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BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION

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DOCKET SECTION

Joint Application of )  
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 UNITED AIR LINES, INC. )  
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 and )  
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 AIR CANADA )  
 )  
 under 49 U.S.C. §§41308 and 41309 )  
 for approval of and antitrust )  
 immunity for an expanded alliance )  
 agreement. )

Docket OST-96-1434 - 30

**OBJECTIONS OF DELTA AIR LINES, INC.  
TO ORDER TO SHOW CAUSE**

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July 24, 1997

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**OBJECTIONS OF DELTA AIR LINES, INC.  
TO ORDER TO SHOW CAUSE**

By Order 97-6-30 (“Show Cause Order”), the Department proposed to grant approval of, and antitrust immunity for, an alliance between United Air Lines, Inc., and its regional commuter affiliates (“United”), and Air Canada and its regional affiliates (“Air Canada”). Delta Air Lines, Inc. (“Delta”) hereby objects to the Show Cause Order to the extent that the Department proposes to grant antitrust immunity for United-Air Canada service between the United States and Toronto, Canada prior to the elimination of the phase-in entry and capacity restrictions contained in the U.S.-Canada bilateral agreement. Although the Department found the limitations on U.S. carrier service to Toronto to be “troubling” (Show Cause Order at 18), it nonetheless, tentatively approved the alliance.

The Department's tentative decision to grant antitrust immunity and provide United and Air Canada a competitive advantage over other U.S.-flag carriers until the bilateral phase-in restrictions on access to Toronto are eliminated would be a serious mistake and cannot be justified on any sound public policy basis.

Delta also urges the Department to defer further consideration of the United-Air Canada alliance pending its consideration of the Star Alliance in which United and Air Canada will play a prominent role along with Lufthansa, THAI Airways, SAS and Varig. The Department would be unable to assess properly the public interest and competition issues on transborder services of the United-Air Canada alliance without an analysis of the impact of the Star Alliance agreements.

In support of these objections, Delta states the following:

1. Delta has no objection in principle to the Department's tentative decision to approve the United-Air Canada alliance, with the exception of the timing of such approval as it applies to service by United and Air Canada between the United States and Toronto, and with respect to the need to assess the impact on transborder services of the Star Alliance.

2. Toronto is Canada's largest and most important market for air transportation services. It will remain entry-restricted under the U.S.-Canada Air Transport Agreement until February 25, 1998. Under the "phase-in" restrictions of the bilateral agreement, in each of the first two years under the Agreement, the U.S. Government was permitted to select only two new U.S.-Toronto routes, and U.S. carriers serving those routes were limited to a maximum of only two daily non-stop frequencies. In the third year (1997), the U.S. was allowed to select up to four additional Toronto opportunities, again with each such opportunity limited to only two daily frequencies.

3. The phase-in restrictions were incorporated in the bilateral agreement at the insistence of Canada in order to give Air Canada a headstart over U.S. carriers and to protect Air Canada from U.S.-flag competition in the largest U.S.-Canada markets. Thus, Air Canada enjoyed unlimited access to the United States, while U.S. carriers were subject to entry-restrictions for the last three years. Although the "phase-in" restrictions for Montreal and Vancouver have expired, the Toronto restrictions continue for another seven months.

4. The Show Cause Order expressly recognized and affirmed the Department's long-standing policy

"to consider the grant of antitrust immunity only where the market(s) at issue are fully open to new entry and operations -- both *de jure* (by reason of bilateral agreements) and *de facto*. Only in such markets can we be

assured that immunity will be pro-competitive and pro-consumer, the touchstones of our immunity approach.”

(Show Cause Order at 19.) Secretary Slater recently reaffirmed this position:

“We have sent a clear and consistent message; there is no possibility of antitrust immunity without an open-skies agreement as a first step.” Remarks of Secretary of Transportation Rodney E. Slater, International Aviation Club, June 17, 1997. Despite the Department’s established policy, in this case it has proposed to grant United-Air Canada antitrust immunity prior to the complete *de jure* elimination of entry restrictions at Toronto. The Department tentatively found that a delay in the effectiveness of the grant of immunity would serve no significant public interest purpose for two reasons.

5. The first reason the Department stated for not delaying the effectiveness of the grant of immunity is that “we anticipate that the additional route opportunities made available in February 1997 will come near to satisfying U.S.-carrier demand for access to that market.” This statement has no basis in fact. The applications filed for Toronto services were based on, and tailored to, the highly limited phase-in restrictions imposed by the bilateral agreement in years 1, 2, and 3. The requests for authority did not reflect airline services that would otherwise be operated in a free market environment. Delta’s service between Atlanta, its largest hub, and Toronto, the largest Canadian city, is currently limited to only four daily nonstop flights. There are numerous city-

pairs as large as Atlanta-Toronto in which Delta operates more than four daily nonstops. Furthermore, Delta has not been able to serve Toronto from its second largest hub at Cincinnati with its own aircraft. (Delta lists its code on services operated by its connection partner, Comair.) Thus, contrary to the Department's unsubstantiated finding, Delta's demand for access to Toronto, has not been satisfied. Indeed, until February 25, 1998, some seven months hence, Delta and other U.S. carriers will not be permitted to fulfill their U.S.-Toronto service requirements.

