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

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| **U.S.-U.K. ALLIANCE CASE** | ) | **Docket OST-2001-11029** |

# MOTION OF UNITED AIR LINES, INC., BRITISH MIDLAND AIRWAYS, LIMITED d/b/a bmi BRITISH MIDLAND, AUSTRIAN AIRLINES ÖSTERREICHISCHE LUFTVERKEHRS AG, LAUDA AIR LUFTFARHRT AG, DEUTSCHE LUFTHANSA AG, AND SCANDINAVIAN AIRLINES SYSTEM TO FURTHER AMEND ORDER 02-4-4


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**DATED:** **June 11, 2003**

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In Order 02-4-4, the Department granted final approval and antitrust immunity for a series of alliance agreements (the "Alliance Agreements") between and among United Air Lines, Inc., bmi British Midland, Austrian Airlines (and Lauda Air), Deutsche Lufthansa and Scandinavian Airlines System (referred to hereinafter collectively as "United/bmi"), subject, among other things, to a condition that the United States conclude an acceptable open skies air services agreement with the United Kingdom within six months of the date of the Order, April 4, 2002.[1/] By Order 02-10-6, the Department amended Order 02-4-4 to extend that deadline, initially to December 31, 2002, and then, by Order 02-12-22, to June 30, 2003.

In light of the Department's recent decision to approve code-share arrangements between American Airlines, Inc. ("American") and British Airways plc ("BA"),

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[1/] On June 5, 2003, the European Commission was granted a mandate to negotiate an open skies agreement with the U.S. on behalf of all EU member states, including the U.K. EC Press Release #IP/03/806. Whether these negotiations are conducted between the U.S. and either the U.K. or the EC under its recent mandate doesn't matter. The end result being negotiated is the same -- an open skies regime that includes the U.K.

United/bmi move that the Department delete the above-referenced condition, thereby enabling United/bmi to implement the Alliance Agreements and provide a more effective competitive counterbalance to the code-share services of American and BA, particularly at Heathrow Airport. The Department has already found that grant of immunity to the United/bmi alliance is both pro-consumer and pro-competitive, a finding that is based on a detailed competition and public interest analysis. In the alternative, if the Department is unwilling to remove the condition, United/bmi request that the Department further amend Order 02-4-4 to the extent necessary to extend the June 30, 2003 deadline for an additional period to coincide with the comparable relief granted by European competition authorities -- *i.e.*, until December 31, 2010.

In support of this Motion, United/bmi submit the following:

1. In deciding to approve and grant antitrust immunity to the Alliance Agreements, the Department concluded that implementation of the proposed United/bmi alliance would (1) not substantially reduce competition in any relevant market, and (2) be consistent with the Department's policy of promoting pro-competitive and pro-consumer international alliances. Order 02-4-4 at 9-10. The Department further found that approving the United/bmi alliance could help achieve a more open aviation agreement with the United Kingdom. *Id.* at 9.

2. Since Order 02-4-4 was issued, nothing has happened to call into question the correctness of any of the findings supporting the Department's conditional grant of antitrust immunity to United/bmi. As a result, it is as true today as it was in April 2002 that the proposed United/bmi alliance will not eliminate or substantially reduce competition in any relevant market. It also remains true that the United States is

continuing to pursue fundamental liberalization of its air services relationship with the United Kingdom as part of its efforts to negotiate an agreement with the European Commission on behalf of all of its member states and that approval of the United/bmi alliance, including the proposed grant of antitrust immunity, can be helpful to that ongoing effort, as the Department so found in Order 02-4-4, and reaffirmed in Order 02-10-6 and Order 02-12-22.[2/]

3. On May 30, 2003, the Department finalized its tentative approval of certain code sharing between American and BA, primarily involving services beyond the gateways served by American and BA in the U.S. and the U.K., including London Heathrow. Orders 03-5-33 and 03-4-7 (Docket OST-02-13861). In granting its approval, the Department recognized that such code sharing between BA, by far the largest carrier at Heathrow, and American, the largest U.S. carrier at that airport, raises particularly complex competitive issues due to London's "unique demographic and geographic position in international aviation" and the fact that Heathrow "is one of the most important origin and destination markets in the world that is virtually closed to new entrants." Order 03-4-7 at 9; *affirmed* Order 03-5-33 at 8-9. The Department noted that "there is a limit to the degree to which global alliances can exert competitive discipline in the large U.S.-London markets by using connecting services via European hubs, due to

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[2/] In its order tentatively approving the American/BA code share, the Department made clear that its efforts to reach an open skies agreement with the United Kingdom are ongoing. Order 03-4-7 at 10 & n.16. As noted above (footnote 1) the U.K. has joined with other EU member states to authorize the European Commission to negotiate an aviation agreement with the U.S.

the circuity involved." Order 03-4-7 at 9. *See also* Order 03-5-33 at 8 (recognizing that American and BA have an advantage due to the geographic location of London).

