

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D. C.

Joint Application of :
AMERICAN AIRLINES, INC. :
and : OST-99-65
BRITISH AIRWAYS PLC :
under 14 CFR Part 212 for statements of :
authorization (reciprocal codesharing) and :
under 49 USC 40109 for related exemption :
authority :

JOINT MOTION OF AMERICAN AIRLINES, INC.
AND BRITISH AIRWAYS PLC UNDER 14 CFR 302.39
FOR CONFIDENTIAL TREATMENT

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January 19, 2000

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D. C.

Joint Application of ;
AMERICAN AIRLINES, INC. :
and : OST-99-6
BRITISH AIRWAYS PLC :
under 14 CFR Part 212 for statements of :
authorization (reciprocal codesharing) and :
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JOINT MOTION OF AMERICAN AIRLINES, INC.
AND BRITISH AIRWAYS PLC UNDER 14 CFR 302.39
FOR CONFIDENTIAL TREATMENT

American Airlines, Inc. and British Airways Plc, 14 CFR 302.39, hereby move that the Department withhold certain proprietary and commercially sensitive confidential information from public disclosure. American and British Airways are submitting such information in response to the staff's evidence request of December 14, 1999, as modified Order 2000-1-8, January 7, 2000.

I. THE CONFIDENTIAL INFORMATION IS PROTECTED FROM PUBLIC DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT

The confidential information submitted by the applicant is protected from public disclosure under various exemptions to the Freedom of Information Act, including 5 USC 552(b)(3) and 5 USC 552(b)(4).

Exemption (4) exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." This exemption has been construed to prevent public disclosure of information that is of the type usually released to the public, and that if released would cause substantial harm to the competitive position of the person from whom the information was obtained. See, e.g., Western Industries, Inc. v. United States, 615 F.2d 527, 5th Cir. 1980); American Airlines, Inc. v. NMB, 588 F.2d 863, 5th Cir. 1978); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 684 (D.C. Cir. 1976); Application of Delta and Virgin Atlantic, Order 94-5-42, March 1, 1994; Joint Application of United and Lufthansa, Order 93-December 18, 1993; Joint Application of Northwest and KLM, Order 93-1-11, January 8, 1993, p. 19; Information Directives Concerning CRS, Order 88-5-46, May 22, 1988; Carrier-Owned Computer Relations Systems, ER-1385, Order 86-5-54, May 19, 1986; Information Directives Concerning CRS, Order 83-12-136, December 29, 1983. The purpose of these exemptions "is to protect the confidence of information which citizens provide to their government, which would customarily not be released to the public, and to facilitate citizens' ability to confide in their government." Burke Energy Corp. v. DOE, 583 F.Supp. 507, 510 (D. Kansas

For information to qualify for exemption (4), the information must be (1) commercial or financial in nature, obtained from a person, and (3) privileged or confidential. Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983). The confidential information submitted by American and British Airways satisfies this three-part test.

First, the confidential information is commercial or financial in nature, in that it relates to commercially sensitive, proprietary, and privileged financial and corporate information. This type of confidential information is proprietary and commercially sensitive, and would not otherwise be made public. The information was being submitted to the Department so that the Department might expeditiously evaluate the public interest benefits that would result from granting codesharing approval to American and British Airways.

Second, the information has been "obtained from a person" within the meaning of exemption (4).

Third, the information is "confidential." This confidential information is not available to the public, and its disclosure is not required to further the public interest or to promote competition. In National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), the Court held that information is "confidential" for purposes of exemption (4) if it would not customarily be released to the public by the person

whom it was obtained, and if disclosure is likely to have of the following results: "(1) to impair the Government's to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person whom the information was obtained."

American and British Airways submit that public disclosure of the type of confidential information at issue here cause substantial harm to its competitive positions, and cause to impair the Government's ability to obtain similar information on a voluntary basis from individuals in the future.

In addition, withholding the information from public disclosure is also provided for under exemption (3). Exemption (3) pertains to information specifically exempted from disclosure by some other statute, such as 49 USC 40115. The release of information which is the subject of this motion may "prejudice the formulation and presentation of positions of the United States in international negotiations" with foreign governments, and therefore be inconsistent with 49 USC 40115.

II. ACCESS TO THESE HIGHLY SENSITIVE DOCUMENTS SHOULD BE LIMITED TO COUNSEL AND OUTSIDE EXPERTS

American and British Airways are submitting highly sensitive internal corporate documents which should be acc

limited access. Such access should be granted only to counsel and outside experts who file Rule 39 affidavits stating that the affiant will (1) use the information only for the purpose of participating in this proceeding, and (2) not disclose such information to anyone other than counsel or outside experts who filed a valid affidavit.

The subject materials contain highly sensitive commercial information relating to international planning and strategic decisionmaking. The information contained in these documents has not been publicly released. If released, competitors would gain valuable insights into the applicants' internal strategies and objectives.

In order to minimize the risk of harmful disclosure, access should be strictly limited. American and British Airways are separately submitting, concurrently with this motion, copies of their information, in sealed cartons labeled "Confidential Treatment Requested Under 14 CFR 302.39; Access Is Limited to Counsel Or Outside Experts Who Have Filed Valid Affidavits".

The request to limit disclosure to counsel and outside experts is fully consistent with Department precedent and policy. Thus, in United/Lufthansa, Order 93-12-32, supra, the Department granted the applicants' request to limit access to certain confidential information to counsel and outside experts who file

39 affidavits. In so limiting such access, the Department precluded the disclosure of the confidential information against competitive harm to the applicants that would result if access were expanded, and concluded that "the undue competitive harm to the applicants outweighs the commenters' need for expanded access to the highly sensitive material in this case" (p. 5). The Department also noted that "interested parties to this proceeding can obtain adequate advice on the merits of the application through outside experts and persons authorized to review the materials" (*id.*). See also, e.g., Joint Application of American and Canadian International, Order 96-1-6, January 11, 1996.

Access to the applicants' internal documents and information should be limited in a comparable manner, in light of the competitive harm that would result from a broader disclosure of such highly sensitive information.

CONCLUSION

The Department should grant this joint motion of American and British Airways under Rule 39 to withhold certain proprietary and commercial sensitive confidential information from public disclosure, as requested herein.

Respectfully submitted,

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January 19, 2000