IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>AIRLINE TARIFF PUBLISHING COMPANY;<br><br>et al.,<br><br>Defendants. | Civil Action<br>No. 92-2854 (SSH) |

## COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry with the consent of Airline Tariff Publishing Company, Alaska Airlines, Inc., American Airlines, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., and Trans World Airlines Inc. in this civil antitrust proceeding.

## I.

## NATURE AND PURPOSE OF THE PROCEEDING

On December 21, 1992, the United States filed a civil antitrust complaint alleging that Alaska Airlines, American Airlines, Continental Airlines, Delta Air Lines, Northwest

Airlines, Trans World Airlines, United Air Lines, and USAir ("airline defendants"), Airline Tariff Publishing Company ("ATP"), and co-conspirators conspired unreasonably to restrain competition among themselves in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint alleges two causes of action.

The first cause of action alleged in the Complaint is that, from at least as early as April 1988 and continuing through at least May 1990, each of the airline defendants and co-conspirators engaged in various combinations and conspiracies with other airline defendants and co-conspirators. These consisted of agreements, understandings, and concerted actions to fix prices by increasing fares, eliminating discount fares, and setting fare restrictions for tickets purchased for travel between cities in the United States. These agreements, understandings, and concerted actions were reached and effectuated through the airline defendants' use of the computerized fare dissemination services of ATP to: (1) exchange proposals and negotiate fare changes; (2) trade fare changes in certain markets in exchange for fare changes in other markets; and (3) exchange mutual assurances concerning the level, scope, and timing of fare changes. The Complaint seeks relief that will prevent the airline defendants from continuing or renewing the alleged

conspiracies, or engaging in any other conspiracy having a similar purpose or effect.

The second cause of action alleged in the Complaint is that from at least as early as April 1988 and continuing through to the date of the Complaint, the airline defendants, ATP, and co-conspirators engaged in a combination and conspiracy, consisting of an agreement, understanding, and concert of action to create, maintain, operate, and participate in the ATP fare dissemination system. This fare dissemination system has been formulated and operated in a manner that unnecessarily facilitates coordinated interaction among the airline defendants and co-conspirators, enabling them to: (1) communicate more effectively with each other to increase fares, change fare restrictions, and eliminate discounts; (2) show links between proposed fare changes in different city-pair markets; (3) monitor each other's proposals on fare changes; and (4) lessen uncertainty concerning each other's pricing intentions. As a result, coordinated interaction among the airline defendants and co-conspirators has been more frequent, successful, and complete, and consumers have been deprived of the benefits of free and open competition in the sale of air passenger transportation services. The Complaint seeks to enjoin the airline defendants from using ATP to restrain competition by prohibiting the dissemination of certain information.

On December 21, 1992, the United States, United and USAir filed a Stipulation in which they consented to the entry of a proposed Final Judgment providing, with respect to United and USAir, all of the relief the United States seeks in the Complaint. After reviewing the proposed Final Judgment pursuant to the Antitrust Procedures and Penalties Act (the "Tunney Act"), the Court concluded that the Judgment was in the public interest within the meaning of the Tunney Act, and it became final with respect to United and USAir on November 1, 1993.

On March 17, 1994, the United States, ATP, Alaska Airlines, American Airlines, Continental Airlines, Delta Air Lines, Northwest Airlines, and Trans World Airlines filed with the Court a Stipulation consenting to the entry of a new proposed Final Judgment with respect to the remaining defendants following compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), unless the United States withdraws its consent. The proposed Final Judgment is substantially identical to the Final Judgment entered against United and USAir (the "United/USAir decree") with the following exceptions. Section V(B) clarifies that the proposed Final Judgment does not prohibit an airline defendant from selling management services to another airline. Section V(C) permits the airline defendants to disseminate last ticket dates through ATP in some specified circumstances where the United/USAir

decree prohibits the use of last ticket dates. The record keeping provisions in Section VI(E) have been changed to reflect the changes to Section V(C). Finally, the proposed Final Judgment provides the relief the United States is seeking against defendant ATP.

Entry of the proposed Final Judgment will terminate this action against all remaining defendants, except that the Court will retain jurisdiction over the matter for further proceedings that may be required to interpret, enforce, or modify the Final Judgment, or to punish violations of any of its provisions.

## II.
## DESCRIPTION OF THE PRACTICES INVOLVED IN THE ALLEGED VIOLATIONS

### A. Industry Background

The domestic passenger airline industry generates annual sales in the tens of billions of dollars. Each of the airline defendants is a significant competitor, providing scheduled nonstop, one-stop, and multi-stop domestic air passenger services between a large number of origin and destination cities (city pairs).

Through hub and spoke route systems, the airlines are able to consolidate passengers from many points at a single location (the hub) and then transport them, along with passengers originating at the hub, to a common destination. These competing hub and spoke networks overlap one another but are

not identical. All airlines do not serve all city pairs, and the type of service offered by airlines on the same city pair may vary (nonstop versus one or more stops). The times and frequencies of service offered also may vary considerably among airlines. These service variations, as well as differences in passenger mixes and cost structures, often result in some airlines serving a particular city-pair market preferring to charge lower prices than others.

For each of the thousands of city pairs served by each airline, numerous fares are offered to customers. Many of these fares carry restrictions that are designed to segment the market for air travel into groups with varying sensitivities to price and time of travel. For example, lower fares designed to attract only leisure travelers may require advance purchase and a Saturday night stay.

Airlines constantly alter fares in response to changes in costs, both industrywide and airline-specific, and to changes in consumer demand, both for travel generally and travel on particular city pairs. Moreover, the availability to consumers of a seat on a particular flight at a particular fare is controlled by each airline's continuous adjustment, based upon projected and actual demand, of the inventory of seats available at that fare.

ATP is the central source for the collection, organization, and dissemination of fare information for virtually every

domestic airline. (ATP does not receive seat inventory or allocation information.) Each of the airline defendants owns and participates in the ATP fare dissemination system through which information is exchanged about fares. ATP also provides this information to computer reservation systems ("CRSs") and other subscribers.

