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**UNITED STATES OF AMERICA**
**DEPARTMENT OF TRANSPORTATION**
**OFFICE OF THE SECRETARY**
**WASHINGTON, DC**

**September 19, 1997**

Issued by the Department of Transportation
on the 19th day of September, 1997

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| **Joint Application of**<br><br>**UNITED AIR LINES, INC.**<br><br>**and**<br><br>**AIR CANADA**<br><br>**under 49 USC §§ 41308 and 41309 for approval of and antitrust immunity for commercial alliance agreement** | **Docket OST-96-1434** |

## FINAL ORDER

By this Order, we grant final approval and antitrust immunity for an Alliance Expansion Agreement (the "Alliance Agreement")[1] between United Air Lines, Inc. and its regional affiliates ("United") and Air Canada, Ltd. and its regional affiliates ("Air Canada") pursuant to 49 U.S.C. §§ 41308 and 41309. Our action is subject to the provisions that the antitrust immunity will not cover (1) the services relating to fares and capacity for particular categories of U.S. point-of-sale local passengers in the Chicago/San Francisco-Toronto markets, (2) operations involving all-cargo transportation, and (3) operations involving services to or from third countries, as fully described below. We direct the Joint Applicants to resubmit for renewal their alliance agreement five years from the date of the issuance of this Order. If the Joint Applicants choose to operate under a common name or brand, including the proposed "Star Alliance " brand, they must obtain advance approval from the Department before implementing the arrangement.

As an express condition to the grant of antitrust immunity to the Alliance, we also direct Air Canada to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic data ("O&D Survey") for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by United). Such reports should commence with the third quarter of 1997.

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[1] The term "Alliance Expansion Agreement" includes the agreements between the Joint Applicants dated May 31, 1996 ("1996 agreement"), May 30, 1995 ("1995 agreement"), any implementing agreements which the applicants conclude pursuant to the 1996 agreement, and any other agreement or transaction by the applicants pursuant to the foregoing agreements. See Joint Application, footnote 1, and Exhibit JA-1.

As we stated in Show Cause Order 97-6-30, we will closely monitor the competitive environment in the Chicago/San Francisco-Toronto markets, where we are withholding antitrust immunity. We will reexamine these markets within eighteen months of service of this order, to determine whether withholding immunity continues to be appropriate. This review will be conducted in full cooperation with the Department of Justice.

## I. BACKGROUND

### A. The Joint Applicants' Request

On June 4, 1996, United and Air Canada filed a request seeking approval of and antitrust immunity for the Alliance Expansion Agreement, for a five-year term.[2] The Joint Applicants state that they intend to broaden and deepen their cooperation in order to improve the efficiency of their coordinated services, expand the benefits available to the traveling and shipping public, and enhance their ability to compete in the global marketplace. They claim that the objective of the Alliance Agreement is to enable the airlines to plan and coordinate service over their respective route networks as if there had been an operational merger between the two companies. The applicants further assert that they will require approval and antitrust immunity for the agreement, inasmuch as proceeding with the agreement in the absence of immunity would present unacceptable risk of challenges under U.S. antitrust laws. Therefore, the airlines regard antitrust immunity as an essential condition precedent to implementation of the Alliance Expansion Agreement.[3]

The applicants assert that approval of and antitrust immunity for the Alliance Agreement are supported by substantial public and commercial benefits and efficiencies and by U.S. international aviation policy, and will encourage other countries to liberalize their bilateral aviation agreements with the United States.[4]

The Joint Applicants state that the alliance will create network synergies by (1) increasing the integration of their route networks; (2) enhancing the efficiency of their operations; and (3) facilitating seamless transportation service to the public. They argue that the

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[2] The Joint Applicants do not seek antitrust immunity relating to the management of their interests in their Galileo computer reservations system (CRS). In fact, their CRSs are specifically excluded by the Alliance Agreement from coordinated services. They do, however, intend to harmonize their information systems, resources, and functions, including their internal reservations systems, inventory and yield management systems, and other distribution and operational systems. Accordingly, they do seek immunity to coordinate the presentation and sale of each other's services in CRSs and to cooperate with regard to the operation of their internal reservations systems. The Joint Applicants claim this is consistent with the Department's action in approving the Northwest/KLM alliance and the United/Lufthansa alliance. (See Orders 93-1-11 and 96-5-38.) Joint Application at 34-35.

[3] Joint Application, at 14.

[4] *Id.*, at 17.

alliance will produce expanded on-line connections, service improvements and lower prices through integration of yield management. It will also enable them to improve aircraft utilization, improve consistency of service, lower input costs through purchasing economies of scale, and reduce advertising, marketing, and other transaction costs.[5]

The Joint Applicants also maintain that the grant of antitrust immunity will advance U.S. international aviation policy objectives by accelerating liberalization of the global marketplace, thus achieving an important goal of the Department's "Open Skies" initiative. Further, the applicants assert that the Alliance Agreement is fully consistent with the Department's policy of encouraging and facilitating the globalization and "cross-networking" of air transportation and with the newly liberalized Air Transport Agreement between the U.S. and Canada.[6]

According to the Joint Applicants, the Alliance Expansion Agreement will lead to increased service, enhanced competition, and other consumer benefits, and will further the objectives of U.S. international aviation policy.

