

ORIGINAL

DEPT. OF TRANSPORTATION  
DOCKET SECTION

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

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

Docket OST-95-792 - 39

**ANSWER OF DELTA AIR LINES, INC. TO  
PETITION FOR RECONSIDERATION OF UNITED AIR LINES, INC.**

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August 15, 1996

14 pgs

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DEPARTMENT OF TRANSPORTATION  
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**ANSWER OF DELTA AIR LINES, INC. TO  
PETITION FOR RECONSIDERATION OF UNITED AIR LINES, INC.**

Delta Air Lines, Inc. ("Delta") hereby files this Answer in response to the Petition filed by United Air Lines, Inc. ("United") for reconsideration of Order 96-7-21, which granted antitrust immunity to the alliance between American Airlines, Inc. ("American") and Canadian Airlines International, Ltd. ("CAI"), and their regional affiliates.

Order 96-7-21 should be reconsidered and on reconsideration approval and immunity should be deferred pending elimination of all phase-in restrictions applicable to U.S. carriers. No alliance between any U.S. or Canadian carrier should be

considered eligible for antitrust immunity until true open skies exist between the two countries. Delta takes no position on United's assertion that it is entitled to "contemporaneous consideration" of its alliance with Air Canada.

Approval of an antitrust immunized alliance agreement between American-CAI and/or United-Air Canada, in the absence of an open skies agreement that permits all U.S. carriers both *de jure* and *de facto* open entry, is a serious policy error. The absence of this fundamental predicate is central to any considerations for antitrust immunity, regardless of whether the alliances are considered separately or together. With barriers to competition by U.S. carriers that exist under the phase-in agreement, there is no assurance that either alliance will be subject to a level of competition sufficient to discipline the alliance.

Allowing CAI and/or Air Canada to participate in an immunized alliance before the open skies provisions of the U.S.-Canadian bilateral are fully implemented, would give these carriers and, by extension, their alliance partners, United and American, an unfair competitive advantage over other U.S. carriers by allowing them to benefit from the protective provisions of the bilateral. The immunized alliances would enjoy a safe haven against competition by other U.S. carriers in the largest and most important Canadian markets. Delta urges the Department to reconsider the Order. The Department should revoke or postpone the effective date of immunity to the American-CAI alliance and defer consideration of the United-Air Canada Joint Application until February 24, 1998, the date on which the bilateral phase-in restrictions on U.S. carrier access are eliminated.

Alternatively the Department should carve out all U.S.-Toronto/Montreal/  
Vancouver city-pairs until the bilateral phase-in restrictions expire.

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

1. The Department has established a firm policy to consider applications requesting the grant of antitrust immunity only where a fully effective open skies agreement exists. As stated by Deputy Assistant Secretary Patrick V. Murphy in a recent speech:

"But even for us to begin to consider an alliance which includes anti-trust immunity will absolutely require a full 'open-skies' agreement and more. I say more because we need not only open markets de jure, but we need them de facto."<sup>1/</sup>

2. Secretary Peña also underscored the importance of open skies as a predicate to antitrust immunity in testimony before Congress introducing the Department's "international aviation policy":

"The existence of an 'open skies' environment, and the elimination of other competitive restrictions, would be key factors in any consideration of a request for immunity."<sup>2/</sup>

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<sup>1/</sup> Speech of Patrick V. Murphy before the 68th Annual American Association of Airport Executives Annual Conference at Las Vegas, Nevada, June 11, 1996 at 14.

<sup>2/</sup> Statement of Secretary Federico Peña before the Committee on Commerce, Science and Transportation, July 15, 1995 at 13-14.

3. Open skies must be a pre-condition to consideration of applications for antitrust immunity in order to assure that the immunized carriers are subject to real marketplace discipline. Such discipline can only be achieved if all U.S. carriers have the unrestricted ability to serve any point in the foreign country from any point in the United States. As the Department stated in the Northwest-KLM case:

"Because of the open skies accord, any U.S. carrier may serve the Netherlands from any point in the United States. As a result, other carriers have the opportunity and ability to enter the U.S.-Netherlands market and to increase their service if the applicants try to raise prices above competitive levels (or lower the quality of service below competitive levels."

Northwest-KLM, Order 92-11-27.

4. The ability of U.S. carriers to mount competitive challenges to the American-CAI and United-Air Canada alliances will not exist under the current U.S.-Canada bilateral agreement until February 25, 1998. Until that date, the U.S.-Canada market cannot be characterized as open to new entry and competition. The current U.S.-Canadian agreement imposes significant restrictions on U.S. carrier access to the three largest Canadian cities (Toronto, Vancouver and Montreal). Toronto -- Canada's largest and most important market -- will remain entry restricted for the next year and one half. Under the "phase-in" restrictions of the bilateral, in each of the first two years the U.S. government is permitted to select only two new U.S.-Toronto routes and carriers serving those routes are limited to a maximum of two daily nonstop frequencies. During the third year, the United

States is permitted to select up to four additional Toronto opportunities, with each such opportunity limited to only two daily frequencies. Access to Montreal and Vancouver is similarly subject to phase-in restrictions which will not expire for another six months.

