Order 2004-5-10
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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 13th day of May, 2004

In the matter of the citizenship of **DHL AIRWAYS, INC. n/k/a ASTAR AIR CARGO, INC.** under 49 U.S.C. 40102(a)(15)	**Docket OST-2002-13089**

ORDER DECLINING REVIEW

SUMMARY

United Parcel Service Co. ("UPS") and Federal Express Corporation ("FedEx") began this proceeding by petitioning for an investigation into whether DHL Airways, Inc. ("DHLA"), a U.S. certificated air carrier, complied with the statutory requirement that every U.S. air carrier must be controlled by U.S. citizens. As Congress directed, we assigned the matter to an administrative law judge ("ALJ") for resolution after an oral evidentiary hearing. After we did so, DHLA's ownership and senior management changed completely, and the new management renamed the carrier ASTAR Air Cargo, Inc. ("ASTAR"). After the hearing, the ALJ, Burton S. Kolko, issued a recommended decision that found that ASTAR satisfies the statutory citizenship test. All of ASTAR's directors and senior management are U.S. citizens, and U.S. citizens own all of ASTAR's stock. He found that ASTAR makes its own financial and operational decisions. ASTAR obtains most of its business from the DHL network of companies ("DHL Network"), a package delivery group controlled by foreigners. However, Judge Kolko found that contracts between ASTAR and the DHL Network provide ASTAR with financial and business guarantees that deny the DHL Network any potential ability to exercise substantial influence over ASTAR's decisions. Judge Kolko therefore concluded that ASTAR is controlled by U.S. citizens and so is complying with the statutory citizenship requirements.

UPS and FedEx (the "Joint Parties") have asked us to take review of the ALJ's decision. They argue that the ALJ erred, because ASTAR is allegedly controlled by the DHL Network. After considering their arguments, we have determined that there is no reason for us to take review of the ALJ's decision. Judge Kolko thoroughly analyzed the evidence presented by the parties and applied the correct legal standards for determining citizenship as defined by 49 U.S.C. 40102(a)(15). By this Order, we therefore deny the petition for discretionary review. As a result,

we will allow Judge Kolko's Recommended Decision, which finds that ASTAR is a U.S. citizen, to become the Department's final decision in this proceeding.

BACKGROUND

ASTAR, formerly DHLA, has been a U.S. air carrier since 1979.[1] ASTAR operates cargo flights within the United States and between the United States and certain foreign points on behalf of the DHL Network under contracts that obligate the DHL Network to use ASTAR's flights and to pay substantial compensation to ASTAR if the DHL Network defaults on its obligations. The parties seeking review of the ALJ's decision, FedEx and UPS, are the two largest package delivery companies in the United States. Together, they account for approximately 80 percent of the parcel and express delivery market in the United States. The DHL Network, a group of interrelated firms controlled by Deutsche Post, AG ("DP"), is their major competitor in foreign markets. Deutsche Post, a partially privatized firm, operates Germany's national postal service.

Only air carriers owned and controlled by U.S. citizens can operate flights within the United States. To offer delivery services within the United States, and to strengthen its position in the worldwide market, the DHL Network therefore must obtain domestic transportation services from a U.S. air carrier. ASTAR has agreed to provide those services.[2]

Since December 2002, Deutsche Post has been the sole owner of DHL International ("DHLI"). The DHL Network of companies share the same "DHL" brand name. DHLI owns DHL Holdings (USA) ("DHLH"), which in turn owns DHL Worldwide Express ("DHLWE"), a foreign air freight forwarder licensed under 14 C.F.R. Part 297. Licensed foreign air freight forwarders do not operate their own aircraft and may offer cargo transportation by air between points within the United States only by utilizing the services of U.S. air carriers.

The Initiation of the Review of DHLA's Citizenship

On September 12, 2000, DHLA notified the Department pursuant to 14 C.F.R. §204.5(c) of a proposed substantial change in its ownership, management, and operations. William Robinson, a U.S. citizen, planned to acquire most of DHLA's equity. Section 204.5 requires a certificated air carrier proposing such a substantial change to file relevant fitness data with the Department's Air Carrier Fitness Division. The staff began examining, among other matters, whether the reorganization would affect DHLA's status as a U.S. citizen.[3]

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[1] This order generally refers to the carrier as ASTAR for the period since July 14, 2003, when John Dasburg and his partners acquired the carrier, and as DHLA for the period before that acquisition.

[2] We are aware that the DHL Network acquired the ground operations of Airborne, Inc., a U.S. cargo airline and package delivery service, on August 15, 2003, and that ABX Air, Inc., Airborne's airline subsidiary, became an independent publicly-held company that provides airlift for the ground operations acquired by the DHL Network from Airborne, Inc. See Notice Requesting Comments (August 6, 2003), Docket OST-2003-15863. No one has argued that that transaction should affect our decision on whether to take review of the factual and legal findings made by the ALJ on ASTAR's citizenship.

[3] We are considering whether, in future cases, we should replace the informal review process initially followed when DHLA gave notice of its proposed reorganization with a more formal process in some controversial cases. The Department's Inspector General reviewed the continuing fitness process and concluded that the traditional informal review approach was not always appropriate in more contentious and complex cases. March 4, 2003, Letter from the Inspector General to the Chairman of the House Transportation and Infrastructure Committee (*available at* OST-

While the informal review was underway, the Joint Parties filed third-party enforcement complaints against DHLA with the Department. FedEx and UPS alleged that, after the proposed reorganization, foreign nationals could control DHLA. They requested the Department to conduct a formal review of DHLA's citizenship. The Department dismissed the complaints and denied the requests for a formal review of DHLA's citizenship. The Department stated that it "has for some time been conducting a review of the citizenship of DHL Airways that deals directly with the issues raised by the complaints within the context of an informal continuing fitness review" and that the more formal proceedings requested by FedEx and UPS were unnecessary.[4]

On May 14, 2001, DHLA completed its reorganization. Mr. Robinson acquired 75 percent of the voting equity, and DHLH acquired the remainder. DHLA and DHLH had an Aircraft, Crew, Maintenance and Insurance Agreement ("ACMI"), which provided that DHLA would perform air transportation for DHLWE.[5] In May 2002, after further review, the Assistant General Counsel for International Law informed DHLA that, as reorganized, it would satisfy U.S. citizenship requirements.[6]

In August 2002, UPS initiated this docket by filing a petition to institute a public inquiry into the citizenship of DHLA. FedEx also filed a petition for further review of DHLA's citizenship. The Department consolidated the petitions in this docket.[7]

Before we acted on the Joint Parties' petitions for a formal hearing, Congress directed us to have the issues in this docket resolved by an ALJ. Section 2710 of the Emergency Wartime Supplemental Appropriations Act states, "the Secretary of Transportation is directed to use an Administrative Law Judge in a formal proceeding to resolve docket number OST-2002-13089."[8]

As required, we directed that an oral evidentiary hearing be held before an ALJ. Order 2003-4-14 (April 17, 2003). We stated that we were instituting the hearing "to consider de novo the current citizenship of DHL Airways only." *Id.* at 2 (emphasis in original). We noted that the question of DHLA's past compliance with the citizenship requirement was the subject of third-party enforcement complaints, that those complaints would be considered under the rules applicable to enforcement complaints, and that we did not expect formal action to be taken on those complaints until this proceeding was completed because the outcome here may have a bearing on

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2002-13089-32 (Mar. 11, 2003)). We have published an Advanced Notice of Proposed Rulemaking requesting comment on, *inter alia,* whether we should amend our rules in this area. 68 Fed. Reg. 44675 (July 30, 2003).

4 Order 2001-5-11 (May 11, 2001).

5 An ACMI agreement is essentially a "wet-lease" agreement under which the lessor (here DHLA) provides the aircraft, all of the crew, all maintenance, and insurance. The lessor charges for block hours and typically is guaranteed payment for a minimum number of block hours per month. The lessee pays all fuel expenses, landing/ground-handling/parking/storage fees, and crew expenses, among other things.

6 Letter from DOT's Assistant General Counsel for International Law to DHLA, dated May 7, 2002. Consolidated Answer of DHL Airways, Inc. (Docket OST-13089-4 (Sept. 6, 2002)), Ex. 1.

7 Notice Consolidating Proceedings and Granting Extension of Time (Dockets OST-2001-8736-12 and OST-2002-13089-3 (Aug. 16, 2002)).

8 § 2710, P.L. 108-11, 117 Stat. 559 (2003).

those deliberations. *Id.* at 2, n. 4.[9] We additionally directed the ALJ to submit his Recommended Decision ("RD") by September 2, 2003, because "the issue of DHL Airways' citizenship has been pending in various forms for a considerable period of time," "[a] substantial amount of relevant information has already been filed in this docket," and "it is in the public interest to make every effort to expedite this proceeding and to reduce the burden on all parties involved, while ensuring a full and fair consideration." *Id.* at 2-3.

The Dasburg Group's Acquisition of DHLA

After we referred this proceeding to an ALJ for a formal hearing, DHLA's ownership and management changed. Joseph R. O'Gorman, DHLA's Chairman, President and CEO, passed away in August 2002. John H. Dasburg, the former CEO of Northwest Airlines, thereafter agreed to become DHLA's President and CEO effective April 1, 2003, but only if he could acquire control of the carrier.[10]

As a result, Mr. Robinson and DHLH sold DHLA to BD Air Partners, LLC ("BDAP" or "the Dasburg group"). BDAP was comprised of John Dasburg (who already owned 5 percent of DHLA), Richard Blum (a venture capitalist), and Michael Klein (a Senior Partner at the law firm of Wilmer, Cutler, and Pickering). The parties closed the transaction on July 14, 2003, and the carrier was renamed ASTAR Air Cargo, Inc. The total purchase price was $60 million. Most of it - $50 million - was financed through a loan from Boeing Capital Loan Corporation ("Boeing Capital"), secured by a DP guaranty to ASTAR that DP's subsidiary, DHLWE, would fulfill its obligations to ASTAR under the ACMI agreement that was executed simultaneously with the purchase transaction. RD at 5-7.

