

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
DOCKETS

Joint Application of)
)
UNITED AIR LINES, INC.,)
BRITISH MIDLAND AIRWAYS LIMITED,)
AUSTRIAN AIRLINES, ÖSTERREICHISCHE)
LUFTVERKEHRS AG,)
LAUDA AIR LUFTFAHRT AG,)
DEUTSCHE LUFTHANSA AG,)
and)
SCANDINAVIAN AIRLINES SYSTEM)
)
under 49 U.S.C. §§ 41308 and 41309 for approval and)
antitrust immunity for an Alliance Expansion Agreement)
and an Amended Coordination Agreement)

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Docket OST-01-10575 - 20

U.S.-U.K. ALLIANCE CASE)
)

Docket OST-01-11029 - 4

**MOTION OF UNITED AIR LINES, INC.
FOR CONFIDENTIAL TREATMENT UNDER 14 C.F.R. § 302.12**

Communications with respect to this document should be sent to:

SHELLEY A. LONGMUIR
Senior Vice President-International,
Regulatory, and Governmental Affairs

MICHAEL G. WHITAKER
Vice President-International
and Regulatory Affairs

JONATHAN MOSS
Managing Director-International
and Regulatory Affairs

UNITED AIR LINES, INC.
P.O. Box 66100, WHQIZ
Chicago, Illinois 60666

MARK ANDERSON
Senior Director-Government Affairs

UNITED AIR LINES, INC.
1025 Connecticut Avenue, N.W., Suite 1210
Washington, D.C. 20036

BRUCE H. RABINOVITZ
JEFFREY A. MANLEY
DAVID HEFFERNAN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6960 (phone)
(202) 772-6960 (fax)
brabinovitz@wilmer.com (e-mail)

Counsel for
UNITED AIR LINES, INC.

DATED: November 21, 2001

**BEFORE THE
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Dated: November 21, 2001

**MOTION OF UNITED AIR LINES, INC.
FOR CONFIDENTIAL TREATMENT UNDER 14 C.F.R. § 302.12**

United Air Lines, Inc. (“United”), pursuant to Rule 12 of the Department’s Rules of Practice (14 C.F.R. § 302.12), requests that the Department withhold from public disclosure documents that United is filing herewith under seal in the above-captioned proceeding. These documents contain confidential, proprietary and commercially sensitive information. United is submitting these documents to facilitate the Department’s processing of the joint application dated September 5, 2001 of United, British Midland Airways Limited, doing business as bmi British Midland, Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa AG, and Scandinavian Airlines System, and their respective affiliates (collectively, the “Joint Applicants”), for approval of and antitrust immunity for an Alliance Expansion Agreement and an Amended Coordination Agreement.

On October 18, 2001, the Joint Applicants submitted additional documents and information in support of their joint application. Certain of those materials were submitted by United on a confidential basis pursuant to a Rule 12 motion for confidential treatment. On November 6, 2001, the Department issued a notice providing eligible representatives of interested parties access to all confidential materials submitted by the Joint Applicants, subject to the same conditions generally imposed by the Department in such cases.¹

On November 20, 2001 the Department issued Order 2001-11-10, in which it found the joint application to be “substantially complete,” but directed the Joint Applicants to submit certain additional documents and information. Specifically, the Department directed the Joint Applicants to submit complete copies of any documents which had been originally submitted in redacted form and to file an electronic copy of the information provided under Exhibit D to the Joint Applicants’ October 18, 2001 submission.² United hereby is submitting those materials subject to this motion for confidential treatment.³ (An index of those confidential documents is attached hereto.) Those documents, produced by United in consultation with attorneys from the undersigned law firm, are confidential and proprietary.

¹ See, e.g., Notice dated August 16, 2001 (Dockets OST-01-10387, 01-10388) (American Airlines/British Airways); Notice dated August 21, 2001 (Docket OST-01-10429) (Delta Air Lines/Air France/Alitalia/Czech Airlines). In this and other antitrust immunity proceedings, including those cited above, the Department has routinely limited Rule 12 access to such data to counsel and outside experts. By limiting access in this manner, the Department can permit parties to fully participate in this proceeding while limiting the risk of competitive harm that would result if the information were disseminated to competitors.

² Per the Department’s request, this electronic copy is being submitted to Randall Bennett, the Director of the Office of Aviation Analysis.

