

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of)	
)	
AMERICAN AIRLINES, INC.,)	
SWISSAIR, SWISS AIR TRANSPORT)	
COMPANY, LTD. and)	
N.V. SABENA S.A.)	
)	Docket OST-99-6528
under 49 U.S.C. §§ 41308 and 41309 for)	
approval of and antitrust immunity)	
for agreements)	

JOINT MOTION OF SWISSAIR, SWISS AIR TRANSPORT COMPANY, LTD.
AND **N.V. SABENA S.A.** FOR CONFIDENTIAL TREATMENT
PURSUANT TO RULE **39** OF THE DEPARTMENT'S
RULES OF PRACTICE, 14 C.F.R. §302.39

Swissair, Swiss Air Transport Company, Ltd. and **N.V. Sabena S.A.** (hereinafter, the "European Joint Applicants") each hereby moves that the Department 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. § 302.39. In connection with the captioned joint application of American, **Swissair** and **Sabena** for approval of and antitrust immunity for agreements, the European Joint Applicants are submitting proprietary and commercially sensitive corporate documents to the Department responsive to Parts VII(A) and VII(B) on page 27 of the Joint Application. The European

Joint Applicants request that access to these documents be limited to counsel and outside experts for interested parties.

In support of this motion, the European Joint Applicants respectfully state as follows:

I. THE EUROPEAN JOINT APPLICANTS' CONFIDENTIAL INFORMATION IS PROTECTED FROM PUBLIC DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT

The confidential information submitted herewith is protected from public disclosure under various exemptions in the Freedom of Information Act, including 5 U.S.C. § 552(b)(3) ("Exemption (3)") and 5 U.S.C. § 552(b)(4) ("Exemption (4)"). 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 Corp. v. DOE, 583 F. Supp. 507, 510 (D. Kan. 1984).

Exemption (4) exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This exemption has been construed to prevent public disclosure of information that is not of 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 Indus., Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1980); American Airlines, Inc. v. NMB, 588 F.2d 863, 871 (2d Cir. 1978); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 684 (D.C. Cir. 1976); Joint Application of Delta and Virgin Atlantic, Order 94-5-42, May 28, 1994; Joint Application of United and Lufthansa, Order 93-12-32, December 18, 1993; Joint Application of Northwest and KLM, Order 93-1-11, January 8, 1993, p. 19; Information Directives Concerning CRS, Order 88-5-46, May 22, 1988; Carrier-Owned Computer Reservations Systems, ER-1385, Order 86-5-54, May 19, 1986; Information Directives Concerning CRS, Order 83-12-136, December 29, 1983.

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

First, the confidential information is commercial or financial in nature, in that it relates to commercially sensitive, proprietary and privileged financial and corporate information. As such confidential information is proprietary and commercially sensitive, it would not otherwise be made

public. The European Joint Applicants are submitting the confidential information so that the Department can expeditiously evaluate the public interest benefits that will result from granting approval of and antitrust immunity for the **American/Swissair/Sabena** alliance.

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 available to the public, and its public disclosure is not required to further the public interest or to promote competition. In National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (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 either "(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."

The European Joint Applicants submit that public disclosure of the type of confidential information at issue here would cause substantial harm to their competitive positions and

could impair the Government's ability to obtain similar information on a voluntary basis from individuals in the future.

Withholding the confidential information from public disclosure 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. § 40115 which promises that the Secretary may on written request of a person, withhold certain information from public disclosure. The European Joint Applicants submit that the release of the information which is the subject of this motion may "prejudice the United States Government in preparing and presenting its position in international negotiations" and would "have an adverse effect on the competitive position of an air carrier in foreign air transportation" and therefore would be inconsistent with 49 U.S.C. § 40115. As shown below, release of the information which is the subject of this motion would have such effects.

II. ACCESS TO THESE CONFIDENTIAL AND HIGHLY SENSITIVE DOCUMENTS SHOULD BE LIMITED TO COUNSEL AND OUTSIDE EXPERTS

The European Joint Applicants are submitting highly sensitive internal corporate documents, studies, surveys, analyses, reports and data which should be accorded limited access. Such access should be granted only to counsel and

outside experts who file Rule 39 affidavits stating that the affiant (1) will use the information only for the purpose of participating in this proceeding and (2) will not disclose such information to anyone other than counsel or outside experts who have filed a valid affidavit.

The subject materials contain highly sensitive commercial information relating to international planning and strategic decision-making. The information contained in these documents has not been publicly released. If released, competitors would gain valuable insights into the European Joint Applicants' internal strategies and objectives with respect to the most competitively sensitive matters relating to their business plans and strategies.

In order to minimize the risk of harmful disclosure of this competitively sensitive information, access should be strictly limited, as requested. Each European Joint Applicant is separately filing, concurrently with this motion, three copies of this information, in sealed containers labeled "Confidential Treatment Requested Under 14 C.F.R. § 302.39; Access Is Limited To Counsel Or Outside Experts Who Have Filed Valid Affidavits."

The request to limit disclosure to counsel and outside experts is fully consistent with Department precedent and

policy. Thus, in United/Lufthansa, Order 93-12-32, supra, the Department granted the applicants' request to limit access to certain confidential information to counsel and outside experts who filed Rule 39 affidavits. In so doing, the Department balanced the disclosure of the confidential information against the competitive harm to the applicants that would 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. at p. 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. See also, e.g., Joint Application of American and Canadian International, Order 96-1-6, January 11, 1996, p.3.

Access to the European Joint Applicants' internal documents and data should be limited in a comparable manner, in light of the undue competitive harm that would result from a broader disclosure of such highly sensitive information.

WHEREFORE, for the foregoing reasons, the Department should grant the European Joint Applicants' motion to withhold from public disclosure their proprietary and commercially sensitive confidential information, as requested herein.

Respectfully submitted,

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December 6, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing joint motion by first-class mail on all persons named on the attached service list and in accordance with the Rules of Practice.

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