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March 21, 2017

Cristina Bonaca, Esq.
Investigator
National Mediation Board
1301 K Street, NW, Suite 250 East
Washington, DC 20005

Re: NMB Case No. CR-7157, ABX Air-ATI-ALPA-IBT

Dear Ms. Bonaca:

The Carriers' reply to the IBT's supplemental position statement asks the National Mediation Board to ignore the substantial record evidence that ATSG's corporate restructuring has ordered its subsidiaries into a network of entities that only together are able to conduct the flight operations contracted by ATSG with its customers. It was ATSG that restructured ABX Air to remove from ABX core airline functions, such as fleet, heavy maintenance and flight dispatch/following, and transfer those functions to new subsidiaries. It restructured ATI through a merger of that airline with Capital Cargo. Because of ATSG's control over the Carriers, a single transportation system finding is appropriate in this case.

ATSG's corporate network presents a unique structure because even in *Republic Airlines*, 38 NMB 138 (2011), the parent company had not broken out core airline functions from the air carriers into a network of subsidiaries. But this case is akin to *Republic*, a parent/subsidiary structure in which the parent controls the scope of the airlines' fleets, operations, finances and customer base.

The Carriers, of course, cannot refute the evidence of ATSG's control over them and instead seek to explain it away by relying on lower-level, limited instances of separation resulting from their separate operating certificates. They ask the Board to view them in isolation, rather than their place in the ATSG subsidiary network, relying on the fact that their operations require them to interact less with one another than with the other ATSG subsidiaries. But this misdirection cannot obscure the facts of ATSG's control over the airlines and their interdependence with the other ATSG subsidiaries. *See, e.g., Republic Airlines*, 38 NMB at 146 (noting that Shuttle America did not perform flying in the Frontier Airlines branded operation but concluding it was part of a single transportation system with other carriers under Republic Airways Holdings' control).

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BAPTISTE & WILDER, P.C.

Ms. Bonaca
March 21, 2017
Page 2 of 6

The Carriers argue they have different aircraft identified on their FAA operating certificates to claim they have separate fleets. Carriers' Reply at 3. But that is a regulatory requirement of the Federal Aviation Administration for air carrier operating certificates. It was true of the carriers in *Republic Airlines* as well. *Republic Airlines*, 38 NMB at 148, 152. The Carriers ignore that they obtain aircraft from the same source, ATSG subsidiary CAM. There is no evidence that either airline can or does obtain aircraft independently of CAM. And the transfers of aircraft between the Carriers occur at the direction of Hete and Corrado. IBT Exh. Z, ¶¶ 15-17 (Ziebarth Declaration).

The Carriers assert "it is the customer who controls" their aircraft, and that DHL or Amazon can transfer the aircraft to another operator. Carriers' Reply at 3. That ABX does not control its aircraft is the result of ATSG removing from ABX its fleet and combining its aircraft with ATI's fleet in CAM. The structure of agreements with Amazon and DHL is the result of ATSG's negotiations. *See, e.g.*, IBT Attachment W, p. 23 ("In 2015, the Company and DHL amended and restated the CMI agreement ("restated CMI agreement") ... Under the restated CMI agreement, ABX continues to operate and maintain the aircraft through March 2019.")¹ The IBT disputes the Carriers' characterization that the agreement between AGS and Amazon gives Amazon sole and unencumbered discretion over the disposition of flying and aircraft to the Carriers. In truth, ATSG's 2015 10-K states that Amazon may cancel the agreement only upon six months' advance notice and payment of "a significant termination fee." IBT Attachment W, p. 13. And ATSG states in its 2016 10-K that its airline subsidiaries operate flying for Amazon for a five-year period under the agreement. IBT Attachment EE, p. 2 ("Under the ATSA, our airline subsidiaries operate those aircraft for an initial term of five years"). DHL also must pay a significant penalty with advance notice to terminate its agreements. IBT Attachment W, p. 13. The Carriers' characterization of the Amazon and DHL agreements is inconsistent with ATSG's 10-K statements and should be tested by production of the agreements. The IBT also disputes the Carriers' "arm's length" and "industry standard" characterizations of their inter-company agreements with other ATSG subsidiaries. Those agreements should be produced to the Board as well.

ABX and ATI misstate the IBT's argument concerning the significance of ATSG's 2016 agreement with Amazon to this case. Carriers' Reply at 5. One factor the Board considers during its single transportation system inquiry is how the Carriers are held out to the public. *See, e.g., Republic Airlines*, 38 NMB at 151, 155 (examining how carriers were held out to the public.) That necessarily implicates their dealings with their customers. So, contrary to ABX and ATI's claim that examining the structure and

¹ As used in the ATSG Form 10-K, the term "Company" refers to ATSG. IBT Attachment W, p. 1 ("When the context requires, we may use the terms "Company" and "ATSG" in this report to refer to the business of ATSG and its subsidiaries on a consolidated basis.")

