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Order 96-1-25

**SERVED** JAN 23 1996

**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

Issued by the Department of Transportation  
on the 23rd day of January, 1996

International Air Transport Association

**AGREEMENT RELATING TO LIABILITY**

**LIMITATIONS OF THE WARSAW CONVENTION**

**Docket OST-95-232 -20**  
**(49152)**

**ORDER GRANTING CONTINUED DISCUSSION AUTHORITY**

By Orders 95-2-44, and 95-7-15, the Department granted and extended discussion authority and antitrust immunity to IATA for the purpose of reaching an Agreement among carriers to waive the liability limits of the Warsaw Convention. In Order 95-2-44 we agreed with IATA that the Montreal intercarrier Agreement of 1966 (Montreal Agreement) must be brought up to date, and we set forth guidelines for such an agreement which reflect the basic objectives which we have pursued in our efforts to secure ratification of the Montreal Protocols and creation of a supplemental compensation plan.<sup>1</sup> Order 95-7-15 incorporated the same guidelines. The discussion authority expired on December 31, 1995.

As a result of the IATA discussions, an IATA Intercarrier Agreement (IIA) was unanimously endorsed at the IATA Annual General Meeting in Kuala Lumpur on October 31, 1995, which requires signatory carriers to take action, by November 1, 1996, to waive the Convention's limitation of passenger liability, "so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger," and to encourage other carriers to do the same.<sup>2</sup> The

<sup>1</sup> Order 95-2-44, at pp. 2 and 3.

<sup>2</sup> IATA has provided the Department with copies of the final resolution and the Intercarrier Agreement in a letter dated November 27, 1995.

Agreement leaves the technical details of implementation to the carriers, subject to requirements of Governments in connection with approval of the Agreement and other implementing Agreements.

On December 22, 1995, IATA filed a request for extension of the discussion authority and antitrust immunity for a period of ninety days, until April 1, 1996.<sup>3</sup> IATA urges that continued discussion authority and immunity is needed to consider whether there is a need for a specific intercarrier agreement on implementation of the IIA, which is not specific in its terms; the terms of any such agreement; whether there is sufficient consensus to reach such an agreement; and the relationship of any such agreement to efforts to seek approval of the IIA. IATA also requests a technical revision to the conditions attached to its previous immunity in Order 95-7-15, to the extent that IATA, as distinct from U.S. carriers required to attend all sessions, would be responsible for reporting to the Department on a 24 hour basis.<sup>4</sup>

Answers<sup>5</sup> in support of IATA's Petition were filed by Air Canada, British Airways, Japan Airlines and the Asociacion Internacional de Transporte Aereo Latinamericano.

We have decided to grant IATA's petition for continued discussion authority and antitrust immunity to the extent set forth in this Order. We will authorize discussions "directed toward producing an acceptable passenger liability regime under the Warsaw convention." We will also make the requested technical revisions to the U.S. carrier reporting requirement.

Given the apparent confusion regarding the scope of the immunity granted by our recent orders, we believe it advisable to elaborate on the scope of the immunity granted here. IATA suggests that immunity should be sufficient to consider the views of many carriers that a further implementing Agreement is not necessary. We would consider the immunity granted as sufficient to permit carriers, on an individual basis, to express their

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<sup>3</sup> IATA states that its requested extension of the discussion authority and antitrust immunity should be issued in lieu of the discussion authority and immunity issued to the Air Transport Association of America (ATA) and IATA in Order 95-12-14 "to develop an intercarrier agreement for implementation of the IATA Intercarrier Agreement in a manner which adequately meets the Department's guidelines as specified in Order 95-2-44", which it suggests should be suspended during the period its requested authority is issued. IATA states that, in the current Petition, it seeks somewhat broader discussion authority and immunity than granted in Order 95-12-14.

<sup>4</sup> IATA otherwise supports the conditions in Order 95-7-15. Specifically it does not object to the requirement of U.S. carrier attendance at all meetings, working groups, etc., or that the U.S. carriers be directed to report. (The condition regarding U.S. carrier reporting was added in Order 95-7-15 when the original conditions were modified at IATA's request to permit discussions outside of Washington, D.C. )

<sup>5</sup> IATA requested a shortened answer period, and by Notice served January 3, 1996, the Department set January 9, 1996, as the date answers would be due.

views in this regard.<sup>6</sup> However, the approved objective of these discussions is to arrive at an Agreement designed to ensure that a single liability regime which adequately meets the Department's Guidelines will be in effect for all passengers on flights to and from the United States, and hopefully for most flights throughout the world. It is our understanding that IATA shares this objective, since its original application expressed IATA's desire to revise and update the Montreal Agreement and the IIA which IATA endorsed in Kuala Lumpur recognizes that the Warsaw Convention system is of great benefit to international air transportation.

