



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Associate Administrator
for Airports

800 Independence Ave., SW.
Washington, DC 20591

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MAY 10 2023

May 10, 2023

PART 16 DOCKETS

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Re: Final Agency Decision - FAA Docket No. 16-14-13

Dear Messrs. Span, Steinbrecher, Warren, Rosenthal Taliaferro, and Mses. Chen, Fisher, and Moseley:

Enclosed is a copy of the final agency decision of the Federal Aviation Administration (FAA) affirming the Director's Determination on Remand in FAA Docket No. 16-14-13.

I conclude that the Director's Determination on Remand is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy. The reasons for upholding the Director's Determination on Remand are set forth in the enclosed Final Decision and Order.

Sincerely,

**SHANNETT
A R GRIFFIN** Digitally signed by
SHANNETTA R GRIFFIN
Date: 2023.05.09
18:18:07 -04'00'

Shannetta R. Griffin, P.E.
Associate Administrator for Airports

Enclosure

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

RECEIVED

MAY 10 2023

UNITED AIRLINES, INC,

APPELLANT,

v.

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY,

APPELLEE.



PART 16 DOCKETS

FAA Docket No. 16-14-13

FINAL AGENCY DECISION
AFFIRMING DIRECTOR'S DETERMINATION ON REMAND

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports (Associate Administrator) on an appeal filed by United Airlines, Inc. (United) of the Director's Determination on Remand (Determination on Remand) issued on May 5, 2022. The Director of the FAA Office of Airport Compliance and Management Analysis (Director) found that the Port Authority of New York and New Jersey (PANYNJ) has grandfather rights based on laws controlling its financing and covenants in debt obligations enacted or issued not later than September 2, 1982, as provided for in 49 U.S.C. §§ 47107(b)(2), 47133(b)(1). The Director also found that issuing civil penalties was not warranted. (FAA Exhibit 2, Item 1, p. 2).

United argues on appeal that the Director did not fully respond to the Associate Administrator's *Order Affirming in Part and Remanding in Part* which requested, "the Director to determine, *inter alia*, (1) whether the Port Authority of New York and New Jersey ("PANYNJ had grandfathered authority to divert airport revenue, and (2) if so, the scope of that authority" (FAA Exhibit 2, Item 3, p.2). United claims that the Director answered the first question but not the second (FAA Exhibit 2, Item 3, pp. 2-5). United argues the Director "should have provided guidance on the purposes for which airport revenue may be legally diverted and whether there are any limits on the amount of such diversion" (FAA Exhibit 2, Item 3, p. 3).

The Associate Administrator examined the record in detail, including the Associate Administrator's Remand, the Determination on Remand, the administrative record supporting the Determination on Remand, and the Appeal pleadings and confirms the following: the Determination on Remand is supported by a preponderance of reliable, probative, and substantial evidence and is consistent with applicable law, precedent, and FAA policy.

II. SUMMARY OF THE ASSOCIATE ADMINISTRATOR'S REMAND AND DIRECTOR'S DETERMINATION ON REMAND

On January 11, 2021, the Associate Administrator issued an *Order Affirming in Part and Remanding in Part* (Remand Order) directing the Director to determine if PANYNJ has grandfather rights based on a pre-September 2, 1982 law controlling financing as provided for in 49 U.S.C. §§ 47107, and 47133 and Grant Assurance 25 (FAA Exhibit 1, Item 1, p. 33). The Associate Administrator also affirmed the Director's decision that to the extent grandfather rights exist, they do not allow for the expenditure of airport revenue to support facilities that PANYNJ does not own or operate.¹

On April 26, 2021, the Director issued an *Order for Supplemental Pleadings* to address the issues raised by the Associate Administrator in the Remand Order and to afford the parties the opportunity to present additional information on the issues (FAA Exhibit 1, Item 1, p. 1). The Director reviewed the supplemental pleadings and on May 5, 2022, issued the Determination on Remand finding that PANYNJ has grandfathered rights based on laws controlling its financing and covenants in debt obligations enacted or issued not later than September 2, 1982, as provided for in 49 U.S.C. §§ 47107(b)(2) and 47133(b)(1) (FAA Exhibit 1, Item 1, p. 2).

III. PARTIES

A. Appellant – United Airlines, Inc.

United is a corporation organized under the laws of the State of Delaware and is based in Chicago, Illinois. United is the largest air carrier at Newark Liberty International Airport (EWR) and operates approximately 135,000 departures from there annually. (FAA Exhibit 1, Item 1, p. 2).

B. Appellee – PANYNJ

PANYNJ, headquartered in New York City, is a bi-state corporate instrumentality and political subdivision of the states of New York and New Jersey. PANYNJ was created by an interstate compact made by New York and New Jersey in 1921 and consented to by Congress. The two states established the PANYNJ to provide transportation, terminal, and other facilities of commerce within the Port District, which includes the cities of New York and Newark, and other municipalities in the two states (FAA Exhibit 2, Item 1, p. 2).

