

**UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, D.C.**

**John C. Roberts**

**Complainant**

**v.**

**Daviess County, Indiana  
Board of Aviation Commissioners**

**Respondent**

**FAA Docket No. 16-00-06**

**FINAL DECISION AND ORDER**

**I. INTRODUCTION**

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on an appeal filed by Dr. John C. Roberts (Complainant), from the Director's Determination of March 1, 2001, issued by the Director of the FAA Office of Airport Safety and Standards, pursuant to the Rules of Practice for Federally-Assisted Airport Proceedings, Title 14 Code of Federal Regulations (CFR), Part 16.

In his formal complaint, Dr. Roberts alleged that the Daviess County Airport Board of Aviation Commissioners (Respondent/Board) had violated 49 U.S.C. §§ 40103(e) and 47107(a)(4) and grant assurance number 23 regarding exclusive rights by not granting the Complainant's request for designation as a fixed base operator, while granting another person fixed base operator status. Specifically, Dr. Robert's alleged that "[t]he Board has violated [the prohibition on exclusive rights] and Dr. Roberts' right to be awarded FBO services at the Daviess County Airport since January 12, 1994," and that the Board "has provided exclusive FBO status to Kessler," an FBO at the Daviess County Airport since 1974.<sup>1</sup>

Upon consideration of Dr. Roberts' complaint and supporting evidence, the Director concluded that the Daviess County Airport was not currently in violation of its obligations regarding exclusive rights. While the Director agreed that Dr. Roberts was not granted "FBO status," he found that "Dr. Roberts has not identified any type, kind or class of aeronautical activity which he has been excluded from conducting at the Airport." Additionally, the Director addressed allegations in Dr. Roberts Reply to the Respondent's Answer to the Complaint that "the lack of Minimum Standards was used by the Board as an excuse to not grant FBO status to [him] since 1994;" and that it was

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<sup>1</sup> FAD Exhibit, Item 4

not until after Dr. Roberts' filed his Complaint that the Minimum Standards were finally adopted by the Board. The Director concluded that even though the record reflects that the Board adopted minimum standards one day after Dr. Roberts filed his initial complaint, the Airport Minimum Standards included in the administrative record of this proceeding form the starting point for the FAA's determination.<sup>2</sup>

Upon an appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (1) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, p.21 (12/30/99) and 14 CFR, Part 16, §16.227]

On appeal, the Complainant argues to the Associate Administrator for Airports that the Director did not address the issue of whether the Board was in violation of its Federal obligations regarding exclusive rights by allowing Daviess County and Kessler<sup>3</sup> to store and sell fuel at the Airport while forbidding Dr. Roberts to store and sell fuel at the Airport.<sup>4</sup> The Complainant also alleges that the Director erred by not making a determination as to the legality of the Board's past failures to act on Dr. Robert's requests. Finally, the Complainant alleges that the minimum standards are unjustly discriminatory and unreasonable.<sup>5</sup>

In arriving at a final decision on this appeal, the Associate Administrator has examined the entire record including the Director's Determination, the Administrative Record supporting the Director's Determination and the appeal and reply submitted by the parties in light of applicable law and policy. Based on this examination, the Associate Administrator affirms the Director's Determination. The Respondent's appeal did not contain persuasive arguments sufficient to reverse any portion of the Director's Determination. This Decision constitutes the final decision of the Federal Aviation Administration, pursuant to 14 CFR, Part 16, §16.33(a).

## II. AIRPORT

Daviess County Airport (Airport) is located in Washington, Indiana. The Airport is owned by the Daviess County Board of Aviation Commissioners (Board) and operated as a public-use airport. The Airport has approximately 40-based aircraft and 6200 general aviation aircraft operations annually.<sup>6</sup>

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<sup>2</sup> FAD Exhibit 1, Item 1

<sup>3</sup> William W. Kessler, Sr. d/b/a Bill's Aero Service of Washington, Indiana (Bill's Aero Service)

<sup>4</sup> Appeal of Director's Determination (Appeal), Final Agency Decision (FAD), Exhibit 1, Item 2

<sup>5</sup> FAA Exhibit 1, Item 2, page 3

<sup>6</sup> FAD, Exhibit 1, Item 7

The Airport has been developed with FAA-administered airport development assistance. The Airport most recently benefited from an FAA Airport Improvement Program (AIP) grant, issued in March 2000, for runway and runway lighting rehabilitation.<sup>7</sup>