The ACMI agreement governs the commercial relationship between ASTAR and DHLWE. ASTAR agreed to provide lift to DHLWE, and DHLWE agreed to utilize ASTAR's services and to reimburse ASTAR's costs and expenses for those services.[11] Under the ACMI agreement, ASTAR dedicates the great majority of its aircraft – currently 38 of its 39 planes – to providing transportation for DHLWE.[12] ASTAR operates the aircraft at the times and places requested by DHLWE in schedules provided to ASTAR.[13] ASTAR may use the dedicated aircraft for third party business under certain conditions and may use its non-dedicated aircraft in any manner it wishes. The ACMI agreement obligates DHLWE to pay ASTAR at least $15 million each year whether or not it uses ASTAR's flights. RD at 7-9.

The Hearing before the ALJ

After substantial discovery, the hearing began on August 26, and, after several breaks, ended on October 14, 2003. The Chief Administrative Law Judge, Ronnie Yoder ("CALJ"), presided over the initial stages of the hearing process, but later recused himself and transferred the case to Judge Kolko, who presided at the hearing.

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9 FedEx and UPS had filed enforcement complaints challenging DHLA's compliance with the citizenship requirement on October 11 and November 6, 2002, in Dockets OST 2002-13590 and OST 2002-13787, respectively.

10 Recommended Decision of the Administrative Law Judge (*hereinafter* RD) (Docket OST-2002-13089-594 (Dec. 19, 2003)) at 5-6.

11 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.

12 Aug. 29, 2003 Hrg. Tr. 69; Oct. 8, 2003 Hrg. Tr. 2167, 2230; Oct. 9, 2003 Hrg. Tr. 2420.

13 ACMI § 2.3, at AS-26, p. 9.

At the hearing the ALJ focused on whether ASTAR – under its current management, ownership, and arrangements with DHLWE – was a U.S. citizen, not on whether DHLA under its previous ownership and management had been a citizen. RD at 2-3.

While the matter was before the CALJ (and later Judge Kolko), several procedural issues required rulings from us. First, two weeks after we referred the case to the CALJ for hearing, he asked us to extend the September 2, 2003, deadline set for his decision by twelve weeks. We thought that an extension of that length was unnecessary at that time, in large part because of the volume of pleadings already submitted on the citizenship issue. We said that our deadline should have given the CALJ and the parties "an adequate amount of time to fully consider the important issues raised in this proceeding," and the case should be completed promptly in view of the concerns expressed by UPS, FedEx, and a third carrier "about the impact of alleged 'foreign' competition" and DHLA's concern about the impact on its business of a further lengthy investigation. Nonetheless, we granted the CALJ an extension until October 31, 2003. Notice on Request for Extension of Time (May 12, 2003).

Thereafter, as discussed above, DHLA's ownership and management changed, and DHLA became ASTAR. We partially granted the CALJ's second request for an extension of time (until December 1, 2003) to enable the parties to consider the impact of those changes. Order 2003-7-36 (July 30, 2003) at 4. We again stated that the issue in the proceeding was the current citizenship of ASTAR. Whether DHLA had complied in the past with the statutory citizenship test would be considered separately in the context of the pending enforcement complaints. *Id.* at 3.

Our reaffirmation of the limits of the scope of this proceeding led to a request by the CALJ for clarification. He asked whether a carrier's compliance with the statutory ownership requirement would be sufficient to satisfy the citizenship requirement and whether our ruling on the scope of the case also determined what evidence should be admitted. In ruling on his request, we responded that ASTAR's ownership was not the only relevant factor in determining its citizenship. The citizenship issue instead included "the question of whether the carrier is now under the actual control of U.S. citizens." Order 2003-8-19 (August 19, 2003) at 3. We stated that that question "should not include the consideration of whether or not ASTAR's prior 'ownership' and actual control were by U.S. citizens, except to the degree that these circumstances, like any others, relate to ASTAR's present citizenship." *Id.* at 3-4 (footnotes omitted). We specifically recognized the ALJ's authority "to determine the relevance of the evidence in the proceeding," but noted that he must follow the scope of the issues as defined by us. *Ibid.*

Finally, Judge Kolko requested a third extension so that the district court could complete its proceedings on the Joint Parties' request to enforce subpoenas against the DHL Network.[14] We granted his request to extend the deadline to January 2, 2004, but denied the Joint Parties' request for an open-ended extension. Order 2003-10-25 (October 22, 2003). We stated that the Joint

[14] The CALJ had issued subpoenas requiring documents from the DHL Network, but the DHL Network's failure to comply with all of the discovery demands had caused the Joint Parties to request a district court to enforce the subpoenas.

Parties' request, based on the alleged failure of the DHL Network (but not ASTAR) to comply fully with several subpoenas, did not warrant such an extension. The ALJ had concluded the hearing, and it was unclear whether the additional evidence that might be submitted would require a reopening of the hearing. In addition, "whether ASTAR is complying with the citizenship requirement is an important issue that should be resolved without undue delay," so "it is not in the public interest to extend the deadline indefinitely." *Id.* at 4.

The ALJ issued his Recommended Decision on December 19, 2003. The Judge found that ASTAR is currently a citizen of the United States. Based on the record, he found that under the totality of the circumstances ASTAR is controlled by U.S. citizens. The Judge discussed all of the factors that the Joint Parties alleged demonstrated actual control of the air carrier by the DHL Network. The Judge found that the arguments made by the Joint Parties did not demonstrate control by the DHL Network over ASTAR. The Judge stated, "Neither DHLWE nor the DHL network can be said to be in actual control of ASTAR in any relevant or meaningful sense." RD at 32.

The Joint Parties filed a petition for review of the ALJ's decision.[15] ASTAR opposed their petition.

DISCUSSION

Federal statute requires that an air carrier must be "a citizen of the United States" before it may obtain a certificate of public convenience and necessity.[16] To maintain such authority, the carrier must continue to be a citizen.[17] To be a "citizen of the United States" the carrier's president and two-thirds of its Board of Directors and other managing officers must be United States citizens, at least 75 percent of its voting interest must be owned or controlled by United States citizens, and the carrier must be under the actual control of United States citizens.[18]

As the ALJ found, there is no dispute in this case over whether ASTAR complies with the ownership and management standards. U.S. citizens own all of ASTAR's stock, and all of its officers and directors are U.S. citizens. RD at 11. The only question is whether ASTAR is under the actual control of U.S. citizens. Congress recently amended the definition of citizenship to include the actual control requirement in the statutory standard.[19] In doing so, Congress codified the longstanding principle applied by the Civil Aeronautics Board and us that both ownership and control by United States citizens are required for an air carrier to be considered a United States citizen.

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[15] We granted the Joint Parties an extension of time for filing their petition for review, and allowed them to file a fifty-page petition instead of confining them to the twenty-page limit normally applicable to petitions for review. Notice on Joint Motion to Modify Schedule (Dec. 31, 2003). Lynden Air Cargo participated as a party during the hearing but did not file a brief to the ALJ or join in the petition for review of the ALJ's decision.

[16] 49 U.S.C. §§ 41101, 41102, 40102(a)(15).

[17] 49 U.S.C. §41110(e)(1).

[18] 49 U.S.C. § 40102(a)(15), *as amended by* the Vision 100 – Century of Aviation Reauthorization Act, P.L. 108-176, § 807, 117 Stat. 2490 (2004).

[19] § 807, P.L. 108-176.

The ALJ found that ASTAR met the citizenship requirement because it is under the actual control of U.S. citizens based on the totality of the circumstances, RD at 30-31 (record citations omitted):

> The structure of ASTAR is consistent with an independent enterprise. It controls all employment decisions. . . . It also controls its own financial operations. It formulates its own budget and is responsible for its own financial statements. Outside the strictures of the ACMI agreement . . . the carrier may acquire assets, recapitalize, restructure, or raise additional equity for growth and development of its business. . . . Only ASTAR makes strategic decisions.
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> ASTAR is autonomous operationally, too. It decides its fleet mix. Decisions to add, change, or retire aircraft are ASTAR's. The air carrier has complete supervisory powers and responsibility for ground operations, including loading and unloading, weight and balance, and security. . . . DHLWE never received nor sought input into operational issues unless they affected the airline's ability to deliver packages. In sum, ASTAR runs its own day-to-day operations.

The ALJ carefully and thoroughly examined the facts and analyzed the issues. The ALJ made his decision after fourteen days of hearings that produced over 3,000 pages of transcript, and the written evidence reviewed by him totaled well over 3,000 additional pages.

We find that the Joint Parties have failed to show that the ALJ erred or that further procedures are required for review.[20] We therefore deny the petition for review.

Joint Parties' Petition for Discretionary Review

Under our rules, a party may petition for discretionary review of an ALJ's decision by arguing that a finding of material fact is erroneous; that a necessary legal conclusion is without governing precedent or departs from, or is contrary to, law, our rules, or precedent; that a substantial and important question of law, policy, or discretion is involved; or that a prejudicial procedural error has occurred. The rule further states, "Review by the DOT decisionmaker pursuant to this section is not a matter of right but is at the sole discretion of the DOT decisionmaker."[21]

The Joint Parties contend that we should take review because the ALJ allegedly used an incorrect legal standard, our earlier procedural orders allegedly denied them a fair opportunity to present their case, the ALJ's factual findings are allegedly wrong, and the ALJ's decision assertedly would harm U.S. aviation policy. As discussed below, we have determined that the Joint Parties have failed to show that any of the ALJ's material findings of fact or conclusions of law are erroneous, that any prejudicial procedural error occurred, or that the ALJ's decision raises important policy issues requiring our review.

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[20] In addition, the ALJ, to a significant extent, based his decision on the credibility of the witnesses. ALJ findings on credibility are entitled to substantial deference from reviewing courts. *See, e.g., AJP Construction, Inc. v. Secretary of Labor*, 357 F.3d 70, 73 (D.C. Cir. 2004).

[21] 14 C.F.R. 302.32(a).

Proper Legal Standard

On the merits, the Joint Parties argue that the ALJ did not apply the proper legal standard for determining whether a carrier is under the actual control of a foreign entity.[22] The Joint Parties base this challenge primarily on claims that the structure of his decision indicates that he did not follow the correct standard for determining citizenship. They also contend that a citizenship test imposed by Congress on Department of Defense ("DoD") airlift contracts, but not on our certificate proceedings, nonetheless must be applied in our cases as well.

These challenges do not warrant review of the ALJ's decision. The Joint Parties have demonstrated neither that the ALJ misapplied the citizenship standard created by our precedent nor that our citizenship standard must incorporate the additional requirement established by Congress for DoD contracts.

