the DHL network obtained a financially substantial group of U.S. citizens headed by a skilled, accomplished executive, Dasburg. Dasburg, as has been noted, has successfully led a major airline as well as other large companies. People with his credentials are not available in great quantity. Such individuals thus possess a "great deal of bargaining leverage" (Oct. 10 Tr. 2467, 2563). The Deutsche Post family, by selling to the ASTAR group, could be assured that their considerable investment in the U.S. would rest with savvy U.S.-citizen businessmen with a track record and reputation of quality and, so important in the express air freight business, reliability (Oct. 10 Tr. 2563; AS-T-5, p. 43). Such assurances do not come cheaply. As Professor Weil stated, "protecting [the DHL network's] quality over the next decade would be worth at least $40 million." (AS-RT-5, p. 16). Thus, the sellers exchanged value for an

operation which promised to enable them to compete more strongly (*see* AS-RT-4, p. 12; Oct. 10 Tr. 2563). In this view, it was a modest price to pay (Oct. 9 Tr. 2438).

Nevertheless, whether BDAP received a "sweetheart deal" is irrelevant because an inference that the sale price reflects an agreement by ASTAR to cede any type of control to the DHL network finds no support in the record. Partly what distinguishes *Daetwyler* (*see* Appendix) from the proceeding at bar is that his control of the applicant air carrier's creation allowed him to provide residual control unto himself in the resulting corporate structure even though he did not surpass the statutory ownership ceiling. Here, no evidence tends to substantiate the retention of residual control from the terms of sale. To make such a finding without any independent support simply is too great a logical leap. Assuming *arguendo* that the transaction were a "sweetheart deal" for BDAP, it does not show influence, much less control, by anyone. More favorable terms for a party more readily demonstrates that party's independence (Oct. 10 Tr. 2548).

For the reasons stated, I conclude that the sale price, rather than suggesting some sort of side or secret agreement, simply reflected market circumstances. It reflected the relative bargaining power of the parties to the sale. The sale price does not signify control of ASTAR by the DHL network.

(3) The Collateral

The Joint Parties note that the Boeing Capital loan financing the bulk of the purchase is secured by payments guaranteed by Deutsche Post. According to the Joint Parties, the DHL network controls ASTAR because it allowed the ASTAR Transaction to occur by, inter alia, providing a $60.9 million receivable in the form of a CapEx asset owed to DHLA as collateral to secure the Boeing Capital loan. The Joint Parties assert that without that receivable, ASTAR would not have been able to secure the Boeing Capital loan. Further, the Joint Parties accuse DHLWE of creating that receivable for the sole purpose of funding the ASTAR Transaction.

I find that nothing on the record supports a finding of control under such a theory. The receivable is merely money already owed to DHLA/ASTAR by the DHL network for services already rendered and is not something Deutsche Post or its subsidiaries can legally refuse to pay. Therefore, no enforcement mechanism exists to effectuate a credible threat to rescind payment of the receivable.

(4) The Deutsche Post Guarantee

A further contention is that Boeing Capital would not have agreed to finance the purchase on presumably favorable terms without the Deutsche Post guarantee (JT-Supp.-304, pp. 5, 7; Sept. 8 Tr. 938, 970). While the guarantee undoubtedly made Boeing Capital's decision easier (Oct. 14 Tr. 2788), the evidence does not show such a cause and effect (Aug. 26 Tr. 99; Oct. 14 Tr. 2753, 2791-93). Nor does it matter. Control might be intimated in the sense that Deutsche Post, through its guarantee enabling the loan, spawned ASTAR, but that connection does not show control by Deutsche Post of ASTAR.

Like sweetheart deals, guarantees may raise some eyebrows and encourage a review to unearth control, but they do not per se indicate that control actually exists. As ASTAR's expert Professor John Coffee, Jr. noted, once Deutsche Post guaranteed DHL's payment under the ACMI Agreement, it must have the ability to withdraw that guarantee in order to have leverage over ASTAR, whether in obtaining financing or otherwise (ASTAR Br. 55 citing AS-RT-1 at 7). There is no evidence on the record indicating that such ability exists.

c) Threat of ACMI Termination

It is generally argued that DHLWE is in actual control of ASTAR through its power to terminate or otherwise walk away from the ACMI, and thus cease making payments under the ACMI. The Joint Parties contend that DHLWE can exercise unwarranted influence over the carrier through such power. Aviation consultant and the Joint Parties' expert Dr. Brian Campbell, in a typical formulation of this idea, contended that DHLWE's threat of termination is a "lever over [ASTAR's] head to control their activities" (Sept. 10 Tr. 1606; *see also* Aug. 27 Tr. 402, Aug. 28 Tr. 442 (Professor Gordon)). The Joint Parties further argue that termination, which would allow DHLWE to cut off most payments to ASTAR—including the $15 million per year guarantee and its two-weeks' advance reimbursement—would be devastating for the carrier (Aug. 27 Tr. 326; Aug. 28 Tr. 573; Sept. 8 Tr. 974; *see* ACMI §10.5(b), at AS-26, p. 36; Joint Parties' Post-Hearing Br., p. 51). ASTAR does little non-DHLWE business. DHLWE's withdrawal would put ASTAR into an "immediate cash crisis" (Aug. 27 Tr. 398). Without its relationship to DHLWE and the DHL network, ASTAR would be "insolvent;" it would no longer be "viable" (Sept. 9 Tr. 1151).

This contention does not hold water. DHLWE's ability to leverage by the threat of withholding payments is severely constrained by its obligation nonetheless to pay the ACMI's "termination expenses"—the amortization of the time maintenance CapEx (ACMI §§1.1 and 12.3(b), at AS-26, pp. 39-40; Aug. 27 Tr. 326. The prospect of termination, further, would be meaningful only if DHLWE could terminate without incurring significant consequences (Oct. 10 Tr. 2487). But this is not the case. Except for the narrow circumstances permitting unilateral termination, it is unlikely that DHLWE would breach the agreement. The downside risk to it would be unacceptably large. The possibility is sufficiently remote to warrant a conclusion that DHLWE is not in "actual control" of ASTAR.

DHLWE's ability to terminate under the ACMI is in fact "severely limited" (AS-RT-4, p. 11). "Events of default" permitting termination in most cases allow ample opportunity for cure. Default can be forestalled if good-faith efforts at cure are taking place (ACMI §§13.1(f) and 13.3(b), at AS-26, pp. 41, 43; Oct. 10 Tr. 2470). That circumstance permits a drawn-out process. The termination procedure respecting on-time performance is especially lengthy, stretching out almost endlessly.[17] Under an event of default, which has procedures for cure, DHLWE cannot then realistically exercise actual control through the threat of termination.

