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Order 96-7-21



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

SERVED: July 16, 1996

Issued by the Department of Transportation  
on the 15th day of July, 1996

**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.**

Docket OST-95-792 - 37

**for approval of and antitrust immunity for a commercial  
alliance agreement under 49 U.S.C. §§ 41308 and 41309**

**FINAL ORDER**

By this Order, we grant final approval and antitrust immunity for a Commercial Alliance Agreement (the "Alliance Agreement"), between American Airlines, Inc. and its regional affiliates ("American") and Canadian Airlines International, Ltd. and its regional affiliates ("CAI" or "Canadian") pursuant to 49 U.S.C. §§ 41308 and 41309. Our grant of antitrust immunity does not encompass (1) the services relating to fares and capacity for particular categories of U.S. point-of-sale local passengers in the New York-Toronto market, (2) operations involving all-cargo services, and (3) operations involving services to or from third countries, as fully described below. We direct the Joint Applicants to resubmit for renewal their alliance agreement five years from the date of the issuance of this Order. If the Joint Applicants choose to operate under a common name or brand, they must obtain advance approval from the Department of Transportation ("the Department") before implementing the arrangement.

As an express condition to the grant of antitrust immunity to the Alliance, we also direct CAI to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic data ("O&D Survey") for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by American).

As we stated in Show Cause Order 96-5-38, we will closely monitor the competitive environment in the New York-Toronto market, where we are withholding antitrust immunity.

## **I. BACKGROUND**

### **A. The Joint Applicants' Request**

On November 3, 1995, American and CAI filed a request seeking approval of and antitrust immunity for their Commercial Alliance Agreement, for a five-year term. Through their Alliance Agreement, the Joint Applicants state that they intend to expand their existing cooperative marketing relationships, which have involved point-to-point code-share arrangements on a limited number of routes, by entering into a more comprehensive business alliance. The applicants state that the purpose of the Agreement is to establish a contractual and legal framework that will allow the two airlines (and their regional affiliates), while retaining their separate corporate and national identities, to establish the proposed Alliance and cooperate to the extent necessary to create a seamless air transport system. The applicants maintain that if the Alliance Agreement is approved and immunized, they will proceed to negotiate and conclude operating accords that will provide for specific coordination and integration mechanisms regarding scheduling, marketing, planning, joint services, and other related matters.

### **B. Show-Cause Order**

On May 28, 1996, the Department issued a Show-Cause Order, Order 96-5-38. We tentatively determined, subject to certain conditions and limitations, to grant approval of and antitrust immunity for the Alliance Agreement between the Joint Applicants. We tentatively determined to approve the alliance and to grant it antitrust immunity because the alliance, subject to the conditions accepted by American and CAI, would benefit the public without significantly reducing competition in any market. The public would benefit because the two airlines' coordination of their services would provide smoother and more efficient service for travelers in almost 20,000 transborder markets. As we stated in our show-cause order, our experience with the first alliance between a U.S. airline and a foreign airline, the Northwest-KLM alliance, "has demonstrated that such alliances between U.S. and foreign airlines can benefit consumers." That alliance "has enabled the two airlines to operate more efficiently and to provide integrated service in many more markets than either partner could serve individually."<sup>1</sup> We have similarly found in other recent cases that such alliances benefit U.S. travelers.<sup>2</sup> We believe in this instance, for the reasons discussed below, that the integration of the transborder services offered by American and CAI will similarly lead to improved and more efficient service for the public.

We tentatively decided to direct the Joint Applicants to resubmit their Alliance Agreements five years from the date of issuance of the final order in this case. The Department noted that it was not proposing to authorize American and CAI to operate under a common name or brand. The Department determined that, if the Joint Applicants choose to operate under a common name or

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<sup>1</sup> Order 95-5-2 at 2.

<sup>2</sup> See Orders 96-5-27, May 20, 1996, and 96-6-33, June 14, 1996.

brand, they will have to obtain prior separate approval from the Department before implementing the arrangement.

We also tentatively decided to exclude certain matters relating to fares and capacity for particular categories of U.S. point-of-sale local passengers on the New York-Toronto route, as agreed between the applicants and the Department of Justice ("DOJ").<sup>3</sup> We also tentatively determined to withhold approval and antitrust immunity from operations involving all-cargo aircraft and from services involving operations to or from third countries.

In addition, we tentatively decided to direct CAI to report full-itinerary O&D Survey data for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by American). Further, we tentatively determined to direct the Joint Applicants to file all subsidiary and subsequent agreement(s) with the Department for prior approval.

We also provided the Joint Applicants and any interested party an opportunity to comment on our tentative findings and conclusions.

## **II. Responsive Pleadings to Order to Show Cause**

On June 4, 1996, Air Canada, Continental Airlines, Inc. ("Continental"), Trans World Airlines, Inc. ("TWA"), and United Air Lines ("United") filed comments and objections to our Show Cause Order. On June 7, 1996, the Joint Applicants, Continental, and Delta Air Lines, Inc. ("Delta") filed answers to the comments and objections. On June 10, 1996, the Joint Applicants filed a response to the answers of Continental and Delta.<sup>4</sup>

### **A. Air Canada**

Air Canada supports the Department's rationale for approving the American/CAI alliance. However, the carrier argues that the Department must give contemporaneous consideration to Air Canada's and United's joint application for approval of and antitrust immunity for their own international airline alliance, filed June 4, 1996, in Docket OST-96-1434.

According to Air Canada, in the event the American/CAI and United/Air Canada applications were mutually incompatible, due process would require the Department to consider them

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<sup>3</sup> Notwithstanding the above, we also found it appropriate to approve and grant immunity with respect to the New York-Toronto market for certain categories of fares, including corporate fares, consolidator-wholesaler fares, limited-duration promotional fares, group fares, and government fares. Our Order further provided that the limitations on immunity in the New York-Toronto market would expire on February 25, 1998, upon conclusion of the phase-in period at Toronto, as provided by the U.S.-Canada Air Transport Agreement, unless we determine that material changes in economic conditions warrant a further review of such limitations. See Appendix A.

<sup>4</sup> The Joint Applicants' response was accompanied by a motion for leave to file. We will grant the Joint Applicants' motion.

simultaneously under *Ashbacker* principles.<sup>5</sup> In particular, Air Canada argues that contemporaneous consideration is required where the grant of one application would preclude consideration and grant of the other, particularly in this case, "where the Department . . . is deviating carefully from its previously-articulated policy" regarding antitrust immunity for airline alliances.<sup>6</sup> Consequently, if the Department determines that only one of the two pending applications can be approved, *Ashbacker* requires the Department "to put all interested parties on notice, to give them all a chance to apply, and to consider each of those competing applications contemporaneously."<sup>7</sup>

## B. Continental

Continental opposes approval and grant of immunity to the proposed American/CAI alliance, on the grounds that (1) the U.S.-Canada agreement does not approach being an "open skies" agreement, since the U.S.-Canada market remains largely closed to new entry until the expiry of the phase-in periods at Montreal, Toronto, and Vancouver; (2) the proposed alliance would lead to especially excessive concentration in the New York/Newark-Toronto market; (3) the emergence of a request for immunity for the United/Air Canada alliance further exacerbates the competitive problems in the phase-in markets, particularly the New York/Newark-Toronto market, and thus requires simultaneous consideration by the Department of both the American/CAI and the United/Air Canada alliances; (4) grant of immunity in this case would impede the Department's negotiating strategy in seeking new open skies agreements, thus endangering the Department's international aviation policy; (5) the Department's show-cause order is inconsistent with its previously enunciated policy with respect to grants of antitrust immunity for international airline alliances; and (6) the U.S.-Canada market is not sufficiently different from other bilateral aviation markets to justify such a radical departure from the Department's general policy, and--to the extent the U.S.-Canada market does differ from other bilateral markets--those differences actually require disapproval of the agreement and denial of immunity.

The carrier claims, "the U.S.-Canada market is neither *de facto* open-entry nor subject to a true 'open skies' agreement at this time."<sup>8</sup> As a consequence, Continental claims that the Department's tentative decision is a "radical departure from recent precedent and the U.S. International Aviation Policy Statement . . . ."<sup>9</sup>

In particular, Continental claims that 78 percent of U.S.-Canada capacity is in markets where both designations and frequencies are restricted, and that 42.6 percent of U.S.-Canada passenger traffic is carried in the U.S.-Toronto market, where designations and frequencies will continue to be tightly restricted for nearly two more years. Furthermore, Continental claims that, even if the U.S.-Canada agreement permitted additional frequencies in the market, slot access at Toronto would impede its ability to mount competitive operations. The carrier asserts that it has been

<sup>5</sup> *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

<sup>6</sup> Answer of Air Canada, footnote 6.

