

**ORIGINAL**

5406  
QA

**BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.**

DEPT. OF TRANSPORTATION  
DOCKET SECTION  
95 OCT 10 1A:4:35

Joint Application of )  
)  
DELTA AIR LINES, INC., )  
SWISSAIR, SWISS AIR TRANSPORT )  
COMPANY, LTD., )  
SABENA S.A., SABENA BELGIAN WORLD )  
AIRLINES, and )  
AUSTRIAN AIRLINES, ÖSTERREICHISCHE )  
LUFTVERKEHRS AG )  
)  
For approval of and antitrust immunity for Alliance )  
Agreements pursuant to 49 U.S.C. §§ 41308 and )  
41309. )

Docket OST-95-618 -7

**JOINT MOTION OF DELTA AIR LINES, INC.,  
SWISSAIR, SWISS AIR TRANSPORT CO., LTD.,  
SABENA S.A., SABENA BELGIAN WORLD AIRLINES,  
AND AUSTRIAN AIRLINES  
FOR CONFIDENTIAL TREATMENT PURSUANT TO RULE 39**

14 pp

Communications with respect to this document should be addressed to:

**William Karas**  
**STEPTOE & JOHNSON**  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
**(202) 429-6223**

Attorney for  
**SWISSAIR, SWISS AIR  
TRANSPORT CO., LTD.**

**R. Tenney Johnson**  
2300 N Street, N.W.  
6th Floor  
Washington, D.C. 20037  
**(202) 663-9030**

Attorney for  
**SABENA S.A., SABENA BELGIAN  
WORLD AIRLINES**

**J.E. Murdock III**  
SHAW, PITTMAN, POTTS  
& TROWBRIDGE  
2300 N Street, N.W.  
Washington, D.C. 20037  
**(202) 663-8342**

Attorney for  
**AUSTRIAN AIRLINES,  
ÖSTERREICHISCHE  
LUFTVERKEHRS AG**

**Robert E. Cohn**  
**Sheryl R. Israel**  
SHAW, PITTMAN, POTTS  
& TROWBRIDGE  
2300 N Street, N.W.  
Washington, D.C. 20037  
**(202) 663-8060**

Attorneys for  
**DELTA AIR LINES, INC.**

**John J. Varley**  
General Attorney  
DELTA AIR LINES, INC.  
Law Department #986  
1030 Delta Boulevard  
Atlanta, Georgia 3 0320  
**(404) 715-2872**

and

**D. Scott Yohe**  
Vice President - Government Affairs  
DELTA AIR LINES, INC.  
1629 IS Street, N.W.  
Washington, D.C. 20006  
**(202) 296-6464**

October 10, 1995

**BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.**

---

<b>Joint Application of</b>	)	
	)	
<b>DELTA AIR LINES, INC.,</b>	)	
<b>SWISSAIR, SWISS AIR TRANSPORT</b>	)	
<b>COMPANY, LTD.,</b>	)	
<b>SABENA S.A., SABENA BELGIAN WORLD</b>	)	<b>Docket OST-95-618</b>
<b>AIRLINES, and</b>	)	
<b>AUSTRIAN AIRLINES ÖSTERREICHISCHE</b>	)	
<b>LUFTVERKEHRS AG</b>	)	
	)	
<b>For approval of and antitrust immunity for Alliance</b>	)	
<b>Agreements pursuant to 49 U.S.C. §§ 41308 and</b>	)	
<b>41309.</b>	)	

---

**JOINT MOTION OF DELTA AIR LINES, INC.,  
SWISSAIR, SWISS AIR TRANSPORT CO., LTD.,  
SABENA S.A., SABENA BELGIAN WORLD AIRLINES,  
AND AUSTRIAN AIRLINES  
FOR CONFIDENTIAL TREATMENT PURSUANT TO RULE 39**

On September 8, 1995, Delta Air Lines, Inc. (“Delta”), Swissair, Swiss Air Transport Co., Ltd. (“Swissair”), Sabena S.A., Sabena Belgian World Airlines (“Sabena”) and Austrian Airlines, Österreichische Luftverkehrs AG (“Austrian”) (collectively, the “Joint Applicants”) filed a Joint Application for approval of and antitrust immunity for certain Alliance Agreements. By Order 95-9-27, the Department required the Joint Applicants to supplement the Joint Application with additional information.

