

6966-QA



Order 96-1-6

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

SERVED January 11, 1996

Issued by the Department of Transportation
on the 11th day of January, 1996

Joint Application of

**AMERICAN AIRLINES, INC. and EXECUTIVE
AIRLINES, INC., FLAGSHIP AIRLINES, INC.,
SIMMONS AIRLINES, INC., and WINGS WEST
AIRLINES, INC. d/b/a AMERICAN EAGLE**

and

**CANADIAN AIRLINES INTERNATIONAL LTD.
and ONTARIO EXPRESS LTD. and TIME AIR INC.
d/b/a CANADIAN REGIONAL and INTER-
CANADIAN (1991) INC.**

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

Docket OST-95-792 -//

**SCHEDULING NOTICE AND DETERMINATION ON MOTIONS FOR
CONFIDENTIAL TREATMENT UNDER 14 C.F.R. 302.39**

APPLICATION

On November 3, 1995, American Airlines, Inc. ("American") and its regional affiliates Executive Airlines, Inc., Flagship Airlines, Inc., Simmons Airlines, Inc., and Wings West Airlines, Inc. d/b/a American Eagle and Canadian Airlines International, Ltd. ("CAI") and its regional affiliates Ontario Express Ltd., Time Air Inc. d/b/a Canadian Regional and Inter-Canadian (1991) Inc. filed a joint application for approval of and antitrust immunity for a commercial alliance agreement ("the Agreement"), between American and its regional affiliates, on the one hand, and CAI and its regional affiliates, on the other hand. The application was filed pursuant to 49 U.S.C. §§ 41308 and 41309.

Concurrently, the applicants filed a joint motion under 14 C.F.R. 302.39 and 49 U.S.C. § 40115 requesting confidential treatment for certain documents and information. In regard to these data, the applicants requested that access be limited to counsel and outside experts for interested parties. The applicants represented to the Department that these documents contain "certain proprietary and commercially sensitive

confidential information." Additionally, the applicants stated that they had withheld from the record other "extraordinarily sensitive" information which they would make available to Department staff for review, on an *in camera* basis, to determine the relevance of the data to this proceeding.

The joint applicants stated that the Agreement will create a legal framework that, subject to negotiation and execution, will allow them to cooperate to the extent necessary to create a "seamless air transport system," while retaining their separate corporate and national identities. The applicants asked that we grant the requested approval and immunization for a five-year term, consistent with the duration of approvals previously granted by the Department to Northwest Airlines, Inc. and KLM Royal Dutch Airlines. Orders 92-11-27 and 93-1-11.

INITIAL DETERMINATION ON CONFIDENTIALITY ISSUES

Based on our initial review, we determined that the joint applicants had not sufficiently described those materials that they considered privileged and therefore withheld from the record. As a result, we were unable to establish the relevance of the materials to specific issues currently determined to be central to our evaluation. Therefore, on November 13, 1995, we directed the applicants, among other things, to describe fully the materials withheld (consistent with our advisory review standard, Order 95-11-5 at 7, n.5), as a supplement to their joint application; and deferred the 21-day deadline for the filing of comments set forth in 14 C.F.R. Part 303 until further notice. Additionally, we stated that when we determined that the joint application was complete, we would establish a procedural schedule for comments and such other responsive pleadings as may be determined necessary to decide this matter. Order 95-11-18.

SUPPLEMENTAL FILING

On November 17, 1995, the joint applicants filed the supplemental descriptions requested in Order 95-11-18.¹ Concurrently, the applicants filed a joint motion seeking confidential treatment for certain additional materials filed on that date. American and CAI state that the information is proprietary and commercially sensitive, and therefore should be withheld from public disclosure.²

Interested parties did not file comments.

¹ At that time, we directed interested parties to file comments on the motion for confidential treatment within seven business after submission of the requested descriptions.

² The joint applicants request that the Department limit access to these data to counsel and outside experts for interested parties.

DECISION

We grant the joint applicants' requests for confidential treatment for certain documents and information filed concurrently with their November 3 and 17 submissions, limiting access to these data in certain respects. Upon an advisory review by the staff of certain other American and CAI information, we will require that the joint applicants file specific data in the docket, as more fully described below. Finally, we will establish a procedural schedule for the submission of answers and replies.

I. MOTIONS FOR CONFIDENTIAL TREATMENT AND ACCESS ISSUES

We have decided to grant the joint applicants' requests for confidential treatment for certain information and data filed on November 3 and 17, 1995. We will restrict access to these materials to counsel and outside experts who represent the interested parties in this case. We have determined that these materials fall within the exemption under the Freedom of Information Act for proprietary information, 5 U.S.C. §552(b)(4); and that release of the information may cause harm to the applicants. We will require that all persons seeking access to these data submit properly executed affidavits (*see* ordering paragraph 8 below). We find these actions to be fully consistent with our determinations in Order 95-11-5, issued November 3, 1995.

II. REQUEST FOR *IN CAMERA* REVIEW TO DETERMINE RELEVANCE

As an initial matter, we have previously determined that if review of the material is appropriate, and we find that the information is relevant to our decision in this matter, we will require that the information be filed in the record. Conversely, if we initially determine that the reviewed materials are not relevant to our decision, we will not require that the materials be filed in the docket, while reserving our right subsequently to decide, at any time, that the previously reviewed information is significant and relevant, and therefore must be placed in the docket. Of course, the applicants could then seek confidential treatment of such material under Rule 39. Order 95-11-5 at 6.

