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BEFORE THE UNITED STATES  
DEPARTMENT OF TRANSPORTATION

DEPARTMENT OF TRANSPORTATION

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DOCKET SECTION

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International Air Transport :	
Association: Agreement :	Docket OST-95-232 - 51
Relating to Liability :	
Limitations of the Warsaw :	
Convention :	
_____ :	
Air Transport Association of :	
America: Agreement Relating :	Docket OST-96-1607 - 20
to Liability Limitations :	
of the Warsaw Convention :	
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**COMMENTS AND OBJECTIONS OF  
GULF AIR COMPANY TO  
ORDER TO SHOW CAUSE**

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Dated: October 24, 1996

22 pgs.

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International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention	:	:	:	:	:
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Air Transport Association of America: Agreement Relating to Liability Limitations of the Warsaw Convention	:	:	:	:	:
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**COMMENTS AND OBJECTIONS OF GULF AIR COMPANY**

Gulf Air Company, by its attorneys Condon & Forsyth, herewith submits its comments and objections to the issuance of the Order described in paragraph 1 and paragraph 2 of the Order to Show Cause, Order No. 96-10-7 served October 7, 1996.

I.

The Position of Gulf Air Regarding the Liability Limits of the Warsaw Convention

Gulf Air has not agreed to any of the IATA Intercarrier Agreements in their present form and will not do so. Gulf Air will agree voluntarily to increase its liability limit to an amount not less than 250,000 SDRs pursuant to Article 22(1) of the Warsaw Convention, by special contract with its passengers. Such option is legally permissible and consistent with the treaty obligations of the Gulf States and the United States contained in

the Warsaw Convention. Gulf Air, reluctantly, will also voluntarily agree to waive its Article 20(1) defense for passenger liability claims for amounts up to 100,000 SDRs.

All other defenses provided by the Treaty shall, and legally must, remain in tact, as must the jurisdictional provisions of Article 28.

The proposed IATA Agreements eviscerate the underlying foundation of the Warsaw Convention: a limitation of liability in exchange for presumptive liability. The DOT Order is even more objectionable: it seeks to extend United States policy extraterritorially without authority in violation of international law; it ignores the Treaty obligations of the United States in violation of its own domestic law, 49 U.S.C. § 40105; it threatens to cancel the operating rights of carriers who do not "agree" in violation of comity and reciprocity, and outstanding Bilateral Agreements; and finally it threatens the very existence of small and medium-size foreign carriers (particularly from developing nations) by imposing draconian and oppressive financial burdens which cannot be borne by such carriers.

The proposed action of the DOT is an unlawful attempt to sidestep the legal obligations to which the United States agreed when it ratified the Warsaw Convention. It is an offensive attempt to impose its will and policies on the world.

The IATA members should withdraw the proposed Agreements from consideration. As the Warsaw Convention allows, the international carriers of the world should be permitted, to the extent they choose, and can afford, to raise the limits of the Convention.

II.

The DOT Order violates 49 U.S.C. § 40105 of the  
Federal Aviation Act

Section 40105(b)(1) of the Transportation Code provides in pertinent part:

In carrying out this part [Chapters 401 through 409 of the Transportation Code], the Secretary of Transportation and the Administrator [of the Federal Aviation Administration] -

- (A) shall act consistently with obligations of the United States Government under an international agreement;

The Warsaw Convention, to which the United States is a party, is an international agreement which sets forth rules governing the liability of carriers in international transportation. Gulf Air is subject to those rules. To force carriers to accept new rules governing the Convention (several of which violate the Convention itself) under the threat of cancelling their operating authority is a direct violation of § 40105. The Convention is an agreement among governments and can only be amended by another agreement among governments, not by the unilateral imposition of new rules by the administrative

order of a government's agency. The Warsaw Convention sets forth the rules to which the governments of the world agreed. Section 40105, and its predecessor 49 U.S.C. § 1501 curtails the DOT from acting contrary to the treaty obligations of the United States and from breaching the United States' solemn undertakings with other nations.

The DOT proposes to make "mandatory" the provisions of the IATA Intercarrier Agreements (including the IPA) as a requirement for operating to the United States.

States the DOT:

We also tentatively propose to amend all US air carrier certificates, all foreign air carrier permits, and any other outstanding authority to operate to or from the United States, to universally apply the Agreements as conditioned to all direct carriers operating to, from or within the United States.

