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Order 2001-12-5



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

Issued by the Department of Transportation  
on the 4th day of December, 2001  
Served: December 4, 2001

U.S.-U.K. Alliance Case

Docket OST-2001-11029 - 20

**ORDER ON MOTIONS**

By this order, we deny three procedural motions in this consolidated proceeding. We also extend the deadlines for answers and replies to December 17 and 21, respectively.

On November 19, Continental, Delta, and Northwest filed a motion asking us to set the AA/BA case for hearing before an Administrative Law Judge. By motions filed on November 9 and 16, Northwest asks us to strike certain submissions by American and British Airways. By this order, we deny all three motions.

**I. Motion for Oral Evidentiary Hearing**

**A. Pleadings**

**Continental, Delta, and Northwest** (the "Joint Movants") argue in their Motion for an Oral Evidentiary Hearing Before an Administrative Law Judge (ALJ) that the proceeding "is extraordinary in terms of the scope, complexity and controversy of the factual issues presented" and that "an oral evidentiary hearing before an Administrative Law Judge is essential to develop, evaluate and resolve the substantial issues of disputed material facts raised in this proceeding."<sup>1</sup> Citing judicial precedent to the effect that "cross examination has long been regarded to have 'unique potential as an engine of truth,'"<sup>2</sup> the Joint Movants recite a list of issues that "can only be developed through an oral hearing and cross examination . . ."<sup>3</sup> The three carriers then discuss each of these issues at length, and conclude:

This case is a watershed in terms of international aviation policy. There are a host of extraordinarily complex, troubling and controverted factual issues that are inadequately addressed on the basis of the existing written record. . . . The Department correctly determined that a hearing was warranted the last time it

<sup>1</sup> Joint Motion, at 1, 2.

<sup>2</sup> *Id.* at 2, quoting *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631 (D.C. Cir. 1973).

<sup>3</sup> Joint Motion, at 5-6.

investigated the American/British Airways alliance, and the same considerations apply to the existing application.<sup>4</sup>

**Virgin Atlantic Airways** supports this motion. It argues that our procedural rules provide for oral evidentiary hearings “to deal with material, disputed issues of fact that cannot be resolved in the absence of such a hearing.”<sup>5</sup> Virgin argues that an ALJ is needed here even though we decided against it in 1997 because of the parties’ disagreement on many disputed factual issues.

**American Airlines and British Airways** oppose the motion, arguing that the motion is untimely under our rules, and is solely intended to delay the case; “[o]n the November 2 comment date, only Continental requested an oral evidentiary hearing, and did so in passing . . . without making any effort to explain why such a hearing is needed.”<sup>6</sup> They note that we have not used oral evidentiary hearing procedures in alliance cases, and that the process set for the 1997 case did not include oral evidentiary hearing procedures before an ALJ. American and BA also reiterate that only a short time remains to negotiate Open Skies with the United Kingdom.

**United Airlines and British Midland** claim that no such procedures are needed to address their request for immunity, and recite our observation that consolidation should expedite both applications.<sup>7</sup> They accuse the Joint Movants of opposing Open Skies “for their own parochial reasons . . . because they have no wish to see added alliance competition at London Heathrow for U.S. transatlantic services.”<sup>8</sup> Like American and BA, these parties note that the Joint Movants’ request is late.

## B. Decision

We begin by noting that neither the statute nor our rules require oral evidentiary hearings in alliance cases.<sup>9</sup> Moreover, opponents of the motion correctly note that the motion has been filed long after the deadline for such requests under our rules.<sup>10</sup> Nevertheless, because of the complicated procedural history of the case, including the institution of this new, consolidated proceeding, we will address the motion on its merits.

Our rules explicitly provide that we may choose between an oral evidentiary hearing and show-cause procedures when we consider whether to approve and immunize agreements affecting international air transportation.<sup>11</sup> Given the lack of any statutory requirement for a formal hearing, we have the discretion to determine whether oral

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<sup>4</sup> *Id.* at 19. The three carriers reiterate their arguments in an unauthorized reply filed on November 30, 2001, for which they request leave to file. We will grant the request.

<sup>5</sup> Answer of Virgin Atlantic, at 2 (citations omitted).

<sup>6</sup> Answer of AA/BA, at 2.

<sup>7</sup> Answer of UA/bmi, at 4, *quoting* Order 01-11-10 at 8-9.

<sup>8</sup> Answer of UA/bmi, at 5.

<sup>9</sup> 49 U.S.C. §§ 41308, 41309 (2001); 14 C.F.R. Part 303 (2001).

<sup>10</sup> 14 C.F.R. § 303.42(a) (2001) (requests for hearing to be filed within 21 days of application).

<sup>11</sup> 14 C.F.R. §§ 303.42(c), 303.44, 303.45.

evidentiary hearing procedures are necessary or appropriate.<sup>12</sup> We have never used formal hearing procedures in such cases. We have concluded that holding an oral evidentiary hearing in this proceeding is unnecessary and that we can properly decide the factual issues without such procedures.