<sup>7</sup> *Id.*

<sup>8</sup> Objections of Continental, at 4.

<sup>9</sup> *Id.*, at 1.

unable to acquire slots at desirable times for its Houston-Toronto and Newark-Toronto services. "Since Toronto slots cannot be bought and sold, Continental has no means of acquiring Toronto slots beyond requesting them from the slot coordinator."<sup>10</sup> Continental argues that access to slots and facilities at Toronto is likely to become more difficult as service expands there, with little likelihood of sufficient slots and facilities being available for all U.S. carriers seeking entry after the end of the phase-in period.

Continental cites our declaration in the show-cause order that we would not grant antitrust immunity for the U.S.-Toronto routes "[a]bsent this near-term satisfaction of entry needs and the certainty of complete entry liberalization in so short a period . . . ."<sup>11</sup> Continental asserts that its own near-term entry needs (as well as those of other carriers) cannot be met, because of the limitations during the phase-in period on route awards and frequencies at Montreal, Toronto, and Vancouver, and the limitations on slots at Toronto, both during and after the phase-in period.<sup>12</sup>

Continental alleges that these limitations are especially severe at Toronto, which accounts for 42.6 percent of U.S.-Canada passengers and 40 percent of seats, and where limitations on entry and frequencies will remain in place until February 1998. Moreover, according to Continental, its own difficulties in obtaining suitable slots at Toronto for its new, limited-frequency Newark-Toronto service indicates that potential competitors will continue to face significant barriers to entry at Toronto even after February of 1998.

Because of these limitations on entry by potential competitors at the three phase-in cities, Continental argues that "[u]ntil Canada is willing to open its markets fully and guarantee U.S. carriers access at Toronto, the American/Canadian agreement should not be approved and given antitrust immunity."<sup>13</sup>

Continental further claims that, because of the phase-in limitations on routes and frequencies at Toronto, as well as the difficulty of obtaining slots, the proposed alliance will have a particularly adverse impact on competition in the New York/Newark-Toronto market.

According to Continental, the post-merger Herfindahl-Hirschman Index (HHI) for the New York/Newark-Toronto market would be 5,121, representing an increase of 580 points. The carrier claims that, under DOJ's merger guidelines, when post-merger HHI is greater than 1800 and results from an increase greater than 100 points, it is presumed to create or enhance market power.<sup>14</sup> Continental argues that this degree of concentration makes open entry imperative in this market. Under the U.S.-Canada aviation agreement, however, Continental is limited to two daily flights until February 24, 1997, when the U.S. may award a total of 8 additional frequencies to all U.S. gateways for Toronto service added since initialing of the new U.S.-Canada aviation agreement.

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<sup>10</sup> *Id.*, at 8.

<sup>11</sup> Order 96-5-38 at 15.

<sup>12</sup> Objections, at 14.

<sup>13</sup> *Id.*, at 2.

<sup>14</sup> *Id.*, at 7.

Because of these limitations on access, Continental claims that the limited restrictions tentatively imposed by the Department on full-fare NYC-Toronto local passengers will be meaningless: while they may be appropriate for U.S.-Europe long-haul markets where passengers have numerous alternative gateways and carriers rarely operate more than one daily frequency, such limitations are of limited utility between Toronto and New York/Newark, where there is a high number of daily nonstop flights, none of which has a flight time of more than an hour and a half, compared to a minimum travel time of at least four hours for all connecting services published in the *Official Airline Guide*, and where alternative gateways are restricted as to designations and frequencies. As a consequence, Continental argues that, in the absence of opportunities for Continental or others to compete freely in the New York/Newark-Toronto market, no antitrust immunity should be given to the proposed alliance in the New York-Toronto market. Rather, the entire New York-Toronto market should be excluded from any immunity granted, including discount and connecting as well as local full-fare passengers.<sup>15</sup>

Continental also claims that the “emergence of an application by Air Canada/United for the same authority doubles the reasons no antitrust immunity should be granted until the U.S.-Canada market is truly open.”<sup>16</sup> According to Continental, in view of the continuing limitations on entry and frequency at the three most important Canadian gateways, the Department should not permit two sets of *de facto* mergers that would create a duopoly between American/Canadian and United/Air Canada, which together controlled 59.4 percent of total U.S.-Canada traffic in 1995 and 99 percent of the traffic in the New York/Newark-Toronto and Chicago-Toronto markets.

While disagreeing with Air Canada and United that approval and immunity for an American/Canadian alliance necessarily requires approval and immunity for an Air Canada/United alliance, Continental joins their argument that the Department must consider both alliances simultaneously. In Continental’s view, these carriers’ combined operations wield enough market power in the heavily-restricted U.S.-Toronto/Montreal/Vancouver markets to prevent other U.S. carriers from overcoming any “head start” the two alliances will acquire during the phase-in period. Instead of granting immunity to the American/CAI alliance, therefore, “now more than ever the Department must reach a market-opening agreement with Canada before approving any alliance. If the Department fails to do so it will have abandoned its own open skies principles, jeopardized the credibility of U.S. negotiators worldwide and risked the future of competitive airline service in U.S.-Toronto/Montreal/Vancouver markets.”<sup>17</sup>

Continental also claims that our tentative decision, if finalized, will compromise the credibility of U.S. negotiators<sup>18</sup> and thereby injure our negotiating strategy for obtaining new open-skies agreements with other nations. Instead of agreeing to true open-skies arrangements, other countries would seek restrictions on U.S.-flag rights similar to those of the U.S.-Canada agreement. “[T]he Department should negotiate an immediate opening of the transborder skies

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<sup>15</sup> *Id.*, at 15.

<sup>16</sup> Answer of Continental at 1.

<sup>17</sup> *Id.* at 2-3.

<sup>18</sup> Objections at 5.

before granting American/Canadian any immunity. If U.S. carriers must wait for an opening of the U.S.-Canada market, the applicants must also wait for antitrust immunity.”<sup>19</sup>

Continental also attacks our tentative decision on the grounds that it is inconsistent with the Department’s previously existing policy on grants of immunity to international carrier alliances. According to Continental, the Department defined “open skies” in Order 92-8-13, *In the Matter of Defining “Open Skies”*, and cited this definition in our show-cause order. “If in fact the Department is developing another definition for Canada, it should use the same process used in establishing its initial definition rather than making an *ad hoc* judgment in this proceeding.”<sup>20</sup> Similarly, in Order 92-8-13, the Department also announced it would evaluate “public interest considerations, including factors in an individual case that could seriously affect the ability of U.S. carriers to realize the benefits of an open-skies agreement, such as access to key airports.”<sup>21</sup> Continental claims that by approving the proposed alliance in the absence of both *de facto* and *de jure* open skies in the U.S.-Canada market would constitute a reversal of the Department’s own policy statements on this matter.

Continental also disagrees with our finding with respect to the unique nature of the U.S.-Canada bilateral aviation market. According to the carrier, Canada’s border with the United States and the alternative surface transportation available are not unique. Similar conditions exist in the U.S.-Mexico aviation relationship, which is actually more open in fact than the U.S.-Canada relationship since Mexico imposes fewer limitations on access between major U.S. and Mexican cities.<sup>22</sup> According to Continental, to the extent that U.S.-Canada markets differ from transatlantic markets, such differences logically require the Department to disapprove the American/CAI alliance.

Continental further alleges that, by reversing its own previous policy and precedent, the Department’s tentative decision in this case violates Continental’s due-process rights. “Although DOT has been considering the American/Canadian application for seven months, it has given interested carriers only five business days to respond to a show-cause order making major changes in the Department’s policy on antitrust immunity. Such short notice for such a major change violates carrier rights to due process.”

Continental challenges our statement that approval of the proposed alliance would enhance the ability of American and CAI to compete against other alliances, inasmuch as there are no other immunized alliances in the U.S.-Canada market.

### C. Delta

Delta also argues that our tentative decision “would reverse the Department’s well established policy and precedent . . . to approve and grant antitrust immunity to alliances only when there

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<sup>19</sup> *Id.* at 15-16, footnote omitted.

