

Served: March 30, 1998



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

Issued by the Department of Transportation
on the 30th day of March, 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

Discussion

On January 10, 1997, American Airlines, Inc. (hereafter "American") and British Airways PLC (hereafter "British Airways") (together "the Joint Applicants") filed an application for approval of and antitrust immunity for an alliance agreement (referred to also as "the Alliance") under 49 U.S.C. §§ 41308 and 41309. Subsequently, the Joint Applicants have filed several motions under Rule 39 of the Department's Rules of Practice, 14 C.F.R. § 302.39, for confidential treatment of documents submitted in support of that application and/or in response to information requests by the Department.

By Order 97-9-4, issued September 5, 1997, we directed the Joint Applicants to file for the record certain specific documents, information, and data that they had identified as responsive to Department information requests, but for which they had requested determinations on relevance to the proceeding, to be determined by *in camera* inspection by the Department. On September 19, 1997, American and British Airways separately filed petitions for reconsideration of Order 97-9-4, to the extent that the order required them to file "extremely sensitive documents" for which they had requested *in camera* review by Department staff.¹

¹ By Order 97-11-5, issued November 4, 1997, the Department accepted in part the Joint Applicants' petitions, finding it appropriate to review *in camera* certain American and British Airways' documents. These documents were reviewed *in camera* because the Department could not determine their relevance to this case based on the descriptions provided in the Joint Applicants' indexes.

By Order 97-12-21, issued December 17, 1997, the Department granted the Joint Applicants' requests for reconsideration of Order 97-9-4, to the extent that it required them to file "extremely sensitive documents" for which they had requested *in camera* review by the Department. Based on our reconsideration, we found that the Joint Applicants had not presented any arguments or evidence that would justify reversal of the actions taken in Order 97-9-4, except as noted. We therefore affirmed, in part, our earlier findings, and required that the Joint Applicants file specific documents, information, and data in the docket.

Specifically, we directed American to file its *in camera* documents, information, and data described in its March 31, 1997, submission as: II.4-5, 7-10, and 12; III.1-2, 23-24, 28, 30, and 35-41; and those described in its July 25, 1997, submission as: II.4; III.1, 3-4, 7-9, 11-14, 18, 20-23, 26-28, 31, 33-37, 39, 41-44, 47-63, 65-66, 68-72, 74-85, and 107. We directed British Airways to file its *in camera* documents, information, and data described in its April 7, 1997, submission as: 13, 18, 53, and 67-69 and those described in its July 25, 1997, submission as: 2, 5-9, 41-45, 47-49, 51, 54, 67-68, and 71-73.

Finally, the Department stated that when it had determined that the Joint Applicants had fully complied with the findings of Order 97-12-21, the Department would announce an appropriate procedural schedule for the filing of answers and replies to this application. Moreover, the Department stated that it would decide the merits of any other issues or motions raised by the several petitioners in this case by subsequent order(s).

On March 24, 1998, American and British Airways filed their remaining documents, information, and data identified in Order 97-9-4, except to the extent modified by Order 97-12-21.

Decision

We have reviewed the supplemental information filed by the Joint Applicants. Based on that review and the additional access we are now providing interested parties, as described below, we find that the record of this case is now substantially complete. Therefore, in order to provide interested parties sufficient time to analyze adequately and comment fully on all material in the public and non-public record, we will require that answers to the application be filed no later than 30 business days from the service date of this order, and that replies be filed no later than 21 business days after the last day for filing answers.²

² The Department will decide the merits of any remaining issues or motions raised by interested parties by subsequent order(s). In particular, after we have had an opportunity to review the answers and replies provided for in this order, we will rule on the outstanding petitions for reconsideration that address the issues of whether an oral hearing should be held in this proceeding, and, if so, what kind of oral hearing would be most appropriate.

On July 18, 1997, Continental Airlines, Inc. filed a motion to require, among other things, the submission of certain materials by the Joint Applicants and the TACA Group carriers³ to submit information related to their joint investments in and alliances with Aerolineas -Argentinas, Austral Lineas Aereas S.A., and Iberia, Lineas Aereas de Espana, S.A., and give interested parties adequate opportunity to comment on this information. We decided to defer action on this motion until we had reviewed these most recent responsive documents filed by the Joint Applicants in this docket.