### III. BACKGROUND

In February 1974, the Board entered into the *Agreement and Lease for Construction of Building to House Airplane Maintenance and Service Center* (1974 Agreement) with William W. Kessler, Sr. d/b/a Bill's Aero Service of Washington, Indiana (Bill's Aero Service) to permit the establishment of a fixed base operation specializing in aircraft repair and maintenance, servicing and sales on the Airport.<sup>8</sup>

In November 1987, the Board entered into the *John Dr. Roberts, D.O., d/b/a Dr. Roberts Hangars- Daviess County Airport Host/Tenant Agreement* (1987 Agreement) for airport property on which to construct a building in which to locate an aircraft storage business.<sup>9</sup>

On May 25, 1989, the Board entered into the *Clarification of Contract of February 1974 and Host/Tenant/Operating Lease Agreement with Bill's Aero Service* (1989 Clarification).<sup>10</sup>

On January 12, 1994, Dr. Roberts requested Board-designation as a fixed-base operator (FBO) known as Midwest Air Charter, a subsidiary of Hoosier Microfilm, Inc. (HMI), in order to better utilize HMI's equipment by engaging in commercial aeronautical activity providing FAA-certificated air charter service. He also requested that the Board permit his construction of an office facility for Midwest Air's commercial air charter service on airport property adjacent to the current HMI hangar.<sup>11</sup>

On January 14, 1994, the FAA registered HMI d/b/a Midwest Air Charter to operate on-demand passenger and cargo air service under *Operating Requirements: Commuter and On Demand Operations and Rules Governing Persons On Board Such Aircraft*, 14 CFR Part 135, and *Exemptions for Air Taxi and Commuter Air Carrier Operations*, 14 CFR Part 298.<sup>12</sup>

On February 4, 1994, the Board approved HMI's request for the construction of a hangar to accommodate Midwest Air Charter, contingent on the plans proposed meeting approved construction regulations. The Board tabled HMI's request for designation as a "limited FBO," indicating that it would research whether it was necessary to formally address the request. The Board also tabled a request by HMI for an on-airport fuel storage area or to rent county fuel storage.<sup>13</sup>

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<sup>7</sup> FAD, Exhibit 1, Item 8 to DD.

<sup>8</sup> FAD Exhibit 1, Item 1, page 2

<sup>9</sup> FAD Exhibit 1, Item 1, page 2

<sup>10</sup> FAD Exhibit 1, Item 1, ¶ 8 and Exhibit H

<sup>11</sup> FAD Exhibit 1, Item 1, page 2

<sup>12</sup> FAD Exhibit 1, Item 1, page 3

<sup>13</sup> FAD Exhibit 1, Item 1, page 3

On February 10, 1994, the FAA authorized HMI d/b/a Midwest Air Charter to provide on-demand passenger and cargo air service to the public at the Airport under FAA Certificate # HMWA494B. FAA Certificate # HMWA494B was subsequently amended to change the name of the authorized operator to Midwest Air, Inc. (Midwest Air).<sup>14</sup>

On October 27, 1994, Dr. Roberts requested that "Midwest Air be recognized and/or designated as a Fixed Base Operation" at the Airport. The Board reconsidered the two previously tabled requests submitted by Dr. Roberts, including the request for designation as a "limited FBO," and agreed to have a draft of requirements for a limited FBO at the next meeting.<sup>15</sup>

On April 10 1997, the Board directed its attorney to draft an agreement for FBO status for Midwest Air.<sup>16</sup>

On July 15, 1999, Dr. Roberts presented his request to become an FBO at a regular meeting of the Board. The Board advised Dr. Roberts that it was in the process of adopting minimum standards for the airport and that his request was tabled until such time those standards were put in place. The Board took his request under advisement; and engaged in discussion concerning the establishment of minimum standards for airport use, which standards it concluded had never been established and were considered to be imperative for the safe operation of the airport. The Board decided to seek professional legal help in drawing up minimum standards.<sup>17</sup>

On April 12, 2000, Dr. Roberts filed a complaint against the Board under 14 CFR Part 16, alleging the grant of an exclusive right by the Board. The complaint did not meet the procedural requirements of 14 CFR Part 16 for consideration by the FAA and the complaint was dismissed without prejudice on April 27, 2000.<sup>18</sup>

On April 13, 2000, the Board adopted *Minimum Standards and Requirements for the Aeronautical Use of the Daviess County Airport* (Airport Minimum Standards) for subsequent publication and promulgation.<sup>19</sup>

On May 8, 2000, the newly adopted Airport Minimum Standards became effective.<sup>20</sup>

On May 18, 2000, Dr. Roberts filed the above-referenced complaint. The Complaint generally alleges that Daviess County Airport Board of Commissioners denied Dr. Roberts the status of "fixed-base operator" while granting this status to another person in violation of the prohibition against exclusive rights.<sup>21</sup>

