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Order 2000-10-12
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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 13th day of October, 2000

Joint Application of

NORTHWEST AIRLINES, INC.

and

MALAYSIAN AIRLINE SYSTEM BERHAD

for approval of and Antitrust Immunity for a Coordination Agreement under 49 U.S.C. 41308 and 41309

Docket OST-2000-6791

ORDER GRANTING APPROVAL AND ANTITRUST IMMUNITY FOR A COORDINATION AGREEMENT

By this order, we grant approval of and antitrust immunity for a Coordination Agreement[1] between Northwest Airlines, Inc. (Northwest) and Malaysian Airline System Berhad (Malaysia Airlines or MAS), and their respective affiliates, pursuant to 49 U.S.C. §§ 41308 and 41309, subject to the conditions described below.

In June 1997, the Governments of the United States and Malaysia reached agreement on an open-skies aviation relationship that promised substantial benefits to consumers and communities in both countries. The predicate for our approval and grant of antitrust immunity for this Coordination Agreement is the existence of the expansive aviation accord. The accord allows U.S. airlines to serve any point in Malaysia (and open intermediate and beyond rights) from any point in the United States and allows Malaysian airlines to do the same. Our evaluation indicates that open-skies initiatives encourage more competitive service, since market forces determine the price and quality of airline service not restrictive government regulation.

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1 For purposes of this application, the Coordination Agreement includes any and all agreements between Northwest and MAS that implement any part(s) of the Coordination Agreement or are entered into by them in connection therewith, including without limitation the Commercial Cooperation Agreement (Exhibit JA-2A) dated September 22, 1999, and the Implementation Agreement (Exhibit JA-2B) dated September 22, 1999.

I. The Coordination Agreement

The essential elements of this Coordination Agreement include coordination of flight schedules, route networks, and route planning; the establishment of joint marketing, advertising and distribution networks; branding/co-branding and product development; code-sharing; the harmonization of existing internal information systems, including pricing, inventory, yield management, reservations, ticketing, accounting, maintenance, financial reporting, and distribution; revenue pooling and sharing; uniform product and service standards; coordinated cargo programs; coordination and possible integration of their frequent flyer programs; and promoting common use of the Joint Applicants' subsidiaries and commuter carrier affiliates. In summary, this Coordination Agreement would allow the Joint Applicants to operate essentially as a single company, while retaining their individual identities regarding ownership and control.[2] The Joint Applicants state that their proposed alliance does not involve any exchange of equity or other forms of cross-ownership.[3]

II. The Joint Application

On January 13, 2000, the Joint Applicants filed an application seeking approval of and antitrust immunity for their Coordination Agreement, for at least a five-year term. They state that the proposed alliance is fully consistent with the U.S.-Malaysia open-skies agreement and with U.S. international aviation policy. They note that the proposed alliance will be the first immunized alliance between U.S. and Asian airlines. They state that the proposed alliance will improve consumer convenience and choice, improve operating efficiencies that will create greater service value for passengers and shippers, increase competition in various markets, and generate economic benefits for communities across the worldwide networks of both airlines. The Joint Applicants argue that improved air services will increase tourism and encourage local economic development, generating growth in employment and tax revenues. They state that the objective of the Coordination Agreement is to enable them to plan and coordinate service over their respective route networks as if they were a single entity. They also claim that the proposed establishment of service with a common financial "bottom line" cannot be accomplished without antitrust immunity.[4]

The Joint Applicants assert that their Coordination Agreement will allow them to develop mechanisms that will reduce costs and improve service by providing more frequencies, discount fares, discount seats, and on-line options; by providing coordinated hubs and coordinated Trans-Pacific segments; by expanding access to each partner's beyond and behind gateway markets, and by promoting better inventory control and more efficient use of equipment. They argue that immunity will allow them to combine their resources to a greater degree than they can today to

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[2] The Department previously approved and granted antitrust immunity for Cooperation and Integration Agreements among Northwest and KLM Royal Dutch Airlines (KLM) and Alitalia-Linee Aeree Italiane-S.p.A. (Alitalia), see Orders 99-12-5 and 93-1-11.