Each airline supplies ATP with basic information about its fares. This information includes fare codes (which indicate the names of the fares -- e.g., "F" is first class; "Y" is full coach), fare amounts, rules, and routings. Rules contain restrictions that limit or condition the use of the fare, including advance purchase requirements and penalties for itinerary changes. Routings are used to limit fares to travelers using a particular itinerary, for example, connecting flights over a particular hub.

An airline also can attach up to two footnotes to any fare in the ATP data base. Footnotes are identified by alphanumeric codes ("footnote designators"), such as "A" or "32." Footnotes are used by airlines to identify, among other things, first or last ticket dates or travel dates.

A first ticket date indicates a future date at which a fare is supposed to become available for purchase by consumers. A last ticket date indicates a future date at which a current fare is supposed to end. The airlines have no obligation to offer fares on their first ticket dates or remove them on their

last ticket dates. In fact, the airlines often change first and last ticket dates to an earlier or later date than originally announced, or increase or withdraw fares without regard to their first or last ticket dates.

The travel dates contained in footnotes indicate when a consumer can travel using a particular fare. A first travel date indicates the first date upon which travel on a particular fare may commence. A last travel date indicates the last date upon which travel may commence.

At least once every workday, the airlines submit their "fare changes" to ATP. Some of these change the restrictions on, or level of fares currently being sold to consumers; many others simply change the footnotes -- adding, postponing or withdrawing ticket dates or switching designators.

ATP processes the fare changes and disseminates them to the airline defendants and other ATP subscribers, including CRSs. The airline defendants, either directly or by contract with third parties, massage this data with sophisticated computer programs to produce detailed daily reports. These reports sort and display information on all markets in a variety of ways so that the airline defendants, using ticket dates and footnote designators, can identify and track their competitors' proposed changes to fares, discerning any interrelationships the airlines establish among the proposed fare changes and

assessing their competitors' intentions to implement the changes.

By contrast, the CRSs use the ATP fare changes to update their fare data bases, and travel agents in turn use the CRSs to make reservations and price tickets on fares currently available for sale. Travel agents using the CRSs cannot sort and analyze the fare change data as the airlines do. The CRSs display fare information only one market at a time, most often for a specific flight on a given day and do not display any airline's footnote designators. Thus, the travel agents have neither the incentive nor ability to re-sort or otherwise piece together the information to find patterns or interrelationships among proposed changes to fares or to predict whether or when the airlines will implement their proposed changes.

B. Illegal Agreements to Fix Prices by Increasing Fares, Eliminating Discount Fares, and Setting Fare Restrictions in Various City-Pair Markets

The first cause of action alleges that, beginning as early as April 1988 and continuing through at least May 1990, the airline defendants used the ATP fare dissemination system to enter into a series of agreements to fix prices by increasing fares, eliminating discount fares, and increasing fare restrictions in various city pairs. Such agreements are per se illegal under Section One of the Sherman Act.

The ATP fare dissemination system provided a forum for the airline defendants to communicate about their prices. Using,

among other things, first and last ticket dates and footnote designators, they exchanged clear and concise messages setting forth the fares each wanted the others to charge, and identifying fares each wanted the others to eliminate. Through this electronic dialogue, they conducted negotiations, offered explanations, traded concessions with one another, took actions against their independent self-interests, punished recalcitrant airlines that discounted fares, and exchanged commitments and assurances -- all to the end of reaching agreements to increase fares, eliminate discounts, and set fare restrictions.

The government identified over fifty agreements among the airline defendants and their co-conspirators. These agreements increased fares in hundreds of city pairs from heavily travelled business markets such as New York-Chicago to smaller leisure travel markets such as Klamath Falls, Oregon-Tampa, Florida.

There were two types of price fixing agreements. In the first type of agreement, the airline defendants used ATP to reach agreements to increase fares. Typically, one airline began the process by filing its proposed higher fares in particular markets with a first ticket date in the future. In this way, it told other airlines when, where and how much it wanted fares to increase. Other airlines responded to such a proposal in different ways. If an airline wanted that

increase, it conveyed its agreement by filing the same proposed increase in the same city pairs with the same first ticket date. If an airline wanted a different increase, it made a counterproposal, filing fares with first ticket dates in the future to communicate which fares it wanted to increase, by how much and in what city pairs. To facilitate negotiations, an airline typically used a common footnote designator on the fares included in its proposal, such as all leisure fares or all fares in certain city pairs. This highlighted for the other airlines which fares it wanted bundled together to receive common treatment.

Often, the airlines exchanged proposals over several weeks, with the first ticket dates repeatedly postponed ("rolled") in order to allow more time for negotiation. At times they took steps to secure the agreement of recalcitrant airlines. Where a dissenting airline wanted a smaller or no increase, the others signaled their displeasure by filing reduced fares in city-pair markets important to that airline and offering to remove those fares if the dissenter agreed to the proposed increase. Where a dissenting airline wanted to increase fewer fares or fares in fewer city pairs, the others refused to increase any fares unless the dissenter agreed to the broader proposed increase. The negotiation process continued until all significant airlines were lined up with the same proposed fare increase and the same first ticket date, thus providing each

other with commitments and assurances as to the amount, scope, and timing of the proposed fare increase. On that first ticket date, the fares for all the airlines increased. As a Continental employee explained, "When using ticketing dates to file an increase -- the actual new levels can be delayed again and again until we have the full cooperation of all participating . . . carriers." 1/

These agreements have had a substantial effect on consumers. Consider only one out of the many agreements identified by the government and only 29 out of the 400 markets affected by that agreement. An economic expert estimated that in those 29 markets alone, because of that one agreement alone, consumers paid at least 11 million dollars more for air transportation than they would have paid in the absence of the agreement. 2/

In the second type of agreement, the airline defendants used ATP to reach agreements to eliminate discount fares offered to consumers. They conveyed their proposals and commitments to end certain widely-available discounts on a

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1/H020641, attached as Exhibit 8 to the United States' Response to Questions in Appendix A of the Court's Order dated May 24, 1993, filed June 28, 1993.