PANYNJ is the airport sponsor of EWR. EWR is a public-use commercial service airport located in Newark, New Jersey. EWR serves as a hub for United (FAA Exhibit 2, Item 1.). Since 1982, EWR has received \$343,625,302 million in Airport Improvement Program (AIP) grants and \$205,264,693 in COVID Relief funds (FAA Exhibit 2, Item 10).

¹ The Associate Administrator also remanded to the Director for a determination as to whether to issue a civil penalty for the instances of non-compliance that were affirmed. (FAA Exhibit 1, Item 1, p. 33). On remand, the Director found no penalties were warranted. The Director's determination in that regard was not appealed.

IV. PROCEDURAL HISTORY

1. On January 11, 2021, the Associate Administrator for Airports issued an *Order Affirming in Part and Remanding in Part the Director's Determination* (FAA Exhibit 1, Item 1).
2. On April 26, 2021, the Director of the Office of Airport Compliance and Management Analysis issued an *Order for Supplemental Pleadings* (FAA Exhibit 1, Item 2).
3. On September 15, 2021, PANYNJ filed a *Supplemental Brief, Filed Pursuant to the Final Decision and the Order for Supplemental Pleadings* (FAA Exhibit 1, Item 6).
4. On October 15, 2021, United filed a *Reply to Respondent's Supplemental Brief on Remand*. (FAA Exhibit 1, Item 7).
5. On November 1, 2021, PANYNJ filed a *Motion for Leave to File Reply Brief and Reply Brief in Further Support of its Supplemental Brief* (FAA Exhibit 1, Item 8).
6. On May 3, 2022, the Director issued the *Director's Determination on Remand* (FAA Exhibit 2, Item 1).
7. On June 2, 2022, United filed a *Request for Reconsideration of the Directors Determination on Remand* (FAA Exhibit 2, Item 2).
8. On June 2, 2022, United filed a *Notice of Appeal and Brief on Appeal from Director's Determination on Remand* (FAA Exhibit 2, Item 3).
9. On June 8, 2022, PANYNJ filed a *Consent Motion to Stay Deadlines to Respond to United Airlines, Inc.'s Notice of Appeal and Brief on Appeal from Director's Determination on Remand* (FAA Exhibit 2, Item 4).
10. On July 13, 2022, the Associate Administrator issued an *Order Granting Stay of Deadline to File a Reply to Notice of Appeal from Director's Determination on Remand* (FAA Exhibit 2, Item 5).
11. On August 1, 2022, PANYNJ filed an *Opposition to the Request of United Airlines, Inc., for Reconsideration of the Directors Determination on Remand* (FAA Exhibit 2, Item 6).
12. On September 2, 2022, United moved for leave to file a *Reply to PANYNJ's Opposition to its Request for Reconsideration* (FAA Exhibit 2, Item 7).
13. On October 19, 2022, the Director issued an *Order Denying United's Request for Reconsideration* (FAA Exhibit 2, Item 8).
14. On November 8, 2022, PANYNJ filed and *Opposition to United Airlines, Inc.'s Appeal of the Directors Determination on Remand* (FAA Exhibit 2, Item 9).

See attached Index for additional procedural filings.

V. BACKGROUND

In its December 10, 2014 Complaint, United raised several claims about PANYNJ's financial management of EWR. United asserted that PANYNJ's flight fees at EWR were not reasonable and not transparent and that PANYNJ generated excessive surpluses and improperly diverted substantial amounts of airport revenue to surface transportation projects and other non-airport projects that it does not own (FAA Exhibit 1, Item 1, pp. 6-7). United asked the FAA "to investigate (i) the entire ratemaking structure at EWR; (ii) the reasonableness of the resulting aeronautical fees; and (iii) the extent to which the Port Authority diverts aeronautical revenues at EWR to non-aeronautical functions." (FAA Exhibit 1, Item 1, p. 8).

Pursuant to 14 CFR § 16.29 the Director conducted an investigation to determine whether "PANYNJ generates excessive surplus revenues in order to subsidize non-aeronautical functions and improperly diverts airport revenue in violation of 49 U.S.C. § 47107(b)(2) and 49 U.S.C § 47133, and Grant Assurance 25, *Airport Revenues*, and FAA's *Policy and Procedures Concerning the Use of Airport Revenue*"² (FAA Exhibit 1, Item 1, p. 4). The Director found "PANYNJ expended airport revenues on non-PANYNJ owned projects contrary to the grandfather provisions contained within 49 U.S.C. §§ 47107 and 47133 and in violation of Grant Assurance 25, *Airport Revenues*" (FAA Exhibit 1, Item 1, p. 3).