The Joint Applicants claim that the proposed alliance will not significantly reduce competition in any relevant market. In particular, they claim that their proposed alliance will increase competition in the overall U.S.-Canada market by permitting them to offer on a joint basis new transborder services that neither carrier alone could provide.[7] Similarly, the Joint Applicants contend that the proposed alliance will not harm competition in any city-pair markets, as each of the five nonstop transborder markets where they now compete would continue to receive alternative nonstop service from other carriers. In addition, competing carriers would also continue to provide a large amount of one-stop and connecting services in these markets. Moreover, all transborder markets are or will soon be open to unlimited entry; this should further ensure the competitive nature of the five overlap markets.[8]

### B. Show-Cause Order

On June 26, 1997, the Department issued a Show-Cause Order, Order 97-6-30. We tentatively determined, subject to certain conditions and limitations, to grant approval of and antitrust immunity for the Alliance Agreement between the Joint Applicants. We tentatively decided to direct the Joint Applicants to resubmit their Alliance Agreements five years from the date of issuance of the final order in this case. The Department noted that it was not proposing to authorize United and Air Canada to operate under a common name or brand. The Department determined that, if the Joint Applicants choose to

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5 *Id.*, at 4-5.

6 *Id.*, at 6.

7 *Id.*, at 24.

8 *Id.*, 28-29.

operate under a common name or brand, they will have to obtain prior separate approval from the Department before implementing the arrangement.

We also tentatively decided to exclude certain matters relating to fares and capacity for particular categories of U.S. point-of-sale local passengers on the Chicago/San Francisco-Toronto routes, as agreed between the applicants and the Department of Justice ("DOJ").[9] We also tentatively determined to withhold approval and antitrust immunity from operations involving all-cargo aircraft and from services involving operations to or from third countries.

Furthermore, we tentatively directed Air Canada to report full-itinerary O&D Survey data for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by United), and tentatively directed the Joint Applicants to file all subsidiary and subsequent agreement(s) with the Department for prior approval.

In addition, we directed the Joint Applicants to file additional information regarding the impact of the proposed "Star Alliance" among United, Air Canada, Lufthansa, SAS, Thai Airways, and (effective in October 1997) Varig on the proposed United/Air Canada alliances.

Finally, we provided the Joint Applicants and any interested party an opportunity to comment on our tentative findings and conclusions and on the Star Alliance information provided by the Joint Applicants.

## II. Responsive Pleadings to Order to Show Cause

On July 8, 1997, the Joint Applicants filed their response to our directive regarding the Star Alliance. Subsequently, on July 24, 1997, American Airlines, Inc. (American) and Delta Air Lines, Inc. (Delta) filed objections to Order 97-6-30. On July 30, 1997, the Joint Applicants filed an answer to the objections of American and Delta.

### A. The Star Alliance Joint Response

In their Joint Response to our request for information regarding the Star Alliance, the Joint Applicants claim that that the United/Air Canada agreement is entirely separate and distinct from the Star Alliance. As a consequence, they maintain that the Star Alliance will

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[9] We also tentatively found it appropriate to approve and grant immunity with respect to the Chicago/San Francisco-Toronto markets for certain categories of fares. Specifically, we tentatively determined to grant antitrust immunity to the joint development, implementation, promotion, or sale of corporate, consolidator/ wholesaler, promotional, group, and government fares, so long as corporate and group fares in the Chicago/San Francisco-Toronto markets do not constitute more than 25 percent of the corporation's or group's travel with United or Air Canada, and so long as consolidator/wholesaler and promotional fare programs include at least 25 city pairs in addition to the Chicago/San Francisco-Toronto markets. In addition, we tentatively determined to grant immunity with respect to restricted fares in the San Francisco-Toronto market. *See* Appendix A, pp. 1-2.

have no meaningful impact on the transborder market served by the Joint Applicants, and raises no issues that are relevant to the Department's decision in this case.[10]

According to the Joint Applicants, the proposed United/Air Canada alliance involves corporate strategy, yield and capacity management, and pricing of transborder services. The Joint Applicants' decisions as to these matters will be undertaken solely by United and Air Canada pursuant to the terms of the alliance agreement, without participation by other Star Alliance members. Rather, the Star Alliance will involve cooperation among the participants to improve interline connections, improved utilization of members' networks, and standardization of services in order to provide a more consistent, lower-cost product. These efforts are intended to enhance the business of each Star Alliance carrier; neither United's nor Air Canada's transborder services would uniquely gain from these efforts.[11]

The Joint Applicants assert that no final agreement has been reached governing the Star Alliance, but that the members intend to negotiate and sign a definitive agreement by the end of 1997; in the meantime, the Star Alliance members are carrying out certain elements of the envisioned alliance relating to frequent-flyer programs, reciprocal lounge access, and airport co-location.[12] Over the long term, Star Alliance members will improve connections between their respective route networks and will standardize on-board services. They intend to use the "Star Alliance" brand to differentiate their services from those of other carriers and to enhance consumer acceptance of the members' individual services.[13]

