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BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
Washington, D.C.

DEPT. OF TRANSPORTATION
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Joint application of)
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DELTA AIRLINES, INC.)
SOCIETE AIR FRANCE)
ALITALIA-LINEE AEREE ITALIANE-P.p.A.)
CZECH AIRLINES)

under 49 USC sec. 41308 & 41309 for)
approval of and antitrust immunity)
for alliance agreements)

Docket OST-2001-10429- 34

ANSWER OF THE
AMERICAN SOCIETY OF TRAVEL AGENTS, INC.

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January 4, 2002

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**ANSWER OF THE
AMERICAN SOCIETY OF TRAVEL AGENTS, INC.**

The American Society of Travel Agents, Inc. (ASTA) submits this answer to the captioned application for antitrust immunity for an agreement between American Airlines and British Airways.

Statement of Position

ASTA's position is that if the Department grants antitrust immunity to these carriers, then it should also confer immunity on travel agencies who will be affected by some of the undeniably anticompetitive elements of the agreement.

Argument

The history of the grants of antitrust immunity for airline alliances since the Northwest-KLM approval reveals that the central idea behind the extraordinary act of

immunizing almost complete commercial collaboration among major competitors is that, all things considered, the public will be better off with fewer competitors providing more integrated services than would be possible through a set of bilaterally reached agreements providing for joint operations in particular markets. Scant if any attention seems to have been paid to some of the negative effects of giving large airlines the freedom to conspire and agree upon such matters as commissions to be paid to third parties for selling their services.

The goal of the Department's approvals appears to be to achieve that which the Federal Aviation Act forbids, namely, the merger of a foreign and domestic airline in such manner that the foreign air carrier would inevitably be deemed in "control" of a U.S. domestic airline. The series of immunizations beginning with Northwest-KLM have permitted *de facto* mergers, whereby the airline parties act as if they are merged but retain their separate legal and national identities.

The net effect of the entire series of immunizations is that the major airlines of the world have been permitted to choose up sides, as it were, to self-select which airlines they want to continue to "compete" with and which not. For as surely as the sun will rise, the agreements in this proceeding will effectively end competition between those carriers and leave them merged in practice if not in name. The same has been true for others that DOT has immunized.

One of the clearest effects of these immunizations has been to allow the airlines involved to agree with each other on marketing strategies and tactics and to agree specifically on the commissions they will pay to travel agencies and other third parties who book their services, as well other terms of dealing that would normally be determined

separately in a competitive market. The collective establishment of such prices (commissions are the price of agency services to the airline) and terms of dealing between two independent competing firms would, absent protective intervention by DOT, be a *per se* violation of the Sherman Act. Immunization under 49 USC sec. 41308 removes not only the threat of government attack against the behavior but also wipes out all third party antitrust-based legal responses to the joint activity, no matter how harmful it may be in practice to those parties or to the competitive processes in which they are engaged or are a part. And, as far as we are aware, there has been no thorough, long term evaluation of the effect of alliance arrangements on airline competitive behavior in markets not covered by the alliances or the immunity conferred upon them.

The airlines' market power has grown considerably over the past decade. Through consolidations widely predicted to be unavoidable in the aftermath of September 11, it may grow even more. The government, in exchange for claimed benefits of more "single carrier" service and other acts of "seamlessness," has approved and immunized numerous aggregations of power in international aviation markets on the premise that "open skies" (i.e, presumed free entry) will control potential abuses and protect the public and others from overbearing airline market power. Those same carriers are simultaneously insulated from most consumer legal redress under state law by virtue of the preemption section that was added to the Federal Aviation Act in 1978.

ASTA will not here debate the question whether the approvals in the context of open skies bilateral aviation agreements have in fact led to the required threat of new entry so as to prevent abuse of consumers and others. The theory that airlines hovering on the edge of a market serve as an effective discipline against the carriers in that market seems

to us to have been largely disproved by the domestic experience and we are aware of no contrary evidence as to international markets in which antitrust-exempted collaborations have been approved.