2/ Declaration of Jonathan B. Baker, attached as Exhibit 1 to the United States' Response to Questions in Appendix A of the Court's Order dated May 24, 1993, filed June 28, 1993.

given date with last ticket dates and footnote designators, much as they had used first ticket dates and footnote designators to convey their increase proposals and commitments. Additionally, they targeted particular discounts offered by one or a few competitors and solicited agreements to eliminate these fares. In these cases, the soliciting airline would punish the disruptive airline by filing similar discounts in the city pairs where the disruptive airline preferred higher fares. The soliciting airline would use fare basis codes, last ticket dates and footnote designators to communicate to the disruptive competitor, and other interested airlines, the limited reason (punishment) for the soliciting airline's discount and its willingness to eliminate the discount in exchange for the competitor eliminating the original discount.

An agreement identified by the government illustrates this conduct. In April 1989, American offered certain discount fares between its hubs in Dallas and Chicago on a few select flights on that route each day. Delta observed American's fares but decided to offer the discount fares on all of its flights between Dallas and Chicago because demand for tickets on all of those flights was low. American then took a number of actions to convey its proposal to Delta that the discounts be limited to only a few flights. First, American matched Delta's action by filing the discount fares on all of its

flights in Dallas-Chicago, but it added a last ticket date to those fares of only a few days away, communicating that it did not want the fares to continue on all flights. American also refiled the discounts restricted to two flights, with a first ticket date in the future, thereby telling Delta that American wanted the availability of the discounts limited. At the same time, American filed fares between Dallas and Atlanta, two of Delta's hubs, using the same fare levels, footnote designator and last ticket date that it used on the fares in Dallas-Chicago. American thus linked the fares in the two city pairs, and communicated to Delta its offer to withdraw the fares in Dallas-Atlanta if, and only if, Delta restricted the availability of its fares in Dallas-Chicago.

A Delta pricing employee, observing the same dollar amounts and footnotes on American's fares in the two city pairs, noted that American's fares in Dallas-Atlanta were an "obvious retaliation" for Delta's fares in Dallas-Chicago. 3/ Delta immediately accepted American's offer by withdrawing its discount fares in Dallas-Chicago and filing discount fares that were restricted to two specific flights. American then

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3/ DL II 38405, attached as Exhibit 13 to the United States' Response to Questions in Appendix A of the Court's Order dated May 24, 1993, filed June 28, 1993.

withdrew the discounts from Dallas-Atlanta, even before their last ticket date, demonstrating that the last ticket date American had placed on the fares was intended to send a message to Delta, not to consumers. The agreement between American and Delta raised the price of a roundtrip ticket between Dallas and Chicago by as much as $138 for many travellers.

C. Illegal Agreement to Operate A Fare Dissemination System that Unreasonably Facilitates Fare Coordination

The second cause of action is based on the airline defendants' joint ownership and participation in ATP, beginning as early as April 1988 and continuing until the date of the Complaint. The core of the second cause of action is that the airline defendants agreed to exchange fare information with one another through ATP in a manner that unnecessarily and unreasonably allowed them to coordinate fares. The Complaint challenged these activities as illegal under a Sherman Act Section 1 "rule of reason" analysis.

ATP provides the airlines with a number of communication devices that allow them to coordinate better on fares. These communication devices, primarily first ticket dates, last ticket dates, and footnote designators, enabled the airline defendants on many occasions to reach overt price-fixing agreements of the type described in the first cause of action. These same devices also facilitate pervasive coordination of airline fares short of price fixing -- coordination that would

not occur simply by virtue of the structure of the airline industry.

1. ATP Communication Devices Facilitate Successful Coordination

The likelihood of successful coordination among horizontal competitors is substantially enhanced when firms are able to identify mutually beneficial terms of coordination, detect deviations (or "cheating") from the coordinated outcome, and punish or credibly threaten to punish those deviations (that is, make the deviation less profitable than adhering to the coordinated price). Because of the structure and nature of the airline industry, some coordination among the airlines on fares is inevitable. As currently operated, however, ATP enables the airlines to coordinate more frequently and more successfully than they otherwise would.

First, the ATP communication devices facilitate the identification of mutually beneficial terms for coordination. While certain characteristics of the airline industry make it easier for airlines to identify mutually beneficial terms for coordination -- the small number of airlines in many city-pair markets and the necessarily wide dissemination of current fares -- other inherent characteristics make the identification of mutually beneficial terms more difficult. There are a vast

number of city-pair markets, and frequent fare changes. In addition, the airlines serving a city-pair market often have quite different prices that they prefer to charge.

ATP helps the airlines to overcome these impediments. By filing fares with first ticket dates in the future and linking the fares with a common footnote designator, the airlines can float proposals to increase fares, see how their competitors react to the proposals, consider alternative proposals, and identify a mutually acceptable fare increase -- all without the risk of losing sales during the process to a competitor with lower fares. Similarly, by placing a last ticket date on discount fares and linking the fares with a common footnote designator, airlines can communicate their desire to eliminate those fares and determine their competitors' willingness to do likewise. The airlines thus can develop at virtually no cost a consensus on whether and when fares should increase or discounts should end, and they can increase fares or remove discounts with greater certainty of their competitors' likely actions.

ATP also enables the airlines to work out any differences they have on what price to charge. By using first and last ticket dates and footnote designators to link markets, the airlines can make complex deals, trading price increases desired by some airlines for price increases desired by others in different markets. Often such trades reflect the different

hubs involved. Each airline tends to prefer higher fares on routes to or from its hub cities, where it tends to have high market shares and generates the highest profits. An airline thus may make a trade: it will charge higher fares than it would otherwise charge on other airlines' hub routes in return for the other airlines charging the higher fares that it desires on its own hub routes.

Second, ATP makes coordination more likely by making it more effective and less costly to punish deviations. When coordinated prices are above the competitive level, an airline will have an incentive to deviate from the coordinated price, that is, to lower its price. The greater the incentive to deviate, the less likely it is that firms will attempt to coordinate prices in the first place, and the less effective will be any coordination. However, if deviations from coordinated fare levels can be detected quickly and made unprofitable ("punished") by other airlines, effective coordination becomes more likely.

