

9528
DA

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

ORIGINAL
DEPT. OF TRANSPORTATION
DOCKET SECTION
96 JUN -7 PM 3:39

Joint Application of)
)
AMERICAN AIRLINES, INC. and)
EXECUTIVE AIRLINES, INC., FLAGSHIP)
AIRLINES, INC., SIMMONS AIRLINES, INC.,)
and WINGS WEST AIRLINES, INC.)
(d/b/a AMERICAN EAGLE))
and)
CANADIAN AIRLINES INTERNATIONAL LTD.,)
and ONTARIO EXPRESS LTD., and TIME AIR INC.)
(d/b/a CANADIAN REGIONAL) and)
INTER-CANADIAN (1991) INC.)
)
under 49 USC §§ 41308 and 41309 for approval of and)
antitrust immunity for commercial alliance agreement)

Docket OST-95-792 - 33

ANSWER OF DELTA AIR LINES, INC.

Communications with respect to this document should be addressed to:

John J. Varley
General Attorney
DELTA AIR LINES, INC.
Law Department #986
1030 Delta Boulevard
Atlanta, Georgia 30320
(404) 7 15-2872

Robert E. Cohn
SHAW, PITTMAN, POTTS &
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8060

and

Counsel for Delta Air Lines, Inc.

D. Scott Yohe
Vice President-Government Affairs
DELTA AIR LINES, INC.
1629 K Street, N.W.
Washington, D.C. 20006
(202) 296-6464

June 7, 1996

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

Joint Application of)
)
AMERICAN AIRLINES, INC. and)
EXECUTIVE AIRLINES, INC., FLAGSHIP)
AIRLINES, INC., SIMMONS AIRLINES, INC.,)
and WINGS WEST AIRLINES, INC.) **Docket OST-95-792**
(d/b/a AMERICAN EAGLE))
and)
CANADIAN AIRLINES INTERNATIONAL LTD.,)
and ONTARIO EXPRESS LTD., and TIME AIR)
INC.)
(d/b/a CANADIAN REGIONAL) and)
INTER-CANADIAN (1991) INC.)
)
under 49 USC §§ 41308 and 41309 for approval of and)
antitrust immunity for commercial alliance agreement)

ANSWER OF DELTA AIR LINES, INC.

Delta Air Lines, Inc. (“Delta”) hereby files this Answer in response to the comments tiled with respect to Department’s Show Cause Order (Order 96-5-38) tentatively approving and granting immunity to an alliance between American Airlines, Inc. (“American”) and Canadian Airlines International, Ltd. (“CAI”), and their regional affiliates. On the same day that comments were filed, United Air Lines, Inc. (“United”) and Air Canada filed an application for approval of and antitrust immunity for an alliance.

The Department's tentative decision to approve and grant antitrust immunity to the American/CA1 alliance in the absence of a fully effective open skies agreement between the United States and Canada would reverse the Department's well established policy and precedent and would constitute a mistake of colossal proportions. The Department's settled policy is to approve and grant antitrust immunity to alliances only when there exists a fully effective open skies agreement that permits U.S. carriers both *de jure* and *de facto* open entry. There is no legitimate basis to distinguish this application, the United-Air Canada application or the U.S.-Canada market for disparate policy treatment.

Moreover, the filing by United and Air Canada of an application for approval of and antitrust immunity for an alliance dramatically changes the competitive backdrop against which the Department must evaluate the American-CA1 application. The Department is now presented with applications for antitrust immunity from the two largest Canadian scheduled carriers. These two carriers are currently reaping the benefits of transitional restrictions contained in the U.S.-Canada bilateral agreement. Those restrictions give Air Canada and CAI a substantial "head start" on U.S. carriers by allowing the Canadian carriers unrestricted access to all U.S. cities while restricting U.S. carrier access to Toronto, Montreal and Vancouver -- the largest and most important Canadian cities. Approval of the alliances would allow American and United to benefit from the market protection provisions, and place other U.S. carriers at a competitive disadvantage. Delta submits that the Department must now examine the public interest and competitive implications of both transactions contemporaneously. Furthermore, in light of both

applications it is more important than ever to require full open skies before any of these alliances are approved.

