



**BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.**

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Applications of	)	
	)	
AMERICAN AIRLINES, INC.	)	Dockets OST-99-6225
and	)	6226
AEROLINEAS ARGENTINAS, S.A.	)	6227
	)	
for exemptions under 49 U.S.C. §40109 and	)	
Statements of Authorization under 14 CFR Part	)	
212	)	
_____	)	

**RESPONSE OF UNITED AIR LINES, INC. AND MOTION FOR LEAVE TO FILE**

United Air Lines, Inc., (“United”) submits the following response to the Joint Reply of American Airlines, Inc. (“American”) and Aerolineas Argentinas, S.A. (“Aerolineas”), dated October 8, 1999, in the above-captioned proceeding<sup>1</sup>:

1. American and Aerolineas assert that United’s opposition to their code-share is motivated by a desire to preclude new service opportunities available under the U.S./Argentina MOC. In fact, United supported the conclusion of an open skies agreement with Argentina in order to create opportunities for new services such as those proposed by United between Los Angeles and Buenos Aires. United opposed and continues to oppose an open skies agreement, however, where it may be gained only at the cost of antitrust immunity for an

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<sup>1</sup> United seeks leave to file this response to address arguments of American and Aerolineas which misrepresent United’s position and to address newly available information relating to LAN Chile’s possible acquisition of Aerolineas. Receipt of United’s timely response will not prejudice any party and will provide the Department with a more complete and balanced record upon which to formulate its decision in this proceeding.

American/Aerolineas alliance. United also opposes new transitional service opportunities that may be exercised only at the cost of approving an anticompetitive code sharing by American/Aerolineas.

Open skies agreements are not ends in themselves. They are concluded in order to create an environment in which market forces, rather than government regulation, determine the level of service and provide the opportunity for more competition. Open skies and expanded transitional service opportunities in the U.S.-Argentina market will not produce the intended competitive benefits, however, if American and Aerolineas are allowed to combine their resources to dominate the market through code-share cooperation and, ultimately, immunity from the antitrust laws.

As United noted at length in its Consolidated Answer, code sharing between American and Aerolineas does not involve cooperation between carriers acting at arm's length. American already exercises control over Aerolineas by appointment of that carrier's top management, a point American and Aerolineas have scrupulously avoided in their joint reply. The Department, however, cannot ignore the already close relationship between American and Aerolineas and must review the degree to which code sharing between two carriers in such a relationship would be anticompetitive, especially in circumstances where the code shares would overlap at the dominant Miami gateway.<sup>2</sup>

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<sup>2</sup> American/Aerolineas criticize United (Reply at 12) for asserting that American "holds a controlling stake in Aerolineas." It was, however, American's hometown newspaper, the Fort Worth Star-Telegram, and not United, that made this assertion. See United Consolidated Answer at 8, n.3. United, as well as the Department, lacks the necessary information to form a conclusion as to the degree of American's corporate control of Aerolineas. It is for that reason  
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In anticipation of objections to their alliance based on its anticompetitive impact, American and Aerolineas sought to include terms in the U.S./Argentina MOC that were intended to secure approval of their alliance, notwithstanding American's control of Aerolineas' senior management and the anti-competitive nature of their code-share service. Thus, Argentina insisted that the transitional capacity increase could not be implemented until code sharing between American and Aerolineas had been approved to the satisfaction of the Argentine government.

Such a provision in a U.S. bilateral agreement is entirely unprecedented. The Department has the obligation to review the code-share arrangement and approve it only to the extent that such approval is consistent with the public interest. The code-sharing provision in the MOC provides that code sharing must "meet the requirements normally applied," which would include the normal competition review by both the Departments of Transportation and Justice. That review should take into account that competition in U.S.-Argentina market has been inhibited for many years by bilaterally-imposed restrictions on carrier capacity. Those artificial capacity restraints continue during the transition period, and this factor must be considered by the U.S. competition authorities in deciding whether immediate code sharing between two of the carriers holding limited frequency allocations is in the public interest while other competitors continue to be restrained in the amount of capacity they can offer.

United fully recognized that the Department's refusal to approve the American/Aerolineas code share to protect competition in the U.S.-Argentina market may indeed

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<sup>2</sup>(...continued)  
that the Department should require American and Aerolineas to submit such information for the record in this proceeding, as United has requested.

delay the implementation of new service opportunities under the MOC (United Consolidated Answer, dated September 29, 1999 at 27). United believes that, if such a delay is necessary to secure a procompetitive result, the delay should be endured for the sake of assuring competition.