Order 96-10-7, p. 10.

The DOT apparently bases its authority to take this action on the sufferance or silence of carriers in the face of the CAB/DOT's policy of requiring acceptance of the 1966 (Montreal) Intercarrier Agreement<sup>1</sup> as a condition for the grant of operating authority. The DOT states: "Mandatory participation of all carriers operating to and from the United States has been in effect since the 1966 waiver agreement." Order 96-10-7, p.

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<sup>1</sup>The Montreal Agreement, incidentally, applied only to transportation involving a point in the United States and not universally as the IATA Agreements propose and the DOT mandates.

10. The fact of the matter is that the carriers agreed to the terms of the Montreal Agreement in May 1966, voluntarily or involuntarily (however one chooses to characterize the acts of the foreign carriers) to avoid denunciation of the Convention which had been filed by the United States. It was only some time later (when a foreign carrier sought permit authority and agreed to accept the terms of the Montreal Agreement) that the CAB decided to make it "mandatory." No one challenged this action because foreign carriers were quite willing to adhere to the Montreal Agreement. The DOT's authority to act in this fashion has never been accepted or litigated. It simply was not worth fighting about, since the carriers were agreeable.

Neither in a "legal" or any other sense can the carriers' inaction in 1966 and thereafter confer upon the DOT the authority to act and impose new rules. The authority to legislate resides in the Congress. An amendment to the Convention requires the agreement of States. Legal research has failed to uncover any judicial decision or any legal support for the DOT's notion that the foreign carriers of the world are empowered by law to confer upon the DOT, expressly or inferentially, legal authority which Congress did not give it and likely was incapable of giving it in respect to legal liability.

The denial of operating authority to any carrier for failing to agree to new terms to an International Agreement -- the Warsaw Convention -- violates the solemn contract between

nations. The DOT cannot suspend operating rights simply because the carrier refuses to do what it is legally permitted to do under the Treaty, without violating § 40105.

### III.

#### The DOT Conditions Violate the Convention and U.S. Law

The DOT seeks to impose upon Gulf Air (as a condition for operating to the United States) acceptance of the terms of the IATA Intercarrier Agreements, including the ATA version and its own DOT conditions, to which Gulf Air has never agreed. The DOT envisages that these terms and conditions will be required to be included in the tariffs and contracts of carriage of the carriers. The imposition of these terms and conditions violate the Convention and other U.S. law. Where the Convention permits changes in the rules by agreement, it so provides. It does not allow governments or government agencies unilaterally to impose new rules or force "agreements."

A. The DOT seeks to impose its regime of unlimited liability "worldwide", "system wide" and "universally" (along with the other terms of the IATA Agreements and most of its DOT conditions). Thus, the DOT seeks to impose this regime on Gulf Air routes having no connection with the United States, on routes, say, between Bahrain and Kuwait. This attempt to impose U.S. policy extraterritorially is a fundamental violation of international law and an insult to the community of nations.

International law recognizes solemn agreements between nations and between citizens of different States. It does not allow one nation to dictate law and policy outside its borders. The DOT cannot impose its will worldwide or system-wide.

B. The DOT seeks to amend the Convention by requiring that the law of the domicile shall govern the measure of compensatory damages with respect to "operations to, from, or with a connection [presumably interline routes on ticketed transportation involving the point in the United States] or stopping place in the United States." Order 96-10-7, pp. 9-10. Essentially, the DOT seeks to tell Gulf Air what law it must argue to Bahrain courts. The Convention, and the judicial precedent construing the Convention, dictate the law to be applied to various issues. Article 32 specifically states: "Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by the Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction shall be null and void." (Emphasis supplied)

The DOT's "condition" on the law to be applied is a clear violation of Article 32.

C. The DOT attempts to require that, on an interline operation involving ticketed transportation with a point in the United States, the carrier is barred from waiving the Article

20(1) defense in an amount below 100,000 SDRS. Thus, the DOT attempts to dictate what Gulf Air can or cannot do involving transportation between Bahrain and London simply because that transportation was interlined or was otherwise connected with the United States. This is another unlawful attempt to extend U.S. law and policy extraterritorially.

D. The DOT attempts to require a carrier operating to the United States to force its interline partner (perhaps a small foreign regional carrier) to accept its IATA/DOT unlimited liability regime or "assume the liability for the entire journey." Order 96-10-7, p. 10.