<sup>20</sup> *Id.* at 10, footnote 10.

<sup>21</sup> *Id.* at 12-13, citing Order 92-8-13 at 7.

<sup>22</sup> *Id.* at 14, footnote 12.

exists a fully effective open skies agreement . . . .”<sup>23</sup> With the joint application of United and Air Canada now on file, according to Delta, the Department now has pending before it applications for immunity from the two largest Canadian carriers, which are now enjoying the benefits of the U.S.-Canada phase-in limitations, which have given CAI and Air Canada a substantial “head start” on U.S. carriers at Montreal, Toronto, and Vancouver. Delta claims that approval of the two alliances would allow American and United to gain similar benefits from the phase-in limitations, to the competitive disadvantage of other U.S. carriers. Consequently, Delta argues that “in the light of both applications it is more important than ever to require full open skies before any of these alliances are approved.”<sup>24</sup>

Delta argues that the Department has proclaimed open skies to be a necessary precondition for antitrust immunity in order (1) to ensure that U.S. carriers have the “unfettered” opportunity to compete with the alliance and (2) to induce foreign governments to enter into liberal bilateral agreements.

According to Delta, the current U.S.-Canada bilateral, by restricting U.S.-flag entry during the phase-in period at Montreal, Toronto, and Vancouver, does not give other U.S. carriers full freedom to compete with the alliance. Furthermore, even the limited U.S.-flag entry permitted under the phase-in limitations limits frequencies on new routes to two daily round trips. These phase-in limitations prevent Delta from responding to the two proposed alliances. In particular, Delta can only offer two daily round trips in the Atlanta-Toronto market to compete against Air Canada’s four daily round trips. Similarly, Delta will be unable to serve Toronto from its hub at Cincinnati before February 1998 unless it obtains one of only four new Toronto routes available in February 1997, even though CAI and Air Canada (and, by proxy, their alliance partners American and United) remain free to increase Toronto frequencies and routes without limit.<sup>25</sup> As a consequence, Delta claims, “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.”<sup>26</sup>

Delta further claims that approval of the alliance would lead foreign governments to believe that they can obtain immunity for alliances involving their national carriers while maintaining limitations on entry by U.S. carriers, thus jeopardizing the Department’s efforts to liberalize the global aviation market, and would violate policy commitments made by the U.S. to the numerous foreign governments that accepted the Department’s European open skies initiative.

Furthermore, according to Delta, there is no legitimate basis to distinguish the U.S.-Canada market for different treatment with respect to the grant of antitrust immunity, and the Department’s reliance on the “unique” nature of the U.S.-Canada market is misplaced. To the contrary, Delta claims that, to the extent the U.S.-Canada market differs from other markets, those differences compel the Department to insist on full open skies before grant of immunity,

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<sup>23</sup> Answer of Delta at 2.

<sup>24</sup> *Id.* at 2-3.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> *Id.* at 6.

inasmuch as (1) Canada is the only country where both major homeland carriers seek immunity for their alliances with U.S. carriers, (2) the largest and most important transborder markets will remain restricted to U.S.-flag entry by as much as 18 months, (3) U.S. carriers' entry needs remain far from satisfied, due to the U.S.-Canada agreement's limitations on U.S.-flag routes and frequencies, and (4) the relatively short-haul nature of U.S.-Canada routes (compared to U.S.-Europe routes) means that there is a greater dependency on competitive nonstop service, owing to the proportionally greater elapsed time required by connecting service in short-haul markets.<sup>27</sup>

As a consequence, Delta claims that, "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 . . . ." <sup>28</sup>

Finally, Delta argues that the Department must examine both the American/CAI and the United/Air Canada applications contemporaneously, in order to determine the combined effects of both alliances on competition.

#### D. TWA

TWA takes no position on the merits of the American/CAI alliance. However, the carrier urges the Department to condition any grant of immunity on the ability of potential competitors to operate competitive service free of governmental or marketplace restrictions.

TWA argues that such conditions on immunity are required to preserve competition where the bilateral agreement, physical restraints at foreign airports, or other marketplace considerations limit full and open competition with the alliance carriers, inasmuch as "the mere existence of a formal open skies arrangement is not enough to insure competitive entry into markets of alliance carriers."<sup>29</sup> In particular, TWA notes that it was originally unable to acquire slots at Toronto for its new St. Louis-Toronto service between 4 and 7 PM, and was, therefore, "forced to plan for operation of an inferior and non-competitive schedule for its initial flights."<sup>30</sup> Although the U.S. government ultimately successfully negotiated award of appropriate slots at Toronto, TWA could not have mounted a fully competitive schedule without intervention by the U.S. government, notwithstanding TWA's rights to inaugurate service under the transition provisions of the U.S.-Canada bilateral.

As a result, TWA argues that the Department should create mechanisms under which its procompetitive international aviation policy can be enforced in the context of approval of alliance agreements. Thus, if potential competitors of the alliance parties are blocked by either governmental or marketplace restrictions in the foreign country, according to TWA, "the potential

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<sup>27</sup> *Id.* at 8-9.

<sup>28</sup> *Id.* at 3.

<sup>29</sup> Comments of TWA at 2.

<sup>30</sup> *Id.*

loss of immunity will encourage the alliance carriers to insure that obstructions to competitive service will be quickly removed.”<sup>31</sup>

Accordingly, TWA requests that the Department condition any approval and antitrust immunity to suspend or revoke immunity in the event the operations of potential competitors of the alliance parties are blocked by either governmental or marketplace restrictions in the foreign country, until such time as the conditions required for full and free competition are established. Alternately, if automatic suspension of immunity cannot be accomplished procedurally, TWA requests the Department to establish ground rules for carriers to file requests for removal of immunity.

#### E. United

United takes no position on the merits of the American/CAI application so long as the Department is prepared to grant similar approval to its proposed alliance with Air Canada in Docket OST-96-1434. Like Air Canada, however, United argues that, if the Department does not grant identical immunity to the United/Air Canada proposal, due process considerations require the Department to give the two applications contemporaneous consideration.

According to United, “notwithstanding United’s position that a grant of such immunity at this time would be premature under previous Department policy and precedent . . . ,”<sup>32</sup> it is now seeking immunity for its alliance with Air Canada in order to compete with the American/CAI alliance. In particular, United claims that grant of immunity to American/CAI without a similar grant to United/Air Canada “would limit inter-alliance competition in the transborder market and clearly discriminate against United in favor of American . . . .”<sup>33</sup> Furthermore, notwithstanding the Department’s tentative decision to withhold immunity from the American/CAI alliance for third-country services, grant of immunity for transborder services “will greatly facilitate American’s and Canadian’s ability to develop an integrated global alliance that can compete efficiently for passengers traveling between the United States and third countries.”<sup>34</sup> Consequently, disparate treatment of the American/CAI and United/Air Canada alliances would “make it more difficult for United . . . to compete for these U.S. international passengers . . . .”<sup>35</sup>

United argues that the issues raised by the two applications are identical. Since grant of immunity to the American/CAI alliance without a similar grant to the United/Air Canada alliance would place United and Air Canada at a serious competitive disadvantage, United claims that “The Department cannot, consistent with any standard of law or fairness, choose American to be the exclusive U.S. carrier to be granted antitrust immunity for an alliance with a Canadian carrier.”<sup>36</sup>

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<sup>31</sup> *Id.*, at 3.

<sup>32</sup> Comments of United, footnote 1.

<sup>33</sup> *Id.*, at 2.

<sup>34</sup> *Id.*, at 4.

<sup>35</sup> *Id.*, at 5.

<sup>36</sup> *Id.*

United further argues that *Doubleday*<sup>37</sup> and *Ashbacker* principles of due process and fairness require that similarly situated supplicants are entitled to similar relief, and that if the Department concludes that the two applications are mutually exclusive, the Department must defer a final decision in this case until it has completed its review of the proposed United/Air Canada alliance.<sup>38</sup>

Thus, if grant of immunity to American/CAI could affect the Department's "analysis regarding the Chicago-Toronto market such that it would limit the antitrust immunity granted to United/Air Canada . . .,"<sup>39</sup> due process requirements compel the Department either to withhold immunity from both alliances for similar activities in the Chicago-Toronto market or to consider both applications contemporaneously.