³ In its November 6, 2001 notice, the Department recognized that the separate Rule 12 confidentiality motions filed by each of the Joint Applicants are unopposed and stated that it would rule on those motions by subsequent order. *Id.* at 1 & n.4. United requests that the Department grant the instant motion contemporaneously and on the same basis as those motions.

United requests that these documents be made available subject to the same conditions set forth in the Department's November 6, 2001 notice. See supra, notes 1, 2.

In support of this request, United submits the following:

1. The confidential documents submitted in conjunction with this motion are protected from public disclosure under various exemptions to the Freedom of Information Act, including 5 U.S.C. §§ 552(b)(3) and (b)(4). Exemption 3 protects from disclosure information specifically protected by another federal statute, including 49 U.S.C. § 40115. See British Airports Authority v. CAB, 531 F. Supp. 408, 414 (D.D.C. 1982). Section 40115 states that the Department "shall" withhold from public disclosure, among other things, information that would adversely affect an air carrier's competitive position in foreign air transportation. The materials at issue here clearly satisfy this standard. They are confidential, have not been made publicly available, and could be used by United's competitors to their strategic advantage, and United's disadvantage, in making competitive decisions with respect to foreign air transportation.⁴

2. Exemption 4 protects from public disclosure information that is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential." Gulf & Western Indus., Inc. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1980) (citations omitted). All the documents at issue here satisfy this standard.

All are commercial or financial in nature; they were obtained from a private citizen; and are

⁴ The Department has found that Exemption 3 also applies to information protected by 49 U.S.C. § 46311. See Order 2001-10-2, at 2-3. That statutory provision prohibits the release of information acquired by the Department "when inspecting the records of an air carrier" or information that "is withheld from disclosure under section 40115." 49 U.S.C. § 46311(a).

privileged or confidential. United would suffer substantial competitive harm if the documents were publicly disclosed. See Washington Post Co. v. HHS, 690 F.2d 252, 268 (D.C. Cir. 1982) (defining the standard for whether a document is privileged or confidential). Public disclosure of such information could "impair the Government's ability to obtain necessary information in the future or . . . cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 677-78 (D.C. Cir. 1976) (quoting National Parks & Conservation Ass'n v. Morton, 498 F.2d 765-70 (D.C. Cir. 1974)); Burke Energy Corp. v. DOE, 583 F. Supp. 507, 510-11 (D. Kansas 1984).

WHEREFORE, for the foregoing reasons, the Department should grant United's motion to withhold from public disclosure the confidential, proprietary and commercially sensitive information that United has filed under seal; limit Rule 12 access to counsel and outside experts; and grant such other and further relief as the Department deems necessary.

Respectfully submitted,



BRUCE H. RABINOVITZ
JEFFREY A. MANLEY
DAVID HEFFERNAN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6960 (phone)
(202) 772-6960 (fax)
brabinovitz@wilmer.com (e-mail)

Counsel for
UNITED AIR LINES, INC.

Dated: November 21, 2001

INDEX OF UNITED AIR LINES' CONFIDENTIAL DOCUMENTS

Date	Description	Responds to:
12/15/1999	Bilateral Cargo Rate and Space Agreement between United and bmi, as subsequently amended (redacted version filed as Exhibit F to letter of Joint Applicants dated October 18, 2001 in Docket OST-01-10575.	Order 01-11-10

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Motion of United Air Lines, Inc. for Confidential treatment on all persons named on the attached Service List by causing a copy to be sent via first-class mail, postage prepaid.


Kathleen Knowlton
Kathleen Knowlton

DATED: November 21, 2001

Megan Rae Rosia
Managing Director, Government Affairs
& Associate General Counsel
Northwest Airlines, Inc.
901 15th Street, N.W., Suite 310
Washington, D.C. 20005

USTRanscom/TCJ5-AA
Attention: Air Mobility Analysis
508 Scott Drive
Scott AFB, IL 62225-5357

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

Roger W. Fones
Chief, Transportation, Energy &
Agriculture Section, Antitrust Division
U.S. Department of Justice
325 Seventh Street, N.W.
Suite 500
Washington, D.C. 20530

Simon Knight
First Secretary (Transport)
British Embassy
3100 Massachusetts Avenue, N.W.
Washington, D.C. 20008

Joanne Young
For America West Airlines
Baker & Hostetler
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036