6. The second basis on which the Department tentatively decided to grant immunity rests on the fact that the phase-in limitations would automatically expire effective in February 1998, without further governmental action. This observation does not address the critical point that until February 25, 1998, U.S. carriers will not be in a position to ensure that the United-Air Canada immunized alliance would be subject to competitive discipline on U.S.-Toronto routes. The Department's policy of requiring *de facto* and *de jure* open skies agreements as a condition precedent to the grant of immunity is designed to ensure that conditions exist that would engender competitive challenges to the immunized alliance. That policy cannot be satisfied with respect to Toronto services until the bilateral entry/capacity restrictions expire.

7. The Department's Show Cause Order failed to discuss why it would not be in the public interest to withhold the grant of immunity for the U.S.-Toronto routes during the relatively short period remaining under the phase-in restrictions of the bilateral, or obtain Canadian government agreement to accelerate the expiration of the Toronto phase-in limitations. Indeed, Delta believes that the public interest requires the Department to take one of those actions. Approval of immunity while phase-in restrictions on U.S. carrier services continue would be inconsistent with Department policy: "It is the Department's policy not to approve and grant antitrust immunity to international inter-carrier cooperation agreements in markets that lack complete freedom of operations for international services." Show Cause Order at 16. For that reason, the Department excluded from its approval third-country (fifth and sixth freedom) services and all-cargo services. It makes no sense to exclude such services and immunize third and fourth freedom transborder services on restricted-entry U.S.-Toronto routes. Allowing the Air Canada-United alliance to enjoy the unfettered ability to operate nonstop service in U.S.-Toronto city-pairs, while expansion to Toronto by other U.S. carriers is blocked, would give Air Canada-United a substantial and unfair competitive advantage.

8. For these reasons, Delta urges the Department to condition its approval of the alliance by delaying the implementation date of antitrust

immunity with respect to U.S.-Toronto service until February 25, 1998. The few additional months of delayed implementation with respect to only a small portion of the alliance should have no adverse impact on the joint applicants' ability to plan and coordinate other U.S.-Canada services.

9. The Show Cause Order also directed the joint applicants to submit further information concerning the proposed Star Alliance involving a cooperative arrangement among United, Air Canada, Lufthansa, SAS, THAI Airways, and Varig and invited comments on the impact of the Star Alliance on the United-Air Canada alliance. The Department was correct in concluding that "the Star Alliance involves matters relevant to our assessment of the competitive implications that we have been addressing in this case." Show Cause Order at 31. Delta urges the Department to defer further consideration of the United-Air Canada alliance until it has reviewed the public interest and competition issues involving the broader and overlapping Star Alliance arrangement, upon completion of the Alliance Agreement.

10. The joint applicants' assertions that the Star Alliance and the United-Air Canada alliance are separate and distinct ring hollow. The Joint Applicants' July 8 submission demonstrates the substantial overlap between the Star Alliance and the United-Air Canada alliance:

- The Star Alliance will involve coordination of all participants' flights and services to provide "same-airline" travel. Joint Response dated July 8, 1997, Attachment 1, p. 1 (emphasis added).
- The Star Alliance is intended to establish "a global network" and offer the traveling public "the ease and convenience of traveling on a single airline network, virtually anywhere in the world." Joint Response dated July 8, 1997, Attachment 6, Page 1 (emphasis added).
- "It is, of course, the hope and expectation of United and Air Canada that these marketing efforts of the Star Alliance will produce enhanced traffic on the transborder services operated pursuant to the United-Air Canada alliance." Joint Response at 10 (emphasis added).
- "The other members of the Star Alliance will play a role in marketing the United-Air Canada alliance services only to the extent they seek to promote generally the use of services offered by the members of the Star Alliance." Joint Application at 9 (emphasis added).

Thus, the carriers' own statements establish the overlap between the United-Air Canada alliance and the Star Alliance.

11. **[Start of confidential section submitted under seal].**

**[End of confidential section.]**

12. The Department should defer approval of, and antitrust immunity for, United-Air Canada until it has an opportunity to evaluate the competitive impact of the Star Alliance on transborder services. The applicants' July 8 submission makes clear that the United-Air Canada and the Star Alliance are intertwined, despite the applicants' attempt to characterize each arrangement as separate and distinct. Therefore, the Department should examine the combined impact of the United-Air Canada alliance and the Star Alliance.

13. Furthermore, because the U.S.-Canada bilateral agreement does not cover third-country services, cooperative arrangements between Air Canada (or for that matter United) and third-country carriers that are parties to the Star Alliance involving service to, from or transiting the U.S. raise serious public interest and competition issues that require close scrutiny by the Department. Efforts to coordinate the Star Alliance involving third-country services have already begun. Air Canada and SAS recently filed for approval of a code-share arrangement involving third-country passengers transiting through the United States. That proposal may lead to proposals to carry Asia traffic (with THAI Airways) or Brazil traffic (with VARIG). While the Air-Canada-SAS proposal may seem innocuous, it is not, especially in light of the absence of third-country rights in the U.S.-Canada bilateral. Such arrangements would have serious implications for transborder services by allowing Air Canada a means not

authorized under the bilateral to bolster traffic flowing on its U.S.-Canada transborder flights, and thereby gain a competitive advantage over U.S. carriers.

14. In conclusion, the Department should defer immunity for U.S.-Toronto routes until the phase-in limitations of the bilateral agreement expire. In addition, the Department should withhold final action on the United-Air Canada alliance pending consideration of the competitive implications of the combined

Star Alliance and United-Air Canada alliance, especially in light of the failure of the U.S.-Canada bilateral agreement to provide for services involving third-countries.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert E. Cohn". The signature is fluid and cursive, with a large initial "R" and "C".

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