[3] Joint Application at 3.

[4] See Joint Application at 13, 25-26, and the Coordination Agreement, Article 4.2.

operate additional U.S.-Malaysia services, which they maintain would not be feasible absent immunity.

The Joint Applicants maintain that these benefits to the traveling public cannot be realized without antitrust immunity. They argue that legal and other obstacles preclude formation of transnational integrated route systems, and that U.S. law concerning nationality and ownership effectively precludes mergers of U.S. and foreign airlines.

The Joint Applicants argue that approval of their application will advance U.S. international aviation policy objectives by serving as a catalyst for the liberalization of other international aviation markets in the Asian region. Moreover, the Joint Applicants maintain that the Coordination Agreement is fully consistent with the Department's policy of encouraging and facilitating the globalization and cross-networking of air transportation. The Joint Applicants state that their request is consistent with existing law, policy, and precedent, and is necessary in order to effectively take advantage of the existing U.S.-Malaysia open-skies agreement. They maintain that approval of the proposed Coordination Agreement coupled with antitrust immunity will foster economic and competitive pressures in the marketplace that will, in turn, accelerate reform in aviation policy.

The Joint Applicants state that their request is warranted by foreign policy considerations, is fully consistent with U.S. international aviation policy, and is an envisioned outcome of the U.S.-Malaysia open-skies accord. They state that their request for antitrust immunity is fully consistent with the U.S. Government's commitment to open-entry markets and free and fair international competition.

Regarding the U.S.-Malaysia market, the Joint Applicants maintain that the proposed alliance will have no adverse competitive effects. The record indicates that the Joint Applicants are the only U.S. and Malaysia-flag passenger airlines in the market, and that Northwest has been serving Malaysia since February 1999. The record shows that neither airline provides nonstop service between the U.S. and Malaysia. Furthermore, the Joint Applicants state that third-country airlines offer a significant amount of online fifth and sixth freedom service between the United States and Malaysia.

The Joint Applicants assert that there will not be a substantial reduction in competition in air services in any city pair.[5] They note that there is no overlap in the city-pairs served by them on a single-plane or single flight-number basis, and that Northwest provides no single-plane U.S.-Malaysia service. Northwest and MAS do not compete on a nonstop basis in any U.S.-Malaysia city-pair market. Thus, they note that there will be no reductions of nonstop competition on any U.S.-Malaysia route. Further, they assert that the Open-Skies Agreements between the U.S. and Malaysia will assure competitive discipline by providing for open entry and pricing and service freedom.

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[5] See Exhibit JA-3.

Finally, MAS states that it is prepared to join Northwest and voluntarily withdraw from participation in any International Air Transport Association (IATA) traffic coordination activities that discuss any proposed through fares, rates or charges applicable between the U.S. and Malaysia, and between the U.S. and any other countries designating an airline that has been granted antitrust immunity for participation in similar alliance activities with a U.S. airline.[6] MAS affirms that it is prepared to provide Origin-Destination Survey of Airline Passenger Traffic (O&D Survey) data for all passenger itineraries that include a United States point.[7]

The application is unopposed.

III. Decision Summary

Northwest and MAS have applied for approval of and antitrust immunity for a Coordination Agreement under 49 U.S.C. §§ 41308 and 41309, whereby they will plan and coordinate service over their respective route networks as if there had been an operational merger between the partners. We find that the Coordination Agreement should be approved and granted antitrust immunity, to the extent provided below. Our examination of their proposal leads us to find that the proposed alliance will enhance competition overall and allow the airlines to provide better service and enable them to operate more efficiently. We also find that it is unlikely that the Coordination Agreement — subject to the conditions included here — will substantially reduce competition in any relevant market. Finally, our actions here will allow the Joint Applicants to maximize fully the various pro-competitive and pro-consumer benefits associated with integrated alliances that we foresaw resulting from the fundamental liberalization of air services under the U.S.-Malaysia open-skies accords.

