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Order 2003-6-39

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

Issued by the Department of Transportation  
on the 30<sup>th</sup> day of June, 2003

Served: June 30, 2003

*U.S.-U.K. Alliance Case*

**Docket OST-2001-11029 - 196**

**ORDER**

By Order 2002-4-4, issued April 4, 2002, the Department granted final approval and antitrust immunity for alliance agreements between and among United, 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.<sup>1</sup>

In taking those actions, 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.

Subsequently, by Orders 2002-10-6 and 2002-12-22, in response to motions filed by United/bmi, we extended, first through December 31, 2002, and most recently through June 30, 2003, the previously established deadline.

In taking those actions, 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 and that, while we had not yet achieved that result, informal contacts between the two governments had continued. We stated that, under these circumstances, we believed that the public interest factors on which we based our actions in Orders 2002-4-4 and 2002-10-6 remained valid,

<sup>1</sup> In that order, we also (1) granted motions of American Airlines, Inc (American), and British Airways Plc (British Airways), 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. (Continental), Delta Airlines, Inc. (Delta), and Northwest Airlines, Inc. (Northwest), to dismiss the applications of United/bmi in Docket OST-2001-11029.

and that the conditional approval and antitrust immunity we granted United/bmi should remain in effect until June 30, 2003.

### **Motion of United/bmi**

On June 11, 2003, United/bmi filed a Motion requesting that the Department remove the condition referenced above or, in the alternative, further amend Order 2004-4-4 to the extent necessary to extend the June 30, 2003, deadline through December 31, 2010.

In support of the request to remove the Open-Skies condition, United/bmi state that, in light of the Department's recent decision to approve code-share arrangements between American and British Airways, removal of the United/bmi condition would enable United/bmi to implement the Alliance Agreements and provide a more effective competitive counterbalance to the code-share services of American and British Airways, particularly at Heathrow Airport.

United/bmi explain that, on May 30, 2003, the Department finalized its tentative approval of certain code-sharing services between American and British Airways, primarily involving services beyond the gateways served by American and British Airways in the United States and the United Kingdom, including London Heathrow.<sup>2</sup> United/bmi maintain that, 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 British Airways at Heathrow to a greater extent than would be possible without such integration. United/bmi argue that, without such integration, United and its partners will be prevented from providing the greatest possible competitive response while American and British Airways will further enhance their positions at Heathrow.<sup>3</sup>

United/bmi state that, if the Department is unwilling to remove the Open Skies condition, the Department should further amend Order 2002-4-4 to extend the June 30, 2003, deadline. In this regard, United/bmi note that the United Kingdom's Office of Fair Trading (OFT) approved the United/bmi Alliance Expansion Agreement concluding that "if the transatlantic air services are opened up...the alliance should bring benefits to passengers."<sup>4</sup> United/bmi state that such approval was made effective for seven years from the elimination of restrictions against bmi offering services between Heathrow and the United States, or until December 31, 2010, whichever comes first. Under these circumstances, United/bmi ask that, in the alternative to removing the Open Skies condition discussed above, the Department extend comparable relief for this alliance for a period to extend through December 31, 2010, to avoid the need for repetitive submissions and review of renewal applications, "should the negotiations between the U.S. and the European Commission (EC) prove to be protracted."<sup>5 6 7</sup>

<sup>2</sup> See Orders 2003-5-33 and 2003-4-7 (Docket OST-2002-13861).

<sup>3</sup> United/bmi state that, while immediate immunity will not allow United and bmi to code share on transatlantic segments between Heathrow and the United States, it will allow them to fully integrate their services in beyond gateway markets served via Heathrow, as well as transatlantic United Kingdom markets other than Heathrow. (United/bmi Motion at 6, footnote 4.)

<sup>4</sup> United/bmi Motion at 11.

<sup>5</sup> United/bmi Motion at 12.

<sup>6</sup> The United Kingdom has joined with other European Union (EU) member states to authorize the EC to negotiate an aviation agreement with the United States.

<sup>7</sup> United/bmi note that 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. United/bmi maintain that such an agreement would also assure compliance with the additional OFT condition that bmi must have access to U.S.-London routes. (United/bmi Motion at 12.)

## Responsive Pleadings<sup>8</sup>

Continental, Delta, and Northwest each filed answers in opposition to the United/bmi Motion and urge the Department to deny it. United and bmi filed a joint reply.<sup>9</sup>

Continental, Delta, and Northwest state their strong opposition to the United/bmi request for approval to implement their antitrust immunized alliance, based on the recent approval of certain American/British Airways code-share services, and without an Open Skies agreement with the United Kingdom that meets U.S. aviation policy objectives.

