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Joint Application of

UNITED AIR LINES, INC.

and

DEUTSCHE LUFTHANSA, A.G.
(LUFTHANSA GERMAN AIRLINES)

for Approval of and Antitrust Immunity
for an expanded alliance agreement
under 49 U.S.C. §§ 41308 and 41309

Docket OST-96-1116 - 22

RESPONSE OF THE INTERNATIONAL AIR
TRANSPORT ASSOCIATION TO ORDER TO SHOW CAUSE

Communications with respect to
this document should be sent to:

Bert W. Rein, Esq.
Edwin O. Bailey, Esq.
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Attorneys for the International
Air Transport Association

David O'Connor, Esq.
Regional Director, United States
International Air Transport
Association
1001 Pennsylvania Avenue, N.W.
Suite 285 North
Washington, D.C. 20004
(202) 624-2977

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

Joint Application of

UNITED AIR LINES, INC.
and
DEUTSCHE LUFTHANSA, A.G.
d/b/a
LUFTHANSA GERMAN AIRLINES

Docket OST-96-1116

for Approval of and Antitrust Immunity)
for an Alliance Expansion Agreement)
pursuant to 49 U.S.C. §§ 41308 and 41309)

**RESPONSE OF THE INTERNATIONAL AIR
TRANSPORT ASSOCIATION TO ORDER TO SHOW CAUSE**

The International Air Transport Association ("**IATA**") hereby responds to paragraph 3 of the Department's Order to Show Cause in this docket. Order 96-5-12 at 32. IATA believes that the limitation on participation in IATA tariff conferences proposed in paragraph 3 is unsupported by the record, inconsistent with the Order's analysis of the relevant markets and contrary to the public interest. Moreover, as demonstrated in **IATA's** opening comments, consideration of a condition affecting the interests of numerous carriers and governments participating in Docket 46928, but not this proceeding, is an improper circumvention of the orderly five-year review procedure the Department itself put in place by Order 85-5-32.

First, it is important to note that no party participating in this proceeding suggested, let alone advocated, any condition

affecting IATA tariff coordination." Moreover, there is no indication that the Department of Justice, which has sought to reopen the general issue of the proper role of tariff coordination in U.S. markets in Docket 46928, sought any **IATA-**related condition to resolve competitive **concerns.**^{2/} Further, there is no evidence that the role of tariff coordination, even in the U.S. -Germany market, was discussed or agreed in the bilateral negotiations between the U.S. and Germany. Thus, the Department's sua sponte attempt to impose this condition by Show Cause Order under an accelerated schedule justifiably will be viewed as an end run around the ongoing review process in Docket 46928 and an attempt to evade the substantial issues of foreign relations and international comity so strongly presented in that docket.^{3/}

^{1/} Thus, unlike the proceeding in Docket 46928 which has attracted the interest and participation of dozens of parties, there has been no meaningful opportunity here for any interested person -- including other air carriers, their governments, or regional aviation organizations -- to challenge the rationale, purpose, scope or economic and geopolitical effects of the proposed IATA **"alliance"** condition on participation in tariff coordination.

^{2/} As IATA pointed out in its opening comments, the legal, economic and political implications of air carrier alliances and their impact on IATA tariff coordination are issues that are being actively and comprehensively addressed by many parties, including the Department of Justice, in Docket 46928. The proposed **"alliance"** condition amounts to a prejudgment of those important issues.

^{3/} Dozens of foreign governments, acting independently or through their regional aviation organizations, have submitted comments in Docket 46928 in support of the continuation of tariff coordination to assure that their national air carriers have a
(continued...)

Second, while Order 96-5-12 purports to justify the proposed condition as a means to increase "**price** competition between the Alliance carriers and other carriers," Id. at 28, there is not a shred of evidence to establish that tariff coordination has or will "undermine such **competition.**"^{4/} Id. Order 96-5-12 itself notes that, notwithstanding unconditional tariff coordination, there is existing price competition on all U.S. Germany routes. Id. at 4. The Order also portrays both the U.S.-Germany market and the U.S.-Europe market as highly competitive. Id. at 21-23. In addition, Order 96-5-12 finds that competition has been increased and consumers benefitted by the Northwest-KLM Alliance, despite the absence of any limitation on IATA tariff coordination. Id. at 19. Finally, Order 96-5-12 determines that the United-Lufthansa Alliance will not adversely affect competition and is a pro-competitive joint venture. Id. at 26.