American and Aerolineas are now demanding approval of their code share arrangement on the basis of the literal language of an undertaking in the MOC rather than on the basis of public benefits. Indeed, American and Aerolineas have still not explained, after three rounds of pleadings, what public benefits their code share would offer. Such an explanation is particularly important given the overlaps in all of the gateway-to-gateway code-share markets and the lack of connections to code-share points to be served beyond Ezeiza Airport in Buenos Aeries. Reliance on the literal terms of the MOC is inappropriate and is one of the principal reasons that the decision in this proceeding should be made by DOT officials other than those who participated in the negotiation of the MOC.

2. American and Aerolineas seek to equate the provisions of the U.S./Argentina MOC with other recent bilateral agreements where open skies agreements were in some way related to antitrust immunity. In this regard American and Aerolineas cite the U.S./Germany open skies agreement, which became final after the U.S. approved antitrust immunity for the United/Lufthansa alliance. (American/Aerolineas Joint Reply at 13).

The U.S./Germany bilateral arrangements on code sharing and open skies are in no way comparable to those concluded between the U.S. and Argentina. In the first place, the U.S./German transitional regime, under which capacity increases and code sharing were agreed, was not tied to approval of code sharing between United and Lufthansa, as is the case in the

U.S./Argentina MOC. Indeed, at the urging of carriers such as American, the Department deferred approval of portions of the United/Lufthansa code-share arrangement pending further negotiations between the two countries in which the U.S. insisted upon modifications to the agreement relating to the transitional period. See e.g., Orders 93-12-32, 94-1-19, and 94-4-43. United is urging that similar action be taken here to secure a U.S./Argentina transitional regime in which competition can flourish.

Moreover, the U.S./Germany open skies agreement contained no term comparable to that in the U.S./Argentina MOC in which the U.S. delegation purported to bind the Department of Transportation to approval of American/Aerolineas code sharing by a date certain. The U.S. government in fact made clear in the context of the U.S./Germany open skies agreement that it did not consider itself under any obligation to grant antitrust immunity to the United/Lufthansa alliance absent the normal competition review. The German government specifically acknowledged this U.S. position in a side letter dated February 29, 1996, in which it stated its understanding that the U.S. “cannot take action on an [antitrust immunity] application before that application has been duly considered by the competent U.S. agencies, based on evaluation by those agencies, independent of the bilateral negotiation process, of whether the proposed arrangements would be pro-competitive and pro-consumer overall.” Such language with respect to Departmental approval of code sharing is missing from the U.S./Argentina MOC and the Argentine government’s side letter, dated August 12, 1999.<sup>3</sup> If applied literally, as

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<sup>3</sup> The U.S./Argentina MOC contains language indicating the U.S. position that “grant of antitrust immunity [is] the subject of independent regulatory process that cannot be prejudged.” There is no comparable language, however, relating to the process for approval of  
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proposed by American and Aerolineas, this language would preclude the Department of Justice, as well as DOT, from reviewing the competitive impact of their code share, contrary to the procedures normally applied in such reviews.

Finally, and most importantly, competition between the U.S. and Germany and between the U.S. and Europe, which were the relevant markets reviewed in the case of the United/Lufthansa alliance, is in no way comparable to competition between the U.S. and Argentina or the U.S. and South America. In the case of the United/Lufthansa alliance, and other comparable transatlantic alliances, such as those of Northwest/KLM and Delta/Swissair/Sabena/Austrian, antitrust immunity was approved because of the large number of competitors in the relevant markets. For example, between the U.S. and Germany, all major U.S. carriers were offering nonstop service from multiple competing U.S. gateways, providing the assurance of competition for the United/Lufthansa alliance. Moreover, other alliances existed that would compete for U.S.-Germany service over their European hubs. In the case of U.S.-Argentina, on the other hand, competition by U.S. carriers has been restricted by the bilateral and only two U.S. carriers operate. There are no other alliances that can compete with American/Aerolineas over South American hubs comparable to those in Europe.<sup>4</sup> In the U.S.-Germany market, United was

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<sup>3</sup>(...continued)  
code sharing.

