



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

Issued by the U.S. Department of Transportation
on the 15th day of April, 2004

Joint Application of

**AMERICAN AIRLINES, INC.,
and DELTA AIR TRANSPORT, NV d/b/a SN
BRUSSELS AIRLINES**

Docket OST-2003-16530

under 49 U.S.C. §§ 41308 and 41309 for approval of
and antitrust immunity for alliance agreements

**ORDER GRANTING APPROVAL AND ANTITRUST IMMUNITY
FOR AN ALLIANCE AGREEMENT**

By this Order, we grant final approval of and antitrust immunity for an alliance agreement between American Airlines, Inc. (and its affiliates TWA Airlines LLC, American Eagle Airlines, Inc. and Executive Airlines, Inc. d/b/a American Eagle, together referred to as "American") and Delta Air Transport, NV d/b/a SN Brussels Airlines ("SN Brussels") under 49 U.S.C. §§ 41308 and 41309. The Department's action is subject to conditions, as explained further in this Order.

On September 5, 1995, the Governments of the United States and Belgium reached an open skies aviation agreement by exchanging diplomatic notes. The agreement promised substantial benefits to consumers and communities in both countries. The predicate for the Department's approval and grant of antitrust immunity for the proposed American/SN Brussels (together referred to as the Joint Applicants) alliance is the existence of an open skies agreement. The agreement with Belgium allows any U.S. airline to serve any point in Belgium (and open intermediate and beyond rights) from any point in the United States, allowing any Belgian airline to do the same. Each of the open skies agreements entered into by the United States has encouraged more competitive service, since market forces, not restrictive agreements, have disciplined the price and quality of airline service.

I. Background

A. The Alliance Agreement

The essential elements of the Joint Applicants' proposed arrangement include coordination of schedules and connecting service; the establishment of individual and joint marketing, promotion, and advertising networks; harmonization of respective service standards and joint product development; codesharing; cooperative pricing and inventory control; revenue sharing;

establishment of joint strategies for selling alliance services and coordinating and allocating sales resources; joint procurement; coordinated cargo programs; coordinated ticketing; coordinated travel intermediary commission structures and incentive arrangements; frequent flyer programs; information technology and distribution systems; and the sharing of facilities and services at commonly served airports.¹ In summary, while the partners state that each airline will retain its separate identity, brand, ownership, and control,² the underlying objective of the proposed arrangement is to enable the companies to plan and coordinate services over their respective route networks as if there had been an operational merger among them.

B. Joint Application

On November 13, 2003, the Joint Applicants filed a request seeking approval of and antitrust immunity for an alliance agreement. According to the Joint Applicants, the Alliance Agreement preserves independent corporate and national identities,³ conforms with U.S. international aviation policy,⁴ and offers substantial new on-line services by integrating two hub-and-spoke systems to form a single, integrated network.⁵ The Joint Applicants consider their alliance necessary to remain competitive with other immunized transatlantic alliances and essential to long-term viability in the U.S.-Belgium market.⁶ The Joint Applicants seek immunity spanning all facets of their Alliance Agreement for at least five years.⁷

In 2000, we approved and granted antitrust immunity to similar alliance agreements between American and Sabena S.A., and, separately, American and Swiss Air Transport Company. *See* Order 2000-5-13 (May 11, 2000). Since that time, both Sabena and Swiss Air ceased operations, recapitalized, and resumed doing business as SN Brussels and Swiss International, respectively. In 2002, American and Swiss International applied for approval of and antitrust immunity for a resurrected alliance agreement. We granted their request, subject to conditions. *See* Order 2002-11-12 (Nov. 22, 2002). This proceeding is similar to the American/Swiss International proceeding in 2002 in that American and Sabena's successor airline, SN Brussels, are seeking to re-establish their immunized alliance relationship.

The Alliance Agreement submitted to the Department in this proceeding involves coordination in such areas as codesharing, frequent flier programs, global route and schedule planning, sales, advertising and marketing, pricing and yield management, inventory and procurement, revenue allocation, ground handling, airport facilities and support services, cargo services, ticketing, and information technologies and distribution systems.⁸ This level of coordination, according to the

¹ Joint Application at 3.

² Joint Application at 2.

³ Joint Application at 2.

⁴ Joint Application at 4.

⁵ Joint Application at 2. The Joint Applicants describe their proposed relationship as "end-to-end linkage, with little network overlap." Joint Application at 21.

⁶ Joint Application at 3.

⁷ Joint Application at 1.

⁸ Joint Application at 3.