#### F. The Joint Applicants

American and CAI urge the Department to finalize the show-cause order. The Joint Applicants argue that none of the comments or objections justifies denying or delaying final approval of and grant of antitrust immunity to the proposed alliance. In particular, they claim that the Department correctly took note of the unique characteristics of the U.S.-Canada market and of the U.S.-Canada agreement's provisions for full freedom of entry and operations in the near future for transborder passenger operations. They further argue that the U.S.-Canada market is now among the most competitive in the world, unlike the monopoly markets where Delta and its European partners sought immunity, and that approval and grant of immunity are thus fully justified by the nature of the U.S.-Canada market.

The Joint Applicants claim that Continental's objections are driven by its own failure to secure a similar alliance with Air Canada, that Continental's claims that the show-cause order's five-day answer period violated its due process rights is without substance, since Continental had voiced no previous objections to the alliance, and that Continental's argument that the U.S.-Canada agreement falls short of open skies "exalts form over substance . . .,"<sup>40</sup> inasmuch as none of the other open skies agreements between the U.S. and foreign countries "has succeeded in opening up the skies *in fact* to the extent that the agreement with Canada has."<sup>41</sup> They also claim that Continental errs in charging that grant of immunity to the alliance would lessen competition; rather, immunity will enhance competition by enhancing their ability to compete against Air Canada, the largest carrier in the U.S.-Canada market.

The applicants also claim that TWA has presented insufficient reasons for the Department to condition the grant of immunity on the availability of slots at Toronto, and that such conditions,

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<sup>37</sup> *Doubleday Broadcasting, Inc. v. Federal Communications Commission*, 655 F.2d 417 (D.C. Cir. 1981).

<sup>38</sup> Comments at 8-9.

<sup>39</sup> *Id.* at 11-12.

<sup>40</sup> Joint Answer of American and CAI, at 6-7.

<sup>41</sup> *Id.*, at 7.

which no party requested and which the Department did not impose on other alliances, would be unwarranted and discriminatory here.

American and CAI further urge the Department to proceed with a final decision in this case, and not defer final approval pending consideration of the proposed United/Air Canada alliance. The Joint Applicants argue that their proposal had been pending for seven months when United and Air Canada filed their joint application, and that if United and Air Canada had truly sought simultaneous review, they would have filed their application months earlier. Because of the lateness of the United/Air Canada application, the applicants further argue that no legitimate *Ashbacker* issues are present; otherwise, opposing parties could delay a competitor's application indefinitely by filing last-minute competing applications. Consequently, the Department should immediately proceed to issue a final order, and process the United/Air Canada application in due course.

Finally, the Joint Applicants claim that Delta's arguments merely restate its February 6, 1996, answer opposing grant of immunity. As such, they argue that Delta's answer should be dismissed as untimely, particularly as Delta failed to file objections or comments to the show-cause order. Thus, they claim Delta should not be permitted to file objections to the show-cause order "under the pretense of submitting an answer."<sup>42</sup>

#### IV. DECISION SUMMARY

We make final our tentative findings that the Alliance Agreement should be approved and the parties given antitrust immunity, subject to (1) the provisions that the approval and antitrust immunity granted herein will not extend to operations involving all-cargo services, or to services involving operations to or from third countries, and (2) the described conditions for the New York-Toronto market (see Appendix A). The commenting parties have not raised any arguments that persuade us to change our ultimate conclusion. The parties have not disputed our finding that the integration of the alliance partners' services would benefit the public by providing better service and enabling the Joint Applicants to operate more efficiently, nor have they presented persuasive evidence or arguments that would lead us to amend our competition analysis with regard to the markets at issue. The Joint Applicants are to resubmit for renewal their alliance agreement in five years from the date of the issuance of this order. If the Joint Applicants choose to operate under a single name or common brand they will have to obtain prior approval from the Department before implementing the change. We also direct the Joint Applicants to file all subsidiary and subsequent agreement(s) with the Department for prior approval.<sup>43</sup>

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<sup>42</sup> Joint Response of American and CAI, at 2.

<sup>43</sup> Regarding this requirement, we do not expect the alliance partners to provide the Department with minor technical understandings that are necessary to blend fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct the Joint Applicants to provide the Department with any contractual instruments that may materially alter, modify, or amend the Alliance Agreement. The Joint Applicants must submit subsequent subsidiary agreements implementing the Alliance Agreement for prior approval (see Ordering Paragraph 4).

In addition, we are also finalizing our determinations directing CAI to report full-itinerary O&D Survey data (similar to the O&D Survey data already reported by American) for all passenger itineraries that contain a United States point.

## V. DECISIONAL STANDARDS UNDER 49 U.S.C. §§ 41308 and 41309

### A. Section 41308

Under 49 U.S.C. section 41308, the Department has the discretion to exempt a person affected by an agreement under section 41309 from the operations of the antitrust laws "to the extent necessary to allow the person to proceed with the transaction," provided that the Department determines that the exemption is required in the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity, if the parties to such an agreement would not otherwise go forward without it, and we find that grant of antitrust immunity is required by the public interest.

### B. Section 41309

Under 49 U.S.C. section 41309, the Department must determine, among other things, that an inter-carrier agreement is not adverse to the public interest and not in violation of the statute before granting approval.<sup>44</sup> The Department may not approve an inter-carrier agreement that substantially reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met or that cannot be achieved by reasonably available alternatives that are materially less anticompetitive.<sup>45</sup> The public benefits include international comity and foreign policy considerations.<sup>46</sup>

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.<sup>47</sup> On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.<sup>48</sup>

## VI. PROCEDURAL ARGUMENTS

Air Canada and United (as well as, to a lesser extent, Continental and Delta) claim that, under *Doubleday* and *Ashbacker*, due process considerations require us to give simultaneous consideration to the American/CAI and United/Air Canada applications. We disagree.<sup>49</sup>

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<sup>44</sup> Section 41309(b).

<sup>45</sup> Section 41309(b)(1)(A) and (B).

<sup>46</sup> Section 41309(b)(1)(A).

<sup>47</sup> Section 41309(c)(2).

<sup>48</sup> *Id.*

<sup>49</sup> While Continental objected to the short time provided for answers to our show-cause order, it has neither claimed nor shown that it was unable to address any of the issues because of the short time.

As both Air Canada and United note, *Ashbacker* requires that, where applications are mutually exclusive, both applications must be considered together, so that each applicant (or, as in this case, each set of Joint Applicants) may argue the relative merits of its application against those of its rivals. If the applicants did not obtain contemporaneous consideration of the mutually exclusive applications, the agency's grant of the first-filed application would necessarily result in the denial of the second-filed application before the agency had undertaken any consideration of the relative merits of the latter application. The *Ashbacker* requirement of contemporaneous consideration of mutually exclusive applications does not govern this proceeding.

The *Ashbacker* principle normally governs licensing cases where only one license may be granted, either because of physical requirements, as in the case of broadcasting licenses, or because of an agency's public interest obligation to limit the number of licensees, as was true of domestic airline routes before deregulation. Since we have no policy of limiting the number of immunized alliances, this proceeding is not analogous to the types of proceedings where courts required contemporaneous consideration of mutually-exclusive licenses. Indeed, no party has cited any precedent where an agency was required to combine its consideration of one acquisition or joint-venture proposal with a second such proposal merely because the approval of one would change the market structure in ways that could make more likely the potential disapproval of the second acquisition or joint-venture proposal.

Furthermore, American and CAI filed their joint application on November 3, 1995. We issued our show-cause order on May 28, 1996, nearly seven months later. However, United and Air Canada only filed their application with their answer and comments to our show-cause order, when the American/CAI application was already ripe for decision and, indeed, had been tentatively decided. Moreover, United and Air Canada did not complete their application until June 26, 1996.<sup>50</sup> The due process requirements of *Ashbacker* do not demand that we defer a final decision in this case, in order to consider an application that was filed much later.

Finally, *Doubleday* merely requires us to give similar treatment to similarly situated applicants. We will consider the United/Air Canada application in due course, and will reach a decision based upon the particular facts in the record of that case and on other officially noticeable data, just as we have done here. United, moreover, has misconstrued our obligation to treat parties similarly when their circumstances are the same. The statute expressly requires us to assess each alliance's impact on competition in the markets affected by that alliance. As we explained in the show-cause order, we have concluded that the alliance between American and CAI would not reduce competition in any market, a decision that reflected the applicants' acceptance of conditions limiting the scope of immunity in one of the two nonstop markets where American and CAI compete, New York-Toronto, but not in the other such market, Chicago-Toronto.

