



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

Issued by the Department of Transportation on **December 3, 2003**
NOTICE OF ACTION TAKEN – DOCKET OST-2003-15758

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Joint Application of **UNITED AIR LINES, INC., AND BRITISH MIDLANDS AIRWAYS LIMITED d/b/a bmi (“bmi”)**, filed July 23, 2003, for:

XX Exemption for two years for United under 49 U.S.C. §40109 to provide the following service:

Scheduled foreign air transportation of persons, property, and mail between (1) any point or points in the United States and a point or points in the United Kingdom, directly and via intermediate points; (2) any point or points within the United Kingdom; and (3) any point or points in the United Kingdom and any point or points in third countries, by code-sharing on flights operated by bmi; and to integrate this authority with authority at other points United is authorized to serve by certificate or exemption.

XX Exemption for two years for bmi under 49 U.S.C. §40109 to provide the following service:

Scheduled foreign air transportation of persons, property, and mail between (1) any point or points in the United States and any point or points in the United Kingdom, directly or via intermediate points; (2) any point or points within the United States; and (3) any point or points in the United States and any point or points in third countries, by code-sharing on flights operated by United.

XX Statement of Authorization for United under 14 CFR Part 212 to:

Display bmi’s “BD*” designator code on flights operated by United between (1) points in the United States; (2) points in the United States and points in the United Kingdom, directly or via intermediate points; and (3) points in the United States and points in third countries.

XX Statement of Authorization for bmi under 14 CFR Part 212 to:

Display United’s “UA*” designator code on flights operated by bmi between (1) points within the United Kingdom; (2) points in the United States and regional airports in the United Kingdom, directly and via intermediate points; and (3) points in the United Kingdom and points in third countries.¹

The applicants initially propose to conduct code-share operations under this authority over various routes (see Appendix D to this Notice).

Applicant reps: Jeffrey Manley (United) (202) 663-6670 and Marshall Sinick (bmi) (202) 626-6651

DOT Analyst: Linda Lundell (202) 366-2390

DISPOSITION

XX **Granted, in part (subject to limitations and conditions, see below)**

XX **Balance Denied (see below)**

The above action was effective when taken: **December 3, 2003**, through **Decemberv3, 2005**.

Responsive Pleadings: Continental Airlines, Inc. (Continental), Delta Air Lines, Inc. (Delta), and Northwest Airlines, Inc. (Northwest) filed answers to the request. United/bmi filed a consolidated reply to the answers.

Continental, Delta, and Northwest oppose the United/bmi application, stating that the proposed code-share arrangement would grant extrabilateral U.S.-Heathrow access to bmi while doing nothing to improve the plight of U.S.

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¹ “Regional airports” in the United Kingdom include all U.K. airports, except Heathrow and Gatwick.

carriers that remain locked out of Heathrow by the restrictive policies of the U.K. Government. The carriers argue that, contrary to the applicants' arguments, the Department's prior approvals of the Delta/Virgin Atlantic and Continental/Virgin Atlantic code-share arrangements do not support the UA/bmi request here. The carriers explain that the Department's extrabilateral approvals of the Delta/Virgin and Continental/Virgin arrangements secured new Heathrow access for U.S.-flag non-incumbent carriers where grant of the UA/bmi request would promote new U.S.-Heathrow access for a U.K. carrier (and, in this particular case, a U.K. carrier that is a member of one of the two dominant alliances at London Heathrow).

In its joint reply, United/bmi maintain that the "lion's share of the economic benefits of expanded codesharing between United and bmi, including most particularly transatlantic codesharing, will inure to United" and will provide needed financial resources to United at a difficult juncture in its history. The applicants state that this benefit and the improvement of service options for travelers, provide compelling reasons for approval of the request. United/bmi argue that the bilateral environment that existed two and one-half years ago when the Department denied a similar UA/bmi request has completely changed. United/bmi assert that, at that time, the Department hoped the denial would bring pressure on the United Kingdom to move toward aviation liberalization; however, this previous bilateral framework has been replaced by the multilateral United States-European Union negotiation – a process that will "consume several years under the most optimistic estimates." United/bmi state that, during the interim, the United States and the United Kingdom should approve balanced exchanges of "procompetitive opportunities such as the United/bmi codeshare." United/bmi assert that grant of the application will have an immediate and substantial beneficial impact on consumers and on United, and will not adversely affect the current multilateral negotiating process.