Director of Flight Standards
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Brian Hunt
General Counsel
American Trans Air
P.O. Box 51609
Indianapolis, IN 46251-0609

John L. Richardson
For Amerijet
Crispin & Brenner, PLLC
1156 Fifteenth Street, N.W.
Suite 1105
Washington, D.C. 20005

Robert D. Papkin
Marshall S. Sinick
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Suite 500
Washington, D.C. 20004

Jonathan Blank
Partner
Preston Gates Ellis & Rouvelas Meeds
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20006

Robert E. Cohn
Alexander Van der Bellen
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037

John R. Byerly
Deputy Asst. Secretary for
Transportation Affairs
Department of State
2201 C Street, N.W.
Suite 5531
Washington, D.C. 20520

Lorraine B. Halloway
For Emery Worldwide
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Nathaniel P. Breed, Jr.
For Federal Express
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037

Hugh M. Ford
General Manager, Legal
Virgin Atlantic Airways Limited
The Office, Manor Royal
Crawley RH10 2NU
United Kingdom

Michael Goldman
Silverberg Goldman & Bikoff, L.L.P.
1101 30th Street, N.W.
Suite 120
Washington, D.C. 20007

David Vaughan
For UPS
Kelley, Drye & Warren
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036

Donald T. Bliss
For USAirways
O'Melveny & Myers
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

R. Bruce Keiner
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004

Stephen H. Lachter
For DHL
Law Offices of Stephen H. Lachter
1150 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036

Richard Taylor
For Evergreen International Airlines and
The St. Louis Parties
Step toe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Julie Sorenson Sande
Manager, Contract and Regulatory
Affairs
World Airways
HLH Building
101 World Drive
Peachtree City, GA 30629

Kevin Borland
Polar Air Cargo, Inc.
1201 Connecticut Avenue, N.W.
6th Floor
Washington, D.C. 20036

William Evans
Verner, Liipfert, Bernhard, McPherson
and Hand
901 Fifteenth Street, N.W.
Suite 700
Washington, D.C. 20005

James Tello
P.O. Box 66824
Washington, Square Station
Washington, D.C. 20035

Edgar N. James
Marie Chopra
James & Hoffman, P.C.
1101 Seventeenth Street, N.W.
Suite 510
Washington, D.C. 20036

Daryl A. Libow
Sullivan & Cromwell
1701 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006

Don H. Hainbach
Boros & Garofalo, P.C.
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036

Edward P. Faberman
Michelle M. Faust
Air Carrier Association of America
1500 K Street, N.W.
Suite 250
Washington, D.C. 20005-1714

Nicholas S. Penn
For the Houston Parties
Leftwich & Douglas, P.L.L.C.
1401 New York Avenue, N.W.
Washington, D.C. 20005-3922

David Stempler, President
Air Travelers' Association
5335 Wisconsin Avenue, N.W.
Suite 440
Washington, D.C. 20015-2034

Professor Darryl Jenkins, Director
The Aviation Institute
The George Washington University
School of Bus. & Public Management
600 21st Street, N.W.
Washington, D.C. 20052

J. E. Murdock III
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037

Charles J. Simpson
Zuckert, Scoutt & Rasenberger
888 17th Street, N.W.
Washington, D.C. 20006

Russ Pommer
Atlas Air, Inc.
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301

Vicki L. Hassman
For Air Transport International
BAX Global Inc.
16808 Armstrong Avenue
P. O. Box 19571
Irvine, CA 92623-9571

Anita Mosner
Eclat Consulting
1555 Wilson Boulevard
Suite 602
Arlington, VA 22209

Paul M. Ruden
Senior Vice President
Legal & Industry Affairs
American Society of Travel Agents, Inc.
1101 King Street
Alexandria, VA 22314

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

Dennis E. Eckert
President and CEO
For the Cleveland Parties
Greater Cleveland Growth Association
Tower City Center
50 Public Square, Suite 200
Cleveland, OH 44113-2291

Chip Hallock, President
Regional Business Partnership
For the New Jersey Parties
744 Broad Street, 26th Floor
Newark, N.J. 07102

Rachel B. Trinder
Jol Silversmith
Counsel for the City of Houston and the
Greater Houston Partnership
Zuckert, Scoutt & Rasenberger, LLP
888 Seventeenth Street, N.W.
Washington, D.C. 20006

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