

138874

Order 2001-9-12



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

Issued by the Department of Transportation
on the 17th day of September, 2001

Served: September 17, 2001

Joint application of

**AMERICAN AIRLINES, INC.
AND
BRITISH AIRWAYS PLC**

under 49 USC §§ 41308 & 41309 for approval of
and antitrust immunity for agreement

Docket OST-2001-10387 - 57

Joint application of

**AMERICAN AIRLINES, INC.
AND
BRITISH AIRWAYS PLC**

under 14 CFR Part 212 for statements of authorization
(blanket code-shares) and under 49 USC § 40109
for related exemption authority

Docket OST-2001-10388 - 47

ORDER

Introduction

American Airlines and British Airways have filed an antitrust immunity application with the Department. The Department then issued a notice, which stated that the application was substantially complete and that comments were due by September 21, 2001.

Pleadings

Numerous pleadings have been filed with the Department pertaining to the granting of antitrust immunity for American Airlines and British Airways (AA/BA). On August 31, 2001, Continental Airlines filed a Motion to Dismiss. On September 5, 2001, Northwest filed a Motion for Extension of Procedural Dates, and Answer supporting Continental's motion.¹ Delta Airlines has filed an Answer to the Motion to Dismiss of Continental Airlines. Delta and Continental filed Answers to the Motion of Northwest Airlines for the Extension of Procedural Dates. Virgin Atlantic Airways filed an Answer to the Motions of Continental Airlines and Northwest Airlines.

¹ Northwest Airlines also filed a First Motion for Production of Additional Data that is being considered separately.

American Airlines and British Airways filed a Joint Answer opposing Continental's and Northwest's motions. Federal Express (FedEx) filed an Answer to Continental's Motion to Dismiss.² The City of Houston and the Greater Houston Partnership have filed an Answer as well. Further, the Air Carrier Association of America (ACAA) filed an Answer in Support of Northwest Airlines Motion for Extension of Procedural Dates.³

Position of the Parties

Continental argues in its Motion to Dismiss that, even if an open skies agreement is achieved, it must provide for a large number of slots to be effective and competitive for U.S. carriers. Continental also asserts that it will be deprived of due process rights by denying it extra time for reviewing AA/BA confidential documents. Continental claims that as part of the alliance, AA and BA are seeking to dominate the U.S. – London routes, as well as providing BA with effective access to domestic U.S. traffic. Continental argues that the Department should dismiss the AA/BA application until there is a *de facto* open skies agreement. If not, then the Department should grant the 120-day extension for answers to AA/BA applications, as recommended by Northwest. The Department must also consider the AA/BA application, together with the United and British Midland antitrust application.

Delta agrees in its Answer to the Motion of Northwest that the 21-day answer period is unrealistic and inadequate due to the unique circumstances of the case. Thus, Delta supports the request for a 120-day extension of the answer period. It also urges the Department to defer the application by AA/BA until a *de facto* open skies agreement is in place that will allow U.S. carriers the opportunity to provide competitive service on U.S.–London Heathrow routes. Delta contends that the fall meeting scheduled between the U.S. and the U.K. is a “far cry” from a true meeting of the minds on the issue of open skies and would not lead to U.S. carrier access in Heathrow. Delta also agrees with Continental Airline's Motion to Dismiss. Delta argues that negotiations with the U.K. have not even been scheduled. Delta also argues that without open skies, the Department is conducting a wasteful proceeding. Moreover, Delta maintains the position that the Department should not consider an application by AA/BA until the Department of Justice has evaluated the antitrust issues raised by the proposed alliance. Delta argues that even with open skies, U.S. airlines would not be able to gain meaningful competitive access to London Heathrow Airport. It argues that Heathrow is already running at full capacity and that it would be necessary to require carriers to give up flight slots in order to ensure meaningful and competitive access for U.S. carriers. Agreeing further with Continental's Motion to Dismiss, Delta claims in its Answer that the Department should establish an answer date no earlier than 60 days after an Order is issued on Continental's Motion.

Northwest argues in its Motion for the Extension of Procedural Dates that answers to the application by AA/BA should be due no less than 120 days from the date of the Notice declaring the application complete. Further, AA/BA should be required to make confidential copies available in two Washington locations. In Northwest's Answer supporting Continental's Motion, it claims that it is against public policy for the Department simultaneously to consider an application from AA/BA and negotiate an “open skies” agreement with the U.K. Government. Northwest states that AA and BA previously filed an application with the Department under

² At the same time, Federal Express also filed a Motion for Leave to File Late, which we will grant.