However, the Joint Applicants claim there is no intention to integrate Star Alliance members into a single corporate entity, or for the Star Alliance to replace the United/Air Canada or other bilateral and multilateral alliance agreements to which United is a party. Rather, each member will maintain its own separate identity, execute its own corporate strategy, independently maintain bilateral or multilateral alliance agreements with other carriers (including, but not limited to, other Star Alliance members). There will be no integration of code-sharing services operated by United/Air Canada with those of other Star Alliance carriers. Furthermore, any such integration would still require advance review and approval by the Department.[14]

Finally, United and Air Canada assert that there is no intention to integrate Star Alliance partners into any decision-making of the proposed United/Air Canada alliance with respect to either yield management, pricing or scheduling of transborder services.[15] Rather, the other Star Alliance members will play a role in marketing the Joint Applicants' transborder

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[10] Joint Response, at 1-2.

[11] *Id.*, at 4-5.

[12] *Id.*, at 5-6.

[13] *Id.*, at 6.

[14] *Id.*, at 7.

[15] *Id.*, at 8.

services only to the extent that they promote generally the use of Star Alliance carriers' services.[16]

### B. American

American does not object to our tentative decision to grant approval and antitrust immunity to the alliance agreement *per se*. American does argue, however, that the Department should not proceed to a final order in this docket without imposing evidentiary requirements on the Joint Applicants similar to those imposed on American and its proposed transatlantic partner British Airways (BA) in Docket OST-97-2058.

According to American, nearly thirteen months had elapsed between the date when United and Air Canada filed their joint application and issuance of the show-cause order, yet the Department did not require them to update or supplement their application, other than to discuss in general terms the impact of the Star Alliance. In contrast, American and BA submitted their application on January 10, 1997; four months later, the Department issued *sua sponte* Order 97-5-16, May 16, 1997, requiring American and BA to file additional evidence, including an "unprecedented" requirement to provide documents in "the DOT evidence request that have been produced between that date and the date of your response to this request for information."[17]

Similarly, American argues that it and BA were required to produce copies of commercial agreements in final or draft form on partnerships with other airlines, numerous supplemental and updated exhibits, and simulated CRS screen display printouts. However, even though the United/Air Canada application has been pending for over a year, the Department has not required the Joint Applicants in this case to provide any such updated or supplemental evidence beyond a generalized description of the Star Alliance.[18]

American therefore argues that procedural fairness demands that the Department require United and Air Canada to submit the same type of information and evidence that it has required American and BA to file in OST-97-2058, including submission of relevant internal documents that have come into existence since June 4, 1996, copies of agreements (in final or draft form) with other airlines, supplemental and updated exhibits, and simulated CRS screen display printouts in U.S.-Canada markets.[19]

### C. Delta

Delta objects to our proposed grant of immunity to U.S.-Toronto markets prior to the elimination of the phase-in entry and capacity restrictions contained in the U.S.-Canada

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[16] *Id.*, at 9.

[17] Objections of American at 2, citing Order 97-5-16.

[18] *Id.*, at 2.

[19] *Id.*, at 5.

bilateral agreement.[20] According to Delta, grant of antitrust immunity prior to elimination of phase-in restrictions would provide United and Air Canada a competitive advantage over other U.S.-flag carriers. Also, Delta argues that the Department should defer further consideration of the United-Air Canada alliance pending consideration of the Star Alliance, since the Department would be unable to assess properly the public interest and competition issues on transborder services of the United-Air Canada alliance without an analysis of the impact of the Star Alliance.[21]

According to Delta, Toronto is Canada's largest and most important market for air transportation services, but will remain restricted under the U.S.-Canada agreement until February 25, 1998. These restrictions were incorporated in the bilateral at the insistence of the Canadian government in order to give Air Canada a headstart over U.S. carriers and to protect Air Canada from U.S.-flag competition in the largest U.S.-Canada markets. Thus, Delta argues, Air Canada enjoyed unlimited access to the U.S., while U.S. carriers were subject to entry restrictions for the last three years.[22] Furthermore, Delta contends that the Department's show-cause order expressly recognized and affirmed the Department' policy to grant immunity only where markets are fully open to new entry and operations, both *de jure* and *de facto*.[23]

According to Delta, the Department claimed to have based its decision not to delay immunity for U.S.-Toronto markets in part on the expectation that the additional route opportunities made available in February 1997 would come near to satisfying U.S.-carrier demand for access to that market,[24] a statement that, according to Delta, had no basis in fact. Rather, Delta argues that the applications filed for Toronto services were based on the highly limited phase-in restrictions, and did not reflect airline service that would otherwise be operated in a free market environment. Delta's service between Atlanta, its largest hub, and Toronto is limited to only four daily nonstop flights. Furthermore, Delta has been unable to serve Toronto from its second-largest hub at Cincinnati with its own aircraft. Thus, Delta claims, its demand for access to Toronto has not been satisfied, notwithstanding the Department's unsubstantiated finding to the contrary.[25]

Delta further argues that the Department also based its tentative decision on the fact that the phase-in limitations will automatically expire in February 1998, a finding that does not address the critical point that until February 25, 1998, U.S. carriers will not be in a position to ensure that the United-Air Canada alliance would be subject to competitive discipline on U.S.-Toronto routes. According to Delta, the Department's policy requiring *de facto* and *de jure* open skies agreements is designed to ensure that conditions exist that

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[20] Objections of Delta at 1.