PANYNJ appealed the Director's Determination and the Associate Administrator upheld the Director's finding that the "grandfathered diversion of airport revenue is limited to support facilities that PANYNJ owns or operates." (FAA Exhibit 1, Item 1, p. 13).³ However, the Associate Administrator remanded the case to the Director with regard to certain issues. In particular, the Associate Administrator asked the Director to determine whether PANYNJ has grandfather rights in the first instance, where such rights would arise from a pre-September 2, 1982, law controlling financing as provided for in 49 U.S.C §§ 47107 and 47133 and Grant Assurance 25 (FAA Exhibit 1, Item 1, p. 33).

On April 26, 2021, the Director issued an *Order for Supplemental Pleadings* to address the issues raised by the Associate Administrator in the Remand Order and to afford the parties the opportunity to present additional information on the issues (FAA Exhibit 2, Item 1, p. 1). The Director reviewed the supplemental pleadings and on May 5, 2022, issued the Determination on Remand finding that the PANYNJ has grandfathered rights based on laws controlling its financing and covenants in debt obligations enacted or issued not later than September 2, 1982, as provided for in 49 U.S.C. §§ 47107(b)(2) and 47133(b)(1) (FAA Exhibit 2, Item 1, p. 2).

VI. THE APPEALS PROCESS

A party adversely affected by a Directors Determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination (14 CFR § 16.33(c)). The review is limited to an examination of the Director's Determination and the administrative record upon which such determination was based. The Associate Administrator

² The Director also conducted an investigation of the EWR rate structure and the reasonableness of aeronautical fees, but those issues are not on appeal in here.

³ PANYNJ has appealed the Associate Administrator's Order Affirming in Part and Remanding in Part on this issue to the D.C. Circuit Court of Appeals.

does not consider new allegations or issues on appeal unless finding good cause as to why the new issue or evidence was not presented to the Director. (14 CFR § 16.33(f)).

Upon appeal of a Part 16 Director's Determination, the Associate Administrator will consider the issues accepted in the Director's Determination using the following analysis:

- (1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record?
- (2) Are conclusions made in accordance with law, precedent, and policy?
- (3) Are the questions on appeal substantial?
- (4) Have any prejudicial errors occurred?

14 CFR § 16.33(e).

VII. ISSUE ON APPEAL

The Associate Administrator identified the following issue to be reviewed on Appeal:

ISSUE 1: Whether the Director Erred by not Deciding the Scope of PANYNJ's Grandfathered Authority?

A. United's Argument

United argues that the Associate Administrator's "remand order instructed the Director to decide the scope of PANYNJ's grandfather authority, if any" and that the Director failed to decide the scope (FAA Exhibit 2, Item 3, p. 3 [capitalizations removed]). United asserts that, "the Determination itself acknowledges, the Director was asked to decide the scope of PANYNJ's ability, if any to legally divert airport revenue: 'As a result, the Associate Administrator asked the Director to determine the basis for PANYNJ's grandfathered rights, and if any, its scope.'" (FAA Exhibit 2, Item 3, p. 3).

United also notes that the Director only made three references to scope:

As to the scope under the finding that PANYNJ has grandfathered rights, it is not without limitation as stated in the Remand Order.

The scope of PANYNJ's grandfathered right is limited as stated in the Remand Order...In accordance with the Remand Order issued on January 11, 2021, airport revenue that falls within the PANYNJ's grandfathered rights are limited to support only those facilities that the PANYJN owns or operates.

At this time the Director is not ruling as to whether the 1/10th provision caps the amount that the Port may grandfather.

(FAA Exhibit 2, Item 3, pp. 3-4).

United also states that its argument is supported by the parties' filings in the U.S. Court of Appeals. United points out that the *FAA and PANYNJ's Joint Motion to Continue to Hold Case in Abeyance* states:

On May 3, 2022, the Director issued a determination on remand, concluding that the Port Authority remains eligible for grandfather rights, *while leaving open the question of whether there may be a cap on the amount that the Port Authority may grandfather* based on the language in the pre-1982 New York statutes controlling financing.

(FAA Exhibit 2, Item 3, pp. 4-5).

United asks the Associate Administrator to (1) find that PANYNJ's grandfather rights are limited to debt service and funding reserves for pre-1982 obligations but do not include the right to divert airport revenue to operation and maintenance of other facilities and (2) remand this case back to the Director with directions to determine any other current limitations – both qualitative and quantitative – on PANYNJ's grandfather authority (FAA Exhibit 2, Item 3, p. 11).

