BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

U.S.-U.K. ALLIANCE CASE	)	**Docket OST-2001-11029**

MOTION OF UNITED AIR LINES, INC., BRITISH MIDLAND AIRWAYS, LIMITED d/b/a bmi BRITISH MIDLAND, AUSTRIAN AIRLINES ÖSTERREICHISCHE LUFTVERKEHRS AG, LAUDA AIR LUFTFARHRT AG, DEUTSCHE LUFTHANSA AG, AND SCANDINAVIAN AIRLINES SYSTEM TO FURTHER AMEND ORDER 02-4-4

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(Lufthansa German Airlines)

DATED: **December 10, 2002**

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In Order 02-4-4, the Department granted final approval and antitrust immunity for a series of alliance agreements (the "Alliance Agreements") between and among United Airlines, bmi British Midland, Austrian Airlines (and Lauda Air), Deutsche Lufthansa and Scandinavian Airlines System (referred to hereinafter collectively as "United/bmi"), subject, among other things, to a condition that the United States conclude an acceptable open skies air services agreement with the United Kingdom within six months of the date of the Order, April 4, 2002. By Order 02-10-6 DOT amended Order 02-4-4 to extend that deadline to December 31, 2002. As the United States is continuing to pursue an acceptable agreement with the United Kingdom, United/bmi request that the Department further amend Order 02-4-4 to the extent necessary to extend the December 31, 2002 deadline for an additional six-month period, until June 30, 2003.

In support of this Motion, United/bmi submit the following:

1. In deciding to approve and grant antitrust immunity to the Alliance Agreements, the Department concluded that (1) implementation of the proposed

United/bmi alliance would not substantially reduce competition in any relevant market, and that (2) implementation of the alliance would be consistent with the Department's policy of promoting pro-competitive and pro-consumer international alliances. Order 2002-4-4 at 9-10. The Department further found that approving the United/bmi alliance could help achieve a more open aviation agreement with the United Kingdom. Id. at 9.

In Order 02-10-6 the Department decided to extend the original deadline to December 31 and explained its basis for doing so as follows:

> We originally imposed the six-month condition, on our own initiative, in the interest of furthering our goal of reaching an Open Skies agreement with the United Kingdom that meets U.S. aviation policy objectives. While we have not yet achieved that result, the process remains ongoing.... Under these circumstances, we believe that the public interest factors on which we based our action in Order 2002-4-4 remain valid, and that the conditional approval and antitrust immunity we granted United/bmi should remain in effect until December 31, 2002, while negotiating efforts with the United Kingdom continue.

Order 02-10-6 at 3-4.

2. In the two months since Order 02-10-6 was issued, nothing has happened to call into question the correctness of any of the findings supporting the grant of antitrust immunity to United/bmi. As a result, it is as true today as it was in April that the alliance proposed between United and bmi will not eliminate or substantially reduce competition between the carriers in any relevant market. It also remains true that the United States is continuing to pursue fundamental liberalization of its air services agreement with the United Kingdom, and that approval of the United/bmi alliance, including the grant of antitrust immunity conditioned upon the conclusion of such an agreement, can be helpful to that on-going effort, as the Department so found in Order 02-4-4, and reiterated in

Order 02-10-6. The UK government also intends to continue its bilateral negotiations with the United States, as the UK officials recently stated.[1/]

On the other hand, failure to extend the immunity would deny United/bmi the ability to implement their alliance once an acceptable US-UK agreement is achieved unless the carriers re-apply for immunity. Such a re-application would be necessary even though the Department has already found that the grant of immunity to the alliance is both pro-consumer and pro-competitive, a finding that is based on a detailed competition and public interest analysis. To allow the immunity to lapse would also be inconsistent with the recent action of the pertinent European competition authority to grant the United/bmi alliance what is effectively antitrust immunity under EU law.[2/] The European approval was effective for seven years from the elimination of restrictions against bmi offering service between Heathrow and the U.S. or until December 31, 2010, whichever came first.

Under the relatively longer term of the European exemption, there is no need to refile for relief in Europe once a U.S.-UK agreement has been reached to open the market

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1/ PRESS SERVICE REPORT, "UK Says EU Court Ruling Won't Stop US Air Talks," Reuters, November 5, 2002. *See also* AVIATION DAILY, November 6, 2002 at 1-2.

2/ The United Kingdom Office of Fair Trading found that pursuant to its authority under Articles 84 and 85 of the EU Treaty that the agreements, while facially restrictive of competition, were exemptible under Article 81 of the EU Treaty because they "contribute to improving production or distribution, or to promoting technical or economic progress, while allowing consumers a fair share of the benefit." It came to the same conclusion as DOT that that "if transatlantic air services are opened up ..., the alliance should bring benefits to passengers." Office of Fair Trading (U.K.), Statement of the Director General of Fair Trading, Press Release dated November 1, 2002, announcing the decision in Case No. CP/1535-01, Notification of British Midland and United of their Alliance Expansion Agreement.

during the seven years the exemption remains in effect. Lack of an extension of the deadline in the DOT order would, however, create the need to re-file an immunity application in the U.S. Such a refiled application would impose a substantial burden on United/bmi, on other carriers that might respond to the application, and on the Department's own limited staff resources, a burden that is wholly unjustified under the circumstances, and that can (and should) be easily avoided by granting the instant Motion.

WHEREFORE, for the reasons set forth above, United/bmi request the Department to further amend ordering paragraph 4 of Order 2002-4-4 to the extent necessary to extend the date by which the United States must achieve a suitable air services agreement with the United Kingdom until June 30, 2003, or that the Department grant them such other or further relief as the Department determines to be consistent with this Motion and the public interest.

Respectfully submitted,

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DATED: December 10, 2002

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Motion of United Air Lines, Inc., British Midland Airways Limited, Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa AG, And Scandinavian Airlines System To Further Amend Order 02-44-4 on all persons named on the attached Service List by causing a copy to be sent via facsimile transmission or first-class mail, postage prepaid.

Brenda Gardner

Brenda Gardner

DATED: December 10, 2002

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