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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
Docket Section

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Joint Application of)
)
 DELTA AIR LINES, INC.,)
 SWISSAIR, SWISS AIR TRANSPORT)
 COMPANY, LTD.)
 SABENA S.A., SABENA BELGIAN WORLD)
 AIRLINES, and)
 AUSTRIAN AIRLINES, OSTERREICHISCHE)
 LUFTVERKEHRS AG)
)
 For approval of and antitrust immunity for)
 Alliance Agreements pursuant to 49 USC 41308)
 and 41309)

Docket OST-95-618 - 29

COMMENTS OF TOWER AIR, INC.
IN OPPOSITION TO THE JOINT APPLICATION

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November 3, 1995

will be able to compete with an immunized Delta in the long run.

Delta is today the largest carrier of any flag that is operating across the Atlantic, and it is the only U.S.-flag carrier operating a significant level of service either to Eastern Europe or on routes beyond any European gateway.

Delta accomplished this feat largely by exercising its control over four U.S. hubs and one European hub. If antitrust immunity is granted in this case, Delta will have a total of four hubs on each side of the Atlantic. Delta's resulting power to accumulate and disperse traffic throughout each continent will create a behemoth with which no small carrier can possibly hope to compete.

Smaller carriers such as Tower Air already suffer severe competitive disadvantages in the transatlantic marketplace because they have access to virtually none of the behind or beyond-the-gateway traffic pools which the possession of hubs like Delta's makes available. Delta's existing four hubs in the United States, thus, already give Delta very substantial competitive advantages over Tower Air for transatlantic traffic. This advantage will be compounded exponentially if Delta is now also allowed to operate as its own three new hubs in Europe as a consequence of antitrust immunity.

The Price For Antitrust Immunity May Well Be The Elimination of Effective Competition By Smaller Carriers

The Department, as the Civil Aeronautics Board before it, has long recognized the very important role that smaller carriers

play in the overall competitive scheme of airline operations. They are the **"spurs"** to competition; the airlines that keep the big carriers **"honest"**. They provide public benefits far greater than their size.

One has only to look at the impact that a carrier like Tower Air exerts on marketplace competition. In virtually every one of the markets in which Tower Air operates, consumer prices are substantially lower than they were before Tower entered solely because Tower Air is able to sell seats at low prices without limiting conditions. Today's low prices in the New York-Los Angeles, New York-Miami, New York-San Juan, New York-Paris, New York-Sao Paulo, New York-Tel Aviv and New York-Bombay markets are all examples of this effect. Countless other examples can be found throughout the industry.

But small carriers can only provide these types of public benefits if they are able to attract traffic to their services. If an immunized mega-carrier controls most of the traffic at its multi-hub sources at both ends of the line, the ability of smaller carriers to operate at lower costs and their aggressive sales methods become of no avail. Travelers simply won't be able to obtain access to their services any longer.

Competition Is One Thing; Unfair
Competition Is Quite Something Else

Tower Air is not here complaining about the present state of competitive affairs in the U.S. airline industry because, to date, it has been able to provide successful competition in the

selected markets where it operates. It is, however, seeking beyond rights in several markets because the existing hub operations of the mega-carriers and the proliferation of their code-sharing services certainly makes competition difficult. What Tower Air is now concerned about is that if Delta is granted anti-trust immunity in this case it will be immunized against unfair competition.

Not only will Delta be able to exercise its existing massive hub power and coordinate its prices and services with those of three European carriers, but if granted anti-trust immunity, it will also be able to eliminate competition, pool revenues, fix prices, and allocate markets with these same foreign partners -- all of which actions have always been forbidden to it as being anti-competitive and unfair practices under United States anti-trust laws.

Why in the world would our government want to give the airline that is already the biggest in the transatlantic market the ability to engage in practices that clearly will make it even more dominant while at the same time eliminating major consumer protection laws? There would certainly have to be overwhelming public benefits arising from this transaction that would justify such highly unusual action. But do they exist?

