

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY**

**In the Matter of
Application for Approval of Agreement by the
International Air Transport Association**

Docket OST-2003-14480

**COMMENTS OF THE HEALTH & PERSONAL CARE LOGISTICS
CONFERENCE, INC. AND THE NATIONAL SMALL
SHIPMENTS TRAFFIC CONFERENCE, INC. IN
OPPOSITION TO IATA APPLICATION**

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Dated: May 29, 2003

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I. INTRODUCTION

The Health & Personal Care Logistics Conference, Inc. ("H&PCLC") and the National Small Shipments Traffic Conference, Inc. ("NASSTRAC") (collectively, the "Shipper Conferences"), hereby file their comments in opposition to the Application for Approval of Agreements by the International Air Transport Association filed February 7, 2003 (hereafter "IATA Application").

In its Application, IATA seeks an antitrust exemption under 49 U.S.C. § 41308 to implement Resolution 502, under which IATA's existing dimensional rule of 166 cubic inches per pound would be superseded by a new dimensional rule of 138 cubic inches per pound. IATA also seeks DOT approval of this change under 49 U.S.C. § 41309.

Compelling considerations of law and policy require DOT to deny IATA's application,

for reasons set forth below and in the comments of other shippers and shipper organizations who join the Shipper Conferences in opposing the requested approval and antitrust exemption.

The Shipper Conferences are aware of, and are not indifferent to the financial straits of the airline industry. This factor may be subject to consideration as part of the statute's public interest test. However, it is not a dispositive consideration when compared with other important considerations, including the availability of less anticompetitive alternatives.

II. IDENTITY AND INTEREST OF THE SHIPPER CONFERENCES

The Shipper Conferences are incorporated membership associations of shippers of freight that have, for many years, pursued their members' interests in regulatory and other legal proceedings dealing with transportation and logistics issues. Members of H&PCLC, which was begun in 1922, are manufacturers of pharmaceutical, health care and personal care products, and include most of the nation's largest pharmaceutical companies. Members of NASSTRAC, which was begun in 1952, are large and smaller companies that ship commodities of all kinds, predominantly in package or parcel volumes.

Members of both Shipper Conferences are major customers of the airline industry, and collectively ship hundreds of thousands of packages annually in international air freight transportation. As such, they have a vital interest in this proceeding, and in the rate increases that would result from approval of the IATA Application.

As demonstrated herein, IATA's proposal falls far short of meeting the applicable statutory standards. Insofar as it would change the current dimensional rule as set forth in

Resolution 502, it is plainly anticompetitive, ignores less anticompetitive alternatives, and will not meet a serious transportation need or achieve important public benefits.

Resolution 502 is also contrary to the public interest and inconsistent with the governing statute, U.S. Code Title 49, Subtitle VII, Part A.

III. BACKGROUND

IATA Resolution 502 was actually adopted at a meeting of IATA members in Geneva in May 2002. The original effective date was October 1, 2002. See the Application for Approval of Agreements filed by IATA on June 28, 2002 in Docket No. OST-02-12700-1. However, IATA filed a Request for Withdrawal of that Application on July 29, 2002, citing "inadvertent omissions" in the Application, and stating that a new application would be filed.

In noting "omissions," IATA was apparently referring to the applicable regulations at 14 CFR Part 303, and in particular to the requirements for explanatory and supporting materials in such applications. See, e.g., 49 CFR Sections 303.05, 303.30 and 303.31. IATA's reference to these omissions as "inadvertent" was disingenuous. Appended to its June 28, 2002 filing was a 70-page Memorandum dated June 25, 2002 concerning the IATA meeting at which Resolution 502 was adopted. That same Memorandum has also been appended to IATA's February 7, 2003 Application.