Nonetheless, the Department decided to approve the American/BA application in order to enhance those carriers' ability to compete with the immunized alliances of United/Lufthansa/Austrian/SAS, Delta/Air France/Alitalia/Czech, and Northwest/KLM. Order 03-5-33 at 8-9. As United/bmi noted in their comments on the tentative decision, there is a serious disconnect between, on the one hand, the Department's findings regarding unique competitive problems at Heathrow and global alliances' inability to "exert competitive discipline" at that airport, and, on the other, its related finding that the American/BA code share may be approved in part because those other carriers, which lack the Heathrow access of BA and American, can offer a competitive alternative to code sharing by American and BA.[3/]

London Heathrow's "unique demographic and geographic position" means that, as the Department correctly recognized, the hubs located on the European continent used by the immunized alliances cannot compete effectively for U.S.-U.K. traffic, nor can they compete successfully for the considerable amount of transatlantic traffic that is more conveniently served via Heathrow than via continental European hubs due to Heathrow's advantageous geographic location. The immunization of the alliances operating on the continent does not in any way alter London's "unique demographic and geographic position" or allow the carriers operating from continental hubs to be more competitive with the American and BA for U.S.-U.K. traffic or the large portion of U.S.-Europe

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[3/] *See Joint Comments and Objections of United Air Lines, Inc. and British Midland Airways Limited d/b/a bmi*, Apr. 16, 2003, at 2-4 (Docket OST-02-13861).

traffic that is more conveniently served through London Heathrow airport. No amount of effort by carriers such as United, Austrian, Lufthansa and SAS is going to cause traffic from the large South of England market or from those points such as the U.K. regions, Ireland, Spain, Portugal, France, Belgium, and the Netherlands that are served more directly over London to shift in competitively meaningful numbers to connections over European hubs at Frankfurt, Vienna or Copenhagen. Antitrust immunity simply does not allow the United and its existing immunized alliance partners to overcome the enhanced dominance American and BA will gain at Heathrow's prime location once they start code sharing at that point.

The Department, however, has another option at its disposal that will enable a more meaningful competitive alternative to American and BA code sharing at Heathrow: it can allow United/bmi to implement immediately the antitrust immunity for their alliance which the Department has already granted after having found it to pose no competitive problems. With full integration of the services of United and bmi -- along with Lufthansa, SAS and the Austrian Group -- United and its partners could at least compete with the enhanced positions of American and BA at Heathrow to a greater extent than would be possible without such integration. Without that integration, however, United and its partners will be prevented from providing the greatest possible competitive response while American and BA will further enhance their positions at Heathrow and

divert traffic to Heathrow from the services of United and its partners, both at Heathrow and at continental hubs.[4/]

4. In its final order in the *American/BA* code-share proceeding, the Department dismisses the United/bmi immunity effectiveness issue in the "relevant circumstances" of that proceeding. Order 03-5-33 at 9 In fact, United/bmi were not seeking immediate effectiveness of their antitrust immunity in Docket OST-02-13861 but reserved the right to do so in this proceeding. *See* Joint Comments and Objections of United/bmi, dated April 16, 2003, in Docket OST-02-13861 at 4-5. To what "relevant circumstances" the Department may be referring in the *American/BA* case, where the United/bmi immunity effectiveness question was no longer at issue is, in these circumstances, far from obvious.

While the Department's final order also includes *dicta* suggesting that implementation of the American/BA code share does not constitute a "changed circumstance" that would warrant immediate implementation of the United/bmi antitrust immunity (*id.*), it appears to do so in reliance on its conclusion that the American/BA code share will have no adverse impact on the United/bmi alliance.[5/] In reaching that

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[4/] While immediate immunity will not allow United and bmi to code share on transatlantic segments between Heathrow and the U.S., it will allow them to fully integrate their services in beyond gateway markets served via Heathrow as well as transatlantic U.K. markets other than Heathrow.

[5/] The Department also argues that American and BA need the ability to code share because "all of the U.S. carriers that now serve London through Gatwick have domestic alliances that strengthen their ability to compete for U.S.-London traffic." Order 03-5-33 at 8. Although the Department clearly includes the United/USAirways code share in this conclusion (*id.*), it does not explain how that code share would affect U.S.-London traffic. Since United does not serve Gatwick Airport, US Airways does not serve Heathrow and neither United nor USAirways may code share on each other's U.S.-
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gratuitous conclusion, the Department substantially underestimates the overwhelming scale of the networks available to American and BA to serve beyond-Heathrow traffic. A comparison between BA and all of United's code-share partners at Heathrow (including those not a party to this proceeding, such as ANA and Thai Airways) highlights the deficit that United/bmi will be powerless to overcome absent DOT authorization to implement the Alliance Agreements. For example:

