

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D. C.

DEPT. OF TRANSPORTATION
DOCKET SECTION
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QA 9765

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

Docket OST-96-1434-5

**MOTION OF AIR CANADA FOR
CONFIDENTIAL TREATMENT UNDER 14 CFR § 302.39**

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Dated: June 24, 1996

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**MOTION OF AIR CANADA FOR
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In order to enable the Department to act expeditiously on their Joint Application filed in this docket on June 4, 1996, Air Canada and United Air Lines (“United”) have volunteered certain information comparable to that sought by the Department from other applicants for antitrust immunity. See Order 95-9-27 (information requests to Delta et al.). In their Joint Application, Air Canada and United provided portions of this information, in the form of interrogatory responses. See Joint Application at 35-43.

To facilitate such review, and in recognition of the Department’s deferral of the procedural schedule in the Notice issued in this docket on June 14, 1996 pending receipt of additional information and data, Air Canada is providing concurrently herewith the

remainder of the materials sought.¹ These materials are responsive to Informational Items 1, 2, and 7 as set forth in Order 95-9-27, and are identified in the Joint Application as Informational Items A, B, and G. These documents have been produced by Air Canada headquarters in coordination with attorneys from the undersigned law firm, and consist of:

- Air Canada corporate documents dated within the last two years that address competition in the U.S.-Canada market;
- Air Canada studies, surveys, analyses and reports dated within the last two years, which were prepared by or for any officer(s) or director(s) (or individual(s) exercising similar functions) for the purpose of evaluating or analyzing the proposed enhanced alliance with respect to market shares, competition, competitors, markets, potential for traffic growth or expansion into geographic markets, indicating (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document; and
- Origin-Destination traffic for the most recent 12-month period available for Air Canada's top 100 markets with a U.S. gateway as origin or destination.

These materials are proprietary and highly commercially sensitive. The Department should accord them the degree of confidentiality that it has accorded similar documents filed by other recent applicants for antitrust immunity. Accordingly, Air Canada moves that these materials be withheld from public disclosure, pursuant to 14 CFR § 302.39 ("Rule 39") and 49 U.S.C. § 40115, and that access to these materials be limited to counsel and outside experts for interested parties who have filed confidentiality affidavits in this docket.

¹ Air Canada is submitting herewith five (5) copies of these materials, under seal, to the Department's Docket Section.

In support of this Motion, Air Canada states as follows:

1. Pursuant to 49 U.S.C. § 40115(a)(2)(B), the Secretary of Transportation may order that information filed with the Department be withheld from public disclosure if such disclosure would have an adverse effect on the competitive position of an air carrier in foreign air transportation. Rule 39, which implements Section 40115, requires that any motion to withhold information from public disclosure include: (i) a description of the information sought to be withheld, sufficient for identification of the same; (ii) a statement explaining how and why the information falls within the exemptions from the Freedom of Information Act (5 U.S.C. § 552b(c)(1-9)); and (iii) a statement explaining how and why public disclosure of the information would adversely affect the interests of the objecting persons and is not required in the public interest.

2. The information sought to be withheld from public disclosure consists of the materials submitted herewith, in five copies, as indicated in note 1, supra.

3. These materials fall within Exemptions 3 and 4 of the Freedom of Information Act, 5 U.S.C. §§ 552b(c)(3), (c)(4).

(a) 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). As noted above, Section 40115 allows for withholding of information that would adversely affect an air carrier's competitive position in foreign air transportation if released. The materials at issue here clearly satisfy this standard. They contain extremely sensitive information, including evaluations of Air Canada's competitive positions and its global strategic plans. None of these materials has

been publicly released. This information could be used by Air Canada's competitors to their strategic advantage, and Air Canada's disadvantage, in making pricing, capacity, and strategic planning decisions,

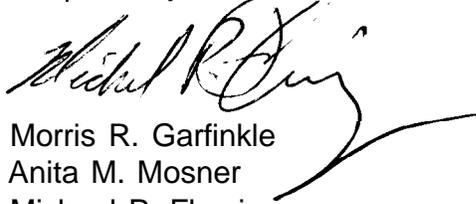
(b) Exemption 4 protects from disclosure information that is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential." Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1979) (citations omitted). All the materials at issue here satisfy this standard. All are commercial or financial in nature, have been obtained from a person outside the U.S. government, and are privileged and confidential. Disclosure of these materials would "cause substantial harm to the competitive position of Air Canada and "impair the Government's ability to obtain necessary information in the future." Washington Post Co. v. HHS, 690 F.2d 252, 268 (D.C. Cir. 1982) (defining the standard for determining whether a document is privileged and confidential). Moreover, many of the documents filed herewith contain competitive information provided to Air Canada by Statistics Canada, a Canadian governmental entity which restricts public disclosure of such data. Air Canada is bound by Statistics Canada's confidentiality restrictions and is prohibited from filing certain of these documents in a public fashion. The Canadian Government therefore has affirmatively determined that such documents are privileged and confidential. Air Canada requests that the Department defer to such determination.

4. Access to the materials should be limited to counsel and outside experts of interested parties who have submitted affidavits stating that the information will be used only for the purposes of this proceeding and will not be disclosed to anyone other than

counsel or outside experts who have filed a similar affidavit. The Department has recently accorded such protection to documents and data filed in response to identical information requests by the other carriers in similar proceedings. See Order 95-I 1-5 (application of Delta Air Lines et al. for antitrust immunity); Order 96-5-27, at 2-3, (application of United and Deutsche Lufthansa for antitrust immunity); Order 96-I -6, at 3 (application of American Airlines and Canadian International for antitrust immunity). As in the Delta, United, and American applications, these heightened confidentiality measures are warranted by the highly commercially sensitive nature of the materials.

WHEREFORE, Air Canada hereby moves that the Department withhold the confidential information filed concurrently herewith under seal from public disclosure as requested above, pursuant to 14 CFR § 302.39 and 49 U.S.C. § 40115.

Respectfully submitted,



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Dated: June 24, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 1996, I served a copy of the foregoing Motion of Air Canada For Confidential Treatment Under 14 CFR § 302.39 on the following individuals by first class mail, postage prepaid.

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