At page 24 of the Memorandum, the following statement appears concerning Resolution 502:

[C]oncern was expressed with the need for US-based TC Members to provide economic cost justification to the US DOT for this amendment. As in the past, IATA confirmed that an outside party would be employed to facilitate the preparation of this justification but this work would take

several months to complete and placed in doubt a 1 October 2002 effective date.

The paragraph goes on to state that consideration was given to a delayed effective date, but the group evidently voted to go forward whether or not an economic cost justification could be provided. Thus, IATA made its June 28, 2002 Application knowing that it did not comply with applicable requirements, and withdrew it only in the face of widespread opposition.

Aside from the casual attitude toward U.S. law demonstrated by this approach, it also appears that IATA's procedure with respect to its proposed international air cargo dimensional rule change reflected a casual attitude toward the facts. Instead of commissioning a study of the potential economic cost justification for the rule change, and basing its decision on the results of the study, IATA decided to adopt the rule change first and then engage an outside party to spend several months attempting to justify IATA's decision on economic grounds.

Between June 28, 2002 and February 7, 2003, IATA evidently collected data from four U.S. air carriers with international air cargo operations -- American Airlines, United Air Lines, Delta Air Lines and Federal Express Corporation. Apparently, this documentation is intended to constitute the necessary economic cost justification. However, relatively little of this documentation addresses with Resolution 502 at all, and the documentation provided does not meet the requirements of the statute and regulations.¹

¹ IATA cannot argue that Resolution 502 is a relatively small part of a more extensive agreement that is largely unobjectionable, and must therefore be approved. Such a loophole would swallow the statutory protections. In any event, the Secretary's authority to consider individual sections of agreements is clear. See Republic Airlines, Inc. v. CAB, 756 F.2d 1304, 1315 (8th Cir. 1985).

IV. ARGUMENT

The statutory requirements for approval of IATA's Application are straightforward. Under 49 U.S.C. § 41309(b)(1), the Secretary must disapprove an Agreement "that substantially reduces or eliminates competition unless the Secretary finds that

- (A) The agreement ... is necessary to meet a serious transportation need or to achieve important public benefits (including international comity and foreign policy considerations); and
- (B) The transportation need cannot be met or those benefits cannot be achieved by reasonably available alternatives that are materially less anticompetitive."

If the Agreement meets these tests, the Secretary must still find it "not adverse to the public interest and not in violation of this part," i.e., 49 U.S.C. Sections 40101 through 46505, before approving it. If the Agreement meets the tests for approval under Section 41309, an antitrust exemption under Section 41308 is available "to the extent necessary" to allow the approved transaction(s) to proceed.

In a proceeding under Section 41309(b)(1), opponents of an Agreement have the burden of proving that it reduces competition and that less anticompetitive alternatives are available, and the proponents of an Agreement have the burden of proving the transportation need or public benefits. The statute does not specify the burden of proof as to the issues of whether the Agreement is "not adverse to the public interest and is not a violation of this part."

As will be seen, IATA Resolution 502 meets none of the foregoing tests for approval.

A. **IATA Resolution 502 Substantially Reduces or Eliminates Competition**

Antitrust immunity with respect to pricing is rare in American law, and is narrowly construed when it exists. See, e.g., Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973). Traditionally, antitrust immunity has existed only where, and to the extent, that the need for implementation of antitrust policies has been displaced by effective regulation. E.g., Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922). Obviously, where antitrust exemptions are disfavored generally, they are even less likely to be justifiable when there is no possibility of regulatory recourse.

IATA may attempt to justify Resolution 502 by reference to a simplistic and flawed syllogism along the following lines: (1) air carriers do not compete today on the basis of the existing 166 cubic inches per pound dimensional rule because it is the same for all international air cargo; (2) air carriers will not compete in the future on the basis of the proposed 138 cubic inches per pound rule because it will also be the same for all carriers; and (3) therefore (IATA might argue), Resolution 502 will not affect competition at all, much less reduce or eliminate it.