The Joint Applicants hereby file this motion requesting the Department to withhold certain proprietary and commercially sensitive confidential information from

public disclosure, pursuant to Rule 39 of the Department's Rules of Practice (14 C.F.R. Section 302.39) and 49 U.S.C. §40115.

The confidential information is being submitted by the Joint Applicants in response to Department Information Item Nos. 1, 2 and 7, as set forth in Order 95-9-27, and accompany this motion in separate, sealed envelopes. With respect to documents responding to Information Item Nos. 1 and 2, the Joint Applicants are requesting limited access only to counsel and outside experts for interested parties due to the extremely competitively sensitive nature of such documents. With respect to documents responding to Item No. 7 (O&D traffic data), routine Rule 39 disclosure (i.e., to persons submitting standard confidentiality affidavits) would apply.

In further support of this motion, the Joint Applicants state the following:

**1. The Confidential Information Submitted In Response To The Department's Information Request Is Protected From Public Disclosure Under The Freedom Of Information Act.**

All of the confidential information in question is protected from public disclosure under various exemptions under the Freedom of Information Act (FOIA), including 5 U.S.C. Section 552(b)(3) ("Exemption (3)") and 5 U.S.C. Section 552(b)(4) ("Exemption (4)").

Exemption 4 exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (§ 552(b)(4)). This exemption has been construed to prevent public disclosure of

information that is not the type usually released to the public, and that, if released, would cause substantial harm to the competitive position of the person from whom the information was obtained. See, e.g., Gulf & Western Industries, Inc. v. United States, 615 F.2d 527,530 (D.C. Cir. 1980); American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 871 (2d Cir. 1978); National Parks & Conservation Association v. Kleppe, 547 F.2d 673,684 (D.C. Cir. 1976); Joint Application of Delta and Virgin Atlantic, Order 94-5-42; Joint Application of United and Lufthansa, Order 93-12-32; Joint Application of Northwest and KLM, Order 93-1- 11, at 19; Information Directives Concerning CRS, Order 88-5-46 (May 22, 1988); Carrier-Owned Computer Reservations Svstems, ER-1385, Order 86-5-54 (May 19, 1986); Information Directives Concerning CRS, Order 83-12-136 (December 29, 1983). The purpose of these exemptions “is to protect the confidentiality of information which citizens provide to their government, but which would customarily not be released to the public, and to facilitate citizens’ ability to confide in their government.” Burke Energy Corn. v. Department of Energy, 583 F.Supp. 507,510 (D.Kansas 1984).

For information to qualify for exemption under Exemption (4), the information must be (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential. See, e.g., Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983). All of the information contained in the Confidential Appendices satisfies this three-part test.

First, the confidential information to be withheld from public disclosure, as described in Sections 2 and 3 below, is commercial or financial in nature, in that it

relates to commercially sensitive, proprietary and privileged **financial** and corporate information. This type of confidential information is proprietary and commercially sensitive, and would not otherwise be made public. It is being submitted to the Department pursuant to the Department's Order so that the Department can fairly and expeditiously evaluate the public interest benefits that will result from granting approval of and antitrust immunity for the Alliance Agreements.

Second, the information has been "obtained from a person" within the meaning of Exemption (4).

Third, the information is "confidential." This confidential information is not generally available to the public, and its public disclosure is not required to further the public interest or to promote competition. In National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), the Court held that information is "confidential" for purposes of Exemption (4) if it would not customarily be released to the public by the person from whom it was obtained and if disclosure is likely to have either of the following results: "( 1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d at 770.

The Joint Applicants submit that public disclosure of the type of confidential information at issue here would cause substantial harm to the competitive positions of the Joint Applicants and could impair the Government's ability to obtain similar information on a voluntary basis from individuals in the future.