1. The ALJ's Application of the Correct Control Standard

Under Department precedent, "The control standard is a *de facto* one – we seek to discover whether a foreign interest may be in a position to exercise actual control over the airline, *i.e.*, whether it will have a substantial ability to influence the carrier's activities."[23] In addition, the inquiry required by the actual control standard examines whether the totality of the circumstances means that the carrier is subject to foreign control.[24] Each citizenship case presents its own set of facts, and we must apply the law to the specific factual situation in the case.[25]

We have never held that a carrier was controlled by a foreign entity merely because it had cooperative arrangements with a foreign business, or because it obtained the majority of its revenues from one or more foreign firms. Without the presence of other controlling factors – such as substantial ownership ties, financial arrangements, or managerial affiliations – we have not found that a close business relationship between a U.S. airline and a foreign airline meant that the foreign carrier was deemed to control the U.S. carrier. For example, in the Northwest/KLM case, we found that Northwest would remain a U.S. citizen even though it was being acquired by a group in which KLM, the flag carrier of the Netherlands, was an important participant, and even though Northwest and KLM intended to cooperate closely on a number of business matters.[26] Since then, close cooperative arrangements between U.S. and foreign carriers have become common with the growth in international airline alliances. The parties to such alliances typically seek to integrate their operations so that in important respects they will operate

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[22] Petition for Discretionary Review of Federal Express Corporation and United Parcel Service Co. (*hereinafter* Pet.) (Docket OST-2002-13089-600 (Jan. 26, 2004)) at 10.

[23] *Acquisition of Northwest Airlines by Wings Holdings, Inc.*, Order 89-9-51 (Sept. 29, 1989) at 5. *See also In the matter of USAir and British Airways*, Order 93-3-17 (Mar. 15, 1993), at 19; *Application of Discovery Airways, Inc.*, Order 89-12-41 (Dec. 22, 1989), at 10; *Application of North American Airlines, Inc.*, Order 89-11-8 (Nov. 6, 1989), at 6.

[24] *See Air-Evac Air Ambulance, Inc.*, Order 96-6-13 (June 7, 1996); *Acquisition of Northwest Airlines by Wings Holdings, Inc.*, Order 89-9-51 (Sept. 29, 1989); *Intera Arctic Services, Inc.*, Order 87-8-43 (Aug. 18, 1987); *In the matter of Page Avjet Corporation*, 102 C.A.B. 488 (1983); *Application of Premiere Airlines, Inc.*, 95 C.A.B. 101 (1982); *Willye Peter Daetwyler, d/b/a Interamerican Airfreight Co.*, 6 C.A.B. 118 (1971).

[25] *See, e.g., Wrangler Aviation, Inc.*, Order 93-7-26 (July 15, 1993), at 7; *Acquisition of Northwest Airlines by Wings Holdings, Inc.*, Order 91-1-41 (Jan. 23, 1991), at 5; *Intera Arctic Services, Inc.*, Order 87-8-43 (Aug. 18, 1987), at 8; *Willye Peter Daetwyler, d/b/a Interamerican Airfreight Co.*, 6 C.A.B. 118, 119 (1971).

[26] *Acquisition of Northwest Airlines by Wings Holdings, Inc.*, Order 89-9-51 (Sept. 29, 1989).

as a single carrier. Nonetheless, such an alliance relationship does not place the U.S. carrier's citizenship in doubt. Thus, when we approved and granted antitrust immunity to an agreement between Northwest and KLM "whereby the two carriers would integrate their services and operate as if they were a single carrier," we found that that kind of relationship would not cause Northwest to be controlled by the foreign airline.[27]

The ALJ's decision demonstrates that he applied the correct legal standard for determining control. The Joint Parties argue that the ALJ did not apply the proper test for control as set forth in Department precedent. Pet. at 12. We disagree.

The Joint Parties say that the potential to exercise substantial influence over the carrier should be the correct standard. We agree with the Joint Parties' statement as to the standard, but not with their assertion that the ALJ did not apply it. It is obvious from the ALJ's decision that he did follow the correct standard. Throughout the RD, the Judge makes reference to actual or potential control over ASTAR.[28]

In arguing the contrary, the Joint Parties do not claim that the ALJ failed to consider whether DHLWE could potentially influence ASTAR or that he misstated the legal test. The Joint Parties instead base their argument largely on a single statement made by the ALJ. The ALJ said, "To determine the citizenship question at the core of this proceeding, the salient question is who has the power to direct or dominate ASTAR." RD at 33, cited at Pet. at 12. We do not think his statement applied the wrong standard. Indeed, in *Page Avjet* we used similar terminology as the Judge, saying, "We have recognized that a *dominating* influence may be exercised in ways other than through a vote."[29] We cannot in any event assume from this one statement that the ALJ misunderstood the applicable standard, especially when other statements in his decision expressly show that he understood the need to examine whether the DHL Network had the potential ability to exercise significant influence over ASTAR. Moreover, even the Joint Parties concede that the Judge stated the correct standard in his decision. Pet. at 13, citing RD at 35-38.

The Joint Parties argue that the ALJ failed to properly apply our standard in another respect. Pet. at 13-14. As noted, applying the actual control standard requires an analysis of the totality of the circumstances. The Joint Parties wrongly argue that the Judge did not look at the "*cumulative effect of the evidence*." Pet. at 13 (emphasis in original). The Judge in fact expressly recognized that he must consider all of the circumstances in determining whether ASTAR met the actual control standard: "Based upon the entire record, I find that the preponderance of reliable, credible, and probative evidence exists to support that, *under the totality of the circumstances*, ASTAR is actually controlled by U.S. citizens." RD at 11 (emphasis added). His analysis of the

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[27] *Acquisition of Northwest Airlines by Wings Holdings, Inc.*, Order 92-11-27 (Nov. 16, 1992) at 1, 20-22.

[28] RD at 12 ("[S]uch a transaction may raise the specter of potential control [but] does not necessarily mean that the foreign entity controls the resulting air carrier); at 18 ("The possibility is sufficiently remote to warrant a conclusion that DHLWE is not in 'actual control' of ASTAR"); at 19 ("The argument for actual control of the carrier on this ground fails"); at 23 ("No entity associated with the DHL Network is, because of the ACMI agreement, in 'actual control' of ASTAR"); at 28 ("In these circumstances, DHLWE exercises no control over ASTAR"); at 30 ("But it would be mistaken to infer from these circumstances that DHLWE is in 'actual control' of ASTAR"); at 32 ("Neither DHLWE nor the DHL network can be said to be in actual control of ASTAR in any relevant or meaningful sense").

[29] Page Avjet, Citizenship, 102 C.A.B. 488, 490 (1983) (emphasis added).

applicable standard concluded, "[C]ircumstances affecting control must be evaluated as a whole" and "[r]elevant matters must be examined as part of a larger picture." RD at 38. The ALJ thus applied the proper standard.

In arguing that the Judge did not look at the totality of the circumstances, the Joint Parties cite the structure of his discussion in the RD, which individually analyzed each of the Joint Parties' assertions about potential control. The Judge, in order to look at the cumulative effect, had to address the individual issues presented by the Joint Parties to determine if, indeed, they were issues that could affect the carrier's citizenship. He found that none of the problems alleged by the Joint Parties individually or collectively demonstrated foreign control. His approach was reasonable and consistent with the statutory requirements.

The Joint Parties thus have not shown that the ALJ misapplied the actual control standard established by our precedent and codified last year by Congress.

2. The Department of Defense Airlift Contract Standard

The Joint Parties wrongly contend that Congress created an additional citizenship requirement last year that the ALJ allegedly should have enforced. In 2003, Congress addressed U.S. carrier citizenship issues through three statutory provisions, two of which expressly apply to this Department. Section 807 of Vision 100, the FAA reauthorization act, enacted in December of 2003, amended the statutory definition of "citizen of the United States," section 40102(a)(15) of title 49, by including the requirement that a carrier must be under the actual control of citizens of the United States. The two other changes were made by section 2710 of the Emergency Wartime Supplemental Appropriations Act, 2003. One provision directed us "to use an Administrative Law Judge in a formal proceeding to resolve" this docket. Section 2710 additionally barred DoD from using any appropriated funds for transportation provided by an air carrier that did not meet a foreign revenue test. The provision states that DoD may not use funds for transportation described in 49 U.S.C. 41106 that would be performed "by any air carrier that is not effectively controlled by citizens of the United States." Section 2710 states that, for DoD contract purposes, "an air carrier shall not be considered to be effectively controlled by citizens of the United States if the air carrier receives 50 percent or more of its operating revenue over the most recent 3-year period from a person not a citizen of the United States and such person, directly or indirectly, either owns a voting interest in the air carrier or is owned by an agency or instrumentality of a foreign state." [30] Under this provision, ASTAR would not be deemed effectively controlled by

[30] Section 2710 reads in full,

> None of the funds in this Act or any other Act may be obligated or expended to pay for transportation described in section 41106 of title 49, United States Code, to be performed by any air carrier that is not effectively controlled by citizens of the United States: *Provided*, That for purposes of implementing section 41106, an air carrier shall not be considered to be effectively controlled by citizens of the United States if the air carrier receives 50 percent or more of its operating revenue over the most recent 3-year period from a person not a citizen of the United States and such person, directly or indirectly, either owns a voting interest in the air carrier or is owned by an agency or instrumentality of a foreign state; *Provided further*, That this prohibition applies to transportation performed under any contract awarded or re-awarded after the date of enforcement of this Act: *Provided further*, That when the Secretary of Defense decides that no air carrier

U.S. citizens, because it receives most of its revenue from the DHL Network, whose parent is DP, an agency or instrumentality of a foreign state (Germany).

The Joint Parties argue that the ALJ should have applied the foreign revenue test adopted by the Congress for DoD contracts in his assessment of ASTAR's citizenship. According to them, the foreign revenue test "codified and ratified" a test used by the Department and the Civil Aeronautics Board. Pet. at 28, n. 43.

We cannot agree with the Joint Parties' argument. First, as discussed above, neither the Board nor we have ever held that a carrier is subject to foreign control merely because it derives most of its business from a foreign firm. The Joint Parties cite no Department or Board precedent supporting their assertion that we have used such a test. Second, while section 2710 of the Emergency Wartime Supplemental Appropriations Act required us to refer this proceeding to an ALJ for a formal hearing, by its terms it does not require us to follow the foreign revenue test imposed on DoD airlift contracts. Congress, moreover, did not insert similar language into our citizenship statute later in the year when it revised the statutory definition in Vision 100, the FAA Reauthorization Act. That revision added our actual control test to the statutory definition of a U.S. citizen but did not add the foreign revenue test that Congress had imposed on DoD several months earlier.