In addition, we will require the Joint Applicants (1) to withdraw from all International Air Transport Association (IATA) tariff conference activities relating to through prices between the United States and Malaysia, as well as between the United States and the homeland(s) of foreign airlines participating with U.S. airlines in other immunized alliances; (2) to file all subsidiary and or subsequent agreement(s) with the Department for prior approval; and (3) to resubmit for review their Coordination Agreement within five years of issuance of this order. We also find it in the public interest to direct MAS to report full-itinerary O&D Survey data for all passengers to and from the United States (similar to the O&D Survey data reported by U.S. airlines and its partner Northwest).

We find that our action in this matter will advance important public benefits, and is consistent with our policy of facilitating competition among emerging multinational airline networks. We fully recognize the trend toward expanding international airline networks as a response to the underlying network economics of the airline industry.

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6 Joint Application at 27-28.

7 Joint Application at 28.

Finally, we have determined that it is appropriate and consistent with the public interest to issue a final decision in this case. Interested parties have had full opportunity to comment on these matters. The application is unopposed. We also have determined that the proposed alliance presents no significant competitive issues requiring further consideration. We therefore will dispense with the issuance of an Order to Show Cause and issue a final order approving this unopposed application.

IV. Decisional Standards under 49 U.S.C. Sections 41308 and 41309

A. Section 41308

Under 49 U.S.C. Section 41308, the Department has the discretion to exempt a person affected by an agreement under Section 41309 from the operations of the antitrust laws "to the extent necessary to allow the person to proceed with the transaction," provided that the Department determines that the exemption is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity, if the parties to such an agreement would not otherwise go forward without it, and we find that the public interest requires that we grant antitrust immunity.

B. Section 41309

Under 49 U.S.C. Section 41309, the Department must determine, among other things, that an inter-carrier agreement is not adverse to the public interest and not in violation of the statute before granting approval.[8] The Department may not approve an inter-carrier agreement that substantially reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met, and those benefits cannot be achieved, by reasonably available alternatives that are materially less anticompetitive.[9] The public benefits include international comity and foreign policy considerations.[10]

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.[11] On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.[12]

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8 Section 41309(b).

9 Section 41309(b)(1)(A) and (B).

10 Section 41309(b)(1)(A).

11 Section 41309(c)(2).

12 *Id.*

V. Approval of the Agreement

The Market Summary

The U.S.-Malaysia market is an important international aviation market. The United States and Malaysia have long recognized that restrictive bilateral aviation relationships adversely affect important cultural and economic ties, and restricted the growth of trade between the two countries. For these reasons, the United States and Malaysia agreed to establish an open-skies aviation regime. The agreement eliminates all existing barriers to new entry, expansion and competition created by government regulation of the market. The agreement provides for unrestricted competitive opportunities, including the flexibility for all U.S. and Malaysia airlines to operate their own direct or joint services. The open-skies agreement recognizes the value of airline networks and provides the opportunity for competing carriers and alliances to offer the services covered by these liberalized regimes.

The Department has examined and found substantial consumer and competitive benefits ensuing from open-skies agreements and from the structural changes that have occurred in the global airline system, such as alliances.[13] The proposed alliance will allow the partners to achieve greater operational efficiencies and to expand their route networks on an integrated and coordinated basis.

Northwest provides one-stop, change-of-gauge service three times per week between Kuala Lumpur, Malaysia, and Detroit, via Osaka, Japan.

MAS provides one-stop service three times per week between Kuala Lumpur and Newark, via Dubai, United Arab Emirates; three times per week between Kuala Lumpur and Los Angeles, via, Tokyo, Japan; and four times per week between Kuala Lumpur and Los Angeles, via Taipei, Taiwan.