Delta's Scheme Offers Many Obvious Private Benefits to Delta And Its Partners; But No Demonstrable Public Benefits

Just what is it that Delta cannot now do under its **code-sharing** arrangements with Swissair, Sabena and Austrian that it

will be able to do if antitrust immunity is granted in this case? Delta now can both discuss with these carriers, and also reach agreements with them, to schedule their jointly operated flights; to time the schedules of their connecting flights; and to share the costs of facilities, aircraft, parts, reservation systems, office systems and personnel. They can also hold out to the public in advertisements and reservation systems (with minimal marginal notations) services that are actually connections between two carriers, but appear to be operated by the same carrier. In sum, they can offer a whole host of joint services, many of which have been argued as benefitting the public.

What Delta cannot now do because of U.S. anti-trust laws -- but what it explicitly says is the purpose of its filing in this case -- is to pool revenues with its partners; to agree on prices for the services that they will operate, both jointly and separately; and to make and execute joint decisions as to which carrier or carriers will fly what schedules in which markets. Without a doubt, these activities will very substantially benefit the mercantile interests of Delta and its partners because Delta will be enabled to vastly magnify its market power and profits. Delta will be able to gain the power to control all of the traffic flowing through four hubs on each side of the Atlantic by

¹ For example, Delta will be able to establish prices in U.S.-third country markets where it is now prohibited from doing **so**, and to set them at predatory, marginal capacity levels which are below the ability of even small, low-cost competitors like Tower Air to match.

means that normally constitute illegal scheduling, pricing and pooling activities.

These activities are illegal today not because of overzealous governmental regulation. Fixing prices, dividing markets and pooling revenues have been demonstrated over and over again to harm consumers every time they are committed; they are the prototypical anti-consumer actions of what used to be called **"cartels"**.

We have combed all of Delta's submissions in this case to try to understand how it can possibly justify turning the primary consumer laws of the United States on their heads, and have found very little other than platitudes. It talks about **"seamless"** transportation opportunities; about greater **"efficiencies"**; about **"economies of scope"**; about **"common financial objectives"**; about inhibitions caused by the necessity to bargain on an **"arms length"** basis. But these are really only euphemisms for gaining market dominance through the waiver of the only laws that today can truly protect consumers.

The Delta Cartel Cannot Be Viewed In Isolation; The Other Mesa-Carriers Will Have To Obtain Anti-trust Immunity For Their Code-Sharings Arranements If They Are To Be Able to Continue Comoeting

If the Department grants anti-trust immunity to Delta and its partners in this case, it is almost an absolute certainty that the other mega-carriers: United, American, Continental and **USAir** -- and their partners, will be filing the same request with the Department within a few months. They will have to because

Delta will have secured a major competitive advantage over them if they do not possess the same immunity from public prosecution for anti-consumer activities as Delta will have.

Take the combination of United and Lufthansa, or **USAir** and British Airways (or, perhaps, American and Air France). What carrier -- large or small -- will be able to offer viable competitive service to the primary European trading countries when the laws prohibiting combinations in restraint of trade are neutered through anti-trust immunity? Imagine how well the public will be served when groups of these carriers are allowed to agree to fix prices and ration the flights that they operate for the purpose of maximizing the profits that they will pool amongst themselves?

The Northwest-KLM Cartel Can Reasonably Be Distinguished From The Delta Case, But If Delta Is Granted Immunity, It Will Be Virtually **Impossible** To **Deny** The Same Benefits To United, American, Continental and **USAir**

In hindsight, it is our view that Northwest and KLM should never have been granted anti-trust immunity when they applied. That wrong decision, however, must not be allowed to forever prohibit the application of anti-trust laws to the rest of the airline industry.

Either the Department should acknowledge that the results of its first experiment with anti-trust immunity have not been beneficial for the public, or the Northwest - KLM case should be

distinguished from the one now before the **Department**.² The sheer size and financial strength of Delta and its partners, and the scope of their operations place this application in an entirely different category from Northwest - KLM. Delta, as noted before, is the largest carrier of any country now operating across the Atlantic, and it is the only U.S. carrier that operates a significant level of service to either Eastern Europe or beyond any European gateway. By one or more measures, Delta is also among the top U.S. domestic carriers. **Swissair** and Sabena are both significant transatlantic operators and also between the United States and many third-country destinations. Austrian is a small, but growing, competitor. Each dominates the market to and from its own country. In sharp contrast, Northwest was a secondary transatlantic carrier on the verge of bankruptcy at the time it applied for anti-trust immunity, and it was only the fifth largest U.S. domestic carrier. KLM controls only one European gateway.