We do not agree with United's argument that our ultimate findings on the competitive consequences for the Chicago-Toronto market must be the same for its proposed alliance. Our decision on the likely impact of the American-CAI alliance is based on each applicant's position in

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<sup>50</sup> See Order 96-7-16, July 12, 1996, establishing a procedural schedule for the joint application of United and Air Canada.

the market. When we examine the United-Air Canada application, we will likewise consider the specific facts presented by the position of United and Air Canada in that market.

## VII. DISCUSSION

We have carefully reviewed the answers and replies to our tentative decision and, consistent with our tentative findings and conclusions, we find that the grant of antitrust immunity in this case is in the public interest. In particular, as we tentatively found in our show-cause order, approval would (1) permit the applicants to operate more efficiently and to provide better service to the U.S. traveling and shipping public, (2) allow American to compete more effectively with other carriers in U.S.-Canada markets, and (3) bring the benefits of online service to nearly 20,000 transborder city-pair markets, with estimated traffic of over nine million passengers.

The parties opposing our decision argue that our tentative findings are unwise as a matter of public policy, particularly because the ability of other U.S. airlines to compete freely in transborder markets will be restricted in some important markets until February 1998, but they have not persuaded us that we erred in tentatively finding that the American-CAI alliance will promote the public interest. We will, therefore, make these findings final.

The basis for our decision is, of course, the new bilateral air services agreement between the United States and Canada, which has already liberalized transborder service in many markets and will soon end all entry barriers and operating restrictions in the remaining transborder markets. The new agreement allows any Canadian carrier to serve any point in the United States, and it allows any U.S. airline to serve any point in Canada except Vancouver, Montreal, and Toronto. The limitations on entry at Vancouver and Montreal will end in February 1997, and the limitations on entry at Toronto in February 1998. All three points already receive service from numerous U.S. carriers. Moreover, pending the complete elimination of the entry restrictions, the United States may designate some additional U.S. airlines to serve these cities, subject to frequency limitations. Despite these short-term entry limitations, the new U.S.-Canada agreement has already led to huge increases in transborder service and traffic and has thereby benefited travelers and shippers in gateway-to-gateway markets. The proposed alliance will extend similar benefits to passengers and shippers in connecting markets, especially between interior U.S. cities and interior Canadian cities.

U.S. airlines have inaugurated nonstop service in 18 transborder markets that previously had no nonstop service. Airlines now offer nonstop transborder service to fourteen U.S. cities and one Canadian city that previously had no such service. In December 1994, 53 transborder markets received scheduled nonstop service; one year later 90 of these markets received nonstop service. Over the same period, the number of U.S.-Canada passengers grew 28 percent, while the number of nonstop flights grew by 45 percent.<sup>51</sup> Since then airlines have introduced still more transborder service. This demonstrates a trend that will soon reach full fruition with the liberalization of the Montreal, Vancouver, and Toronto markets; indeed, these three destinations have become the exception to the rule. These developments convince us that when those

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<sup>51</sup> Office of International Aviation, *The Impact of the New US-Canada Aviation Agreement At Its First Anniversary*, March 1996

remaining markets are liberalized, the competitive benefits of the alliance will become even more evident.

We tentatively found that the proposed alliance will benefit travelers in connecting markets originating or ending in interior U.S. or Canadian cities. While the parties opposing our tentative decision challenge the wisdom of our decision on the ground that U.S. airlines cannot freely compete yet in all transborder markets due to the short-term limitations on entry at Vancouver, Montreal, and Toronto, they do not dispute our findings that the alliance itself will provide major benefits for many transborder travelers. Only Continental questions our finding that the alliance itself will not reduce competition significantly in any market.

#### A. Competitive Considerations

We based our tentative decision to approve and grant antitrust immunity to the American-CAI alliance under 49 U.S.C. 41308 and 41309 on our findings that the alliance would not substantially reduce competition in any relevant market and that the alliance would benefit the public interest. While all of the parties opposing the American-CAI alliance dispute our public interest analysis, as discussed below, only Continental challenges our finding that the alliance will not injure competition. We find its challenge unpersuasive.

American and CAI currently compete in only two nonstop markets, Chicago-Toronto and New York-Toronto. CAI has only a minor share of the Chicago-Toronto market, and no one contends that the alliance will reduce competition in that market. Thus, the only serious competitive issue presented by the alliance is its impact on the New York-Toronto market.

In this case, DOJ's Antitrust Division undertook an initial analysis of whether the alliance would injure competition in any market. DOJ's investigation indicated that the alliance would reduce competition in the New York-Toronto market, unless the applicants' antitrust immunity were limited to exclude much of their operations in that market. DOJ and the applicants agreed on the conditions set forth in Appendix A of this order. Those conditions basically exclude from the grant of antitrust immunity pricing, inventory, or yield management coordination, or pooling of revenues, with respect to U.S. point-of-sale passengers flying nonstop between New York and Toronto; American and CAI may, however, jointly develop, promote, and sell certain limited types of discounted fare products, such as corporate fare products where the nonstop New York-Toronto traffic is a small part of the corporation's traffic covered by its agreement with American and CAI. DOJ, moreover, retained the right to recommend that the Department extend of these conditions after the restrictions on U.S.-carrier entry at Toronto expire in February 1998, if DOJ determines that material changes in economic conditions warrant a review of the limitations.<sup>52</sup>

Continental has not even attempted to show that the conditions for the New York-Toronto market will not adequately protect competition. The conditions will prevent the applicants from coordinating prices for all local U.S. point-of-sale passengers except those passengers flying on

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<sup>52</sup> We also may reexamine the conditions before February 1998, if the applicants request us to do so, or thereafter, if we decide a reexamination is appropriate.

certain specified types of discount fares. With respect to full-fare and most discount-fare local passengers, American and CAI will continue competing with each other on the basis of price.

American and CAI may only coordinate prices for local passengers flying on certain limited categories of discount fares<sup>53</sup> and for travelers using the applicants' New York-Toronto flights as part of a connecting service, but that is unlikely to injure competition.

The conditions will enable the Joint Applicants to obtain antitrust immunity for only a carefully circumscribed category of discount fares. To receive immunity for corporate fares and group fares, no more than 25 percent of a corporation's or group's anticipated travel could be in the New York-Toronto market, and to receive immunity for consolidator-wholesaler fares, the alliance must offer similar fares in at least 25 city-pairs in addition to New York-Toronto. These limitations ensure that, to receive immunity, corporate, group, and consolidator-wholesaler fares must be part of large-scale fare programs applying to many other markets and will be offered only to large-volume purchasers, who can negotiate favorable rates. As a consequence, it is unlikely that the American/CAI alliance could exert market power over such fares. Similarly, government fares involve contract fares with governments--primarily the U.S. Federal and Canadian governments--which are likewise large-volume purchasers able to negotiate favorable rates. Finally, promotional fares are defined as limited-duration discounts from regularly available fares, including other discount fares, and are unlikely to be affected by any market power the alliance may otherwise acquire. Thus, the large majority of local passengers will move under unimmunized fares, and those using immunized fares will be protected by other factors from the exercise of market power by the alliance. Accordingly, we believe the limitations on immunity will adequately protect local passengers in the New York-Toronto market. ..

To a large extent, Continental's objections to our competitive findings do not involve the alliance's impact on competition in the New York-Toronto market. Instead, Continental complains that New York-Toronto travelers would benefit from increased competition if Continental's new Newark-Toronto service were not limited by the short-term capacity limitations imposed by the agreement between the United States and Canada. In considering whether American and CAI's request for approval and antitrust immunity satisfies the statutory competition standard, however, the question is whether their agreement will substantially reduce competition. As conditioned, the alliance will not reduce competition in the local New York-Toronto market.

The alliance, moreover, should have no significant impact on competition in any transborder market served with connecting service, and thus will not reduce competition in these markets. No party has argued that there will be any loss of competition in those markets. There are a number of alternative gateways in the Northeast offering competing connecting service with jet aircraft, including Boston (Air Canada and USAir), Detroit (Northwest), Philadelphia (USAir), Pittsburgh (USAir), and Washington, D.C. (USAir), as well as competing New York/Newark-Toronto service (Air Canada and Continental) and commuter service to Toronto from a large number of gateways by numerous U.S. and Canadian airlines. This large array of competing connecting services should be more than adequate to discipline the market and to prevent the alliance from

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<sup>53</sup> These include corporate fares, consolidator-wholesaler fares, government fares, group fares, and limited-duration promotional fares.

obtaining market power over passengers using their New York-Toronto flights to travel from interior U.S. points to Toronto and beyond-gateway points in Canada.

