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

DEPT. OF TRANSPORTATION
DOCKET SECTION
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Joint Application of

Delta Airlines, Inc.
Swissair, Swiss Air Transport Company, Ltd.
Sabena, S.A., Sabena Belgian World
Airlines, and
Austrian Airlines, Osterreichische
Luftverkehrs AG

for approval of and antitrust immunity for
Alliance Agreements pursuant to 49 U. S.C.
§§ 41308 and 41309

Docket OST-95-6 18 - 13

**ANSWER OF TRANS WORLD AIRLINES, INC.
TO MOTION FOR CONFIDENTIAL TREATMENT**

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October 17, 1995

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TO MOTION FOR CONFIDENTIAL TREATMENT**

By a motion, dated October 10, 1995, Delta and its European partners have requested that the Department grant confidential treatment to much of the information and documents submitted pursuant to Order 95-9-27. TWA has no objection to the basic principle that the carrier's confidential information should be protected under Rule 39. It does object to two elements of the parties' request -- their proposal that only outside counsel and experts should have access to the data, and their suggestion that key information about traffic, revenue, operating results and pricing should be totally withheld from other parties. In support of its Answer, TWA states as follows:

L TWA Requires Full Participation of Inside Counsel and Experts in Order to Present its Case in this Proceeding.

1. The applicants have provided no basis for depriving other parties of the educated assistance of the personnel within the company who are most knowledgeable in the subject matter. Outside attorneys cannot claim special expertise in the economic matters at issue here or in the operating intricacies of airline operations in these markets. Outside experts may have more operational expertise, but are not involved in the intense, daily submersion in airline operations in these markets that give inside experts unique perspectives on comments or positions that the applicants may make in their internal documents. In addition, outside counsel has to be able to discuss the evidence with the company's Senior Vice President & General Counsel to develop a policy position in the matter. It would place TWA at a significant disadvantage if it were not able to avail itself of the expertise of senior inside officials in developing its pleadings in this matter.

2. The applicants claim that their request "is fully consistent with Department precedent and policy" (p. 6). However, they cite only one case, Joint Application of United and Lufthansa, Order 93-12-32, and ignore numerous others in which the Department refused to grant such unusual protection. For example, in Northwest/Hawaiian, Order 92-6-14, the Department rejected a request that American's Vice President - International Planning be denied access to internal documents because he was involved in international marketing strategy. Rather, it found that, as American's stated in-house expert on regulatory affairs, he could

provide his employer with an expert analysis'. The Department noted that Northwest's request raised significant due process concerns by depriving parties of a full opportunity to participate in the hearing. In Texas Air and People Express, Order 86-10-11, the Department examined prior decisions, found that they had not created a general rule, and established a balancing test:

In considering this issue, we must balance two goals. On the one hand, disclosure of competitively sensitive material should be prevented. On the other hand, we can only rule on the proposed acquisition after giving other parties a fair opportunity to develop and present their positions on the competitive and public interest issues. Providing others such an opportunity requires giving their counsel and experts reasonable access to the confidential material, since the material bears directly on those issues. We also shall not adopt procedures that compel parties to use outside counsel and experts when they prefer to rely on their inside staff. Moreover, even when the carrier parties to the proceeding have outside counsel and experts, the carrier's own personnel must make the policy decisions and are likely to be in the best position to interpret the confidential data." (pp. 9-10)

The Department granted access to confidential material to five Pan American Airways officials and an in-house attorney for a labor union,

While applicants rely on the United/Lufthansa, that case only continued the balancing policy established in Texas Air. However, United/Lufthansa involved a marketing arrangement, and not the per se antitrust violations from which the applicants request immunity in this proceeding. The Department believed that the parties could obtain adequate advice through

¹ In this case, TWA proposes to show the documents only to its Vice President - Planning and Corporate Strategy, who has direct regulatory responsibility for the company, and to its Senior Vice President & General Counsel.

outside experts and attorneys, and weighed that against the “undue” competitive harm that might be imposed on applicants (Order 93-12-32, p. 10). Here, when applicants are proposing to be allowed to fix prices and to pool revenue on competitive routes, the balance must clearly shift towards full access for other parties.

II. The Information that the Applicants Propose to Withhold Entirely From Other Parties Is Essential to Determination of the Issues in This Case.

The applicants request that they be allowed to withhold information concerning the number of code share seats purchased, their price, the operating results of joint services on code share routes, and frequent flyer fees because they are allegedly irrelevant to the Department’s public interest assessment of the Joint Application. They rely on two code share cases, Delta/Virgin, Order 94-5-43, and United/Lufthansa, Order 93-12-32. However, both cases involved only marketing arrangements, and not agreements that would be per se antitrust violations absent the immunity requested here.

In this case, the number of seats purchased, the price, and the operating results of the joint operations are key factual questions that will form a substantial part of the basis for determining whether the proposed operations are anticompetitive. Unlike prior code share cases, this proceeding involves:

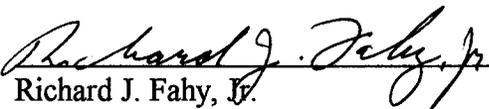
- ▶ Revenue pooling - a practice that is so anticompetitive that the European Union has outlawed it, and the United States has never allowed U.S. carriers to participate.
- ▶ Price fixing - The applicants propose to establish common pricing and inventory control with respect to all coordinated services.
- ▶ Capacity agreements - The applicants propose to coordinate airline schedules, route networks, and route planning.
- ▶ Agreed payments to travel agents - The applicants propose to agree upon commissions that each will pay to travel agents.

(Application, pp. 10- 12)

In this context, a claim that the details of the blocked space agreements, the agreed prices, and the operational results of the alliance are irrelevant to the Department's decision can hardly be serious. This is not a marketing agreement, but a long term arrangement under which the major competitors on important transatlantic routes will conduct a joint operation with total immunity **from** the normal competition laws applicable to every other competitor in our economy. It is not the intervenors that bear the burden in this case. It is the applicants that bear a heavy burden of demonstrating that competition laws should not apply to them, and correspondingly that the other parties should not be allowed to develop their arguments on the basis of the details of the proposed operation. As the old saying goes, the devil is in the details. **If the** intervenors are to provide maximum assistance to the Department, they must have access to the details of the agreements.

WHEREFORE, TWA **respectfully** requests that the applicants' motion for confidentiality be denied to the extent that it would deprive inside counsel and experts of the opportunity to view the documents, and deny other parties the chance to examine the details of the proposed operation.

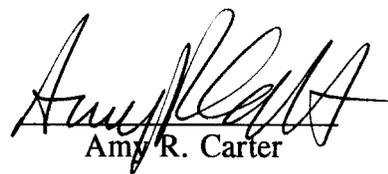
Respectfully submitted,


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October 17, 1995

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a copy of the foregoing Answer of TWA on all parties named on the attached service list, via first class mail, postage pre-paid .


Amy R. Carter

October 17, 1995

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