

SEN. VOINOVICH HEARING STATEMENT ON DHL ...

September 9, 2008



**Statement of Senator George V. Voinovich
House Committee on the Judiciary
“Competition in the Package Delivery Industry”
September 9, 2008
Introduction**

Chairman Conyers, Ranking Member Smith, and Committee members, good afternoon and thank you for this opportunity to testify before you at this important hearing, which will examine competition in the package delivery industry, including the competitive impacts of the proposed agreement between DHL Express U.S., its parent Deutsche Post World Net (collectively “DHL”), and United Parcel Service, Inc. (“UPS”). I am pleased that the Committee will spend time reviewing the competitive situation in this industry. I believe activities like this hearing, as well as what I anticipate will be a review of the proposed DHL/UPS agreement by the Department of Justice Antitrust Division (“Antitrust Division”), will reveal why the DHL/UPS agreement is likely to result in consumer harm, an unnecessary loss of jobs, and uprooting the lives of thousands of families in Ohio.

Before I turn to the specific topic of this hearing, I would like to say a few words about the efforts of the Ohio delegation relating to the DHL/UPS situation. There is a saying that trying times bring out the best in people – and that has certainly been the case with the DHL situation and the Ohio Congressional delegation’s reaction. I have been very proud of the way Ohio’s community and public leaders have come together to ensure that competition in this industry is maintained and the Wilmington community is treated fairly. This unity is evidenced by the presence of Senator Brown, Mr. Turner, Ms. Sutton, Ms. Kaptur, Lieutenant Governor Fisher, and Wilmington Mayor Raisk at this hearing. We all recognize the devastating impact that the loss of roughly 8,000 jobs will have on the Wilmington community. Families will struggle to pay their mortgages, save for their children’s education, and ensure their retirements.

The DHL/UPS Agreement

When DHL first announced that it intended to partner with UPS, I met with the head of DHL’s North American Operations, John Mullen, and needless to say, I expressed my disappointment and concern about the transaction. Ohio and Wilmington made a commitment to DHL, and now DHL is not willing to work with the Ohio stakeholders to help the company solve its financial issues. Instead, DHL will try to resolve its financial issues by completing an agreement with one of its closest competitors.

In news reports, DHL and UPS characterize their agreement as nothing more than a customer-vendor supply agreement that raises no antitrust issues. The companies maintain there is nothing anticompetitive about such a customer-vendor agreement, and in the abstract, I would tend to agree. However, the proposed DHL-UPS agreement is not a theoretical customer-vendor agreement, nor is it a typical agreement. Rather, this agreement will result in DHL becoming heavily dependent on one of its closest competitors for a key component of its service – the airlift that moves overnight letters and packages around the country. In addition, the agreement will inevitably result in DHL sharing critical and competitively sensitive information with UPS when UPS handles DHL’s packages.

The companies also claim that they have not yet entered into an agreement; thus, there is no need to worry about the competitive implications. Unfortunately, such logic does not hold up under scrutiny. If DHL and UPS complete an agreement, which both companies have agreed does not require review under the Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”), then any government antitrust review would occur after the agreement went into effect and after the likely competitive harm has permanently changed the competitive landscape. The airlines that currently provide airlift service for DHL, ABX and ASTAR, will likely scale back quickly, shedding workers, planes, and abandoning the Wilmington, Ohio facility from which they operate. If this sort of change occurs and later the Antitrust Division finds competitive issues with the DHL/UPS agreement, then it would be nearly impossible to return the market to the situation as it exists today.

I know this Committee is aware that the very purpose of the HSR Act was to avoid situations where two parties enter into an agreement that would irreversibly harm competition. That is, the HSR Act was designed to avoid situations in which the egg cannot be unscrambled. The HSR Act, however, does not apply to every agreement that raises antitrust issues. Nevertheless, there is a significant role for Congress and the Antitrust Division to ensure that competition and consumers are protected against the harms that could ensue from agreements, such as the DHL/UPS agreement, that are not reported under the HSR Act.

Any DHL/UPS Agreement Raises Competitive Issues

Section 1 of the Sherman Antitrust Act (“Sherman Act”) makes contracts in restraint of trade unlawful. Whenever there is a concerted activity between or among competitors, special caution must be taken to ensure competition is maintained. Because the DHL/UPS agreement will require DHL to relinquish cost and quality control over its business to UPS and allow UPS to gain information about DHL’s customers, any DHL/UPS agreement raises significant antitrust issues under the Sherman Act.

As discussed in the Antitrust Division and Federal Trade Commission’s (“FTC”)

Antitrust Guidelines for Collaborations Among Competitors (the “*DOJ/FTC JV Guidelines*”), an agreement that limits the independent decision-making or combines control over key assets is prone to result in situations that “reduce the ability or incentive [for competitors] to compete independently” and “may increase the likelihood of an exercise of market power by facilitating explicit or tacit collusion.”

A DHL/UPS agreement will likely result in DHL surrendering cost and quality control to UPS over a significant part of its U.S. operations resulting in just the sort of competitive harm the *DOJ/FTC JV Guidelines* anticipate. Moreover, if DHL adopts UPS’s package tracking and labeling system, it appears UPS will gain competitive information about DHL’s customers. As a result, such an agreement should be scrutinized closely to ensure that it does not lead to consumer harm in terms of increased costs or decreased services.

Conclusion

Thank you for allowing me to testify today, and I look forward to continuing my work with the state of Ohio and my colleagues in the entire Ohio Congressional delegation. I want to thank this Committee for its willingness to provide the necessary oversight of the competitive environment in the package delivery industry.