The principal flaw in this reasoning is that it ignores the transfer of millions of dollars from shippers to carriers as a result of the dimensional rule change. A review of Attachment 1 (page 1 of 11) in each of the economic cost justifications prepared by (or for) the four commenting air carriers indicates that affected shipments will be hit with rate increases exceeding 20%.

Those same statements project annual revenue increases resulting from Resolution 502 of \$9,307,000 for American; \$2,078,314 for Delta; \$17,300,000 for FedEx, and \$13,174,935 for United.² Assuming these figures are accurate, this is a total of almost \$42 million in increased revenues for just four air carriers, and it is to be recovered not as the result of better service or cost cutting, but as the result of a meeting in Geneva among air carriers that must otherwise compete for revenues.

Properly understood, Resolution 502 is a device for competing air carriers to act collectively to take a 20% rate increase on low density shipments, and to do so in a way that enables them to argue that the rate increase is the fault of a shadowy international organization, not the carriers themselves.

Simply stated, this is cartel behavior of the type that Congress intended to eliminate when it deregulated the airline industry, and it is not just cartel behavior, but cartel behavior with the intended result of a form of price fixing. What IATA asks DOT to approve would in all likelihood be per se unlawful under the antitrust laws, which is why IATA also seeks an exemption from those laws. See, e.g., United States v. Container Corporation of America, 393 U.S. 333, 337 (1969) ("interference with the setting of prices by free market forces is unlawful per se").

If approved by DOT, Resolution 502 will create a new model for collective ratemaking. IATA has already argued that it could justify a further reduction in the dimensional rule to 3000 cc per kg or 83 cubic inches per pound. This is less than 50% of the 194 cubic inches per pound dimensional rule the airlines use for domestic air cargo without collective action.

² See American Airlines Statement at page 10, Delta at 8, FedEx at 8 and United at 9.

Thus, to the extent the change would be commercially viable, IATA could come before DOT in a year or so and seek a reduction from 5000 cc to 4000 cc, and later from 4000 cc to 3000 cc, that would generate further \$41 million rate increases for these four air carriers, as well as untold millions more for other air carriers. Other rate increases disguised as rule changes would surely follow. This in turn would reduce the airlines' need for conventional rate increases subject to market discipline.³

Accordingly, Resolution 502 must be found to substantially reduce or eliminate competition.

B. Resolution 502 is Not Necessary to Meet a Serious Transportation Need or Achieve Important Public Benefits

According to Appendix E to IATA's Application, the main transportation "need" or "public benefit" at which Resolution 502 is aimed is the air carriers' need for more money. Appendix E states:

Loose freight tendered to airlines would generally bear the same rate per chargeable kilo regardless of its density. Therefore 1000 kgs taking up only 2 cubic meters of space would be priced the same as 1000 kgs taking up 6 cubic meters.

Note that IATA is not proposing to reject freight that is less dense; it simply wants to charge more for such freight through a collective targeted rate increase.

Appendix E goes on to argue that the airlines carry less heavy machinery and machine parts today, and more high tech equipment, and that these high tech goods have

³ The trucking industry was deregulated in 1980, shortly after airline deregulation, and motor carriers used to setting rates and charges in a cartel setting also sought to preserve their "stealth" rate increases by acting in ways that would increase those rates and charges indirectly. In one of many court decisions rejecting such devices, the D.C. Circuit emphatically rejected continued carrier gamesmanship in Clark & Reid Co. v. United States, 851 F.2d 1468 (D.C. Cir. 1988) ("motor carriers cannot avoid the antitrust laws simply by wrapping their specific rate changes in the clothing of rules").

become lighter in weight due to "technology advancements" (which are normally considered a good thing), and due to packaging.

There being no other "transportation need" IATA has identified in support of Resolution 502, it was the expectation of the Shippers Conferences that IATA's cost justification would expand on and corroborate the claims in Appendix E. Resolution 502 is obviously controversial, and would lead to enormous rate increases on affected shipments.

