

BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Application for Approval of Agreements)
by the International Air Transport)
Association)

Docket OST-2003-14480

COMMENTS OF THE DEPARTMENT OF JUSTICE

On February 7, 2003, the International Air Transport Association (“IATA”) filed for approval of agreements in the above-captioned docket. Of particular concern to the Department of Justice (“DOJ”) is IATA’s request for approval of an agreement reached by IATA members to amend Resolution 502 - Low Density Cargo, which would change the volume conversion factor used to calculate freight rates for low density shipments.¹ DOJ recommends that the Department of Transportation (“DOT”) deny approval of and antitrust immunity for IATA’s proposal to amend Resolution 502. This proposal is effectively a price-fixing agreement to increase rates for low density shippers, and IATA has not demonstrated any offsetting important public benefit or fulfillment of a serious transportation need. Each carrier should be required to determine independently whether and to what extent it wishes to increase, or decrease, low density cargo rates.

¹Freight rates are typically calculated on the basis of actual weight in kilograms (kg), or an imputed weight, whichever is greater. Imputed weight is based on volume. Imputed weight is calculated as cargo volume in cubic centimeters (cc) divided by a volume conversion factor, which is currently 6,000 cc/kg. The proposal would change the volume conversion factor from 6,000 cc/kg to 5,000 cc/kg, thereby resulting in shippers of low density cargo having to pay higher shipping costs. Most affected by this change would be shippers of high-value, low-density goods such as the high-tech, pharmaceutical and flower industries, all of which ship items that have relatively low weights but take up a large amount of cargo capacity on the aircraft due to their packaging requirements.

In addition, DOJ urges DOT to re-activate its now dormant Docket 46928, in order to re-examine whether approval and antitrust immunity should be withdrawn for all IATA agreements on fares or rates charged by United States airlines for passenger tickets or air freight carriage sold in this country to consumers for travel or shipments to and from the United States (the “core U.S. interest”), as well as with respect to IATA agreements on airline fares, rates and charges in other contexts in which United States national interests are strong. Such agreements are contrary to fundamental United States competition policy as set forth in the antitrust laws, and any foreign policy or international comity justifications for immunizing such agreements have further eroded as foreign countries increasingly adopt policies more reliant on market competition.²

²A DOT proceeding to re-examine IATA’s grant of antitrust immunity has been open since 1990, but is currently inactive. See Application of the International Air Transportation Association for Approval of Revised Traffic Conference Provisions, Agreement CAB 1175 as amended (Dep’t Transp.) (No. 46928) (the “1990 Proceeding”). In that proceeding, DOJ filed comments recommending that DOT issue an order for IATA to show cause why approval and antitrust immunity should not be withdrawn for anticompetitive IATA agreements on fares charged by United States airlines for tickets sold in the United States to consumers for travel to and from the United States, and also urged DOT to consider whether approval and immunity should be withdrawn with respect to IATA agreements on airline fares in other contexts where United States national interests are strong. See Comments of the Dep’t of Justice, Application of the International Air Transportation Association for Approval of Revised Traffic Conference Provisions (No. 46928) (“DOJ’s 1990 Comments”). In 1992, DOJ filed reply comments, arguing that the purpose and effect of IATA Tariff Coordination is to raise prices to consumers, while advancing no important public benefit or transportation need. See Reply Comments of the Dep’t of Justice, Application of the International Air Transport Association for Approval of Revised Traffic Conference Provisions (No. 46928) (“DOJ’s 1992 Comments”). DOT has not issued an order in that proceeding, and IATA’s operating provisions for its Tariff Coordinating Conferences continue to receive antitrust immunity. Although DOJ’s comments filed in the 1990 Proceeding focused on passenger fare agreements resulting from the Tariff Coordinating Conferences, DOJ herein recommends analogous action by DOT with respect to cargo rate agreements.