Termination without proper cause could prove unattainable in any event. By setting out that "irreparable damage" would occur in the event of a failure to perform, the ACMI expressly allows the parties to seek injunctive relief (ACMI §17.14, at AS-26, p. 50; Oct. 10 Tr. 2478, 2707-08). In the short run at least, there is a "very strong argument" for an injunction (Oct. 10 Tr. 2478). Termination might never occur.

Even if DHLWE managed to terminate the relationship, its resulting expense might prove higher than it would be willing to bear (Oct. 10 Tr. 2479). A lawsuit would likely follow (Oct. 9 Tr. 2295; Oct. 10 Tr. 2487). And it could prove so costly to DHLWE that threats of termination without cause would be, in the words of Professor Janusz Ordover, "highly incredible" (Aug. 26 Tr. 289). But such circumstances are far from certain. The Joint Parties' expert Professor Jeffrey Gordon suggested that it could be economically rational for DHLWE to

[17] Oct. 10 Tr. 2470. Professor Coffee added that courts are reluctant to interfere with alternative dispute resolutions for which parties have contracted. Oct. 10 Tr. 2528-29.

engage a lawsuit, even at the risk of eventually losing it and absorbing damages; it is a question of incurring short-term losses for long-term gains, he explained (Aug. 28 Tr. 678, 685; Aug. 29 Tr. 716-17, 721, 745). Thus, the expert evidence does not clearly suggest that the one outcome is more likely than the other. It cannot be concluded, then, that a DHLWE breach in this scenario is more likely than not.

But, a DHLWE threat of termination to influence or manipulate ASTAR must be considered in its commercial context. Thus viewed, the threat is illusory, because for DHLWE to walk away from the ACMI would be commercially irresponsible. The freight forwarder would need to find thirty-eight aircraft to fit its network without delay, or risk losing significant market share that it may never recover. The Joint Parties' expert Dr. Brian Campbell noted that the DHL network "cannot take the risk of a major service interruption in the marketplace" (Sept. 10 Tr. 1601) and ASTAR's witness, Professor Roman Weil, stated that a market share loss due to a service interruption would be difficult to get back (Oct. 9 Tr. 2412-15). Where would DHLWE find the planes? It could not engage them itself. As Professor Coffee explained, DHLWE would likely need to stitch together a "ma and pa" network—a few aircraft from this operator, a few from that. That is relatively inefficient and, as such, competitively damaging. It certainly would not work as well as the current arrangement DHLWE has with ASTAR. By breaching, then, DHLWE plainly would be harming its own business—and thereby jeopardizing the DHL network's sizeable investment in the U.S. market.[18] A breach, in sum, would be commercially unwise (*see* Aug. 27 Tr. 321-22). Against this background, DHLWE can make no credible threat of termination in order to bend ASTAR to its will (Aug. 26 Tr. 299). The argument for actual control of the carrier on this ground fails.

It was also suggested that ASTAR would itself generate an "event of default" through failing to bring its planes in on time in violation of the terms of the ACMI. Dr. Brian Campbell, who examined the carrier's schedule, fleet (by type, mix, age, and quantity), and level of congestion, warned that ASTAR's schedule would produce impermissible levels of delay or cancellation (Sept. 10 Tr. 1522, 1633, 1640, 1642, 1661, 1673; Sept. 11 Tr. 1758). He asserted also that the fleet was not competitive, either on an operating or cost basis. The carrier's planes are too old, too small, and too expensive to operate, he maintained (Sept. 12 Tr.

[18] Aug. 26 Tr. 300; Oct. 10 Tr. 2475-77. Additionally, replacing ASTAR with another carrier or carriers could, depending on circumstances, open the DHL network to renewed -- and perhaps more persuasive -- charges that it would be in actual control of that successor carrier(s) in violation of the citizenship statute. Oct. 10 Tr. 2476.

1969, 1985-86). But Gary Hammes, who, as ASTAR's chief operating officer, runs its day-to-day operations (Oct. 8 Tr. 2109, 2111), effectively refuted these claims. He debunked the suggestion that ASTAR could not deliver its cargo in a timely manner. ASTAR, he said, has consistently exceeded the ACMI's minimum on-time percentage of 95.2% (§13.1(a), at AS-26, p. 41); in fact, the carrier has not performed at less than a 97% on-time rate in his nearly 17-month tenure at the company.[19] ASTAR's fleet, further, is standardized and is optimized for its network (AS-RT-6, pp. 2, 3). Hammes also explained that aircraft age is irrelevant; what matters is the number of cycles a plane has operated and the type and quality of maintenance performed (AS-RT-6, p. 3; Oct. 8 Tr. 2115-16). The carrier, he further asserted, has sufficient aircraft to operate its DHLWE schedule. Dr. Campbell's notion that ASTAR operated a closed-loop schedule was simply wrong (AS-RT-6, p. 5; Oct. 8 Tr. 2117). Further, Hammes pointed out, the route schedule attached to the ACMI, upon which Dr. Campbell based his conclusions, has never been used by ASTAR. It was only meant to be illustrative.[20] Last, Hammes stated that ASTAR was not experiencing any notable congestion problems—or, at least, problems no worse than those experienced by Federal Express (AS-RT-6, p. 7; Oct. 8 Tr. 2118), thereby ameliorating Dr. Campbell's concern.

I conclude, then, that there is no reason to find that ASTAR cannot fulfill its operating commitments with DHLWE. Hammes was a credible witness whose conclusions were based on "hands-on" experience and reliable information. His testimony impels the finding that ASTAR's fleet and schedule do not reasonably suggest the possibility of default for failure to meet the required on-time standard or, for that matter, any other matter under the ACMI.

Finally, to assume that termination would necessarily hurt ASTAR financially is mistaken. It could in fact prove a bonanza. The ACMI obligates DHLWE in the event of termination—for whatever reason—to pay the ASTAR receivable known as the pre-effective time maintenance CapEx and/or the post-

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[19] Oct. 8 Tr. 2113-14. I acknowledge that the on time performance rate requirement may increase to 98% in the event of a "change of control." However, whether a "change of control" occurs depends upon ASTAR's own activities. Further, a "change of control" comprises only a small portion of ASTAR's owner's alienation rights (§13.1(i), at AS-26, pp.41-42).