In further support of this Reply, Delta states the following:

1. The Department has firmly established a policy to consider the grant of **anti-trust immunity** for airline alliances only where there is a fully effective open skies agreement. Secretary Peña stated in testimony to the Congress introducing the Department's International Aviation Policy statement that:

The existence of an 'open skies' environment, and the elimination of other competitive restrictions, would be key factors in any consideration of a request for immunity.”

The Show Cause Order restates this policy:

Our policy remains to consider the grant of antitrust immunity only where the market(s) at issue are currently specified to be fully open to new entry and operations -- both *de jure* (by reason of bilateral agreements) and *de facto*. Only in such markets can we be assured that immunity will be pro-competitive and pro-consumer, the touchstones of our immunity approach.

Order 96-5-38 at 16. In short, the policy of the Department is that open skies is a minimum requirement for the grant of antitrust immunity.

While paying lip service to the importance of having open skies as a precondition to the grant of immunity, the Show Cause Order proceeds to undermine that policy in a way that will set a very dangerous precedent for future cases involving limited entry markets such as, for example the United Kingdom, as to which it has been reported that an

“Statement of Secretary Federico Peña before the Committee on Commerce, Science and Transportation, July 15, 1995 as 13-14.

application for approval of an immunized alliance between British Airways and American may soon be filed.

2. The proposal to grant antitrust immunity to an alliance involving a foreign carrier whose government maintains significant limitations on U.S. carrier entry effectively would turn U.S. international aviation policy on its head. The reason why open skies is a necessary precondition to consideration of antitrust immunity is twofold: First, to ensure that there are unfettered opportunities for U.S. carriers to marshal competitive challenges to the immunized alliance. Second, to provide an inducement to encourage our foreign trading partners to enter into liberal bilateral relationships as a means to promote competition.

3. Instead of encouraging other governments to liberalize their aviation agreements with the United States, approval of the American/CA1 alliance and/or the United/Air Canada alliance would send foreign governments (such as the United Kingdom, Japan, France and others) precisely the opposite message. It would tell those governments that they can obtain antitrust immunity for alliances involving their national carriers while continuing to insist on entry and other restrictions designed to protect those carriers from U.S.-flag competition. This approach represents a “sea-change” in U.S. policy which will jeopardize progress to liberalize aviation throughout the world.

4. Approval and immunity in the absence of an open skies agreement would also betray the commitments made by the United States to the numerous governments (including Switzerland, Belgium, and Austria) that were told that antitrust immunity cannot be considered in the absence of an open skies agreement. Thus, during negotiations on the

open skies agreements with Austria, Belgium, and Switzerland, the U.S. Government firmly resisted consideration of antitrust immunity either as a component of or prior to an open skies agreement. The U.S. Government stated that its policy was to consider antitrust immunity only when unrestricted market access has been assured by an open skies agreement. The Department's proposed reversal of that policy would violate the U.S. policy commitments which underlie the European Open Skies initiative.

5. A second important reason behind the Department's policy of requiring open skies agreements as a pre-condition to the grant of immunity is to ensure that other U.S. carriers have the ability to competitively challenge the immunized alliance. That ability does not exist under the current U.S.-Canada bilateral agreement. The U.S.-Canada market is anything but "fully open to new entry and operations". Show Cause Order at 16. The U.S.-Canada agreement imposes substantial limitations on services by U.S. airlines to the three largest Canadian cities and, as a result, U.S. carrier services to those cities are controlled by governmental restrictions not by the competitive forces of a free market. The phase-in provisions of the bilateral were imposed at the insistence of the government of Canada in order to protect CAI and Air Canada from competition by U.S. carriers in the three largest U.S.-Canada markets. Moreover, the grant of immunity to the American/CAI and United/Air Canada alliance would have the effect of cloaking American and United with the "phase-in" protections of the bilateral and, thereby, giving them a significant competitive advantage over all other U.S. carriers. By allowing American and United to coordinate U.S.-Canada services with their Canadian counterparts, would give the two U.S. carriers the unique ability to, in effect, circumvent the phase-in restrictions

