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BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION  
DOCKET SECTION

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

Docket OST-96-1411 - 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

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

CYRIL D. MURPHY  
Vice President - International  
Affairs

Counsel for  
UNITED AIR LINES, INC.

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

DATED: July 1, 1996

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

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Joint Application of	)	
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UNITED AIR LINES, INC.	)	
	)	Docket OST-96-1411
and	)	
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SCANDINAVIAN AIRLINES SYSTEM	)	
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an expanded alliance agreement	)	

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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 and 49 U.S.C. Section 40115 [formerly section 1104 of the Federal Aviation Act of 1958, as amended], United Air Lines, Inc. ("**United**") hereby moves to withhold from public disclosure (1) a Cooperation Agreement United entered into with Scandinavian Airlines System ("**SAS**") on September 1, 1995, which is being filed herewith, and (2) certain proprietary and commercially sensitive information that United is filing in this docket to facilitate Department action on the application United filed jointly with SAS for approval of and antitrust immunity for their Alliance Expansion Agreement. United has submitted five (5) copies of the Cooperation Agreement and the other information, under seal, to the Docket Section. Due to the competitively sensitive nature of these materials, United requests that access to all of these documents be limited to counsel and outside

experts for interested parties. In support of this motion, United states as follows:

1. United is seeking confidential treatment for a Cooperation Agreement it entered into with SAS on September 1, 1995. By application filed with the Department on May 28, 1996, United and SAS requested approval of and antitrust immunity for an agreement between the carriers referred to in the application as the "Alliance Expansion Agreement." A more detailed version of the Alliance Expansion Agreement is being filed with the Department contemporaneously herewith." Because this Alliance Expansion Agreement incorporates by reference the earlier Cooperation Agreement, United is also filing the Cooperation Agreement in order to expedite and facilitate action by the Department on the Joint Application pending in this docket. However, because the Cooperation Agreement contains confidential, commercially sensitive information, United requests that the Agreement be accorded confidential treatment pursuant to Rule 39.

2. United is also seeking confidential treatment for other competitively sensitive, commercial information that it is filing to facilitate Department action on the Joint Application. This information (and the Cooperation Agreement) are protected from public disclosure under exemptions 3 and 4 of the Freedom of Information Act, 5 U.S.C. §§ 552(b) (3), (4). A portion of these materials consists of corporate documents dated within the last

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<sup>1/</sup> When the Joint Applicants applied on May 28, 1996 for approval of and antitrust immunity for an expanded alliance agreement, the Alliance Expansion Agreement was in the process of being finalized and the applicants attached to the Joint Application a Letter Agreement concluded on May 24, 1996. See Joint Application of United and SAS, at note 1.

two years that address competition in U.S.-Scandinavia air travel markets, as well as studies, surveys, analyses and reports dated 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 SAS with respect to market shares, competition, competitors, markets, potential for traffic growth or expansion into geographic **markets**.<sup>2/</sup>

3. The test for withholding of information under exemption 4 is "an objective **one**,"<sup>3/</sup> 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 cause substantial harm to the competitive position of the person from whom the information was **obtained**."<sup>4/</sup>

The Cooperation Agreement, and all of the other documents being submitted herewith, are commercial or financial in nature, have been obtained from a person within the meaning of exemption (4), and are privileged and confidential. Neither the

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<sup>2/</sup> United indicated in the Joint Application that it would be filing this commercially sensitive information under Rule 39. See Joint Application at 43-44.

<sup>3/</sup> 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)).

<sup>4/</sup> Washington Post Co., at 268.

Agreement nor the documents have been publicly released. 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 its joint operations with SAS. This showing, by itself, demonstrates that the documents are privileged or confidential within the meaning of exemption (4).

4. A portion of the documents submitted herein, including United's Cooperation Agreement with SAS, also qualify for withholding under exemption (3), which provides for nondisclosure of information specifically protected from disclosure by another statute. Such documents are protected from disclosure by 49 U.S.C. 540115, which prohibits the release of information that would adversely affect the competitive position of a U.S. carrier in foreign air transportation. The courts have recognized 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).