Joint Applicants, will significantly improve consumer convenience, produce operating efficiencies creating greater value for passengers and shippers, increase competition in thousands of city-pairs, and generate economic benefits for communities across the world.⁹ The Alliance Agreement contains no proposed exchange of equity or other forms of cross-ownership, but with antitrust immunity, the Joint Applicants will operate as if they were a merged entity.¹⁰

In support of their application, the Joint Applicants advance numerous arguments. First, the Joint Applicants argue that the Alliance Agreement clearly meets the public interest test because it stimulates vigorous competition and consumer choice.¹¹ The Joint Applicants state that the public benefits that arise from their Alliance Agreement closely mirror those of other transatlantic alliances, including improved choices for consumers, cost efficiencies and price reductions.¹²

Second, the Joint Applicants argue that the full benefits of the alliance cannot be achieved absent antitrust immunity. Coordination of prices, routes and services, among other things, could potentially expose the Joint Applicants to antitrust liability, and thus the Joint Applicants declare that it is not feasible for them to proceed without a grant of immunity.¹³

Third, the Joint Applicants argue that their alliance does not substantially reduce or eliminate competition in any relevant market. In the global market, they assert that an American/SN Brussels alliance will create additional consumer choice and enhanced competition. With respect to the transatlantic market, the Joint Applicants cite the highly competitive state of the U.S.-Europe market, including competition between three immunized alliances (Star Alliance, SkyTeam, and Northwest/KLM).¹⁴ Overall, the Joint Applicants assert that their alliance will enhance competition by increasing their ability to compete against other carriers and alliances. In the U.S.-Belgium market, the Joint Applicants assert that the U.S.-Belgium Open Skies Agreement ensures that alliances and carriers can compete effectively. The Joint Applicants note that SN Brussels does not currently serve the United States with its own aircraft, and that American's only flights between the United States and Belgium consist of a single daily round trip flight between Chicago and Brussels.¹⁵ Thus, the Joint Applicants state that there are no nonstop city-pair overlaps to raise competitive concerns.¹⁶

⁹ Joint Application at 3.

¹⁰ Joint Application at 2.

¹¹ Joint Application at 11.

¹² Joint Application at 12-13.

¹³ Joint Application at 15.

¹⁴ Joint Application at 17.

¹⁵ Joint Application at 17. The Department notes that subsequent to filing its application, American announced new code-share service with SN Brussels between New York and Brussels to begin in May 2004. *See* AVIATION DAILY, Jan. 30, 2004, at 4 (announcing new daily New York- Brussels service, operated by American).

¹⁶ Joint Application at 18. The Joint Applicants also state that because SN Brussels is not a member of the oneworld global marketing alliance, of which American is a member, American will be able to manage its proposed alliance with SN Brussels independently. The Joint Applicants state that there are no agreements providing for coordination among American, SN Brussels, Finnair, and Swiss. Revenue from American's other immunized alliances will continue to be managed separately. Joint Application at 28.

Fourth, the Joint Applicants argue that approval and grant of antitrust immunity will promote important U.S. aviation policy goals. The cultivation of alliances is an integral part of a liberalized and globalized aviation marketplace, the Joint Applicants point out. The Joint Applicants suggest that failure to approve and grant antitrust immunity would have significant negative consequences on U.S. foreign relations, particularly in Belgium.¹⁷

Fifth, the Joint Applicants argue that the Department should rely upon its past orders to approve and grant antitrust immunity. Past similar orders, according to the Joint Applicants, include Order 93-1-11 (Northwest/KLM), Orders 96-5-27 and 96-11-1 (United/Lufthansa/SAS), and Order 2002-1-6 (Delta/Air France/Alitalia/Czech). In looking at past precedent, the Joint Applicants acknowledge that the Department has included conditions on grants of immunity. The Joint Applicants propose to condition their immunity on compliance with Department policy on Computer Reservation Services ("CRS"), International Air Transport Association ("IATA") conferences, use of common brand names, and Origin & Destination ("O&D) survey data reporting. Specifically, the Joint Applicants indicate their willingness to agree that immunity will not extend to their management of interests in individual CRS', participation in certain IATA tariff coordination activities, use of common service or brand names and submission of full itinerary O&D survey data by SN Brussels on the understanding that such data will be handled on a confidential basis.

C. Responsive Pleadings

No responsive pleadings were filed in this proceeding.