In general, we must follow the express language of a statute. "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"[31] Nothing in the history of these legislative changes suggests that Congress meant to require us to follow the foreign revenue test in our citizenship cases. If Congress had wanted us to follow the same foreign revenue test imposed on DoD airlift contracts, Congress would have said so. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[32] As shown, Congress twice determined to expressly amend the citizenship provision – first by requiring us to hold a formal hearing in this proceeding and then by incorporating our actual control standard into the statutory language – without adding the foreign revenue control test. In these circumstances, there is no basis for assuming that Congress also meant to impose that test in our citizenship cases.[33]

> holding a certificate under section 41102 is capable of providing, and willing to provide, such transportation, the Secretary of Defense may make a contract to provide the transportation with an air carrier not having a certificate: *Provided further*, That the Secretary of Transportation is directed to use an Administrative Law Judge in a formal proceeding to resolve docket number OST-2002-13089.

P.L. 108-11. Section 41106 allows DoD to use only specified types of carriers for airlift services provided by contract.

[31] *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).

[32] *Russello v. United States*, 464 U.S. 16, 23 (1983), quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

[33] In addition, the language within the statutory amendments indicates that Congress believed that it was establishing a different rule for DoD airlift contracts. Section 2710 uses the phrase "effectively controlled by citizens of the United States" for the limitation imposed on those contracts. The Vision 100 amendment of our statutory citizenship definition uses different language, "under the actual control of citizens of the United States." If

The ALJ thus properly based his findings on the actual control test without including the foreign revenue test applicable only to DoD airlift contracts.

DOT Procedural Rulings

The Joint Parties contend that we should take review because procedural rulings made by us and Judge Kolko allegedly denied them a fair opportunity to present their case. Their contentions, including their complaint that we could not properly limit the scope of this proceeding, challenge our exercise in this case of our authority to choose the procedures best suited for carrying out our responsibilities, including our responsibility to enforce the statutory citizenship requirement. The Joint Parties' procedural complaints do not warrant review of Judge Kolko's decision, as discussed next.

1. Scope of the Proceeding

When we referred this case to an ALJ for hearing, we stated that the issue in this proceeding was whether ASTAR (then still DHLA) currently met the citizenship requirement. After the Dasburg group acquired control of DHLA, we again stated that the issue in this proceeding was whether the carrier, now ASTAR, was currently a U.S. citizen.

The Joint Parties nonetheless complain now that our limits on the scope of the proceeding allegedly prevented them from obtaining and introducing all of the relevant evidence on the ties between the DHL Network and DHLA. These complaints are without merit.

While Congress directed us to hold a hearing before an administrative law judge to resolve the question of ASTAR's current citizenship, Congress did not otherwise specify the procedures to be used in this case. Congress has generally authorized us to choose which procedures should be used in individual cases and to determine how each case will be structured, subject to the requirements of the Administrative Procedure Act and statutory provisions requiring specific procedures in certain types of cases. Our governing statute states that we "may conduct proceedings in a way conducive to justice and the proper dispatch of business."[34] The courts have routinely held that we and other agencies have substantial discretion to establish the procedures for administrative proceedings.[35] That authority includes the discretion to determine whether related issues should be included in one proceeding or be considered in separate proceedings, and when those proceedings should be held.[36]

We acted reasonably in limiting the scope of this proceeding to the question of whether ASTAR is now a U.S. citizen. Our immediate goal was to determine whether ASTAR's current structure

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Congress had wanted to require both agencies to follow the same standard, it would not have used different language in that respect.

[34] 49 U.S.C. 46102(a).

[35] *See, e.g., City of St. Louis v. Dept. of Transportation*, 936 F.2d 1528, 1535, n.1 (8th Cir. 1991); *Louisiana Ass'n of Independent Producers v. FERC*, 958 F.2d 1101, 1114-15 (D.C. Cir. 1992); *Michigan Public Power Agency v. FERC*, 963 F.2d 1574, 1579 (D.C. Cir. 1992).

[36] *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211, 230-31 (1991); *National Airlines v. CAB*, 392 F.2d 504 (D.C. Cir. 1968); *City of San Antonio v. CAB*, 374 F.2d 326 (D.C. Cir. 1967).

and relationships are consistent with the statutory citizenship requirement. A case that focused on DHLA's past compliance with the citizenship requirement, on the other hand, would essentially be an enforcement case. The question then would be whether DHLA had operated unlawfully and, if so, whether civil penalties should be assessed. Enforcement complaints against DHLA are currently pending before the Office of Aviation Enforcement and Proceedings. Dockets OST-2002-13590 and OST-2002-13787.[37]

While the Joint Parties complain that we improperly limited the scope of this proceeding, they cite no authority for the proposition that agencies may not define the scope of individual proceedings. Instead, they cite *Atlas Copco, Inc. v. EPA*, 642 F.2d 458, 467 (D.C. Cir. 1979), which held that an agency could not arbitrarily limit the scope of its administrative hearings. That case is not relevant. There the EPA had attempted by regulation to create a blanket evidentiary exclusion in certain types of cases. Here, in contrast, we limited the scope of the issues in the hearing to the current citizenship of ASTAR, and our decision was not arbitrary.[38]

There is equally no basis for the Joint Parties' allegation that Congress expected us in this proceeding to establish whether DHLA met the citizenship test before the Dasburg group acquired the carrier. Pet. at 19. The UPS petition that initiated this proceeding sought a determination of whether DHLA was operating unlawfully and, if so, the revocation of DHLA's operating authority.[39] Given UPS' request that the carrier's operating authority be revoked, UPS clearly intended to obtain a ruling on whether the carrier's structure and operations at the time of our decision complied with the citizenship requirement, not a decision on whether DHLA had met that requirement when UPS filed the petition on August 9, 2002. As discussed above, a determination that DHLA had violated the citizenship requirement before the Dasburg group's purchase could result only in the assessment of civil penalties, a result that would not address the Joint Parties' concerns about the on-going citizenship of ASTAR. The Joint Parties concede as much elsewhere in their petition for review: "The CALJ properly understood that the purpose of the hearing was to investigate and determine ASTAR's current citizenship . . . under the totality of circumstances." Pet. at 22.

The Joint Parties further argue that we must take review of Judge Kolko's decision because our limit on the scope of the proceeding caused him to exclude relevant evidence on ASTAR's citizenship. They claim that ASTAR's citizenship could not be properly judged without more evidence on DHLA's relationships with the DHL Network before the Dasburg group acquired DHLA. Pet. at 20-25.

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[37] The Assistant General Counsel for Aviation Enforcement and Proceedings, at the direction of the Deputy General Counsel, is responsible for determining whether these complaints warrant a formal proceeding. Because the ALJ's decision has resolved the citizenship question for ASTAR, that Office should promptly consider whether further action should be taken on the complaints against DHLA.

[38] The *Attorney General's Manual on the Administrative Procedure Act,* cited by the Joint Parties at Pet. at 23, supports the principle that an agency may limit the evidence in a case by defining the scope of a case. The manual states, "For example, if an agency provides by rule that the fact of citizenship must be established in a prescribed manner, the hearing officer must conform to such rule in exercising his power to 'rule upon offers of proof and receive relevant evidence.'" *Id.* at 75. Our order defining the scope of this case established the factual information that should be considered in determining ASTAR's citizenship.

[39] Petition of United Parcel Service Co. to Institute a Public Inquiry into the Citizenship and Foreign Control of DHL Airways, Inc. (Docket OST-2002-13089-1 (Aug. 9, 2002)) at 2, 12-13.

The suggestion that our ruling on the proceeding's scope necessarily led to the exclusion of relevant evidence overlooks our express statement that the ALJ had the discretion to determine what evidence was relevant given the limits on the scope of the proceeding. We specifically recognized the ALJ's authority "to determine the relevance of the evidence in the proceeding," consistent with our definition of the scope of the issues.[40] We did not foreclose the parties from introducing any evidence on the DHLA structure and arrangements in effect before the Dasburg group's acquisition. We instead stated that past circumstances could be considered where those facts would be relevant to the current citizenship status of ASTAR.[41]

The Joint Parties, moreover, have failed to show that the ALJ could not properly determine whether ASTAR met the citizenship requirement without additional evidence on DHLA's relationships before the Dasburg group's purchase of the carrier. According to the Joint Parties, "When DHLA was purchased by BDAP on July 14, 2003, the vast majority of its operations and control structure remained unchanged." As a result, they argue, "It is not possible to assess [ASTAR's] ownership or actual control on and after July 14, 2003 without understanding the manner in which the carrier operated under the ownership and control structure prior to that date." Pet. at 20, 21.

The ALJ did consider certain past circumstances in this proceeding.[42] The ALJ explained, however, why the pre-existing arrangements were largely irrelevant to the question of whether ASTAR is now controlled by U.S. citizens, RD at 12:

> 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 . . . have no comparable existing agreement. Other now-terminated agreements, such as the ACMI agreements, have only superficial, irrelevant similarities to comparable existing agreements.

The Joint Parties' petition does not explain why we should review this finding by Judge Kolko. The Joint Parties' assertion that "the vast majority of [DHLA's] operations and control structure remained unchanged" after the Dasburg group's acquisition, Pet. at 20, is plainly incorrect. As the ALJ pointed out, the major arrangements did change: DHLA has new owners, all of whom are U.S. citizens, new senior management, and a new and different ACMI agreement with DHLWE.

In their efforts to show that the Dasburg purchase changed nothing despite the ownership, management, and operational changes, the Joint Parties rely on a brief submitted to the National Mediation Board by DHLWE (not ASTAR), which purportedly stated that the Dasburg acquisition "relates solely to a change in equity ownership, not control," and "that there is absolutely no record evidence that [those transactions] will fundamentally change the nature in which the integrated enterprise [will] conduct its business." Pet. at 21. Whatever may have been

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[40] Order 2003-8-19 at 4; *see also* Order 2003-10-25 at 5.

[41] Order 2003-8-19 at 3-4.