Requirements for Approval and Antitrust Immunity

Section 41309 of Title 49 of the United States Code requires disapproval of an agreement that substantially reduces or eliminates competition, unless the agreement is necessary to meet a serious transportation need or to secure important public benefits, including international comity or foreign policy considerations, and the transportation need it meets or public benefits it generates cannot be secured by reasonably available alternatives that are materially less anticompetitive. Once a necessary and appropriately limited anticompetitive agreement is approved, 49 U.S.C. Section 41308 requires that DOT exempt any person affected by its approval from the operation of the antitrust laws to the extent necessary to enable such a person to proceed under the agreement.³

The Agreement to Amend Resolution 502 Reached by IATA's Cargo Tariff Coordinating Conference is Anticompetitive and Immunity is not Justified

As admitted in IATA's February 7, 2003 filing, the agreement to amend Resolution 502 is a product of the IATA Tariff Coordinating Conferences, which DOT has found to be anticompetitive.⁴ Notwithstanding their recognized anticompetitive effects, DOT approved and immunized these price-fixing conferences nearly twenty years ago based on foreign policy and

³If an agreement is not found to be anticompetitive, exemption from the antitrust laws may not be granted unless it is "required by the public interest." § 41308(b).

⁴Order 85-5-32, Agreements Adopted by the International Air Transport Association relating to the conduct of Traffic Conferences, Agreement 1175, as amended (Dep't Transp. May 6, 1985) (No. 32851). For a history of the CAB's and DOT's findings on the anticompetitive effects of IATA's Tariff Conferences, see Order 81-5-27, Agreements Adopted by the International Air Transport Association relating to the Traffic Conferences at 4, 7 (C.A.B. May 6, 1981) (No. 32851); Order 80-4-113, Agreements adopted by the International Air Transport Association relating to the Traffic Conferences, (C.A.B. April 15, 1980) (No. 32851).

international comity considerations.⁵ The proposed agreement currently before DOT should neither be approved nor given antitrust immunity. It is clearly a price-fixing agreement among horizontal competitors.⁶ This agreement could result in rate increases as high as 20% on a substantial amount of air freight commerce.⁷ Approval and immunity are not warranted under the statute because IATA has not claimed any efficiency justifications nor has it explained the serious transportation need that the agreement would fulfill or public benefits it would generate.

IATA's current application does not proffer any efficiency justifications for its price-fixing agreement to change the low density cargo rate formula. In its February 7, 2003 application, IATA claims only that approval of its proposal to amend Resolution 502 "would not yield fares or rates that are unlawful or injurious to competition." The IATA member United States airline carriers filed, as required, supporting economic justification statements with IATA's application. In these statements, the airlines claim that the "amended density more accurately reflects the current operating conditions, with respect to different types of aircraft and capacities and the less dense nature of the commodities" and that over the past few years "many

⁵Order 85-5-32.

⁶ In certain circumstances, collectively established standards can facilitate efficient pricing. Here, however, IATA has agreed to a pricing formula for low density cargo, which directly affects rate levels. See United States v. Columbia Pictures Indus., 507 F. Supp. 412 (S.D.N.Y. 1980) (The fact that an agreement does not set specific prices but rather an allocation formula for valuation does not remove it from the definition of price-fixing.). See also Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683 (1948) (upholding FTC's cease and desist order against an agreement among competitors to use a "basing point" formula that produced identical delivered prices for each seller at any given location in the United States).

⁷Cargo currently designated as low density is rated at its imputed weight, which is cargo volume in cc's divided by the volume conversion factor of 6,000 cc/kg. Assuming that weight-based rates remain fixed, dividing by a revised volume conversion factor of 5,000 cc/kg implies a rate increase of 20%. Cargo that becomes re-classified as low density under the revised standard could experience a rate increase of 0-20%, depending on cargo density.

aircraft and routes tend to ‘volume out’ before weight limitations are reached.”⁸ The statements also include an estimate of the increased revenue the carriers will receive from the amended formula. There is no discussion, however, as to why IATA members must *jointly* set the rate formula.⁹ IATA has failed to show why individual airlines should not set their own low density formulas in a free market environment.

Furthermore, IATA’s claimed public benefits are implausible and unsupported by any factual showing. IATA’s application asserts that the proposed amendment will advance the public interest in “maintaining good aviation relations with other countries,” without specifying whether those “good aviation relations” are government-to-government, or merely the good relations among competing cartel members that flow naturally from sharing a collusive supra-competitive price increase. Whatever the nature of the “good aviation relations,” the IATA petition fails to explain *why* the agreement is necessary to achieve those good relations. Indeed, the minutes of the Cargo Tariff Conference at which the airlines agreed upon Resolution 502 demonstrate that at least one country may be opposed to a change in the resolution.¹⁰ In fact,

⁸See Economic Justification Statements of American Airlines, Delta Air Lines, Federal Express Corporation, and United Air Lines, Attach. to Application for Approval of Agreements by the International Air Transport Association (Dep’t Transp.) (No. OST-2003-14880).