[20] AS-RT-6, p. 5. Dr. Campbell acknowledged that he did not have the information necessary to prepare a real-life routing of each aircraft (Sept. 11 Tr. 1840). Nor did he know the cycles recommended or used per aircraft or their maintenance schedules or histories (Sept. 11 Tr. 1735, 1758, 1821).

effective time maintenance CapEx (ACMI §1.1, at AS-26, p. 7 (definition of "termination expense") and §12.3(b), on pp. 39-40). The balance of the pre-effective CapEx at the time of closing was nearly $61 million—more than the Boeing Capital loan ($50 million) and the three principals' investment ($10 million) combined.[21] In addition to this money, the carrier could sell its assets, which would include aircraft and aircraft parts (Oct. 10 Tr. 2666-67; Oct. 14 Tr. 2798). Thus, although ASTAR would have to absorb liquidation expenses should it cease to exist (Aug. 26 Tr. 180-81; Oct. 14 Tr. 2799-2800), termination by DHLWE could prove profitable—putting aside the distinct possibility of monetary recovery as a result of a lawsuit.[22] In these circumstances, the ability to influence ASTAR's direction through DHLWE's threat, or ASTAR's belief, that termination will have grim financial consequences for the carrier, will not wash. DHLWE does not exercise "actual control" of ASTAR through the possibility of dire financial difficulty through termination.

The ACMI agreement's provisions guaranteeing $15 million per annum for 11 years significantly diminishes the amount of control DHLWE may have over ASTAR. No easily accessible effective mechanism exists to permit DHLWE to cut off the stream of payments or limit the incentives of ASTAR to pursue other business (Oct. 10 Tr. 2470-71). Accordingly, the ACMI Agreement provides no credible threat of termination in the eyes of a rational economic actor.[23]

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[21] Aug. 26 Tr. 180-81; Oct. 14 Tr. 2798-99. Klein acknowledged that it is "not typical" to receive as an asset in an acquisition a receivable exceeding the purchase price of the acquired entity. Oct. 14 Tr. 2794.

[22] Dr. Campbell felt that the carrier would be insolvent "before very long" (Sept. 10 Tr. 1561), but his view was predicated on ASTAR paying the Boeing Capital loan out of the proceeds of its ongoing operation. Sept. 10 Tr. 1599. That note, however, is to be paid on a schedule similar to the schedule of its CapEx receivable.

[23] Whether Dasburg, Blum or Klein are "the type to be bluffed into submissions" is not relevant to our inquiry. We cannot rely on the individual personae of various businessmen to determine the credibility of economic threats, but rather, we must rely on the fictitious rational economic actors in the same position as those businessmen. Having said that, these are a tough crew. Dasburg is a savvy and accomplished company leader; Klein, a tough negotiator, clearly piqued that he had to bother being in our courtroom at all; and Blum, astute in the whims and caprices of the financial markets, also pained at having to spend his valuable time with us. They are not as numerous as "The Magnificant Seven", but I suspect that one messes with this trio at his peril.

d) Alienation Rights

The Joint Parties argue that many of the ACMI agreement's seemingly unrelated provisions give DHLWE the ability to prevent a "change of control" of ASTAR—or rather, to prevent Dasburg, Blum and Klein from selling a controlling interest in ASTAR to what DHLWE would consider an undesirable purchaser. According to the ACMI agreement, a "change of control" of ASTAR occurs when, *inter alia*, the initial stockholders at the beginning of a two-year period cease to own 50% of ASTAR's voting power (ACMI § 1.1, at AS-26, pp. 3-4).

According to the Joint Parties, section 13.1(h) of the ACMI agreement requires ASTAR to notify DHLWE and consult "in good faith" with DHLWE prior to a "change of control," thus providing DHLWE with "advance notice and an opportunity to implement poison pills including, without limitation, (1) the elimination of the minimum guaranteed payment to ASTAR, (2) the return to DHL of the two-week prepayment to ASTAR, and (3) the elevation of the minimum on-time performance guarantee."[24] The Joint Parties contend that DHLWE's exercise of those rights in the event of a "change of control" would endanger 90-95% of ASTAR's business, and therefore, effectively preclude the sale of ASTAR to even the most solicitous buyer.

Apparently, the ACMI agreement provides DHLWE with significant *de facto* control over ASTAR in the event of any "change of control," which is an Event of Default. DHLWE can prevent a "change of control" by threatening to limit, if not extinguish, ASTAR's financial lifeline, which would significantly affect ASTAR's pockets and possibly its marketability to potential purchasers and underwriters. During the notification and consultation period required by §13.1(h), DHLWE would also have the power to renegotiate the ACMI agreement by using such threats as leverage. DHLWE would not risk losing ASTAR as a service supplier, because a "change of control" is not an ACMI terminating "Event of Default" in those circumstances, and thus, DHLWE has little, if any, incentive to apply its "poison pills" in the event of a "change of control."

On the other hand, and determinative of this issue, under the ACMI agreement ASTAR LLC can still sell as much of the equity as it wishes to any

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[24] JT Br. 68-69 (citing ACMI Agreement §§ 6.1, 10.5, 13.1(h) and 13.1(i), at AS-26; JT-303 at 12; JT 303 at 22). In actuality, § 13.1(h) provides for an "event of default" when ASTAR fails to notify and consult with DHLWE in good faith prior to a "change of control" of ASTAR.

individual or group, as long as it retains at least 50% of the voting power or all of the equity and voting power in a disbursed offering to public or private investors, so long as no individual or "group" (as defined in Regulation 13D under the Securities Act of 1934) owns 50% or more of the voting rights (ACMI § 1.1, at AS-26, pp. 3-4; Oct. 10 Tr. 2499; AS-T-2, at 20). Since the ACMI's "change of control" provisions only restrict a fraction of ASTAR's owners' full alienability rights, I do not view those provisions as reflecting significant control by DHLWE over ASTAR.

e) The DHLWE-ASTAR Relationship

The Joint Parties also contend that the current DHLWE-ASTAR relationship, particularly as it is reflected in the terms of the ACMI agreement, demonstrates that DHLWE and/or Deutsche Post are in "actual control" of ASTAR for purposes of determining the air carrier's citizenship.

I reject their arguments. The relationship between the entities does not show that DHLWE, or any of its foreign affiliates, are in actual control of ASTAR. Certain provisions perhaps suggest that ASTAR could be manipulated in certain circumstances, but in fact require actions that make little business sense or are otherwise very unlikely to happen. No entity associated with the DHL network is, because of the ACMI agreement, in "actual control" of ASTAR.

