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Order 2002-12-22

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

Issued by the Department of Transportation
on the 31st day of December, 2002

Served: December 31, 2002

U.S.-U.K. Alliance Case

Docket OST-2001-11029-189

ORDER

Summary

In this Order, we are amending a condition we attached, in Order 2002-4-4, to our grant of approval and antitrust immunity for alliance agreements between and among United Air Lines, Inc., British Midland Airways Limited d/b/a bmi British Midland, and various affiliates of these carriers. Our action in that order, as amended by Order 2002-10-6, currently makes our approval and antitrust immunity subject to the condition (among others) that the United States achieve by December 31, 2002, an Open-Skies agreement with the United Kingdom that meets U.S. aviation policy objectives. Our action in this order extends that December 31, 2002 deadline through June 30, 2003. In taking this action, we are granting a Motion filed on December 10, 2002, by the conditionally immunized carriers, requesting that we extend this deadline.

Background

By Order 2002-4-4, issued April 4, 2002, the Department granted final approval and antitrust immunity for alliance agreements between and among United Air Lines, Inc. (United), British Midland Airways Limited d/b/a bmi British Midland (bmi), Austrian Airlines Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa AG, and Scandinavian Airlines System, and their wholly-owned affiliates (hereafter collectively referred to as "United/bmi"), subject to a number of conditions, including the condition that the United States achieve, within six months from the issue date of that order (*i.e.*, by October 4, 2002), an Open-Skies aviation agreement with the United Kingdom that meets U.S. aviation policy objectives. We also granted

United/bmi the necessary exemption authority and statements of authorization to implement their proposed alliance/code-share arrangements.¹

In taking this action, we found, among other things, that our decision in this case granting United/bmi's request, subject to conditions, could help the United States achieve an Open-Skies agreement with the United Kingdom; and that replacing the current restrictive U.S.-U.K. Bermuda 2 agreement with an Open-Skies agreement would provide important public benefits.

By Order 2002-10-6, dated October 3, 2002, in response to a motion filed September 13, 2002, by United/bmi, we extended the October 4 deadline we set in Order 2002-4-4, through December 31, 2002. In taking this action, we noted that we had originally imposed the six-month condition in the interest of furthering our goal of reaching an Open-Skies agreement with the United Kingdom that meets U.S. aviation policy objectives; that while we had not yet achieved that result, the process remained ongoing; and that the United States had recently expressly communicated to the Government of the United Kingdom the U.S. Government's continued interest in reaching Open Skies.²

Motion of United/bmi

On December 10, 2002, United/bmi filed a Motion requesting that we again extend the deadline we set for the achievement of Open Skies with the United Kingdom, for an additional six months, through June 30, 2003. In support of their request, United/bmi state that, in the time since we issued Order 2002-4-4, nothing has happened to draw into question any of the Department's findings in that Order; that it remains true that the proposed alliance will not eliminate or substantially reduce competition in any relevant market; that the United States has continued to pursue with the United Kingdom fundamental liberalization of the U.S.-U.K. agreement; that the continued approval of the United/bmi alliance can be helpful to that ongoing effort; and that recent press reports indicate that the U.K. Government intends to continue bilateral negotiations with the United States.

Finally, United/bmi state that our failure to extend the deadline would mean that they would lose the ability to implement their proposed services in the market once the Open-Skies prerequisite is satisfied; that they would therefore need to reapply for this authority at that future date; and that allowing the authority to lapse would be inconsistent with a recent action of the U.K. Office of Fair Trading to grant United/bmi the European equivalent of antitrust immunity for their alliance arrangement.

¹ In that order, we also (1) granted motions of American Airlines, Inc. and British Airways Plc in this Docket to dismiss their joint applications seeking approval of and antitrust immunity for their alliance agreement, and to dismiss their requests to engage in reciprocal code sharing under that alliance agreement; and (2) denied a motion of Continental Airlines, Inc., Delta Airlines, Inc., and Northwest Airlines, Inc. to dismiss the applications of United/bmi in Docket OST-2001-11029.

² See letter dated September 9, 2002, from John R. Byerly, Deputy Assistant Secretary of State for Transportation Affairs, to Anthony T. Baker, Director, International Aviation Negotiations, U.K. Department for Transport, Local Government, and the Regions. A copy of this letter is in Docket OST-2001-11029.

Responsive Pleadings

On December 19, 2002, Continental Airlines, Inc. (Continental), and Delta Air Lines, Inc. (Delta), filed answers in opposition to United/bmi's Motion.

Continental states that, since our action in Order 2002-10-6, there have been significant changes in both the state of the air transportation industry and the legal framework for negotiating with the United Kingdom, and that the record in the case is therefore stale. Specifically, Continental states that United and Lufthansa have announced plans to engage in immunized operations between London's Heathrow Airport and the United States; United has filed for bankruptcy protection; bmi has terminated transatlantic flights; United and bmi are strengthening their hubs at London Heathrow; American and British Airways are again seeking to code share with one another; and the European Court of Justice has raised "serious doubts" about the United Kingdom's ability to enter into a new agreement with the United States that does not provide all European Union carriers with access to London Heathrow.

