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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC

DEPT. OF TRANSPORTATION
DOCKET SECTION
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Joint Application of)
 UNITED AIR LINES, INC.)
 and) Docket OST-96-1411 - 5
 SCANDINAVIAN AIRLINES SYSTEM (SAS))
 under 49 USC 41308 and 41309 for approval)
 of and antitrust immunity for an expanded)
 alliance agreement)

Motion of Scandinavian Airlines System for
Confidential Treatment Under Rule 39 of the Department's
Rules of Practice and Under 49 U.S.C. § 40115

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Dated: July 1, 1996

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Scandinavian Airlines System (SAS) moves to withhold from public disclosure certain proprietary and commercially sensitive information pursuant to 14 C.F.R. § 302.39 (Rule 39) and 49 U.S.C. § 40115. The documents containing this information are being submitted by SAS in connection with the above-captioned Joint Application of SAS and United Airlines, Inc. (United), for approval of and antitrust immunity for their Alliance Expansion Agreement filed May 28, 1996. The accompanying documents respond to the same information requests made by the Department to Delta, et al., in Order 95-9-27 relating to three categories:

1. SAS corporate documents (In English or with English translations) dated within the last two years that address competition in the U.S.-Scandinavia market;

2. SAS studies, surveys, analyses and reports (in English or with English translations) 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, and indicate (if not contained in the document itself) the date of preparation, the name and title of each individual who prepared each such document; and

7. O&D traffic for the most recent 12-month period available for SAS's top 100 markets with a U.S. gateway as origin or destination.

Concurrently with this motion for confidential treatment, SAS is submitting, under seal, to the **Docket** Section of the Department, six (6) copies of the documents it has identified as responsive to these requests. Because these documents contain competitively sensitive information, SAS urges that access to all such documents be limited to counsel and outside experts for interested parties who have filed confidentiality affidavits in this docket.

In support of this motion, SAS states as follows:

1. The documents for which confidential treatment is sought consist of and contain 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). Documents responsive to Items 1 and 2 consist of commercially sensitive materials, containing non-public data and other information, dated within the last two years, that (1) address competition in the U.S.-Scandinavia market, or (2) consist of studies, surveys, analyses and reports prepared by or for corporate officers or directors to evaluate or analyze the proposed United/SAS expanded alliance with respect to market shares, competition, competitors, markets, potential for traffic

growth or expansion into geographic markets. Documents responsive to Item 7 disclose sensitive information relating to O&D traffic for the most recent 12-month period available for SAS's top 100 U.S. markets.

2. Under 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 disclosure of the information would have an adverse effect on the competitive position of the air carrier in foreign air transportation. That statutory provision is implemented by Rule 39.

3. The documents identified and described above for which confidential treatment is sought fall within Exemptions 3 and 4 of the Freedom of Information Act, 5 U.S.C. §§ 552(b) (3) and (b) (4).

(a) Exemption 3 protects from disclosure information specifically protected by a federal statute. In this case, 49 U.S.C. § 40115 authorizes withholding information if disclosure would adversely affect an air carrier's position in foreign air transportation. See *British Airports Authority v. CAB*, 531 F. Supp. 408, 414 (D.D.C. 1982). The information at issue here comes squarely within that description. The documents contain highly sensitive internal information, including evaluations, that could be used by competitors of SAS to gain a competitive advantage and to frustrate SAS's operational plans. Accordingly, the information should be withheld under Exemption 3 and 49 U.S.C. § 40115.

(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). Information is privileged or confidential if 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." Washinton Post Co. v. HHS, 690 F.2d 252, 268 (D.C. Cir. 1982), quoting National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). The test for withholding information under exemption 4 is an objective one. Washinton Post Co., 690 F.2d at 268; National Parks & Conservation Ass'n, 498 F.2d at 766.

All of the documents submitted in response to Items 1, 2 and 7 are commercial or financial in nature, containing commercially sensitive, proprietary and privileged information relating to SAS's commercial and financial operations, and have been obtained from a "person" within the meaning of the cited language. Moreover, all of the documents for which confidential treatment is sought are privileged and confidential. SAS has not released the documents publicly. If information of this nature is not protected, carriers will be reluctant to provide it to the Government in the future.

Finally, it is apparent that if the documents are released, there is a likelihood of substantial competitive harm to SAS.

From these documents, its competitors could gain valuable insights into its strategies and objectives, including those regarding its operation of joint services with United. On this basis alone, the documents would be privileged or confidential within the meaning of exemption 4.

4. SAS further requests that access to the documents be limited to counsel and outside experts of interested parties who have submitted affidavits in this proceeding 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 similar affidavits in this proceeding.

As discussed, the documents for which confidential treatment is sought contain highly sensitive commercial information, and include internal corporate documents, studies and analyses prepared for in-house use for the purposes of international planning and strategic decision-making. None of the information contained in the documents has been publicly released, and much of it has not been shared between the Joint Applicants themselves. Release of the documents would cause substantial harm to the operation of SAS.

In similar circumstances involving other carriers, the Department has recognized the likelihood of serious harm in disclosing documents of these types, as in Dockets OST-95-618, OST 95-792 and OST-96-1116, in which the Department instituted affidavit procedures for confidential materials submitted by the joint applicants. See Order 95-11-5 (Joint Application of Delta

Air Lines, et al.); Order 96-1-6 at 3 (Joint Application of American Airlines and Canadian Airlines International); and Order 96-3-26 (Joint Application of United Airlines and Lufthansa German Airlines).

The information at issue here is similar in nature to that submitted by the Joint Applicants in those dockets in response to the same informational items. As in the case of the other applicant carriers, even a limited release of the information would be damaging to SAS. Accordingly, SAS urges that all documents and data submitted herein be protected from disclosure under Rule 39 of the Department's Rules of Practice and further urges that the Department institute confidential affidavit procedures to limit disclosure of the documents to counsel and outside experts of interested parties in this proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of July served a copy of the foregoing Motion of Scandinavian Airlines System for Confidential Treatment Under Rule 39 of the Department's Rules of Practice and Under 49 U.S.C. § 40115 on all persons on the attached service list by first class mail.

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