<sup>4</sup> American and Aerolineas cite (Joint Reply at 6, 10) the Varig/United alliance as one which would compete with American/Aerolineas for U.S.-Argentina traffic via Sao Paulo. However, American/Aerolineas fail to note that, under the U.S./Brazil agreement, third-country code sharing is not provided. The other regional hub well-located for affording competitive service to Argentina is Santiago, Chile, but American has already entered into an alliance with LAN-Chile, the foreign carrier that dominates Santiago.

a relatively small competitive factor before its alliance with Lufthansa, and services were already being offered by other U.S. carriers from their hubs, providing substantial and intra- and intergateway competition. By contrast, American dominates the U.S.-South America market from its hub at Miami and will increase that dominance, to the exclusion of other carriers, if it is allowed to join with Aerolineas in its proposed alliance.

The bargain struck between the U.S. and Argentina is in an entirely different (and anticompetitive) league from the open skies agreements concluded by the U.S. with Germany and other European countries. The U.S./Argentina MOC and the American/Aerolineas alliance raise unprecedented competition issues, and the action proposed by United in its Consolidated Answer is necessary in order to address these issues in the unique circumstances of the U.S.-Argentina marketplace.<sup>5</sup>

3. American/Aerolineas also argue that United's concerns about the reduction of competition between Miami and Central America in the wake of the approval of the American/TACA Group alliance are based on "the wrong facts." (Joint Reply at 11). American and Aerolineas, however, cite facts relating to Central American service from gateways other than Miami, whereas the reduction in competition between American and the TACA Group is most directly felt at Miami, the largest U.S.-Central America market and one served exclusively by the American/TACA alliance.

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<sup>5</sup> American and Aerolineas somewhat facetiously chide United for requesting U.S. negotiators to recuse themselves from decisionmaking in this case but not in the case of the United/Lufthansa alliance. (Joint Reply at 13) For the reasons set forth above, there was no occasion for recusal in the case of the United/Lufthansa alliance, as is amply demonstrated by the fact that even American, which dredged up every conceivable obstacle in opposition to United's alliance, did not see any need to request such recusal.

In fact, according to Federico Bloch, the CEO of the TACA Group, in a press interview reported yesterday, “capacity reductions by competitors of Grupo TACA have eased downward pressure on its passenger fares . . .” Mr. Bloch went on to state: ““In 1998 and early 1999 we had tremendous fare wars, people positioning themselves for marketshare. I think some of that excess capacity is sort of working its way out.””<sup>6</sup> These statements by the head of the TACA Group, one of the dominant carriers at Miami, fully confirm the concerns raised by United that the combination of American and TACA have had an adverse impact on price competition at Miami, to the detriment of passengers in the largest U.S.-Central America market.

4. Recent press reports also indicate that LAN-Chile is negotiating for the acquisition of Aerolineas.<sup>7</sup> If these negotiations turn out to be successful, it becomes even more critical that the Department obtain the information needed from American and Aerolineas, as well as from LAN-Chile, in order to review the impact their consolidation will have on competition between the U.S. and the entire Southern Cone of South America.

A merger of LAN-Chile, Aerolineas, and American would also include LAN-Peru, which is a subsidiary of LAN-Chile and is on the way to becoming a major Peruvian carrier. Cooperation and elimination of competition among these carriers would create nothing less than a dominant regional airline cartel which would be large enough to exert market control over the entire Southern Cone region of South America.

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<sup>6</sup> Reuters New Service report, datelined Miami, October 19, 1999, and entitled “CEO says Grupo TACA Feels Less Fare Pressure.”

<sup>7</sup> Aviation Daily (October 11, 1999), p. 2 (“LAN Chile Mulling Aerolineas Majority Share Purchase”).

The Department should not delay any longer the institution of a thorough investigation of the cartelization of South America that is being undertaken by American and its partners. This must include the sort of fact-finding urged by United in its Consolidated Answer, expanded to include any plans for acquisition of Aerolineas by LAN-Chile, as well as reconsideration of the American/LAN-Chile alliance approval as urged by United in Docket OST-97-3285.

Respectfully submitted,

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JEFFREY A. MANLEY  
KIRKLAND & ELLIS  
655 Fifteenth Street, NW  
Washington, DC 20005  
(202) 879-5161

Counsel for  
UNITED AIR LINES, INC.

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