### B. Public Interest Factors

To grant approval and antitrust immunity for the alliance between American and CAI, we must find that their agreement is consistent with the public interest. We tentatively concluded in the show-cause order that the agreement met that standard, since the applicants' alliance would provide substantial public benefits for transborder travelers without creating any significant adverse effects. In reaching that decision, we recognized that the bilateral agreement between the United States and Canada does not immediately provide for unrestricted entry in transborder markets by U.S. airlines and that the agreement itself is not an open skies agreement. We nonetheless concluded that the remaining limitations on U.S. airline entry -- limitations that will end by February 1998 -- should not delay our approval and grant of antitrust immunity. As we explained in the show-cause order, because our relationship with Canada is *sui generis*, and because of circumstances enumerated herein, the differences between the Canadian air services agreement and a full-fledged open-skies agreement do not justify denying antitrust immunity to the American-CAI alliance. In summary, in our discussion of the relevant public interest factors, we stated:<sup>54</sup>

We have tentatively concluded that despite our policy not to grant antitrust immunity in markets where there are restrictions on entry or flexibility of operations, the unique situation arising from the U.S.-Canada Agreement, as recited above, and the limited nature of the continuing restrictions, balanced against the very significant consumer competitive advantages that will arise from this alliance, justifies our grant of approval and immunity in these markets, notwithstanding the restrictions temporarily in effect.

We have determined to make our tentative conclusions final. We conclude that the proposed alliance will benefit the public interest.

In our show-cause order, we noted the substantial differences in aviation relationships between the U.S.-Canada market and other U.S. international markets. In particular, the size of the bilateral market for goods and services exceeds every other international market. This market can only continue to grow with the adoption of NAFTA. For this and other reasons, the U.S.-Canada aviation market supports more U.S. gateways, nonstop city-pairs, diverse airlines, and competitive routings and service options than any other international aviation market. The volume of service and traffic dwarfs that in any other bilateral market. Most importantly, when the limitations on U.S. airlines at Toronto end, the air transport agreement between the United States and Canada will create a totally open environment for transborder passenger flights and fares and for transborder belly-cargo services and rates.

We remain firmly committed to insisting on open-skies agreements with other nations as a condition for granting antitrust immunity on overseas routes to any alliances between a U.S.

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<sup>54</sup> Order 96-5-38 at 14.

airline and a foreign airline. As we stated earlier in this proceeding, "[n]o other bilateral market resembles the U.S.-Canada market and, accordingly, we intend to continue to insist upon full open-skies agreements as a prerequisite to our consideration of applications for antitrust immunity."<sup>55</sup>

We cannot agree with Continental that the U.S.-Canada market does not substantially differ from other bilateral markets, including the U.S.-Mexico market. While the two bilateral markets have certain characteristics not shared with transatlantic markets, there are a number of major differences. Most important, the U.S.-Mexico bilateral aviation agreement does not provide for complete freedom of entry and operations in transborder markets within the very near future. Furthermore, unlike Mexico and most of our other major trading partners (including Austria, Belgium, Germany, the Netherlands, and Switzerland, whose national carriers also participate in immunized alliances with U.S. carriers), Canada has no major connecting and transit points for travelers between the U.S. and third-country points. In fact, it is solely because relatively little U.S.-third country traffic moves on connecting service *via* Canada that we have determined to grant immunity to the American/CAI alliance's transborder operations despite the U.S.-Canada bilateral's lack of open 5th/6th-freedom entry and 3rd-country code-sharing rights.

We also do not agree with arguments that the unique nature of the U.S.-Canada market actually requires disapproval and denial of immunity here. Although Continental and Delta may be correct that connecting service provides less competitive discipline in the relatively short-haul U.S.-Canada market than in transatlantic markets, owing to the proportionately greater elapsed time difference between connecting and nonstop service, we do not find this to be sufficient grounds to withhold approval and immunity here. Unlike transatlantic markets, U.S.-Canada markets are characterized by high-frequency nonstop services from multiple gateways. In addition, travelers in these markets have more options than transatlantic travelers, including surface transportation (by car, bus, or rail). In the relatively few major, longer-range markets with limited nonstops, connecting services offer further competition. Accordingly, we continue to view the differences between the U.S.-Canada market and other bilateral aviation markets as favorable to the grant of immunity here.

For these reasons, we see little similarity between the U.S.-Canada relationship and those with our other trading partners. Accordingly, we reiterate our declaration in the show-cause order that grant of immunity in this case should not be interpreted to suggest any relaxation of our policy regarding antitrust immunity. Rather, our decision is premised on the uniqueness of the Canadian case. Absent all of the special circumstances of our relationship with Canada, the Department would not provide immunity in the absence of full, immediate open skies. There is no present or potential situation in Europe or elsewhere that presents the many extraordinary factors in the Canadian case that support our decision to grant immunity here.

In arguing that approval and antitrust immunity for the American-CAI alliance is contrary to the public interest, the opponents -- Continental, Delta, and TWA -- also argue that that action would be unfair to them, since their ability to enter Vancouver, Montreal, and Toronto markets is significantly restricted, and that it would be unwise, since it would encourage other nations to

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<sup>55</sup> Order 95-5-38, at 10 n.16.

believe that they could obtain approval and antitrust immunity for alliances between their carriers and U.S. carriers without having to agree to an open skies agreement.<sup>56</sup> We think these arguments are overstated, and we cannot agree that our action here will encourage other countries to believe that immunized alliances are possible without open-skies agreements.

As a preliminary matter, we reiterate that none of the opponents disputes our finding that the alliance itself will greatly benefit transborder travelers. For the reasons explained in our show-cause order, we stand by our finding that the alliance will enable thousands of travelers to obtain smoother, more efficient service in a large number of transborder markets.<sup>57</sup>

We have recognized that U.S. entry at Toronto will be limited until February 1998. We also note that the U.S.-Canada agreement so far has provided for only four U.S.-flag Toronto route awards (plus additional new opportunities from splitting of co-terminalized routes), with an additional four more effective February 1997. Thus, new entry authorized by the bilateral at Toronto is less than the 12 new routes (plus route splits) each at Montreal and Vancouver, even though the U.S.-Toronto market is significantly larger than the U.S.-Montreal and U.S.-Vancouver markets, with a proportionately greater need for expanded service opportunities.

Notwithstanding these concerns, however, we have determined to affirm our tentative findings that "delaying the effectiveness of immunity would serve no significant public interest purpose."<sup>58</sup> The U.S.-Canada bilateral agreement provides for the automatic lifting in 19 months of all restrictions on the ability of U.S.-flag carriers to serve the U.S.-Toronto market, including route designations and frequency. We view this as of paramount importance. As we stated in our show-cause order, "Absent . . . the certainty of complete entry liberalization in so short a period, we would not grant immunity for the U.S.-Toronto routes."<sup>59</sup>

Thus, the airlines opposing the grant of antitrust immunity are essentially claiming that giving American and CAI immunity is unwise because U.S. entry at two Canadian points will be restricted for an additional seven months and a third point will be restricted for nineteen months. We find these arguments unpersuasive.

As a practical matter, even if the United States were to negotiate with the Canadian government for an immediate lifting of all entry and frequency limitations at Montreal and Vancouver, at this point it is unlikely that any U.S. carriers could undertake major expansions of service to these cities before autumn (or even early winter). Except for winter leisure markets such as Florida and Hawaii, therefore, the best time this year to begin new or expanded U.S.-Canada service has

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<sup>56</sup> The opponents base some of their arguments on the assumption that both the American-CAI alliance and the United-Air Canada alliance will be given approval and antitrust immunity. In this proceeding we are considering only the American-CAI alliance. We will consider whether the United-Air Canada alliance meets the standards for approval and antitrust immunity in a later proceeding.

<sup>57</sup> We made similar findings in approving three other alliances between a U.S. airline and one or more foreign airlines. See, e.g., Orders 93-1-11 (Northwest/KLM), 96-5-27 (United/Lufthansa), and 96-6-33 (Delta/Austrian/Sabena/Swissair).

