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Order 2002-2-4

155442

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



Issued by the Department of Transportation  
on the 7th day of February, 2002  
SERVED: February 7, 2002

U.S.-U.K. Alliance Case

Docket OST-2001-11029 - 81

**ORDER DENYING MOTION**

On January 31, 2002, Continental, Delta, and Northwest filed a motion asking us to dismiss the *U.S.-U.K. Alliance Case*. By this order, we deny that motion.

**Motion to Dismiss**

**Continental, Delta, and Northwest** (the "Joint Movants") argue in their Motion to Dismiss that these proceedings have become moot, based on the applicants' (American and British Airways) January 25 press release responding to the Department's show cause order. Principally, they contend that "consideration of the alliances at issue in this proceeding is dependent upon negotiation of an Open Skies agreement between the U.S. and the U.K. and that the U.K. has insisted that satisfactory approval of, and antitrust immunity for, an American/British Airways alliance is a prerequisite to the U.K.'s agreement to Open Skies," and that based on AA/BA's joint public response, the U.K. has cancelled negotiations with the U.S. pertaining to an Open Skies agreement.

**Pleadings**

**Virgin Atlantic Airways** supports this motion in its answer filed February 6, 2002, accompanied by a motion to file late (which we will grant). In addition to contending that further proceedings would be futile due to the U.K. precondition of regulatory approval of the AA/BA alliance before an Open Skies agreement can be reached, Virgin argues that the conclusion of any such agreement is precluded by European Community law. In support of this position, Virgin relies on the Advisory Opinion of the Advocate General for the Commission of European Communities, issued January 31, 2002, which called into question the compatibility of certain provisions of Open Skies agreements negotiated by member states, with Community law.

**United Airlines, British Midland (bmi) and other Star Alliance carriers**<sup>1</sup> filed an answer on February 5, 2002, in opposition to the Joint Movants' Motion to Dismiss. As joint applicants in this proceeding, United and bmi maintain a continued interest in pursuing an Open Skies Agreement with the United Kingdom. It is their position that dismissal at this juncture would be premature given the tentative nature of the show cause order, as well as their assertion that the United and bmi have a due process right to a final decision on their applications.<sup>2</sup> They further argue that a dismissal at this time would be based on the private commercial concerns of the Joint Movants, rather than the public interest.

**American Airlines and British Airways** also filed a joint answer on February 5<sup>3</sup>. They state that the motion should be denied. They argue that the show cause order provides an opportunity to object, and that they intend to submit objections. AA/BA further state that the "proposed alliance agreement between American and British Airways remains in place."

**Federal Express** also filed an answer in opposition to the Motion to Dismiss. Citing the urgency for establishment of an U.S.-U.K. Open Skies agreement, Federal Express argues that granting dismissal would effectively eliminate the opportunity for further negotiation and compromise at a point in which the process has not been allowed to run its course. It contends that all participants have a due process right to respond to the show cause order, and that not permitting them to do so will preclude the possibility that a satisfactory solution could be reached. Federal Express also notes that the European AG's Advisory Opinion is not binding upon member states, and moreover, argues it does not prohibit the negotiation of bilateral open skies agreements.

### **Decision**

In their Motion to Dismiss, Joint Movants incorrectly assert that U.S. – U.K. Open Skies negotiations have been cancelled. The British Government (HMG) has not "cancelled" the negotiations. In light of the show cause order, HMG has deferred the talks pending its further consideration. We therefore find that a critical element of the joint movants' request has not been satisfied and does not constitute a basis for granting their motion.

Furthermore, as pointed out by the Joint Applicants, as well as by Federal Express, the parties have not yet had the opportunity to comment on the show cause order. The

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<sup>1</sup> Austrian Airlines, Oesterreichische Luftverkehrs AG, Lauda Air Luftfahrt AG ("Austrian Group"), Deutsche Lufthansa AG ("Lufthansa") and Scandinavian Airlines System ("SAS").

<sup>2</sup> In addition to AA/BA's application for antitrust immunity, United/bmi are awaiting a decision regarding authority to code share on Heathrow services.

<sup>3</sup> On February 1, 2002, a letter from D.J. Carty, Chairman, President, and CEO of American Airlines addressed to Secretary of Transportation Norman Mineta and Secretary of State Colin Powell was filed in the record of this case and duly served upon all parties. It will be considered a comment or objection to the show cause order of January 25, 2002, and is considered part of the docket for these proceedings. All parties thus will have the opportunity to comment on Mr. Carty's arguments and proposals.

parties should have an opportunity to file a response to the show cause order, so that they may voice their concerns and opinions. It would therefore not be in the public interest to grant the joint movants' motion.

**ACCORDINGLY,**

1. We deny the Motion of Continental, Delta, and Northwest Airlines to Dismiss this proceeding; and
2. We grant the motion of Virgin Atlantic to file late.

By:

**READ C. VAN DE WATER**  
Assistant Secretary  
for Aviation and International Affairs

(SEAL)

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