Instead, we ask the Department to use its full statutory powers as they were intended, not merely to give the airlines the freedom to evade the ownership provisions of the Federal Aviation Act and the freedom to violate the Sherman Act, but to also protect others directly in the path of the airline juggernauts thereby created.

Section 41308 of the Federal Aviation Act confers upon the Department the power to exempt “any person affected” by an order approving an agreement under Section 41309 in order to permit the person to proceed with the transaction. This, we submit, empowers the Department to confer immunity upon persons who are not parties to the agreement, such as the travel agencies that will necessarily be affected by the agreement of the contracting alliance partners to, for example, fix commissions to be paid by them. American and British Airways have made clear in their application, as have other airlines in prior immunity applications, that without immunity they will not proceed with the alliance. The immunity will, therefore, permit them to proceed, but they are not the only affected persons.

Travel agents should also be immunized simultaneously because, after the alliance is implemented, they will in effect be parties, however unwillingly, to any commission fixing or terms of dealing agreement reached by the alliance carriers, in the sense that the agents will have to signify acceptance of the fixed price or terms of dealing as their compensation when they sell seats at that rate or under those terms. This is the necessary and inevitable consequence of the vertical power relationships that enable airlines to dictate

terms to agents and compel agents, if they want to stay in business, to adhere to the airlines' declared policies and practices. Third parties necessarily implicated in the implementation of any price fixing agreement reached by the airline partners are surely entitled to the same protection from third party litigants as the airlines who hatched the plan in the first instance.

The relief that ASTA seeks for travel agents would permit them to respond collectively to joint actions of the immunized airlines that are directly detrimental to the interests of those agents. This is not a request for travel agents to simply go out and operate independently of the antitrust laws. It is, instead, a request that travel agents be given the legal equipment necessary to protect themselves against alliance airline actions that, but for the government's protection under Section 41308, would be *per se* violations of national competition law and which have direct impact on the agencies.

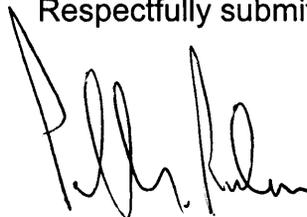
If, for example, a pair of airlines were to decide to use their immune status to agree that commissions to agents in international markets A-B and C-D are to be reduced, the agencies selling those airlines' services in those markets would likewise be free to discuss and agree upon a common response to the airlines' decree. The response might be as simple as seeking joint negotiation of the issue with the immunized airlines. It might entail other commercial responses.

It is not plausible to believe, in light of years of contrary experience, that competition is somehow going to resolve the problems created by immunized joint airline decisions of this nature. In most cases the airlines receiving the immunity are dominant carriers in the immunized territory with large market shares and, self-evidently, an intention to cease such competition as existed between them prior to the conferral of the immunity. Any carrier

contemplating entry against them and any form of maverick behavior, given the realities of international aviation, airport access issues, and the other relationships that have been allowed to form among the partners in different alliances (such as Orbitz, Opodo and yet to be realized Internet-based joint ventures aimed at third party competitors in the distribution marketplace), has little incentive, and even less practical ability, to make a market-shaping move against the dominant firms. The disciplining force of “free entry” under “open skies” is a myth for the third parties, such as travel agencies, who face these behemoths every day.

The only fair solution, then, is to allow the impacted firms the freedom, though not the obligation, to align with like-minded firms in their part of the market to defend themselves, and thus defend the competitive process, by exerting back-pressure on the competition-stifling decisions of immunized airlines.

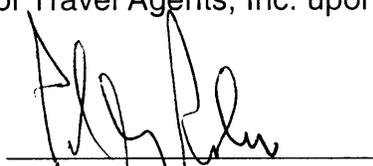
Respectfully submitted

A handwritten signature in black ink, appearing to read 'Paul M. Ruden', written in a cursive style.

Paul M. Ruden
Attorney for the
American Society of Travel Agents, Inc.

CERTIFICATE OF SERVICE

I certify that I have this 4th day of January, 2002, mailed, postage prepaid, a true copy of the foregoing Answer of the American Society of Travel Agents, Inc. upon the parties on the list following this certification.



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