[42] *See* RD at 3-7 (discussing the history of DHLA prior to the July 14th purchase).

the evidence in the National Mediation Board proceeding, the evidence in this proceeding, as discussed by Judge Kolko, did show that fundamental changes occurred at DHLA insofar as the citizenship issues are concerned. Furthermore, the brief's statement that a change in equity ownership has no effect on control is entitled to no weight, because a change in ownership always causes a change in control, unless rebutted by other factors. No such factors have been cited by the Joint Parties, other than DHLWE's continuing role as ASTAR's major source of revenue. As shown, under our precedent that by itself does not demonstrate foreign control.

Finally, the Joint Parties assert that the pre-existing relationships are relevant because the DHL Network's objective "has been, and continues to be, to devise a means of doing indirectly what it cannot lawfully do directly, which is to give the DHL Network the ability to hold itself out in the United States unlawfully as a direct air carrier." Pet. at 21. The Joint Parties cite no evidence in support of this assertion. While the DHL Network obviously wishes to hold itself out as offering a worldwide delivery service, just as do FedEx and UPS in their own global operations, that goal does not indicate that the DHL Network additionally wishes to cause shippers to believe that it is operating as a direct carrier, that is, operating the flights itself within the United States. As a result, the Joint Parties have failed to show that the limits placed on the scope of this proceeding caused evidence that would be relevant and material to be excluded from the hearing.

While the Joint Parties argue at some length that we could not limit the ALJ's discretion on what evidence is relevant and should be admitted, they somewhat inconsistently urge us to take review because the ALJ assertedly erred in denying their requests to introduce evidence on DHLA's relationships before the Dasburg group acquired control. Pet. at 24. This evidence allegedly would show the DHL Network's "substantial influence over DHLA" before the Dasburg group's acquisition of the carrier. Pet. at 24. Even if this assertion were correct, any ability by the DHL Network to exert substantial influence *before* the Dasburg acquisition would not necessarily show that the DHL Network had any ability to exercise such influence *after* the BDAP acquisition. The ALJ's findings that the additional evidence on the previous arrangements between DHLA and the DHL Network was not relevant to determining ASTAR's current citizenship appear reasonable and correct and represented a proper exercise of his discretion.

2. Deadline for the RD

We determined when we set this case for hearing before an ALJ that the case should be resolved relatively promptly. If DHLA were competing unlawfully with the Joint Parties, as FedEx and UPS argued, the public interest would mandate an early resolution of the issue that would lead to DHLA's taking steps to comply with its legal obligations or facing the revocation of its certificates if it did not. We accordingly established a deadline for the ALJ, although we later granted three extensions to the deadline.[43] The ALJ was able to serve his decision two weeks before the deadline. The Joint Parties now argue that we erred in setting a deadline because that enabled the DHL Network to manipulate discovery. Specifically, the Joint Parties point to DHLWE's withholding of documents from production under a subpoena issued by the CALJ. By September 17 the DHL Network had provided only four documents. The Joint Parties asked the

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[43] *See* Notice of May 12, 2003 (extending the deadline to Oct. 31, 2003); Order 2003-7-36 (extending the deadline to Dec. 1, 2003); and Order 2003-10-25 (extending the deadline to Jan. 2, 2004).

U.S. District Court for the District of Columbia for relief, but they failed to obtain all of the documents they sought before the close of the hearing. Pet. at 19-20.

We cannot accept this argument. The Joint Parties have failed to complete the story in their petition for review. First, we extended the deadline for the Judge to issue his decision on three occasions, as noted above. On the last occasion, we extended the date to January 2, 2004, after noting the Joint Parties' pending suit in federal court to enforce the DHL Network's subpoenas. Order 2003-10-25 at 4-5. Second, the DHL Network ultimately produced several thousand pages of documents, and the Joint Parties sought to admit only a few of them.[44] If the Joint Parties had wished, they could have asked the ALJ to ask us for more time, but they did not. We fail to see any prejudicial effect on the Joint Parties from our limiting the time for adjudication.

3. Public Counsel

In formal hearing proceedings involving air carrier fitness and citizenship issues, we may direct the Office of Aviation Enforcement and Proceedings and the Air Carrier Fitness Division to act as Public Counsel. Their role is to assist in the development of a complete record in the case by participating as a party in the proceeding.[45] Nothing in our rules, our governing statute, or the Administrative Procedure Act requires us to appoint Public Counsel in any formal hearing case. In this case, we determined not to appoint Public Counsel. Order 2003-4-14 at 2, n. 5. When the CALJ later complained that the lack of Public Counsel would keep him and the parties from meeting the deadline for completion of the hearing, we explained that the lack of Public Counsel should not hinder the ability of the ALJ and the parties to conduct a thorough examination of the issues, May 12, 2003, Notice at 2:

> Both sides of the questions at issue here are adequately, indeed amply, represented by competent counsel. We therefore see no reason to believe that the parties would require the intervention of Public Counsel to develop a full record on the issues in a timely way.

The Joint Parties never formally requested us to appoint Public Counsel after we set the case for hearing. In his April 29, 2003, Pre-Hearing Conference, the CALJ instructed the parties that should they want Public Counsel, they needed to file a Petition for Reconsideration of the Instituting Order, and added, "You need to do it promptly."[46] They filed no such request with us. Accordingly, the Joint Parties may not complain that we erred by not appointing Public Counsel in this proceeding.

In any event, the Joint Parties incorrectly argue that our failure to make Public Counsel a party in the case made it difficult to create an "orderly evidentiary record." Pet. at 26. The Joint Parties had ample opportunity to conduct discovery. They had the right to obtain subpoenas and enforce those subpoenas in district court, and they did so. Because the Joint Parties had sufficient ability on their own to protect their interest in developing a complete record, participation of Public Counsel was not necessary.

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[44] Answer of ASTAR Air Cargo, Inc. to Petition for Discretionary Review (*hereinafter* Answer) (Docket OST-2002-13089-602 (Feb. 6, 2004)) at 10.

[45] 14 C.F.R. § 300.4.

[46] April 29, 2003 Prehearing Conf. Tr. 26:16-27:9.

4. Burden of Proof

The Joint Parties additionally argue that the ALJ committed prejudicial error by allegedly shifting the burden of proof from ASTAR to the Joint Parties. Pet. at 14. The Joint Parties again base this argument on the manner in which the Judge structured his decision. On each issue he presented the Joint Parties' arguments first, and then rebutted them with ASTAR's evidence. They argue that this demonstrates that he shifted the burden of proof to the Joint Parties. Pet. at 15.

We find that the Joint Parties have failed to show that the ALJ placed the burden of proof on them. ASTAR, over its objection, was assigned the burden of proof in this case as a result of a ruling by the CALJ.[47] Statements by the ALJ at the hearing demonstrate that he thought that ASTAR bore the burden of proving its citizenship.[48] Nothing said during the hearing or in the RD indicates that the ALJ reversed the burden of proof.

While Judge Kolko took the Joint Parties' arguments and then addressed each of them in light of ASTAR's counterarguments, this pattern of analysis neither seems unusual under the circumstances nor indicates that he silently shifted the burden of proof to the Joint Parties. In any event, the ALJ did not base his findings on any failure by the Joint Parties to satisfy a burden of proof. Judge Kolko's factual findings and his belief that ASTAR had the burden of proof show that he concluded that ASTAR met its burden by proving its prima facie case and the Joint Parties failed to effectively rebut ASTAR's case. We find the Joint Parties have failed to show that the ALJ placed the burden of proof on them.[49]

5. Recusal of Department Staff

The Assistant General Counsel for Environmental, Civil Rights, and General Law, the Department's Alternate Designated Ethics Official, has examined whether members of the staff must be recused from participation in the decision of this proceeding if they had previously informally reviewed DHLA's citizenship. After reviewing the facts and the law, she has concluded that no recusals are necessary. I have reviewed the memorandum which sets forth her analysis and findings; I agree with her reasoning and conclusions; and I am incorporating her memorandum in this decision by reference and placing a copy of it in the docket.

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[47] April 29, 2003 Prehearing Conf. Tr. at 34-44; Order No. 13089-1(K), served August 18, 2003.

[48] *See, e.g.,* Oct. 14, 2003 Hrg. Tr. 2952:8-10; Oct. 15, 2003 Hrg. Tr. 3039:10-11.

[49] While we need not decide whether the CALJ's ruling on the burden of proof was correct, his ruling may not have been consistent with the Administrative Procedure Act, which normally determines which party has the burden of proof in our proceedings. Section 7(c) of that statute, 5 U.S.C. § 556(d), states "the proponent of a rule or order has the burden of proof." *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994). ASTAR is not an applicant for a license in this proceeding, for it already has certificate authority. UPS initiated this docket by filing a petition asking us to reexamine the citizenship of DHLA, now ASTAR, and to revoke its certificate authority if we found that foreign citizens controlled DHLA. Congress expressly required us to resolve the issues in this docket. The Joint Parties, not ASTAR, could therefore be regarded as the proponent of the order in this case. *Cf. Air Canada v.Dept. of Transportation*, 148 F.3d 1142, 1155-56 (D.C. Cir. 1998). That result would be consistent with the principle that, unless otherwise required by statute, an agency normally may not terminate a firm's license without meeting the burden of showing that the license should be terminated due to the firm's conduct or changes in circumstances. "Except as applicants for a license or other privilege may be required to come forward with a prima facie showing, no agency is entitled to presume that the conduct of any person or status of any enterprise is unlawful or improper." *S. Rep. No. 79-752*, 79th Cong., 1st Sess. (1945) at 22, *quoted at Environmental Defense Fund v. EPA*, 548 F.2d 998, 1014-15 (D.C. Cir. 1976).

In determining whether to take review of the ALJ's decision, we have relied entirely on the record developed in this proceeding without considering extra-record information.

The ALJ's Factual Findings on ASTAR's Actual Control by U.S. Citizens

Judge Kolko concluded, after analyzing the record, that ASTAR was actually controlled by U.S. citizens and therefore satisfied the citizenship requirement. He recognized that ASTAR depended on DHLWE for the great majority of its business, that ASTAR's role in meeting DHLWE's airlift requirements within the United States meant that ASTAR needed to coordinate its operations with DHLWE to some extent, and that DHLWE could force ASTAR out of business if DHLWE failed to use ASTAR for its transportation needs or if the DHL Network otherwise failed to comply with its contractual obligations to ASTAR. He found that the record demonstrated that ASTAR controlled its own operations and would not be controlled by the DHL Network. ASTAR's contracts with the DHL Network would fully protect ASTAR against any efforts by the DHL Network to deny ASTAR revenues and working capital by attempting to breach the contracts. The Joint Parties argue that Judge Kolko erred, both because of the DHL Network's theoretical ability to ruin ASTAR and because of the close cooperation between ASTAR and the DHL Network. After considering the Joint Parties' arguments, we find that they do not justify review of the ALJ's decision.