Contrast the situation now facing the Department in the Delta case with that were the anti-trust laws to be waived for the Delta Cartel and the issue before the Department was whether that decision should be extended to United, American, etc., etc. Then there will be two precedents to distinguish: one involving a weak, smallish carrier and one involving the largest and strongest of them all. And that largest carrier will have been

² This is especially warranted in view of the pending disagreement between KLM and Northwest over control.

granted immunity to control traffic at four American hubs plus four European hubs -- a combination greater than any other carrier can possibly come up with.

The time to stop this very real threat is now!

If The Department Nevertheless Is Inclined to Grant Immunity In This Case And It Seriously Wishes To Contain The Ensuing Damages To Competition, It Must Mandate Most Favored Nation Interline Agreements For All Smaller Carriers And Grant Anti-trust Immunity To The Operations Of All Air Carriers

In order to partially ameliorate the huge harm to competition that grant of anti-trust immunity to Delta in this case will create -- if it is ever granted -- several drastic remedies are required. First, the Department must require that Delta, and any other carrier whose operations are similarly immunized, enter into full interline agreements with all other carriers that wish them, and that they must do so on a "**most favored nation**" basis. At present, smaller carriers like Tower Air are barred by Delta from obtaining even the small competitive benefits that interline arrangements enable.

Second, the Department must grant anti-trust immunity to all small carriers that compete with Delta so that they too can gain some of the benefits that flow from conspiring with their competitors to fix prices, divide markets and pool revenues. **Why** should only the largest of the large carriers be given this privilege when it is the smaller carriers that most need it to be able to continue competing? Why is it in the public interest for the two airlines that control most of the traffic going to Switzerland or Belgium, for example, to be the **only** ones that are

allowed to raise prices by limiting capacity? Why shouldn't a small carrier like Tower Air be equally entitled to share in this benefit? Tower Air certainly can use the financial strengthening that will thereby become available more than already-huge Delta.

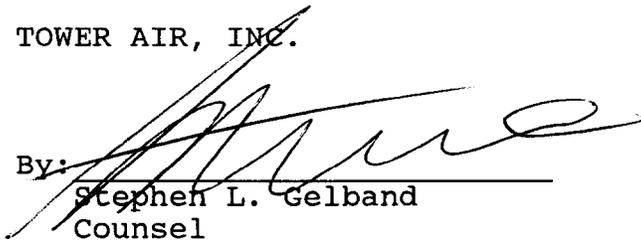
Indeed, it is much more important to the maintenance of a balanced competitive air transportation system for the consuming public to have the continuing services of smaller carriers like Tower Air available to it than to enable mega-carriers like Delta to be able to reduce competition through exclusive anti-trust waivers which favor only the largest of them.

CONCLUSION

In sum, it would be highly anti-competitive for the Department to grant anti-trust immunity to Delta and its partners in this proceeding. Virtually no redeeming public benefits would accrue from such action. If, however, immunity is granted to Delta, across-the-board interlining must be mandated and anti-trust immunity must also be extended to smaller carriers so that they are able to retain sufficient financial strength with which to continue competing for the public good.

Respectfully submitted,

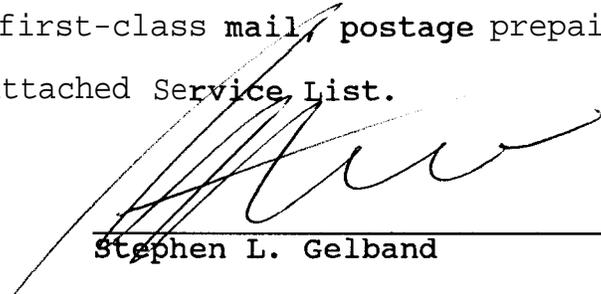
TOWER AIR, INC.

By: 

Stephen L. Gelband
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Comments of Tower Air, Inc. In Opposition To The Joint Application was served this 3rd day of November, 1995, by first-class mail, postage prepaid, on each person listed on the attached Service List.



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