

57686
DA

DEPT. OF TRANSPORTATION
DOCKET SECTION

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

95 OCT 20 PM 3:43

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 -18

MOTION FOR LEAVE TO FILE
REPLY OF THE JOINT APPLICANTS TO
ANSWERS TO MOTION FOR CONFIDENTIAL TREATMENT

13 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
**SHAW, PITTMAN, POTTS
& TROWBRIDGE**
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8060

Attorney for
DELTA AIR LINES, INC.

John J. Varley
General Attorney
DELTA AIR LINES, INC.
Law Department #986
1030 Delta Boulevard
Atlanta, Georgia 30320
(404) 7 15-2872

and

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

October 20, 1995

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

Joint Application of)	
)	
DELTA AIR LINES, INC.,)	
SWISSAIR, SWISS AIR TRANSPORT)	
COMPANY, LTD.,)	
SABENA S.A., SABENA BELGIAN WORLD)	Docket OST-95-618
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.)	

**MOTION FOR LEAVE TO FILE
REPLY OF THE JOINT APPLICANTS TO
ANSWERS TO MOTION FOR CONFIDENTIAL TREATMENT**

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") (the "Joint Applicants") hereby request leave to file this Reply to address issues raised by the answers of Trans World Airlines, Inc. ("TWA") and Air Line Pilots Association ("ALPA") to the Joint Applicants' Motion for Confidential Treatment. This Joint Reply will aid the Department in resolving the issues raised in connection with the request for confidential treatment.

The Joint Applicants submit this Joint Reply to the Answers of TWA and ALPA to the motion for confidential treatment filed by the Joint Applicants under Rule 39 and 49 U.S.C. § 40115.

1. TWA and ALPA do not object to the basic principle that the Joint Applicants' confidential information should be protected under Rule 39. However, TWA states that it objects to limiting access to "only outside counsel and experts" and to withholding certain highly confidential information pending *in camera* review by the Department of the confidentiality and relevance of such information. ALPA's answer objects to the request to limit access to outside experts but did not indicate any objection to the request for *in camera* treatment.

2. TWA has misread the Joint Applicants' Motion for Confidentiality in several significant respects. First, with respect to the scope of the request for limited access regarding the Department Information Items 1 and 2, and second with respect to the character of the documents withheld by the Joint Applicants for *in camera* review.

3. The Joint Applicants did not propose to exclude "inside counsel" from having access to the confidential documents. The Joint Motion could not have been more clear that the request for access was limited to "counsel" and "outside experts". The Department's scheduling Notice, served October 16, 1995, correctly comprehended the Joint Applicants' Motion:

First, regarding Information Items 1 and 2 (Order 95-9-27 at 2), the Applicants request that, besides confidential consideration, the Department restrict access to these documents and information to counsel and outside experts for interested parties in this case.

Notice served October 16, 1995 at 2 (emphasis added). Contrary to TWA's erroneous claim, TWA's outside counsel (or in-house counsel for that matter) will be able to discuss the matter with the Company's Senior Vice President and General Counsel to develop a policy position.

4. The objections to limiting access to highly sensitive information to outside experts are without foundation. The exclusion of inside business experts is supported by sound policy and longstanding precedent, including cases involving merger-antitrust issues. See, United-Air Canada, Order 95- 10-27; United-Lufthansa, Order 93- 12-32; Order 88-1-5 1; USAir-Piedmont, Order 87-4-39; American-AC1 Holdings, Order 87-2-33; Delta-Western Acquisition, Order 86- 1 O-44; Texas Air-Eastern, Order 86-4-24; Texas Air-People Express, Order 86-9-64; Pacific Division Transfer, Order 85-9- 10; Order 85-6-93 and Comnuter Reservations Systems, Order 84-2-85 at 7. The Joint Applicants have requested that access be limited to counsel and outside experts with respect to the confidential information responding to Department Information Item Nos. 1 and 2, based upon the clear and present danger that the Joint Applicants would incur significant competitive harm if access to the highly sensitive information were available to non-legal company personnel (*i.e.*, in-house business experts) engaged in competitive decisionmaking activity.