[21] *Id.*, at 1-2.

[22] *Id.*, at 3.

[23] *Id.*, at 3, citing Order 97-6-30 at 19.

[24] *Id.*, at 4, citing Order 97-6-30 at 18.

[25] *Id.*, at 4-5.

would engender competitive challenges to immunized alliances, and that policy cannot be satisfied with respect to Toronto services until the bilateral restrictions expire.[26]

Delta also claims that the Department's show-cause order fails to discuss why it would not be in the public interest to withhold the grant of immunity for U.S.-Toronto routes until the phase-in restrictions expire, or obtain Canadian government agreement to accelerate the expiration of the Toronto phase-in limitations. Delta believes that the public interest requires the Department to take one of these actions.[27]

Delta urges the Department to condition approval of the United/Air Canada agreement by delaying the effective date of antitrust immunity with respect to U.S.-Toronto services until expiration in February 1998 of the entry restrictions at Toronto. Delta claims such a delay for a few months of only a small portion of the alliance should have no adverse impact on the Joint Applicants' ability to coordinate other transborder services. It further urges the Department to defer further consideration of the proposed United/Air Canada alliance until it has reviewed the issues involving the Star Alliance on the United/Air Canada alliance; Delta claims this is necessary because the Joint Applicants' Joint Response shows a substantial overlap between the United/Air Canada and Star alliances, including: (1) coordination of all participants' flights to provide "same-airline" travel; (2) development of a global network; and (3) stimulation of enhanced traffic on United/Air Canada transborder services. [28]

Finally, Delta argues that, because the U.S.-Canada bilateral does not cover third-country services, cooperation between United and/or Air Canada, on the one hand, and other Star Alliance members, on the other, involving third-country service raise serious public interest issues requiring close scrutiny by the Department. In particular, the Star Alliance could allow Air Canada a means not authorized under the bilateral to bolster traffic flowing on its U.S.-Canada transborder flights, thereby gaining an advantage over U.S. carriers.[29] Delta further claims that to view the United/Air Canada alliance as distinct from the Star Alliance would contradict the stated purpose and objectives of the Star Alliance.[30]

### D. The Joint Applicants' Answer

The Joint Applicants argue that, in its show-cause order, the Department found that approval and grant of immunity would "advance important public benefits."[31] They claim that no party has challenged the Department's findings respecting the public benefits

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[26] *Id.*, at 5.

[27] *Id.*, at 6.

[28] *Id.*, at 6-8.

[29] *Id.*, at 10-11.

[30] *Id.*, at 8.

[31] Consolidated Joint Answer of United and Air Canada at 1, citing Order 97-6-30.

underlying our tentative decision; instead, American and Delta merely seek to advance their own agendas. The Department should not allow the "irrelevant and repetitive issues" they raise to delay this proceeding further, and should make final the tentative findings and conclusions of Order 97-6-30.[32]

United and Air Canada claim that Delta seeks to reopen the issue of Toronto service. They argue that the Department has already considered this issue not only in this case, but in the American/Canadian Airlines International (CAI) case, where the Department granted American and CAI antitrust immunity for their U.S.-Toronto operations; the show-cause order extended the same reasoning to the competing operations of the Joint Applicants.[33]

According to the Joint Applicants, Delta has offered no basis for the Department to reverse its decision to grant approval and immunity to Toronto markets; in fact, the Department's reasoning is even more compelling than in the American/CAI case, inasmuch as the remaining entry restrictions on Toronto service expire in half a year. Consequently, they argue that Delta offers no basis to distinguish between the two alliances.[34]

The Joint Applicants also attack Delta's suggestion that the Department should defer a final order until it has reviewed the issues involving the relationship of the Star Alliance to the United/Air Canada alliance. They claim no further consideration is necessary; in their Joint Response, the Joint Applicants have demonstrated that the global Star Alliance would have little impact on the United/Air Canada alliance, which is limited to transborder markets. Further, they argue that, despite a three-week opportunity to examine the Joint Response, Delta has not itself identified any issues relating to the Star Alliance requiring further consideration by the Department; Delta's request should, therefore, be dismissed.[35] Finally, they assert that Delta's claim with regard to third-country code-sharing services between the Joint Applicants and other members of the Star Alliance ignores the facts that approval and immunity in third-country markets were neither sought by the Joint Applicants nor tentatively granted by the Department; Delta's concerns, therefore, are irrelevant and should be rejected.[36]

With respect to American's arguments, the Joint Applicants claim that, to the extent that there is any basis for comparing procedures in this case with those of another, it is with those applied to the American/CAI proposal, inasmuch as both the American/CAI and United/Air Canada proposals arise under the same bilateral agreement and require consideration of the competitive impact in the same markets. Yet, American and CAI

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[32] *Id.* at 2.