The necessarily broad dissemination of fares and fare availability means that airlines can quickly detect any competitor's fare changes. However, the number of markets and frequency of fare changes make it difficult to determine whether a fare change is a punishing action -- one that is intended to discipline a competitor for cheating -- or a fare change that is itself a deviation from a coordinated fare

level. ATP enables an airline to use ticket dates and footnote designators to label the fare changes that it intends as punishment. Through ATP, an airline can communicate to a competitor that the reason it is cutting fares in markets important to the competitor is to punish the competitor for taking some fare action -- for example, cutting fares in another market or refusing to increase fares. By clearly identifying the purpose of its actions, the airline decreases the risk that other airlines will misinterpret the fare change as a deviation that itself should be punished, and increases the likelihood that the "cheating" airline will receive the intended message and return to the coordinated fare or agree to a proposed increase.

Thus, without the ATP communication devices (or some substitute), each airline is more likely to act independently, charging low prices in certain city pairs, such as those in which it is the low cost carrier, or matching low prices in other markets where it would have preferred a higher price. With the ATP communication devices, the airlines can coordinate and achieve fare levels above those that otherwise would have prevailed.

### 2. ATP Communication Devices Provide Little or No Benefit to Consumers

While first and last ticket dates and footnote designators are of immeasurable value to the airlines in facilitating

pricing coordination, they provide little benefit to consumers. Ticketing dates have neither the purpose nor effect of protecting consumers from unanticipated fare changes. None of the airline defendants has a policy or consistent practice with respect to the number of days in advance of a fare change it places a last ticket date (or corresponding first ticket date) on fares. Whether an airline defendant places a last ticket date on a fare two weeks in advance, one week in advance, one day in advance, does not use a last ticket date at all before increasing fares, or increases fares before the last ticket date arrives, depends not on the amount of time necessary to ensure that consumers are protected from unexpected increases, but on how much (or how little) time is necessary to reach agreement or coordinate with its competitors.

Because the airlines change the ticket dates frequently as they react to each other's messages, ticket dates are extremely unreliable and misleading. On average, ticketing dates are inaccurate 54 percent of the time. Moreover, when ticket dates are inaccurate, they tend to be very inaccurate: 28 percent of the time, a fare continues to be available for fifteen or more days after its last ticket date, and 13 percent of the time, a fare is withdrawn prior to its last ticket date. Thus, consumers cannot rely on the presence or absence of a last ticket date on a fare as assurance that the fare will be available for a certain period of time -- the airlines are more

likely either to continue offering the fare or to withdraw the fare without prior notice than to actually make the proposed fare change on the posted date. With little reason to rely on the accuracy of ticket dates, consumers are harmed far more by the coordinated pricing that ticket dates facilitate than they are benefited by the information those dates contain.

## III.

## EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is intended to ensure that the airline defendants do not continue to use the ATP fare dissemination system or any similar mechanism in a manner that unnecessarily facilitates fare coordination or that enables them to reach specific price-fixing agreements. It prohibits the airline defendants from disseminating first ticket dates or using designating mechanisms, and substantially restricts their use of last ticket dates. The proposed Final Judgment also prohibits other conduct that would allow the airline defendants to communicate without market risk their pricing intentions or signal competitors that fare actions in different markets are linked. The proposed Final Judgment does not prevent the airline defendants from disseminating their currently available fares through ATP to CRSs for consumer booking and ticketing, from advertising current fare information to consumers, or from offering for sale fares for which travel can only begin in the future, for example, offering fares in the summer that apply to

winter travel to Florida. Neither does it regulate the independent pricing decisions of an airline, whether or not those prices are a response to or evoke a response from other airlines.

A. Prohibited Airline Defendants Conduct

Section IV(A) of the proposed Final Judgment contains six categories of prohibited conduct. Certain exceptions to these prohibitions are contained in the limiting conditions in Section V. Section IV(A) is identical to Section IV of the United/USAir decree.

Section IV(A)(1) contains general prohibitions on agreements between airlines "to fix, establish, raise, stabilize, or maintain any fare." This provision prohibits the airline defendants from any further price fixing whether by the means alleged in the Complaint or by other means violative of the Sherman Act.

Section IV(A)(2) contains one of the key provisions of the proposed Final Judgment. It prohibits the airline defendants from "disseminating any first ticket dates, last ticket dates, or any other information concerning the defendant airline's planned or contemplated fares or changes to fares." This provision bars, with limited exceptions discussed below, the airline defendants' use of first and last ticket dates, as well as any alternative means of communicating their future pricing intentions. For example, it prevents the airline defendants

from, with any precision, negotiating fare increases through press releases. Similarly, it prevents the airline defendants from beginning to use travel dates to coordinate fare changes rather than to communicate meaningful information to consumers on the relevant travel periods for particular fares. This provision will eliminate the extensive and costless negotiation over the amount, scope and timing of fare changes, thus making coordination or agreement on fares far more difficult.

The ban on the airline defendants' use of first ticket dates is absolute. All of the airline defendants' fares, whether in ATP, a CRS or elsewhere, must be currently available for sale to consumers.

The airline defendants may continue to use last ticket dates, but only in very limited circumstances. Section V(C) permits the airline defendants, through advertising in media of general circulation or through mass mailings, and in a manner designed to directly reach a meaningful number of likely potential consumers, to state that a promotional fare will end on a particular date or that a last ticket date on a sale fare has been extended to a later date. Once an airline defendant has informed consumers through the required advertising, it may then disseminate the fare's last ticket date in a CRS and elsewhere.

After an airline defendant has disseminated a fare with a last ticket date, or a non-defendant airline has disseminated a sale fare with a last ticket date or extended the last ticket

date on a sale fare, an airline defendant may, without advertising, disseminate a new fare with the same price, restrictions and last ticket date as the other airline's fare. Additionally, an airline defendant may extend one time, without advertising, the last ticket date on that sale fare to the same last ticket date as another airline's sale fare that has the same price and restrictions. In either case, a defendant airline's fare must be applicable in the same city or airport pair as the other airline's fare or in a city or airport pair with origin and destination, respectively, within 100 miles of the origin and destination of the city or airport pair of the other airline's fare.