II. Decision

We find that approving and granting antitrust immunity to the alliance agreement between the Joint Applicants under §§ 41308 and 41309 is in the public interest, subject to conditions, and that the agreement is not likely to substantially reduce competition in any market. In this Order, the Department requires, as a condition of approval and immunity, that the Joint Applicants (1) withdraw from all IATA tariff conference activities relating to through prices between the United States and Belgium, as well as between the United States and the homelands of foreign airlines participating with U.S. airlines in other immunized alliances; (2) file all subsidiary and subsequent agreements with the Department for prior approval; and (3) resubmit for review their Alliance Agreement within five years of the issuance of this Order. We find that is in the public interest to further require SN Brussels to report full-itinerary O&D Survey data for all passengers to and from the United States (similar to the O&D Survey data reported by U.S. airlines and its partner American).

Our decision in this case rests on an examination of the impact of the proposed alliance on the competition and the public interest in the subject markets. Antitrust immunity allows the partner airlines to engage in price and service coordination while avoiding the potential risk of antitrust

¹⁷ Joint Application at 20.

liability.¹⁸ We will consider granting antitrust immunity if our evaluation finds the proposed transaction, on balance, to be pro-competitive, pro-consumer, and consistent with our international aviation competition policy. A determination as to whether a particular transaction is consistent with the public interest is made only on a case-by-case basis, in light of the specific facts and circumstances affecting that case.

Here we have conducted a full examination of the merits of the Joint Application. We have assessed the impact of the new alliance on competition and the overall public interest in light of the facts and circumstances that are likely to affect the outcome of this case. To facilitate our examination, the Joint Applicants have provided the record with detailed evidence similar to that which we have required in previous antitrust immunity cases. Interested parties had the opportunity to comment on the record and the merits of the Joint Application. No answers were filed. We have also determined that the proposed alliance presents no significant competitive issues requiring further consideration. We therefore will dispense with the issuance of an Order to Show Cause and issue a Final Order granting this unopposed application.

III. Decisional Standards Under 49 U.S.C. Sections 41308 and 41309

The Department employs a two-step process to review alliance agreements. First, under 49 U.S.C. § 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.¹⁹ The Department cannot 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, if that need or those benefits cannot be met or achieved by reasonably available alternatives that are materially less anticompetitive.²⁰ The public benefits include international comity and foreign policy considerations.²¹

Any 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.²² On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.²³

Second, under 49 U.S.C. § 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 by 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.

¹⁸ Notwithstanding, the immunized partners are required to conduct their operations consistent with applicable U.S. laws and regulations.

¹⁹ § 41309(b).

²⁰ § 41309(b)(1)(A) and (B).

²¹ § 41309(b)(1)(A).

²² § 41309(c)(2).

²³ § 41309(c)(2).

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 the public interest requires that we grant antitrust immunity.

IV. Approval of the Alliance Agreement Under Section 41309

The Department approves the American/SN Brussels agreement, finding that it is not adverse to the public interest, and further that it does not substantially reduce or eliminate competition.²⁴ The following analysis supports the Department's determination.

A. Market Summary

The U.S.-Belgium market is an important part of the transatlantic market. The U.S.-Belgium open skies agreement, which has eliminated barriers to new entry, expansion, and competition created by government regulation, has enabled carriers to begin and increase service in the U.S.-Belgium market. The agreement creates unrestricted competitive opportunities for all U.S. and Belgian airlines, including the flexibility to operate their own direct services, or joint services with another airline. The agreement recognizes the value of airline networks and provides opportunities for competitive alliances.

The Department has examined and found substantial consumer and competitive benefits ensuing from each of the open skies agreements and from the structural changes that have occurred in the global airline system, such as the growth of alliances.²⁵ The Alliance Agreement now before us will create a new immunized alliance between American and SN Brussels.²⁶

The U.S.-Belgium open skies regime has produced a more competitive aviation environment, and it has provided airlines with the opportunity to implement new initiatives for serving local, regional, and global markets. The facts in this proceeding support that conclusion. Four U.S. airlines provide scheduled nonstop U.S.-Belgium service: American (from Chicago),²⁷ Continental Airlines (from Newark), Delta Air Lines (from Atlanta and New York), and United Air Lines (from Washington). These airlines offer a total of five daily frequencies in the relevant market. Each U.S. airline operates to Belgium from one of its hubs, permitting it to offer passengers throughout the country extensive on-line connecting service. No Belgian carrier operates U.S.-Belgium scheduled passenger service with its own aircraft.

²⁴ Because we have found that the agreement does not substantially reduce or eliminate competition, the Department need not determine whether the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be otherwise met through reasonably available alternatives that are materially less anticompetitive.

²⁵ See *International Aviation Developments: Global Deregulation Takes Off* (First Report), U.S. Department of Transportation, Office of the Secretary, December 1999.