B. PANYNJ's Reply

PANYNJ first argues that United lacks standing to appeal the Determination on Remand (FAA Exhibit 2, Item 6, p. 5). PANYNJ's position is that although United had standing in the initial complaint because the "outcome of the proceeding arguably affected the rates and charges it paid to PANYNJ", once the FAA determined "United had failed to demonstrate that its (PANYNJ) rates and charges were unreasonable...United's standing was limited to challenging that determination." (FAA Exhibit 2, Item 6, p. 5).

PANYNJ argues in the alternative that United attempts to "improperly expand the issues on remand" and "ignores the actual Order from the Associate Administrator's Final Decision which only orders the Director 'to determine if PANYNJ has grandfather rights based on a pre-September 2, 1982, law controlling financing as provided for in 49 U.S.C. §§ 47107 & 47133 and grant assurance 25.'" (FAA Exhibit 2, Item 6, p.13).

PANYNJ states that the Associate Administrator's reference to "scope" was in response to PANYNJ's position that "once it (PANYNJ) had been determined to be a grandfathered airport, FAA had no ability to dictate further limitations on how grandfathered revenue could be spent." (FAA Exhibit 2, Item 3, p. 13). PANYNJ recognizes that the Associate Administrator "concluded that the Port Authority was in error on this argument, and thus there was no need to remand it to the Director." (FAA Exhibit 2, Item 3, p. 14). PANYNJ has filed a Petition of Review with the U.S. Court of Appeals on this finding (FAA Exhibit 2, Item 3, p. 14).

C. Associate Administrator's Analysis

As it relates to PANYNJ's argument that United does not have standing to appeal the Director's Determination on Remand, the Associate Administrator disagrees.

FAA regulations for airport complaints provide:

A person directly and substantially affected by any alleged noncompliance or a person qualified under 49 CFR § 26.105(c) may file a complaint under this part. A person doing business with an airport and paying fees or rentals to the airport shall be considered directly and substantially affected by alleged revenue diversion as defined in 49 U.S.C § 47107(b).

14 CFR § 16.23(a).

In the original complaint, United had standing to ask the FAA to investigate in part, “the extent to which the Port Authority diverts aeronautical revenues at EWR to non-aeronautical functions” (FAA Exhibit 1, Item 1, p. 8).

The issue United raises on appeal is directly related to the original complaint of alleged revenue diversion. United does business at the airport and pursuant to section 16.23, it is therefore directly and substantially affected by alleged revenue diversion. The Associate Administrator finds that PANYNJ’s defense that United does not have standing to file this appeal is without merit.

The question before the Associate Administrator is whether the Director, in addition to determining if PANYNJ had grandfather rights, should have defined the limits or “scope” of the grandfathered rights, and that is evaluated below.

Associate Administrator’s Determination and Remand Order

On appeal by PANYNJ from the Director’s Determination, the Associate Administrator analyzed whether grandfather rights are limited by the terms of the following exception:

Under PANYNJ’s view of the grandfather provision [FN 9], if it has the requisite “debt obligation” or the requisite “law controlling financing,” then it is grandfathered. According to PANYNJ, these conditions determine if it is grandfathered in the first instance, but in no way restrict how grandfathered revenue may be used once that status is conferred. The Associate Administrator disagrees and finds that the proper reading of the statute is that these two statutory attributes both give rise to grandfathered status, as PANYNJ argues, but also define the allowable scope of the exception.

Footnote nine in the Associate Administrator’s determination stated,

For purposes of this analysis, the Associate Administrator assume[s] without deciding that the Port is grandfathered. However, as noted later in this Order, the Associate Administrator remands this matter to the Director to analyze and confirm ... that the Port currently retains grandfather rights.

(FAA Exhibit 1, Item 1, p. 11)

In addition, the Associate Administrator upheld the Director's finding that "the grandfathered diversion of airport revenue is limited to support facilities that PANYNJ owns or operates" (FAA Exhibit 1, Item 1, p. 13).

After upholding the Director's findings that (1) the statute defines the scope and (2) that grandfathered diversion is limited to facilities that PANYNJ owns or operates, the Associate Administrator remanded the case back to the Director to determine whether the PANYNJ has grandfather rights in the first instance. The Associate Administrator observed that "[a]lthough the Director found that grandfather rights allow diversion to occur 'within certain limits,' the Determination appears to assume PANYNJ is grandfathered without analyzing this issue." (FAA Exhibit 1, Item 1, p. 13). He held further:

In order to definitively resolve the questions of compliance, such an essential condition must be established and not merely assumed. For this reason, I remand this case, in part, to the Director, to determine the basis for PANYNJ's grandfather rights, if any. And if such rights are based solely on the PANYNJ's enabling act whether the enabling act is sufficient to create grandfathered status and, if so, its scope."

(FAA Exhibit 1, Item 1, pp. 13-14).