[33] *Id.* at 2-3.

[34] *Id.* at 3.

[35] *Id.* at 6-7.

[36] *Id.* at 7.

have enjoyed antitrust immunity for over a year while this case has been pending; any further delay in this case will further delay the competition the United/Air Canada alliance will offer against the already immunized American/CAI alliance.[37]

United and Air Canada argue that it is the Department's policy to consider each alliance "individually based on the circumstances presented in each case."[38] They claim that, under this standard, the American/BA alliance requires different procedures because it involves a far different regulatory and economic context from that of the United/Air Canada alliance. In addition, American has offered no reason why the Department needs any further evidentiary submission in this proceeding in order to issue a final order; the evidence required in this case is comparable in scope to that required and considered in the American/CAI case. Consequently, the Department has no need to require updated information here where its consideration of the evidence is complete.[39]

## IV. DECISION SUMMARY

We make final our tentative findings that the Alliance Agreement should be approved and the parties given antitrust immunity, subject to (1) the provisions that the approval and antitrust immunity granted herein will not extend to operations involving all-cargo aircraft, or to services involving operations to or from third countries, and (2) the described conditions as agreed to by DOJ and the Joint Applicants, for the Chicago/San Francisco-Toronto markets (see Appendix A). The commenting parties have not raised any arguments that persuade us to change our ultimate conclusion**.** The parties have not disputed our finding that the integration of the alliance partners' services would benefit the public by providing better service and enabling the Joint Applicants to operate more efficiently, nor have they presented persuasive evidence or arguments that would lead us to amend our competition analysis with regard to the markets at issue.

The Joint Applicants are to resubmit for renewal their alliance agreement in five years from the date of the issuance of this order. If the Joint Applicants choose to hold themselves out under a single name or common brand (including the "Star Alliance" brand) in a manner that implies that they are a single entity, they will have to obtain prior approval from the Department before implementing the change. We also direct the Joint Applicants to file all subsidiary and subsequent agreement(s) with the Department for prior approval.[40]

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[37] *Id.* at 4.

[38] *Id.* at 4-5, citing Order 97-5-7 at 4.

[39] *Id.* at 5-6.

[40] Regarding this requirement, we do not expect the alliance partners to provide the Department with minor technical understandings that are necessary to blend fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct the Joint Applicants to provide the Department with any contractual instruments that may materially alter, modify, or amend the Alliance Agreement, and other major implementing agreements, including (but not limited to) Star Alliance agreements. Such agreements must be reduced to writing and are not covered by immunity until and

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

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

### A. Section 41308

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

### B. Section 41309

Under 49 U.S.C. section 41309, the Department must determine, among other things, that an inter-carrier agreement is not adverse to the public interest and not in violation of the statute before granting approval.[41] The Department may not approve an inter-carrier agreement that substantially reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met or that cannot be achieved by reasonably available alternatives that are materially less anticompetitive.[42] The public benefits include international comity and foreign policy considerations.[43]

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives

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unless it is affirmatively granted. Significant implementing agreements related to the structure of the alliance must also be filed if written. If within the scope of the immunity already granted, these agreements would continue to have immunity until and unless disapproved. Contractual instruments and agreements in principal between the Joint Applicants and additional carrier partners, regardless of whether antitrust immunity is sought for any activities related to such additional partners and/or where the instruments/agreements may be drafted as separate agreements which merely supplement the "Alliance Expansion Agreement," must also be filed for review. In such cases, the Department will determine what further action, if any, may be required with respect to such arrangements.

[41] Section 41309(b).

[42] Section 41309(b)(1)(A) and (B).

[43] Section 41309(b)(1)(A).

are available.[44] On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.[45]

## VI. DISCUSSION

We have carefully reviewed the Joint Applicants' response to our request for information regarding the Star Alliance, and the answers and replies to our tentative decision. Consistent with our tentative findings and conclusions, we find that the grant of antitrust immunity in this case is in the public interest. In particular, in our show-cause order we tentatively found that approval would (1) permit the applicants to operate more efficiently and to provide better service to the U.S. traveling and shipping public, (2) allow United to compete more effectively with other carriers in U.S.-Canada markets, and (3) bring the benefits of online service to nearly 16,000 transborder city-pair markets with an estimated annual traffic of nearly 9 million passengers. In particular, the alliance will significantly increase competition and service opportunities for many of the 4.5 million U.S.-Canada passengers in behind-U.S. gateway and beyond-Canadian gateway markets.[46] No party disputed these public benefits. Furthermore, we have determined not to delay immunity since the remaining restrictions on U.S.-flag entry at Toronto expire in a few months. Notwithstanding the restrictions on entry at Toronto, the new U.S.-Canada agreement has already led to huge increases in transborder service and traffic, with consequent large benefits to passengers and shippers in gate-to-gate markets.[47] The proposed alliance will extend similar benefits to passengers and shippers in connecting markets, especially between interior U.S. cities and interior Canadian cities.