1. DHL's Theoretical Ability to End Its Relationship with ASTAR

According to the Joint Parties, the DHL Network's ability "to terminate the ACMI Agreement. . . is tantamount to the ability to destroy ASTAR – whatever the likelihood that such action will, in fact, be taken – and indisputably provides the [DHL Network] with the ability to exercise substantial influence over ASTAR." Pet. at 18. As the ALJ explained, however, the DHL Network would never realistically take such action – and could not credibly threaten to do so – because of its own dependence on ASTAR.

The principal agreement governing the relationship between ASTAR and the DHL Network is their ACMI agreement. It is essentially a cost-plus contract under which ASTAR agrees to provide lift to DHLWE, and DHLWE is obligated to use ASTAR's services.[50] The DHL Network also provides working capital to ASTAR. The DHL Network, as discussed below, could terminate the agreement if ASTAR defaults on certain obligations and fails to cure the default. The DHL Network otherwise could only terminate the agreement by breaching it, and even then ASTAR could likely obtain injunctive relief and substantial damages.

The DHL Network requires ASTAR's services, as Judge Kolko explained. Because the DHL Network "hopes to create a seamless, fully integrated system to carry and deliver express packages by air throughout the world," "[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." The DHL Network cannot do that itself, for "only a U.S. citizen air carrier is permitted to perform such operations." RD at 33 (citations omitted). The DHL Network has chosen to have ASTAR provide those services under their ACMI agreement.

[50] RD at 7-9; 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.

Judge Kolko found that the contractual arrangements between ASTAR and the DHL Network substantially eliminate the DHL Network's ability to exercise influence over ASTAR, RD at 21 (citations omitted):

> 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. Accordingly, the ACMI Agreement provides no credible threat of termination in the eyes of a rational economic actor.

The DHL Network could not effectively threaten to end its relationship with ASTAR. First, the DHL Network benefited greatly when Dasburg agreed to take over the management of DHLA, an agreement that was conditioned upon his ability to acquire control of the carrier. RD at 5. The ALJ thus explained, RD at 15 (citations omitted):

> The DHL delivery network is worldwide. It is worth billions. But without a viable U.S. foothold, its value is much less – "if not . . . nearly worthless." 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.

The ALJ additionally reasoned that the DHL Network, as a practical matter, could not threaten to undermine ASTAR's business in any believable manner by refusing to comply with its own contractual obligations, and so could not exercise substantial influence over ASTAR by making such threats, RD at 19:

> [F]or 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 . . . noted that the DHL Network "cannot take the risk of a major service disruption in the marketplace" . . . . Where would DHLWE find the planes? It could not engage them itself. . . . 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. . . Against this background, DHLWE can make no credible threat of termination in order to bend ASTAR to its will.

Even a credible threat by the DHL Network to terminate its relationship with ASTAR by breaching the ACMI agreement would not likely compel ASTAR's owners to yield to DHL Network demands. As the ALJ put it, any termination of the agreements by the DHL Network "could in fact prove a bonanza" for ASTAR. RD at 20. As a result, "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." RD at 21. Indeed, even the Joint Parties recognize that the ACMI agreement's termination by DHLWE "could prove *profitable* for ASTAR." Pet. at 33 (emphasis in original).

Similarly, Judge Kolko found that ASTAR's dependence on the DHL Network for the large majority of its business would not give the DHL Network substantial influence over ASTAR. As he explained, RD at 23-24:

> [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.

He reasonably concluded that the DHL Network could not credibly threaten to shift its shipments to another carrier, and that any threats to do so would not be taken seriously. RD at 24.

In attacking the RD, the Joint Parties do not characterize fairly the ALJ's reasoning. According to them, "The RD never asks the seminal question of whether [the DHL Network] could put an end to the airline." Pet. at 18. The ALJ recognized that the DHL Network, in theory, "could put an end to the airline" (but without damaging the Dasburg group's investment) by breaching its contractual obligations. As shown, however, he concluded that the record demonstrated that the DHL Network would not take any such action, because it could not afford to do so. The Joint Parties have not even attempted to rebut Judge Kolko's reasoning by arguing that the DHL Network has any realistic ability to end its relationship with ASTAR. They challenge neither the ALJ's findings that the DHL Network's own success in the United States requires the maintenance of its relationship with ASTAR nor the ALJ's reasoning that any termination threats from the DHL Network would not be credible. Instead, the Joint Parties cite ASTAR's own dependence on the DHL Network for its working capital and revenues and the harm that ASTAR would suffer if the DHL Network breached its obligations. *See, e.g.*, Pet. at 45-46. However, while the DHL Network in theory could breach the ACMI agreement and terminate it, as the Judge noted, the resulting cost to DHLWE would be prohibitive. RD at 18-19. "[T]he threat is illusory, because for DHLWE to walk away from the ACMI would be commercially irresponsible." RD at 19.

Furthermore, the ALJ held that the ACMI agreement by its terms would likely enable ASTAR to obtain injunctive relief if DHLWE attempted a breach. RD at 18. Judge Kolko also found that ASTAR would then be entitled to obtain substantial damages from the DHL Network. RD at 20-21.

In addition, the ALJ found that ASTAR's three owners are individuals who cannot be bullied, RD at 21, n. 23:

> [T]hese 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 "Magnificent Seven", but I suspect that one messes with this trio at his peril.

Looking at the specific points made by the Joint Parties gives us no reason to believe that the ALJ erred in his analysis. The ACMI agreement, for example, requires DHLWE to prepay two weeks of ASTAR's expenses for which ASTAR will be entitled to reimbursement.[51] The prepayment provides ASTAR with working capital. The Joint Parties argue that the Judge erred by not treating the two-week expense prepayment as a loan and that the loan gives DHLWE the ability to exercise substantial influence. Pet. at 43. The Joint Parties do not explain why the ALJ should have treated DHLWE's pre-payment obligation as the equivalent of a loan commitment or why that would make any difference to the ALJ's analysis. Furthermore, the DHL Network is unlikely to breach its obligation to prepay ASTAR's expenses. We have no reason to doubt the validity of the ALJ's findings on this point, RD at 18:

> 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 prospect of termination, further, would be meaningful only if DHLWE could terminate without incurring significant consequences. But this is not the case. . . . [I]t 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.

Similarly without merit is the Joint Parties' argument that the ALJ erred in finding that the DHL Network had no ability to terminate the agreements, specifically the ACMI and guaranty agreements, because, they assert, the ACMI agreement defines DP's termination or breach of the guaranty as an "event of default" in DHLWE's ACMI agreement. According to the Joint Parties, this contractual provision recognizes that DP may terminate the guaranty agreement under certain conditions. Pet. at 40.

Boeing Capital's agreement to finance the Dasburg group's purchase of DHLA was contingent upon Deutsche Post's guaranty agreement with ASTAR, whereby DP guarantees the performance of DHLWE's contractual obligations to ASTAR under the ACMI agreement. ASTAR granted a security interest in the guaranty to Boeing Capital in order to secure the $50 million loan.[52] On the ground that DP "could take unilateral action to cause an event of default under the Boeing note," the Joint Parties assert that the DHL Network has the ability to substantially influence ASTAR. Pet. at 31. We disagree. The guaranty agreement provides no avenue for termination by Deutsche Post. Assuming that maintaining the guaranty is important for maintaining ASTAR's operations, the ALJ correctly concluded that DP, like DHLWE, is unlikely to default on its obligations because the DHL Network depends too much on ASTAR's flights for its worldwide service. If DP walked away from its obligations under the guaranty agreement, DP

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[51] *See* ACMI, Art. 10, AS-26, at 25-38.

[52] Acknowledgement and Consent to Grant of Security Interest in the Guaranty, AS-36.

would be in breach of its agreement with ASTAR, and could be sued by Boeing Capital (as the holder of the security interest) and ASTAR.[53]

The Joint Parties cite no evidence that would rebut the ALJ's findings that the DHL Network needs ASTAR's services and Mr. Dasburg's managerial skills. Despite the lack of contrary evidence, they complain that the ALJ had an inadequate basis for making those findings because no witness from the DHL Network testified on these matters. Pet. at 39. The lack of any DHL Network witness could not undermine the ALJ's findings. The evidence in the record fully supports the ALJ's analysis. The Joint Parties chose not to present contrary evidence or testimony.

The Joint Parties cite the possibility that DHLWE could terminate the ACMI agreement if ASTAR defaults on its obligations, for example, by failing to meet the on-time requirements set by the agreement. In that event, they assert, the DHL Network would have some ability to exert influence over ASTAR's operations. Pet. at 30. Judge Kolko considered this argument and found no likelihood that DHLWE could terminate the agreement due to an ASTAR default. First, ASTAR would have the right to attempt to cure its default, with a few exceptions. Second, he concluded, "there is no reason to find that ASTAR cannot fulfill its operating commitments with DHLWE." RD at 20. The Joint Parties had argued that ASTAR could not meet its commitment to operate the schedules required by the ACMI agreement. The ALJ disagreed. He relied on ASTAR's Chief Operating Officer, Gary Hammes, who had "effectively refuted these claims" that ASTAR could not carry out its obligations. The Judge noted that Mr. Hammes "was a credible witness whose conclusions were based on 'hands-on' experience and reliable information." The ALJ concluded, "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."[54]

Thus the Joint Parties have not shown that we should take review of the ALJ's decision on the ground that the DHL Network theoretically could destroy ASTAR, either by refusing to comply with its contractual obligations to ASTAR under the ACMI agreement and related agreements or by exercising its rights under those agreements in the event of a breach by ASTAR.

2. ASTAR's Contractual Relationship with the DHL Network

The Joint Parties argue on several grounds that the on-going business relationships between ASTAR and the DHL Network will enable the DHL Network to exert substantial influence over ASTAR. The ALJ concluded that these business relationships would not give the DHL Network potential control over ASTAR. RD at 23. After considering the Joint Parties' arguments, we see no reason to doubt the ALJ's findings.

To begin, the Joint Parties note that ASTAR now obtains about 90 percent of its revenues from the DHL Network, that almost all of ASTAR's aircraft must be dedicated to operating the flights required by the ACMI agreement, and that ASTAR must coordinate its operations with DHLWE. Pet. at 27. As shown by our earlier discussion in this order, however, a U.S. carrier's reliance on

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[53] Guaranty, Ex. A, AS-26; Note Agreement, AS-31.