In addition, the Associate Administrator's Order requiring corrective actions included detailed direction on accounting for grandfathered payments. (*See Order Items B.2 Limitations on the Use of Airport Revenue, Exceptional Use, and Item E Accounting of Excepted Payments*). After providing this direction, the Associate Administrator issued the partial remand on the question of grandfather rights. The pertinent text of that order is set forth below:

Partial Remand. This matter is remanded to the Director to determine if PANYNJ has grandfather rights based on a pre-September 2, 1982 law controlling financing as provided for in 49 U.S.C. §§ 47107 & 47133 and grant assurance 25. This decision affirms the Director's decision that to the extent grandfather rights exist, they do not allow for the expenditure of airport revenue to support facilities that PANYNJ does not own or operate.

This matter is further remanded to the Director for a determination as to whether to issue a civil penalty consistent with the instances of non-compliance affirmed herein, and if so, the amount.

ACCORDINGLY, it is hereby ORDERED that (1) the Director's Determination is affirmed, as so modified, and (2) this matter is remanded, in part, to the Director, to determine the basis for PANYNJ's grandfather rights, if any, and as to whether to issue a civil penalty.

(FAA Exhibit 1, Item 1, p. 33).

Director's Determination on Remand

On remand, the Director analyzed whether PANYNJ had grandfather rights. The Director reviewed the statutory language in 49 U.S.C. §§ 47107(b)(2) and 47133(b)(1) and the text of Grant Assurance 25, *Airport Revenues* (FAA Exhibit 2, Item 1, pp. 7-8). The Director properly concluded that there are two ways to meet the grandfather exception:

The first way is to determine if a provision in a law controlling financing by the airport owner, that was enacted not later than September 2, 1982, provides for the use of revenue from any of the owner or operator's facilities, including the airport, to support not only the airport, but also general debt obligations and facilities of the owner or operator. The second way is to determine if there were covenants or assurances in debt obligations issued not later than September 2, 1982 that provide for the use of revenue from any of the owner or operator's facilities, including the airport, to support not only the airport, but also general debt obligations and facilities of the owner or operator.

(FAA Exhibit 2, Item 1, p. 8).

While the Associate Administrator's Remand Order was for the "Director to determine if PANYNJ has grandfather rights based on a pre-September 2, 1982 law controlling financing as provided for in 49 U.S.C. §§ 47107 & 47133 and grant assurance 25", the Director analyzed both ways that PANYNJ could meet the grandfather exception – through a law controlling financing and through covenants or assurances in debt obligations.

First, the Director thoroughly analyzed whether PANYNJ had grandfathered rights based on a pre-September 2, 1982 law controlling financing as provided for in 49 U.S.C. §§ 47107 and 47133, and Grant Assurance 25. The Director reviewed the applicable laws, including McKinney Unconsol. Laws §§ 6636, 7001, and 7002, and found that these laws satisfy the grandfather clause requirements of §§ 47107 and 47133 for several reasons. The Director found that both §§ 6636 and 7002 were enacted before September 2, 1982. Section 7002 constituted a "law controlling financing by the airport owner or operator" because it requires surplus revenues to be pooled and applied to a general reserve fund in an amount equal to one-tenth (1/10) of the par value of all bonds. The Director found that PANYNJ has grandfather rights under its enabling legislation (FAA Exhibit 2, Item 1, pp. 9-13). The Associate Administrator agrees that the pre-1982 state law based requirement to pool surplus revenue satisfies the statutory requirements for the grandfather exception.

After making this finding, the Director further noted that while he addressed the primary question of whether PANYNJ has grandfather rights based on a pre-existing law controlling financing:

Language in the Remand Order also raised a related question in asking the Director to determine the basis for the PANYNJ's grandfathered rights and if any, its scope. As to the scope under the finding that PANYNJ has grandfathered rights, it is not without limitation as stated in the Remand Order.

(FAA Exhibit 2, Item 1, p. 13).

Finally, the Director thoroughly analyzed whether PANYNJ had grandfather status based on a pre-September 2, 1982, covenant or assurance in a debt obligation that provides that the revenues, including airport revenue, be used to support general debt obligations as provided for in 49 U.S.C. §§ 47107 and 47133, and Grant Assurance 25. The Director found that PANYNJ has grandfather rights under this prong of the statute as well (FAA Exhibit 2, Item 1, pp. 13 – 16). The Director examined PANYNJ's 1952 Consolidated Bond Resolution, which continues to govern the issuance of bonds and is the authority by which PANYNJ issues consolidated bonds. The Director found that 1952 Consolidated Bond Resolution was enacted before September 2, 1982. (FAA Exhibit 2, Item 1, p. 16). Next, the Director determined that the 1952 Consolidated Bond Resolution continues to govern the issuance of bonds by PANYNJ. The Bond Resolution constitutes part of the contract with bondholders and therefore is "a covenant or assurance in a debt obligation issued." Finally, the Director found that the issuance and refunding of bond obligations pursuant to the Bond Resolution requires that airport revenue "be used to support not only the airport but also the general debt obligations or other facilities of the owner or operator." (FAA Exhibit 2, Item 1, p. 16). The Associate Administrator agrees with the Director's analysis and affirms PANYNJ's grandfather status based upon a pre-1982 covenant or assurance in a debt obligation.