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<sup>14</sup> FAD Exhibit 1, Item 1, page 3

<sup>15</sup> FAD Exhibit 1, Item 1, page 3

<sup>16</sup> FAD Exhibit 1, Item 1, page 3

<sup>17</sup> FAD Exhibit 1, Item 1, page 3

<sup>18</sup> FAD Exhibit 1, item 1, page 4

<sup>19</sup> FAD Exhibit 1, Item 1, page 4

<sup>20</sup> FAD Exhibit 1, Item 1, page 4

<sup>21</sup> FAD, Exhibit 1, Item 4

On July 18, 2000, the Board filed its answer to the complaint. The Respondent denies these allegations and denied that it had granted an exclusive right.

On July 31, 2000, Dr. Roberts filed a reply to the Board's answer.<sup>22</sup>

On August 2, 2000, Daviess County filed a rebuttal to Dr. Roberts' reply.<sup>23</sup>

On March 1, 2001, FAA issued the Director's Determination finding that the Daviess County Airport was currently in compliance with its airport grant assurances.<sup>24</sup>

On April 2, 2001, the Complainant filed an appeal to the Director's Determination, alleging that the Director failed to address the issue of whether the Board was in violation of its Federal obligations regarding exclusive rights by allowing Daviess County and Kessler<sup>25</sup> to store and sell fuel at the Airport while forbidding Dr. Roberts to store and sell fuel at the Airport.<sup>26</sup> The Complainant also alleges that the Director erred by not making a determination as to the legality of the Board's past failures to act on Robert's requests.

On April 30, 2001, the Daviess County Board of Aviation Commissioners filed a Response to Complainant's Appeal indicating, "the Respondent agrees with the Director's Determination in all respects...."<sup>27</sup>

#### IV. APPLICABLE LAW AND POLICY

The following is a discussion pertaining to the FAA's enforcement responsibilities; the FAA compliance program; statutes, sponsor assurances, and relevant policies; and the appeal process.

##### A. FAA Enforcement Responsibilities

The Federal Aviation Act of 1958, as amended, 49 U.S.C. Section 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. Various legislative actions augment the Federal role in encouraging and developing civil aviation. These actions authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by

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<sup>22</sup> FAD, Exhibit 1, Item 6

<sup>23</sup> FAD, Exhibit 1, Item 7. As stated in the Director's Determination, due to a clerical error, the Director did not consider the rebuttal in his deliberations. Upon review of the rebuttal, the FAA determined that this constituted harmless error.

<sup>24</sup> FAD, Exhibit 1, Item 1

<sup>25</sup> William W. Kessler, Sr. d/b/a Bill's Aero Service of Washington, Indiana (Bill's Aero Service)

<sup>26</sup> FAD, Exhibit 1, Item 2

<sup>27</sup> FAD, Exhibit 1, Item 3. In its Response, the Board notes that there is "one minor exception to its agreement with the DD which will be addressed at a later point in the Response"

airport sponsors in property conveyances or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

#### B. FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their Federal obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving Federal grant funds or when accepting the transfer of Federal property for airport purposes. The FAA incorporates these obligations in grant agreements and instruments of conveyance to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports which airport sponsors operate in a manner consistent with their Federal obligations and the public's interest in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of valuable rights, which airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of Federal property, to ensure that airport sponsors serve the public interest.

FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of Federal funds or the conveyance of Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports and facilitates interpretation of the assurances by FAA personnel.

#### C. Statutes, Sponsor Assurances, and Relevant Policies

As a condition precedent to providing airport development assistance under the Airport and Airway Improvement Act of 1982 (AAIA), the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 U.S.C. § 47107(a), et seq., sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. Section 511(b) of the AAIA, 49 U.S.C. 47107(g)(1) and (i) as amended by Pub. L. No. 103-305 (August 23, 1994) authorizes the Secretary to prescribe

project sponsorship requirements to ensure compliance with Sections 511(a), 49 U.S.C. 47107(a)(1)(2)(3)(5)(6) as amended by Pub. L. No. 103-305 (August 23, 1994). These sponsorship requirements are included in every AIP agreement as set forth in FAA Order 5190.38A, Airport Improvement Program Handbook, issued October 24, 1989, Ch. 15, "Sponsor Assurances and Certification" Sec. 1. Assurances-Airport Sponsors. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding contractual obligation between the airport sponsor and the Federal government.