- BA serves 75 points beyond Heathrow, whereas United and its code-share partners serve only 34 points, or less than half of BA's total;
- BA offers 267,000 seats per week at Heathrow, whereas United and its partners offer 146,000 weekly seats, or slightly more than half of BA's total; and
- BA operates 1,518 weekly frequencies at Heathrow, whereas United and its partners operate only 970 weekly frequencies.[6/]

The Department's rationale for continued deferral of the effectiveness of the United/bmi immunity is tied to "achievement of an Open-Skies agreement with the United Kingdom that meets U.S. aviation policy objectives." Order 03-5-33 at 9. By approving the American/BA code share, however, the Department assures that there will be no achievement of that goal by eliminating any incentive BA might have to encourage its government and through its government, the EC, to enter into an expanded agreement that would almost certainly be expected to include provisions to enable other carriers to offer a competitive challenge to BA at Heathrow.[7/] By approving the beyond-gateway

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London services, the impact of their code share on U.S.-London traffic would be minimal.

[6/] These statistics are based on data from OAG, June 2003.

[7/] The Department's conclusion (Order 03-5-33 at 10) that its tentative decision to approve the American/BA code share would not "in any way impede our efforts to reach

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code share, the Department has given BA all of the traffic benefits it can expect to receive under the present agreement while ensuring that BA will have no incentive to support conclusion of an open skies agreement applicable to the U.K.

5. The Department, in tentatively approving the American/BA code share, stated that it was disinclined to remove the condition that prevents United/bmi from implementing the Alliance Agreements because "there is . . . a substantial difference between the limited American/British Airways request to conduct non-immunized code-share services, and the United/bmi request to engage in fully immunized alliance activities." Order 03-4-7 at 11. The Department's final order affirms that conclusion without further discussion. The Department's focus on differences in the form of the American/BA and United/bmi agreements appears to be obscuring its perception of the relative substantive impact of implementing those agreements. The American/BA agreement will enable each of those carriers, both of which are already entrenched incumbents on U.S.-Heathrow routes, to leverage BA's Heathrow mega-hub to gain a substantial competitive advantage over other carriers such as United, bmi and their partners in most U.S.-Europe air travel markets.[8/] Implementation of United/bmi's

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a more liberal aviation agreement with the United Kingdom...." is unsupported by any explanation and contrary to any reasonable expectation of success in future negotiations. On the other hand, if United/bmi and their partners were allowed to coordinate their operations at Heathrow without antitrust risk, BA might well decide that it would be worthwhile to move forward with a market-opening agreement that would enable BA to enjoy similar opportunities at Heathrow with American.

[8/] Although BA and American will remain competitors, they are each already the number 1 and 2 carrier, respectively, in the U.S.-Heathrow markets. By linking their existing transatlantic networks to BA's substantial network behind Heathrow, these

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Alliance Agreements will not change the fact that bmi is frozen out of the U.S.-Heathrow market by the restrictive terms of the Bermuda 2 agreement. Thus, allowing United, bmi and their partners to implement fully their alliance without antitrust risk will not reduce the number of actual (or potential) competitors on U.S.-Heathrow routes, but will instead benefit the traveling public by enabling United and its partners to pool their more limited resources at Heathrow in order to offer improved service and better compete with the larger presences of American and BA at Heathrow.

United and its existing transatlantic partners, however, must have antitrust immunity in order to include bmi in their fully integrated service and price offerings. With antitrust immunity, bmi can join with United and the other partners in the coordination of inventory management and revenue pooling which is necessary to allow the full development of joint discount fares, corporate fares, and other joint products on each other's services.[9/] By pooling its revenues with these other carriers and gaining access to their inventory management programs, bmi could reduce its risk of unsold seats, lower its costs and offer more seats at lower fares in markets where it competes with BA.

By including bmi in the joint pricing, capacity and inventory management programs already created for the services of United, Lufthansa, SAS and Austrian, the

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carriers will each obtain an unmatchable advantage over other U.S. carriers for U.S.-London and U.S.-Europe traffic via London.

[9/] Unless the carriers can look at each other's inventories, they cannot efficiently manage the sale of joint fare products to maximize seat utilization at various fare levels. For example, United will be able to sell more tickets to points served by bmi beyond the U.K. by coordinating its sales on transatlantic services with bmi's U.K. services. It can do this most effectively by coordinating United's inventory management program with that of bmi and pooling the revenues from joint services. Antitrust immunity is needed, however, to ensure the carriers' ability to achieve this integration without antitrust risk.

competitive benefits of the alliance product offered by all participating partners will be spread to the additional markets that are served by bmi via the United Kingdom. This competition will, on the one hand, help United and its alliance partners overcome the inherent advantages American and BA will have in the UK while, on the other hand, put pressure on BA to support the negotiation of an international agreement containing the provisions that are needed to allow it to achieve antitrust immunity with American.