It is against this background that we have decided to approve and grant antitrust immunity to the Northwest-MAS Coordination Agreement, subject to the conditions noted.

Public Benefit Summary

We find that the proposed alliance would provide important public benefits. The Joint Applicants contend that the proposed arrangement is pro-competitive and pro-consumer, and will offer the traveling public a greater choice of destinations and competitive routings. We have previously determined that an important pro-competitive effect of global alliances is particularly evident in the case of the behind- and beyond-markets where integrated alliances with coordinated connections, marketing, and services can offer competition well beyond mere

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[13] See *International Aviation Developments: Global Deregulation Takes Off* (First Report), U.S. Department of Transportation, Office of the Secretary, December 1999.

interlining.[14] Integrated alliances can offer a multitude of new on-line services, on a global basis. In this case, we note that Northwest's global network provides consumers with service to more than 750 cities in more than 120 countries, and that MAS's global network serves more than 110 cities. This extensive network of both applicants further supports our view that the proposed alliance will benefit consumers by increasing international access to more foreign destinations with new and improved routing options, particularly for traffic to or from cities behind major gateways. Our recent evaluation of international alliances shows that they stimulate traffic in these connecting markets and thereby increase competition and service options in the overall international market and increase overall opportunities for the traveling public and the aviation industry.[15] The proposed alliance would also allow the partners to improve the efficiency of their operations and to otherwise work together to improve service not only in the U.S.-Malaysia market, but also in the U.S.-Far East market.

Competitive Summary

We also find that it is unlikely that the Coordination Agreement as conditioned would substantially reduce or eliminate competition in any relevant market. The Joint Applicants do not compete head-to-head in any city-pair market. The most significant structural consideration with respect to the impact of the proposed alliance is that Northwest and Malaysia are not major transpacific competitors. For that reason, it is unlikely that the public would lose any significant service because of the proposed alliance. Approval of the alliance will only nominally increase the presence and share of the new partnership in the U.S.-Far East market.

We have reached the same conclusion with respect to the U.S.-Malaysia market. The record shows that there is no significant competitive overlap among the partners in this market. Therefore, approval of the alliance will not substantially reduce competition here.

The record also supports a finding that the proposed arrangement will not reduce nonstop and single-plane competition in any city-pair market.

A. Antitrust Issues

The Joint Applicants state that the Coordination Agreement will allow them to develop mechanisms to improve efficiency, expand various benefits available to the traveling and shipping public, and enhance their ability to compete in the global marketplace. They state that, while retaining their separate corporate and national identities, they fully intend to cooperate to the extent necessary to create a seamless air transport system. Accordingly, the Coordination Agreement's intended commercial and business effects are equivalent to those resulting from a merger. In determining whether the proposed transaction would violate the antitrust laws, we

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[14] See Order 96-5-12 at 17-18.

[15] See International Aviation Developments: Global Deregulation Takes Off (First Report), U.S. Department of Transportation, Office of the Secretary, December 1999.

apply the Clayton Act test used in examining whether mergers will substantially reduce competition in any relevant market.[16]

The Clayton Act test requires the Department to consider whether the Coordination Agreement will substantially reduce competition by eliminating actual or potential competition between Northwest and MAS so that they would be able to effect supra-competitive pricing or reduce service below competitive levels.[17] To determine whether a merger or comparable transaction is likely to violate the Clayton Act, the Department considers whether the transaction is likely to create or enhance market power, market power being defined as the ability profitably to maintain prices above competitive levels for a significant period of time (firms with market power can also harm customers by reducing product and service quality below competitive levels). To determine whether a proposed merger or comparable transaction is likely to create or enhance market power, we primarily consider whether the transaction would significantly increase concentration in the relevant markets, whether the transaction raises concern about potential competitive effects in light of concentration in the market and other factors, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed transaction's potential for harm.