²⁶ American and SN Brussels already have a code-sharing relationship. SN Brussels, for example, sells seats under its code on the flights operated by American between Chicago and Brussels, but American controls the inventory on those flights.

²⁷ The Department notes that subsequent to filing its application, American announced code-share service with SN Brussels between New York and Brussels to begin in May 2004.

It is in this competitive environment that we have decided to approve the American/SN Brussels Alliance Agreement, subject to conditions.

B. Public Benefit Summary

We find that the proposed alliance would provide important public benefits. We have determined that the pro-competitive effect of global alliances is particularly evident in the case of the behind-gateway and beyond-gateway markets where integrated alliances with coordinated connections, marketing, and services can offer competition well beyond mere interlining.²⁸ Integrated alliances can, in short, offer a multitude of new on-line services to thousands of city-pair markets, on a global basis. In this case, the record shows that American serves 255 points worldwide and SN Brussels serves 50. There are only four points served by both carriers.²⁹ Importantly, the record indicates that the integration of their two networks will create up to 11,730 new on-line markets.³⁰ Thus, the proposed alliance will benefit consumers by increasing international service options and enhancing competition between airlines, particularly for traffic to or from cities beyond and behind major gateways. Our evaluation of international alliances shows that they stimulate traffic in these connecting markets and thereby increase competition and service options in the overall international market and increase overall opportunities for the traveling public and the aviation industry.³¹ The proposed alliance should also allow the Joint Applicants to improve the efficiency of their operations and to otherwise work together to improve service between the U.S. and Belgium, and between the U.S. and other international destinations.³²

Moreover, approval of the proposed alliance will allow the Joint Applicants to use the opportunity to establish an alliance that was created by the open skies agreement with Belgium.

C. Competitive Summary

We find that it is unlikely that the American/SN Brussels Alliance Agreement would substantially reduce or eliminate competition in any relevant market. Because SN Brussels does not serve the U.S. with its own aircraft, American and SN Brussels are not operating competitive services in the relevant transatlantic market. Therefore, there is no significant competitive issue presented in this proceeding.³³ The competitive discipline afforded by other U.S. airlines operating from their

²⁸ See Order 2000-4-22 at 9 (April 21, 2000); Order 96-5-12 at 17-18 (May 9, 1996).

²⁹ Joint Application at JA-4.

³⁰ Joint Application at JA-5.

³¹ See *International Aviation Developments: Global Deregulation Takes Off* (First Report). U.S. Department of Transportation, Office of the Secretary, December 1999.

³² Joint Application at 3, 8, 10.

³³ The disposition in this proceeding will facilitate the Joint Applicants' plans to serve Brussels from New York beginning in May 2004, with flights operated by American. See AVIATION DAILY, Jan. 30, 2004, at 4 (announcing new daily New York-Brussels service, operated by American).

competing U.S. hubs and the existing competition from one-stop and connecting services should continue to provide competitive discipline for the U.S.-Belgium market. The record shows that the proposed alliance will face vigorous competition from other airlines and alliances in the U.S.-Europe market. Given all of these factors, the American/SN Brussels alliance will not substantially reduce or eliminate competition.

Antitrust Issues

The Joint Applicants state that the proposed arrangement is intended to create a framework that will allow them to cooperate in order to improve efficiency, expand the benefits available to the traveling and shipping public, and enhance their ability to compete in the global marketplace. They state that, while retaining their separate corporate and national identities, they fully intend to cooperate to the extent necessary to create a seamless air transport system. Accordingly, the Alliance Agreement's intended commercial and business effects are equivalent to those resulting from a merger of the two airlines. In determining whether the proposed transaction would violate the antitrust laws, we apply the Clayton Act test used in examining whether mergers may substantially reduce competition in any relevant market.³⁴

The Clayton Act test requires the Department to consider whether the Alliance Agreement is likely to substantially reduce competition by eliminating actual or potential competition between American and SN Brussels so that they would be able to charge supra-competitive prices or reduce service below competitive levels.³⁵ To determine whether an alliance or comparable transaction is likely to violate the Clayton Act standard, the Department considers whether the transaction is likely to create or enhance market power, "market power" being defined as the ability profitably to maintain prices above competitive levels for a significant period of time or to reduce output and service quality below competitive levels. To determine whether a proposed alliance is likely to create or enhance market power, we primarily consider whether the alliance would significantly increase concentration in relevant markets, whether the alliance raises concern about potential competitive effects in light of other factors, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed merger's potential for harm.

The relevant markets requiring a competitive analysis are: first, the U.S.-Europe market; second, the U.S.-Belgium market; and third, the city-pair markets.