(1) DHLWE as a Predominant Customer

ASTAR is a major air component of DHLWE's freight forwarding business in the United States (JT-403, pp. 50-51). About 75% of DHLWE's U.S. domestic express packages are flown with ASTAR (JT-303, p. 21). Conversely, flying for DHLWE is a significant, indeed very large, component of ASTAR's business. ASTAR receives about 90% of its revenues from DHLWE (Aug. 26 Tr. 69; Oct. 9 Tr. 2307). Thirty-eight of the carrier's forty planes—soon to be thirty-eight of thirty-nine—are dedicated to DHLWE (Oct. 8 Tr. 2231). It is not hyperbole to state, as does Professor Gordon, that ASTAR "hardly exists" apart from DHLWE's need for its services (JT-303, p. 20).

Nevertheless, a predominant customer may actually control an air carrier only when 1) that predominant customer (i.e. DHLWE) is in a position to control the air carrier (i.e. ASTAR) by threatening the removal of certain benefits, such as the predominant customer's business and revenues, and 2) a rational economic

actor in the air carrier's position would perceive that threat as a credible one. As Professor Coffee testified, you only have control "if you have a strong enforcement mechanism that permits you to cut off that stream of payments" (Oct. 10 Tr. 2468-69); such threats would be available in limited circumstances mostly controlled by ASTAR and could not be taken seriously.

(2) ASTAR as a Captive Supplier

The Joint Parties allege that ASTAR is a captive supplier to DHLWE because ASTAR does not intend materially to increase third-party business, and, even if it did have such an intention, ASTAR would be limited in its ability to do so by the ACMI agreement (JT Br. 59). On the other hand, ASTAR asserts that the ACMI agreement does not prevent ASTAR from seeking non-DHLWE business as supplemental and filler cargo on its dedicated aircraft and for all cargo on its non-dedicated aircraft.

Under the ACMI, dedicated aircraft cannot be used for third-party service unless DHLWE passes on it first. However, the fact that ASTAR's dedicated aircraft may not be used elsewhere without a "first call" right, or be used to service FedEx and UPS at all, does not show significant DHLWE control of ASTAR.

ASTAR flies DHLWE's routes only during the nighttime. During that time, ASTAR may secure non-DHLWE business to ship "filler" or "supplemental" cargo on the unused portion of the dedicated aircraft.

Further, when the dedicated aircraft are not being used for DHLWE's purposes (i.e. during the day), ASTAR may use them solely for the purpose of transporting non-DHLWE cargo (Aug 26 Tr. 208-09; Sept. 10 Tr. 1659-61; Sept. 12 Tr. 1971-72), (ACMI §4.2, at AS-26, p. 13-14; AS-T-2, p. 4). In fact it has provided charters for the U.S. Department of Defense, the U.S. Postal Service, and other entities (AS-T-5, p. 22; Oct. 8 Tr. 2164, 2230). ASTAR also may add to its total of non-dedicated aircraft.

Granted, ASTAR's growth away from its ACMI responsibilities is entirely speculative. The carrier had formulated no written plans to expand by the initiation of the hearing (Aug. 26 Tr. 183; *see also* JT 53, p.6; Oct. 10 Tr. 2779-80), although its chief executive officer, Dasburg, has stated his intention to do so (AS-T-3, p. 10). Dasburg has begun to explore possible alliances and acquisitions (Oct. 14 Tr. 2748-49); where that may lead right now is anyone's guess. But the

carrier's success *vel non* to expand third-party business is irrelevant to the question of control. The salient point is that its ability to do so is beyond DHLWE's control (AS-T-5, p. 23). That the carrier may procure and develop meaningful air freight business independent of DHLWE demonstrates in itself that DHLWE does not control it (Aug. 26 Tr. 212-15; Oct. 9 Tr. 2278). Control still rests in the hands of ASTAR because it maintains the power of choice to pursue the business model it crafts.

For ASTAR to increase its cargo operations by flying for third parties requires a market for such services, of course. In the absence of a market it cannot expand (Oct. 9 Tr. 2423). But even assuming that no market exists—which arguably would suggest *de facto* DHLWE control—does not meaningfully constrain ASTAR's ability to grow. Market conditions are undoubtedly temporary (Oct. 9 Tr. 2420-21). Circumstances change. The weight of the evidence in any event shows that the air cargo business is healthy—even, in Professor Ordover's opinion, "robust" (AS-T-5, p. 23). While the domestic U.S. freight and express market (which excludes mail) has contracted since 2000 (Sept. 11 Tr. 1895, 1898, 1901), testimony uniformly suggested that recovery will occur in the near term (Sept. 11 Tr. 1907-08; AS-66). The carrier in any event could, of course, decide to expand into unrelated businesses. While the Joint Parties' expert Jerrold Zimmerman, a business professor, testified that such a course did not make economic sense (Sept. 8 Tr. 1064), that is neither here nor there. Whether ASTAR exercises the option to grow outside its core business does not remove the option. The existence of the option, which enables the carrier to act independently of DHLWE and the Deutsche Post family, is the critical consideration (Oct. 9 Tr. 2421).

The ACMI in any case gives ASTAR other significant incentives to expand. DHLWE's guaranteed minimum yearly payment of $15 million allows the carrier great freedom to seek different avenues of growth (Oct. 10 Tr. 2469, 2486). By cushioning the risk of loss, the payment in effect encourages the carrier to pursue opportunities and take chances it might not otherwise take—including exposing itself to a downside risk by way of enlarging the business. The guarantee plainly enhances ASTAR's ability to seek third-party business.[25] Further, in setting aside

[25] AS-T-5, p. 28. Additional financing, should the carrier need or otherwise decide to obtain it, would not present a problem either. The capital markets are Blum's business. Dasburg, as a former chief financial officer, has raised billions himself. Aug. 26 Tr. 51-52; Oct. 14 Tr. 2750. Klein testified that the capital markets are "very receptive" to the air cargo business. Oct. 14 Tr. 2750.

revenues that ASTAR may generate from independent services (i.e. third-party flying using non-dedicated aircraft) for the carrier's own account, the ACMI gives ASTAR another important incentive to expand (ACMI §4.2, at AS-28, pp. 13-14; JT-404, p. 92; AS-RT-3, p. 4). Finally, ASTAR's low one percent profit margin for reimbursable costs and expenses over $250 million also demonstrates a "very strong incentive" for the carrier to look for third-party business after achieving $250 million in business from ASTAR (Oct. 10 Tr. 2641; *see* ACMI §10(b), at AS-28, p. 25). A concrete example underscores the point. Assume a 30 percent margin, which is, according to ASTAR, at the low end of historical experience. Only $25 million in third-party business, or $7.5 million in profit ($25 million × 30% = $7.5 million), would allow ASTAR to achieve the same profit result as $750 million—or thirty times the amount—transacted with DHLWE after the initial $250 million in business (*see* ASTAR Post-Hearing Br., p. 43).