The relevant markets requiring a competitive analysis are: first, the U.S.-Far East market; second, the U.S.-Malaysia market; and third, the city-pair markets.

1. The U.S.-Far East Market[18]

We find that the Coordination Agreement should not diminish competition in the U.S.-Far East market. During the 12 months ended December 1999, Northwest's nonstop passenger market share was about 18 percent. The proposed alliance's passenger market share was about 19 percent. In contrast, the Star Alliance partners (United Air Lines-All Nippon Airways-Singapore Airlines-Thai Airways) nonstop passenger market share was about 23 percent; Japan Airlines had about a 23 percent market share; the oneworld alliance partners (American Airlines-Cathay Pacific) had about a 5.5 percent market share; and Delta Air Lines and Continental Airlines had 3.1 and 1.3 percent market shares, respectively.

The U.S.-Far East market is thus highly competitive in terms of service. Five U.S. airlines provide scheduled passenger service in this market from their hubs, either individually or in conjunction with an existing alliance. The market is also served by more than fifteen foreign airlines, principally from hubs in their homelands.

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16 Order 92-11-27, at 13.

17 *Id.*

18 Source: T-100 and T-100(f) nonstop segment and market data, for the 12 months ended December 1999.

2. The U.S.-Malaysia Market

The Joint Applicants are currently the only U.S. and Malaysian airlines in the U.S.-Malaysia market. Nonetheless, based on our evaluation, we do not find that the proposed integration will enable Northwest-MAS to charge supra-competitive prices or to reduce service below competitive levels. Importantly, the record shows that the Joint Applicants do not directly compete against each other to any significant extent in this market. Neither airline operates nonstop service between the United States and Malaysia. Northwest offers single flight number, change-of-gauge service three times per week in the Detroit-Kuala Lumpur market, via Osaka. MAS operates single-plane service three times per week in the Kuala Lumpur-Newark market, via Dubai, U.A.E.; three times per week in the Kuala Lumpur-Los Angles market, via Tokyo; and four times per week in the Kuala Lumpur-Los Angeles market, via Taipei. See Exhibit JA-3.

Since the partners do not provide nonstop service in this market, on-line connecting service offered by third-country airlines should provide competitive alternatives to the proposed Northwest-MAS alliance. The record shows that thirteen third-country airlines provide on-line connecting services between Kuala Lumpur and the United States. See Exhibits JA-4 and JA-5. Moreover, the U.S.-Malaysia Open-Skies accord provides that any U.S. airline may serve Malaysia from any point in the United States. For this reason, we see no reason why U.S. airlines could not begin new service to Malaysia if Northwest-MAS should introduce supra-competitive fares or lower service below competitive levels.

We therefore find that the proposed alliance would not eliminate or substantially reduce competition in the U.S.-Malaysia market. As we noted above, these markets are governed by an Open-Skies agreement that eliminates all barriers to entry and provides the opportunity for other airlines to freely enter and meet the needs of consumers in the affected market.

3. The City-Pair Markets

We have reached the same conclusion with respect to the city-pair markets at issue here. The record shows that the two airlines do not compete on a nonstop basis in any city-pair market. Northwest offers one-stop service in the Detroit-Kuala Lumpur market; and MAS offers one-stop service in the Kuala Lumpur-Newark/Los Angeles markets. See Exhibit JA-3. We find that the alliance therefore will not eliminate or substantially reduce competition in any city-pair market.

For these reasons, we find that the arrangement will benefit overall competition in the affected markets. The proposed alliance will enable the partners to operate more efficiently and to provide the public with enhanced service options. The integration of the partners' services will provide pro-competitive advantages that outweigh any possible negative affects on competition in these city-pair markets.

B. Public Interest Issues

Under Section 41309, we must determine whether the Coordination Agreement would be adverse to the public interest. Section 41308 requires a similar public interest examination. We find that approval of the Coordination Agreement will promote the public interest.