⁹The parties may argue that IATA rate agreements are not binding upon member carriers, and that individual airlines can and frequently do negotiate alternative rates with their shipper customers. This may reduce the effect of the price-fixing agreement but does not cleanse it of its anticompetitive effect. Some shipments are likely to be carried at the agreed upon rates. Furthermore, the agreed-upon rates can be used by individual carriers as a reference point. The joint agreement promotes higher shipping costs than those which would exist in a competitive market. See, e.g., *Plymouth Dealers Ass’n v. United States*, 279 F.2d 128 (9th Cir. 1960) (illegality of agreed-upon uniform list price used as starting point for discounting).

¹⁰See Minutes of the Composite Meeting of Cargo Tariff Coordinating Conferences, The Hague, 27-31 May 2002, at ¶ 156 (“TG made the following statement for the record: ‘Although the chance of obtaining Thai Government approval is minimal as explained during discussions,

shippers from a number of nations have publicly expressed their opposition to the proposal, and have stated that they will convey those concerns to their respective national governments.¹¹

Even if IATA were to demonstrate forthcoming public benefits, it still would have to show that those benefits could not be secured by reasonably available alternatives that are materially less anticompetitive. It has failed to do so.

DOT Should Re-activate the 1990 Proceeding and Withdraw Approval of and Antitrust Immunity for All Anticompetitive IATA Agreements that Affect the Core United States Interest and in Other Contexts in Which United States National Interests are Strong

In 1985, DOT granted indefinite antitrust immunity to IATA for the operating provisions for its Traffic Conferences (“by-laws”). See Order 85-5-32. As a condition of this grant of immunity, DOT required IATA to reapply for immunity in five years so that DOT could reassess whether IATA immunity continued to be in the public interest. DOT opened Docket 46928 in 1990 (the 1990 Proceeding) and it is still pending. DOJ filed comments in that proceeding, becoming a formal party.¹² In its comments, DOJ urged DOT to consider withdrawing approval of and antitrust immunity for at least IATA fare agreements that directly affected the “core U.S.

TG respects the Conferences’ decision to have the new conversion factor for volumetric weight calculation for global application. Therefore, TG reluctantly abstains and seeks Members’ support through their local representatives in Thailand to obtain government approval.”).

¹¹See, e.g., Joint Shippers’ Declaration of Canadian Shippers’ Council, The National Industrial Transportation League, European Shippers’ Council, Japan Shippers’ Council, Korean Shippers’ Council, Philippines Shippers’ Bureau, The Hong Kong Shippers’ Council, The Thai National Shippers’ Council, The Federation of ASEAN Shippers’ Council, from The 2002 Tripartite Shippers’ Meeting, September 12-14, 2002, New Orleans, Louisiana, *at* <http://www.nitl.org/jointdec02.htm>; Media Release, Panalpina China Ltd., Panalpina welcomes deferred implementation of controversial IATA resolution on low density cargo (Sept. 18, 2002); Flower Export Council of Australia, Inc., AFEC Leads Battle Against Freight Increases, *at* <http://www.feca.com.au/main.htm>.

¹²See DOJ’s 1990 Comments.

interest” – fares charged by United States airlines to consumers for travel to and from the United States. DOJ also urged DOT to consider whether approval of and immunity for IATA fare agreements was warranted in other contexts where United States national interests are strong. There were several rounds of comments and reply comments filed by numerous interested parties (including DOJ in 1992),¹³ but a decision by DOT is still pending.

Because DOT’s grant of immunity to IATA is indefinite, IATA’s Tariff Coordination Conferences continue to engage in immunized price-fixing. In the meantime, the worldwide aviation industry has experienced significant changes. Throughout this time period, DOT has acted in other proceedings to reduce the scope of IATA’s tariff conference coordination. For example, as a condition to its approval of and antitrust immunity for major international airline alliances, DOT has required that the alliance partners withdraw from IATA tariff coordinating activities between the United States and the home countries of the alliance members and any other countries with immunized alliances.¹⁴ This has diminished the impact of IATA because some carriers are blocked from participating in IATA tariff coordination conferences, especially in the United States-European markets. Notably, there have been no findings or discussion in the

¹³See DOJ’s 1992 Comments.