Section V(C) of the proposed Final Judgment allows the airline defendants to use last ticket dates in a few narrow circumstances where the United/USAir decree does not. For instance, if a non-defendant introduces a sale fare, Section V(C) allows an airline defendant to match that sale fare with the same last ticket date. However, Section V(C) of the proposed Final Judgment contains an additional safeguard. In disseminating any unadvertised fares with last ticket dates, whether they match a defendant or non-defendant, the airline defendants remain subject to the proposed Final Judgment's prohibition against using fares solely to communicate pricing intentions.

The restrictions in Sections IV(A)(2) and V(C) on the dissemination of last ticket dates lessen the likelihood that

last ticket dates will be used by the airline defendants to coordinate fare changes. The requirements that the fares be new fares and that the last ticket dates be disseminated at the time the fares are first offered for sale, together with the limitations on extensions of the ticket dates, will make it difficult for the airline defendants to use last ticket dates to negotiate the elimination of discounts or to facilitate trades across markets. Also, the requirement that certain fares with last ticket dates be advertised will help ensure that the airline defendants use the dates to inform consumers of the ending dates of sales, rather than to communicate with competitors.

The restrictions in Section V(C) apply only when an airline defendant chooses to use a last ticket date. The airline defendants remain free to advertise and market their services and fares in any other manner they choose, including any marketing or advertising that a fare will be available only for a short period of time.

Section V(D) provides another limited exception to the prohibition on disseminating information relating to planned or contemplated fare changes. It will allow the airline defendants to continue to give consumers general information on impending fare changes. For example, airlines may make general public statements that because of increases in costs they expect fares to increase, or may advertise that certain low

fares are available for a limited time only. Because the information is general, it is unlikely that the airline defendants could use it to coordinate fares.

Section IV(A)(3) prohibits the airline defendants from "making visible or disseminating its own tags or any other similar designating mechanism to any other airline." This provision prohibits the airline defendants from using any other device to link markets and coordinate fare changes in the way that they currently use footnote designators. It would, for example, prevent the airline defendants from attaching arbitrary but unique travel complete dates to fares in different markets in order to communicate a connection or link between those fares.

Section IV(A)(4) prohibits the airline defendants from "making visible or disseminating to any other airline any fare that is intended solely to communicate a defendant airline's planned or contemplated fare or contemplated changes to fares." This provision would proscribe fares that, although technically currently available for sale, will not, as a practical matter, be considered by consumers and that have no other legitimate purpose. For example, Section IV(A)(4) would preclude an airline defendant from communicating its intention to increase fares by filing fares that are higher but otherwise identical to existing fares, and then waiting for other airlines to file identical higher fares before withdrawing its lower fares. Because no rational consumer would purchase the

higher fares as long as the lower fares were available, the higher fares would be "intended solely to communicate" an airline defendant's contemplated changes to fares.

Section IV(A)(5) prohibits the airline defendants from "disseminating two or more footnote designators that identify footnotes that contain identical information." This provision will prevent the airline defendants from continuing to use multiple footnotes, each with different designators, that contain the same ticketing and travel date information. In addition, Section IV(A)(5) prohibits the airline defendants from disseminating any footnote designator that identifies an "empty" footnote, that is, one that has no travel dates, last ticket date or other information. In both cases, the footnote designator serves no purpose other than to communicate connections between fares or to call competitors' attention to particular fares.

Section IV(A)(6) prohibits the airline defendants from "using fare codes that convey information other than fare class or terms and conditions of sale or travel." Certain standard fare codes are used throughout the industry to identify the class as well as the restrictions associated with a fare, such as advance purchase requirements. This provision is intended to prevent the airline defendants from using codes not related to either the fare class or the terms and conditions of sale or travel to send messages and link markets. For example, Section IV(A)(6) prevents an airline defendant from sending a message

to another airline by placing letters that identify that airline in the airline defendant's fare code.

B. Prohibited ATP Conduct

Section IV(B)(1) prohibits ATP from disseminating or conveying fares with first ticket dates. This provision parallels the prohibition in Section IV(A)(2) against the airline defendants' dissemination of first ticket dates. Section IV(B)(1) will ensure that ATP is not used for extensive and costless negotiations of fare increases through fares not available for actual sale. Section IV(B)(1) does not prohibit ATP from disseminating last ticket dates because the airline defendants will continue to be able to disseminate last ticket dates in certain limited circumstances.

Section IV(B)(2) prohibits ATP from disseminating any airlines' tags or similar designating mechanism to any other airline. This provision, which parallels a prohibition on the airlines (Section IV(A)(3)), prevents ATP from replacing footnote designators with any new mechanism by which airlines can communicate links or ties between fares. Section IV(B)(3), which also parallels a prohibition on the airlines (Section IV(A)(5)), limits the type of footnote designator information that ATP may disseminate. This provision is intended to prevent ATP from disseminating footnote designators that have been designed to facilitate fare coordination by the airline defendants.

Section IV(B)(4) prohibits ATP from "making visible or disseminating to any airline changes to any other airline's fares prior to disseminating or conveying such changes to the domestic CRSs." This provision will bar ATP from disseminating fare changes to airlines before such fare changes can be made available to the general public through CRSs. Section IV(B)(5) prohibits ATP from "making visible or disseminating any changes to fares more frequently than the number of times a day that at least one domestic CRS updates its fare data base with such changes to fares." This provision ensures that ATP does not disseminate fare changes to the airlines more frequently than such changes are actually made available to the general public through CRSs. In tandem, Sections IV(B)(4) and (5) prevent ATP from facilitating a completely private exchange of information among the airline defendants and thereby enabling them to negotiate fare changes, as they do currently, through the use of fares that are not available for sale to the public through CRSs.