The public disclosure of these documents would adversely affect United's competitive position in U.S.-Europe markets because such release would disclose to United's U.S.- and foreign-flag competitors specific steps United and SAS intend to take to expand their joint service and to improve their competitive position in the U.S.-Europe market. Therefore, withholding under exemption (3) is required by the terms of 49 U.S.C. § 40115.

5. 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, which has not been released publicly. Release of the documents would cause substantial harm to United's competitive position, as was demonstrated above. Moreover, the Department has previously recognized the likelihood of serious harm in similar circumstances 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: July 1, 1996  
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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 Under Rule 39 Of The Department's Rules Of Practice And Under 49 U.S.C. Section 40115 to the persons on the attached Service List by causing a copy to be sent via first class mail, postage prepaid.

  
Kathryn Dionne North

DATED: July 1, 1996

Eileen Gleimer  
Boros & Garofalo  
1201 Connecticut Ave., N.W.  
Suite 700  
Washington, D.C. 20036-2605  
(for Air Transport Int'l)

Carl B. Nelson, Jr.  
American Airlines, Inc.  
1101 17th Street, N.W.  
Suite 600  
Washington, D.C. 20036

John L. Richardson  
Seeger Potter Richardson Luxton  
**Joselow & Brooks**  
2121 K Street, N.W.  
Suite 700  
Washington, D.C. 20036-3208

**William Callaway**  
Zuckert, Scout, Rasenberger  
& Johnson  
888 17th Street, N.W.  
Suite 500  
Washington, D.C. 20006  
(for Challenge)

Buddy Anslinger  
Director, Regulatory  
Proceedings  
Continental Airlines, Inc.  
2929 Allen Parkway  
Houston, Texas 77019

Robert E. Cohn  
Shaw, **Pittman**, Potts &  
Trowbridge  
2300 N Street, N.W.  
Washington, D.C. **20037-1116**  
(for Delta)

Roger W. Fones, Chief  
Transportation, Energy & Agriculture Sec.  
Antitrust Division  
U.S. Department of Justice  
Judiciary Center Building  
555 Fourth Street, N.W.. Room 9104  
Washington, D.C. 20007

R. Tenney Johnson  
2300 N Street, N.W.  
Suite 600  
Washington, D.C. 20037  
(for DHL)

Richard Taylor  
**Steptoe & Johnson**  
1330 Connecticut Ave., N.W.  
Washington, D.C. 20035  
(for Evergreen)

Nathaniel P. Breed  
Shaw, **Pittman**, Potts &  
Trowbridge  
2300 N. Street, N.W.  
Washington, D.C. 2037  
(for Federal Express)

**Megan Poldy**  
Associate General Counsel  
Northwest Airlines, Inc.  
901 15th Street, N.W.  
Suite 500  
Washington, D.C. 20005

Kevin P. Montgomery  
Vice President, Government  
& Industry Affairs  
Polar Air Cargo  
1215 17th Street, N.W.  
3rd Floor  
Washington, D.C. 20007

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

David L. Vaughan  
Kelley, Drye & Warren  
1200 19th Street, N.W.  
Suite 500  
Washington, D.C. 20036

Frank Cotter  
**USAir**  
2345 Crystal Drive  
8th Floor  
Arlington, VA 22227

Vance Fort  
Worldcorp, Inc.  
13873 Park Center Road  
Herndon, VA 22071

Thomas C. Accardi  
Director of Flight Standards  
Federal Aviation Administration  
800 Independence Ave., S.W.  
Room 831  
Washington, D.C. 20590

Bruce Keiner  
Crowell & Moring  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(for Continental and Emery Air)

His Excellency K.E. Tygesen  
Ambassador of Denmark  
3200 Whitehaven Street, N.W.  
Washington, D.C. 20008

His Excellency Kjeld Vibe  
Ambassador of Norway  
2720 34th Street, N.W.  
Washington, D.C. 20008

His Excellency Henrik Liljegren  
Ambassador of Sweden  
1501 M Street, N.W.  
Washington, D.C. 20005

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

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