The Associate Administrator rejects United's argument that the scope of PANYNJ's grandfather rights are limited to debt service and funding reserves for pre-1982 obligations but do not include the right to divert airport revenue for the operation and maintenance of other facilities, such as the World Trade Center or the PATH train. The language of the grandfather clause statutes in 49 U.S.C. §§ 47107(b)(2) and 47133(b)(1) authorize the use of grandfathered airport revenue for the support of facilities of the owner or operator. The statute provides for the use of grandfathered airport revenue "to support not only the airport, but also general debt obligations and facilities of the owner or operator." 49 U.S.C. § 47133(b)(1). United's proposed limitation on the use of grandfathered airport revenue on other facilities owned by PANYNJ is contrary to the statutory language.

United further argues here that PANYNJ's pre-1982 statutes and bond covenants do not require the use of airport revenue for the expenses of its other facilities, and therefore the requirements of the grandfather statutes are not satisfied. The Director considered this on remand and disagreed, finding that § 7002 requires surplus revenues to be pooled and applied to the general reserve fund and any revenue that is not required for the general reserve fund shall be used "as may hereafter be directed by the two said states." N.Y. Unconsol. L. § 7002 (McKinney). The Director found that the 1952 Consolidated Bond Resolution constitutes one such "direct[ive]," and the Resolution provides for the pooling of revenue from all PANYNJ's facilities. (FAA Exhibit 2, Item 1, p. 16).

The Associate Administrator affirms the Director's decision. PANYNJ's pre-1982 statutes and the Bond Resolution dictate and control financing for all of PANYNJ's facilities. The surplus revenue from all facilities is pooled, including the revenue from airports, and the expenses of each facility, including capital expenses, are paid from the same fund. The laws and bond covenants were in place before 1982 and require airport revenues to be used to support not only

airports but also other PANYNJ owned and operated facilities. This financing structure falls within the ambit of the grandfather provision in 49 U.S.C. §§ 47107 and 47133.

In reaching this holding, we consider not just statutory language, but the financial structure of the Port as a whole, how it functions, and how it has functioned since the grandfather qualification date of September 2, 1982. This provides a more meaningful analysis than, for instance, a search for the word “required” in the Port’s authorities. We find that the very nature of the Port’s financial system, which requires the pooling of surplus revenue and provides its use at other PANYNJ owned and operated facilities, reflects a system where the use and/or availability of these funds are fundamental to the Port’s business and operations. We also note that no one has argued that the Port’s practices are not longstanding. Congress elected to bar the practice of revenue diversion in 1982 but allowed certain pre-existing uses of airport revenue for non-airport purposes to continue via the grandfather rights. Our holding respects the will of Congress by maintaining a status quo, initially assumed by the Director in his November 19, 2018 Determination and heretofore not questioned.

United next contends that PANYNJ’s grandfather rights are limited to debt obligations incurred prior to September, 1982. United does not adequately explain the basis of its position. The Director found, and the Associate Administrator confirms, that PANYNJ’s 1952 Consolidated Bond Resolution continues to govern the issuance of PANYNJ’s bonds, including those issued after September, 1982 and to present. The 1987 House Report No. 100-123(II) supports the conclusion that grandfather provision was intended to allow an airport sponsor to continue issuing debt obligations in the same manner after September, 1982 as before that date:

The Committee intends that those airport owners or operators that had legislation or issued assurances or covenants in general debt obligations prior to September 3, 1982, which make it difficult or impossible for them to represent that all airport revenues would be used for the purposes specified in the Act may continue to utilize the exceptions for these airports. *The continuing issuance of general debt obligations in this manner will not preclude those owners or operators from qualifying for Federal airport grants* (emphasis added).

(FAA Exhibit 1, Item 11, p. 11).

The Associate Administrator finds that PANYNJ may continue to issue debt obligations pursuant to its original 1952 Consolidated Bond Resolution under its grandfather rights.

United claims that the Director should have further defined and limited the scope of PANYNJ’s grandfather rights and seeks another remand to the Director. However, the parties advanced their arguments concerning the scope of PANYNJ’s grandfather rights before the Director and in this appeal. Although the Remand Order could have been clearer, the Associate Administrator previously found that use of grandfathered revenue is limited in scope to supporting facilities that are owned or operated by the Port. United’s arguments regarding this finding were considered and resolved. United’s arguments on appeal regarding the scope of PANYNJ’s grandfather rights have also been adequately considered and resolved, as explained above. Given the posture of this case, the Associate Administrator finds the Director did not have an obligation to further

define the scope of grandfather rights. There is no reason for another remand of this lengthy, ongoing proceeding. United's request for a remand is denied.