5. These phase-in restrictions were expressly designed to give Canadian carriers a "head start" over U.S. carriers and to protect Canadian carriers from U.S.-flag competition in prime markets -- namely, Toronto, Montreal and Vancouver. It is bad enough that Delta is subject to entry restrictions under the "phase-in" limitations of the bilateral and cannot operate the desired level of service to either of its two largest hubs, while Canadian carriers have had unlimited ability to access the U.S. market. However, it is patently unfair for the Department to compound the competitive harm of these restrictions by immunizing alliances between Canadian carriers and Delta's two largest U.S. competitors -- American and United. Such a result focuses the competitive harm of the bilateral restrictions on Delta by enabling American and United to enjoy the benefits of the "phase-in" protections and indirectly to circumvent the access limitations applicable to other U.S. carriers.

6. The limited opportunities available under the phase-in restrictions of the bilateral do not provide sufficient opportunities for other U.S. carriers to effectively discipline immunized alliances between American-CAI and/or United-Air Canada. The phase-in restriction opportunities do not reflect the full extent of

U.S. carrier access requirements in the key Canadian markets. In each of the entry-restricted years, there have been more requests for Toronto authority than there were opportunities available under the bilateral. Delta is currently engaged in a competitive carrier selection process to secure additional frequencies at Atlanta.

7. For the past two years, Delta's service between Atlanta and Toronto has been limited to only two daily nonstop flights, preventing Delta from matching Air Canada's four daily nonstops. Furthermore, Delta is unable to serve Toronto from Cincinnati -- its second largest hub -- in its own right (Delta provides services pursuant to a code share arrangement on flights operated by Comair, with commuter aircraft). Moreover, the bilateral restrictions not only prevent Delta from operating service to meet consumer demand, they impair Delta's ability to marshal competitive responses to immunized U.S.-Canadian carrier alliances. In short, U.S. carrier access to the major Canadian markets will be governed by artificial governmental restrictions rather than by the marketplace for at least another 18 months.

8. Approval of immunized alliances between major U.S. and Canadian carriers in the absence of a fully effective open skies agreement allowing unrestricted access by U.S. carriers to all of the major Canadian cities is contrary to the Department's international aviation policy. Antitrust immunity should be used as an inducement to encourage expansion of liberal bilateral relationships and should

be available only to those countries that agree to fully liberalize their aviation regimes. Allowing Canadian carriers to enjoy the fruits of immunized alliances before open skies becomes a reality sends other restrictive foreign governments, such as the United Kingdom, Japan, and France, a message that foreign governments can obtain antitrust immunity for their national carriers' alliances while the governments insist on entry and other restrictions that protect the national carriers from U.S.-flag competition.

9. Delta concurs with the earlier comments of United and Air Canada in this docket in opposition to approval of the American-CAI alliance. United and Air Canada urged the Department not to grant antitrust immunity to U.S.-Canadian alliances until the U.S.-Canada open skies agreement became fully effective:

"... the [U.S.-Canada] Agreement cannot yet be characterized as an 'open skies agreement.'"

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

"Without this assurance [that other U.S. carriers have the ability to enter U.S.-Montreal/Vancouver/Toronto markets], the Department should not proceed at this time with consideration of the joint application."<sup>3/</sup>

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<sup>3/</sup> Answer of Air Canada, February 6, 1996, Docket OST-95-792; Comments of United Air Lines, Inc., February 6, 1996, Docket OST-95-792.

10. Without open skies, the adverse competitive effects of any immunized alliance will be exacerbated by the bilateral restrictions which prevent U.S. carriers from entering the major U.S.-Canadian markets during the phase-in periods. This fact is equally true whether the approval of the alliances is considered separately or together.

For the foregoing reasons, the Department should reconsider the antitrust immunity granted to the American-CAI alliance by Order 96-7-21. The Department should withdraw antitrust immunity for the American-CAI alliance and defer consideration of the United-Air Canada alliance until the open skies provisions of the U.S.-Canada bilateral become fully effective. In the alternative, the Department should carve out from the grant of any immunity all U.S.-Canada markets which are subject to the phase-in restrictions of the bilateral until those restrictions are eliminated.

Respectfully submitted,



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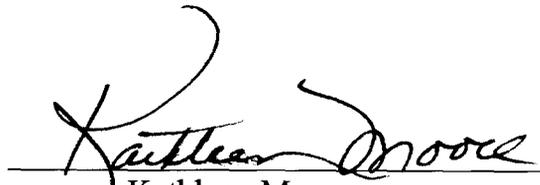
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Answer of Delta Air Lines, Inc. was served this 15th day of August, 1996, on all persons listed on the attached service list.

  
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