### A. Procedural Arguments

American offers no substantive objections to the proposed alliance. Rather, American's objections pertain, in essence, not to the substance of the instant United/Air Canada proposal, but to the alleged differences in evidentiary burden and delay in the Department's processing of American's joint application with BA in Docket OST-97-2058 with the processing in this case. In particular, American cites the evidence requirements we have imposed on American and BA in that docket, including the updating of previously submitted documents, and demands that the United/Air Canada proposal be subjected to the same burden.

As we have stated before, in evaluating applications for antitrust immunity we examine each proposed alliance "individually based on the circumstances presented in each case."[48]

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[44] Section 41309(c)(2).

[45] *Id.*

[46] Combined Transborder Origin-Destination Survey (Data Bank 9), Calendar Year 1995.

[47] See, *e.g.*, Office of International Aviation, *The Impact of the New US-Canada Aviation Agreement At Its Second Anniversary*, April 1997.

[48] Order 97-5-7 at 4. See also Orders 97-1-15 and 96-11-12.

As correctly noted by the Joint Applicants, the environment and circumstances of the proposed United/Air Canada alliance differ substantially from those of the alliance proposed by American and BA in Docket OST-97-2058. Rather, the proposal before us here most nearly resembles the alliance proposed by American and Canadian Airlines International in Docket OST-95-792 and approved by the Department in Order 96-7-21. We have required the Joint Applicants in this case to provide essentially identical data as we required American and CAI to provide in Docket OST-95-792. As a consequence, our grant of approval and immunity here will in no way disadvantage American, on whom we placed a similar (or smaller) evidentiary burden in a similar proceeding.

Furthermore, the United States and the United Kingdom are still negotiating the terms of an open skies agreement. Until such an agreement is reached, we will not grant requests for antitrust immunity in the U.S.-U.K. market. In addition, the U.S.-Canada bilateral has now been in effect for nearly three years. As a result, the Department has a large volume of recurrently reported data (including T-100 and T-100(f) reports and transborder O&D data) for periods after most transborder markets were opened. We have been able to rely to a great extent on these data in evaluating the impact of the proposed United/Air Canada alliance on transborder competition. However, we currently have no equivalent O&D data from U.K. carriers, including BA. Moreover, the American/BA proposal involves operations at London's Heathrow airport, one of the world's busiest and most congested airports, where slot access is extremely limited. Together, the foregoing factors force us to require American and BA to submit more expansive evidentiary materials than we required of the instant United/Air Canada proposal or the previous American/CAI alliance.

Most importantly, American has presented no reason why the data and evidence now in the record are insufficient to proceed to an immediate decision in this case. In addition, the Joint Applicants, in response to our directive in Order 97-6-30, have now filed substantial data on the Star Alliance. We have reviewed that information, and we have concluded that this case is now ripe for decision.

### B. Competitive Issues

Delta argues that the Department's proposed grant of immunity in U.S.-Toronto markets should be deferred until expiry of the existing entry restrictions on U.S. carriers in February 1998.

Although Delta argues that immunity in U.S.-Toronto markets should be delayed, it does not directly challenge our tentative finding that the proposed United/Air Canada alliance will not have a significant adverse effect in U.S.-Toronto markets. Instead, Delta alleges that grant of immunity in Toronto markets before complete lifting of entry restrictions would give the United/Air Canada alliance an "unfair competitive advantage,"[49] and

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[49] Objections of Delta at 6.

further that there continues to be an unsatisfied U.S.-carrier demand for access to the Toronto market.

To support these claims, Delta presents its inability to increase its own frequencies in the Atlanta-Toronto market and its inability to operate Cincinnati-Toronto service with its own aircraft,[50] and notes that new entrants at Toronto are currently limited to two daily round trips. We do not view these temporary limitations on frequencies to be significant, however, particularly in view of the imminent opening to unlimited U.S.-carrier entry to Toronto, where all restrictions on both routes and frequencies expire on February 23, 1998. Because of this imminent expiration of entry restrictions on transborder operations at Toronto, we do not consider the remaining bilateral limitations on U.S.-flag transborder operations to warrant further limitations on the alliance. Furthermore, Delta overstates the magnitude of the current limitations. In particular, although each new Toronto *designation* is limited to two daily round trips, the third-year designations under the bilateral permitted frequencies to be added to previously awarded authority. As a consequence, the Department has awarded Delta a total of four daily round trips in the Atlanta-Toronto market (two from the first-year designations, and two from the third-year designations).[51] Similarly, Continental now operates four daily Newark-Toronto round trips (two from the second-year and two from the third-year designations).[52] These double designations have enabled Delta and Continental to respond vigorously to the competitive service in these markets offered by Air Canada.

Moreover, Delta fails to show that existing competitive services--whether operated by Delta itself, by Delta's code-sharing partners, or by other carriers or alliances--would be unable to prevent the United/Air Canada alliance from raising prices above, or reducing service below, competitive levels, particularly for the short remaining duration of entry restrictions at Toronto. Consequently, we will affirm our tentative findings in Order 97-6-30 that the proposed alliance will not significantly reduce competition in any relevant market, including U.S.-Toronto markets.