We have previously found that evidentiary material relating to other aviation arrangements being pursued by the Joint Applicants is relevant to our determinations, and that the applicants must file all relevant information into the record. Based on our review of the previously filed material and the supplementary material filed by the Joint Applicants in response to the Department's evidentiary directives in Orders 97-9-4 and 97-12-21, we have decided to make available to the interested parties in this case limited access to information and data in the American-TACA Group and American-Lan Chile cases relating to these other arrangements. Consistent with our earlier decisions in the American-TACA Group and American-Lan Chile cases,⁴ we will grant to counsel and outside experts for the interested parties in the American-British Airways case immediate interim access to all confidential materials filed in the American-TACA Group and American-Lan Chile cases. However, we will require that these parties file appropriate affidavits in advance with the Department in the American-TACA Group case (Docket OST-96-1700) and the American-Lan Chile case (Docket OST-97-3285) and file a copy of such affidavit in the American-British Airways docket.

We expect all such affidavits to state, at a minimum, that (1) the affiant is counsel for an interested party or an outside independent expert providing services to such a party in the American-British Airways case; (2) the affiant will use the information only for the purpose of participating in the American-British Airways case; and (3) the affiant will disclose such information only to other individuals who have filed such affidavits. Affiants and interested parties must understand and agree that any pleading or other filing in the American-British Airways case that includes or discusses confidentially filed information in the American-TACA Group or American-Lan Chile cases must itself be accompanied by a Rule 39 motion requesting confidential treatment. Affidavits must be filed in Dockets OST-96-1700 and OST-97-3285 and in this docket with the Department of Transportation's Dockets Facility, Room PL-401, 400 Seventh Street, S.W., Washington, D.C., 20590.

³ The TACA Group consists of six Central American carriers: Aviateca S.A., Compania Panamena de Aviacion S.A., Lineas Aereas Costarricenses S.A., Nicaraguense de Aviacion S.A., TACA International Airlines S.A. and TACA de Honduras S.A. de C.V. *See* Docket OST-96-1700.

⁴ *See* Notice dated January 27, 1998, Dockets OST-96-1700 and OST-97-3285.

As a final matter, on March 23, 1998, Delta Air Lines, Inc. filed an answer urging the Department to defer consideration of this case until the United States Government insists that “bilateral assurances” be in place that ensure U.S. carrier access to adequate slots and facilities at London’s airports. We find this unnecessary. Under our established policy and practice, the Department will not grant approval of and antitrust immunity for an alliance arrangement without a full Open-Skies regime. In addition, U.S. carriers must have a competitively effective presence at London’s Airports.⁵

Access to Documents

To provide the 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 in addition, at the following locations provided by the Joint Applicants in Washington, D.C.:

- A. 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); and
- B. Carl B. Nelson, Jr., Associate General Counsel for American Airlines, 1101 - 17th Street, N.W., Suite 600, Washington, D.C. 20036, (202) 496.5647.

A stamped copy of the affidavit filed with the Department of Transportation must be presented prior to document examination by an interested party.

Accordingly:

1. We direct interested parties to file answers to the joint application no later than thirty (30) business days from the service date of this order, and replies shall be filed no later than twenty-one (21) business days after the last day for filing answers;⁶
2. Except to the extent determined herein, we are deferring action on the Joint Applicants’ motions for confidential treatment under Rule 39 of the Department’s regulations (14 C.F.R. § 302.39);

⁵ Order 97-3-34 at 4.

⁶ The original submissions are to be unbound and without tabs on 8½” x 11” white paper, using dark ink (not green) to facilitate use of the Department’s document imaging system.

3. We grant, to the extent determined herein by allowing access to materials filed in Dockets OST-96-1700 and OST-97-3285, Continental Airlines' July 18, 1997, motion to require the Joint Applicants to furnish supplemental information concerning their investments in Aerolineas Argentinas, Austral Lineas Aereas S.A., and Iberia, Lineas Aereas de Espana, S.A.;

4. Interested parties may review the confidential materials, described in this order as follows: (a) in the U.S. Department of Transportation's Dockets Facility, Room PL 401, 400 Seventh Street, SW, Washington, D.C. 20590; (b) 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); and (c) in the offices of Carl B. Nelson, Jr., Associate General Counsel for American Airlines, 1101 - 17th Street, NW, Suite 600, Washington, D.C. 20036, (202) 496-5647. 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;⁷ 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://dms.dot.gov/general/orders/aviation.html>*

⁷ 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.