1. Use of Airport, and Not Unjustly Discriminatory Terms

Assurance 22, "Economic Nondiscrimination," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport

will make its airport available for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities. Assurance 22(a)

may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. Assurance 22(h)

may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or is necessary to serve the civil aviation needs of the public. Assurance 22(i)

Subsection (h) qualifies subsection (a) and subsection (i) represents an exception to subsection (a). The intent is to permit the sponsor sufficient control over the airport to preclude unsafe and inefficient conditions, which would be detrimental to the civil aviation needs of the public.

FAA Order 5190.6A describes the responsibilities under Assurance 22 assumed by the owners of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. [See FAA Order 5190.6A, Secs. 4-14(a)(2) and 3-1]

The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. [See FAA Order 5190.6A, Sec. 3-8(a)]

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. [See FAA Order 5190.6A, Sec. 4-13(a)]

(a) Minimum Standards

The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who engage in a commercial aeronautical activity at the airport. It is the prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must, however, be reasonable and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. [See FAA Order 5190.6A, Sec. 3-12.]

The FAA ordinarily makes an official determination regarding the relevance and/or reasonableness of the minimum standards only when the effect of a standard denies and aeronautical activity access to a public-use airport. Such determinations often include consideration of whether failure to meet the qualifications of the standard is a reasonable basis for such denial and/or whether the application of the standard results in an attempt to create an exclusive right. [See FAA Order 5190.6A, Sec. 3-17(b).]

The airport owner may quite properly increase the minimum standards from time to time in order to ensure a higher quality of service to the airport users. Manipulating the standards solely to protect the interest of an existing tenant, however, is unacceptable. [See FAA Order 5190.6A, Sec. 3-17(c).]

FAA Order 5190.1A, *Exclusive Rights at Airports*, provides that an airport sponsor may impose minimum standards on those engaged in aeronautical activities; however, an unreasonable requirement or any requirement which is applied in an unjustly discriminatory manner could constitute the grant of an exclusive right. See FAA Order 5190.1A, Para. 11(c). Additionally, Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [See e.g. *Pompano Beach v. FAA*, 774 F.2d 1529 (11<sup>th</sup> Cir, 1985)]

2. Exclusive Rights

Title 49 U.S.C. §40103(e) provides, in relevant part, that “[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended.” In accordance with 49 U.S.C. §40102(a)(4), (9), (28), an “air navigation facility” includes an “airport.”

49 U.S.C. §47107(a)(4) similarly provides, in pertinent part, that “a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport...”

Assurance 23, “Exclusive Rights,” of the prescribed sponsor assurances implements the provisions of 49 U.S.C. §§40103(e) and 47107(a)(4), and requires, in pertinent part, that the sponsor of a federally obligated airport “...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public.” The sponsor further agrees that it “will not, either directly or indirectly, grant



or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities..."

FAA Order 5190.6A provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. *See* FAA Order 5190.6A, Ch. 3. The Order defines an exclusive right as "a power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right." [*See* FAA Order 5190.6A, Appendix 5.]

The FAA has concluded that the existence of an exclusive right to conduct any aeronautical activity at an airport limits the usefulness of the airport and deprives the using public of the benefits of a competitive enterprise. Apart from legal considerations, the FAA considers it inappropriate to provide Federal funds for improvements to airports where the benefits of such improvements will not be fully realized due to the inherent restrictions of an exclusive monopoly on aeronautical activities. [*See* FAA Order 5190.6A, Sec. 3-8(a).]

#### D. The Complaint and Appeal Process

##### 1. Right to File the Formal Complaint

Pursuant to 14 CFR, Part 16, §16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The Complainant shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the things done or omitted by the Respondents directly and substantially affected the complainant. [14 CFR, Part 16, §16.23(b)(3,4)]

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [14 CFR, Part 16, §16.29]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and Federal case law. The APA provision states, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). [*See also, Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 US 267, 272 (1994); *Air Canada et al. v. Department of Transportation*, 148 F3d 1142, 1155 (DC Cir, 1998). 14 CFR §16.229(b) is consistent with 14 CFR §16.23, which requires that the complainant must submit all documents then available to support his or her complaint. Similarly, 14 CFR §16.29 states that "[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance."