applicable to other U.S. carriers and benefit from the “head start” afforded to Canadian carriers under the bilateral. As a result, Delta and other U.S. carriers will be placed at a severe competitive disadvantage. It is bad enough that Delta and other U.S. carriers must labor under the yoke of entry restrictions while the Canadian carriers have unlimited ability to serve the U.S. market. That problem must not be compounded by allowing American and United the ability to benefit from those protections and gain an unfair competitive disadvantage over other U.S. carriers.

6. The phase-in restrictions of the U.S.-Canada agreement prevent other U.S. carriers from installing needed competitive responses to the American/CAI and United/Air Canada alliances for another 18 months in U.S.-Toronto city-pairs, and for another eight months in U.S.-Montreal and U.S.-Vancouver city-pairs. United and Air Canada admit that “to keep pace [with the United/Air Canada alliance] other carriers and carrier alliances will have to take steps to respond to the new services, products and prices made available by United/Air Canada.” United/Air Canada Application, June 4, 1996 at 40. But, as long as Delta remains subject to the phase-in restrictions, it is foreclosed from “tak[ing] steps to respond” to the American/CAI and United/Air Canada alliances in U.S.-Toronto/Montreal/Vancouver city-pairs. It would be unthinkable to allow Canadian carriers and, by extension, their U.S. partners -- American and United -- unrestricted access to the U.S. market in conjunction with an immunized alliance while entry by all other U.S. carriers remains restricted.

7. It is highly significant that both Air Canada and United only a few months ago vehemently opposed the American-CA1 application and urged the Department not to grant antitrust immunity until the open skies agreement became fully effective.

" . . . the Agreement cannot yet be characterized as an "Open Skies Agreement. "

" . . . Air Canada cannot help but observe that the Joint Application would represent a fundamental shift in the U.S. position toward the grant of antitrust immunity."

"The primary concerns which underlie U.S. policy will be undermined if the Department were to approve the Joint Application."

"By conferring antitrust immunity upon the Joint Applicants before the transition periods have expired, the Department would be making the 'carrot' a far less powerful inducement to other nations to sign an 'Open Skies' agreement with the United States."

Answer of Air Canada, February 6, 1996. United's objections echoed the same sentiments: "Without this assurance [that other U.S. carriers can enter U.S.-Montreal, Vancouver and Toronto city-pairs], the Department should not proceed at this time with the considerations of the Joint Application." Comments of United, February 6, 1996.

Having now completed their own agreement, both United and Air Canada have done a "180," because they too wish to enjoy the fruits of an immunized arrangement without fear of competitive challenges by other U.S. carriers.

8. The Department's reliance on the alleged "unique" nature of the U.S.-Canada market is misplaced. The fact that the U.S.-Canada border is extensive and that there are

significant number of passengers traveling between the two countries does not justify an exception to the Department's firm policy of requiring an open skies agreement before antitrust immunity is granted. The length of the U.S.-Canada border and the number of U.S.-Canada passengers are factors that have no significance to the competition issues or whether the Department should reverse its policy of requiring open skies as a precondition to immunity.