Open-Skies agreements with foreign countries give any authorized carrier from either country the ability to serve any route between the two countries (and open intermediate and beyond rights) if it so wishes. These agreements place no limits on the number of flights that carriers can operate, and carriers can charge any fare unless both countries disapprove it.[19]

For the reasons explained above, we have found that approving the Coordination Agreement will benefit the traveling public, taking into account the conditions imposed by the Department, and is unlikely to reduce competition significantly in any relevant markets, and is otherwise in the public interest

VI. Grant of Antitrust Immunity

We have the discretion to grant antitrust immunity to agreements approved by us under Section 41309 if we find that the public interest requires immunity. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. However, we are willing to grant immunity if the parties to such an agreement would not otherwise go forward, and if we find that the public interest requires the grant of antitrust immunity.

The record shows that Northwest and MAS will not proceed with the Coordination Agreement without antitrust immunity.[20] The Joint Applicants claim that they cannot accomplish the public benefits that they seek to achieve through the formation of this alliance absent antitrust immunity. They maintain that the proposed integration of their operations would surely expose them to antitrust litigation, since they fully intend to establish a common financial objective. Additionally, they indicate that full operational integration will necessarily mean that they will coordinate all of their U.S.-Far East business activities, including pricing, scheduling, route planning, marketing, and sales.

Since the antitrust laws allow competitors to engage in joint ventures that are pro-competitive, we think it unlikely that the integration of the Joint Applicants' services violates the antitrust laws. Nevertheless, the record indicates that the Joint Applicants could be subject to extensive and burdensome antitrust litigation if we did not grant immunity. The record also persuades us that they will not proceed without it.

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[19] Order 92-8-13, August 5, 1992.

[20] Joint Application at 25-26.

To the extent discussed above, we find that we should grant antitrust immunity to the Coordination Agreement. We also intend to review and monitor the Joint Applicants' progress in implementing the alliance in order to ensure that they are carrying out the arrangement's pro-competitive aims. We will also require them to resubmit the Coordination Agreement for review in five years.

While we conclude that the alliance should be approved and given immunity, we find, as discussed next, that certain conditions appear necessary to allow us to find that our actions in these matters are in the public interest.

VII. IATA Tariff Coordination Issue

Consistent with our earlier decisions, it is contrary to the public interest to permit immunized alliances to participate in certain price-related coordination that is now immunized within IATA tariff coordination. We therefore have decided to condition our approval and grant of antitrust immunity to the Coordination Agreement by requiring the Joint Applicants to withdraw from participation in any IATA tariff conference activities that affect or discuss any proposed through fares, rates or charges applicable between the United States and Malaysia, or between the United States and any other countries designating a carrier that has been or is subsequently granted antitrust immunity or renewal thereof by the Department for participation in similar alliances.[21]

Under this condition, the Joint Applicants may not participate in IATA tariff coordination activities affecting fares, rates and charges between the United States and Malaysia, and between the United States and the homeland(s) of their similarly immunized alliance competitors. Through prices between the U.S. and other countries, as well as all local fares in intermediate and beyond markets, are not covered by the condition.[22]

We find that this condition is in the public interest for a number of reasons. The immunity that is requested in this proceeding includes broad coverage of price coordination activities between the Joint Applicants. With respect to internal Alliance needs, tariff coordination through the

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[21] This condition currently applies to prices between the United States and the Netherlands; between the United States and Germany (see Order 96-5-27 at 17); between the United States and Denmark, Norway, and Sweden (see Order 96-11-1 at 23); between the United States and Chile (see Order 99-9-9 at 21); between the United States and Italy (see Order 99-12-5 at 3); and between the United States and Belgium and Switzerland (see Order 2000-5-13 at 3-4). Also, by letter dated May 8, 1996, Northwest and KLM indicated their willingness to limit voluntarily their participation in IATA (see Dockets OST-96-1116 and OST-95-618).