U.S.-Europe Market Analysis

We find that the Alliance Agreement should not diminish competition in the U.S.-Europe marketplace. During the 12 months ended March 2003, American and its immunized partners in oneworld had a 12.12% market share in the transatlantic market as measured in passengers, giving it the fourth largest market share behind United and its immunized partners in Star Alliance (21.29%), Delta and its immunized partners in SkyTeam (18.47%), and British Airways

³⁴ Order 92-11-27 at 13.

³⁵ *Id.*

(12.45%).³⁶ The proposed American/SN Brussels alliance will not increase concentration because SN Brussels does not operate its own flights to the U.S.

These statistics make it clear that the U.S.-Europe marketplace is highly competitive. Six U.S. airlines operate scheduled passenger flights in transatlantic markets from their hubs, and several offer additional transatlantic services through with alliances with foreign airlines. The U.S.-Europe market is also served by more than thirty foreign airlines, principally from hubs in their homelands.

U.S.-Belgium Market Analysis

The U.S.-Belgium market is similarly competitive. In that market, American has the smallest market share of U.S. carriers. In the year ended March 2003, as measured in passengers, Delta had the largest market share at 38.62%, while United had 19.87%, Continental, 17.59%, and American, 17.40%.³⁷

The proposed American/SN Brussels alliance will not dominate the market, at least initially, and the alliance should not enable American and SN Brussels to exclude competition. The three other U.S. airlines operating flights between the United States and Belgium should be able to compete effectively, since they are serving Brussels from their hubs. Thus, there is no basis upon which to find that the Joint Applicants will charge supra-competitive prices or reduce service below competitive levels in this country-to-country market.

As we noted above, this market is governed by an open skies agreement that eliminates all barriers to entry and provides the opportunity for other airlines to freely enter and meet the needs of consumers. The agreement facilitates market entry and competition because it gives any authorized carrier from either country the ability to serve any route between the two countries (and open intermediate and beyond rights) if it so desires. The agreement places no limits on the number of flights that carriers can operate, and carriers can charge any fare unless both countries disapprove it.³⁸ U.S. airlines have made effective use of these opportunities. Currently, three U.S. airlines besides American operate nonstop flights to Brussels. It is also significant that other U.S. airlines are parties to airline alliances that offer additional competitive options in the U.S.-Belgium market over their networks, such as SkyTeam, Northwest/KLM, and Star Alliance.

These considerations support a finding that it is likely that the services of the proposed alliance will be effectively disciplined by competition provided by other airline services in the market.

The City-Pair Markets

³⁶ Source: T-100 and T-100(f) nonstop segment and market data, for the 12 months ended March 2003. Additional market shares are as follows: Northwest/KLM (9.07%), Virgin Atlantic (6.86%), Continental (5.98%), US Airways (4.06%), and Aer Lingus at (2.31%).

³⁷ Source: T100 and T100(f) nonstop segment and market data, for the 12 months ended March 2003.

³⁸ Order 92-8-13 (August 5, 1992).

We have reached the same conclusion with respect to the city-pair markets at issue in this proceeding. The U.S.-Brussels market is a large and important international aviation market, as illustrated by the fact that it generated more than 41 million passengers in the year ended March 2003.³⁹ Since SN Brussels does not serve the U.S. with its own aircraft, we find that the proposed alliance will not increase concentration in any city-pair markets such as Chicago-Brussels.

However, American and SN Brussels have blanket code-share authority, permitting them to conduct joint code-share operations in all markets where either carrier has underlying authority from the Department.⁴⁰ Importantly, the partners' existing code-share agreement does not provide for guaranteed block-space reservations. Accordingly, neither American nor SN Brussels purchases or guarantees the seats allocated to it by the other. Seats are allocated only for the purposes of inventory management. The operating airline maintains control over inventory on the code-share flights. Under these circumstances, as we have found in recent similar cases, the partners do not price compete in these city-pair markets. *See, e.g.*, Order 2002-11-12 at 11 (Nov. 22, 2002).

Moreover, other U.S. airlines offer on-line connecting service to Brussels from Chicago and other U.S. points via other gateways. Chicago-Brussels passengers can travel on Delta via New York and its Atlanta hub; on Continental via its Newark hub; and on United via its Washington hub. These services should provide a competitive alternative for the bulk of passengers whose greater flexibility in time of travel permits them readily to take advantage of competing one-stop and connecting fares on other airlines.⁴¹

D. Public Interest Issues

Under section 41309, we must determine whether the Alliance Agreement would be adverse to the public interest. Section 41308 requires a similar public interest examination. We find that approval of the Alliance Agreement, subject to conditions, will promote the public interest.