9. The factors that make U.S.-Canada unique actually compel the Department to insist on full open skies before immunity is granted. First, this is the only country from which both major homeland carriers propose to join in immunized alliances. Second, the largest and most important U.S.-Canada city-pairs will remain restricted to U.S. carrier entry. U.S.-Toronto, the largest traffic generator and the market that accounts for most of the U.S.-Canada passengers, will be restricted for another 18 months. Third, U.S. carrier entry needs are far from satisfied. The Department's assertion that "near term . . . entry needs" of U.S. carriers have been satisfied is wrong. The applications filed for Toronto, Vancouver and Montreal in years one and two were based on the phase-in restrictions and do not reflect airline service needs in a free market environment. Delta's service between Atlanta, its largest hub, and Toronto, is limited to only two daily nonstop frequencies. Delta today is unable to match Air Canada's four daily nonstops on the Atlanta-Toronto route. And, Delta will not be able to serve Toronto from its Cincinnati hub for 18 more months. Delta will be required to compete with other U.S. carriers for one of only four additional Toronto opportunities that become available next year, while Air Canada and CAI and, therefore, United and American, are free to increase Toronto frequencies

without limitation. Contrary to the Department's finding, Delta's "entry needs" for service between the U.S. and Toronto have not been satisfied. It will be at least 18 months before U.S. carriers will be allowed to begin to meet their "near term . . . entry needs". Fourth, the fact that many U.S.-Canada routes are short haul (relative to, say, Europe) means that there is a greater dependency on the provision of competitive nonstop **service in the larger** U.S.-Canada city-pairs. This is because alternative one stop/connecting service adds proportionally greater time to the elapsed journey on short haul routes than on long haul routes. Thus, to the extent the Canadian carriers (and by extension United and Americans) have unfettered ability to operate nonstop service in major city-pairs, while other U.S. carriers are foreclosed from similar access, American, United and their Canadian partners will enjoy substantial competitive advantages. Those advantages are compounded, by orders of magnitude, when the Canadian carriers and their U.S. partners can operate online service under a grant of antitrust immunity.

10. The filing of the United-Air Canada alliance application exacerbates the adverse competitive impacts on U.S. carriers, and requires the Department to examine the combined effects of both alliances on competition and the public interest. Neither the American-CA1 nor United-Air Canada arrangements should be evaluated in isolation. The pending applications involve the two largest Canadian carriers (including the dominant Canadian carrier) operating coordinated, antitrust immunized services with American and United, while other U.S. carrier's ability to serve major U.S.-Canada routes remain restricted. It is imperative that the Department consider the combined competitive consequences of approving and immunizing both applications at the same time.

In conclusion, for the reasons stated above Delta urges the Department to reconsider its decision to grant any U.S.-Canadian carrier alliance antitrust immunity prior to the open skies provisions of the U.S.-Canada agreement becoming fully effective, especially in light of the pendency of the United-Air Canada antitrust immunity application.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert E. Cohn". The signature is fluid and cursive, written over the printed name below.

Robert E. Cohn

SHAW, PITTMAN, POTTS & TROWBRIDGE

2300 N Street, N.W.

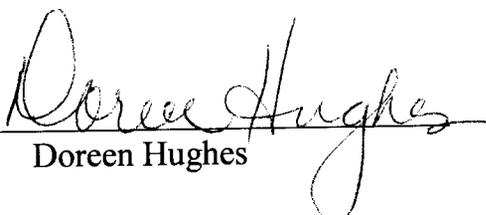
Washington, D.C. 20037

(202) 663-8060

Counsel for Delta Air Lines, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Answer of Delta Air Lines, Inc. was served this 7th day of June, 1996, on all persons listed on the attached service list.