The Joint Movants have accurately noted that oral evidentiary proceedings are appropriate to develop facts in certain circumstances, and have enumerated several significant issues alleged to belong in this category. We disagree, however, that an oral evidentiary hearing is therefore needed in this case. Assuming *arguendo* the relevance and intricacy of the issues discussed, we note that the importance and even complexity of issues, including factual issues, do not automatically imply that oral evidentiary procedures are necessary. Rather, the question is whether there are material issues of fact whose resolution *requires* such procedures. We have not been convinced that such issues exist here. We have routinely decided factual issues involving economic and policy questions in other cases of similar complexity without a formal hearing; we believe that similar issues can be resolved here without ALJ hearing procedures.<sup>13</sup>

In addition, holding a formal hearing would require a significant amount of time and thereby delay our final decision. We have not made any decision in this case, but we do not wish to see our options limited by external events that would forestall any particular result. As all the parties recognize, and as we have stated earlier in this case, we would like to be able to issue our decision in this case by early next year. A timely decision would enable us to take advantage of this potential opportunity to achieve an open skies agreement with the United Kingdom, if the outcome of our negotiations and our decision on the merits lead to that result.<sup>14</sup>

We are well aware, of course, that our statute and precedent require us to determine whether the alliance satisfies the antitrust test (or, if not, the public benefits and transportation needs test in the statute). We intend to carefully examine these issues, which we believe can be accomplished by using show-cause procedures, and to give every party a fair opportunity to present its evidence and arguments on the issues.

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<sup>12</sup> See *City of St. Louis v. Department of Transportation*, 936 F.2d 1528 (8<sup>th</sup> Cir. 1991).

<sup>13</sup> The movants are mistaken in arguing that we regarded a full oral evidentiary hearing as necessary in the first AA/BA case. We did not. We instead found that the development of an adequate record did not require cross-examination and other formal hearing procedures. Order 98-7-23, July 31, 1998, at 8-9; Order 97-9-4, September 5, 1997, at 17. While we had planned to hold an oral argument in that proceeding, no one has sought such procedures in this case, and we believe that an oral argument is not necessary here.

<sup>14</sup> Achieving an open skies agreement with the United Kingdom would be a necessary predicate to any approval of the alliance proposals. Order 2001-9-12, September 17, 2001, at 4-5.

## II. Motions to Strike

### A. Pleadings

**Northwest Airlines** has moved to strike three statements filed by American and BA on November 2 (motion to strike of November 9), as well as the more voluminous Joint Appendices to the Joint Applicants' Reply filed by American and BA on November 9 (motion to strike of November 16). In both motions, Northwest argues that the material should have been filed much earlier, with the original applications. Northwest also pleads lack of time to review the submissions, particularly the lengthy appendices that include technical analyses, and also claims that much of the material is unfounded.

**Continental** filed answers to each of Northwest's motions. It supports both, reciting similar arguments and emphasizing its request for an oral evidentiary hearing before an ALJ. **Delta** also answered, supporting both motions. Delta claims that the applicants have "frustrated the orderly review process" and that we "should not condone such unfair tactics."<sup>15</sup>

**American and BA** oppose the motions, arguing that the material submitted on November 2 is well within the bounds of what may be included in answers to application, and was submitted in ample time for parties to comment. The applicants claim that the material submitted on November 9 was "in direct response to arguments raised by the opponents in their answers on November 2," enumerating specific examples.<sup>16</sup>

### B. Decision

We find it unnecessary to strike the material in question from the record. Northwest may well be correct in arguing that much, if not all, of the material should have been filed as part of the application submitted by American and British Airways. All parties now have, however, additional time to consider these materials and to respond to them, including the question of their substantiation or lack of it. We see no prejudice to opponents in allowing them an opportunity to refute or rebut evidence and arguments, rather than ignoring them. Therefore, in the interests of a complete record and in the absence of prejudice to interested parties, we deny both Northwest motions.

## III. Deadlines

Certain material filed by the Joint Applicants was received several days after the deadline that we set in Order 2001-11-10.<sup>17</sup> We will accordingly extend the deadlines for answers and replies to December 17 and December 21, respectively.

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<sup>15</sup> Consolidated Answer of Delta, at 3.

<sup>16</sup> Joint Answer of AA/BA, at 5, 5-7.

<sup>17</sup> That order gave American and BA until November 23 to file their data, and set answer and reply deadlines of December 11 and December 18, respectively. The data submitted late were accompanied by a motion for extension of time to file, which Continental, Delta, and Northwest do not oppose, provided that comparable time is added to the deadlines for answers and replies. We will grant the motion.

**ACCORDINGLY,**

1. We deny the Motion of Continental, Delta, and Northwest Airlines for an Oral Evidentiary Hearing;
2. We deny the Motions of Northwest Airlines to strike;
3. We direct interested parties to file answers in Docket OST-2001-11029 by December 17, 2001, and any replies by December 21, 2001;
4. We grant the motions of American and British Airways for extension of time and of Continental, Delta, and Northwest for leave to file; and
5. We will not entertain petitions for reconsideration of this order.

By:

**READ C. VAN DE WATER**  
Assistant Secretary  
for Aviation and International Affairs

(SEAL)

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