¹⁴See, e.g., Order 2001-4-2, Joint Application of United Air Lines, Inc. and Air New Zealand Ltd. for Approval and Antitrust Immunity for Alliances (Dep’t Transp. April 3, 2001) (No. OST 1999-6680-8) (final order).

alliance proceedings of the effect of the carriers' withdrawal on "good aviation relations with other countries."

Other countries have also reviewed IATA's grant of immunity in recent years. Perhaps most compelling is that in 2001, the Commission of the European Communities ("Commission") issued a statement of objections in which it stated that IATA had failed to demonstrate that cargo tariff conferences were necessary to provide efficient interlining services within the European Economic Area ("EEA"). As a result, IATA agreed to end all joint setting of cargo rates within the EEA.¹⁵ In June 2002, the Commission renewed its block exemption for IATA passenger tariff conferences for the purpose of interlining benefits for three years, until June 2005. The Commission noted, however, that "as alliances develop, it might be argued that in the longer term the need for tariff conferences becomes less obvious..." and imposed an additional condition on the participating carriers obligating them to collect data providing concrete information on the extent to which tickets issued in the EEA are tickets at IATA tariffs, and the relative importance of such tickets for interlining. This will enable the Commission to examine in the future whether to extend its block exemption.¹⁶ In addition, the Australian Consumer and Competition Commission ("ACCC") is undertaking a review of IATA's Passenger Agency Program.¹⁷

¹⁵ See Press Release, Commission of the European Communities, IATA Agrees to End the Joint Setting of Cargo Rates Within the EEA (Oct. 19, 2001).

¹⁶ See Commission of the European Communities, Report From the Commission, Part One, XXXIInd Report on Competition Policy 2002 at § 4.1.1 (May 5, 2003).

¹⁷ See Application for Revocation and Substitution of Authorisation A900408, International Air Transport Association Passenger Agency Program (Australian Competition and Consumer Comm'n November 13, 2002) (File No. C2001/601).

DOJ recommends that DOT re-activate the dormant 1990 Proceeding in light of the changes that have occurred throughout the world in the aviation industry. IATA's Tariff Coordinating Conferences allow competing international carriers to fix passenger fares and freight rates. Both DOT and its predecessor, the CAB, have found that IATA's Tariff Coordinating Conferences substantially reduce competition. See Order 85-5-32. IATA has not shown - or even claimed - that its price-fixing agreements will achieve economic efficiencies. Furthermore, the justification IATA has offered for agreements among competing airlines on fares – international comity and foreign relation considerations – was not plausible back in 1990 and is even less plausible now. Given DOT's modification of IATA's scope of immunity in connection with alliance agreements between international carriers, and the increased reliance on competition laws and their enforcement by competition authorities in numerous countries throughout the world, the justification for tariff conferences is even further diminished. International comity considerations do not warrant continuing approval and antitrust immunity for IATA price-fixing agreements that affect the core interest of the United States: passenger travel and freight shipments on United States airlines between the United States and the rest of the world.

As to other air transportation, DOT should re-activate the 1990 Proceeding to consider, on a country-by-country basis, whether international comity considerations justify approval of and antitrust immunity for IATA agreements that fix prices in which the United States interests are strong – for example, fares or rates for transportation on foreign carriers to and from the United States or for transportation between foreign countries, where passenger tickets or air freight is purchased in the United States.

Conclusion

IATA's agreement to amend Resolution 502 and all of IATA's Tariff Coordinating Conference activity is anticompetitive, and IATA has failed to carry its burden of proving that its agreements fulfill a serious transportation need of, or provide an important benefit to, the United States. DOT therefore should deny approval of and antitrust immunity for IATA's proposal to change the low-density cargo rate formula.

DOJ also requests that DOT re-activate the 1990 Proceeding so that DOT may re-examine its grant of approval and antitrust immunity for IATA's Tariff Coordination Conferences in light of the changes in the aviation market throughout the last decade.

Respectfully submitted,

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