Doreen Hughes

SERVICE LIST

Gerard J. Arpey
Senior Vice President -
Finance and Planning and
Chief Financial Officer
American Airlines, Inc.
P.O. Box 619616, MD 5621
DFW Airport, Texas 75261

Gary R. Doernhoefer
Senior Attorney
American Airlines, Inc.
P.O. Box 619616, MD 5675
DFW Airport, Texas 75261

Arnold J. Grossman
Vice President - International
Affairs
American Airlines, Inc.
P.O. Box 619616, MD 5635
DFW Airport, Texas 75261

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

Donald B. Casey
Vice President - Capacity Planning
Canadian Airlines
International Ltd
Suite 2800
700 - 2nd Street S.W.
Calgary, Alberta, Canada
T2P 2W2

Kenneth J. Fredeen
Solicitor
Canadian Airlines
International Ltd
Suite 2800
700 - 2nd Street S.W.
Calgary, Alberta, Canada
T2P 2 W2

Gregg A. Saretsky
Vice President - Passenger Marketing
Canadian Airlines
International Ltd
Suite 2800
700 - 2nd Street S.W.
Calgary, Alberta, Canada
T2P 2 W2

Stephen P. Sibold
Acting General Counsel
Canadian Airlines
International Ltd
Suite 2800
700 - 2nd Street S.W.
Calgary, Alberta, Canada
T2P 2W2

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

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

Mr. Thomas C. Accardi, AFS-1
Federal Aviation Administration
Director of Standard Services
800 Independence Avenue, S. W.
Room 822
Washington, D.C. 20591

Marshall S. Sinick
Squire, Sanders & Dempsey
120 1 Pennsylvania Ave., N. W.
Suite 400
Washington, D.C. 20004

Stephen H. Lachter
2300 N Street, N. W.
Suite 725
Washington, D.C. 20037

Richard J. Fahy
1800 Diagonal Road
Suite 600
Alexandria, VA 223 14

Megan Rae Poldy
Northwest Airlines
901 15th Street, N.W., Suite 500
Washington, D.C. 20005

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

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

Roger W. Fones
Chief, Transportation, Energy
& Agriculture Section
Antitrust Division
U.S. Department of Justice
Room 9 104, Judiciary Center Building
555 Fourth Street, N.W.
Washington, D.C. 20001

John E. Gillick
Winthrop, Stimson, Putnam & Roberts
1133 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20036

R. Bruce Keiner
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

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

Patrick P. Salisbury
Salisbury & Ryan
1325 Avenue of the Americas
New York, NY 10019

John De Gregorio
Senior Attorney
Midwest Express Airlines
700 1 Ith Street, N.W.
Suite 600
Washington, D.C. 20001

Richard P. Taylor
Steptoe & Johnson
1330 Connecticut Ave., N.W.
Washington, D.C. 20036

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

D. Scott Yohe
Vice President - Gov't Affairs
Delta Air Lines, Inc.
1629 K Street, N.W.
Washington, D.C. 20006

Richard D. Mathias
Cathleen Peterson
Zuckert, Scutt & Rasenberger, L.L.P.
888 17th Street, N.W.
Suite 600
Washington, D.C. 20036

Mark S. Kahan
Galland, Kharasch, Morse & Garfinkle
1054 31st Street, N.W.
Washington, D.C. 20007

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

John L. Richardson
Vedder, Price, Kaufman & Day
2121 K Street, N.W.
Suite 700
Washington, D.C. 20036

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

William Karas
Steptoe & Johnson
1330 Connecticut Ave., N.W.
Washington, D.C. 20036

Craig Denny
Vice President
Big Sky Airlines
P.O. Box 3 1397
Logan Int'l Airport
Billings, MT 59 107

Jonathan B. Hill
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

John J. Varley
General Attorney
Delta Air Lines, Inc.
1030 Delta Boulevard
Atlanta, GA 30320

Berl Bernhard
Verner, Liipfert, Bernhard,
McPherson and Hand
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

Aaron A. Goerlich
Boros & Garofalo, P.C.
1201 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20036

R. Tenney Johnson
2300 N Street, N. W.
6th Floor
Washington, D.C. 20037

William C. Evans
Vemer, Liipfert, Bernhard,
McPherson and Hand
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

Russell E. Pommer
Verner, Liipfert, Bernhard,
McPherson and Hand
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

Steven A. Alterman
Meyers & Alterman
1220 19th Street, N. W.
Washington, D.C. 20036