## 2. Right to Appeal the Director's Determination

A party adversely affected by the Director's Determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination. If no appeal is filed within the time period specified, the Director's Determination becomes the final decision and order of the FAA without further action. A Director's Determination that becomes final because there is no administrative appeal is not judicially review able. [14 CFR, Part 16, §16.33]

Part 16 requires all relevant facts to be presented in the complaint documents. [14 CFR, Part 16, §16.23(b)(3)] New allegations or issues shall not be presented on appeal. Review by the Associate Administrator is limited to an examination of the Director's Determination and the Administrative Record upon which such determination was based. Under Part 16 complainants are required to provide with the complaint and reply all supporting documentation upon which it relied to substantiate its claims. Failure to raise all issues and allegations in the original complaint documents may be cause for such issues and allegations to be deemed waived and not review able upon appeal. This is consistent with the Supreme Court's recognition that courts may require administrative issue exhaustion as a general rule because it is usually appropriate under an [administrative] agency's practice for contestants in an adversary proceeding before it to develop fully all issues there. The Court concluded that where parties are expected to develop the issues in an adversarial administrative proceeding, the rationale for requiring issue exhaustion is at its greatest. See Sims v. Apfel, 530 US 103, 108-110 (2000) citing Hormel v. Helvering, 312 US 552 (1941) and US v. LA Tucker Truck Lines, 344 US 33, (1952).

## 3. FAA's Responsibility with Regard to an Appeal

Pursuant to 14 CFR, Part 16, §16.33, the Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where the complaint is dismissed after investigation.

In each such case, it is the Associate Administrator's responsibility to determine whether (1) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, p.21 (12/30/99) and 14 CFR, Part 16, §16.227]

## V. ANALYSIS AND DISCUSSION

In his formal complaint, Dr. Roberts alleged that the Daviess County Airport Board of Aviation Commissioners had violated 49 U.S.C. §§ 40103(e) and 47107(a)(4) and grant assurance number 23 regarding exclusive rights by not granting the Complainant's request for designation as a fixed base operator, while granting another person fixed base

operator status. Specifically, Dr. Robert's alleged that "[t] he Board has violated [the prohibition on exclusive rights] and Dr. Roberts' right to be awarded FBO services at the Daviess County Airport since January 12, 1994. On that date, Dr. Roberts first requested FBO status from the Board. Since January 12, 1994, over six (6) years ago, he [Dr. Roberts] has requested FBO status many other times from the Board. Each request has been ignored." Dr. Roberts asserts that the Board "has provided exclusive FBO status to Kessler," an FBO at the Daviess County Airport since 1974.<sup>28</sup>

Upon consideration of Dr. Roberts' complaint and supporting evidence, the Director concluded that the Daviess County Airport was not currently in violation of its obligations regarding exclusive rights. While the Director agreed that Dr. Roberts was not granted "FBO status," he found that "Dr. Roberts has not identified any type, kind or class of aeronautical activity which he has been excluded from conducting at the Airport." Moreover, the Director found that while Dr. Roberts alleged that Midwest Air Charter was not designated as an FBO, "[a] t approximately the same time as HMI d/b/a Midwest Air Charter registered with the FAA to provide air charter service, Dr. Roberts proposed, and the Board authorized, construction of a Midwest Air Charter facility on property adjacent to the HMI leasehold. Consequently, "on the basis of available FAA information regarding Midwest Air's operating history, [the Director] agreed with the Board's assertion that it "did not and has not denied the Complainant the use of his facilities to conduct a Charter operation on the Airport."<sup>29</sup>

Additionally, the Director addressed allegations in Dr. Robert's Reply to the Respondent's Answer to the Complaint that "the lack of Minimum Standards was used by the Board as an excuse to not grant FBO status to [him] since 1994;" and that it was not until after Dr. Roberts' filed his Complaint that the Minimum Standards were finally adopted by the Board. Specifically, the Director concluded that even though the record reflects that the Board adopted minimum standards one day after Dr. Roberts filed his initial complaint, the Airport Minimum Standards included in the administrative record of this proceeding form the starting point for the FAA's determination. In making this determination, the Director noted that the FAA Airport Compliance Program is designed to achieve voluntary compliance on the part of the airport owner or operator with applicable grant obligations; therefore the FAA will base its determination on whether or not the airport is currently in compliance.<sup>30</sup>

The Complainant's appeal from the Director's Determination asserts that by "allowing the Airport to continue to discriminate against Dr. Roberts by allowing Kessler the right to sell fuel, and setting up Minimum Standards designed to prohibit Dr. Roberts from obtaining access to enough fuel to operate his business is not consistent with the FAA's responsibility to ensure that the Airport is made available for aeronautical use on fair and reasonable terms and without unjust discrimination." Additionally, the Complainant alleges "because Dr. Roberts has indeed shown that the Minimum Standards will not resolve any past violations of the Board...the Director's Determination should be

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<sup>28</sup> FAD Exhibit 1, Item 4, page 4

<sup>29</sup> FAD Exhibit 1, Item 1, page 15

<sup>30</sup> FAD Exhibit 1, Item 1, page 15

overturned and the FAA should find that the Airport, now through the use of its own Minimum Standards, continues to violate federal rules and regulations against exclusivity by limiting Dr. Robert's ability to use the Airport."

