

several U.S. and other governmental initiatives under way to ban smoking on international flights and assert that the voluntary action they advocate will produce faster results and avoid the possibility of different or conflicting rules for different countries.

The Joint Applicants also state that the antitrust immunity they seek is consistent with Department precedent. They state that, under either of the two tests the Department has employed for granting antitrust immunity, their application merits approval.

Answers in response to the Joint Application were filed by the National Smokers Alliance, the Coalition on Smoking or Health, and Congressman Richard J. Durbin.¹ The National Smokers Alliance, a nonprofit membership organization seeking accommodation for smokers, opposes the grant of antitrust immunity on the grounds that the purpose of the discussions is to eliminate competition in the provision of air services and to reduce consumer options. It states that individual carriers should make decisions banning smoking in a competitive environment, subject to the economics of the marketplace, and cites the voluntary ban by one U.S. carrier, Delta, as evidence that such an approach can achieve antismoking goals.

The Coalition on Smoking or Health, representing the American Cancer Society, the American Heart Association and the American Lung Association, supports grant of the discussion immunity. The Coalition believes that a voluntary agreement among carriers in the important transatlantic market would probably lead to similar agreements on other international routes, greatly increasing the prospects of worldwide compliance with the resolution of the International Civil Aviation Organization (ICAO) calling for smokefree international flights by July 1, 1996. Congressman Durbin also urges prompt approval of the requested discussion authority, observing that the efforts of the U.S. and other countries to achieve implementation of the ICAO resolution through intergovernmental agreement is a slow process, and states that a voluntary agreement among carriers would provide an important public health benefit that is clearly in the public interest.

The Joint Applicants filed a request for leave to file a reply to the answers of the National Smokers Alliance and the Coalition on Smoking or Health,

which we will grant. The Joint Applicants contend that the Coalition's comments highlight the important public benefit and strong U.S. policy of achieving a smoke-free environment on international flights that underlie the discussion immunity request, while the position of the Alliance that the proposed discussions would be anticompetitive underscores the reluctance of the carriers to proceed without that immunity.

As required by statute, we have given the Attorney General and the Secretary of State a copy of the application and the opportunity to submit written comments on the application. Neither the Attorney General nor the Secretary of State has submitted any comments.

Decision

The Department has decided to grant the requested discussion immunity, subject to several conditions traditionally imposed to protect the public interest when potentially anticompetitive discussion authority is granted. The United States has a firmly-established policy that smoking should be banned on international flights, because eliminating smoking on international airline flights will provide important public health benefits. We are granting the application, because the discussions proposed by the carrier applicants should hasten the achievement of that goal in transatlantic markets.

We assume for the purposes of our decision here that both the purpose and effect of the proposed discussions would be to substantially reduce competition among carriers in the provision of air transportation. In such instances, we may authorize intercarrier discussions and grant them antitrust immunity where we find that the discussions are necessary to meet a serious transportation need or to achieve important public benefits and that such benefits or need cannot be secured by reasonably available alternatives that are materially less anticompetitive. 49 U.S.C. 41308, 41309.

The purpose of the discussions in this case is to secure the important public benefit of smoke-free air travel in a faster and more orderly fashion than the present process of government regulation and intergovernmental negotiation. The discussions are also consistent with a strong and clearly articulated U.S. policy.

The public health and safety benefits of eliminating smoking and passive smoke contamination of aircraft were addressed in regulatory proceedings prompted by the enactment of section

335 of Public Law 101-164 and resulting in the adoption of the smoking ban on most domestic flight segments set forth in Part 252 of the Department's regulations, 14 CFR Part 252. In the case of international flights, the U.S. has sponsored, and in 1992 ICAO adopted, a resolution urging member states to ban smoking on all international flights by July 1, 1996. In November, 1994, the U.S., Canada and Australia announced the signing of an agreement to ban smoking on flights by their carriers operating nonstop between their territories.

Despite such initiatives, however, the process of negotiating and implementing smoking bans with dozens of governments is a slow and uncertain process due to the complexities of dealing with so many different countries. Furthermore, failure to achieve agreement with all of the countries of a given region would create confusion for passengers and present significant crew and aircraft coordination problems for airlines. A voluntary agreement among carriers in the important transatlantic market will clearly help avoid such problems while making it more likely that the goals of the U.S. and most of the world's nations under the ICAO resolution can be achieved.

We also find that there are no reasonably available alternatives to the requested discussions having a materially less anticompetitive effect. Direct governmental action would not be a market solution and would present the difficulties noted above. And, while the National Smokers Alliance points to an independent action by one U.S. carrier to ban smoking on at least some of its international flights, we find no basis to believe that a pure reliance on individual carrier marketing decisions will either avoid the difficulties faced by direct government action or significantly contribute to the realization of U.S. policies and objectives.

The applicants assert that each of them would be reluctant to ban smoking on its own transatlantic flights because doing so could cost it a significant number of passengers. As a result, notwithstanding Delta's own decision to bar smoking on its flights, the applicant carriers might well delay prohibiting smoking until smoking was prohibited by government action. This causes us to find that independent carrier action is not a reasonably available alternative which would achieve the same result as the proposed discussions, the early elimination of smoking from most transatlantic service. The United States wishes to bar smoking on international

¹ Congressman's Durbin's comments were filed by United Airlines, which requests that they be accepted. We will grant that request.