The DOT purports by order to establish rules of legal liability and require carriers to "assume liability" for another's accident. DOT has no authority to establish or legislate rules of liability for tort, and/or contract, for air transportation or anything else. This is outside the DOT's regulatory authority.

The DOT has not expressed "serious concern" that American carriers in the U.S. domestic system have not agreed to strict liability in any amount, or that an "inefficient liability system" governs U.S. carriers domestically. See Order 96-10-7, p. 12. Accordingly, the DOT might wish first to test its authority in this regard by requiring American carriers to agree (1) to strict liability in an unlimited amount with respect to U.S. domestic accidents (not governed by the Convention); (2) to

apply the law of damages of the state of the passenger's citizenship; and (3) to agree to a DOT rule as to the state where the carrier can be sued. It is absurd to suggest that the DOT has such statutory and legal authority to impose such a liability regime within the United States upon American carriers. Even more absurd is the proposition that DOT has the authority in respect to international transportation and foreign carriers.

The DOT seeks to force legal liability extraterritorially on carriers where there is none under the Convention. The DOT points to Article 30(1) and (2) of the Convention. Article 30(1) deals with successive carriage and states in essence that the successive carrier will be bound by the contract terms of the first carrier. Article 30(2) states that "the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey." (Emphasis supplied)

There was a time when the term "agreement" meant a consensual and voluntarily assumed contract obligation. Apparently the DOT believes that it has the authority to impose "agreements" and "contract terms" on parties. While in numerous areas of law it has been recognized that legislatures are empowered, for reasons of public policy, to impose contract terms, thus limiting the freedom to contract, the DOT is neither

a legislature nor has it been delegated by the Congress the authority to impose contract terms relating to the assumption of legal liability under the Warsaw Convention. This condition imposing legal liability is beyond the authority of the DOT.

E. In part to sidestep Article 28,<sup>2</sup> the DOT seeks to condition the operating authority of carriers operating to, from or within the United States on the carriers' acceptance of a "most favored nation" clause in their contracts of carriage. Such a claim provides that any provision anywhere in the world more favorable to the passenger than the IATA/DOT regime shall also apply to transportation to and from the United States. Order 96-70-7, p. 11.

Leaving aside the DOT's inexplicable allusion to § 41310 which seems to relate to uncompetitive acts against other airlines, the DOT, alluding to the EU proposed regulation, apparently seeks to apply a rule of mandatory, up-front, non-recoverable payments of about \$75,000 to a claimant for the death or injury to a passenger. The DOT apparently envisions that the airline should write out a check of \$75,000 to a passenger who was bruised by turbulence, whether or not his seat belt was fastened. Such a provision is apparently under consideration in

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<sup>2</sup>The European Union, whatever its legal authority to do so, seeks to treat the Union itself as a single State for Article 28 purposes. It does not create a fifth jurisdiction in another "State" and only applies to EU carriers. How this fact would logically be applicable to the United States is far from clear in the DOT's Order.

some form by the European Union. Apart from the fact that the DOT will likely foreclose any consideration of up-front payments by the EU airlines because of this DOT condition, and apart from the fact that airlines' insurance costs will probably explode, one might gently ask the DOT where it finds the power to impose such a "most favored nation" clause.

F. The DOT requires U.S. carriers to submit to "fifth jurisdiction" under Article 28 based upon the domicile or permanent residence of the passenger. The Montreal Protocols provided for such a change, in the proper way, by treaty amendment. As the United States has chosen not to ratify the Protocols, the DOT has invoked its non-existent statutory authority to impose them on U.S. carriers. This statutorily unauthorized action is in clear violation of Article 32, which prohibits changes in the rules governing jurisdiction by contract.

G. Unwilling to take the proper course of amending the Convention and unwilling to accept the fact recognized by virtually all the foreign carriers of the world that Article 28 cannot be changed by agreement with the passenger, the DOT announced in effect that there is more than one way to skin a cat: "a fifth jurisdiction may not be the only way to provide adequate protection for U.S. citizens."<sup>3</sup> Order 96-10-7, p. 14.

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<sup>3</sup>Since most U.S. citizens flying on foreign carriers buy their tickets here (which is one of the four jurisdictions of

Thus, admittedly the DOT is trying to sidestep the legal requirements of Article 28.