The opponents do not deny that such injury would occur to the Joint Applicants if the documents were so released. Nor have they shown any countervailing harm to their positions if the documents are accorded confidential treatment with access limited to counsel and outside experts. TWA candidly admits that it wants to gain access to the

Joint Applicants' competitively sensitive internal documents for its Vice President - Planning and Corporate Strategy, who is, in TWA's words, "involved in the intense, daily submersion in airline operations in these markets." TWA Answer at 2. TWA is a substantial competitor of the Joint Applicants in the provision of transatlantic service and it should not be allowed to gain a strategic competitive advantage over the Joint Applicants by having access to highly confidential proprietary information that would not otherwise be available to TWA's competitive decisionmakers. While ALPA claims it is not a competitor, ALPA represents members who work for airlines that are competitors of the Joint Applicants.

Moreover, it is impossible for an in-house business expert to disregard information learned on a confidential basis from his or her daily commercial decisionmaking activity. As the CAB has observed in this regard:

It is simply unrealistic to believe that even the **best-**intentioned individuals would not find it "difficult to separate their knowledge of the confidential data of their competitors gained in this proceeding from their day-to-day decisions and advice to their employers."

Order 84-2-85, at 5, quoting Berght-AIA-Western-Wien Acquisition, Order of ALJ, March 18, 1982 at 3. The Department has made a similar observation:

Our decision to limit access to outside experts was based upon the sensitive nature of the data. As Delta appears to recognize, individuals who have inside responsibilities relating to carrier marketing and system expansion may find the information pertinent to their duties with their firms. We cannot reasonably ask these persons to ignore information they have obtained **from** this proceeding in formulating their advice to their principals.

Pacific Division Transfer Case, Order 85-9-10 at 4.

Courts routinely issue protective orders in cases involving sensitive commercial information and trade secrets and such protective orders frequently limit access to outside experts to prevent inside business experts who are involved in strategic decisionmaking from accessing confidential information. This is because it is impossible to prevent an inside expert from using the confidential information he or she has acquired in future business decisions. As one court observed:

Once an expert has digested this confidential information, it is unlikely that the expert will forget. *The expert's raison d'être* is to assimilate information in his or her chosen field and formulate material into various theories. The information obtained . . . will be added to the expert's repository of other information for possible future use. Even with stern sanctions for unauthorized use, how does one practically police a protective order?

Litton Industries v. Chesapeake & Ohio Railroad, 129 F.D.R. 528, 531 (E.D. Wisc. 1990); Greater Rockford Energy & Technology v. Shell Oil, 138 F.D.R. 530,537 (C.D. Ill. 1991).

5. TWA's attempt to distinguish United-Lufthansa is without merit. TWA claims that United-Lufthansa should not apply because it involved a marketing arrangement "and not the *per se* antitrust violations from which the Applicants request immunity in this proceeding." We have several responses to this erroneous assertion.

First, the scope of authority requested in an application should have no bearing on the Department's requirement to balance the need for disclosure against the substantial undue competitive harm to the Applicants that access to highly sensitive would produce.

While TWA relies on Texas Air-People Express to support its point, TWA ignores the fact that the Department's decision to grant access to certain confidential material to five Pan American officials was made only after it first concluded that "the material, moreover, does not directly concern People Express' operational and marketing strategies" and that "the five [Pan Am] officers are responsible for regulatory affairs and are not responsible for operational and marketing decisions at Pan Am." Order 86-10- 11 (emphasis added).

Second, as noted in paragraph No. 4 above, the Department and the CAB have issued confidentiality orders limiting access to outside experts in numerous cases involving mergers and antitrust issues.

Third, the Joint Applicants strongly disagree with TWA's bald assertion that the Alliance would involve "*per se* antitrust violations". To the contrary, as the Joint Application clearly demonstrates, the Alliance would be viewed as procompetitive under the antitrust laws. However, the risk of exposure to charges and lawsuits by third parties alleging antitrust violations such as those asserted by TWA, is precisely the reason why the Joint Applicants seek antitrust immunity and why the GAO concluded that "the key benefit of immunity. . . is the protection from legal challenge by other airlines". GAO Report, April 1995 at 30.