D. Conclusion

United asserts that the Director did not fully respond to the Remand Order by not defining the scope of PANYNJ's grandfather rights. The Associate Administrator disagrees.

In the partial remand, the Associate Administrator fully analyzed the scope (or limitation) of grandfather rights and concluded three important points (1) the grandfather authority is not without limitation, (2) the limit is defined by statute, and (3) grandfathered diversion of airport revenue is limited to support facilities owned and operated by PANYNJ.

The Associate Administrator's Remand Order was narrower and confined to "determine the basis for PANYNJ's grandfather rights, if any, and as to whether to issue a civil penalty." (FAA Exhibit 1, Item 1, p. 33). In addition, the Associate Administrator's Order for corrective action addressed the limits of airport revenue expenditures and outlined submission requirements. The Associate Administrator did not ask the Director to revisit these limits.

The Associate Administrator finds that the Director fully responded to the Remand Order to determine whether PANYNJ has grandfather rights. While the Director reconfirmed the analysis of the scope (or limitation) on grandfather rights provided by the Associate Administrator, this merely and serves to strengthen the decision that the scope of the grandfather authority is defined by the statute and limited to support facilities owned and operated by PANYNJ. The question of scope of the grandfather rights has been fully answered by both the Associate Administrator's Order Affirming in Part and Remanding in Part and the Director's Determination on Remand.

VIII. CONCLUSIONS AND FINDINGS

The Associate Administrator's role is to determine whether the Director erred in findings of fact or conclusions of law in issuing the Director's Determination. In arriving at a final decision in this Appeal, the Associate Administrator has reexamined the record in detail, including the Associate Administrator's Remand, the Director's Determination on Remand, the administrative record supporting the Director's Determination on Remand, the Appeal, and Reply, and applicable law and policy. Based on this reexamination, the Associate Administrator concludes that the Director's Determination on Remand is supported by a preponderance of reliable, probative, and substantial evidence and is consistent with applicable law, precedent, and FAA policy.

The Appeal does not contain persuasive arguments or evidence sufficient to reverse any portion of the Director's Determination on Remand. The Director's Determination on Remand is affirmed.

ORDER

ACCORDINGLY, it is hereby ORDERED that (1) the Director's Determination is affirmed, and (2) the Appeal is dismissed, pursuant to 14 CFR § 16.33.

RIGHT OF APPEAL

The parties are offered the opportunity to appeal the agency's final decision in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business.

A party to this decision disclosing a substantial interest in the final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. § 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after a Final Decision and Order has been served on the party. (Title 14 CFR § 16.247(a).)

SHANNETT Digitally signed by
A R GRIFFIN SHANNETTA R GRIFFIN
Date: 2023.05.09
18:18:53 -04'00'

Shannetta R. Griffin, P.E.
Associate Administrator for Airports
Federal Aviation Administration

Date

United Airlines, Inc, Appellant
v.
The Port Authority of New York and New Jersey, Appellee

Docket No. 16-14-13

INDEX OF ADMINISTRATIVE RECORD

The following items constitute the administrative record in this proceeding:

FAA Exhibit 1

- Item 1** Order Affirming in Part and Remanding in Part, January 11, 2021, and Index including Director's Determination, November 19, 2018.
 - Item 2** Order for Supplemental Pleadings, April 26, 2021.
 - Item 2A** Consent Motion by Respondent the Port Authority of New York and New Jersey's To Extend the Date For Submission Of Supplemental Pleading, May 19, 2021.
 - Item 3** Notice For Extension of Time, May 27, 2021.
 - Item 4** Second Motion by Respondent the Port Authority of New York and New Jersey's To Extend the Date For Submission Of Supplemental Pleading, August 8, 2021.
 - Item 5** Order For Extension of Time, August 10, 2021.
 - Item 6** The Port Authority of New York and New Jersey's Supplemental Brief, Filed Pursuant To the Final Decision and the Order for Supplemental Pleadings, September 15, 2021.
- Exhibit A - McKinney's Consolidated Laws of New York Annotated Unconsolidated Laws, Title 17. Port Authority of New York and New Jersey, Chapter 6--Air Terminals, § 6636, Use of reserve funds of Authority: disposition of revenues.
 - Exhibit B - McKinney's Consolidated Laws of New York Annotated Unconsolidated Laws Title 17. Port Authority of New York and New Jersey, Chapter 20-General Reserve Fund, § 7002, Establishment of general reserve fund.
 - Exhibit C - McKinney's Consolidated Laws of New York Annotated, Unconsolidated Laws, §§ 6631-2.
 - Exhibit D - McKinney's Consolidated Laws of New York Annotated, Unconsolidated Laws, §§ 7001-3.
 - Exhibit E - McKinney's Consolidated Laws of New York Annotated, Unconsolidated Laws §§ 6643-5.
 - Exhibit F - Bonds, Notes And Other Obligations, Consolidated Bond Resolution, (Adopted October 9, 1952).