Decision: We have decided to grant the applicants' request to expand their existing code-share arrangement to the extent that it is consistent with the terms of the aviation agreement between the United States and the United Kingdom. We have decided to deny the applicants' request for extrabilateral authority to provide code-share services at London Heathrow (see Appendix D for a summary of the applicants' initially proposed code-share routes, and the Department's corresponding action) and for unlimited U.S.-London exemption authority.

Our action here grants the applicants the following authority, subject to the conditions described herein:

United:

- I. Exemption authority to conduct scheduled foreign air transportation of persons, property, and mail between any point or points in the United States and regional airports in the United Kingdom, directly and via intermediate points, and beyond the United Kingdom to any point or points in third countries, limited to operations under its code-sharing agreement with bmi, whereby United will place its code on flights operated by bmi; and to combine this authority with authority at other points United is authorized to serve by certificate or exemption.
- II. A statement of authorization to display bmi's "BD" designator code on flights operated by United between (1) points in the United States; (2) points in the United States and regional airports in the United Kingdom, either nonstop or via third-country intermediates; and (3) points in the United States and points in third countries, either nonstop or via third-country intermediates.

bmi:

- I. Exemption authority to conduct scheduled foreign air transportation of persons, property, and mail between regional airports in the United Kingdom and any point or points in the United States, via bmi's authorized U.S. gateways, and beyond the United States to any point or points in third countries, limited to operations under its code-sharing agreement with United, whereby bmi will place its code on flights operated by United.
- II. A statement of authorization to display United's "UA" designator code on flights operated by bmi between (1) points in the United Kingdom; (2) points in the United States and regional airports in the United Kingdom, either nonstop or via third-country intermediates; and (3) points in the United Kingdom and points in third countries, either nonstop or via third-country intermediates.

Our basis for grant of this authority, as limited and conditioned by this Notice, is the 1995 Memorandum of Consultations between the United States and the United Kingdom (MOC). We also find that the services we are authorizing will enhance competition in the markets involved, to the benefit of the traveling and shipping public. Moreover, the authority granted is comparable to authority we have granted to America/British Airways and Continental/Virgin Atlantic. See Order 2003-5-33 (in Docket OST-2002-13861), and Notice of Action Taken dated August 22, 2003 (in Docket OST-1997-2880).

As stated above, we have decided not to grant the applicants the broad authority sought between any point in the United States and London. While United has argued that it would benefit financially from the Heathrow code-share services proposed at a difficult time in the carrier's history, the grant of such extrabilateral authority to bmi is beyond what we are prepared to grant to a carrier of the United Kingdom at this time. Accordingly, given the current state of our aviation relationship with the United Kingdom, we continue to believe that the best course of action here is to deny, without prejudice, that portion of the application involving the extrabilateral authority at London.

**Action taken by: Paul L. Gretch, Director
Office of International Aviation**

Except to the extent exempted or waived, this authority is subject to the terms, conditions, and limitations indicated:

XX United's certificates of public convenience and necessity
XX Standard Exemption Conditions (attached as Appendices A and B)

Conditions: The exemption authority granted to United and bmi is limited to services provided on a code-share basis only. The code-share operations conducted under this authorization are subject to the conditions contained in Appendices A, B, and C below. United and bmi may initially conduct the authorized code-share operations over the approved routes set forth in Appendix D to this Notice; and may conduct code-share operations in additional markets subject to the terms, conditions, and limitations of this Notice, and in particular conditions (b) and (e) of Appendix C.

The route integration authority granted to United is subject to the condition that any service provided under this exemption shall be consistent with all applicable agreements between the United States and the foreign countries involved. Furthermore, (a) nothing in the award of the route integration authority granted should be construed as conferring upon United rights (including fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless United notifies the Department of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any such carrier to use the limited-entry route rights that are included in United's authority by virtue of the route integration authority granted here, but that are not then being used by United, the holding of such authority by route integration will not be considered as providing any preference for United in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

On the basis of data officially noticeable under Rule 24(g) of the Department's regulations, we found the applicants qualified to provide the services authorized.

Under authority assigned by the Department in its regulations, 14 CFR Part 385, we found that (1) our action was consistent with Department policy; (2) grant of the application was consistent with the public interest; and (3) grant of the authority would not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975. To the extent not granted or dismissed, we denied all requests in the referenced Docket. We may amend, modify, or revoke the authority granted in this Notice at any time without hearing at our discretion.

