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BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION  
DOCKET SECTION

96 MAY 31 AM 9:36

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 - 45 -

MOTION OF DELTA AIRLINES, INC.  
FOR CONFIDENTIAL TREATMENT  
PURSUANT TO RULE 39

Communications with respect to this document should be addressed to:

**Robert E. Cohn**  
**Alexander Van der Bellen**  
Shaw, Pittman, Potts & Trowbridge  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8060  
Attorneys for  
**DELTA AIR LINES, INC.**

May 31, 1996

9 pgs.

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§§ 41308 and 41309.**

**MOTION OF TRISTAR AIRLINES, INC.  
FOR CONFIDENTIAL TREATMENT  
PURSUANT TO RULE 39**

Delta Air Lines, Inc. ("Delta") hereby files this motion, pursuant to Rule 39 of the Department's Rules of Practice (14 C.F.R. Section 302.39), to withhold from public disclosure international O&D data that is contained in exhibits attached to Delta's portion of the "Answer of Joint Applicants to Comments on Order to Show Cause." These exhibits contain information that is based on restricted international Origin and Departure ("O&D") Survey Data and international T-100 data reported to the Department, and which is not generally available to non-U.S. carriers."

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<sup>1</sup> The confidential information is being filed concurrently with the Docket Section, in a sealed envelope marked "Confidential Treatment Requested Under Section 302.39".

Delta has no objection to the public disclosure of these exhibits. As the Department has noted in the Show Cause Order (96-5-26), “the Department may disclose restricted O&D data consistent with its regulatory functions and responsibilities.” *Id.* at 19 n.47. However, as a private party, Delta recognizes its responsibility to protect this information from public disclosure, in the absence of a determination by the Department to the contrary.

In support of this Motion, Delta states as follows:

1. The information at issue consists of:

(a) Confidential Exhibit 4, which is a list of other similarly sized NYC-Europe city-pairs that have two or more carriers serving the market.

(b) Confidential Exhibit 7, which is a comparison of the NYC-Europe Delta Alliance city-pairs with other carrier alliance markets that are not subject to an immunity carve-out.

(c) Confidential Exhibits 9, which is a comparison of Delta Alliance NYC-Europe city-pairs with United/Lufthansa overlap markets that were not subject to immunity carve-out.

2. Delta submits that all of the confidential information in question is based on restricted DOT data that is protected from public disclosure under various exemptions

under the Freedom of Information Act (FOIA), principally 5 U.S.C. Section 552(b)(4). This section exempts from public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential” Id. The purpose of this exemption “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. Department of Energy, 583 F.Supp. 507,510 (D.Kansas 1984).

3. For information to qualify for exemption under subsection (b)(4), the information must be (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential. See, e.g., Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

4. The information in these confidential exhibits satisfies this three-part test.

5. First, the confidential information to be withheld from public disclosure is commercial or financial in nature, in that it relates to proprietary and commercially sensitive airline statistical data. The traffic and other survey information reported to DOT contains commercial information which is sensitive and proprietary. The release of such information could adversely affect some U.S. Airlines’ (including Delta) competitive position by providing non-U.S. airline competitors a window into U.S. carrier restricted data -- information that otherwise would not be made public.

6. Second, the information which is contained in Delta's Confidential Exhibits has been obtained **from** U.S. Carriers (including Delta), who are persons within the meaning of subsection (b)(4).

7. Third, the information is "confidential." This confidential information is not generally available to the public, and its public disclosure ordinarily is not required to further the public interest or to promote competition. In National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), the Court held that information is "confidential" for purposes of § 552(b)(4) if it would not customarily be released to the public by the person from whom it was obtained and if disclosure is likely to have either of the following results: "( 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." 498 F.2d at 770. Delta submits that public disclosure of the type of confidential information at issue here may impair the Government's ability to obtain similar information on a voluntary basis from individuals in the future, and could cause substantial harm to the competitive position of U.S. airlines (including Delta).

WHEREFORE, Delta hereby moves the DOT, pursuant to Rule 39 of the DOT's Rules of Practice, to withhold the confidential information filed concurrently herewith under seal as Confidential Exhibits 4,7 and 9 from public disclosure, unless the Department determines that the policy considerations in this case warrant such disclosure.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Van der Bellen".

Robert E. Cohn  
Alexander Van der Bellen  
SHAW, PITTMAN, POTTS &  
TROWBRIDGE  
2300 N Street, N.W.  
Washington, D.C. 2003 7  
(202) 663-8060

Attorneys for  
**DELTA AIR LINES, INC.**

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Motion of Delta Airlines, Inc. for Confidential Treatment Pursuant to Rule 39 was served this 3 1st day of May, 1996, on all persons listed on the attached service list.

  
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Susan Kobilis

## 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, D.C. 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

Michael Goldman  
Klein & Bagileo  
1101 30th Street, N.W.  
Suite 120  
Washington, D.C. 20007

Bert W. Rein  
Edwin O. Bailey  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

David O'Connor  
Regional Director  
United States International  
Air Transport Association  
Suite 285 North  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004