

ORIGINAL

9685
OA

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
DOCKET SECTION

96 JUN 19 PM 4:55

Joint Application of)
)
)
 UNITED AIR LINES, INC.)
)
 and)
)
 AIR CANADA)
)
 under 49 U.S.C. 41308 and 41309 for)
 approval of and antitrust immunity for)
 an expanded alliance agreement)
)

Docket OST-96-1434 - 3

MOTION OF UNITED AIR LINES, INC.
FOR CONFIDENTIAL TREATMENT UNDER
RULE 39 OF THE DEPARTMENT'S RULES OF PRACTICE
AND UNDER 49 U.S.C. SECTION 40115

Communications with respect to this document should be sent
to:

STUART I. ORAN
Executive Vice President -
Corporate Affairs and
General Counsel

CYRIL D. MURPHY
Vice President - International
Affairs

MICHAEL G. WHITAKER
Senior Counsel - International and
Regulatory Affairs

UNITED AIR LINES, INC.
P.O. Box 66100
Chicago, Illinois 60666
(708) 952-5052

SHELLEY A. LONGMUIR
Vice President - Government
Affairs

UNITED AIR LINES, INC.
1707 L Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 296-2733

JOEL STEPHEN BURTON
GINSBURG, FELDMAN and BRESS,
CHARTERED
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 637-9130

Counsel for
UNITED AIR LINES, INC.

DATED: June 19, 1996

gpr

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

Joint Application of)	
)	
UNITED AIR LINES, INC.)	
)	
and)	Docket OST-96-1434
)	
AIR CANADA)	
)	
under 49 U.S.C. 41308 and 41309 for)	
approval of and antitrust immunity for)	
an expanded alliance agreement)	

**MOTION OF UNITED AIR LINES, INC.
FOR CONFIDENTIAL TREATMENT UNDER
RULE 39 OF THE DEPARTMENT'S RULES OF PRACTICE
AND UNDER 49 U.S.C. SECTION 40115**

Pursuant to Rule 39 of the Department's Rules of Practice, United Air Lines, Inc. ("United") hereby moves to withhold from public disclosure certain proprietary and commercially sensitive data pursuant to 14 C.F.R. Section 302.39 ("Rule 39") and 49 U.S.C. Section 40115 [formerly section 1104 of the Federal Aviation Act of 1958, as amended]. This information is being submitted by United in connection with its application for approval of and antitrust immunity for its Alliance Expansion Agreement with Air Canada. United has submitted five (5) copies of this material, under seal, to the Docket Section of the Department. Due to the competitively sensitive nature of these materials, United requests that access to these documents be limited to counsel and outside experts for interested parties. In support of this motion, United states as follows:

1. The documents for which United is seeking confidential treatment consist of competitively sensitive commercial information which is protected from public disclosure under exemptions 3 and 4 of the Freedom of Information Act, 5 U.S.C. §§ 552(b) (3), (4) . These materials consist of corporate documents dated within the last two years that address competition in the U.S.-Canada market, as well as studies, surveys, analyses and reports within that time frame, prepared by or for corporate officers or directors of United, which evaluate or analyze the proposed expansion of United's Alliance with Air Canada with respect to market shares, competition, competitors, markets, potential for traffic growth or expansion into geographic markets.

2. The test for withholding of information under exemption 4 is "an objective one,"^{1/} which protects from disclosure information that is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential." Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 529 (D.C.Cir. 1979) (citations omitted). Whether information is privileged or confidential, in turn, depends on whether disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to

^{1/} Washington Post Co. v. HHS, 690 F.2d 252, 268 (D.C.Cir. 1982) (citing National Parks & Conservation Association v. Morton, 498 F.2d 765, 766 (D.C.Cir. 1974)).

cause substantial harm to the competitive position of the person from whom the information was **obtained.**"^{2/}

All of the documents submitted herein are commercial or financial in nature, in that they contain commercially sensitive, proprietary and privileged information relating to United's commercial and financial operations. Moreover, the documents have been obtained from a person within the meaning of exemption (4).

Finally, the documents submitted pursuant to this Motion are privileged and confidential. United has not publicly released the documents for which it now files this Motion. The likelihood of harm arising from such disclosure is apparent, since competitors would gain valuable insights into United's strategies and objectives regarding the expansion of the operations United conducts jointly with Air Canada. This showing, by itself, demonstrates that the documents are privileged or confidential within the meaning of exemption (4).

3. A portion of the documents submitted herein also qualify for withholding under exemption (3), which provides for nondisclosure of information specifically protected from disclosure by another statute. Such documents qualify for withholding under exemption (3) because their release would adversely affect United's competitive position in foreign air transportation, so that their release is proscribed by the requirements of 49 U.S.C. § 40115. The courts have recognized

^{2/} Washington Post Co., at 268.

that 49 U.S.C. § 40115 constitutes a withholding statute under exemption (3). See, e.g., British Airports Authority v. CAB, 531 F.Supp. 408, 414 (D.D.C. 1982).