C. Compliance Program and Certification

In addition to the prohibitions contained in Sections IV and V, each defendant would be obligated to implement an antitrust compliance program. This program would require each defendant to designate an Antitrust Compliance Officer within 30 days of entry of the Final Judgment. The Antitrust Compliance Officer for each settling defendant would be responsible for distributing copies of the Final Judgment to all relevant officers or employees of that defendant. These

persons would be required annually to certify that they understand and agree to abide by the terms of the Final Judgment. Each defendant must, within 45 days after the Antitrust Compliance Officer learns of any violations of the Final Judgment, take appropriate action to terminate or modify the activity so as to comply with the Final Judgment. Finally, the airline defendants must maintain records relating to their use of last ticket dates under the limited exception provided in Section V(C). The record keeping requirements of the proposed Final Judgment differ slightly from those in the United/USAir decree to reflect the changes made to Section V(C).

D. Effect of the Proposed Final Judgment on Competition

The relief in the proposed Final Judgment is designed to remove the artificial restraints that the defendants have imposed on competition and create an environment in which more vigorous competition may take place. The Department of Justice believes that the proposed Final Judgment contains sufficient provisions to prevent further violations of the type alleged in the Complaint and to remedy the effects of the alleged conspiracies.

The Final Judgment entered against United and USAir gives them the right to have this proposed Final Judgment substituted for theirs. Such a substitution would not materially affect the ability of United and USAir to coordinate or agree on prices.

## IV.
## REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Judgment has no prima facie effect in any subsequent lawsuits that may be brought against any defendant in this matter.

## V.
## PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to Roger W. Fones, Chief, Transportation, Energy and Agriculture Section, U.S. Department of Justice, Antitrust Division, 555 Fourth Street, N.W., Room 9104, Washington, D.C. 20001, within the 60-day period provided by the Act. These comments, and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw

its consent to the proposed Final Judgment at any time prior to entry.

## VI.

## ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

Although the Department considered alternatives to the proposed Final Judgment, such as the United/USAir decree, none of these were substantially different from the proposed Final Judgment. The only real alternative would be a full trial of the case. In the view of the Department of Justice, such a trial would involve substantial cost to the United States and is not warranted because the proposed Final Judgment provides relief that will remedy the violations of the Sherman Act alleged in the United States' Complaint.

VII.

DETERMINATIVE MATERIALS AND DOCUMENTS

No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), were used in formulating the proposed Final Judgment.

Respectfully submitted,

Mary Jean Moltenbrey
Assistant Chief
Transportation, Energy, and
Agriculture Section
Antitrust Division
U.S. Department of Justice
555 Fourth Street, N.W.
Room 9104
Washington, D.C. 20001
(202) 307-6349

MAR 17 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA



| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>AIRLINE TARIFF PUBLISHING COMPANY,<br><br>et al.<br><br>Defendants. | Civil Action:<br>No. 92-2854 SSH (DAR) |

MOTION AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES ON CONSENT TO MAKE PART OF THE OFFICIAL RECORD THE ATTACHED LETTER OF JANUARY 21, 1994, FROM MICHAEL DOYLE

The plaintiff United States of America and defendants today filed with the Court a proposed Final Judgment and Stipulation of consent to entry of the proposed Final Judgment. The attached letter dated January 21, 1994, by Michael A. Doyle, counsel for American Airlines, and confirmed by Roger Fones, Antitrust Division, U.S. Department of Justice, which sets forth plaintiff's interpretation of the proposed Final Judgment, is a material factor in each of the defendants' decisions to consent to entry of this proposed Final Judgment, and the plaintiff acknowledges that defendants are relying upn

that letter as if each were named therein. Accordingly, the plaintiff, with consent of counsel for the defendants, hereby moves the Court to make this letter part of the official record in this case.

A proposed order is attached.

Respectfully submitted,

Mary Jean Moltenbrey
Attorney
Antitrust Division
U.S. Department of Justice
555 Fourth St., N.W. -- Room 9104
Washington, D.C. 20001
(202) 307-6349

Dated: March 17, 1994

# ALSTON&BIRD

One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

404-881-7000
Fax 404-881-7777 Telex 54-2996

MICHAEL A. DOYLE

Direct Dial (404) 881-7340

January 21, 1994

Roger W. Fones, Esq.
Section Chief
Transportation, Energy and
Agriculture Section
U.S. Department of Justice
Antitrust Division
555 4th Street, NW
Room 9104
Washington, DC 20001

Dear Mr. Fones:

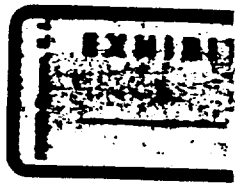
I write on behalf of American Airlines, Inc. in connection with United States v. Airline Tariff Publishing Company, et al., Civil Action No. 92-2854 (SSH), United States District Court for the District of Columbia (the "Civil Action").

The Complaint in the Civil Action alleges that certain pricing practices of the defendants (relating to the dissemination of fare information through ATPCO and the use of first and last ticketing dates) have violated Section One of the Sherman Act. Two of the defendants, United Airlines and USAir, have earlier consented to a Final Judgment (which the Court entered as to them on November 1, 1993) (the "Decree"). American has vigorously denied the pertinent allegations of the Complaint.

We have, as counsel to American, advised the Department of Justice of the following:

1. American has been unwilling to consent to the entry of the Decree for two reasons. First, American believes that its pricing practices challenged by the Complaint are legal under the Sherman Act. Second, American believes that the Decree, which clearly bans the use of first ticketing dates (in all instances) and last ticketing dates (except for certain advertised promotions), creates great uncertainty with respect to a number of pricing practices which are functionally similar to the use of ticketing dates.





2. American is uncertain as to whether these particular pricing practices are intended by the Department of Justice to be prohibited by the Decree.

3. American is thus uncertain whether, if it agrees to be bound by the Decree, it will be exposed to enforcement actions, with the attendant risk of treble damages, with respect to practices it believes to be lawful but which American believes are not specifically addressed by the Decree. American also fears the competitive disadvantage it will inevitably suffer if other carriers engage in pricing actions that American has foresworn because of uncertainty about the Decree's meaning.

