BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Joint Application of **DELTA AIR LINES, INC.** **and** **LATAM AIRLINES GROUP S.A., et al.** **Under 49 U.S.C. §§ 41308 and 41309** **For Approval of and Antitrust Immunity for Alliance Agreements**	**Docket DOT-OST-2020-0105**

ANSWER OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL TO OBJECTIONS OF THE DELTA MASTER EXECUTIVE COUNCIL

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On behalf of over 59,000 U.S. pilots at 23 U.S. airlines, the Air Line Pilots Association, International (ALPA) supports the Objections of the Delta Master Executive Council of ALPA (Delta MEC) to the Department's Order to Show Cause, Order 2022-6-15, tentatively granting approval of an antitrust-immunized (ATI) metal-neutral joint venture between Delta and LATAM ("JV").[1]

ALPA fully endorses the Delta MEC's concerns about the Department's tentative decision to strike the JV's capacity growth provision. Together, Delta and LATAM

[1] Objections of the Delta MEC (filed July 7, 2022, in this docket) ("Delta MEC Objs."). Carriers' common names are used.

decided that their combined growth in flying, to be conducted by each carrier's metal and each carrier's pilots, would be shared fairly and equitably by Delta on the one hand, and LATAM, on the other.[2] JV Section 5.3. The Show Cause Order erroneously determined, however, that the provision should be stricken as a "capacity constraint clause" because the Department desires the Latin American airline to be able grow faster than the U.S. airline.

In this respect, the Show Cause Order is mistaken. For the reasons the Delta MEC fully articulated, the decision rests on flawed assumptions about LATAM's ability to reach its pre-pandemic operational capacity without Delta's investment and network, as well as on the JV's supposed ability to charge supra-competitive airfares as a result. Show Cause Order at 18, 20, 23; Delta MEC Objs. at 3-10. More broadly, the Show Cause Order overlooked the critical role shared growth clauses like this one have in preserving and expanding JV flying performed by U.S. airline labor now and in the future. As U.S. airlines enter into joint ventures with developing-world carriers, growth clauses like the one the Show Cause Order rejected may become the cornerstone of the Department's ability to approve JVs consistent with its statutory public interest objectives.

[2] Order to Show Cause, Order 2022-6-15 (June 23, 2022) ("Show Cause Order").

1. Fair Allocations of JV Flying Are Critical to U.S. Airline Labor and U.S. Carrier Capacity

Since the advent of fully-integrated, metal-neutral, antitrust-immunized joint ventures, ALPA has advocated to the Department for a fair allocation of joint venture flying to U.S. pilots.[3] Such allocations would fulfill the Department's statutory mandate to consider the public interest by encouraging "fair wages and working conditions," 49 U.S.C. § 40101(a)(5), and in "strengthening the competitive position of [U.S.] air carriers to at least ensure equality with foreign air carriers," 49 U.S.C. §§ 40101(a)(15) and (e)(1).

In 2010, when the Department considered the United Air Lines/All Nippon Airways[4] metal-neutral joint venture ATI application, ALPA, supported by the Association of Flight Attendants and the Allied Pilots Association, urged the Department to place a condition that would have closely correlated United's share of joint venture flying with the amount of joint venture revenue it would receive. Public Answer of ALPA at 5-6, Docket DOT-OST-2010-0059 (June 29, 2010). Such a provision would have ensured that "the U.S. carriers in joint ventures perform, at minimum, a reasonable share of the flying covered by the arrangement." *Id.* at 6. Unfortunately,

[3] Under "metal neutrality," the joint venture carriers are indifferent as to which partner operates the aircraft over the relevant routes, and thus can be indifferent as to which pilots and flight attendants operate those services. Where the foreign JV partner has lower wages and work rules across its work groups, including for flight crew, U.S. labor's concern is heightened that such "metal neutral" indifference invites the risk of outsourcing.

[4] Before they merged, Continental Airlines applied with United and All Nippon Airways for approval of a three-way JV; references to Continental are omitted for simplicity.

during the Obama Administration, the Department declined to place such a condition but relied on the hope "that [the U.S. carriers], like their partners, have the incentive to increase capacity *if possible*, which *could* provide more opportunities for pilots and other labor groups…." *U.S.-Japan Alliance Case*, Order 2010-10-4, at 17 (Oct. 6, 2010) (emphasis added). Put another way, the Department's speculative hope for growth outweighed labor's request for fair-share-of-flying condition.

Now, twelve years later, another U.S. carrier and another foreign carrier *have* agreed to fair-share provisions. Nonetheless, the Show Cause Order did not address the growth provision's effect on labor but found that the provision must be stricken because it "*could* prevent full restoration" of the *foreign carrier's* capacity, and may enable higher fares. Show Cause Order at 18 (emphasis added). In other words, a speculative concern about marketplace benefits – in favor of a foreign carrier – outweighs U.S. carriers' and U.S. airline employees' interest in retaining a privately-negotiated fair-share provision that prevents the erosion of U.S capacity. It is one thing for the Department to have declined *to add* a fair-share condition to its approval; it is quite another for the Show Cause Order to require *removal* of a fair-share clause as a prerequisite for approval. The insistence on this prerequisite is mistaken and inconsistent with the Department's public interest mandate.