6. If the Department is unwilling to remove the condition to enable United/bmi to implement the Alliance Agreements immediately, United/bmi move that the Department further amend Order 02-4-4 to extend the June 30, 2003 deadline. The Department's reasons for granting extensions of the original deadline have been sound and consistent, and remain so today:

> 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. . . . [I]n 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 Order 2002-4-4 and Order 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.

Order 02-12-22 at 4.

The United Kingdom Office of Fair Trading ("OFT") also found, pursuant to its authority under Articles 84 and 85 of the EU Treaty, that the United/bmi Alliance Agreements, while facially restrictive of competition, were exemptible under Article 81 of the EU Treaty because they "contribute to improving production or distribution, or to

promoting technical or economic progress, while allowing consumers a fair share of the benefit." The OFT came to the same conclusion as the Department that that "if transatlantic air services are opened up . . . , the alliance should bring benefits to passengers." Office of Fair Trading (U.K.), Statement of the Director General of Fair Trading, Press Release dated November 1, 2002, announcing the decision in Case No. CP/1535-01, Notification of British Midland and United of their Alliance Expansion Agreement. The European approval was made effective for seven years from the elimination of restrictions against bmi offering service between Heathrow and the United States or until December 31, 2010, whichever comes first.

On the other hand, failure to extend the immunity would deny United/bmi the ability to implement their alliance once an acceptable open skies agreement that includes the U.K. is achieved, unless the carriers re-apply to the Department for immunity. Such a re-application would be necessary even though the Department has already found that the grant of immunity to the alliance is both pro-consumer and pro-competitive, a finding that is based on a detailed competition and public interest analysis. To allow the immunity to lapse also would be inconsistent with the recent action of the pertinent European competition authority to grant the United/bmi alliance what is effectively antitrust immunity under EU law.

Under the relatively longer term of the European exemption, there is no need to re-file for relief in Europe once an agreement has been reached to open the U.S.-U.K. market during the seven years the exemption remains in effect. Lack of an extension of the deadline in the DOT order would, however, create the need to re-file an immunity application in the United States. Such a re-filed application would impose a substantial

burden on United/bmi, on other carriers that might respond to the application, and on the Department's own limited staff resources, a burden that is wholly unjustified under the circumstances, and that can (and should) be easily avoided by granting the instant Motion.

In light of the decision of the European authorities to extend comparable relief for this alliance for a period to extend through December 31, 2010, United/bmi urge the Department to grant an extension for a similar period.[10/] This will avoid the need for the repetitive submission and review of renewal applications should the negotiations between the U.S. and the EC prove to be protracted.

WHEREFORE, for the reasons set forth above, United/bmi request the Department to amend further the second sentence of ordering paragraph 4 of Order 02-4-4 to remove the condition that the United States must achieve a suitable air services agreement that includes the United Kingdom as a predicate to implementation of the Alliance Agreements.[11/] Alternatively, United/bmi request that the Department amend further ordering paragraph 4 of Order 02-4-4 to the extent necessary to extend the date by which the United States must achieve a suitable air services agreement governing

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10/ The Department may prefer to retain as its condition the conclusion of an Open Skies agreement covering, *inter alia*, U.S.-U.K. service rather than linking it to an agreement with the EC. Such an agreement would also assure compliance with the additional OFT condition that bmi must have access to U.S.-London routes.

11/ United/bmi request that the Department revise the second sentence of ordering paragraph 4 of Order 02-4-4 to read as follows:

> "The approval and grant of immunity is subject to the condition that the antitrust immunity will not cover any activities of the Joint Applicants as owners or marketers of computer reservations systems businesses."

services between the United States and the United Kingdom until December 31, 2010,[12/] or that the Department grant such other or further relief as it deems consistent with this Motion and the public interest.

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[12/] In light of the EC negotiating mandate, DOT should amend the condition on effectiveness of the United/bmi antitrust immunity to read as follows:

> The approval and grant of immunity is subject to the conditions that the United States achieves, on or before December 31, 2010, an Open Skies agreement governing services between the U.S. and the United Kingdom that meets U.S. aviation policy objectives, and that the antitrust immunity will not cover any activities of the Joint Applicants as owners or marketers of computer reservation systems businesses.

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**DATED: June 11, 2003**

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## CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Motion of United Air Lines, Inc., British Midland Airways Limited, Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa AG, and Scandinavian Airlines System to Further Amend Order 02-4-4 on all persons listed below by causing a copy to be sent via facsimile transmission or first-class mail, postage prepaid:

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