You have advised us that the Antitrust Division continues to believe that the pricing practices challenged by the Complaint violate the Sherman Act, and that the relief embodied in the Decree is appropriate and adequate. You have also advised us that the Division is interested in encouraging a satisfactory settlement, and accordingly it is willing to respond to certain questions posed by American concerning the applicability of the Decree to particular kinds of conduct. We, therefore, have requested the Antitrust Division to advise us whether in its view the pricing practices described below are prohibited by the Decree.

## PARTICULAR PRICING ACTIONS AND PRACTICES

### 1. Weekend and Off-Hour Fare Increases.

#### A. Description Of Airline Pricing Action.

1. At noon on Friday an airline transmits fare increases on certain city-pairs to the Airline Tariff Publishing Company ("ATPCO"). The increased fares become available for sale through computerized reservation systems (CRS) later that same day or early the next morning.[1] The airline withdraws the fare increases on the following Sunday when it learns that some or all competitors have failed to implement matching fares for all of the same city-pairs.

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[1] We presume that all fares described in these Statements are for city-pairs on which the airline offering the fares provides service, are accompanied by fare basis codes that convey only the fare class and terms or conditions of sale or travel, are fares likely to be considered for purchase by reasonable, informed consumers during the time they are available, or are fares having some other legitimate use (e.g., prorate fares) and are disseminated by the airline to ATPCO to be immediately effective, without first or last ticket dates. However, ATPCO technical constraints currently require that all fares have an effective date no sooner than the next calendar day.

2. Same as paragraph 1.A.1., except that all competitors implement matching fare increases on Saturday for all of the same city-pairs, and the increased fares are left in place.

3. Same as paragraph 1.A.1., except that the fare increases with immediate effective dates are initially transmitted to ATPCO Saturday noon.

4. At noon on Friday Airline A transmits 10% fare increases on certain city-pairs to ATPCO. The increased fares become available for sale through CRS at 5:00 p.m. that same day. On Saturday, Airline B transmits 5% fare increases to ATPCO on the same city-pairs. Airline A withdraws its 10% fare increases on Sunday when it learns that competing airlines have not offered matching fares for sale. Airline B withdraws its 5% increased fares. The following week, on Friday, Airline A raises its fares 5% on those city-pairs where Airline B had raised its fares 5% the previous week. On Saturday, Airline B matches Airline A's 5% fare increases, and both Airlines thereafter offer those fares for sale.

5. On Friday Airline A transmits to ATPCO increases in two categories of fares (for example, full Y and 14-day advance purchase). On Saturday, Airline B matches only the full Y fare increase, and then on Sunday, Airline A withdraws both fare increases, and Airline B withdraws its increase. The following week, on Friday, Airline A increases its full Y fare for travel in the same city-pairs that it had raised that fare the prior week, Airline B matches that full Y fare increase on Saturday, and both Airlines thereafter continue to offer that full Y fare.

6. Over time, the practices described in paragraphs 1.A.1., 1.A.2., 1.A.3., 1.A.4. and 1.A.5., above become a pattern for airline pricing.

B. Antitrust Division's Statement Of Decree Applicability.

The pricing actions described above are not prohibited by the Decree.

The fares in all of the pricing actions described in 1.A. above are bona fide fares -- fares actually available when they are published through ATPCO, and likely to be considered for purchase by reasonable, informed consumers during the time they are available or are fares that have some other legitimate use during that period (for example, prorate fares). In each scenario, the airline that

publishes the increased fares is, for at least twenty-four hours, at risk of losing sales as a result of its fare increase. Thus, the increased fares are bona fide and not fares "intended solely to communicate a defendant's planned or contemplated fares or changes to fares" within the meaning of Section IV(D) of the Decree. Moreover, although there may be an element of communication inherent in fares that are actually available and intended to be sold, the fares do not convey "other information concerning the defendant's planned or contemplated fares or changes to fares" within the meaning of Section IV(B) of the Decree. Indeed, the Decree specifically provides that it does not prohibit a defendant, "in unilaterally determining its own fares, from considering all publicly available information relating to the fares of other airlines." Section V(G). Publicly available information encompasses information concerning other airlines' current and prior bona fide fares and fare changes, as well as any "pattern" that emerges from changes in such fares. Because the fares described are bona fide fares, the Antitrust Division has no present intention to challenge the pricing actions described in 1.A. under the Decree, nor, given the totality of the circumstances of the airline industry, the antitrust laws.

**2. Cross Market Initiatives.**

**A. Description Of Airline Pricing Action.**

1. Airline A offers for sale a low fare (e.g., $101) for travel on a city-pair route that is important to Airline B. Airline B matches the $101 fare for travel on the same city-pair and also offers for sale a $101 fare for travel on a city-pair that is important to Airline A. Airline B withdraws both $101 fares after one day. Airline A then withdraws its initial $101 fare the next day.

2. Same as 2.A.1., except that Airline A does not withdraw the initial $101 fare, and Airline B then offers for sale $101 fares for travel on several city-pair routes important to Airline A. After two days, Airline A withdraws the initial $101 fare, and Airline B then withdraws its $101 fare.

**B. Antitrust Division's Statement Of Decree Applicability.**

All of the fares described in 2.A. above are bona fide fares that are actually available for purchase when they are published through ATPCO, and are likely to be considered by reasonable, informed consumers during the time they are available. Accordingly, the fares are bona fide fares and not fares "intended solely to communicate a

defendant's planned or contemplated fares or changes to fares" within the meaning of Section IV(D) of the Decree. Moreover, although there may be some communication inherent in these fares, the fares do not convey "other information concerning the defendant's planned or contemplated fares or changes to fares" within the meaning of Section IV(B) of the Decree. Thus, the pricing actions described above are not prohibited by the Decree. Indeed, the Decree specifically states that "[r]egardless of what fares any airline offers in any city or airport pair, offering any fare in the same or any other city pair, in and of itself, does not constitute a violation of this judgment." Section V(H). Because the fares described are bona fide fares, the Antitrust Division has no present intention to challenge the pricing actions described in 2.A. under the Decree, nor, given the totality of the circumstances of the airline industry, the antitrust laws.