A. Alleged Exclusive Fuel Sales Right

In the DD, the Director concluded that the administrative record in this case did not establish that the Board had economically disadvantaged the Complainant's conduct of his commercial aeronautical services at the Airport so as to effectively grant an exclusive right.

On Appeal, the Complainant contends that the Director did not address the issue of whether the Board, by allowing Daviess County and another commercial aeronautical entity (Bill's Aero) to store and sell fuel at the Airport, is in violation of the prohibition on exclusive rights. In support of his argument on appeal, Dr. Roberts contends for the first time that he is being discriminated against by the Board's refusal to allow him to store and sell fuel. According to Dr. Roberts, "The Board notified [Dr.] Roberts prior to enacting the Minimum Standards that he could not store or sell fuel, while allowing Kessler to store and sell fuel at the Airport." It appears that Dr. Roberts believes that the Board continues to allow Kessler to sell fuel as a result of a letter, dated December 20, 1996, from the Board to Kessler stating that "the Airport Board has no problem with you continuing to sell fuel products in competition with the County."<sup>31</sup>

In its Reply, the Board avers that "the subject Airport Management Agreement with Kessler, was terminated by Action of the Board of Aviation Commissioners on August 30, 1999...Kessler does not sell or store aviation fuel on the airport...The Aviation fuel sales operation at the Airport has been conducted solely by the Board of Aviation Commissioners, with its own employees, as the Minimum Standards provide."<sup>32</sup> The Board states, "the Daviess Board of Aviation Commissioners is the sole authorized provider of fuel and oil sales on the Daviess County Airport for profit to the aviation public. No other entity is permitted to fuel aircraft except an individual servicing its own aircraft with its own employees."<sup>33</sup>

A review of the issues raised in his initial Complaint and Reply shows that Dr. Roberts did not raise this issue before the Director in his Complaint. Rather, Dr. Roberts argued only that the Board had effectively prohibited Dr. Roberts' right to obtain fixed base operator status while permitting another person exclusive fixed base operator status at the Daviess County Airport.<sup>34</sup> The Director did not address the question of commercial fuel sales in the Determination because the Complainant did not raise it in his pleadings.

Pursuant to 14 CFR § 16.23(b)(3) and (g), Dr. Roberts was required to have submitted all his pleadings with all documents then available in the exercise of reasonable diligence in support of his case. In rendering its Director's Determination, the FAA can rely entirely

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<sup>31</sup> FAD, Exhibit 1, Item 2, page 2

<sup>32</sup> FAD, Exhibit 1, Item 3, page 4

<sup>33</sup> FAD, Exhibit 1, Item 3, page 2

<sup>34</sup> FAD, Exhibit 1, Item 2

on the pleadings and supporting documents in the record. 14 CFR §§ 15.23(b)(3) and 16.29(b)(1). See *Sims v. Apfel*, *supra*. Accordingly, the Director could not have erred in failing to address an issue that was not raised or argued in the initial Complaint or Reply, and the Associate Administrator will not decide this issue on appeal. *Sims v. Apfel*, 530 U.S. 103, 108-110 (2000) citing *Hormel v. Helvering*, 312 U.S. 552 (1941) and *U.S. v. LA Tucker Truck Lines*, 344 U.S. 33, (1952); *United Transportation Union v. Surface Transportation Board*, 114 F.3d 1242, 1244 (D.C. Cir. 1997). See also, discussion above in "2. Right to Appeal the Director's Determination" and FAA Docket No. 16-00-03, *Aerodynamics of Reading, Inc. v. Reading Regional Airport Authority, Final Decision and Order*, dated July 23, 2001, p. 14.

However, in the interest of providing the Complainant and Respondent sufficient policy guidance to resolve this informally, I am providing the following comments regarding the issue of commercial fuel sales.

The airport can legally preempt a commercial entity's right to sell fuel at a federally assisted public use airport. Under the "proprietary exception" the owner of a public-use airport may elect to provide any or all of the aeronautical services needed by the public at the airport. The statutory prohibition against exclusive rights does not apply to these owners and they may exercise but not grant the exclusive right to conduct any aeronautical activity. See FAA Order 5190.6A (3-9)(d). If the airport owner reserves unto itself the exclusive right to sell fuel, it can prevent an airline or air taxi from selling fuel to others but it must deal reasonably to permit such operators to refuel their own aircraft. Thus, it is consistent with FAA policy and the grant obligations for an airport sponsor to exercise a proprietary exclusive on fuel sales.