The Department believes it is in the public interest to approve pro-competitive alliances that follow the spirit of our open skies agreements. The alliance between American and SN Brussels should enable the two airlines to offer more attractive and efficient service to many transatlantic travelers as well as to many U.S.-Belgium travelers. As discussed above, we have found that alliances have enabled many travelers to obtain lower fares and better service. Under these circumstances, we find that approving the Alliance Agreement subject to conditions will benefit the traveling public, is unlikely to reduce competition significantly in any relevant markets, and is otherwise in the public interest.

V. Grant of Antitrust Immunity for Alliance Agreement Under Section 41308

³⁹ Source: T-100 and T-100(f) nonstop segment and market data, for the 12 months ended March 2003.

⁴⁰ Decision, Docket OST-2003-14629-4 (April 11, 2003); Joint Application at 5-6.

⁴¹ *See* Order 99-4-17 at 19-20 (April 22, 1999).

The Department grants antitrust immunity to the full scope of the American/SN Brussels Alliance Agreement, subject to conditions, finding that immunity is necessary for the parties to proceed with the transaction, and that immunity is required by the public interest.

We have the discretion to grant antitrust immunity to agreements approved by us under section 41309 if we find that immunity is required by 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. However, we are willing to grant immunity if the parties to such an agreement would not otherwise go forward, and if we find that the public interest requires the grant of antitrust immunity.

The record shows that the Joint Applicants will not proceed with the Alliance Agreement without antitrust immunity.⁴² The Joint Applicants claim that they cannot accomplish the public benefits that they seek to achieve through the formation of this alliance absent antitrust immunity. They state that the proposed integration of services will surely expose them to antitrust risk, since they fully intend to coordinate business activities, including scheduling, route planning, pricing, marketing, sales, and inventory control.⁴³

Since the antitrust laws permit competitors to engage in joint ventures that are pro-competitive, we think it unlikely that the integration of the Joint Applicants' services would be found to violate the antitrust laws. Nevertheless, the record suggests that the Joint Applicants could be subject to extensive and burdensome antitrust litigation if we did not grant their request. The record also persuades us that they will not proceed without it.

To the extent discussed above, we find that we should grant antitrust immunity to the Alliance Agreement. We also intend to review and monitor the Joint Applicants' progress in implementing the agreement. We will also require them to resubmit the Alliance Agreement for review in five years.

While concluding that we should approve and give immunity to the alliance, we find, as discussed next, that certain conditions are necessary to allow us to find that our actions in these matters are in the public interest.

VI. Conditions on Antitrust Immunity

Our approval and grant of antitrust immunity are subject to the conditions below.

A. IATA Tariff Coordination Issue

As we have found in earlier decisions, it is contrary to the public interest to permit immunized alliances to participate in certain price-related coordination that is now immunized within IATA tariff coordination. We therefore have decided to condition our approval and grant of antitrust

⁴² Joint Application at 14-15; JA-1 at 4.

⁴³ Joint Application at 5-8.

immunity to the Alliance Agreement by requiring the Joint Applicants to withdraw from participation in any IATA tariff conference activities that affect or discuss any proposed through fares, rates or charges applicable between the United States and Belgium, or between the United States and any other countries designating an airline that has been or is subsequently granted antitrust immunity by the Department for participation in similar immunized alliances.⁴⁴

Under this condition, the Joint Applicants may not participate in IATA tariff coordination activities affecting fares, rates and charges between the United States and Belgium, and between the United States and the homelands of their similarly immunized alliance competitors. Through prices between the U.S. and other countries, as well as all local fares in intermediate and beyond markets, are not covered by the condition.⁴⁵

We find that this condition is in the public interest for a number of reasons. The immunity that is requested in this proceeding includes broad coverage of price coordination activities between the Joint Applicants. With respect to internal alliance needs, tariff coordination through the IATA conference mechanism is duplicative and unnecessary. At the same time, one of the reasons that we find supports immunity for the proposed activities is the potential for increased price competition between the partners and other carriers, particularly other international alliances. We have found that such potential competition will, on balance, outweigh any potential anticompetitive effects of price coordination within the alliance itself and encourage the passing on of economic efficiencies realized by the alliance to consumers in the form of lower prices. We have previously found in similar cases that competition is undermined if the partners in an immunized alliance are permitted to continue tariff coordination within IATA.

