



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 15th day of June, 1998

Joint Application of

AMERICAN AIRLINES, INC.

and

BRITISH AIRWAYS PLC

under 49 U.S.C. Sections 41308 and 41309
for approval of and antitrust immunity for
alliance agreement

Docket OST-97-2058

ORDER

Background

By motion filed on May 21, 1998, the U.S. Department of Justice ("DOJ") requested that the Department of Transportation ("DOT") grant confidential treatment, under 14 C.F.R. § 302.39, to the Confidential Appendix to the Comments of the Department of Justice, and the Confidential Comments of the Department of Justice. DOJ stated that these two submissions contained documents that were obtained by the DOJ during its investigation of the proposed alliance and exhibits based on data obtained by the DOJ. The DOJ stated that the material was obtained either through Civil Investigative Demands issued under the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314, or through voluntary submissions in response to DOJ requests under which the DOJ committed to attempt to maintain the confidentiality of the materials.

The DOJ indicated that it had notified the parties who submitted documents and data referred to in the two pleadings, identifying relevant materials for each. The DOJ requested that the DOT consider these two pleadings in accordance with the DOT's normal interim confidentiality procedures established in this case. The DOJ also asked the DOT to "accord confidential treatment to the two pleadings for a minimum of ten days" in order to give the affected parties a reasonable opportunity to request additional restrictions other than those already in effect in this docket.

By Notice dated May 27, 1998, in order to expedite consideration of these requests, the DOT directed interested parties to file answers to the motion by 12 noon on Friday, May 29, 1998, and to file replies by Tuesday, June 2, 1998.

Responsive Pleadings

On June 1, 1998, British Airways filed in support of the DOJ's motion for confidential treatment. British Airways says that since these documents were provided to DOJ on a confidential basis, it asserts a claim that the documents warrant confidential treatment under 14 C.F.R. § 302.39 ("Rule 39"), in part. British Airways stated that nine of the documents cited by DOJ have already been filed with DOT under Rule 39, and British Airways incorporated by reference its previous Rule 39 motions applicable to these documents.¹ British Airways claims confidential treatment for three documents that have not been submitted in the nonpublic record of this case.² British Airways has no objection to the public release of one document.³ Finally, British Airways accepts the use of the Department's affidavit procedures for interim access to the documents for which confidential treatment is requested.

DOJ's motion is unopposed.

Discussion

As an initial matter, we will rule on the merits of the Rule 39 Motion by subsequent order. As with other documents covered by Rule 39 motions for confidential treatment, we will permit limited interim access to those documents not previously filed with the Department, as requested by British Airways, pending a decision on the basic Rule 39 motions. Accordingly, counsel and outside experts, for the interested parties only, may review the documents that are the subject of the DOJ motion and British Airways' request, consistent with our previously established confidential affidavit procedures.

Access to Documents

To provide interested parties with a fair and adequate opportunity to review all confidential materials in a timely manner, affiants having filed valid affidavits may examine the documents at the Department of Transportation's Dockets Facility, and, consistent with British Airways' pleading, at Sullivan and Cromwell, Counsel for British Airways, 1701 Pennsylvania Ave., N.W., 7th Floor, Washington, D.C. 20006 (contact Jeffrey W. Jacobs, (202) 956-7510).

¹ British Airways lists these documents by Title and Bates Range (DOT), respectively, identified in exhibit 2 to its answer: Alpha, BAP 040210-12; Heathrow/Gatwick Split, BAP 040494; Damage and Benefits, BAP 045046-47; New York/American Airlines, BAP 040949; JFK-Sum95 Schedules, BAP 040950; New York-London BA Marketing Action for Spring 95: A Discussion Document, BAP 040951-55; American Airlines, BAP 065130; Project Apple, BAP 005099-104; Schedule proposal, BAP 141007-10.

² British Airways lists these documents by Title and Bates Range (DOJ), respectively, identified in exhibit 2 to its answer: An American in New York, BAX 229936-38; London/New York Route Research, BAX 7000358-60. British Airways also lists a document (10) that consists of an excerpt from a deposition of a British Airways' employee taken in civil litigation. *Virgin Atlantic Airways Limited v. British Airways PLC*, 93 Civ. 7270 (MGC).

³ In exhibit 2 to its answer, British Airways identifies the material as document 8: Letter from Alastair McDermid of BAA to Chris Allen, Esq. of BA, dated December 4, 1996.

Accordingly:

1. We grant, to the extent indicated in this order, the Department of Justice's May 21, 1998, motion to withhold information from public disclosure;
2. Except to the extent determined herein, we defer action on DOJ's and British Airways' requests for confidential treatment under Rule 39 of the Department's regulations (14 C.F.R. § 302.39);
3. As requested by DOJ and to the extent requested by British Airways, we grant interim confidential treatment to the information described in the British Airways' response as (1) An American in New York, BAX 229936-38; (2) London/New York Route Research, BAX 7000358-60; and (3) Deposition Transcript of Bryan Wilson (In the Matter of *Virgin Atlantic Airways Limited v. British Airways PLC*, 93 Civ. 7270 (MGC)). We limit access to this material to counsel and outside experts upon their filing of an affidavit stating that the person will preserve the confidentiality of the information and will only use it to participate in this proceeding. Further, regarding information afforded limited access by the Department, each affidavit must specifically indicate that the person(s) are counsel or outside expert(s) for the interested parties in this case;
4. Interested parties may review the confidential materials, described in ordering paragraphs 1 and 2 in the Docket Section at the U.S. Department of Transportation, Room PL 401, 400 Seventh Street, SW, Washington, D.C. 20590. Regarding the information described in ordering paragraph 2, interested parties may also review these materials in the offices of Sullivan and Cromwell, Counsel for British Airways, 1701 Pennsylvania Ave., N.W., 7th Floor, Washington, D.C. 20006 (contact Jeffrey W. Jacobs, 202.956.7510). Interested parties shall submit in advance an affidavit stating that the person will preserve the confidentiality of the information and will only use it to participate in this proceeding. Further, each affidavit must specifically indicate that the person(s) are counsel or outside expert(s) for the interested parties in this case;⁴ and
5. We shall serve a copy of this order on all persons on the service list in this docket.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at
<http://www.dot.gov/general/orders/aviation.html>*

⁴ Any pleading or other filing that includes or discusses information contained in the confidential documents must be accompanied by a Rule 39 motion requesting confidential treatment.