#### B. Minimum Standards

On appeal, Dr. Roberts alleges that the Airport's minimum standards are unreasonable and unjustly discriminatory. He complains about the definition of an FBO (and how it is not consistent with a list he sent to the airport in 1999, listing those FBO services he would prefer to be able to conduct);<sup>35</sup> that Bill's Aero Service is a designated FBO but does not meet the minimum standard requirements; and he alleges that the 300 gallon maximum amount of fuel that can be brought onto the airport is unreasonable. However, these arguments were neither raised in Dr. Robert's Complaint or Reply. As explained above, all arguments must be raised at the pleading stage. Arguments cannot be raised for the first time on appeal.

Moreover, the record reflects that the Complainant knew of the Board's adoption of the new minimum standards at the time he filed the instant complaint. Specifically, in its reply to the Respondent's Answer to the Complaint, the Complainant stated "it was not until after this Complaint was originally filed (April 12, 2000) that the Minimum Standards were finally adopted by the Board on April 13, 2000. As discussed in the "Background" section above, the Complainant's April 12, 2000, complaint was dismissed

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<sup>35</sup> FAD, Exhibit 1, Item 2, page 8/9

without prejudice as incomplete under 14 CFR Part 16 on April 27, 2000. The Complainant did not refile the instant complaint until May 18, 2000.<sup>36</sup>

It is well established that in an internal agency appeal process new evidence need not be admitted unless the new evidence was not available and could not have been discovered or presented at the prior proceeding. Charles H. Koch, Jr., *Administrative Law and Practice*, Vol. 1, § 6.76, (1997). The new evidence will not be considered if the party could reasonably have known of its availability. Koch, *supra*, § 6.76. Based on the foregoing, it appears that the new evidence was available to the Complainant but he chose not to present it in his complaint. Absent any explanation by the Complainant on appeal as to why this evidence was not available and could not have been discovered or presented during the prior proceeding, it will not be considered in this appeal. A party may not correct a mistake in its original selection of evidence by compelling the agency to consider it on appeal. Koch, *supra*, § 6.76. [See also, FAA Docket No. 16-98-19, James Vernon Ricks, Jr., et. seq., d/b/a Millington Aviation, LLC v. Millington Municipal Airport Authority, Final Decision and Order, p. 13, f. 3.] The Complainant may choose to file a separate complaint with the Director on this issue.

That said, 14 CFR § 16.21, "Pre-complaint resolution," provides that prior to filing a complaint under 14 CFR Part 16, a person directly and substantially affected by the alleged noncompliance shall initiate and engage in good faith efforts to resolve the disputed matter informally with those individuals or entities believed to be responsible for the noncompliance. Since the reasonableness of the Respondent's minimum standards was raised for the first time on appeal, it appears that such good faith negotiations to resolve the alleged unreasonableness have not occurred. As always, the Associate Administrator offers the assistance of the FAA Great Lakes Region Airports Division to help resolve these issues informally. Mr. John Gross, an employee of the Great Lakes Region Airport Division, will be contacting you shortly to offer assistance in resolving this dispute.

The Associate Administrator encourages the use of the Great Lakes Region Airports Division office in this matter because, while not deciding the issue on appeal, the Associate Administrator is concerned about the reasonableness of the Respondent's minimum standard limiting to 300 gallons the amount of aviation fuel that can be brought onto the airport for purposes of self-fueling. As discussed in FAA Order 5190.6A, if the airport owner reserves unto itself the exclusive right to sell fuel, it can prevent an airline or air taxi from selling fuel to others but it must deal reasonably to permit such operators to refuel their own aircraft. The self-service fueling by such flight operators, however, must be done with their own employees and equipment. [See FAA Order 5190.6A, Sec. 3-9(d)(2).]

The Complainant alleges that the 300-gallon limitation unduly restricts his ability to operate his business. According to the Complainant, it owns fuel trucks that hold in excess of 2000 gallons and that he is attempting to operate a commercial business dependent upon two aircraft, one that holds 200 gallons of fuel, and another that holds

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<sup>36</sup> FAD Exhibit 1, Item 6, page 5

385 gallons.<sup>37</sup> The Associate Administrator is concerned about the reasonableness of the 300-gallon limitation because it appears to be affecting the Complainant's ability to operate his business, and the Respondent has not provided a basis for this specific limitation (i.e., why not 400, 500 gallons or some other number). As stated previously, airport minimum standards must be relevant to the proposed activity, reasonably attainable, and uniformly applied. [See FAA Order 5190.6A, Sec. 3-12.]