Continental and Northwest state that the Department has already adequately considered and rejected United/bmi's attempt to compare the United/bmi antitrust immunity application to the recent code share arrangement of American/British Airways. Continental argues that United and bmi have held for years the same authority recently awarded to American and British Airways, and that the Department has concluded repeatedly that neither of the two U.K.-U.S. London Heathrow partnerships should receive antitrust immunity while other U.S. carriers continue to be locked out of London's Heathrow. Delta states that the Department has "made clear that the existence of an Open Skies agreement is an absolute and "fundamental predicate" to antitrust immunity, and that the unique access restrictions affecting London Heathrow alliances will require more, not less, in the way of meaningful competitive assurances."<sup>10</sup> Continental urges that, rather than equivocating further, the Department should deny the motions and focus instead on negotiation of the transformative agreement covering London Heathrow access which "must be the sine qua non for reaching any comprehensive aviation agreement with the EU."<sup>11</sup>

Continental and Delta argue that the alternate request for a seven-year extension of the United/bmi conditional authority is counter-productive to the Department's original intent of providing a negotiating catalyst for an Open Skies agreement. Furthermore, Continental, Delta, and Northwest argue that the Department cannot make a responsible decision to pre-approve implementation of the United/bmi alliance up to seven years from now, when it has no idea what the U.S.-Heathrow marketplace will be like at that time.

Continental, Delta, and Northwest also argue that the record on which the Department's conditional approval was based is now stale and that the Department should permit its conditional grant of antitrust immunity to United/bmi to expire and require United/bmi to file a new application at such time as the prospects of an Open Skies agreement meeting U.S. objectives at London Heathrow are imminent and an accurate analysis of the relevant competitive circumstances may be completed.

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<sup>8</sup> Under the Department's rules of practice, 14 CFR Section 302.11, answers to United/bmi's Motion would normally have been due on June 20, 2003. In view of the short time remaining until the June 30 deadline in this matter, the Department, by Notice dated June 12, 2003, shortened the answer period to June 17, 2003.

<sup>9</sup> United and bmi accompanied their joint reply with a motion for leave to file an otherwise unauthorized document. We will grant the motion. United and bmi explain that, because the Department had already expressed a need to expedite this matter in the June 12, 2003, Notice Shortening Answer Period, they decided to file this reply without the participation of their other European partners.

<sup>10</sup> Delta answer at 2.

<sup>11</sup> Continental answer at 2.

In their joint reply, United and bmi state that Delta, Continental, and Northwest (“Delta Group”) raise the same arguments against the relief requested by United/bmi that they directed against the approval of code sharing by American and British Airways. United and bmi maintain that, because the Delta Group are not able to gain entry to London Heathrow under the present aviation agreement, they oppose any enhancement of the services of incumbent carriers at Heathrow until their entry has been agreed. United and bmi state, further, that these arguments have no validity as applied to the instant request of United/bmi.

## **Decision**

We have decided to amend the condition as set forth below. We will also deny the request for removal of the Open Skies condition in ordering paragraph 4 of Order 2002-4-4.

As we stated in Order 2002-12-22, 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. With regard to the United/bmi request that, in light of the Department’s recent decision to approve certain code-share services between American and British Airways, the Department should remove the Open Skies condition to enable United/bmi to implement their Alliance Agreements, we note that American and British Airways were not granted antitrust immunity for their proposed code-share services. As we already stated in Order 2003-5-33,<sup>12</sup> “it has been our long-standing policy not to grant antitrust immunity in cases where an Open Skies aviation agreement does not exist between the United States and the foreign country involved.” No such agreement now exists between the United States and the United Kingdom, and United/bmi have not presented evidence to convince us that it is in the public interest to depart from our normal policy in this matter.

Most recently, on June 5, 2003, the EC was granted a mandate to negotiate a U.S.-EU aviation agreement. The United States and the EU have agreed to begin negotiations of a comprehensive new agreement to maximize benefits for aviation services. Talks with the EU are expected to begin in early autumn. In these talks, the United States looks forward to building on and extending the Open-Skies framework that already exists with 11 of the current 15 member states. In these circumstances, we believe that it is in the public interest to amend the subject condition in Order 2002-4-4, while we explore this new channel for achieving our liberalization objectives for the U.S.-U.K. aviation regime.

With respect to the concerns raised by Continental, Delta, and Northwest that the record in this case is stale, the Department intends, in light of any future agreement, to review the situation. The amended condition is subject to that review.

## **ACCORDINGLY,**

1. We grant, in part, the June 11, 2003, 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 (“United/bmi”), to amend Order 2002-4-4, as amended by Orders 2002-10-6 and 2002-12-22;

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<sup>12</sup> In the matter of the joint application of American Airlines, Inc., and British Airways PLC for statements of authorization under 14 CFR Part 212, et. al. (Docket OST-2002-13861).

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 an Open Skies agreement applying to the United Kingdom that meets U.S. aviation policy objectives, that the Department further review the matter at that time, and that the antitrust immunity will not cover any activities of the Joint Applicants as owners or marketers of computer reservation systems businesses”;

3. We grant the joint motion of United Air Lines, Inc., and British Midland Airways Limited d/b/a bmi British Midland for leave to file an otherwise unauthorized document in Docket OST-2001-11029;

4. To the extent not granted above, we deny the Motion of United/bmi and all other requests for relief in this Docket; and

5. 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:

**MICHAEL W. REYNOLDS**  
Acting Assistant Secretary for  
Aviation and International Affairs

(SEAL)

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