However, a review of the four air carriers' submissions discloses little or no corroborating evidence. The four air carriers essentially content themselves with repeating the general claims made in Appendix E. United states that its "cargo density has declined" (submission at page 2), but it doesn't say by how much or over what period. There is no way to judge the relevance of its general statement to IATA's proposed rule change. If, for example, the decline in density is because 90% of its 25 pound per cubic foot shipments are now 23 pound per cubic foot shipments, the decrease has no relevance to Resolution 502.

In addition, there is no way of telling whether these four air carriers' experience (whatever it is) is representative of the experience of the universe of air carriers worldwide or air carriers based in this country. FedEx speaks of "industry-wide trends" at page 2 of its submission, but does not quantify or even identify those industry trends. Indeed, most of the documentation provided by these carriers in support of IATA's Application has nothing to do with Resolution 502.

Nor have we been provided with any analysis of the effectiveness of Resolution 502 as a remedy for the alleged problem, except as a generator of additional revenues.

Will the rate increases have unintended consequences, such as adversely affecting certain products' delivered prices, and therefore their competitiveness? Are there manufacturers that will be unable to recover the increased costs, and whose viability will suffer as a result? If "competitive marketing conditions" will affect the impact of Resolution 502 (United Submission at 2), which shippers will pay what portion of these rate increases?

"Transportation need" within the meaning of the statute is not necessarily the same as "carrier need," but IATA's application fails even to prove that Resolution 502 is necessary to meet the needs of air carriers. Where, as here, the statute also requires an examination of "public benefits" and of the public interest (which are addressed in more detail below) the weakness of IATA's "proof" becomes even more glaring.

C. Less Anticompetitive Alternatives to Resolution 502 are Available

Appendix E to IATA's Application states: "The present air cargo industry volume allowance is far too lenient, and does not provide an adequate return on limited capacity available." The first part of this statement is difficult to credit, given that these four carriers all use 194 cubic inches per pound in determining chargeable weight for their domestic air cargo shipments.⁴

The second part of the statement merely confirms that the goal of Resolution 502 is to increase air carrier returns by increasing rates for the affected shipments. It is obvious that a "less anticompetitive" way of achieving this goal is "reasonably available." Instead of changing the dimensional rule and increasing their rates collectively with an antitrust exemption, the air carriers could change their rule and/or increase their rates individually.

⁴ See, e.g., United Shipping Guide -- General Rules and Regulations Section 14, at www.unitedcargo.com/shipping/RRgeneral.jsp.

Individual action on dimensional rules is plainly an option for air carriers. Air carriers adopted their 194 cubic inches per pound domestic air cargo dimensional rule in just this way, without antitrust immunity.

Individual action is not just less anticompetitive and readily available, satisfying the Section 41309(b)(1)(B) test, but individual action is preferable. Individual action is subject to discussions between carriers and shippers in which adverse impacts can be addressed in concrete rather than abstract terms. Where Resolution 502 offers a one-size fits all "fix," individual dimensional rules and/or rate adjustments may permit win-win solutions reflecting market forces, as Congress intended.

It is true that individual action to change the status quo may be resisted, but collective action to change the status quo has hardly been welcomed by shippers and intermediaries. In any event, the statutory inquiry is whether the Agreement's goals "cannot be met ... by reasonably available alternatives that are materially less anticompetitive." There may be situations in which there are no less anticompetitive alternatives available, or such alternatives would be ineffective, but this is not such a situation.

D. Resolution 502 is Adverse to the Public Interest

In addition to the specific tests of Subsection (b)(1), Section 41309 also establishes the more general tests of Subsection (b), under which an agreement is to be approved if the Secretary finds that "it is not adverse to the public interest and not in violation of this part. Resolution 502 also fails these tests.