<sup>58</sup> Order 96-5-38 at 15.

<sup>59</sup> *Id.*

already passed; we therefore believe that the competitive need for significant further U.S.-carrier expansion at Montreal and Vancouver is small before the spring of 1997, after all restrictions on transborder services to these two cities expire.

For similar reasons, while Continental correctly notes that new entrants are currently limited to two daily round trips, we do not view these temporary limitations on frequencies to be significant in this case, particularly at Montreal and Vancouver. In fact, in view of the imminent expiration of any limitations on transborder operations at Montreal and Vancouver, we consider the remaining bilateral limitations on U.S.-flag operations to be *de minimis*. We conclude, therefore, that the U.S.-Montreal/Vancouver markets, which become *de jure* open in February 1997, will be open before the proposed expansion of the alliance can have an impact on competition, and that, as a consequence, the Montreal and Vancouver markets are already open *de facto*, and the remaining nominal limitations there do not justify our withholding of approval and immunity for the short period until all restrictions are removed.

Thus the only potentially troublesome market at issue is the Toronto-U.S. market, but CAI has a relatively small share -- five percent -- of the traffic in that market. American has a larger share, 21 percent, while Air Canada has the largest share, 40 percent. Air Canada, not CAI, has a hub at Toronto. Consequently, to the extent the alliance strengthens American's position at Toronto, it will enhance competition in the U.S.-Toronto market.<sup>60</sup>

In addition, the new air services agreement limits the ability of American and CAI to create new code-share service in transborder markets in competition with other U.S. airlines. In particular, Annex V of the U.S.-Canada Agreement limits the number of gateway-to-gateway transborder flights operated by Canadian-flag carriers on which code-sharing connecting passengers to/from interior U.S. points may be carried. This frequency limit is equal to the total number of available U.S.-flag frequencies in new frequency-limited markets, and expires with the phase-in limitations on U.S.-flag entry at Montreal, Vancouver, and Toronto.<sup>61</sup>

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<sup>60</sup> While CAI has a large market share at Vancouver -- almost 25 percent -- the additional route rights made available by the new air services agreement for U.S. airlines at Vancouver were sufficient to satisfy all U.S. carriers' wishes for new Vancouver routes, and the remaining limitations at Vancouver will end in seven months. CAI, on the other hand, has operated no transborder services at all at Montreal, although American has had an 18 percent share of the U.S.-Montreal market.

<sup>61</sup> The Canadian government may allocate these frequencies to any of the restricted Canadian gateways, irrespective of the number of U.S.-flag frequencies available at each gateway, but cannot allocate more than one half of the total frequencies to any carrier. With the expiration of the phase-in limitations at Montreal and Vancouver in February 1997, however, only Toronto markets will have limitations on U.S.-flag entry or on code-sharing frequencies operated by Canadian carriers. Consequently, there will be no limitations on U.S.-carrier frequencies or Canadian-flag code-sharing frequencies at Montreal or Vancouver. During the third year of the phase-in limitations, U.S. carriers will be limited to 16 daily frequencies in new U.S.-Toronto markets (8 routes times 2 daily frequencies). Similarly, all Canadian carriers will be able to operate a total of 16 daily U.S.-Toronto frequencies on which they can carry code-sharing passengers to/from interior U.S. points.

In our show-cause order, we tentatively found that these Annex V restrictions will substantially limit the ability of CAI (and other Canadian airlines) to carry connecting code-share traffic and will preserve other U.S. carriers' ability to compete against the proposed alliance for connecting passengers during the phase-in period. No party has disputed these findings. Consequently, while American and CAI can implement the alliance before all limitations on U.S. airline entry have ended, the alliance's ability to operate new code-share service itself will be subject to restrictions under Annex V.

In short, we cannot agree that the alliance will give American and CAI an unfair head start over other U.S. airlines. The opponents' other argument -- the claim that our approval and immunization of the American-CAI alliance will undermine our negotiations for open skies agreements with other countries -- is less persuasive. In our judgment, that claim is without merit.

We agree, of course, with the opponents' position that immunity should not be granted to alliances with a foreign airline whose home government has not agreed to the elimination of restrictions on entry and pricing. It is precisely because we are unwilling to immunize alliances in such circumstances that we are not granting immunity to the American-CAI alliance for services where U.S. airline entry will remain subject to restrictions: all-cargo services and services in third-country markets.<sup>62</sup> The alliance before us, however, stems from an agreement that will open all transborder passenger markets to unrestricted entry by U.S. airlines within a relatively short time. As a practical matter, as explained above, the limitations on U.S. airline entry in some transborder markets will end within a short period of time, and only the limitations on entry at Toronto are significantly limiting U.S. airline service in the meantime.

Continental and TWA have raised the issue of the potential lack of slots at Toronto for U.S. airlines wishing to expand or initiate service between Toronto and U.S. gateways. We believe that *de facto* access to airports is a critical element in evaluating applications for antitrust immunity and we are not prepared to grant immunity where U.S. carriers are effectively precluded from competitive entry because of slot constraints. In this case, however, neither TWA nor Continental has demonstrated that it has been prevented from offering services it is authorized to provide.

Moreover, the slot situation at each airport is different, due to different demands, traffic patterns, and rules. Additionally, in antitrust cases, the unique competitive context of each airport requires us to reach an *ad hoc* determination for the specific airport at issue. At Toronto, the potential difficulty in obtaining slots is ameliorated, as a competitive factor, by several features. We have already identified some of these in the general context of granting immunity here, including the significant limitation on antitrust immunity with respect to the New York-Toronto market. In addition, we note that Toronto is not a major connecting hub for U.S.-third country markets, in contrast to Frankfurt, Amsterdam, and Zurich, key hubs in the other immunity cases we have decided. Rather, Toronto is a significant connecting point for other destinations in Canada. As

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<sup>62</sup> We invite the Canadian government, however, to negotiate for the liberalization of all-cargo services, 5th- and 6th-freedom services, and 3rd-country code-sharing rights, as well as the acceleration of open entry at the three restricted Canadian cities.

we have noted earlier, such destinations will be subject to competition and the discipline of market forces through other gateways and, in many cases, through their own nonstop services to U.S. points. Still more significant is the presence of many U.S. carriers at Toronto already, even though that presence may be, in individual cases, temporarily limited by the terms of the bilateral.

While these factors, on balance, persuade us not to impose a slot condition at this time, we remain very concerned about access to slots at Toronto. Accordingly, we will closely monitor that situation, and we will address concerns that competing carriers may raise as the newly liberalized environment develops. Finally, we note that DOJ's condition excluding basic pricing and yield management decisions for most local New York-Toronto passengers can be extended beyond February 1998 upon a determination that entry into the New York-Toronto market is not easy enough to discipline the service offered by American and CAI.

### C. Approval of and Antitrust Immunity for the Alliance Agreements

In the Order to Show Cause we described the antitrust analysis required by section 41309. We tentatively found that the relevant markets included the U.S.-Canada, the various city-pair markets, the overall U.S.-Montreal/Toronto/Vancouver markets, and the transborder behind- and beyond-gateway markets. Our analysis indicated that implementation of the Alliance Agreement, as conditioned, would not significantly reduce competition in the U.S.-Canada market, in the U.S.-Montreal/Toronto/Vancouver markets, or in the behind- and beyond-gateway transborder markets.<sup>63</sup> We will make final our tentative findings in that regard.

We also tentatively determined to withhold approval and antitrust immunity from operations involving all-cargo service and from operations involving services to or from third countries. No party has objected to these determinations, and we will consequently finalize that determination.

We will also finalize our determinations that antitrust immunity is required in the public interest and that the Joint Applicants are unlikely to proceed with the Alliance Agreements absent the immunity. Accordingly, we grant antitrust immunity to the Alliance Agreements, as conditioned and limited herein.

Approval under section 41309 requires that an agreement not be adverse to the public interest. Granting antitrust immunity under section 41308 requires that the exemption is required by the public interest. It is the Department's policy not to grant antitrust immunity to agreements that violate the antitrust laws. Furthermore, we grant antitrust immunity to agreements that do not violate antitrust laws only where the agreement will provide important public benefits and where the parties to such an agreement would not otherwise go forward without it. In these cases, we may find that grant of antitrust immunity is required by the public interest.