The foregoing statements represent the position of the Antitrust Division concerning the applicability of the Decree to the specific pricing practices described, and the Division will not urge a contrary position in any adversarial, administrative, or regulatory proceeding. If so requested by American, the Division will consider in good faith a request to state the position of the United States, and to argue its correctness, in any adversarial, administrative, or regulatory proceeding, if the position of the United States is germane to issues in such proceeding, even if the United States is not a party to or otherwise directly involved in the proceeding.

I enclose a proposed Final Judgment attached to a Stipulation I have executed on behalf of American, which makes the following previously agreed upon changes to the Final Judgment entered on November 1, 1993:

1. Adding otherwise lawful sales of airline management services to other airlines to Section V(B);

2. Expanding the limitation of Section V(C); and

3. Modifying slightly the record keeping obligation in Section VI(C).

Although American continues to deny that its past pricing activities challenged in the Civil Action were unlawful, American has agreed to consent to the entry of the Decree in order to avoid the burden and expense of litigation and in consideration of the Division's statements of its position concerning the applicability of the Decree as set out above.

A stipulation executed by American through its counsel is enclosed herewith and made a part of this letter of understanding.

Your signature below confirms that the foregoing Statements of Decree Applicability accurately reflect the position of the Antitrust Division.

Sincerely,

MICHAEL A. DOYLE
Counsel for AMERICAN AIRLINES, INC.

Confirmed:

Roger W. Fones
Section Chief
Transportation, Energy and
Agriculture Section
U.S. Department of Justice
Antitrust Division

MAD:aem

Enclosures

[AC940210.087]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>AIRLINE TARIFF PUBLISHING COMPANY; et al.,<br><br>Defendants. | Civil Action<br>No. 92-2854 SSH (DAR) |

ORDER

UPON CONSIDERATION of the plaintiff's motion to make the letter of January 21, 1994, from Michael A. Doyle, counsel for American Airlines, to Roger Fones, Antitrust Division, U.S. Department of Justice, part of the official record in this case, it is this ____ day of _____, 1994, hereby

ORDERED, that the plaintiff's motion is GRANTED; and it is,

FURTHER ORDERED, that the CLERK will make the letter from Michael A. Doyle part of the official record in this case.

Dated: _____

_____
STANLEY S. HARRIS
United States District Judge

Upon entry copies to:

Mary Jean Moltenbrey
Antitrust Division
U.S. Department of Justice
555 Fourth Street, N.W.
Washington, D.C. 20001

for plaintiff United States

Mark Leddy
Michael J. Byrnes
Cleary, Gottlieb, Steen & Hamilton
1752 N Street, N.W.
Washington, D.C. 20036

Jonathan B. Hill
Dow, Lohnes & Albertson
1255 Twenty-third Street, N.W.
Washington, D.C. 20037

for defendant Airline Tariff Publishing Company

James V. Dick
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

for defendant Alaska Airlines, Inc.

Michael Doyle
Alston & Bird
700 Thirteenth St., N.W.
Suite 350
Washington, D.C. 20005-3960

Irving Scher
Weil Gotshal & Manges
767 Fifth Avenue
New York, N.Y. 10153

Peter D. Isakoff
Weil, Gotshal & Manges
1615 L Street, N.W., Suite 700
Washington, D.C. 20036

for defendant American Airlines, Inc.

Donald L. Flexner
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595

for defendants Continental Airlines, Inc., and Northwest Airlines, Inc.

Emmet J. Bondurant II
Bondurant, Mixson & Elmore
1201 West Peachtree Street, N.W.
39th Floor
Atlanta, Georgia 30309

James R. Weiss
Preston Gates Ellis & Rouvelas Meeds
1735 New York Ave., N.W. Suite 500
Washington, D.C. 20006

for defendant Delta Air Lines, Inc.

Thomas Demitrack
Jones, Day, Reavis & Pogue
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114

James E. Anklam
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, D.C. 20005-3939

for defendant Trans World Airlines, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing STIPULATION, proposed FINAL JUDGMENT, COMPETITIVE IMPACT STATEMENT, and MOTION ON CONSENT TO MAKE PART OF THE OFFICIAL RECORD LETTER OF JANUARY 21, 1994, FROM MICHAEL DOYLE to be served upon counsel in this matter in the manner set forth below:

By hand:

Mark Leddy
Michael J. Byrnes
Cleary, Gottlieb, Steen & Hamilton
1752 N Street, N.W.
Washington, D.C. 20036

Jonathan B. Hill
Dow, Lohnes & Albertson
1255 Twenty-third Street, N.W.
Washington, D.C. 20037

for defendant Airline Tariff Publishing Company

James V. Dick
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

for defendant Alaska Airlines, Inc.

Peter D. Isakoff
Weil, Gotshal & Manges
1615 L Street, N.W., Suite 700
Washington, D.C. 20036

for defendant American Airlines, Inc.

Donald L. Flexner
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595

for defendants Continental Airlines, Inc., and Northwest Airlines, Inc.

James R. Weiss
Preston Gates Ellis & Rouvelas Meeds
1735 New York Ave., N.W. Suite 500
Washington, D.C. 20006

for defendant Delta Air Lines, Inc.

James E. Anklam
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, D.C. 20005-3939

for defendant Trans World Airlines, Inc.

By Federal Express:

Michael Doyle
Alston & Bird
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3960

Irving Scher
Weil Gotshal & Manges
767 Fifth Avenue
New York, N.Y. 10153

for defendant American Airlines, Inc.

Emmet J. Bondurant II
Bondurant, Mixson & Elmore
1201 West Peachtree Street, N.W.
39th Floor
Atlanta, Georgia 30309

for defendant Delta Air Lines, Inc.

Thomas Demitrack
Jones, Day, Reavis & Pogue
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114

for defendant Trans World Airlines, Inc.

Dated: March 17, 1994

Mary Jean Moltenbrey
Antitrust Division
U.S. Department of Justice
555 Fourth St., N.W.
Washington, D.C. 20001
(202) 307-6396