The main interest served by Resolution 502 is conceded by IATA to be the interest of air carriers in higher revenues. The Shipper Conferences do not contend that

this is an illegitimate interest. However, assuming air carriers' interests in higher rates can be considered an aspect of the public interest, the inquiry cannot end there. What's good for air carriers is not necessarily good for the public.

At a minimum, the public interest also includes the following considerations, which would be adversely affected by Resolution 502.

- The public interest in competition. IATA's decision to pursue rate increases in an anticompetitive manner leads to a direct conflict between Resolution 502 and the aviation policy of the United States. See 49 U.S.C. § 40101(a)(6):

- (a) Economic regulation -- In carrying out subpart II of this part [which includes Sections 41309 and 41308] ... the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with the public convenience and necessity.

* * * *

- (b) placing maximum reliance on competitive market forces and on actual and potential competition --
 - (A) to provide the needed air transportation system; and
 - (B) to encourage efficient and well-managed air carriers to earn adequate profits and attract capital, considering any material differences between interstate air transportation and foreign air transportation.

Instead of placing "maximum reliance" on competitive market forces to support the air transportation system and to produce adequate profits for well-managed air carriers, IATA Resolution 502 would place no reliance on competition, but would inflate profits for all air carriers, well-managed or not, through collective action that would violate the antitrust laws, if not exempted.

To similar effect, see subsections (9) and (10) of Section 40101, defining the public interest to include preventing anticompetitive practices and avoiding monopoly powers and unreasonable rate increases. See also subsection (12), encouraging reliance on competition (not collusion) to provide efficiency and low prices, and to decide on the variety of and prices for air transportation services.

- The public interest in the economic health of shippers and intermediaries.

Economic strength is one of the most important public interest components of national policy. See, e.g., 49 U.S.C. § 40101(a)(7). The importance of the need for economic strength has been recognized by Congress even in the context of current efforts to enhance homeland security. In the Homeland Security Act of 2002, Pub. L. No. 107-296, Congress provided that part of the primary mission of the Department of Homeland Security is to "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland."

If the public interest in homeland security does not necessarily supersede the public interest in economic security, it follows that the interest of a small number of air carriers in rate increases should not outweigh the public interest in the health of the nation's economy. And the many shippers commenting in opposition to Resolution 502, either individually or through associations like the Shipper Conferences, the National Industrial Transportation League, and the High Tech Airfreight Shippers Coalition, are a far better proxy for the economy as a whole than IATA and the four air carriers that filed supporting economic statements.

The Shipper Conferences have worked closely with the High Tech Airfreight Shippers Coalition, and we understand that the Coalition's comments in opposition to

Resolution 502 will demonstrate that the adverse impact of Resolution 502 on the shippers studied by the Coalition is actually far greater than the four air carriers' submissions suggest. Specifically, the Coalition is projecting rate increases just for high tech electronics shippers that far exceed the \$42 million in increased revenues projected by the four air carriers. This imbalance is exacerbated by the increased air cargo rates that will be imposed on the pharmaceutical and health and personal care products manufacturers represented by H&PCLC, and the manufacturers of the various commodities shipped in international air cargo by the members of NASSTRAC.

The Shipper Conferences share this and other concerns expressed by the Coalition, whose evidence strongly suggests that the principal beneficiaries of Resolution 502 will actually be foreign air carriers, while the principal victims of Resolution 502 will be U.S. shippers, their suppliers and their customers, who collectively represent a significant segment of the U.S. economy. Other comments filed with DOT make this same point -- that Resolution 502 is adverse to the public interest in a strong U.S. economy.

- The public interest in a coordinated and smoothly-operating transportation system. The current 166 cubic inches per pound dimensional rule for air cargo has been in effect since 1981, and the members of the Shipper Conferences, as well as many other shippers, have relied on that rule in designing their products and packaging. The proposed change to a 138 cubic inches per pound rule would be highly disruptive, forcing shippers to choose between paying higher rates, increasing the density of their products, reducing the volume of their packaging, or some combination of these.