Persons entitled to petition the Department for review of the action set forth in this Notice under the Department's regulations, 14 CFR §385.30, may file their petitions within seven (7) days after the date of issuance of this Notice. This action was effective when taken, and the filing of a petition for review will not alter such effectiveness.

An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports_aviation.asp

U.S. CARRIER EXEMPTION CONDITIONS

In the conduct of the operations authorized, the U.S. carrier applicant(s) shall:

- (1) Hold at all times effective operating authority from the government of each country served;
- (2) Comply with applicable requirements concerning oversales contained in 14 CFR 250 (for scheduled operations, if authorized);
- (3) Comply with the requirements for reporting data contained in 14 CFR 241;
- (4) Comply with requirements for minimum insurance coverage, and for certifying that coverage to the Department, contained in 14 CFR 205;
- (5) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (6) Comply with all applicable requirements of the Federal Aviation Administration and with all applicable U.S. Government requirements concerning security. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) to or from a foreign airport, contact its Principal Security Inspector (PSI) to advise the PSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served; and
- (7) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department of Transportation, with all applicable orders and regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

The authority granted shall be effective only during the period when the holder is in compliance with the conditions imposed above.

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FOREIGN CARRIER EXEMPTION CONDITIONS

In the conduct of the operations authorized, the foreign carrier applicant(s) shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36, and with all applicable U.S. Government requirements concerning security. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) from a foreign airport that would be the holder's last point of departure for the United States, contact its Principal Security Inspector (PSI) to advise the PSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are: (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States. In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;
- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
- (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- (10) If charter operations are authorized, except as otherwise provided in the applicable aviation agreement, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code.

CODE-SHARE CONDITIONS

APPENDIX C

The code-share operations authorized here are subject to the following conditions:

(a) The statements of authorization will remain in effect only as long as (i) United and bmi continue to hold the necessary underlying authority to operate the code-share services at issue, and (ii) the code-share agreement providing for the code-share operations remains in effect;

(b) United and/or bmi must notify the Department no later than 30 days before they begin any new code-share service under the code-share services authorized here. Such notice shall identify the market(s) to be served, which carrier will be operating the aircraft in the code-share market added, and the date on which the service will begin. Such notices should be filed in Docket OST-2003-15758;

(c) United and/or bmi must notify the Department immediately if the code-share agreement under which these code-share services are operated is no longer in effect or if the carriers decide to cease operating all or a portion of the approved code-share services. We expect this notification to be received within 10 days of such non-effectiveness or of such decision. Such notices should be filed in Docket OST-2003-15758;

(d) The code-sharing operations conducted under this authority must comply with 14 CFR 257 and with any amendments to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in computer reservation systems and elsewhere; that the carrier selling such transportation (*i.e.*, the carrier shown on the ticket) accept responsibility for the entirety of the code-share journey for all obligations established in its contract of carriage with the passenger; that the passenger liability of the operating carrier be unaffected; and that the operating carrier shall not permit the code of its U.S. code-sharing partner to be carried on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition;

(e) The authority to operate to third countries is subject to the condition that any service provided under the statement of authorization shall be consistent with all applicable agreements between the United States and the foreign countries involved. Furthermore, (i) nothing in the award of this blanket statement of authorization should be construed as conferring upon United and bmi rights (including code-share, fifth freedom intermediate and/or beyond rights) to serve markets where U.S. carrier rights are limited unless United and bmi notify us of their intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights;¹ and (ii) should there be a request by any carrier to use the limited-entry route rights that are included in United and bmi's authority by virtue of the blanket statement of authorization granted here, but that are not being used by United and bmi, the holding of such authority will not be considered as providing any preference for United and bmi in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue; and

(f) The authority granted here is specifically conditioned so that neither United nor bmi shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions.

¹ The notice in paragraph (b) above can be used for this notification.