Section 4.2 of the ACMI permits ASTAR to operate non-dedicated aircraft for third parties only "at the incremental cost and expense thereof" (AS-26, p. 13). It is argued strenuously by the Joint Parties that this clause requires the carrier to price at cost (Aug. 28 Tr. 582). ASTAR, it is alleged, may not price at a profit for these activities (*see, e.g.,* Sept. 10 Tr. 1469-70, 1687; Sept. 11 Tr. 1851, 1853-54). Discouraging independent services is another indicator that DHLWE controls ASTAR, the argument continues; it shows that DHLWE intends to forestall ASTAR's growth or independence (Sept. 11 Tr. 1856).

To be sure, the plain language of the text invites the reading that is urged by the Joint Parties. With all of the legal talent that was applied to drafting this document one would think that it would have been easy to insert "at not less than the incremental cost and expense thereof" (emphasis added) to achieve the parties' desired end of not having competitors subsidized by ASTAR's third party services. Nevertheless, I reject this control claim made by the Joint Parties. That the missing language is indeed missing does not, I find, evince the purpose proposed by the Joint Parties. Instead, while it could have been drafted with greater clarity, just as could be the myriad of expertly drafted documents that end up in court to resolve drafting oversights and which provide the stuff of law school casebooks, I find that the purpose of §4.2 is to prevent ASTAR from offering below-cost air transportation (i.e. "loss leader" pricing) to DHLWE competitors, particularly FedEx and UPS—which, given the payments DHLWE guarantees, would amount to subsidizing a competitor (Aug. 27 Tr. 334, 601; Sept. 10 Tr. 1696-97; Oct. 10 Tr. 2494, 2588, 2591).

The reference to "incremental cost" in §4.2 must be read as a floor and not as a ceiling (Aug. 27 Tr. 333; Oct. 10 Tr. 2490, 2592). A fair reading of the paragraph as a whole illustrates that conclusion. If §4.2 reads as a floor *and* a ceiling, thus prohibiting ASTAR from turning a profit on that business, why then the allowance that the revenue ASTAR receives from independent services "shall be for its own [ASTAR's] account"? The language sufficiently shows the drafters' intention that ASTAR be allowed to charge more than its incremental cost and keep the resulting revenue (any such revenue would include at least the recoupment of its cost, and to the extent more than incremental cost were charged, any above cost income) (Oct. 10 Tr. 2491). The more persuasive interpretation of §4.2 shows that it was designed to prevent ASTAR from subsidizing DHLWE's competitors; it was never intended to limit the carrier to recovery of its incremental costs.

But, it is argued, the $15 million annual cash-flow guarantee and ASTAR's concomitant high rate of after-tax return—estimated by Professor Zimmerman at about 39%—suggests that ASTAR has little incentive to act independently (JT-305, pp. 25, 26). Under this "golden handcuffs" theory (*see, e.g.,* JT-305, p. 26; Sept. 8 Tr. 1032, 1115), DHLWE's generous stream of payments holds ASTAR's independence in check. According to that theory, DHLWE could threaten, implicitly or expressly, to transfer its business from ASTAR to another entity and cut off its payments to ASTAR, thus causing ASTAR to accede to DHLWE's demands and providing DHLWE with the power to direct, or cause the direction of, ASTAR management policy. More specifically, any ASTAR attempt to expand would have to conform to DHLWE's business objectives (Aug. 27 Tr. 403; Aug. 28 Tr. 554, 651). Even if the percentage of revenues ASTAR derives from its operations for DHLWE were somewhat lower than 90, Professor Gordon added, the threat that ASTAR could lose its "exceptionally high" rate of return would prompt it to toe the line set by DHLWE. In any event, under the "golden handcuffs" theory, there would be little temptation to generate non-DHLWE business. Why jeopardize the status quo when it is giving you this gravy train? (Aug. 28 Tr. 646).

The golden-handcuffs argument falls apart, however, because the stream of payments from DHLWE to ASTAR is (absent termination) guaranteed (Oct. 20 Tr. 2627). It is DHLWE's obligation under the ACMI whether the forwarder uses ASTAR's lift or not (ACMI §6.1, at AS-26, p. 14). DHLWE can threaten to take its business elsewhere. And it can carry out such a threat. But it would still be obligated for a $15 million annual payment to ASTAR for each of the eleven years

of the ACMI. Indeed ASTAR would be in a better position if DHLWE elected to take its business elsewhere; ASTAR could then charter the formerly dedicated aircraft to other air freight forwarders and still collect on the DHLWE guarantee (AS-RT-1, p. 4). In these circumstances, DHLWE exercises no control over ASTAR. The ACMI does not constitute any sort of "golden handcuffs" on the air carrier.[26]

(3) ASTAR as a "Cost Center"

The Joint Parties also presented testimony suggesting that ASTAR is a "cost center" of the DHL network (*see generally* JT-305, pp. 17-28). As Professor Zimmerman explained, a cost center is an entity functionally within a larger operation that is established to produce some stipulated level of service or output. It sets neither prices nor levels of production. It is not financially or operationally independent of the greater enterprise. The cost center has limited decision-making authority. Generally it has limited authority for investment and banking decisions. It is judged upon costs, rather than profits or investments (Sept. 8 Tr. 1031, 1037, 1047, 1055). It is not independent of, and is controlled by, the larger enterprise.

An example of a cost center, Professor Zimmerman stated, might be a plant which is responsible for making bumpers for the Ford Motor Company (Ford). Ford specifies the type and quality of the bumpers and a delivery schedule (Sept. 8 Tr. 1048-49). The plant submits a budget that is reviewed and approved by Ford. The bumper plant neither is designed to, nor is it expected to, make a profit (Sept. 8 Tr. 1049). The plant may not sell bumpers to another automobile manufacturer without Ford's approval (Sept. 8 Tr. 1049-50). But if the plant used, say, five or ten percent of its capacity for profit-making purposes in non-Ford bumper sales (with Ford's approval), it would still be considered a cost center (Sept. 8 Tr. 1053-54). The cost center may even be permitted to branch into another kind of product (Sept. 8 Tr. 1057-58).