B. O&D Survey Data Reporting Requirement

We have access to market data where U.S. carriers operate, including markets that they serve jointly with foreign airlines, for example, the Department's Origin-Destination Survey of Airline Passenger Traffic (O&D Survey). We have also collected special O&D Survey code-share reports

⁴⁴ This condition currently applies to prices between the United States and the Netherlands; between the United States and Germany (Order 96-5-27 at 17); between the United States and Denmark, Norway, and Sweden (Order 96-11-1 at 23); between the United States and Austria (Order 2001-1-19 at 16); between the United States and Chile (Order 99-9-9 at 21); between the United States and Malaysia (Order 2000-10-12 at 14); between the United States and Iceland (Order 2000-10-13 at 16); between the United States and Panama (Order 2001-5-1 at 11); between the United States and New Zealand (Order 2001-4-2 at 3); between the United States and the Czech Republic, France, and Italy (Order 2002-1-6 at 7); between the United States and the Republic of Korea (Order 2002-6-18 at 14); between the United States and Finland (Order 2002-7-39 at 10); and between the United States and Switzerland (Order 2002-11-12 at 17).

⁴⁵ In addition to Belgium, under this condition, the partners could not participate in IATA discussions of the total ("through") price (14 C.F.R. § 221.4) between a U.S. point of origin or destination and an origin or destination in Austria, Chile, the Czech Republic, Denmark, Finland, France, Germany, Iceland, Italy, Korea, Malaysia, the Netherlands, New Zealand, Norway, Panama, Sweden, and Switzerland or a homeland of a subsequently immunized alliance, whether such prices are offered for direct, on-line or interline service. They could, however, discuss local segment prices, arbitraries or generic fare construction rules that have independent applicability outside such markets. IATA activities covered by our condition would include all those discussing prices proposed for agreement, including both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

for three large alliances and have directed all other U.S. airlines to file reports for their transatlantic code-share operations beginning with the second quarter of 1996.

However, we receive no market information for passengers traveling to or from the U.S. when their entire trip is on foreign airlines, except for T-100 data for nonstop and single-plane markets. Such passengers account for a substantial portion of all O&D traffic between the U.S. and foreign cities, and the absence of such information severely handicaps our ability to evaluate the economic and competitive consequences of the decisions we must make on international air service.

We must ensure that our grant of antitrust immunity does not lead to anticompetitive consequences. Consistent with determinations in similar cases,⁴⁶ we have therefore decided to continue requiring SN Brussels (American already reports O&D Survey data) to report full-itinerary O&D Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by American).⁴⁷

To prevent this reporting requirement from having any anti-competitive consequences, we have decided to grant confidentiality to the SN Brussels Origin-Destination 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).

Our regulation, 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 the foreign partners in immunized alliances to provide certain limited Origin-Destination data to the O&D Survey, the foreign partners are not air carriers within the meaning of Part 241. The regulation (14 C.F.R. Part 241, Section 03) defines an air carrier as "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." The foreign partners accordingly will have no access to the data filed by U.S. air carriers. Moreover, we will be making the SN Brussels submissions confidential while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers.

C. Computer Reservations System (CRS) Issues

⁴⁶ See, e.g., Order 2002-6-18 at 12-13, Docket OST-2002-11842 (Delta-Korean Air Lines-Air France-Alitalia-CSA request for antitrust immunity) (June 27, 2002).

⁴⁷ Consistent with our determinations in Orders 96-7-21, 96-11-1, and 99-9-9 we intend to request other foreign airline partners of immunized international alliances to submit O&D Survey data and condition any further grants of antitrust immunity on provision of such data. We will treat the foreign carriers' O&D data as confidential, will not allow U.S. airlines any access to the data, and will not allow foreign airlines any access to U.S. carrier O&D Survey data. We will use these data only for internal analytical purposes.

Another competitive issue concerns ownership interests that the Joint Applicants may acquire in the future in competing CRSs. Neither American nor SN Brussels now has any interest in a CRS, although American is a major shareholder in Orbitz, the on-line travel agency that has considered whether it should enter the CRS business. We note that the parties recognize that immunity will not extend to their management of any interest they may have in individual CRSs.⁴⁸

D. Operation under a Common Name/Consumer Issues

Since operation of the Alliance Agreement could raise important consumer issues and “holding out” questions, if the Joint Applicants choose to operate under a common name or use “common brands” they will have to seek separate approval from the Department prior to such operations. For example, it is Department policy to consider the use of a single air carrier designator code by two or more carriers to be unfair and deceptive and in violation of the Act unless the air carriers give reasonable and timely notice to passengers of the actual operator of the aircraft.⁴⁹

VII. Summary

We grant approval and antitrust immunity to the Alliance Agreement, subject to the conditions described in this Order. We also direct the Joint Applicants to resubmit the Alliance Agreement five years from the date of the issuance of this Order. However, the Department is not authorizing American/SN Brussels to operate under a common name. If the Joint Applicants choose to operate under a common name, they will have to comply with our relevant procedures before implementing the change.