[54] RD at 20.

a foreign firm for most of its business by itself does not mean that the U.S. carrier is subject to the actual or potential control by the foreign firm. We agree with Judge Kolko's finding that DHLWE cannot exert substantial influence over ASTAR as a practical matter, even though ASTAR obtains most of its business from DHLWE. RD at 23-24. The ALJ further found that DHLWE is contractually obligated to continue paying ASTAR $15 million annually even it if it chooses not to use ASTAR's services. Thus DHLWE cannot pressure ASTAR by threatening to stop using its flights. RD at 27-28.

ASTAR's failure thus far to obtain a substantial volume of business from other sources does not prove control, despite the Joint Parties' arguments to the contrary.[55] The ALJ rationally found that ASTAR's current derivation of most of its revenues from DHLWE does not give DHLWE control. The Joint Parties' arguments that ASTAR will not develop third-party business, therefore, would not justify taking review of the ALJ's decision. Furthermore, the ALJ found that ASTAR had incentives to develop third-party business and would likely do so in the future. RD at 24-26.

Similarly, as explained above, the existence of a close working relationship between a U.S. airline and a foreign airline does not show that the foreign airline can exercise substantial influence over the U.S. airline for citizenship purposes. A number of U.S. airlines have such relationships with one or more foreign airlines, most notably by participating in global airline alliances, without having had their citizenship placed in question. This has been true even though U.S. airlines that have alliances with foreign airlines often seek to integrate the operations of the U.S. and foreign airline partners so that they operate as if they were a single airline.

The arrangements between ASTAR and DHLWE necessarily require a substantial amount of cooperation between the carrier and the DHL Network. After all, DHLWE depends on ASTAR for the transportation of its packages within the United States. RD at 29-30, 33. The Joint Parties nonetheless seize upon ASTAR's obligations to coordinate its operations with DHLWE's needs as proof that DHLWE controls ASTAR. Pet. at 28, 37-38. The ALJ rationally rejected that argument. As the ALJ pointed out, ASTAR controls all of its employment decisions, controls its own financial operations and formulates its own budget, makes its own strategic decisions, makes its own decisions on aircraft acquisitions, leases, and sales, and has complete supervisory powers over its ground operations. He thus concluded, "In sum, ASTAR runs its own day-to-day operations," and "DHLWE has little if any say." RD at 30-31.

We find equally unpersuasive the Joint Parties' argument that DHLWE's audit rights give it substantial influence over ASTAR. They assert, "[I]t is axiomatic that people possessing such audit rights . . . have the potential to exercise substantial influence over the audited person's activities." Pet. at 33-34. DHLWE's right to audit ASTAR's cost records is consistent with the nature of the ACMI agreement, because it is a cost-plus contract.[56] As the ALJ concluded, "DHLWE's interests in ASTAR's costs are grounded in business reasons unrelated to any

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[55] Pet. at 28-29. In fact, the limits placed by section 2710 of the Emergency Wartime Supplemental Appropriations Act on DoD's airlift contracts have undermined ASTAR's efforts to obtain business from other sources. Pet. at 28.

[56] *See* ACMI, § 10.3(b), AS-26, at 33.

notions of control."[57] Furthermore, the ALJ found that DHLWE's audit rights would not give it control: "DHLWE has no right to override ASTAR's estimates – a power an entity actually exercising control of another might have." RD at 31. The Joint Parties have not shown that his finding is erroneous.

The Joint Parties argue that the Judge erred in finding, RD at 30, that ASTAR sets its employees' salaries. According to them, the salaries for ASTAR employees, except for senior management, are subject to a cap in the ACMI agreement, and any additional compensation must be paid by ASTAR from funds from other sources. Pet. at 43-44. Here again, this limit on compensation is reasonable and not a sign of control in light of the arrangements between ASTAR and DHLWE. Because DHLWE reimburses ASTAR's expenses, it understandably wished to place limits on ASTAR's ability to increase the expenses, such as employee salaries, that would be paid by DHLWE.[58] The ACMI agreement, however, does not bar ASTAR from paying higher compensation if it chooses to do so. The Joint Parties contend that DHLWE can exert influence over ASTAR because ASTAR's employees derive their salaries from payments made by DHLWE, Pet. at 29-30, but, as shown, DHLWE cannot practicably evade its obligation to make the payments required by the ACMI agreement. DHLWE's payment of the executive salaries at ASTAR also does not give DHLWE control over the carrier. A Board of Directors runs ASTAR, and two of the three directors, Messrs. Blum and Klein, are not executives whose salaries are subject to the ACMI agreement. The third director, Mr. Dasburg, has an employment contract that provides extensive benefits in addition to a negotiated salary.[59]

The ACMI agreement provides DHLWE with certain rights regarding the potential sale of ASTAR, or alienation rights. As the Joint Parties characterize it, "DHL has the ability to influence and, in certain cases prevent, the Dasburg Group from selling a controlling interest in ASTAR." The Joint Parties therefore argue that DHLWE has control over ASTAR. Pet. at 34-35. The ALJ disagreed, and we think that the record supports his findings. As he explained, the agreement requires ASTAR to notify DHLWE and consult with it if there is going to be a change of control, that is, if the Dasburg group will no longer hold at least half of the voting power. The ALJ recognized that DHLWE could then threaten to terminate ASTAR's rights under the ACMI agreement. Nonetheless, as he pointed out, DHLWE would have no real incentive to terminate those rights, because the change in control would not terminate the ACMI agreement itself, and DHLWE's obligation to depend on ASTAR for its transportation needs would continue.[60]

Furthermore, the ALJ pointed out that the ACMI agreement gives the Dasburg group a substantial ability to sell their interests. The agreement does not bar them from selling their interests, as long as (i) they keep at least 50 percent of the voting power or (ii) they sell the ASTAR stock to unrelated investors so that no individual or group owns more than 50 percent of the voting power. RD at 22-23. It is, of course, reasonable for the DHL Network to wish to have some influence over changes in ASTAR's control, because the DHL Network depends on ASTAR for lift in the United States. Our precedent indicates that such restrictions do not

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[57] *See* ACMI § 10.3(b)-(d). AS-26, at 33-34.

[58] *See* ACMI § 10.2(d), AS-26, at 32. This section provides the formula by which employee salary increases are computed.

[59] *See* Dasburg Employment Contract, JT-603, at DHLA90001.

[60] RD at 22; ACMI, § 13.1(h), AS-26, at 41.

constitute foreign control. For example, in *North American Airlines, Inc.*, Order 89-11-8, we found that the carrier was a U.S. citizen, even though its minority foreign owner (Israel's El Al Airlines) could prohibit parties considered hostile to Israel from purchasing an interest in North American Airlines.

Finally, the Joint Parties argue that the DHL Network has a potential ability to have substantial influence over ASTAR because one of ASTAR's owners, Michael Klein, is a partner at the law firm of Wilmer, Cutler and Pickering (WCP), which has on occasion represented the DHL Network and Deutsche Post. Pet. at 36. Judge Kolko found that Mr. Klein's partnership and WCP's representation of the DHL Network and Deutsche Post did not constitute control. He saw "no reason to suspect that because of common representation Klein and his group have not been (and are not) completely separate and independent of" the DHL Network. RD at 32. In that regard, he cited the negotiations for DHLA's purchase by Messrs. Dasburg, Klein, and Blum, which had been "divisive and contentious." His findings appear reasonable. *Id.* The Joint Parties have neither shown how WCP's role could create control nor addressed the ALJ's rationale as to why it would not.

On the basis that ASTAR forms an integral part of the DHL Network's worldwide delivery service and depends on DHLWE for almost all of its business, the Joint Parties argue that ASTAR is a "cost center" and as such is subject to foreign control. Pet. at 48-49. The ALJ rejected this claim because ASTAR did not have the characteristics of a cost center. A cost center is "an entity functionally within a larger operation that is established to produce some stipulated level of service or output," that "is not financially or operationally independent of the greater enterprise," "has limited decision-making authority," "has limited authority for investment and banking decisions," and "is not independent of, and is controlled by, the larger enterprise." RD at 28. The ALJ found that ASTAR, as shown, makes its own budgeting, financing, aircraft fleet mix, and operational decisions.

In considering whether we should review the ALJ's decision, we have examined his findings on the likely effects of the arrangements between ASTAR and the DHL Network and related matters. The Joint Parties have not shown that the ALJ erred in his analysis of these points. The Joint Parties' cost-center argument is essentially an effort to make us decide the citizenship question not on an analysis of relevant citizenship factors but on terminology. In any event, the ALJ reasonably concluded that ASTAR was not a cost center.

In short, the Joint Parties have not shown any error in the ALJ's findings that the on-going business relationships between ASTAR and the DHL Network will cause ASTAR to become subject to control by foreign citizens. The Joint Parties therefore have failed to justify further review of his decision.

3. The DHL Network's Role in the Dasburg Group Purchase

The ALJ found that the DHL Network's need to have a reliable provider of air transportation within the United States made the DHL Network welcome Mr. Dasburg's agreement to manage DHLA and the Dasburg group's purchase of control of the carrier. He found, however, that DHLA's sale to the Dasburg group was "simply an arm's length transaction." The negotiations that resulted in the sale "were protracted and sometimes contentious" and "featured hard

bargaining." RD at 15-16. The Dasburg group did not obtain unusually favorable terms from DHLA and the DHL Network. RD at 13-15.

The Joint Parties argue that Mr. Dasburg's appointment by DHLA and the carrier's purchase by the Dasburg group show that the DHL Network will have the ability to control ASTAR. Allegedly, for example, the DHL Network gave the Dasburg group very favorable terms for their purchase of DHLA, and arranged for the funding of the group's payment of the purchase price. Pet. at 30-33. These arguments fail to show that the DHL Network can exercise control over ASTAR. Indeed, if the Joint Parties' allegations were true, they would disprove control. If Mr. Dasburg's management at DHLA and his group's acquisition of control of the carrier were so important to the DHL Network, ASTAR should have a substantial ability to fend off any efforts by the DHL Network to influence ASTAR's decisions. RD at 16. We have no basis for questioning the ALJ's rejection of these arguments.

