BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the Matter of the	)	
	)	
CITIZENSHIP OF DHL AIRWAYS, INC.	)	**Docket OST-02-13089**
	)	

CONTINGENT ANSWER OF DHL WORLDWIDE EXPRESS TO MOTION OF UNITED PARCEL SERVICE CO.

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Counsel for
DHL WORLDWIDE EXPRESS

Dated: April 4, 2003

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DHL Worldwide Express ("Express") submits the following contingent answer in opposition to the motion of United Parcel Service Co. ("UPS")[1/] filed March 26, 2003.[2/] That pleading seeks to have the Department initiate in this docket a review of the recently-announced merger agreement between Express and Airborne, Inc. ("Airborne"). That agreement provides for Express to acquire Airborne's ground business so as to create a stronger third competitor in the domestic express delivery market and bring the benefits of increased competition and improved service to shippers throughout the United States. In conjunction with that transaction, Airborne's air operations will be separated from its ground operations and become an

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[1/] Motion of United Parcel Service Co., Mar. 26, 2003 (Docket OST-02-13089) ("UPS Motion"). On the same day, Federal Express Corp. ("Fed Ex") also filed a motion in this docket. Express will not respond to the unauthorized Fed Ex motion because it concerns a May 2002 letter issued by the Department pertaining to the citizenship of DHL Airways that has nothing to do with Express or the Express/Airborne transaction. Fed Ex's motion is unauthorized because Fed Ex neither cites authority for its acceptance nor moves for leave to file an otherwise unauthorized document. Although Fed Ex captions its filing as an "emergency motion," it never identifies the nature of the emergency that prompts the use of such an apocalyptic caption.

[2/] Express hereby submits this answer pursuant to Rule 11(c) of the Department's Rules of Practice in Proceedings on a contingent basis because the UPS motion is unauthorized and the Department has not stated whether it plans to accept it. UPS, acknowledging that its right to file pursuant to the Department's procedural rules governing motions (14 C.F.R. § 302.11) is questionable, requests that the Department accept its motion as an otherwise unauthorized document. UPS Motion, at 1 n.1. The Department, in addition to its general Rules of Practice applicable to this proceeding, has established specific procedures in this docket, and those procedures do not authorize UPS's (or any other) further filings. See DOT Notice dated March 5, 2003. In the event the Department does not reject UPS's motion *sua sponte* due to its unauthorized status, Express moves for leave to file this answer pursuant to Rule 6(c) of

independent public company, ABX Air, Inc. ("ABX Air"), to be wholly owned by Airborne's existing shareholders, a transaction consistent with the requirements of U.S. law.

UPS, obviously concerned about the impact of such transaction on the duopoly position it, along with Fed Ex, currently holds in the U.S. express delivery business, has apparently decided to initiate a regulatory attack on the transaction, even though the acquisition is subject to shareholder and other approvals, which have not yet even been sought, much less obtained. In its zeal to head-off any additional competition, UPS has taken the extraordinary step of demanding that the Department initiate a review of the Express/Airborne transaction in a docket involving the citizenship of an entirely different carrier, even though no aspect of the transaction is ripe for review, there is no obvious interrelationship between the two matters (other than UPS's opposition), and no event has occurred to require or justify such action. The Department should not allow its procedures to be abused by an entrenched incumbent to place unjustified administrative hurdles in the path of procompetitive transactions.

The announcement of the Express/Airborne merger agreement does not give rise to any issue requiring action by the Department at this time — and certainly not in this docket. Express assumes that, in due course, Airborne will submit any filings and notifications that may be required under the Department's regulations as a result of the establishment of ABX Air as an independent, publicly-owned air carrier. The Department has well-established procedures to review such fitness-related submissions and to take such action as may be appropriate under the circumstances extant at the time. Until then, UPS's exhortations for the Department to take

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the Department's Rules of Practice (14 C.F.R. § 302.6(c)). Due process and fundamental fairness require that if the Department accepts UPS's unauthorized motion, it must also accept this answer.

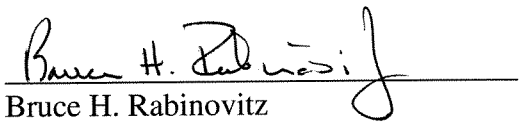
unprecedented action on the transaction in this docket should be rejected as having no basis in law or in Department policy or precedent.[3/]

UPS's motion is unauthorized, untimely, and seeks relief that is entirely unjustified. It is an opportunistic attempt to place an unprecedented administrative hurdle in the path of the newly-announced Express/Airborne agreement by seeking to drag the transaction into a wholly-unrelated proceeding involving whether a different air carrier is a U.S. citizen. The motion is largely based on misstatements of law and fact and raises issues that either are moot or not ripe for action by the Department – and certainly should not be considered in this docket. Even if the Department were to consider the motion, UPS has provided no basis for granting the relief it seeks. Its predictable effort to drag the new Express/Airborne transaction into the pending Airways citizenship proceeding is nothing more than a pretext for trying to prevent the Express/Airborne transaction from establishing a strong competitive alternative to the UPS/Fed Ex duopoly in the U.S. express delivery market. Such a result would serve well the private commercial interests of UPS (and Fed Ex), but would be highly adverse to the public interest, because U.S. shippers would be denied more competition and choice, and because the jobs of thousands of Americans employed by Express and Airborne across all 50 states could be put in jeopardy.

[3/] As the Department has noted, UPS has a history of submitting premature, redundant filings. See Letter of Norman Y. Mineta to Senator Ernest Hollings, Chairman, Committee on Commerce, Science, and Transportation, dated Sept. 25, 2002, at 2 ("the initial filings of UPS and FedEx were premature, as was pointed out in Order 2001-5-11, which dismissed those complaints . . . ."). The Department also should deny UPS's instant motion, which is similarly premature.

The Department should promptly reject or deny the unauthorized motions UPS has filed.

Respectfully submitted,



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Counsel for
DHL WORLDWIDE EXPRESS

Dated: April 4, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Contingent Answer of DHL Worldwide Express on all persons named on the attached Service List by causing copies to be sent via first-class mail, postage prepaid.

Kathleen Knowlton

Kathleen A. Knowlton

DATED: April 4, 2003

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