We also direct the Joint Applicants to withdraw from all IATA tariff conference activities relating to through fares, rates or charges between the United States and Belgium, as well as between the United States and the homeland of any other foreign carrier granted antitrust immunity or renewal thereof, by the Department for participation in similar alliance activities with a U.S. airline; and file all subsidiary and/or subsequent agreement(s) with the Department for prior approval. We also direct SN Brussels to report full-itinerary O&D Survey data for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by American).

ACCORDINGLY:

1. We approve and grant antitrust immunity to the Alliance Agreement between and among American Airlines, Inc. (and its affiliates TWA Airlines LLC, American Eagle Airlines, Inc., and Executive Airlines, Inc. d/b/a American Eagle) and Delta Air Transport, NV d/b/a SN Brussels Airlines, in so far as the Alliance Agreement relates to foreign air transportation, and subject to the provisions that the antitrust immunity will not cover any activities of the Joint Applicants as owners or marketers of computer reservation systems businesses;

⁴⁸ Joint Application at 22-23.

⁴⁹ See 14 C.F.R. Part 257.

2. We direct American Airlines, Inc. (and its affiliates TWA Airlines LLC, American Eagle Airlines, Inc., and Executive Airlines, Inc. d/b/a American Eagle) and Delta Air Transport, NV d/b/a SN Brussels, to resubmit their Alliance Agreement for review before five years from the date of issuance of this Order;
3. We direct American Airlines, Inc. (and its affiliates TWA Airlines LLC, American Eagle Airlines, Inc., and Executive Airlines, Inc. d/b/a American Eagle) and Delta Air Transport, NV d/b/a SN Brussels Airlines to submit any subsequent subsidiary agreements implementing their Alliance Agreement for prior approval;⁵⁰
4. We condition our grant of approval and immunity to require American Airlines, Inc. (and its affiliates TWA Airlines LLC, American Eagle Airlines, Inc., and Executive Airlines, Inc. d/b/a American Eagle) and Delta Air Transport, NV d/b/a SN Brussels Airlines to withdraw from participation in any International Air Transport Association ("IATA") tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Belgium and/or between the United States and any other countries whose designated airlines participate in similar agreements with U.S. airlines that have been or are subsequently granted antitrust immunity by the Department;
5. We direct Delta Air Transport, NV d/b/a SN Brussels Airlines 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 American Airlines, Inc.). The full itinerary record is defined as the passenger's complete itinerary from origin to destination as opposed to the abbreviated gateway record reported under T100(f);
6. We direct American Airlines, Inc. (and its affiliates TWA Airlines LLC, American Eagle Airlines, Inc., and Executive Airlines, Inc. d/b/a American Eagle) and Delta Air Transport, NV d/b/a SN Brussels Airlines to obtain prior approval from the Department if they choose to operate under a common name or use "common brands";
7. We delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in ordering paragraph 4 to specific prices, markets, and tariff

⁵⁰ Regarding this requirement, we do not expect the Joint Applicants to provide the Department with minor technical understandings that are necessary to implement fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct them to provide the Department with all contractual instruments that may materially alter, modify, or amend the Alliance Agreement. Any appropriate documents shall be submitted to the Director, Office of Aviation Analysis, Room 6401. We note that the media has reported that on March 16, 2004, the Virgin Group and the majority shareholder of SN Brussels Airlines announced a non-binding letter of intent signed March 15, 2004, which contemplates placing their respective operational airlines, Virgin Express NV/SA and SN Brussels Airlines, under common ownership. They noted in their joint announcement that they have not as yet determined a detailed plan of how the Virgin Express and SN Brussels Airlines businesses would be jointly managed. Our grant of approval and antitrust immunity in this Order does not extend to arrangements between American and/or SN Brussels on the one hand, and Virgin Express NV/SA and/or the Virgin Group on the other hand. If the common ownership of the two airlines is realized, SN Brussels Airlines and American Airlines are expected to provide notice to the Department.

coordination activities, consistent with the scope and purpose of the condition, as previously described;

8. This order is effective immediately;
9. We may amend, modify, or revoke this authority at any time without hearing; and
10. We shall serve this order on all persons on the service list in this docket.

By:

KARAN K. BHATIA
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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