We recognize, although regretfully, that it may not be possible to reach unanimity on an Agreement for worldwide application.<sup>7</sup> The absence of unanimity, or even a large worldwide consensus for areas other than to and from the U.S., should not, however, deter the efforts to achieve the maximum U.S. and foreign carrier participation in the development of a single liability regime that conforms to the Department's guidelines to be applicable to and from the United States.<sup>8</sup>

We therefore find that the discussion authority granted here is necessary to meet a serious transportation need and will provide important public benefits which cannot be met by reasonably available and materially less anticompetitive alternatives. Since implementation of the discussion authority and Agreements will be dependent on the grant of antitrust immunity, we also find that grant of such immunity meets the standards of the Act, and will be in the public interest. Our discussion authority, and the antitrust immunity granted by this Order, will extend to all carriers participating in the discussions or approved agreements, regardless of whether they are members of IATA.

We will reserve the right to modify this order, and its conditions, at any time as may be required in the public interest.

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<sup>6</sup> We would not consider, however, that the immunity would extend to any collective understanding that there should be no such Agreement.

<sup>7</sup> We note, in this regard, that the EU is proceeding to develop and consider regulations that would implement the IIA for EU carriers in accordance with EU requirements. We would prefer to base our proposed regulations on an agreement developed by the carriers and approved by us, if such an agreement is possible.

<sup>8</sup> Thus, we will not suspend Order 95-12-14. As we stated in that Order, it would be our preference for discussions to proceed under the auspices of IATA, in order to create as wide an application as possible. Nevertheless, we believe that ATA should also have immunity to continue discussions, with full participation of foreign carriers, in the event that IATA is unable or unwilling to proceed on this basis.

**ACCORDINGLY:**

1. The Department approves, under section 41308 of Title 49 of the United States Code, until April 1, 1996, to the extent provided herein, the request filed by IATA in Docket OST-95-232 for continued discussion authority directed toward producing an acceptable passenger liability regime under the Warsaw Convention, subject to the restrictions listed below;
2. The Department exempts IATA and any other persons participating in the discussions approved by this order from the operation of the antitrust laws under section 41309 of Title 49 of the United States Code;
3. The Department's approval is subject to the following conditions:
  - (a) Advance notice of any meeting for discussions covered by this order shall be given to all U.S. carriers participating in the meeting, and the U.S. Departments of Transportation, State and Justice;
  - (b) Representatives of the entities listed in subparagraph (a) above shall be permitted to attend all meetings authorized by this order;
  - (c) A U.S. air carrier representative designated by the Air Transport Association of America shall be in attendance at all meetings, discussions, working groups, drafting groups, or other discussions covered by this order, to the extent that the discussions may have any bearing on matters within the scope of the Guidelines set forth in Order 95-2-44;
  - (d) The designated U.S. carrier representative(s) attending all such discussions shall be authorized to report fully and continually to the Department on the substance, nature and progress of such discussions, by telephone or otherwise, within 24 hours after any such discussion, and shall be authorized to submit all drafts, working papers or other documentation to the Department by facsimile, or otherwise;
  - (e) IATA or ATA shall file within 14 days with the Department a report of each meeting, discussion, working group or drafting session held, including *inter alia* the date, place, attendance, a copy of any information submitted to the meeting or other discussion by any participant, and a summary of the discussions, any drafts or preliminary drafts prepared, and any proposed agreements;
  - (f) Any agreement reached must be submitted to the Department for approval and must be approved before its implementation;
  - (g) Attendees at such meetings must not discuss rates, fares or capacity, except to the extent necessary to discuss ticket price additions reflecting the cost of any passenger compensation plan;

(h) This order may be amended, revoked or further conditioned, at any time, without a hearing, as the Department may find to be consistent with the public interest; and

(i) The Department retains jurisdiction over the discussions to take such further action at any time, without a hearing, as it may deem appropriate; and

5. An ATA designated U.S. carrier representative attending all discussions, working groups, drafting sessions, *etc.*, shall report fully and continually to the Department on the substance, nature and progress of such discussions, by telephone or otherwise, within 24 hours after any such discussion, and shall submit all drafts, working papers or other documentation to the Department by facsimile, or otherwise;

6. We will serve a copy of this order on all parties in the above-titled docket, and on the Departments of State and Justice.

By:

MARK L. GERCHICK  
Acting Assistant Secretary for  
Aviation and International Affairs

(SEAL)