The Joint Parties argue that Mr. Dasburg's selection as CEO points to the DHL Network having considerable influence over ASTAR. Pet. at 44-45. According to them, the DHL Network "has already exerted substantial influence over ASTAR by hiring the U.S. carrier's top executive. . . ." Pet. at 45. Even if the DHL Network participated in DHLA's appointment of Mr. Dasburg, that does not show that the DHL Network has continuing influence over ASTAR. Mr. Dasburg now has an employment contract with ASTAR, and he and his two investor-partners own all of ASTAR's stock. Furthermore, the record disproves any suggestion that Mr. Dasburg would be inclined to do the DHL Network's bidding. Mr. Dasburg made clear in his interviews with DHLA that "he would not be interested in DHLA, or any company position, unless he had the opportunity to acquire control."[61] The ALJ additionally found that the Dasburg group's negotiations for DHLA's purchase "featured hard bargaining." RD at 15.

The Joint Parties claim that the agreements between the Dasburg group and the DHL Network are so favorable that "the Dasburg Group stands to earn millions in profits regardless of the outcome of this proceeding" and will gain an "above-market rate of return" on its investment. Allegedly these facts give the Dasburg group an incentive to cooperate with the DHL Network, which thereby may have substantial influence over ASTAR. Pet. at 33. The ALJ found these claims unpersuasive: "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 demonstrate that party's independence." He further found that the record offered no support to any inference "that the sale price reflects an agreement by ASTAR to cede any type of control to the DHL Network." RD at 16.

The ALJ's findings do not require review. If the DHL Network was anxious to obtain Mr. Dasburg's services and his investment group's purchase of DHLA, as suggested by the Joint Parties, that would give the Dasburg group and its airline, ASTAR, more bargaining leverage with the DHL Network. Furthermore, the Dasburg group's rights to earn an alleged above-market rate of return are now fixed by contract and no longer subject to the DHL Network's discretion. The Dasburg group's contractual rights to a fixed return on their investment further eliminate the possibility that the partners might cater to the DHL Network's wishes in order to increase their profits (though their interest in assuring ASTAR's success will, of course,

[61] RD at 5.

encourage them to satisfy DHLWE's transportation needs – and the needs of any other current or prospective customers).

Equally unpersuasive are the Joint Parties' allegations that the DHL Network funded the Dasburg group's purchase of DHLA, largely by creating the $61 million CapEx obligation, and that the DHL Network therefore has the potential to exert influence over ASTAR. Pet. at 30-31. Here, again, the existing contracts impose payment obligations on the DHL Network, which the DHL Network is not free to change. Given the Dasburg group's contractual rights, the group's alleged past reliance on the DHL Network for assistance in financing the purchase would not now give the DHL Network continuing influence over ASTAR.

Furthermore, the Joint Parties have mischaracterized the record on this issue. The ALJ found that Boeing Capital had financed $50 million of the Dasburg group's $60 million purchase price for DHLA with a loan. The loan is being paid off with a DHLWE receivable that was already owed DHLA and pledged as collateral for the loan, the CapEx receivable. RD at 6-7. The CapEx receivable represents money that had been spent on dedicated aircraft for maintenance-related expenses that had been capitalized but not yet amortized. The amount on DHLA's books at the time of the Dasburg group purchase was $61 million. The parties set an amortization schedule for the receivable that would track and cover the amortization of Boeing Capital's loan to ASTAR. Deutsche Post, which has guaranteed all of DHLWE's obligations to ASTAR, has guaranteed DHLWE's amortization of this receivable as well. RD at 10.

Although the ALJ expressly found that the CapEx receivable was on DHLA's books at the time of closing, the Joint Parties nonetheless claim that the DHL Network and the Dasburg group created it in order to provide financial support for the group's purchase of ASTAR. According to the Joint Parties, there was no evidence to support the ALJ's conclusion. Pet. at 41-42. Rather than cite evidence showing that the CapEx receivable did not exist before the Dasburg group purchased DHLA, the Joint Parties only quibble with the quality of the evidence relied upon by the ALJ. However, as the ALJ pointed out, the owners and experts testified to its existence, and several documents substantiated its existence.[62] We believe the record was sufficient to support Judge Kolko's findings. We therefore reject the Joint Parties' argument.[63]

Policy

The Joint Parties argue in their Petition that the ALJ's misapplication of the law regarding citizenship has adverse policy implications for U. S. aviation interests and that the Department should, therefore, take review of the RD on policy, as well as legal, grounds. They first argue

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[62] The record evidence supporting the ALJ's findings includes testimony from owners Dasburg and Blum (Aug. 26, 2003 Hrg, Tr. 67:9-68:12; 75:3-76:1; 77:10-78:7; 175:2-176:16); testimony from Professor Gordon (Aug. 27, 2003 Hrg. Tr. 401:2-16); written testimony and rebuttal testimony of Professor Gordon (JT-303 at 24; Reb. Ex. 303 at 4 n.3, 8 n.10); Flow of Funds Memo (JT-40, at A022570); and an internal memo from Jane J. Su to Richard C. Blum discussing the approximate amount of the CapEx (JT-39, at A023157). *See also* ASTAR Five-Year Projection, JT-53, at 12; Valuation Summary, JT-119, at A017767; Notes to Financial Statements, JT-128, at 90269.

[63] The Joint Parties assert that the RD noted a "lockbox" arrangement for payment of the Boeing Capital loan, Pet. at 31, but the ALJ never referred to a lockbox arrangement. He instead stated, "The loan is being paid off by a DHLWE receivable already owed to DHLA/ASTAR, which was pledged as collateral for the loan." RD at 6-7. The Joint Parties cite nothing in the record showing a lockbox arrangement. The record indicates only that the receivable was used as security for the Boeing Capital loan.

that the RD would severely compromise the position of the U.S. Government in negotiating international aviation agreements because the RD effectively "abolishes" the citizenship requirements and "disarms" U.S. policy on retaining ownership restrictions. They then argue the RD "promotes the same flag-of-convenience system that has led to the demise of the U.S. shipping industry." Pet. at 7 (footnote omitted).

First, to the extent that the Joint Parties' policy arguments depend upon the assumption that the RD is a misapplication of, or is inconsistent with, the citizenship requirements, those arguments fail to hold up. As already discussed, the ALJ did not misapply the law. Rather, he properly decided whether ASTAR satisfied the statutory citizenship requirement on the basis of established legal standards and the evidence in this case. We have determined that there is no need to take review of his decision on legal grounds, because we have concluded that the Joint Parties have failed to show that his findings of fact are erroneous or that he misapplied the legal standard for judging citizenship.

Second, the Joint Parties' current contention that we must review the Judge's decision on policy grounds is contrary to their position at the hearing. Then they argued that policy issues were irrelevant.[64] They chose not to cross-examine ASTAR's expert witnesses and did not call their own witnesses on any policy issues arguably presented in this proceeding.

Third, the Joint Parties have failed to persuasively present any aviation policy concerns that would justify our taking review of the RD. They provide no support for their first contention that, if the RD is adopted, the United States would be permitting more foreign-influenced "U.S. franchises to access the U.S. aviation market" without getting anything in return. Pet. at 5. Of course, that argument is largely premised on the erroneous belief that the RD misapplies the law and thereby guts the citizenship requirements. Nonetheless, it has never been the policy of the Department to throw away "bargaining chips" in any negotiation to liberalize international air services, and we do not believe that RD would in any way have that effect if adopted. Furthermore, the only evidence presented at the hearing on this issue suggests that the decision sought by the Joint Parties – a determination that ASTAR is not a citizen because of its close ties with the DHL Network – could undermine efforts to liberalize international aviation markets. According to ASTAR, FedEx and UPS operate in foreign countries under arrangements like those between ASTAR and the DHL Network in order to provide their own international delivery services. A decision that ASTAR was not a citizen as a consequence of its contractual arrangements with DHLWE could be used by other governments to challenge the Joint Parties' own overseas arrangements, thereby resulting in the same international aviation policy concerns that the Joint Parties have sought to avoid.[65]

With respect to their second policy argument, the maritime practice of using a flag-of-convenience is not analogous to the situation at issue here. Traditionally, companies use flag-of-

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64 Aug. 27, 2003 Hrg. Tr. 356:12-15.

65 ASTAR Brief (Docket OST-2002-13089-572 (October 31, 2003)) at 13; AS-T-6 at 19-24. ASTAR cites press reports that Denmark is now examining UPS' ties with a Danish carrier that operates flights for UPS. Answer of ASTAR at 4, n. 2.

convenience registration to reduce their taxes and operate under less restrictive safety and labor regulations. If, as argued by the Joint Parties, a foreign company were to create an affiliated airline in the United States, that airline would still be subject to the laws and regulations of the United States that apply to every U.S. carrier, including the Railway Labor Act (RLA) (governing labor relations in the airline industry), and all applicable FAA and DOT safety and economic regulations. The airline would obtain no ability to operate under a more lenient regulatory regime than other airlines serving the U.S. domestic markets. The Joint Parties have failed to explain how the RD would enable any firm to evade the legal requirements applicable to carriers providing domestic air transportation services in this country. In any event, we have enforced the citizenship requirement in the past, and we will continue to do so. We therefore have no reason to believe that the ALJ's decision will harm U.S. policy interests.

To the extent that other policy issues are relevant, ASTAR's evidence on such matters would lend support to a decision that ASTAR meets the statutory citizenship test. ASTAR asserts that its witnesses have shown that American consumers benefit from the participation in the U.S. market of ASTAR and the DHL Network because it promotes competition within the express delivery business. Answer at 3.

For the foregoing reasons, we see no need to review the RD on policy grounds.

CONCLUSION

Therefore, based on these findings, we deny the Joint Parties' petition for discretionary review. As a result, we will allow Judge Kolko's decision, which finds that ASTAR is a U.S. citizen as defined by 49 U.S.C. 40102(a)(15), to become the Department's final decision in this proceeding.

ACCORDINGLY,

1. We hereby deny the Petition for Discretionary Review filed by Federal Express Corporation and United Parcel Service on January 26, 2004.

2. We make effective the Recommended Decision of the Administrative Law Judge as of May 13, 2004.

3. We conclude that ASTAR Air Cargo, Inc. is a citizen of the United States within the meaning of 49 U.S.C. § 40102(a)(15).

4. To the extent not granted, we deny all other requests.

5. We will serve this order on all parties to this proceeding.

By:

MICHAEL W. REYNOLDS
Deputy Assistant Secretary for
Aviation and International Affairs

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