Continental states that, as a result, any approval of the United/bmi alliance should await the successful achievement with the United Kingdom of Open Skies meeting U.S. objectives at London Heathrow and a new Department analysis of competition at that airport. Finally, Continental notes that the Department denied, in Order 2002-10-6, United/bmi's request to extend their conditional immunity beyond December 31 (*i.e.*, until April 4, 2003); and that the carriers have presented no basis to conclude that there is any likelihood of the United States and the United Kingdom reaching an acceptable Open-Skies agreement during the next six months.

Delta filed a consolidated answer to the request in this proceeding, and to that of American Airlines and British Airways in Docket OST 2002-13861 for authority to engage in certain code-sharing operations. Delta states that the United States and the United Kingdom are no closer to reaching an agreement than they were in April of this year; that the previous extension granted by Order 2002-10-6 provided no motivation for United Kingdom to engage in meaningful negotiations with the United States; and that the United States should not continue to grant extensions to United/bmi. Delta further states that the recent application of American and British Airways for code-share authority should be consolidated with the United/bmi proceeding to enable the Department to determine whether U.K. reciprocity warrants approval of these requests. Delta states that there have been no recent developments in the U.S.-U.K. relationship that warrant approval of these requests, and that so long as Delta and other U.S. carriers are barred from London Heathrow, the Department should not extend United/bmi's immunity or allow American and British Airways to code-share.

Decision

We have decided to grant United/bmi's Motion, and to extend through June 30, 2003, the date on which the authority we granted United/bmi in Order 2002-4-4, as amended, will terminate unless the United States achieves an Open-Skies agreement with the United Kingdom that meets U.S. aviation policy interests.

As we stated in Order 2002-10-6, we originally imposed the six-month condition, on our own initiative, in the interest of furthering our goal of reaching an Open-Skies agreement with the United Kingdom that meets U.S. aviation policy objectives. As noted above, in Order 2002-10-6, we found that a limited extension of the six-month deadline was warranted in view of the ongoing process aimed at achieving this goal, and noted our recent communication to the Government of the United Kingdom concerning our continued interest in Open Skies. Since that time, informal contacts between the two governments have continued. Under these circumstances, we believe that the public interest factors on which we based our actions in Orders 2002-4-4 and 2002-10-6 remain valid, and that the conditional approval and antitrust immunity we granted United/bmi should remain in effect until June 30, 2003.³

In their answers, Continental and Delta have reiterated many of the arguments they made in their opposition to United/bmi's September 13 Motion in this Docket. We see nothing in those arguments, however, that would support a finding that the public interest warrants terminating at this time the conditional approval and antitrust immunity we granted to United/bmi.

With respect to the concern raised by Continental that the record in this case is stale,⁴ while it is true, as Continental states, that a number of events have transpired in the U.S.-U.K. market involving carriers serving the market, since our original grant of conditional authority to United/bmi, none of these events, in our view, leads us to question the continuing validity of the record in this proceeding as a basis for granting a limited extension of our conditional authority.⁵

ACCORDINGLY,

1. We grant the December 10, 2002, Motion of United Air Lines, Inc., British Midland Airways Limited d/b/a bmi British Midland, Austrian Airlines Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa AG, and Scandinavian Airlines System, and their wholly-owned affiliates, to amend Order 2002-4-4, as amended by Order 2002-10-6;
2. We amend the second sentence of ordering paragraph 4 of Order 2002-4-4 to read as follows:

“The approval and grant of immunity is subject to the conditions that the United States achieves, no later than June 30, 2003, an Open Skies agreement with the United Kingdom that meets U.S. aviation policy objectives, and that the antitrust immunity will not cover

³ We do not concur with Delta's view that we should consolidate this proceeding with that in which American and British Airways seek authority to conduct certain code-share operations. We are currently reviewing the application filed by American and British Airways in Docket OST 2002-13861, and will consider that request separately.

⁴ Continental raised a similar argument in response to the September 13 Motion of United/bmi. See Order 2002-10-6 at 3.

⁵ With particular reference to Continental's statements concerning the views of the European Court of Justice, the United Kingdom has stated that it maintains the ability to continue to negotiate, on a bilateral basis, aviation agreements and modifications to such agreements.

any activities of the Joint Applicants as owners or marketers of computer reservation systems businesses;” and

3. We will serve a copy of this order on the parties to this proceeding; the Ambassador of the United Kingdom of Great Britain and Northern Ireland in Washington, D.C.; the Federal Aviation Administration; and the Department of State.

By:

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

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports/reports_aviation.asp*