C. Complaints prior to enactment of Minimum Standards

Dr. Roberts alleges on Appeal "the Director did not consider any of [Robert's] complaints prior to the enactment of the Minimum Standards." Dr. Roberts alleges "for six (6) years preceding the Board's adoption of Minimum Standards, the Board violated the statutory provisions forbidding discrimination at federally assisted airports by refusing to consider Dr. Roberts' request for FBO status."<sup>38</sup> Dr. Roberts lists the dates and types of requests and the Board action taken. The list shows events from January 12, 1994 through July 14, 1999. A second list identifies requests by Dr. Roberts for other concessions, such as hangar expansion, fuel storage, and additional rental space and goes from July 18, 1988 through September 12, 1996.<sup>39</sup> Dr. Roberts concludes that "it becomes evident from the Board's responses to Dr. Roberts' other requests to improve and expand his business located on Airport property, that the Board has, during Dr. Roberts entire relationship with the Board, acted with deliberate intent to obstruct Dr. Roberts ability to conduct business and provide important services to the community."<sup>40</sup>

In its Reply, the Board does not specifically address the allegation that the Director erred by not addressing past events.

In the Director's Determination, the issue of 'past events' is expressly addressed. Specifically, the Director noted, "While Dr. Roberts argues that the adoption of the Airport Minimum Standards should not abrogate the Board's responsibility for its past actions, we note that the FAA Airport Compliance Program is designed to achieve voluntary compliance on the part of the airport owner or operator with the applicable grant obligations. Therefore, the FAA will base its determination on whether the Airport is currently in compliance with its grant assurance prohibiting an exclusive right. Consequently, the FAA will consider any actions of the Board prior to its adoption of the Airport Minimum Standards only in the event that Dr. Roberts establishes that those standards will not resolve any alleged past violations of the grant assurances. The Director also noted, "The FAA will make an official determination only when the establishment of a minimum standard results in a violation of applicable federal obligations, and the determination will be limited to a judgment as to whether an allegedly violative minimum standard constitutes economic discrimination or the grant of an exclusive right." See e.g. FAA Order 5190.6A, Sec. 3-17(b).

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<sup>37</sup> FAD Exhibit 1, Item 2, page 3

<sup>38</sup> FAD, Exhibit 1, Item 2, page 5

<sup>39</sup> FAD, Exhibit 1, Item 2, page 6-7

<sup>40</sup> FAD, Exhibit 1, Item 2, page 8

To support this position, the Director stated that, "Specifically, the administrative record does not establish that the Board's departure from the FAA's definition of FBO has resulted in the grant of an exclusive right of airport use, or has otherwise economically disadvantaged Dr. Roberts' conduct of his commercial aeronautical services at the Airport so as to effectively grant such an exclusive right. Dr. Roberts has not identified any type, kind or class of aeronautical activity that he has been excluded from conducting at the Airport."<sup>41</sup>

The Director correctly applied FAA policy in addressing the issue of past conduct and events and their relevance to the current situation in light of the Respondent's actions to establish minimum standards addressing the Complainant's concerns. The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports which airport sponsors operate in a manner consistent with their Federal obligations and the public's interest in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of valuable rights, which airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of Federal property, to ensure that airport sponsors serve the public interest.

As discussed above, to the extent that the Complainant believes that the new minimum standards are unreasonable and unjustly discriminatory, it should seek to resolve the issues informally with the Respondent. If such informal efforts are not successful in resolving the issues raised for the first time in this appeal, the Complainant may file a new complaint with the Director. However, as observed by the Director, any review by the FAA Office of Airport Safety and Standards will focus on the Respondent's current state of compliance.

The arguments presented by Dr. Roberts are not sufficiently persuasive to the Associate Administrator to find that the Director committed substantive errors in the interpretation of the evidence causing the FAA to erroneously dismiss the Complaint.

## VII. FINDINGS AND CONCLUSIONS

Based on the foregoing discussion and analysis, the Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent and FAA policy as described above. The appeal does not provide a sufficient basis for reversing the Director's Determination with regard to alleged violations of 49 U.S.C. 40103(e), 47107(a)(4) and the related Federal grant assurance 23 regarding exclusive rights.

## ORDER

Accordingly, it is ordered that the Appeal is dismissed and the docket is closed pursuant to 14 CFR Part 16, section 16.33.

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<sup>41</sup> FAD, Exhibit 1, Item 1, Page 15



## APPEAL RIGHTS

A person 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. Section 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. [14 CFR, Part 16, Section 16.247(a)]



for: Woodie Woodward  
Acting Associate Administrator for  
Airports.

Date: DEC 13 2001