Accordingly, we have determined to affirm our tentative findings that **"**delaying the effectiveness of immunity would serve no significant public interest purpose.**"**[53] The U.S.-Canada bilateral agreement provides for the automatic lifting in five months of all restrictions on the ability of U.S.-flag carriers to serve the U.S.-Toronto market, including route designations and frequency, without further governmental action. We view this as of significant importance. As we stated in our show-cause order, "Absent this automaticity and short period, we would not grant immunity for the U.S.-Toronto

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[50] In the Cincinnati-Toronto market, Delta provides only commuter service operated by its code-sharing partner Comair. See Objections of Delta at 5.

[51] Delta was free to seek more than one designation in Docket OST-96-1538. Nevertheless, Delta requested only additional Atlanta-Toronto authority in that case, and did not seek Cincinnati-Toronto authority.

[52] Order 96-11-11, issued November 15, 1996.

[53] Order 97-6-30, at 18.

routes."[54] Since Toronto will become *de jure* open to unlimited entry on February 24, 1998, however, the question of immunity for the Toronto markets is reduced primarily to one of timing.

### C. The Star Alliance

Delta urges the Department to defer issuance of a final order until we have reviewed the issues regarding the overlapping Star Alliance. We have examined the additional Star Alliance materials filed by the Joint Applicants, and have concluded that the proposed Star Alliance arrangements will not have a material impact on the instant United/Air Canada alliance.

In particular, the participants of the Star Alliance do not plan to engage in price or capacity coordination (except to the extent of timing of connecting flights) and do not seek antitrust immunity for the Star Alliance. Rather, the participants propose to coordinate connections and frequent-flyer programs, relocate airport gates to provide closer proximity (and, hence, more convenient connections), provide reciprocal lounge access, and improve and standardize on-board services. Members will maintain their own separate corporate identities and pursue their own individual corporate strategies.

In addition, the Joint Applicants do not plan to integrate their transborder code-sharing operations under the instant application with those of other Star Alliance carriers, or to permit participation by other Star Alliance members in the United/Air Canada alliance's joint yield management, pricing, or scheduling of transborder services.

Finally and most importantly, the U.S.-Canada agreement does not provide for third-country code-sharing operations. As a consequence, the Joint Applicants have not sought, nor will we grant, approval and immunity for third-country operations. Furthermore, pursuant to the U.S.-Canada agreement, the Department will continue to withhold approval of third-country code-sharing applications involving Canada.[55] These limitations on third-country code-sharing will help ensure that the Star Alliance will not significantly increase the market power of the United/Air Canada alliance in transborder markets. Accordingly, we have determined to finalize our tentative findings and conclusions without further delay.

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

In the Order to Show Cause we described the antitrust analysis required by section 41309. We tentatively found that relevant markets included the U.S.-Canada, various city-pair markets, the overall U.S.-Toronto market, and the transborder behind- and beyond-

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[54] *Id.*, at 19.

[55] See, *e.g.*, Order 97-9-6, September 5, 1997, where we withheld approval of proposed code-sharing operations of Air Canada and SAS in the Copenhagen/Oslo/Stockholm-Newark-Halifax/ Montreal/ Toronto/Yorktown markets, and in the Copenhagen/Oslo/Stockholm-Seattle-Vancouver markets.

gateway markets. Our analysis indicated that implementation of the Alliance Agreement, as conditioned, would not significantly reduce competition in the U.S.-Canada market, in the U.S.-Toronto market,[56] or in the behind- and beyond-gateway transborder markets. We will make final our tentative findings in that regard.

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

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

Approval under section 41309 requires that an agreement not be adverse to the public interest. Granting antitrust immunity under section 41308 requires that the exemption is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity if the parties to such an agreement would not otherwise go forward without it, and we find that grant of antitrust immunity is required by the public interest.

Since the alliance partners will be ending their competitive service entirely in several nonstop markets, they could be exposed to liability under the antitrust laws if we did not grant immunity. The applicants assert that they would not proceed with the alliance in the absence of such immunity. Based on the above, we found that United and Air Canada are unlikely to proceed with the Alliance Agreement without immunity. No party to this proceeding has disputed these findings.

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

No party opposes the imposition of an Origin-Destination Survey of Airline Passenger Traffic (O&D Survey) reporting requirement. However, to further ensure that our grant of antitrust immunity does not lead to anticompetitive consequences, we have decided to grant confidentiality to Air Canada's Origin-Destination data reports and special reports on code-share passengers. Currently, we grant confidential treatment to international Origin-Destination data. We provide these data confidential treatment because of the potentially damaging competitive impact on U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data

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56 Except in the Chicago/San Francisco-Toronto markets, where the Joint Applicants are significant competitors to each other, and where they undertook to exclude from the scope of their requested immunity capacity, fares, and yield management decisions for particular U.S.-source local passengers, consistent with Appendix A.

covering the operations of foreign air carriers that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).

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

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

We affirm our directive that if the Joint Applicants choose to operate under a common name or use common brands, including the "Star Alliance" brand, in a manner that implies that they are a single entity, they must obtain approval from the Department before commencing sales, solicitations, marketing, or operations under that brand.