BAPTISTE & WILDER, P.C.

Ms. Bonaca
March 21, 2017
Page 3 of 6

course of dealing by ATSG with Amazon is an unknown single carrier factor, that inquiry goes to how these Carriers are marketed to customers. It also reflects the degree of ATSG control over the Carriers. The Amazon agreement shows that ATSG, through AGS, deals with customers as a combined entity able to provide the range of aircraft leasing and ACMI/CMI related services to a customer.² It also shows that ATSG negotiated the terms of the customer contract and ATSG structured in its negotiations with Amazon how aircraft will be committed to its air carrier subsidiaries. ABX and ATI merely receive work orders on terms negotiated by ATSG to facilitate the customer agreements entered by ATSG through AGS. In ATSG's March 2017 earnings call, for example, ATSG/ABX CEO Hete confirmed that all future scheduled deliveries of aircraft under the Amazon agreement will go to ATI, rather than ABX. See IBT Attachment FF, p. 8 (ATSG Q4 2016 Earnings Call Transcript). So ATSG negotiated its agreement with Amazon to allow the parties to direct future flying to either airline.³

ATSG in fact holds out to the public that the cargo fleet owned and operated by its subsidiaries is its fleet. For example, under the heading of "unrivaled leader in ACMI medium wide-body aircraft," ATSG's website states, "ATSG has the largest fleet of medium wide-body aircraft in the world". See IBT Attachment, GG, p. 1. It further states, "The ATSG 767 freighter fleet yields unlevered base ROICs [Return On Invested Capital] above 10% and incremental return potential driven by complementary services." *Id.* at 2. And in describing its business strategy, ATSG states, "ATSG offers 767 freighter dry leases with the differentiated ability to provide a wide range of complementary services generating incremental returns through dry leasing, ACMI & CMI leasing, and support services." *Id.* at 3. ATSG markets its subsidiaries together under a "wide range of complementary services." *Republic Airlines*, 38 NMB at 155 ("RAH holds out to the public that the Carriers are part of a consolidated entity as shown at its website").

The Carriers repeat their officers' conclusory assertions that agreements among the ATSG subsidiaries were the result of arm's length dealing and are "industry standard." Carriers' Reply at 4-5. But they fail to present any evidence supporting these claims. They produce no evidence that the agreements between ABX and ATI for subservice were the result of an open, competitive process with unaffiliated carriers. Instead, the Carriers concede that they structured their work order agreements with

² ATSG's revenue from Amazon has grown from 5% of total revenue in 2015 to 29% of total revenue in 2016. IBT Attachment EE, p. 25 (ATSG 2016 10-K Annual Report). The Amazon, DHL and Air Mobility Command operations, which both ABX and ATI operate, made up 92% of ATSG's consolidated revenues for 2016. *Id.* at 4.

³ If ABX had actually negotiated its own air service agreement with Amazon, no rational airline management would agree to a structure that allowed Amazon to transfer at will to another carrier aircraft and flying covered by the agreement.

BAPTISTE & WILDER, P.C.

Ms. Bonaca
March 21, 2017
Page 4 of 6

Amazon and DHL to let them exclusively use one another for subservice.⁴ Starkovich Decl. ¶ 30; O’Grady Decl. ¶ 34 Similarly, there is no evidence that the agreements between the Carriers and AMES for maintenance, and the Carriers and Global Flight Source for flight dispatch/following, were the result of an open, competitive process with unaffiliated entities.⁵ There is no evidence that the Carriers are free to do business with third parties, rather than ATSG entities, for services that an ATSG entity can provide. Instead, the record shows that the Carriers use ATSG entities, including one another, for services their sister companies can provide and only use third parties for services ATSG does not have. *See, e.g.*, IBT Attachment W, p. 14 (“We rely on certain third party aircraft modification service providers and aircraft and engine maintenance service providers that have expertise or resources that we do not have.”)

It is irrelevant what operating relationships the Carriers claim they could have with unaffiliated entities for these essential airline functions of subservice, maintenance, flight dispatch/following and fleet. What matters is the present state of the Carriers’ operations in the ATSG network.⁶ The record establishes that present structure is one where ABX and ATI cannot provide air services to customers without the services provided to them by other ATSG subsidiaries.

On the question of overlapping officers and integrated labor relations, the Carriers repeat their illogical and conclusory assertions that ABX and ATI conduct their labor relations independently of ATSG. And they again claim there are no overlapping officers or directors between them. The Carriers fail to note that Joe Hete appointed the officers of the subsidiaries, not their individual boards of directors. For example, Hete appointed David Soaper as President of ABX Air effective February 1, 2017. *See* IBT Exh. HH (ATSG December 22, 2016 press release announcing appointment of president for ABX Air.) The Carriers already admitted that Hete sets the corporate goals to be achieved in collective bargaining and sets the permitted cost of contracts. Their

⁴ Counsel for the Carriers again claims that instances of subservice between them are “rare.” Carriers’ Reply, at 5, n. 13. This is a contention by Mr. McClintock that Mr. Starkovich would not verify under oath. IBT Supplemental Position Statement at 22, n. 9. Starkovich retired as President of ABX Air effective February 1, 2017. IBT Attachment HH.