In addition, the withholding from public disclosure of the information is also provided for under Exemption (3). Exemption (3) pertains to information specifically exempted from disclosure by some other statute, such as 49 U.S.C. §40 115. The release of the information which is the subject of this Motion may “prejudice the formulation and presentation of positions of the United States and international negotiations” with foreign governments, and would, therefore, be inconsistent with 49 U.S.C. §40115. The Department has ruled that U.S. carrier aircraft cost data submitted under Form 41 should be withheld from public disclosure under former Section 1104 of the Act (new 49 U.S.C. §40115) because of the competitive harm that would result to the filing carriers if such data were revealed to foreign carriers not required to file the same information. See, letter dated March 29, 1993 to Don M. Adams, Assistant Vice President, Delta Air Lines, Docket 48649. See also Order 93-12-32 at 4 (United-Lufthansa). The release of the sensitive commercial information subject to this motion would have similar adverse impacts on the Joint Applicants if it is obtained by their competitors, who are not required to submit similar information.

**2. Access To Responses To Department Information Item Nos. 1  
And 2 Should Be Limited Only To Counsel And Outside Experts.**

The Joint Applicants’ responses to Department Information Item Nos. 1 and 2 in Order 95-9-27, p. 2 include internal corporate documents, studies, surveys, analyses and reports. These highly proprietary documents should be accorded limited access only to counsel and outside experts who file Rule 39 affidavits stating that the **affiant** will (a) use the information only for the purpose of participating in this proceeding, and (b) not

disclose such information to anyone other than counsel or outside experts who have filed a valid affidavit.” These documents contain highly sensitive commercial information, including corporate documents, studies, surveys, analyses and reports, prepared by each of the Joint Applicants for internal planning and strategic decisionmaking. The information contained in these documents has not been publicly released; some of the documents have not even been shared among the Joint Applicants. If released, competitors of the Joint Applicants would gain valuable insights into the internal strategies and objectives with respect to the most competitively sensitive matters relating to the Joint Applicants. In order to minimize the risk of harmful disclosure of this competitively sensitive information, access must be limited as requested.

The request to limit disclosure only to counsel and outside experts is fully consistent with Department precedent and policy. Thus, in the Joint Application of United and Lufthansa, Order 93-12-32, served December 22, 1993, the Department granted the applicants’ request to limit access to certain confidential information only to counsel for interested parties and outside experts who filed Rule 39 affidavits. In limiting such access, the Department balanced the disclosure of the confidential information against the competitive harm to the applicants that could result if access were expanded, and concluded that “the undue competitive harm to the applicants outweighs the commenters’ need for expanded access to the highly sensitive material in this case.” Id.

---

<sup>12</sup> The Joint Applicants are filing concurrently with this Motion five (5) copies of Information Items Nos. 1 and 2 with the Docket Section, in sealed envelopes with red markers, and labeled as follows: “CONFIDENTIAL TREATMENT REQUESTED UNDER SECTION 302.39. ACCESS IS LIMITED ONLY TO COUNSEL OR OUTSIDE EXPERTS, AS DESCRIBED IN THE ATTACHED RULE 39 MOTION.”

at 5. The Department also noted that “interested parties to this proceeding can obtain adequate advice on the merits of the application through outside experts and persons authorized to review the materials.”” Id. Access to the documents responding to Information Item Nos. 1 and 2 should be limited in a comparable manner, in light of the undue competitive harm to the Joint Applicants that would result from a broader disclosure of the highly sensitive information.

**3. Response To Department Information Item No. 7 - Standard Rule 39 Access.**

The data contained in response to the Department’s Information Item No. 7 in Order 95-9-27, consisting of Origin & Destination (“O&D”) traffic for 1994 for Austrian, Sabena and **Swissair**,<sup>3/</sup> should be accorded routine Rule 39 treatment, limiting access only to persons who file a standard Rule 39 confidentiality affidavit. The Department historically has limited access to this type of O&D data only to persons who file a Rule 39 affidavit, who **affirm** that they will use the data only for the purpose of the proceeding and will not disclose such data to persons who have not filed a confidentiality affidavit in the proceeding.

