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Order 2001-9-15



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

Issued by the Department of Transportation
on the 24th day of September, 2001

Served: September 24, 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 - 64

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 - 54

ORDER

Introduction

On August 10, 2001, American Airlines and British Airways ("Applicants") filed a joint application with the Department for approval of and antitrust immunity for an alliance agreement between them. Upon determining that the application was substantially complete, the Department issued a Notice setting September 20 as the deadline for third-party answers to the joint application and September 27 as the deadline for replies to any answers. On September 17, 2001, the Department issued Order 2001-9-12 extending the answer period until October 19 and the reply period until October 26.

Pleadings

On September 10, 2001, Northwest Airlines (NW) filed a First Motion for Production of Additional Data. Continental Airlines (CO) and Delta Air Lines filed answers in support of NW's motion. The Applicants filed a joint answer in opposition to NW's motion.

Position of the Parties

Northwest raises in its First Motion for Production of Additional Data the question of whether London Heathrow (LHR) and London Gatwick (LGW) are, in fact, substitutes in the same market. In this regard, NW argues that the Department has a duty to develop a sufficient factual basis in order to adequately assess the effects of the Applicants' proposed alliance agreement and that such a basis must include data relating to the potential treatment of LHR and LGW as separate markets. NW argues that the Applicants must therefore submit certain data listed in items 1-4 of their motion. Specifically, NW urges that the Applicants provide data from their 1995 and 2000 operations showing the origin and destination (O&D) passenger traffic between various U.S. cities and Heathrow (LHR), Gatwick (LGW), and Stansted (STN) and that this data be broken out by individual unrestricted fare classes (F, J, and Y) and all other fare classes. NW argues that the Applicants must also provide the Department with various revenue figures corresponding to this O&D data and to O&D data for the total traffic between the U.S. and LHR, LGW, and STN.

Furthermore, NW argues that the Applicants must submit to the Department additional information, described in items 5-8 of their motion, regarding their plans for up to three years after final government approval of the proposed alliance for various LHR, LGW, and STN routes and slots. Specifically, NW urges that the Applicants specify: the London airport to be served by every route listed in Schedule 2-2 of their Codeshare Agreement; the source of any LHR slot that the Applicants will use to "fund" any U.S.-London route listed in Schedule 2-2 that they plan to transfer from LGW to LHR; the U.K gateway that currently serves each of the points listed in Schedule 2-1 of the Codeshare Agreement and that will serve each of these points during the first year after final government approval of the proposed alliance; and the Europe-, Africa-, or Middle East-London routes listed in Schedule 2-1 that the Applicants plan to add to LHR or to transfer from LGW to LHR and the source of the LHR slot that will be used to fund any such addition or transfer.

Continental supports NW. CO states that the data that NW requests are essential to any "meaningful" analysis of the Applicants' proposed alliance agreement and urges the Department to grant NW's motion. CO argues, among other things, that such an analysis must focus on whether LHR and LGW constitute separate markets. Assuming that the Department grants NW's motion, CO requests that the Department extend the deadline for answers to the joint application until after all parties have had "ample" time to evaluate the data in light of repercussions of the terrorist attacks on the Pentagon and the World Trade Center. Specifically, CO proposes that the Department extend the date for answers until 120 days after the Applicants have submitted the additional data. CO states that the exigencies arising from these terrible events will continue in the near-term to prevent airline officials from focusing on the data that the Applicants have already disclosed, let alone from focusing on any additional data that the Department would order them to provide.

Delta also supports NW. Delta argues that that the Department and other interested parties must be able to review the Applicants' London traffic and revenue data broken down by airport, rather than in the aggregate as submitted in their joint application. Delta notes that both the U.S. Department of Justice and U.K. trade authorities concluded that LHR was the relevant market for purposes of analyzing the Applicants' previous application for antitrust immunity. Delta also contends that LHR is unable to accommodate the Applicants' current operations, therefore further hampering the ability of competitors to gain entry to LHR should the proposed alliance receive governmental approval.

American Airlines and British Airways filed a joint answer on September 19, opposing NW's motion. They first characterize NW's motion effectively as a Petition for Reconsideration that has been filed late without a motion for leave to do so. They also argue that the Department has already found the application to be complete; that much of the material sought is already available from existing sources, some being officially noticeable; that the Joint Applicants have already filed more data than the applicants in any previous cases; and that they have not yet finalized any schedule changes to be made after implementation of the proposed alliance. They also state that they have previously stated that some information requested is not available. In addition, they argue that CO's request to extend the answer date should not be granted.

Decision

The Applicants submitted data in their joint application that seem to reflect an assumption that all London airports constitute a single market, such that a dominant presence at one airport will not give them market power over the "London market" as a whole. However, both NW, CO, and Delta argue that many travelers do not consider LHR and LGW as substitutes for each other and that an airline with a dominant presence at one airport may therefore have market power in at least some relevant markets at that airport. Accordingly, they argue that the Department should analyze each London airport as a discrete unit, rather than analyze all three London airports in the aggregate.

While we do not here address the merits of this question, we agree with NW that there must be sufficient data in the record of this proceeding to address them. NW requests data that are essential to our analysis of this issue. Although some data are already available through existing sources, in the interest of establishing an easily comprehensible record of this proceeding, we believe that the Applicants are best positioned to compile this data and provide them to the Department. Submission of the data should not be burdensome on the Applicants, and they have not argued that it would be. Moreover, our Notice finding the application complete specifically stated that additional data might be required. Therefore, we grant NW's motion with respect to items 1-5 and 7.

A second issue is the time period for which the applicants should submit projections for items 6 and 8. We find that three years represents too long a period, with any data for the final year necessarily too speculative to be of value. Accordingly, we grant NW's motion with respect to items 6 and 8, but with the modification that the Applicants submit information on their plans from June 1, 2002, to May 31, 2004.

The information described in items 5-8 is crucial to making a reasonable forecast of the public benefits that would result from the Applicants' proposed alliance. The Applicants must use their best efforts to provide the information described in items 5-8 of NW's motion, as limited in time by this order, or a reasonable forecast of their route plans and slot usage. If they cannot provide any information on one or more of these items, they should explain why they are unable to do so. To the extent that schedules are tentative or not final, the information provided should be so qualified.

Finally, we acknowledge that the burdens imposed on airline management and employees by the tragic events of September 11 and their aftermath may make more difficult their efforts to prepare their arguments and analyses in this proceeding. However, while we are sympathetic to the demands placed on the resources of the parties, we strongly believe that we must move forward with the public's business as required by the exigencies of this case, and that the schedule we recently announced will give the parties an adequate opportunity to present their case in this proceeding.

Therefore, we are requiring the Applicants to file these data in the docket within 3 business days of the date of service of this order. We believe that this time frame does not necessitate an extension of the date for answers, which was recently extended to October 19.

ACCORDINGLY,

1. We grant Northwest's First Motion for Production of Additional Information in its entirety with respect to the data listed in items 1-5 and 7;
2. We grant Northwest's First Motion for Production of Additional Information with respect to the information described in items 6 and 8, with the condition that the Applicants provide this information for the period from June 1, 2002, to May 31, 2004;
3. We require American Airlines and British Airways to file the additional evidentiary material set forth in this order no later than three business days from the date of service of this order;
4. We deny Continental Airlines' request that we extend the deadline for answers to the joint application; and
5. We will serve this order on all parties to the captioned dockets.

By:

SUSAN McDERMOTT
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

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http://dms.dot.gov/reports/report_aviation.asp*