Exhibit G - Report to the Committee on Appropriations, U.S. House of Representatives on the Diversion of Airport Revenue, December 8, 1993.

- Item 7** Reply of United Airlines, Inc. to Respondent's Supplemental Brief on Remand, October 15, 2021.
- Item 8** The Port Authority of New York and New Jersey's Motion For Leave To File Reply Brief and Reply Brief in Further Support of its Supplemental Brief, November 1, 2021.
- Item 9** House Conference Report, 97-760, August 17, 1982, excerpt.
- Item 10** Public Law 97-248, excerpt.
- Item 11** House Report No. 100-123, June 26, 1987.
- Item 12** *Airport Funding - Information on Grandfathered Revenue Diversion and Potential Implications of Repeal*, GAO-20-684, September 2020.
- Item 13** Press Release Number: 5-2010, Press Release Number 130-2011, Press Release Number: 133-2012, Press Release Number: 8-2013, and Press Release Number: 125-2014.
- Item 14** *PANYNJ Financial Statements and Appended Notes for the Year Ended December 31, 2019*.

FAA Exhibit 2

- Item 1 Director's Determination on Remand, May 3, 2022, and Index including Order Affirming in Part and Remanding in Part, January 11, 2021, and Index including Directors Determination, November 19, 2018.
- Item 2 United Airlines, Inc Request for Reconsideration of the Director's Determination on Remand, June 2, 2022.
- Item 3 United Airlines, Inc's Notice of Appeal and Brief on Appeal from Directors Determination on Remand, June 2, 2022.
- Item 4 Consent Motion by Respondent the Port Authority of New York and New Jersey to Extend the Date to Respond to Request of United Airlines, Inc. for Reconsideration of Director's Determination on Remand, and to Stay Deadlines to Respond to United Airlines, Inc.'s Notice of Appeal and Brief on Appeal from Director's Determination on Remand, June 8, 2022.

- Item 5 FAA Order Granting Stay of Deadline to File a Reply to Notice of Appeal from Director's Determination on Remand, July 13, 2022.
- Item 6 Port Authority of New York and New Jersey Opposition to the Request of United Airlines, Inc. for Reconsideration of the Director's Determination on Remand, August 1, 2022.
- Item 7 United Airlines, Inc. Motion for Leave to file a Reply to PANYNJ's Opposition to its Request for Reconsideration, September 2, 2022.
- Item 8 FAA Order denying United Airlines, Inc., Request for Reconsideration, October 19, 2022.
- Item 9 The Port Authority of New York and New Jersey's Opposition to United Airlines, Inc.'s Appeal of the Director's Determination on Remand, November 8, 2022.
- Item 10 FAA Grant History, dated January 23, 2023.
- Item 11 Notice of Extension of Time, January 4, 2023.
- Item 12 Notice of Extension of Time, March 2, 2023.
- Item 13 Notice of Extension of Time, April 11, 2023.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 10, 2023, I caused to be emailed and/or to be placed in the Federal Express a true copy of this Final Agency Decision Affirming Director's Determination on Remand for FAA Docket No. 16-14-13 addressed to:

For the Complainant

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Copy to:

FAA Part 16 Airport Proceedings Docket (AGC-600)
FAA Office of Airport Compliance and Management Analysis (ACO-100)
FAA Airports Division, Eastern Region (AEA-600)



Natalie Curtis
Office of Airport Compliance
and Management Analysis

Walenga, Pat (FAA)

From: 9-ARP-Part16-Complaints (FAA)
Sent: Wednesday, May 10, 2023 3:00 PM
To: rspan@steinbrecherspan.com; Fisher, Amy; mwarren@jenner.com; srosenthal@loeb.com; jtaliaferro@loeb.com; tmoseley@loeb.com
Cc: 9-AWA-AGC-Part-16 (FAA); 'AWA-ARP-ACO-100'; 'AEA-600-Intake'
Subject: FAD - Affirming Director's Determination on Remand - FAA Docket No. 16-14-13
Attachments: P16_Docket 16-14-13_PANYNJ_FAD of DD on Remand_Final_2023 05 09 Signed.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Please see the attached Final Agency Decision Affirming Director's Determination on Remand for FAA Docket No. 16-14-13.

Best Regards,

Natalie Curtis
Administrative Support to
Airport Compliance and Management Analysis
202-267-3085