---

<sup>2/</sup> United and Lufthansa had requested that the Department require the affiants affirmatively to state that they were not involved in competitive decisionmaking. The Department determined such a standard would be unnecessary given that “the safeguards already included in the affidavit process. . . should prove more than adequate to prevent undue competitive harm to United and Lufthansa.” See, Joint Application of United and Lufthansa, Docket 49223, Notice Granting Access to Documents, served November 24, 1993.

<sup>3/</sup> The Joint Applicants are filing concurrently with this Motion five (5) copies of Information Item No. 7 with the Docket Section, in sealed envelopes with yellow markers, and labeled as follows: “CONFIDENTIAL TREATMENT REQUESTED UNDER SECTION 302.39 PURSUANT TO STANDARD RULE 39 ACCESS PROCEDURES.”

**4. Request For *In Camera* Review Of Certain Information.**

Delta has withheld from its confidential responses to Information Item Nos. 1 and 2 extremely sensitive commercial information relating to (a) the number of code-share seats purchased, (b) the price paid by Delta for code-share seats, (c) traffic, revenue, operating and financial results of code-share routes and (d) frequent flyer fees. Delta will make this information available to DOT staff for review, on *an in camera* basis, in order for the Department to make a determination relating to the confidentiality and relevancy of this information to the proceeding.

This information is extremely sensitive, both competitively and commercially, and is not relevant to the Department's public interest assessment of the Joint Application. Moreover, the disclosure to competitors -- even on a confidential basis under Rule 39 -- of this highly sensitive information, would reveal key information concerning Delta's cost of production and financial and operating performance of its existing code-share services on a route-by-route basis and thereby cause significant competitive and commercial harm to Delta, without any countervailing benefit. In light of the potentially serious competitive damage that public disclosure of this route-specific information would impose on Delta, competitors seeking access to this kind of confidential information carry a significant burden that the information is relevant and essential for them to participate adequately in the proceeding, and also that their need outweighs the enormous harm to Delta that would result from such disclosure. See, Joint Application of Delta and Virgin Atlantic, Order 94-5-43. Significantly, in that Order, the Department determined that

similar route-specific information concerning code-share seats and prices “is indeed both irrelevant to our review and highly commercially sensitive,” and “that the information will not assist parties in addressing the issues raised by the application.” Order 94-5-42 at 4; See also Joint Application of United-Lufthansa, Order 93-12-3 1 n. 5; Joint Application of American Airlines, Inc. and ACI Holdings, Inc., Order 87-2-33; USAir-Piedmont Acquisition Case, Order 87-4-39 at 9-10.

In United-Lufthansa, the Department permitted the applicant to withhold information concluding that:

the information is not relevant to our public interest assessment of the merits of this application. The documents contain sensitive competitive information that does not need to be examined to assess the public interest issues in this case. Similarly, other interested parties in this proceeding will not be affected adversely by not having this information. In contrast, the great commercial sensitivity of the material creates the potential for significant harm to the applicants if the material were released and available to their direct competitors in the market. All relevant portions of the Alliance Agreement are already either public or available to persons filing proper affidavits. Therefore, we will not require the applicants to file this information in this proceeding.

Order 93-12-32, n.5. Delta requests similar treatment and a ruling that the withheld information is not necessary to the Department’s public interest assessment.

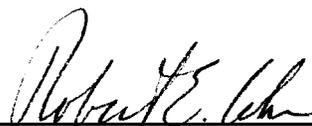
WHEREFORE, the Joint Applicants hereby move that the Department withhold the confidential information filed concurrently herewith under seal from public disclosure as requested above, pursuant to Rule 39 of the Department's Regulations, and 49 U.S.C. §40115 of the Act.