IATA may argue that approval of Resolution 502 is necessary for consistency between U.S. air carriers' dimensional rules for international air cargo and foreign air carriers' dimensional rules for international air cargo. However, in narrowing or eliminating differences in dimensional rules on international air cargo, Resolution 502 would widen the gap between U.S. domestic air cargo, with its 194 cubic inches per pound rule, and international air cargo. This would increase inefficiencies in supply chain operations for U.S. shippers, most of whom ship more freight by air domestically than internationally.

The current dimensional rules have also led to stable relationships among modes of transportation that would be disrupted by approval of Resolution 502. Some shippers may elect to ship by ocean carrier, or use surface transportation rather than air for western hemisphere cross-border shipments. Such diversions would presumably defeat IATA's purpose in adopting Resolution 502.

To the extent that shippers of similar products make different decisions on diversion of freight, competitive relationships in those shippers' businesses may be altered. To the extent that differences exist in shippers' ability to protect themselves against the rate increases produced by Resolution 502, the most "captive" shippers are least likely to be able to avoid the resulting rate increases, undermining the desire of Congress to promote competition as the main determinant of rates and service quality.

The full extent of these impacts may be uncertain, but the significant and collective change by air carriers to rates and service terms embodied in Resolution 502 will disrupt the air cargo system. In this respect, too, Resolution 502 is adverse to the public interest.

- Other public interest considerations. IATA claims that Resolution 502 is needed because the density of air freight has declined. The Shipper Conferences have already noted the lack of specificity, let alone evidentiary support, for these claims. But assuming freight density has declined in ways relevant to the issues presented by Resolution 502, it is not in the public interest for air carriers to penalize this development. Lighter products and lighter packaging are economically efficient, often requiring less use of resources and materials, and less fuel in transportation.

Similarly, globalization has led to shifts in the nature of production in developed and developing countries. Fewer raw materials are produced in this country, which has shifted to more finished goods, and particularly to more high-tech goods. These trends have generally been welcomed by policy-makers as economically efficient, and as serving the public interest.

If the result is that air cargo densities have fallen, reducing carrier revenues, rate adjustments may be necessary. However, there are right ways and wrong ways for carriers to adjust their rates. The right way is through individual action, subject to negotiations with customers. The wrong way is to adopt a uniform rate increase through collective carrier action, or through rule changes intended to produce that result, for which an antitrust exemption must be sought. IATA's reliance on the latter approach with respect to Resolution 502 is adverse to the public interest.

E. Collective Carrier Action to Implement Resolution 502 Would Violate Part A of Subtitle VII of U.S. Code Title 49

The final statutory criterion for assessing the IATA Agreement is also in Section 41309(b). The Secretary is to disapprove an agreement that is "in violation of this part," i.e., Title 49, Subtitle VII, Part A, or 49 U.S.C. §§ 40101 through 46505. Obviously, one

purpose of IATA's Application is to seek a determination by the Secretary that Resolution 502 is lawful and in the public interest.

However, it is clear from the issues raised earlier in these Comments that there is a fundamental inconsistency between the policies and provisions of the statute with respect to competition and market forces, and the collusive activities of IATA in developing, and seeking to implement, Resolution 502 as a means of increasing rates for U.S. shippers and revenues for U.S. and foreign air carriers. That inconsistency provides an additional reason why the Secretary should deny IATA's application, so that air carriers may address their concerns through individual action, in arms-length negotiations with their customers.

V. CONCLUSION

For the foregoing reasons, and for reasons set forth in the arguments of the High Tech Airfreight Shippers Coalition and the National Industrial Traffic League, which the Shipper Conferences adopt and support, IATA's Application for approval of, and an antitrust exemption for, Resolution 502 should be denied.

Respectfully submitted,

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Dated: May 29, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of May, 2003, served copies of the foregoing document by email and by U.S. mail, postage prepaid, on the attorney-in-fact for Applicant IATA as follows:

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