[22] Under this condition, the partners could not participate in IATA discussions of the total ("through") price (see 14 C.F.R. § 221.4) between a U.S. point of origin or destination and an origin or destination in Belgium, Chile, Denmark, Germany, Italy, Norway, Sweden, Switzerland, and the Netherlands, or a homeland of a subsequently immunized alliance, whether such prices are offered for direct, on-line or interline service. They could, however, discuss local segment prices, arbitraries or generic fare construction rules that have independent applicability outside such markets. IATA activities covered by our condition would include all those discussing prices proposed for agreement, including both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

IATA conference mechanism is duplicative and unnecessary. At the same time, one of the reasons that we find supports immunity for the proposed activities is the potential for increased price competition between the partners and other carriers, particularly other international alliances. We have found that such potential competition will, on balance, outweigh any potential anticompetitive effects of price coordination within the Alliance itself and encourage the passing on of economic efficiencies realized by the Alliance to consumers in the form of lower prices. Permitting the Joint Applicants to continue tariff coordination within IATA undermines such competition.

VIII. O&D Survey Data Reporting Requirement[23]

We have access to market data where U.S. carriers operate, including markets that they serve jointly with foreign airlines, for example, the Department's Origin-Destination Survey of Airline Passenger Traffic (O&D Survey). We have also collected special O&D Survey code-share reports for certain large alliances and have directed all other U.S. airlines to file reports for their transatlantic code-share operations beginning with the second quarter of 1996.

However, we receive no market information for passengers traveling to or from the U.S. when their entire trip is on foreign airlines, except for T-100 data for nonstop and single-plane markets. Such passengers account for a substantial portion of all O&D traffic between the U.S. and foreign cities, and the absence of such information severely handicaps our ability to evaluate the economic and competitive consequences of the decisions we must make on international air service.

We must also ensure that our grant of antitrust immunity does not lead to anticompetitive consequences. Consistent with determinations in similar cases,[24] we have decided to require MAS (Northwest already reports O&D Survey data) to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by its partner Northwest).[25]

To prevent this reporting requirement from having any anticompetitive consequences, we have decided to grant confidentiality to the MAS Origin-Destination reports and special report on code-share passengers. Currently, we grant confidential treatment to international Origin-Destination data. We provide these data confidential treatment because of the potentially damaging competitive impact on U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data covering the operations of foreign

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[23] We will provide confidentiality protection for these data, as we do for international O&D data submitted by U.S. airlines. Although we will use these data for internal monitoring purposes, we will not disclose it to any other airlines.

[24] For example, see Order 96-6-33 at 21.

[25] Consistent with our determinations in Orders 96-7-21, 96-11-1, and 99-9-9 we intend to request other foreign carrier members of immunized international alliances to submit O&D Survey data and condition any further grants or renewals of antitrust immunity on provision of such data. We will treat the foreign carriers' O&D data as confidential, will not allow U.S. carriers any access to the data, and will not allow MAS or other foreign carriers any access to U.S. carrier O&D Survey data.

airlines that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).

Our regulation, 14 C.F.R. Part 241 section 19-7(d)(1), provides for disclosure of international O&D Survey data to air carriers directly participating in and contributing to the O&D Survey. While we have found it appropriate to direct MAS to provide certain limited Origin-Destination data to the O&D Survey, MAS is not air carrier within the meaning of Part 241. The regulation (14 C.F.R. Part 241, Section 03) defines an air carrier as "[a]ny citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." MAS accordingly will have no access to the data filed by U.S. air carriers. Moreover, we will be making MAS's submissions confidential while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers.