## VII. SUMMARY

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

Furthermore, we affirm our determination to direct Air Canada to report O&D Survey data, as defined in this order. We also direct the Joint Applicants to submit any subsidiary and/or subsequent agreement(s) with the Department for prior approval (see footnote 40, *supra*).

Finally, within eighteen months of the issuance of this order, we intend to review, in cooperation with the DOJ, the Joint Applicants' operations to ensure that the effects of the immunity have been consistent with our pro-competitive and pro-consumer objectives.

ACCORDINGLY:

1. We approve and grant antitrust immunity, as discussed by this order, to the Alliance Expansion Agreement between United Air Lines, Inc. and Air Canada and their subsidiaries and affiliates, insofar as it relates to foreign air transportation, subject to the following limits and conditions as set forth in (a), (b), and (c) below;

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

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

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

2. We direct United Air Lines, Inc. and Air Canada and their subsidiaries and affiliates, to resubmit their Alliance Expansion Agreement five years from the date of issuance of this Order;

3. We direct Air Canada to report, commencing with the third quarter of 1997, full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its U.S. alliance partner United Air Lines, Inc.);

4. We direct United Air Lines, Inc. and Air Canada and their subsidiaries and affiliates to submit any subsequent subsidiary agreement(s) implementing the Alliance Agreements for prior approval;[57]

5. We defer action on the motions of United Air Lines, Inc., Air Canada, and Delta Air Lines, Inc., for confidential treatment of certain data and information;

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[57] See footnote 40, p. 10, *supra*.

6. This order is effective immediately; and

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

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

# CONDITIONS GOVERNING THE ANTITRUST IMMUNITY FOR THE ALLIANCE EXPANSION AGREEMENT BETWEEN UNITED AIR LINES, INC., AND AIR CANADA

**Grant of Immunity**
The Department grants immunity from the antitrust laws to United Air Lines, Inc. and Air Canada, and their affiliates, for the Alliance Expansion Agreement dated May 31, 1996, between United Air Lines, Inc. and Air Canada and for any agreement incorporated in or pursuant to the Alliance Expansion Agreement.

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

**Exceptions to limitations on immunity**
Despite the foregoing limitations, antitrust immunity shall extend to the joint development, implementation, promotion, or sale by the parties (including but not limited to pricing, inventory or yield management coordination, or pooling of revenues) of the following with respect to local U.S.-point-of-sale passengers flying nonstop between Chicago/Toronto and/or San Francisco/Toronto: corporate fare products; consolidator/wholesaler fare products; promotional fare products; group fare products; and fares and bids for government travel or other traffic that either party is prohibited by law from carrying on services offered under its own code. For immunity to apply, however: (I) in the case of corporate fare products and group fare products, local U.S.-point-of-sale nonstop Chicago/Toronto and San Francisco/Toronto traffic shall constitute no more than 25% of a corporations' or group's anticipated travel (measured in flight segments) under its contract with United and Air Canada; and (ii) in the case of consolidator/wholesaler fare products and promotional fare products, the fare products must include similar types of fares for travel in at least 25 city pairs in addition to Chicago/Toronto and/or San Francisco/Toronto.

In addition, despite the foregoing limitations, antitrust immunity shall extend to the joint development, implementation, promotion or sale by the parties (including but not limited to pricing, inventory or yield management coordination, or pooling of revenues) of restricted fares with respect to local U.S.-point-of-sale passengers flying nonstop between San Francisco/Toronto.

Appendix A

**Definitions for purposes of this Order**

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

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

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

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

“Restricted fares” means published fares that require either a Saturday night stay or a minimum advance purchase of at least seven days.

**Clarification of scope of limitation on immunity**

Under no circumstances shall the limitations on antitrust immunity set forth above be construed to limit the parties' antitrust immunity for activities jointly undertaken pursuant to the Alliance Expansion Agreement other than as specifically set forth in this Order. Immunized activities include, without limitation: decisions by the parties regarding the total number frequencies and types of aircraft to operate on the Chicago/Toronto and San Francisco/Toronto routes, and the configuration of such aircraft; coordination of pricing, inventory and yield management, and pooling of revenues, with respect to non-local passengers traveling on nonstop flights on the Chicago/Toronto and San Francisco/Toronto routes; the provision by one party to the other of access to its internal reservations system to the extent necessary for use exclusively in checking-in passengers or making sales to or reservations for the general public at ticketing or reservations facilities; joint cargo programs; coordination of frequent flyer programs; coordination of travel agency commission and override programs and policies; and coordination of terms and charges for ancillary passenger services.

Appendix A

**Review of limitations on immunity**

Within eighteen months from the date that this Order becomes final, or at any time upon application of the parties, the Department will review the limitations on antitrust immunity set forth above to determine whether they should be discontinued or modified in light of: current competitive conditions in the Chicago/Toronto and/or San Francisco/Toronto city pairs; the efficiencies to be achieved by the parties from further integration that would be made possible by discontinuation of the limitations on immunity, when balanced against any potential for harm to competition from such a discontinuation; regulatory conditions applicable to competing alliances; or other factors that the Department may deem appropriate.