^{3/}(...continued)

fair opportunity to compete in point-to-point and interline markets. The DOT's proposed "**alliance**" condition would effectively force withdrawal of major U.S. and foreign airlines from participation in tariff coordination, thus implicating the concerns expressed by these foreign interests in Docket 46928. Many of the governmental expressions of view in that docket were expressly solicited by the Department of State, given the recognized importance of tariff coordination to nations around the world. There is no indication on the record of the instant proceeding that the Department of State or these foreign interests (with the possible exception of the Government of Germany) were consulted by the DOT before the announcement of the proposal to bar alliance carrier participation in tariff coordination in important markets.

^{4/} The evidence on this subject is being developed in Docket 46928. DOT's proposed IATA "**alliance**" condition thus prejudices a critical determination to be made on the record in that docket.

In those circumstances, there is absolutely no foundation of record for the imposition of any condition to "fix" a non-existent competitive problem."

Third, the broad scope of the proposed condition and its foreseeably harmful effects on tariff coordination cannot be justified by the factually unsupported assertion that "potential [price] competition [to be achieved by the condition] will, on balance, outweigh any potential anti-competitive effects of price coordination within the Alliance **itself.**"^{5/} Id. at 28. Under the condition, the Alliance carriers would not only be barred from IATA tariff coordination involving U.S.-Germany routes, but also U.S.-Netherlands routes and all other U.S. routes involving immunized alliances to be approved in the future, whether or not the Alliance carriers at issue here provide services on such routes. Thus, it is apparent that Order 96-5-12 is using a slim

^{5/} The Show Cause Order's inability to articulate a rational basis in fact for the imposition of the proposed IATA "**alliance**" condition is, itself, not only a demonstration of faulty administrative decisionmaking, but also emphasizes the importance of the comprehensive record on competition concerns that is being developed in Docket 46928. Simply put, what are the precise concerns about the competitive effects of alliances that underlie the imposition of the proposed IATA condition? Is the proposed condition designed to address possible oligopolistic behavior? If so, how will this behavior be manifested, and in what circumstances or markets? Are the concerns addressed by the proposed "**alliance**" condition a function of the anticipated number of future alliances or the size disparities among alliances? Does the DOT have economic models addressing these issues? If so, they should be made part of this record and the record in Docket 46928.

^{5/} As noted, that claim contradicts the Order's prior finding that the joint operations of the Alliance carriers will not impair competition. Order at 26.

fig leaf of "**balance**" to cover up a broad, patently disproportionate assault on tariff coordination worldwide. This effort to impose unilaterally restrictions that the Department has been unable heretofore to persuade its aviation partners to accept and which are not justified by the record in Docket 46928 both distorts the record in the instant proceeding and threatens the adverse international reaction which, until now, has properly persuaded the Department to move cautiously in Docket 46928.

Fourth, Order 96-5-12 addresses in only the most perfunctory manner the legitimate concerns of smaller international carriers and their governments by proclaiming that the proposed condition would not affect interlining. Order at 28. This conclusory assertion lacks any record support and will not be accepted in the international **community**.^{2/}

Alliances between major U.S. and European carriers, while perhaps inevitable and certainly not a proper target of government restriction, nevertheless raise important concerns about the future international role of smaller carriers. Those carriers rely heavily upon the interline system and believe that

^{2/} The record position of airlines, their governments and regional airline and government organizations in Docket 46928 as solicited in large part by the U.S. Department of State, is overwhelmingly against the position taken by the DOT on the need for and value of tariff coordination for the maintenance of effective interlining by most of the world's air carriers. The DOT will not be able credibly to assert that it is unaware of the position taken by these entities in Docket 46928 or that it does not recognize the harmful consequences for IATA tariff coordination of its proposed IATA "**alliance**" condition which greatly limits participation by major U.S. and other air carriers.