Respectfully submitted,

/REC

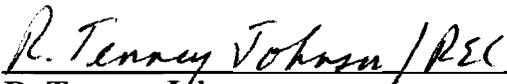
**William Karas**  
STEPTOE & JOHNSON  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 429-6223

Attorney for  
**SWISSAIR, SWISS AIR TRANSPORT  
COMPANY, LTD.**



**Robert E. Cohn**  
SHAW, PITTMAN, POTTS &  
TROWBRIDGE  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8060

Attorney for  
**DELTA AIR LINES, INC.**

/REC

**R. Tenney Johnson**  
2300 N Street, N.W., 6th Floor  
Washington, D.C. 20037  
(202) 663-9030

Attorney for  
**SABENA S.A., SABENA BELGIAN  
WORLD AIRLINES**

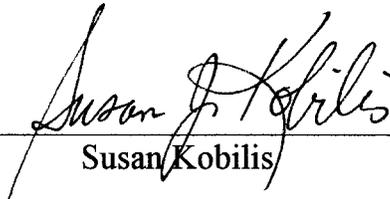
/REC

**J.E. Murdock III**  
SHAW, PITTMAN, POTTS &  
TROWBRIDGE  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8342

Attorney for  
**AUSTRIAN AIRLINES,  
ÖSTERREICHISCHE  
LUFTVERKEHRS AG**

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion For Confidential Treatment Pursuant to Rule 39 of Delta Air Lines, Inc., Swissair, Swiss Air Transport Co., Ltd., Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines, Österreichische Luftverkehrs AG was served this 1 lth day of October, 1995, on all persons listed on the attached service list.

  
\_\_\_\_\_  
Susan Kobilis

## SERVICE LIST

Roger W. Fones  
Chief, Transportation, Energy  
& Agriculture Section  
Antitrust Division  
U.S. Department of Justice  
Room 9 104, Judiciary Center Building  
555 Fourth Street, N.W.  
Washington, D.C. 20001

R Bruce Keiner  
Crowell & Moring  
1001 Pennsylvania Ave., N.W.  
10th Floor North  
Washington, D.C. 20004

Carl B. Nelson, Jr.  
Associate General Counsel  
American Airlines, Inc.  
1101 17th Street, N.W., Ste 600  
Washington, D.C. 20036

R. D. Devlin  
Richard J. Fahy, Jr.  
Trans World Airlines  
808 17th Street, N.W., Suite 520  
Washington, D.C. 20006

Nathaniel P. Breed, Jr.  
Shaw, Pittman, Potts &  
Trowbridge  
2300 N Street, N.W.  
Washington, D.C. 20037

Mr. Jon F. Ash  
Global Aviation Associates, Ltd.  
1800 K Street, N.W., Suite 1104  
Washington, D.C. 20006

Russ Bailey  
Air Lines Pilots Association  
1625 Massachusetts Ave., N.W.  
Washington, D.C. 20036

Elliott M. Seiden  
**Megan** Rae Poldy  
Northwest Airlines  
901 15th Street, N.W., Suite 500  
Washington, D.C. 20005

Joel Stephen Burton  
Ginsburg, Feldman & Bress  
1250 Connecticut Avenue, N.W.  
Suite 800  
Washington, D.C. 20036

Richard D. Mathias  
Frank Costello  
Cathleen P. Peterson  
Zuckert, **Scoutt &** Rasenberger  
888 17th Street, N.W., Ste. 600  
Washington, D.C. 20006

James R. Weiss  
Preston, Gates, Ellis  
& Rouvelas  
1735 New York Avenue, N.W.  
Suite 500  
Washington, D.C. 20590

Stephen L. **Gelband**  
Hewes, Morella, **Gelband**  
& Lamberton, P.C.  
1000 Potomac Street, N. W.  
Suite 300  
Washington, D.C. 20007

Edward J. Driscoll  
President and Chief Executive  
NATIONAL AIR CARRIER ASSOCIATION, INC.  
1730 M Street, N.W.  
Suite 806  
Washington, D.C. 20036