Material differences between the bumper plant's relationship to Ford and ASTAR's relationship to DHLWE and the DHL network, however, demonstrate that ASTAR is not a "cost center." Unlike in the Ford example, the ACMI permits ASTAR to supply additional lift with non-dedicated aircraft or to expand into

[26] ASTAR's actual rate of return, then, is irrelevant. The carrier is not constrained no matter what the rate. Nonetheless, the evidence suggested that a rate of 30-40% is consistent with historic experience. Oct. 14 Tr. 2755, 2810, 2823. And the carrier is currently operating for third parties at a margin in that range. Oct. 14 Tr. 2755.

other businesses without prior permission or capacity limits (Sept. 8 Tr. 1050-51, 1060). ASTAR has incentives to earn profits, and not, as is normal in a cost center, just to reduce costs (AS-RT-5, pp. 7-8). The bumper plant managers must take their financial cues from Ford; by contrast, ASTAR may make its own investment decisions (Oct. 9 Tr. 2336). More specifically, while Ford in the bumper example may veto the plant's budget, DHLWE holds no such power in reviewing the analogous ASTAR cost recovery estimate. The ACMI stipulates that differences between the entities will be resolved by an independent expert (ACMI §10.3(d), at AS-26, p. 34; Sept. 8 Tr. 1093-95, 1097-98, 1100). ASTAR's independent decisionmaking powers set it apart from the "cost center" model.

It is true that certain parallels exist between the bumper plant example and the ACMI agreement. Just as Ford would inform the bumper plant of its manufacturing needs, DHLWE informs ASTAR of its forecast output requirements (ACMI §10.3(a), at AS-26, p. 33; Sept. 8 Tr. 1093), and, like Ford, DHLWE specifies the amount of output it needs and sets a schedule for its delivery. The analogy breaks down, however, because it fails to consider the supplier's activities and overall rationale. The bumper plant exists to supply Ford with bumpers; any other actions are tangential to and do not detract from that purpose. ASTAR, by contrast, is in business to offer lift, not—were it truly parallel to the bumper plant in the Ford example—to act as DHLWE's house supplier. ASTAR has signed an agreement in which most of its present capacity will be dedicated to DHLWE's express packaging service. Unlike the Ford bumper plant's relationship to Ford, however, ASTAR is operationally and functionally independent of DHLWE (AS-RT-5, p. 4). It retains the option to use other forwarders or to move into other lines of business altogether without its dominant customer's permission. ASTAR has cost center components, to be sure, but while that option exists, it is not itself a cost center (AS-RT-5, p. 6; Oct. 9 Tr. 2334-35, 2339). It is not under the dominating influence of DHLWE or the DHL network so long as it can branch out on its own.

f) Administrative and Operational Control

The entities work closely together. They consult on operations (Aug. 28 Tr. 441). DHLWE specifies the routes ASTAR is to fly. It designates the points to which ASTAR brings its aircraft to load the freight forwarder's packages and the points to which they are to be delivered (JT-403, p. 48; Aug. 26 Tr. 88; Aug. 28 Tr. 441, 610-11). Because DHLWE's schedule preferences will change from time to time, the ACMI obligates DHLWE and ASTAR to discuss long-term planning

and maintenance issues every quarter (ACMI §6.3, at AS-26, p. 15). But in fact they talk much more often than that; they hold regular biweekly meetings on fleet planning, route, and station issues, and talk daily about more immediate concerns such as weather and short-term operational situations (Oct. 8 Tr. 2137-39, 2142-44, 2148, 2152, 2216). ASTAR accommodates its predominant customer when it can. It will implement operational adjustments at DHLWE's request, for example. So if DHLWE wants to reduce frequencies or eliminate a route entirely, it informs ASTAR, and the carrier makes the change as soon as it is operationally feasible (Oct. 8 Tr. 2234).

But it would be mistaken to infer from these circumstances that DHLWE is in "actual control" of ASTAR.

The structure of ASTAR is consistent with an independent enterprise. It controls all employment decisions. The carrier hires and fires its own employees—executive, managerial, and otherwise—and sets their responsibilities and compensation (JT-404, p. 86; AS-RT-3, p. 4; AS-T-5, pp. 24, 33; Aug. 26 Tr. 48; Aug. 29 Tr. 837-38). ASTAR will perform human resources services and has established health and pension plans (AS-30; JT-404, pp. 104-05). It also controls its financial operations. It formulates its own budget and is responsible for its own financial statements (AS-T-5, p. 24). Outside the strictures of the ACMI agreement—such as prohibitions relating to FedEx or UPS influence—the carrier may acquire assets, recapitalize, restructure, or raise additional equity for growth and development of its business (AS-RT-4, pp. 19, 25). Neither Deutsche Post, nor any of its affiliates, has rights to buy or otherwise acquire shares in ASTAR, or to empower others to do so (AS-T-2, p. 7). Only ASTAR makes strategic decisions (Aug. 27 Tr. 362).

ASTAR is autonomous operationally, too. It decides its fleet mix. Decisions to add, change or retire aircraft are ASTAR's (AS-RT-4, p. 19; AS-RT-6, p. 6; Oct. 8 Tr. 2141). The air carrier has complete supervisory powers and responsibility for ground operations, including loading and unloading, weight and balance, and security matters (AS-RT-6, pp. 7-8; Oct. 8 Tr. 2118-19). While DHLWE employees handle loading and unloading, they are ASTAR-trained, and the carrier is responsible for their performance (Oct. 8 Tr. 2202, 2228). Had ASTAR nonetheless been under a contractual obligation to hire these employees, control by DHLWE might have been inferred; but in fact no such obligation exists (Aug. 26 Tr. 257). It was ASTAR's decision to use DHLWE employees for these functions. It is clear from the testimony of ASTAR's Chief Operating Officer, Mr.

Gary Hammes, that the day-to-day contact with DHLWE was mostly advisory, providing updates on weather problems and other issues that might affect operations and that DHLWE neither received nor sought input into operational issues unless they affected the airline's ability to deliver packages (ASTAR Br. 23; Oct. 8 Tr. 2151-52). In sum, ASTAR runs its own day-to-day operations. DHLWE has little if any say (Oct. 8 Tr. 2134).