IX. Computer Reservations System (CRS) Issues

Another competitive issue concerns ownership interests that the Joint Applicants have in competing CRSs. Northwest and MAS have ownership and marketing ties with Worldspan and Abacus Distribution Systems, competing CRS firms. Therefore, as with the Delta Air Lines-Austrian-Sabena-Swissair arrangement (see Order 96-5-26 at 31-32) and the Northwest-KLM arrangement (see Order 92-11-27 at 16), the proposed integration of marketing operations of the Joint Applicants presents a risk that CRS competition may be reduced. In view of these factors, we find that any grant of antitrust immunity for the Coordination Agreement should exclude the Joint Applicants' CRS interests and operations. We note that the Joint Applicants recognize that immunity will not extend to the Northwest-MAS management of any interest they may have in individual CRSs.[26]

X. Operation under a Common Name/Consumer Issues

Since operation of the Coordination Agreement could raise important consumer issues and "holding out" questions, if the Joint Applicants choose to operate under a common name or use "common brands," they will have to seek separate approval from the Department prior to such operations. For example, it is Department policy to consider the use of a single air carrier designator code by two or more airlines to be unfair and deceptive and in violation of the Act unless the airlines give reasonable and timely notice to passengers of the actual operator of the aircraft.[27]

XI. Summary

We grant approval and antitrust immunity to the Coordination Agreement. We also direct the Joint Applicants to resubmit the Coordination Agreement within five years of the issuance of this Order. However, the Department is not authorizing Northwest-MAS to operate under a common

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[26] Application at 26.

[27] See 14 C.F.R. 399.88.

name. If they decide to operate under a common name, they will have to comply with our relevant procedures before implementing the change.

We also direct the Joint Applicants to withdraw from all IATA tariff conference activities relating to through fares, rates or charges between the United States and Malaysia, as well as between the United States and the homeland of any other foreign airline granted antitrust immunity or renewal thereof by the Department for participation in similar alliance activities with a U.S. airline; and file all subsidiary and/or subsequent agreement(s) with the Department for prior approval.[28] We also direct MAS to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by its partner Northwest).

ACCORDINGLY:

1. We approve and grant antitrust immunity, as discussed by this order, to the Coordination Agreement between Northwest Airlines, Inc. and Malaysian Airline System Berhad, and their subsidiaries, insofar as it relates to foreign air transportation subject to the provision that the antitrust immunity will not cover any activities of Northwest and MAS as owners of Worldspan and Abacus Distribution Systems computer reservation systems businesses;

2. We direct Northwest Airlines, Inc. and Malaysian Airline System Berhad to resubmit their Coordination Agreement five years from the date of issuance of this Order;

3. We condition our grant of approval and immunity to require Northwest Airlines, Inc. and Malaysian Airline System Berhad to withdraw from participation in any International Air Transport Association tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Malaysia, and/or between the United States and any other countries whose designated airlines participate in similar agreements that either have been or are subsequently granted antitrust immunity or renewal thereof by the Department;

4. We direct Malaysian Airline System Berhad to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its alliance partner Northwest Airlines, Inc.);

5. We direct Northwest Airlines, Inc. and Malaysian Airline System Berhad, and their subsidiaries, to obtain prior approval from the Department if they choose to operate or hold out service under a common name or use "common brands";

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[28] Regarding this requirement, we do not expect the Joint Applicants to provide the Department with minor technical understandings that are necessary to implement fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct them to provide the Department with all contractual instruments that may materially alter, modify, or amend the Coordination Agreement.

6. We delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in ordering paragraph 3, and further described in footnote 22, to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition as heretofore described;

7. We direct Northwest Airlines, Inc. and Malaysian Airline System Berhad, and their subsidiaries, to submit any subsequent subsidiary agreements(s) implementing the Coordination Agreement for prior approval;

8. We defer action on the motions filed by Northwest Airlines, Inc. and Malaysian Airline System Berhad for confidential treatment of certain data and information;

9. This order is effective immediately;

10. We may amend, modify, or revoke this authority at any time without hearing; and

11. We shall serve this order on all persons on the service list in this docket.

By:

FRANCISCO J. SANCHEZ
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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