The joint applicants have withheld from the record particular material that they have characterized as "extraordinarily sensitive information." The joint applicants have requested that we undertake an advisory review of this material to determine its relevance to this case. As directed by Order 95-11-18, the joint applicants submitted comprehensive descriptions of the data and information contained in these documents.

Based on the joint applicants' characterization of this material (*see* the November 17, 1995, supplemental filing), we have determined that the following information and data are:

A. Not relevant to specific issues currently determined to be central to our evaluation: (1) American documents A. 1 and 5 and B. 1 through 7;³ and (2) CAI documents A. 2 and B. 3 and 4. We understand that this material constitutes historical pricing, traffic, financial and prorata data, frequent flyer programs, and other miscellaneous materials which we do not consider to be relevant to the issues central to our evaluation.

As previously stated, if in the course of our analysis we determine that this information is central to our evaluation, we reserve the right to require that the information be filed in the docket; and

B. Relevant to specific issues currently determined to be central to our evaluation: (1) American documents A. 2, 3, 4 and 6; and (2) CAI documents A. 1 and B. 1, 2, 5 and 6.⁴ We understand that this material is more specifically related to the scope and nature of the proposed code-share operations and it is therefore relevant to the issues central to our evaluation.

Although these documents may contain certain information considered sensitive by the joint applicants, we believe that the Department's statutory responsibility to evaluate the competitive aspects of this case outweigh any real or perceived harm that disclosure of this information might have regarding American and CAI. Further, we have decided to provide for limited access to this material. Therefore, counsel and outside experts, for the interested parties only, may review these documents, consistent with our confidential affidavit procedures.⁵

³ We were unable to determine the relevance of information items A.5 and B. 7 (i), since American did not sufficiently describe these items, and accordingly we reviewed this information. Based on that review, we determined that these data were not relevant to our public interest assessment of the merits of this case.

⁴ We were not able to determine the relevance of information item B. 5, since CAI did not sufficiently detail this item, and accordingly we reviewed this information. Based on that review, we determined that this material was relevant to our public interest assessment of the merits of this case.

⁵ We direct American and CAI to submit these additional documents and information into the docket, no later than 3 business days from the date that this order is served and to notify all interested persons that are identified on the service list attached to the applicants' joint application.

III. PROCEDURAL DATES

As discussed above, the joint applicants filed their application on November 3 and filed supplementary information on November 17. We have carefully reviewed the applicants' supplemental information, and now have determined that, with the submission of the relevant documents identified, the application is complete. Therefore, in order to provide all interested parties sufficient time to analyze adequately and comment fully on all material in the public and non-public record, we will require that answers to the application be filed no later than 21 days from the date that the applicants file their supplementary documents and information in the docket, and that replies be filed no later than 7 business days after the last day for filing an answer.

ACCORDINGLY:

1. We grant, to the extent indicated in this order, the Joint Applicants' November 3 and 17, 1995, motions for confidential treatment specifically regarding the proprietarily sensitive information and data filed concurrently with the applicants' submissions on those dates, restricting access to this material to counsel and outside experts, and require that persons seeking to review these documents file appropriate affidavits;
2. We grant, to the extent indicated in this order, the Joint Applicants' November 3, 1995, motion for review by Department staff of certain documents withheld and considered privileged by the Joint Applicants;
3. We direct the Joint Applicants, based on their supplemental filing of November 17 and on our advisory review of these additional materials, to file in this docket, no later than 3 business days from the date that this order is served, all information and data identified in their November 17 supplemental filing as (1) American documents A. 2, 3, 4 and 6; and (2) CAI documents A. 1 and B. 1, 2, 5 and 6;
4. We determine it appropriate, *sua sponte*, to provide the information described in ordering paragraph 3 confidential treatment, limiting access to this material to counsel and outside experts;
5. We direct interested parties to file answers to the joint application no later than 21 days from the date that the Joint Applicants file their supplementary documents and information in this docket, and replies shall be filed no later than 7 business days after the last day for filing answers;
6. We find that the Joint Applicants need not submit, at this time, the materials identified in their November 17 supplemental filing as (1) American documents A. 1 and 5 and B. 1 through 7; and (2) CAI documents A. 2 and B. 3 and 4;

7. We reserve the right subsequently to determine, at any time, that the materials noted in ordering paragraph 6 are relevant to specific issues central to our evaluation of this case and therefore must be placed in the docket;

8. Interested parties may review the confidential materials, described in ordering paragraphs 1 and 3, in the Docket Section at the U.S. Department of Transportation, Room PL 401, 400 Seventh Street, SW, Washington, D.C., *provided* that such parties submit in advance an affidavit stating that he or she will preserve the confidentiality of the information and will only use it to participate in this proceeding. Further, each affidavit must specifically indicate that the person(s) are counsel or outside expert(s) for the interested parties in this case;⁶ and

9. We shall serve this order on all interested parties.

By:

MARK L. GERCHICK
Acting Assistant Secretary for Aviation
and International Affairs

(SEAL)

An electronic version of this document
will be made available on the World Wide Web at:
<http://www.dot.gov/dotinfo/general/orders/aviation.html>

⁶ Any pleading or other filing that includes or discusses information contained in the confidential documents must be accompanied by a Rule 39 motion requesting confidential treatment.