IATA tariff conferences enhance their ability to design and implement joint fares which permit them to compete in through markets which they cannot serve on-line. The implicit message of Order 96-5-12 is that the Department views the future of international aviation as a contest between major alliances sealed off from each other and the rest of the international aviation community by government-imposed restrictions. Whether or not an alliance-dominated outcome is inevitable, it should not be imposed by unjustified restrictions on the facilitating role of tariff coordination in the interline system. At a minimum, the practical factors influencing interlining in a world of alliances should be properly explored in Docket 46928 before the Department stakes itself out as an opponent of the interline system and of meaningful, independent participation in international aviation by carriers with restricted route systems.

Fifth, as noted in the Order 96-5-12, the U.S.-Germany market, as well as other approved and pending alliance markets, is served by many carriers other than alliance participants, including third-country carriers not benefitting from the **open-skies** provisions of the U.S.-Germany bilateral. These carriers, and their governments, have a substantial interest in the efficacy of IATA tariff coordination. However, they have had no reason to participate in this docket and hardly can be expected to respond to Order 96-5-12 in the brief time allowed. Thus, finalization of the proposed paragraph 3 condition would

jeopardize their legitimate interests without affording them a realistic opportunity to be heard.

For all these reasons, IATA respectfully requests that proposed paragraph 3 of Order 96-5-12 be withdrawn and that the **role** of tariff coordination in alliance-affected markets be properly and comprehensively assessed in Docket 46928.

Respectfully submitted,

Bert W. Rein

Bert W. Rein, Esq.
Edwin O. Bailey, Esq.
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Attorneys for the International
Air Transport Association

David O'Connor

David O'Connor, Esq.
Regional Director, United States
International Air Transport
Association
1001 Pennsylvania Avenue, N.W.
Suite 285 North
Washington, D.C. 20004
(202) 624-2977

May 16, 1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response of the International Air Transport Association has been served by facsimile on Washington, D.C. counsel for the air carriers and the Department of Justice listed below and by first class mail, postage-prepaid, upon the remaining persons, this 16th day of May 1996.

Robert E. Cohn, Esquire
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

Mr. D. Scott Yohe
Vice President - Government Affairs
Delta Air Lines, Inc.
1629 K Street, N.W.
Washington, D . C . 20006

Mr. Roger W. Fones
Chief, Transportation, Energy &
Agriculture Section
Antitrust Division
U.S. Department of Justice
555 Fourth Street, N.W., Room 9104
Washington, D.C. 20001

R. Bruce Keiner, Esquire
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
10th Floor North
Washington, D . C . 20004

Carl B. Nelson, Jr., Esquire
Associate General Counsel
American Airlines, Inc.
1101 17th Street, N.W.
Suite 600
Washington, D.C. 20036

Mr. R. D. Devlin
Trans World Airlines
808 17th Street, N.W.
Suite 520
Washington, D . C . 20006

Nathaniel P. Breed, Jr., Esquire
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

Mr. Elliott M. Seiden
Ms. Megan Rae Poldy
Northwest Airlines
901 15th Street, N.W.
Suite 500
Washington, D .C. 20005

Joel Stephen Burton
Ginsburg, Feldman & Bress
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Richard D. Mathias, Esquire
Frank Costello, Esquire
Cathleen P. Peterson, Esquire
Zuckert, Scoutt & Rasenberger
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006

James R. Weiss, Esquire
Preston, Gates, Ellis & Rouvelas
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20590

Stephen L. Gelband, Esquire
Hewes, Morella, Gelband &
Lamberton, P.C.
1000 Potomac Street, N.W.
Suite 300
Washington, D.C. 20007

Frank Cotter
Assistant General Counsel
USAir, Inc.
2345 Crystal Drive
8th Floor
Arlington, VA 22227

David L. Vaughan
Kelley, Drye & Warren
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Vance Fort
World Airways, Inc.
13873 Park Center Road
Suite 490
Herndon, VA 22071

Richard P. Taylor, Esq.
Stephoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

U.S. Transcom/TCJ5
Attention: Air Mobility
Analysis
508 Scott Drive
Scott AFB, IL 62225

Mr. Stuart I. Oran
Executive Vice President
Corporate Affairs and General Counsel
United Air Lines, Inc.
P. O. Box 60666

Wolfgang Sacher
General Counsel
Deutsche Lufthansa, A.G.
Flughafen Frankfurt
D-60549 Frankfurt/Main
Germany

James S. Campbell, Esq.
Karan K. Bhatia, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-142



Edwin O. Bailey