Initially-Proposed Code-Share Operations and Department Action

GATEWAY CITY	BEYOND CITY	DISPOSITION
	(intra U.S. – BD* on UA)	
Chicago	Anchorage	Approved
	Atlanta	Approved
	Austin	Approved
	Baltimore	Approved
	Boise	Approved
	Boston	Approved
	Cedar Rapids	Approved
	Charlotte	Approved
	Cincinnati	Approved
	Cleveland	Approved
	Colorado Springs	Approved
	Columbus	Approved
	Dallas/Ft. Worth	Approved
	Dayton	Approved
	Denver	Approved
	Des Moines	Approved
	Detroit	Approved
	Ft. Lauderdale	Approved
	Ft. Myers	Approved
	Grand Rapids	Approved
	Hartford	Approved
	Houston	Approved
	Indianapolis	Approved
	Kansas City	Approved
	Las Vegas	Approved
	Los Angeles	Approved
	Miami	Approved
	Minneapolis/St. Paul	Approved
	New Orleans	Approved
	New York	Approved
	Oakland	Approved
	Omaha	Approved
	Orange County	Approved
	Orlando	Approved
	Philadelphia	Approved
	Phoenix	Approved

Initially-Proposed Code-Share Operations and Department Action

GATEWAY CITY	BEYOND CITY	DISPOSITION
	(intra U.S. – BD* on UA)	
Chicago (cont'd)	Pittsburgh	Approved
	Portland (PDX)	Approved
	Rochester	Approved
	Sacramento	Approved
	St. Louis	Approved
	St. Thomas	Approved
	Salt Lake City	Approved
	San Antonio	Approved
	San Diego	Approved
	San Francisco	Approved
	San Jose	Approved
	San Juan	Approved
	Seattle	Approved
	Spokane	Approved
	Tampa	Approved
	Tucson	Approved
	Wichita	Approved
Washington, D.C.	Atlanta	Approved
	Austin	Approved
	Boston	Approved
	Chicago	Approved
	Cincinnati	Approved
	Dallas/Ft. Worth	Approved
	Denver	Approved
	Detroit	Approved
	Hartford	Approved
	Houston	Approved
	Indianapolis	Approved
	Kansas City	Approved
	Las Vegas	Approved
	Los Angeles	Approved
	Miami	Approved
	Minneapolis/St. Paul	Approved
	New Orleans	Approved
	New York	Approved
	Oakland	Approved

Initially-Proposed Code-Share Operations and Department Action

GATEWAY CITY	BEYOND CITY	DISPOSITION
	(intra U.S. – BD* on UA)	
Washington, D.C. (cont'd)	Orange County	Approved
	Orlando	Approved
	Philadelphia	Approved
	Phoenix	Approved
	Portland (PDX)	Approved
	St. Thomas	Approved
	Salt Lake City	Approved
	San Diego	Approved
	San Francisco	Approved
	San Jose	Approved
	San Juan	Approved
	Seattle	Approved
	Tampa	Approved
	Tucson	Approved
	(beyond U.S. – BD* on UA)	
Chicago	Mexico City	Approved
Washington, D.C.	Mexico City	Approved
	(intra U.K. – UA* on BD)	
London (LHR)	Belfast	Approved
	Edinburgh	Approved
	Glasgow	Approved
	Leeds/Bradford	Approved
	Manchester	Approved
	Teeside	Approved
Manchester	Aberdeen	Approved
	Edinburgh	Approved
	Glasgow	Approved
	(beyond U.K. – UA* on BD)	
Birmingham	Brussels	Approved
East Midlands	Amsterdam	Approved
	Brussels	Approved
	Frankfurt	Approved
	Paris	Approved

Initially-Proposed Code-Share Operations and Department Action

GATEWAY CITY	BEYOND CITY	DISPOSITION
	(beyond U.K. – UA* on BD)	
London (LHR)	Amsterdam	Approved
	Barcelona	Approved
	Berlin	Approved
	Brussels	Approved
	Budapest	Approved
	Cologne/Bonn	Approved
	Copenhagen	Approved
	Dresden	Approved
	Dublin	Approved
	Faro	Approved
	Frankfurt	Approved
	Geneva	Approved
	Hanover	Approved
	Helsinki	Approved
	Lisbon	Approved
	Madrid	Approved
	Malaga	Approved
	Milan	Approved
	Nice	Approved
	Paris	Approved
	Prague	Approved
	Rome	Approved
	Stockholm	Approved
	Stuttgart	Approved
	Warsaw	Approved
Manchester	Dusseldorf	Approved
	Frankfurt	Approved
	(U.S.-U.K. – UA* on BD)	
Manchester	Chicago	Approved
	Washington, D.C.	Approved

Initially-Proposed Code-Share Operations and Department Action

GATEWAY CITY	BEYOND CITY	DISPOSITION
	(U.S.-U.K. – BD* on UA)	
London (LHR)	Chicago	Denied
	Los Angeles	Denied
	New York/Newark	Denied
	San Francisco	Denied
	Washington, D.C.	Denied