(1) DOT's first surgical insertion is to require carriers to accept arbitration in a United States forum, if barred by Article 28 from U.S. courts. Whether the mode of litigation is by civil action or arbitration, Article 28 bars a forum in the United States, if the United States is not one of the four jurisdictions listed therein. Article 32 specifically covers that issue with respect to the arbitration of cargo claims.

(2) The second less delicate alternative suggested by the DOT is to impose a "notice provision" requiring carriers to advise the passenger that by flying a foreign carrier he may not have access to U.S. courts (which, of course, would not be true if the ticket were purchased in the United States). The DOT apparently wants to steer U.S. passengers to U.S. airlines with such a notice and turning the Convention into a marketing tool.

This attack on fair competition for traffic seems to violate fundamental principles of comity and reciprocity and the scores of Bilateral Agreements to which the United States is a party. One hesitates to consider the reaction of the DOT if a foreign government were to require all carriers serving that

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Article 28), the U.S. citizens which would be affected by Article 28 are probably less than .1% of U.S. citizens taking international journeys.

State to deliver messages to passengers that they should not fly on American carriers. In the end, the result is the same: even if they wanted to, foreign carriers (and U.S. carriers) cannot add a fifth jurisdiction in their contracts of carriage, without violating Article 28.

(3) The DOT also proposed that all carriers (not accepting the "fifth jurisdiction") on a journey from the United States must obtain for each passenger an accident policy of, say, 500,000 SDRs. The DOT "legislates" that insurance proceeds could be offset against any Warsaw recovery. Since the DOT does not have the power to "legislate" that accident policy proceeds are not from a collateral source, the passenger, in addition to recovering an unlimited amount under the IATA Agreements, will likely recover the full amount of the accident policy as well. A carrier will be hard pressed to find a judicial decision anywhere which permits accident policy proceeds to offset a carrier's liability at law.

The insurance costs to the carrier to provide double compensation to the passenger will be astronomical, insurance costs which will not be imposed on U.S. carriers.

Finally, in their last proposal the DOT asks that the first carrier in departures from the U.S. assume liability for the entire journey, a condition which, as above mentioned, is beyond the DOT's authority to impose. On the face of it, this condition would not have any effect on a U.S. citizen who

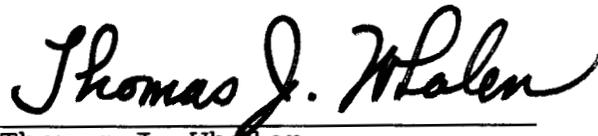
purchased a ticket abroad. Apparently, the DOT wants the carrier who carries the passenger outside the United States to purchase an accident policy covering not only carriage on the first carrier, but covering all carriers involved in the entire journey, which would further increase a carrier's insurance costs.

#### **CONCLUSION**

For the reasons stated above, the DOT's conditions are a clear violation of law, violating both § 40105 and the Warsaw Convention. They are an unlawful attempt to extend U.S. policy and law extraterritorially in direct contravention of U.S. and international law.

The Warsaw Convention, to which the United States is a party, must be adhered to. Those carriers who wish to adopt, voluntarily by agreement, in their contracts of carriage the provisions of the IATA Agreements, are free to do so. Those carriers that do not wish to do so are also free under the Convention to raise the liability limits, or not, to any amount and are also free to waive some of the other provisions, or not waive them. Most carriers, like Gulf Air, recognize that the liability limits of the Convention should be raised and the Convention itself provides the mechanism to do so. For its part, Gulf Air intends to do so, voluntarily.

The DOT simply cannot impose the IATA/DOT regime of legal liability under the Warsaw Convention on Gulf Air and the other carriers of the world.

A handwritten signature in black ink that reads "Thomas J. Whalen". The signature is written in a cursive, flowing style.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 24<sup>th</sup> day of October, 1996, I served a copy of the foregoing document, entitled "Comments and Objections of Gulf Air Company to Order to Show Cause," on the following individuals by first class mail, postage prepaid.

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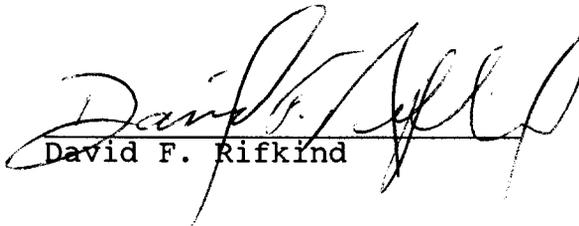
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