DHLWE holds certain audit rights respecting reimbursable costs (ACMI §10.3(b), at AS-26, p. 33) as well as with regard to DHLWE's two-weeks' prepayment obligation (ACMI §10.5(b), at AS-26, p. 36). But such rights do not enable control. DHLWE's interest in ASTAR's costs are grounded in business reasons unrelated to any notions of control. DHLWE has no right to override ASTAR's estimates—a power an entity actually exercising control of another might hold. Disagreements are turned over to independent experts for resolution (ACMI §10.3(d) and 10.5(b), at AS-26, p. 34 and 36, respectively; Sept. 8 Tr. 1093-95, 1097-98). Actual control is not implicated by these rights (Oct. 10 Tr. 2554).

g) Common Representation

Michael Klein, one of the ASTAR principals and its chief negotiator in the July 14, 2003 transactions, is an attorney and partner in the law firm of Wilmer, Cutler, & Pickering (WCP) (JT-404, p. 12; Aug. 26 Tr. 83). In that capacity, he has represented for many years one of his partners in ASTAR, Richard Blum, as well as the investment firm Blum heads, Blum Capital Partners (JT-404, pp. 14, 24; Aug. 26 Tr. 84, 157). WCP counsel represented Klein in the transactions surrounding the creation of ASTAR (JT-404, pp. 24-25). WCP also represents, or has represented, many of the DHL entities, including DHLWE, DHLH, DHLI, and Deutsche Post, in addition to heads of DHLI and Deutsche Post, Doerken and Zumwinkel respectively (Aug. 26 Tr. 83, 157-58). The Joint Parties argue that these circumstances show common control of DHLWE and ASTAR, or that Klein, and through him ASTAR, is controlled by the DHL entities (*see, e.g.,* Oct. 14 Tr. 2940-42; Joint Parties' Post-Hearing Br., pp. 75-76).

Klein stated that he has been "walled off" from his firm's representation of any of the DHL entities or their executives (Aug. 26 Tr. 90). Representatives of those entities, as well as Blum, further, have waived any objection they might assert to Klein's past or present involvement in ASTAR (Aug. 26 Tr. 84-85, 90).

I am not in a position to rely on such non-legal or self-regulatory safeguards such as a law firm's "Chinese wall" between its attorneys to assure ASTAR's compliance with the statutory citizenship regulations.[27] Such safeguards exist primarily for the client's benefit and can be modified, changed, or ignored without the Department's—or anyone else's—knowledge.

Nevertheless, I find that these circumstances demonstrate neither common control nor control of Klein or the ASTAR group by foreign entities. WCP's apparent representation of opposing interests in the same transactions, whatever it might suggest in terms of appearances of impropriety, does not show that Klein, or ASTAR, is actually controlled by the foreign DHL entities. The evidence and representations offer no reason to suspect that because of common representation Klein and his group have not been (and are not) completely separate and independent of Deutsche Post, DHLH, and DHLWE. Recall that the ASTAR principals credibly and without challenge testified that the negotiations preceding the sale were divisive and contentious. The ASTAR principals' separation from WCP-represented entities with arguably conflicting interests does not suggest control here. I therefore reject this contention.

IV. FINAL CONSIDERATIONS

ASTAR *arguendo* was formed at the instance of a foreign entity;[28] a foreign entity is backing the loan financing over 80% of its purchase price; its dominant customer is a foreign entity; and without that customer, ASTAR probably would not exist—certainly not in a form resembling its form today (Sept. 9 Tr. 1246).

Yet while these facts and suppositions have suggested an inquiry into the question of its actual control, they do not determine the answer (AS-T-5, p. 36). An examination of this question in fact shows that ASTAR is, so to speak, its own person; it is functionally independent of DHLWE. Neither DHLWE nor the DHL network can be said to be in actual control of ASTAR in any relevant or meaningful sense.

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[27] To paraphrase Genghis Khan, the strength of a wall is only as strong as those who defend it. I cannot rely on a law firm or its employees to assure statutory compliance.

[28] ASTAR insists that that is not so, pointing out that Dasburg began negotiating with DHLA in the fall of 2002, about six months before this proceeding began. He signed an employment agreement stating his intention to gain control of the company on March 18, 2003, a month prior to the April 17, 2003 institution of this proceeding. ASTAR's contention is persuasive. Nonetheless, I will assume causation for the sake of argument.

The DHL network hopes to create a seamless, fully integrated system to carry and deliver express packages by air throughout the world (Aug. 26 Tr. 264; Aug. 27 Tr. 390). A U.S. presence—that is, the ability to carry cargo between U.S. points—is a major, even invaluable, facet of such a system. And only a U.S. citizen air carrier is permitted to perform such operations. So the network has outsourced this crucial service (AS-T-5, p. 41). ASTAR is one carrier (among others) with which the DHL network has contracted to perform U.S. operations. ASTAR, thus, is a component of an integrated package delivery system in the U.S. whose ground and shipping element is owned by DHLWE (Sept. 9 Tr. 1246). In some sense, then, ASTAR is part of a greater, foreign-operated integrated system. The carrier can be viewed as a unit of a venture larger in conception and scope. But that does not mean that the global DHL network controls its U.S. "unit." It does not suggest in itself that ASTAR is not independent of the larger enterprise.

And in fact the nature of the ASTAR-DHLWE relationship does not implicate control. DHLWE is not a parent or affiliate or even, at bottom, a business partner of ASTAR. It is a client. All clients have needs particular to them. DHLWE's require ASTAR to mesh the entities' services to insure a smooth and reliable delivery system. That is ASTAR's role (*see* JT-404, p. 128). ASTAR simply is selling its services to DHLWE. In Professor Ordover's analogy, the DHL network could have its house painted to its particular specifications without controlling the painting company it hires for the job. Against this background, the notions of actual control and a seamless integrated network for package delivery are not mutually exclusive.

To determine the citizenship question at the core of this proceeding, the salient question is who has the power to direct or dominate ASTAR. And the answer is ASTAR (Aug. 26 Tr. 88). As the carrier's chief operating officer, Hammes, stated: "We run the airline, they [DHLWE] run the ground" (Oct. 8 Tr. 2158).

In view of the foregoing, I find and conclude that the preponderance of evidence shows that ASTAR Air Cargo, Inc. (formerly DHL Airways, Inc.) is owned and controlled by U.S. citizens within the meaning of the operative statute, 49 U.S.C. §40102(a)(15). Accordingly, I conclude that ASTAR is a U.S. citizen.

Pursuant to 14 C.F.R. 302.32, petitions to the DOT decisionmaker for discretionary review of this decision are to be filed by January 12, 2004.