⁵ That the regulatory responsibility for these functions remains with the FAA-mandated flight operations personnel of ABX or ATI is a result of their separate operating certificates.

⁶ The Carriers also respond to the fact that the core airline functions they receive from CAM, AMES and GFS were formerly part of ABX Air by asserting that the restructuring of ABX heavy maintenance into AMES, for example, occurred in 2009. Carriers’ Reply at 6, n. 16. When ATSG restructured the entities is immaterial to the fact it was ATSG who controlled their restructuring and the Carriers obtain these essential services from ATSG subsidiaries formerly within ABX.

BAPTISTE & WILDER, P.C.

Ms. Bonaca
March 21, 2017
Page 5 of 6

argument that Carrier officials who serve at the pleasure of Hete are independent of his control in carrying out his strategy in labor relations is specious. Illustrating the unreasonableness of this argument, the Carriers continue to claim the same independence from Hete for ABX officials despite the fact that he is CEO of ABX. Carriers' Reply at 8.

The Carriers unsurprisingly claim that perpetuating the separate representational systems between ABX and ATI in the pilot craft or class is better for labor relations. They mean it is their preferred structure of labor relations since it allows ATSG to use the promise of additional flying to extract preferred terms from the pilots. For example, in announcing that future aircraft deliveries under the Amazon agreement would be delivered to ATI, Hete noted in the earnings call that ATI pilots had not supported the strike action of ABX pilots during the major dispute between ABX and its pilots in November 2016. IBT Attachment FF, p. 8 ("ATI, whose pilots are represented by ALPA and did not support the strike, will accrue all of the remaining aircraft we deploy for Amazon.") That ATSG views its relations with the ATI pilots as more favorable than its relationship with ABX pilots, Carriers' Reply at 9, obviously is not the measure of rational labor relations.⁷ Rather, that policy goal is achieved when the scope of the craft or class, and the duty of the employee representative and the carrier to make and maintain agreements, is aligned with the level of actual corporate control over the carriers. Failing to do so invites whipsawing of the employees and artificially separated negotiations that cannot resolve the collective bargaining issues facing the employees. And it also undermines the Board's mediatory function to require the true decisionmaker's involvement in negotiations.

In summary, the Carriers' reply simply repeats the conclusory assertions of their initial filing. They ignore the record evidence establishing ATSG's control over and structuring of its subsidiaries into an integrated operational network to provide services to ATSG customers. As in *Republic Airlines*, the parent ATSG controls the fleet, finances, scope of operations, customer base and, therefore, the labor requirements of its subsidiaries. ATSG's business model reflects an innovation on the Republic Airways Holdings model, where the parent has broken out core airline functions into separate subsidiaries to better take advantage of synergies within the network and business opportunities with outside parties. Unlike Republic Holdings, however, which did not dispute its airline subsidiaries' status as a single transportation system, ATSG seeks to

⁷ The Carriers submit false testimony from Robert Boja alleging statements by IBT Local 1224 Chief Counsel Edward Gleason during a February 1, 2017 mediated bargaining session. Boja's statement is false and Gleason did not say what Boja alleges in his declaration paragraph 4 or anything of the kind. IBT Attachment II (Gleason declaration). The Carriers' submission of this testimony concerning statements made in mediated negotiations is also improper since it potentially puts at issue testimony from the assigned NMB mediator.

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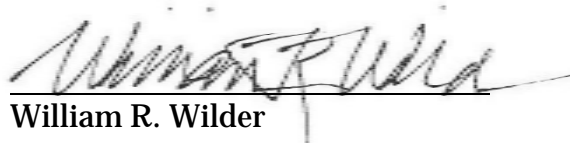
Ms. Bonaca
March 21, 2017
Page 6 of 6

exploit superficial instances of separation among its subsidiaries resulting from corporate forms and separate operating certificates to resist the single transportation status of ABX and ATI. But as the Board has long recognized, its exercise of authority under its single transportation system doctrine is for the purpose of "prevent[ing] carriers from frustrating representation rights by artful corporate devices." *Continental Airlines-Continental Express*, 20 NMB 326, 336 (1993). ABX and ATI do not function independently in the ATSG network any more than did the Republic Airways' subsidiary carriers. They both rely on other ATSG subsidiaries for essential airline functions, which ABX formerly possessed. The control by ATSG over the Carriers, and their interdependence with other ATSG entities, warrants the Board finding ABX and ATI constitute a single transportation system in the pilot craft or class.

Very truly yours,

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