³ The Air Carrier Association of America full time members are as follows: Sun Country Airlines, Spirit Airlines, AirTran Airways, Vanguard Airlines, and Frontier Airlines. Associate members include small and medium sized communities and airports.

similar circumstances, which was dismissed by the Department. Northwest also states that the United Airlines and British Midland application for antitrust immunity should be considered simultaneously with AA/BA because it involves the analysis of equivalent issues. Northwest further argues that the European Commission (EC) has asserted that the U.K. lacks competence to negotiate bilateral aviation agreements with the U.S.⁴

Virgin Atlantic Airways agrees fully with Continental's Motion that is supported by Northwest. Virgin argues that it is unreasonable to review the application when there are no assurances of an open skies agreement. Virgin also argues that Heathrow's saturated condition would not allow competition even if an open skies agreement were signed. It claims that the Department is wasting time and resources, since a similar application was filed 5 years ago and terminated due to the lack of an open skies agreement. Virgin agrees with Continental that the time for parties to respond to the application should be extended until an open skies agreement is entered into with the U.K. Virgin also supports Northwest's alternative request for extending the deadline for answers.

American Airlines and British Airways filed a Joint Answer in Opposition to the Motion to Dismiss of Continental Airlines and to the Motion for Extension of Procedural Dates of Northwest Airlines. AA and BA argue that "Continental, Northwest, and Delta are only frustrating bilateral efforts with the U.S. and the U.K."⁵ They assert that the actions sought by the airlines would only delay an open skies agreement with the United Kingdom. Moreover, AA and BA argue that the U.K. will not enter into an open skies agreement without assurances that BA will be given effective access to the U.S. domestic market, which can only be attained by granting antitrust immunity with AA. They also argue that "thirty-five days is more than sufficient to enable diligent parties to review all of the confidential materials submitted with the application."⁶ AA and BA argue that the pending ECJ case must not delay the review of the AA/BA alliance and that European law does not prohibit the parties from entering into an agreement while the case is pending with EC competition authorities.

FedEx Corporation argues that Continental's argument in its Motion to Dismiss was inconsistent with the Department's definition of open skies because it ignores the needs of air express/cargo carriers for unrestricted access to points beyond the U.K.⁷ FedEx also argues in the Answer Opposing the Motion to Dismiss of Continental Airlines that dismissing the AA/BA application "would undermine, not further, U.S. efforts to achieve open skies with the United Kingdom."⁸

The City of Houston has filed an Answer agreeing with Continental and Northwest.

⁴ The European Court of Justice (ECJ) is currently adjudicating this issue. Northwest contends that this factor is pressuring the U.S. and the U.K. to move quickly and reach a new bilateral agreement before the ECJ issues its decision. Further, the EC has issued a proposal that would prohibit the sale or lease of slots at all European Union (EU) airports. Although Northwest concedes that leasing is not a meaningful means of accessing Heathrow, they must have the benefit of knowing whether slots might be available in order to have a fair opportunity to answer in this proceeding. Answer of Northwest Airlines at 7.

⁵ Joint Answer of American Airlines and British Airways at 2.

⁶ Joint Answer of American Airlines and British Airways at 5.

⁷ According to FedEx, "the Department's definition of open skies includes two key elements not included in Continental's motion: 1) open entry on all routes, and 2) no restrictions on intermediate and beyond rights." It claims that U.S. carriers do not have access to fifth-freedom traffic in the U.K. FedEx argues that, "all U.S. carriers need access to fifth-freedom markets beyond the U.K. to compete effectively in the global marketplace." Answer of FedEx at 4.

⁸ Answer of Federal Express Corporation Opposing Motion to Dismiss of Continental Airlines at 1.

The Air Carrier Association of America (ACAA) agrees with Northwest in its Answer in Support of Northwest Airlines' Motion for Extension of Procedural Dates. The AACA claims that the Department should look at both the international impact of the proposed AA/BA alliance, and its domestic impact as well.

Decision

We have decided to extend the date for the filing of answers to the subject application to October 19, 2001, and to extend the date for the filing of replies to the answers to October 26, 2001. We have also decided to deny the motions of Continental and Northwest in all other respects.