6. TWA's objection to the withholding by Delta of certain information pending *in camera* review by the Department is also without merit. The *in camera* information does not relate to the proposed Alliance or any of the proposed coordination

activities. Rather, the documents contain route-specific information about Delta's historic transatlantic services pursuant to the limited code-share arrangements.

This data is even more commercially sensitive than international passenger O&D data -- which is withheld by rule from public disclosure -- because it involves both carrier-specific and route-specific information. Because of this heightened sensitivity, the Department has determined to withhold from disclosure similar information submitted by U.S. carriers in special code-share reports. See, e.g., Letter dated August 11, 1994, of James W. Mitchell, Director, Office of Airline Statistics, Research and Special Programs Administration to Richard B. Hirst, Senior Vice President and General Counsel, Northwest Airlines. Delta's carrier-specific information is akin to "carrier-specific INS data [which] has generally been maintained as strictly confidential because of its competitive nature." Order 85-9-10 at 4 (emphasis added).¹

While we can understand TWA's keen commercial interest in obtaining access to such highly confidential and competitively sensitive information involving Delta's existing code-share services, TWA's review of such information is not necessary for the Department to perform its analysis of the competitive and public interest issues in this case. USAir-Piedmont, Order 87-4-39. TWA's position is tactical not substantive. TWA has made it clear that it opposes the proposed Alliance, and therefore it is not surprising that TWA would argue that the withheld information is relevant and essential for it to participate in this proceeding. However, under the standard used by the Department to evaluate the Joint Application -- i.e., "the standard Clayton Act test used in examining whether

¹ In the Pacific Transfer Case, the Department released carrier-specific INS data only to U.S. government parties. Order 85-6-93.

mergers will substantially reduce competition in any relevant market” (Order 92-1 1-27 at 13) -- data relating to Delta’s existing code-share services (such as the amount of seats purchased, the price for such seats, and the operating/financial results) would not, as TWA erroneously claims, “form a substantial part of the basis for determining whether the proposed operations are anticompetitive”. TWA Answer at 4. Delta’s existing limited services under its garden-variety code-share arrangements with Swissair, Sabena and Austrian do not involve any of the coordination activities for which antitrust immunity is requested and, contrary to TWA’s assertion, do **not** involve “the details of the proposed operation.” TWA Answer at 5.

The Department should apply its well-established policy and precedent, and permit Delta to withhold competitively sensitive route-specific information concerning its code-share services. See, Delta-Virgin Atlantic, Order 94-5-42 at 4; United-Lufthansa, Order 93-12-3 1 n. 5; USAir-Piedmont, Order 87-4-39; American-AC1 Holdings, Order 87-2-33. Given the highly sensitive nature of the withheld information, the Department should review the information *in camera* and make a determination relating to both the confidentiality and relevancy of the information to the proceeding. Even if the documents are considered to be arguably relevant, non-disclosure is still warranted where the harm of disclosure outweighs the need of the person seeking access. Greater Rockford v. Shell, supra at 534; American Standard v. Pfizer, 828 F.2d 734 (Fed. Cir. 1987).

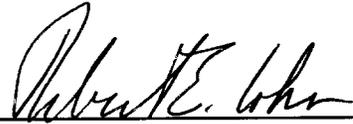
WHEREFORE, the Joint Applicants request that the Department grant the Motion for Confidential Treatment in its entirety.

Respectfully submitted,



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

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



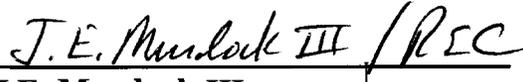
Robert E. Cohn
SHAW, PITTMAN, POTTS &
TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8060

Attorney for
DELTA AIR LINES, INC.



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**

229391

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion For Leave To File And Reply of Delta Air Lines, Inc., Swissair, Swiss Air Transport Co., Ltd., Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines, Österreichische Luftverkehrs AG To Answers To Motion For Confidential Treatment was served this 20th day of October, 1995, on all persons listed on the attached service list.



Lesly Belloff

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, DC. 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