The Department should not prioritize foreign-carrier over U.S. aviation interests. ALPA's largest passenger carrier pilot groups now work within ATI joint venture

structures, including United/Lufthansa Group/Air Canada, United/ANA, Delta/Air France-KLM/Virgin Atlantic, and Delta/Korean. Over the past decade, experience gained in these relationships has validated labor's concern that with ATI joint ventures comes the risk of imbalanced work allocations.[5] In the years ahead, as U.S. airlines enter into and expand joint ventures with foreign carriers in the developing world, the highly disparate labor costs (and, in some cases, less stringent work and operating rules) will make equitable growth clauses essential to ensuring that approvals of such JVs are consistent with the Department's statutory public interest objectives.

2. The Department's Proposed Remedy is Unnecessary

In addition, the Department's decision to demand the deletion of the fair share provisions is mistaken because it is unnecessary. As discussed more fully in the Delta MEC Objections, the Show Cause Order erroneously asserts that they might somehow enable the joint applicants to charge supra-competitive fares. The DOT's stated goals – to encourage more service and to enable synergies to provide competition at Miami – will be achieved by the JV as a single entity, not by carriers individually: indeed, the policy assumption that only a single entity can deliver such benefits is the crux of the case for ATI. Show Cause Order at 7. The "Open Skies" air service regime and consequent robust competition in the region will prevent the JV from charging supra-

[5] *See* Delta MEC Objs. at 4, n. 4.

competitive fares in the market.[6] Delta and LATAM's internal business decisions to allocate flying and growth will in no way disturb that result. *See* Delta MEC Objs. at 8-11. In these circumstances, the Department should not substitute its business judgment for that of these carriers.

Furthermore, a final decision to strike a fair-share condition in this agreement would have implications well beyond this single alliance. As we have mentioned, future joint ventures will increasingly bring together U.S. carrier employees with those in the developing world. Delta MEC Objs. at 4-5. A final decision striking the Delta-LATAM fair-share clause here has the potential to deter private parties from including such clauses in future JVs, much to the detriment of U.S. aviation workers, and U.S. airline capacity generally. Conversely, a decision to keep the fair-share-of growth-clause would be consistent with the Biden Administration's renewed commitment to the promotion of U.S. workers to reverse negative trends related to "globalization."[7]

Today, the economic position of U.S. airlines and their employees is among the strongest in the world. That strength should be a source of gratification for the Department, not a reason for restraint. Thanks to the Department's support for the

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[6] *See* Delta MEC Objs. at 8-10, on this point.

[7] White House Task Force on Worker Organizing and Empowerment, *Report to the President* at 2 (Feb. 7, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/02/White-House-Task-Force-on-Worker-Organizing-and-Empowerment-Report.pdf.

CARES Act and the Payroll Support Program (PSP) that provided critical emergency support for U.S. airlines, our carriers survived a near-complete loss of air travel demand during the pandemic. The United States was the only nation on Earth to specifically and robustly support its airline employees as well as its airlines during the pandemic. The result: U.S. carriers have recovered their operational tempo faster than their foreign counterparts. The Department should be proud of its work to facilitate such support then and should support the investment the U.S. Government made by enabling the growth of U.S. airlines and the work of U.S. airline employees now.

3. The Department Should Be Commended for its Labor Impact Reporting Requirement Decision

In keeping with its recent precedents, the Department rightly granted the Delta MEC's request that Delta and LATAM's annual reports "should include information and data on the proposed JV's impacts on aviation jobs and the relative amount of flying undertaken by each party to the alliance." Show Cause Order at 24. ALPA welcomes the reporting requirement as a positive step forward to enable an assessment of JV benefits to others besides consumers.

Unfortunately, airline labor will not be able to participate in the assessment. ALPA fully supports the Delta MEC's earlier request that that counsel for interested parties be permitted to view the reports under Rule 12's confidentiality provisions.

However, because labor will not have direct visibility into the JV's impact on U.S. flying and U.S. jobs, preservation of the existing fair-share clause is all the more important.

CONCLUSION

U.S. carriers that include fair-share growth clauses in their joint venture agreements should be commended, not forced to remove them. Specific concerns of airline labor which those clauses assuage should not be sacrificed to appease a specter of speculative marketplace harm. The Show Cause Order's directive to remove the fair-share provision is contrary to the Biden Administration's policy goals and contrary to the public interest in the encouragement of "fair wages and working conditions." 49 U.S.C. § 40101(a)(5), and in "strengthening the competitive position of [U.S.] air carriers to at least ensure equality with foreign air carriers," 49 U.S.C. §§ 40101(a)(15) and (e)(1). For the reasons set forth above, ALPA fully supports the Delta MEC's objections to the Department's tentative remedy to strike the capacity growth provision of the JV.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2022, the foregoing document was served on the following persons via the email addresses listed below in accordance with the Department's Rules of Practice:

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