Since the alliance partners will be ending their competitive service entirely in one nonstop market and partially in a second nonstop market, they could be exposed to liability under the antitrust laws if we did not grant immunity. The applicants assert that they would not proceed with the

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<sup>63</sup> Similarly, our orders in the United and Delta alliances were predicated on our finding that the grant of immunity would not result in a substantial loss of competition. See Orders 96-5-7 and 96-6-33.

alliance in the absence of such immunity, and this has not been refuted. Based on the above, we found that American and CAI are unlikely to proceed with the Alliance Agreement without immunity. No party to this proceeding has disputed these findings.

#### D. O&D Survey Data Reporting Requirement

No party opposes the imposition of an Origin-Destination Survey of Airline Passenger Traffic (O&D Survey) reporting requirement. However, to further ensure that our grant of antitrust immunity does not lead to anticompetitive consequences, we have decided to grant confidentiality to the foreign applicants' Origin-Destination data reports and special reports on code-share passengers. Currently, we grant confidential treatment to international Origin-Destination data. We provide these data confidential treatment because of the potentially damaging competitive impact on U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data covering the operations of foreign air carriers that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).

14 C.F.R. Part 241 section 19-7(d)(1) provides for disclosure of international Origin-Destination data to *air carriers* directly participating in and contributing to the O&D Survey. While we have found it appropriate to direct foreign applicants to provide certain limited Origin-Destination data to the O&D Survey, we have determined that CAI is not an "air carrier" within the meaning of Part 241. 14 C.F.R. Part 241, Section 03 defines an air carrier as "[a]ny citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." CAI, accordingly, will have no access to the O&D Survey data filed by U.S. air carriers. Moreover, we are making the CAI's data submissions confidential and not available to U.S. carriers, while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers (including CAI).

#### E. Operation under a Common Name/Consumer Issues

We affirm our directive that if the Joint Applicants choose to operate under a common name or use "common brands," they must obtain prior approval from the Department prior to such operation.

### **VIII. Summary**

We make final our approval and antitrust immunity for the Alliance Agreement, subject to the aforesaid limitations on all-cargo and third-country service, and as conditioned in Appendix A with respect to the New York-Toronto market. In addition, we affirm our directive that the Joint Applicants resubmit the Alliance Agreements five years from the date of the issuance of this Order. Notwithstanding our final determination, if American and CAI choose to operate under a common name or brand, they will have to seek separate approval from the Department before implementing the change.

Furthermore, we affirm our determination to direct CAI to report O&D Survey data, as defined in this order. We also direct the Joint Applicants to submit any subsidiary and/or subsequent agreement(s) with the Department for prior approval (see footnote 43, *supra*).

**ACCORDINGLY:**

1. We approve and grant antitrust immunity, as discussed by this order, to the Commercial Alliance Agreement between American Airlines, Inc. and Canadian Airlines International Ltd. and their subsidiaries and affiliates, insofar as it relates to foreign air transportation, subject to the following limits and conditions as set forth in (a), (b), and (c) below;

(a) The approval and immunity granted in this proceeding shall not apply to operations involving all-cargo services or to operations involving services to or from third countries;

(b) The Joint Applicants shall not operate or hold out service under a common name or brands without obtaining prior approval from the Department; and

(c) The approval and immunity granted in this proceeding is further subject to the terms, limitations, and conditions set forth in Appendix A hereto.

2. We direct American Airlines, Inc. and Canadian Airlines International Ltd., and their subsidiaries and affiliates, to resubmit their Commercial Alliance Agreement five years from the date of issuance of this Order;

3. We direct Canadian Airlines International Ltd to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its U.S. alliance partner American Airlines, Inc.);

4. We direct American Airlines, Inc. and Canadian Airlines International Ltd. and their subsidiaries and affiliates to submit any subsequent subsidiary agreement(s) implementing the Alliance Agreements for prior approval;<sup>64</sup>

5. We grant the motion of American Airlines, Inc. and Canadian Airlines International Ltd. for leave to file an otherwise unauthorized document;

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<sup>64</sup> See footnote 43, p. 12, *supra*.

6. We defer action on the motions of American Airlines, Inc. and Canadian Airlines International Ltd. for confidential treatment of certain data and information;

7. This order is effective immediately; and

8. We shall serve this order on all persons on the service list in this docket.

By:

**CHARLES A. HUNNICUTT**  
Assistant Secretary for Aviation  
and International Affairs

(SEAL)

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**CONDITIONS GOVERNING THE ANTITRUST IMMUNITY FOR  
THE COMMERCIAL ALLIANCE AGREEMENT BETWEEN  
AMERICAN AIR LINES, INC. AND CANADIAN AIRLINES, LTD.**

**Grant of Immunity**

The Department grants immunity from the antitrust laws to American Air Lines, Inc. and Canadian Airlines, Ltd., and their affiliates, for the Commercial Alliance Agreement dated November 2, 1995 between American and Canadian and for any agreement incorporated in or pursuant to the Commercial Alliance Agreement.

**Limitations on Immunity**

The foregoing grant of antitrust immunity shall not extend to the following activities by the parties: pricing, inventory or yield management coordination, or pooling of revenues, with respect to local U.S. point-of-sale passengers flying nonstop between New York and Toronto or provision by one party to the other of more information concerning current or prospective fares or seat availability for such passengers than it makes available to airlines and travel agents generally.

**Exceptions to Limitations on Immunity**

Despite the foregoing limitations, antitrust immunity shall extend to the joint development, promotion or sale by the parties of the following discounted fare products with respect to local U.S. point-of-sale passengers flying nonstop between New York and Toronto: corporate fare products, consolidator-wholesaler fare products, promotional fare products, group fare products, and fares and bids for government travel or other traffic that either party is prohibited by law from carrying on services offered under its own code. For immunity to apply, however: (i) in the case of corporate fare products and group fare products, local U.S. point-of-sale non-stop New York - Toronto traffic shall constitute no more than 25% of a corporation's or group's anticipated travel (measured in flight segments) under its contract with American and Canadian; and (ii) in the case of consolidator/wholesaler fare products and promotional fare products, the fare products must include similar fares for travel in at least 25 city pairs in addition to New York - Toronto. Antitrust immunity shall also extend to the following: joint cargo programs, frequent flyer programs, joint travel agency commission and override programs, combined AAirpass program, and standard system-wide terms and charges for ancillary passenger services.

**Definitions for purpose of this order**

"Corporate fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices to corporations or other entities for authorized travel, which discounts may be stated as percentage discounts from specified published fares, net prices, volume discounts, or other forms of discount.

"Consolidator/wholesaler fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices to (i) consolidators for sale by such consolidators to members of the general public either directly, or through travel agents or other intermediaries, at prices to be decided by the consolidator, or (ii) wholesalers for sale by such wholesalers as part of tour packages in which air travel is bundled with other travel products, which discounts, in either case, may be stated either as net prices due the parties on sales by such consolidator or wholesaler, or as percentage commissions due the consolidator or wholesaler on such sales.

"Promotional fare products" means published fares that offer directly to the general public for a limited time discounts from previously published fares having similar travel restrictions.

"Group fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices for the members of an organization or group to travel from multiple origination points to a single destination to attend an identified special event, which discounts may be stated either as percentage discounts from specified published fares or net prices.

#### **Clarification of scope of limitations on immunity**

Under no circumstances shall the limitations on antitrust immunity set forth above be construed to limit the parties' antitrust immunity for activities jointly undertaken pursuant to the Alliance Agreement other than as specifically enumerated. Immunized activities include, without limitation: decisions by the parties regarding the total number of frequencies and types of aircraft to operate on the New York - Toronto route and the configuration of such aircraft; coordination of pricing, inventory and yield management, and pooling of revenues, with respect to non-local passengers traveling on nonstop flights on the New York - Toronto route; and the provision by one party to the other of access to its internal reservations system for use exclusively in checking-in passengers or making sales to the general public at ticketing facilities.

#### **Expiration of Limitations on Immunity**

The limitations on immunity described above shall expire on February 25, 1998, upon the conclusion of the phase-in period at Toronto, as described in the U.S.-Canada Air Transport Agreement, unless at that time, the Justice Department notifies the parties that material changes in economic conditions (which could include an absence or delay in expected new entry into the market) warrant a review of such limitations. Nothing herein shall prohibit the parties from requesting that the Department review the limitations on antitrust immunity set forth above to determine whether they should be discontinued or modified in light of changed competitive conditions prior to February 25, 1998.