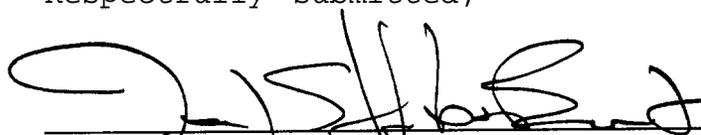
There can be no question that public disclosure of this information would adversely affect United's competitive position in foreign air transportation, since it contains sensitive commercial information that could be used by United's competitors to frustrate its operational plans on a worldwide basis. Therefore, withholding under exemption (3) is required by the terms of 49 U.S.C. § 40115.

4. United also requests that the Department limit access to these documents to counsel and outside experts of interested parties who have submitted affidavits stating that the information will be used only for purposes of this proceeding and will not be disclosed to anyone other than counsel or outside experts who have filed a similar affidavit.

The documents at issue contain sensitive commercial information, and include corporate documents, studies and analyses prepared for the purposes of international planning and strategic decision-making. None of the information has been publicly released. Release of the documents would cause substantial harm to the operations of United, as was demonstrated above. Moreover, the Department has previously recognized the likelihood of serious harm in similar circumstances, as when it instituted affidavit procedures for the confidential materials submitted in Docket OST-95-618 (Application of Delta, et al., for antitrust immunity). Order 95-11-5. See also Order 96-1-6, at

3. The information submitted herein is of a similar nature to the materials submitted by the Joint Applicants in that docket. In these circumstances, United requests that all documents submitted herein be protected from disclosure under Rule 39 of the Department's Rules of Practice, and furthermore that the Department institute its confidential affidavit procedures to limit disclosure of the documents to counsel and outside experts of interested parties in this proceeding.

Respectfully submitted,



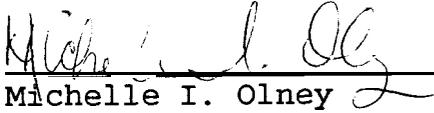
JOEL STEPHEN BURTON
GINSBURG, FELDMAN and BRESS,
CHARTERED
1250 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20036
(202) 637-9130

Counsel for
UNITED AIR LINES, INC.

DATED: June 19, 1996
g:\jb\005g\502\antimmun.r39

CERTIFICATE OF SERVICE

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



Michelle I. Olney

Dated: June 19, 1996

Carl B. Nelson, Jr.
Associate General Counsel
American Airlines, Inc.
1101 17th Street, N.W.
Washington, D.C. 20036

Robert E. Cohn
for Delta Air Lines, Inc.
Shaw, **Pittman**, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

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

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

John **Gillick**
Winthrop Stirnson Putnam
1133 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036

John R. Degregorio
Senior Attorney
Midwest Express Airlines
700 11th Street, N.W.
Suite 660
Washington, D.C. 20001

Elliott M. Seiden
Megan Rae Poldy
Northwest Airlines, Inc.
901 15th Street, N.W.
Suite 310
Washington, D.C. 20005

Richard Fahy
Consulting Attorney
Trans World Airlines
808 17th Street, N.W.
Suite 520
Washington, D.C. 20006

Steven A. Alter-man
Myers & Alterman
1220 19th Street, N.W.
Washington, D.C. 20036

Stephen H. Lachter
Law Offices of Stephen Lachter
2300 N Street, N.W.
Suite 725
Washington, D.C. 20036

Louis Turpen
Director-Airports
Airports Division
City and County of San Francisco
P.O. Box 8097
San Francisco, CA 94128

Richard D. **Mathias**
Cathleen Peterson
Zuckert, **Scoutt & Rasenberger**
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006

Patrick P. Salisbury
Salisbury & Ryan
1325 Avenue of the Americas
New York, NY 10019

Leslie Madsen
Air Service Manager
Denver International Airport
8500 **Peña** Blvd.
Denver, CO 80249-2200

Rich Leidl
for City and County of Denver
Reid & Priest
701 Pennsylvania Avenue, N.W.
8th Floor
Washington, D.C. 20004

Frank Cotter
Assistant General Counsel
USAir, Inc.
2345 Crystal Drive
8th Floor
Arlington, VA 2227

Theodore I. **Seamon**
1000 Potomac Street, N.W.
Suite 300
Washington, D.C. 20007

Kenneth Quinn
Winthrop, Stimson, Putnam & Roberts
1133 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036

Richard P. Taylor
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
10th Floor
Washington, D.C. 20036

Berl Bernhard
Joseph L. **Manson**
John R. Mietus, Jr.
Vemer, Liipfert, Bernhard,
McPherson and Hand
901 15th Street, N.W., Suite 700
Washington, D.C. 20005

David R. Mosena
Commissioner
Chicago Department of Aviation
P. O. Box 66142
Chicago O'Hare International
Terminal Mezzanine
Chicago, IL 60666

Steve Gelband
Lewes, Morella, Gelband
& Lamberton
1000 Potomac Street, N.W.
Suite 300
Washington, D.C. 20007

James A. Wilding
General Manager
MWAA
44 Canal Center Plaza
Alexandria, VA 22314

Roger W. Fones
Transportation, Energy, Agricultural
Section
Antitrust Division
Department of Justice
555 4th Street, N.W., Room 9104
Washington, D.C. 20001