Burton S. Kolko
Administrative Law Judge

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APPENDIX
CITIZENSHIP STANDARDS

This proceeding originated with Order 2003-4-14, April 17, 2003, by which the Department initiated a *de novo* review of the citizenship of direct air carrier DHL Airways, Inc. (DHLA), which was to bear the burden of establishing that it is a U.S. citizen (*see, e.g., Page Avjet, Citizenship,* 102 CAB 488, 492 (1983)). To be found a U.S. citizen, a carrier must comply with the specific requirements set forth by 49 U.S.C. §40102(a)(15). That section in pertinent part states:

> "citizen of the United States" means—
>
> > (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, *which is under the actual control of citizens of the United States*, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.[29]

To fulfill the requirements of U.S. citizenship, an air carrier must not only meet the technical requirements of the statute, but must also, under a preponderance of evidence, satisfy the qualitative evaluation of the "actual control" test. Even where an air carrier meets the "technical minima" of the statute, which is "merely the threshold issue for questions of control," the air carrier does not meet the citizenship requirements if actual or effective control lies with non-U.S. citizens. The substance of any transaction and arrangement must guarantee that control in fact resides in U.S. citizens. *Silvas Airlines,* 87 CAB 160, 162

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[29] 49 U.S.C. §40102(a)(15) as amended by Vision 100—Century of Aviation Reauthorization Act, Pub.L. 108-176, § 807, 117 Stat. 2490 (Dec. 12, 2003) (emphasis added).

(September 23, 1980), *citing Willye Peter Daetwyler, d.b.a. Interamerican Airfreight Co., Foreign Permit*, 58 CAB 120 (1971).

'Control' means "the ability to exert significant influence over a carrier." *Petition of Allegis Investors Group,* Order 87-7-42, July 17, 1987, p. 3. In determining whether control exists, the Department seeks to discover "whether a foreign interest . . . will have a substantial ability to influence [a] carrier's activities." *Acquisition of Northwest Airlines by Wings Holdings,* Order 89-9-51 (September 29, 1989), p. 8. The control standard evaluates both actual and potential control and influence both positive and negative. It assesses every form of control, whether residing in debt, equity, personal relationships, or other forms of influence. Because "there are myriad potential avenues of control," analysis necessarily must proceed on a case-by-case basis. *Acquisition of Northwest Airlines by Wings Holdings,* p. 8. The Department does not—indeed cannot—use a checklist. Whether control exists in any particular situation depends on its specific facts. *Allegis,* p. 3. As such, circumstances or combinations of circumstances that would demonstrate control cannot be defined with precision.

Nevertheless, past proceedings furnish some overall guidelines for evaluating the question. The Department assesses whether a foreign interest has the power, either directly or indirectly, to influence an entity's directors, officers, or stockholders. Close personal and business relationships between a foreign-citizen part-owner and an applicant's U.S. officers and directors have trumped a non-U.S. citizen's minority shareholder status. The Department's predecessor, the Civil Aeronautics Board, found that when the applicant would "continue to do business as part of the system of [foreign citizen]-controlled companies" it had not met its burden of proving U.S. citizenship. *Willye Peter Daetwyler, d.b.a. Interamerican Airfreight Co., Foreign Permit*, 58 CAB 120 (1971); *see also Wrangler Aviation, Inc.*, Order 93-7-26 (July 15, 1993). Control also may be found from the ability to manage a carrier's day-to-day operations, although it is not necessarily limited to

operations. *Petition of Allegis Investors Group,* Order 87-7-42 (July 17, 1987), p. 3. A foreign majority-equity holder's right to name a director and a three-person committee to give financial advice of apparently unlimited scope were factors in finding that that entity was "in a strong position to exert substantial influence" over the applicant carrier. *Acquisition of Northwest Airlines by Wings Holdings,* Order 89-9-51 (September 29, 1989), p. 8.

As *Daetwyler* showed, a dominating influence may be exercised in ways other than through voting power. *See also Page Avjet, Citizenship,* 102 CAB 488, 489 (1983). Shareholders of non-voting stock could possess the requisite control. If, for example, non-U.S. citizens holding only non-voting shares could, individually or collectively, require an entity to repurchase its stock under a variety of easily satisfied conditions, the shareholders' ability to withdraw capital could influence company management to the point of finding control. *Intera Arctic Services, Inc.,* Order 87-8-43 (August 18, 1987). Foreign nonvoting shareholders who could veto any merger or acquisition and could force the carrier to liquidate at any time were found to exercise control of that carrier. *Page Avjet Corporation,* 102 CAB 488 (1983). Individuals or entities with neither shares nor votes, such as creditors, could exert control. While creditor status—holding even half of a carrier's debt—does not in itself constitute control (*Golden West Airlines,* 96 CAB 814 (1982)), a lender's powers under its lending agreement could lead to a control finding. A lender's contractual right to block some company actions (including certain mergers and acquisitions) did not, however, constitute control when the lender's consent was reasonably related to its interest in assuring payment. The Department noted that "any loan agreement involving an air carrier will necessarily restrict the borrower's conduct to some degree." *Allegis Investors Group,* Order 87-7-42 (July 17, 1987), p. 4; *accord, Acquisition of Northwest Airlines by Wings Holdings,* Order 92-11-97 (November 16, 1992), p. 17 (". . . any party voluntarily entering into a contract necessarily gives up part of its freedom of action"). On the other hand, a provision of an agreement that

has a legitimate business purpose does not necessarily negate the possibility of control. In the end, the question is whether such a provision, among any other existing indicia of control, suggests as a whole actual control.

The foregoing is not an exhaustive list of situations bearing on the question of control. That "myriad avenues of control" exist precludes such a list. Moreover, circumstances often defy easy characterization. Several types of operational and financial arrangements may be involved. In one matter, for example, the Department found that the non-U.S. citizen was in a position to exercise actual control over the applicant carrier by virtue of the "multiplicity and importance of links" between the two entities. *Acquisition of Northwest Airlines by Wings Holdings,* Order 89-9-51 (September 29, 1989), p. 7.

Further, that an entity under review has reorganized to attain U.S. citizenship status is not a negative factor. *See, e.g., Wrangler Aviation, Inc.,* Order 95-7-31 (July 31, 1995). An applicant's changes do not necessarily suggest a motive to evade the citizenship statute or to otherwise exalt form over substance. The reorganized entity will be analyzed under the same principles applying to all.

Finally, circumstances affecting control must be evaluated as a whole. Relevant matters must be examined as part of a larger picture. As the Department has aptly summarized, "we examine the totality of circumstances unique to the particular transaction in the context of the control standard." *Wrangler Aviation, Inc.,* Order 93-7-26 (July 15, 1993), p. 5.