It has been the policy of the U.S. Government to negotiate and implement open skies agreements with countries throughout the world. We here enjoy a unique opportunity to reach this goal with the United Kingdom. We understand, however, that the U.K. is likely to be unwilling to sign an open skies agreement unless and until we have granted the applicant's request for approval and antitrust immunity. Because of a pending challenge to the U.K.'s authority to sign a bilateral aviation services agreement with the United States, we must act promptly on the application filed here by American and British Airways. Currently, each member state of the European Union negotiates separately its bilateral aviation relations with the United States. The Commission of the European Union has asked the European Court of Justice to rule that the Commission – and not individual member states – is the appropriate party to negotiate aviation relations with the United States. The ECJ is expected to issue its ruling soon. A favorable ruling for the Commission could seriously inhibit our ability to reach an Open-Skies agreement with the United Kingdom.

Northwest argues that the pending European Court of Justice case may delay the Commission's review of the proposed alliance, and that the Joint Applicants could not implement that alliance without the Commission's approval. We agree with the joint applicants that Northwest's arguments are not supported by the facts. See Joint Answer, pp. 3-4. We also believe that that it would not be in the public interest to refuse to consider the merits of the application based on speculation as to what action may be taken with respect to the proposed alliance in other fora.

We have determined that we can process the case without undue delay while at the same time providing all interested persons with sufficient time to analyze adequately and comment fully on all material in the public and non-public record. We have already taken significant steps to enhance the ability of all interested persons to participate effectively in this proceeding. We have granted access to all non-public documents to the parties by affidavit (as is our normal procedure), and we have established procedures to facilitate that access. We have directed the applicants to file additional copies of their confidential exhibits. We have also allowed persons who file affidavits to reproduce commercially sensitive confidential materials submitted by the applicants. We are requiring the parties to destroy or return to the applicants all copies of the confidential materials when our decision on this case has become final, either after the completion of judicial review or the expiration of the time for petitioning for judicial review.

Moreover, after careful consideration of all of the pleadings filed in this case, we have decided that it is in the public interest to extend substantially the time for the filing of answers to the joint application. We believe that the steps that we have taken to ensure effective participation in this proceeding provide all parties with the opportunity to respond to the joint application, and that

our actions accommodate both the public need to proceed in this case and the positions of the petitioners.

As noted, the existence of an open skies agreement is one necessary precondition for considering the approval and grant of immunity to airline alliances such as the one at issue in this proceeding. It is our intention to reach such an arrangement with the U.K. before we make our tentative decision in this case. In this regard, as Continental notes, we have scheduled talks with the U.K. We have already received assurances from representatives of the U.K. that the U.K. also intends to reach full agreement on a new open-skies accord before a tentative decision in this case. Therefore, any analysis of the impact of the proposed alliance on competition should presume the existence of an U.S.-U.K. open skies agreement that contains all of the essential elements of our Model Open-Skies agreements, including those elements enumerated by FedEx.

Our procedures, as amended, will give the parties an adequate opportunity to provide their analysis of that impact and to participate in the development of a record on this issue. It will also provide them with the opportunity to address the impact of slot restrictions at London's Gatwick and Heathrow airports on the ability of U.S. airlines to enter and compete effectively in relevant markets, and to propose remedies for ensuring effective access to those airports if they believe that slot restrictions would otherwise prevent such access. Since the ability of U.S. airlines to serve those airports is a critical consideration in our evaluation of the proposed alliance, we will carefully examine all evidence of record on this issue in reaching a decision in this case.

Continental and Northwest argue that we must consider the subject joint application and the proposed alliance between United Air Lines and British Midland at the same time. However, at this point we have not established procedures and procedural dates for considering the UAL/bmi application because those applicants have not submitted all of the information needed to process their application.

With respect to the argument of ACCA that we consider the domestic implications of approval of this application, we will consider its comments on the merits as appropriate.

Against this background, we find no merit in Continental's argument that it would be denied due process without a much longer answer period. Nor do we see any other reasons for dismissing or otherwise materially delaying this proceeding.

Parties are authorized to serve pleadings by fax or by E-mail in this proceeding.

ACCORDINGLY:

1. We extend the time for filing answers to the Joint Application in Dockets OST-2001-10387 and OST-2001-10388 to October 19, 2001 and the time for filing replies to answers in those dockets to October 26, 2001;
2. We deny the motion of Continental Airlines to dismiss this proceeding in those dockets;
3. We grant the motion of Federal Express to file an unauthorized document;
4. Immediately after the completion of any judicial review of our final decision in this docket or the expiration of the 60-day period within which a person may petition for judicial review, all persons who have filed confidentiality affidavits in this proceeding are hereby

directed to file a further affidavit stating that all copies of the applicants' confidential materials have been destroyed or returned to the applicants; and

5. We deny the motion of Northwest Airlines For Extension of Procedural Dates in those dockets to the extent not granted in this Order.

By:

SUSAN MCDERMOTT
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

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