



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

Office of the Chief Counsel

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NOV 20 2009

RE: Request for Legal Opinion on Airport Fee Waiver Program

Dear Mr. Walden:

Thank you for your August 26 request on behalf of New Mexico Airlines (NMA), sent to the Honorable Robert S. Rivkin, General Counsel, Office of the Secretary (OST), United States Department of Transportation, and myself, for an opinion on whether an airport sponsor may base the eligibility for a fee waiver or discount on a distinction between interstate and intrastate air service. Mr. Rivkin asked that I respond to you on his behalf. You enclosed a copy of a December 7, 2007 letter from the Federal Aviation Administration (FAA) Southwest Regional Office to the manager of the Santa Fe Municipal Airport concerning the use of fee waivers at the Airport.

As you know, we received a September 1 letter from Mr. James Montman, Airport Manager, Santa Fe Municipal Airport. Mr. Montman wrote to advise that the City of Santa Fe and NMA are currently in litigation over NMA's alleged failure to pay rent for use of the terminal building in response to the City's negotiations with American Eagle Airlines for service to Dallas-Forth Worth (DFW) and Los Angeles (LAX). Mr. Montman also stated the City's views on its air carrier incentive program.

We are also in receipt of your September 17 reply to Mr. Montman's letter, in which you advise that the ongoing litigation is irrelevant to the question presented in your August 26 letter – whether an airport sponsor, in determining eligibility for a fee waiver or discount, may distinguish between interstate and intrastate service – and that there is no apparent Federal interest warranting the U.S. Department of Transportation's involvement in this litigation.

In response to your question, an airport sponsor may fail to comply with the Airport Improvement Project (AIP) grant assurance on self-sustainability, Grant Assurance 24 *Fee and Rental Structure*, if it based the eligibility for the fee waiver or discount incentive programs upon a distinction between interstate and intrastate service.¹

¹ Such a broad, non-destination specific classification would provide the potential for a large number of eligible destinations, such that an airport establishing such a classification could find itself in an untenable position of having to offer a prohibitive number of fee waivers.

The FAA has never permitted such a distinction. The distinction appears to have first arisen in November 2007 e-mail communications between your client and Mr. Montman, that were later forwarded to FAA's Southwest Region Airports Office.

Title 49 of the United States Code, §§ 47107(b) and 47133, require that an airport owner or operator receiving Federal financial assistance use airport revenue only for purposes related to the airport. At the request of the Congress, the FAA issued a policy statement on the use of airport revenue and maintenance of a self-sustaining rate structure by Federally-assisted airports. Policy and Procedures Concerning the Use of Airport Revenue ("Revenue Use Policy" or "Policy"), 64 Fed. Reg. 7696 (Feb. 16, 1999). Among other things, the Revenue Use Policy describes prohibited and permitted uses of airport revenue, and FAA's interpretation of the obligation of an airport sponsor to maintain a self-sustaining rate structure to the extent possible under the circumstances existing at each airport. The Policy includes provisions to assist airport operators in pursuing reasonable strategies to promote the airport and provide incentives to encourage new air service.

Under the Revenue Use Policy, use of airport revenue to directly subsidize air carrier operations is prohibited. Such subsidies are considered to be payments of airport funds to carriers for air service. However, prohibited direct subsidies do not include waivers of fees or discounted landing or other fees during a promotional period. The Policy does not preclude an airport sponsor from using funds other than airport revenue to pay airline subsidies for new service, and it does not preclude other community organizations – such as chambers of commerce or regional economic development agencies – from funding a program to support new air service.

The FAA has consistently maintained that fee waivers or discount incentive programs involving no expenditure of airport funds raise issues of compliance with the self-sustaining rate structure requirement, rather than the revenue-use requirement. Therefore, the Policy maintains the distinction between direct subsidy of air carriers and the waiving of fees, and prohibits the former. The Revenue Use Policy permits fee waivers and discounts during a promotional period. The airport sponsor must offer the waiver or discount to all users that are willing to provide the type and level of new service that qualifies for the promotional period. The Policy limits the fee waiver or discount to promotional periods because of the requirement that the airport maintain a self-sustaining airport rate structure. In addition, support for marketing of air service to the airport must be provided consistently with grant assurances prohibiting unjust discrimination. For example, indefinite fee waivers or discounts could raise questions of compliance with grant assurances prohibiting unjust discrimination.

The December 7, 2007 letter you enclosed from Mr. Ed Chambers, the FAA Southwest Region's airport compliance manager, to Mr. Jim Montman, manager of the Santa Fe Airport, responds to questions posed by Mr. Montman concerning fee waiver or discount programs. Mr. Chambers states that NMA and American Eagle/Delta are not similarly situated for purposes of these programs and that the carriers are not providing service to similar destinations. He further states that the Airport has the role of selecting the destinations for any incentive program, and that the same incentives should be offered to any air carrier that establishes new service consistent with the Airport's program. Finally, Mr. Chambers advises that the airport cannot specify the type of aircraft to be included in the incentive program (e.g., regional jet aircraft). Mr. Chambers makes several references to interstate versus intrastate air service.

Your letters ask specifically about whether FAA policy would permit an airport to base the eligibility for a fee waiver or discount on a distinction between interstate and intrastate commerce. As indicated above, the answer is no.

Under its policy, the FAA allows airports to provide promotional incentives to air carriers on a limited basis for new service to increase travel using the airport and/or promote competition at the airport. Incentive programs may not be designed for the purpose of promoting general economic development. FAA defines new service as (1) service to an airport destination not currently served, (2) nonstop service where no nonstop service is currently offered, and (3) increased frequency of flights to a specific destination. (In the last case, the incentive would be available only on the added flights.) FAA does not recognize repeated seasonal service, upgrade of equipment type, or increased number of seats on existing flights as new service.

Incentives must be for new service, not for a specific type of carrier. For example, targeting only low cost carriers would violate the grant assurance on economic nondiscrimination and could possibly violate the exclusive rights grant assurance. All air carriers must have the same opportunity to receive the same incentives under the same circumstances. Incentives may not be designed and offered to air carriers on an individual basis. The airport sponsor may offer marketing incentives to attract new service to targeted airport destinations. The airport sponsor will identify the new service it is seeking. The airport sponsor is not obligated to provide an incentive for those destinations not targeted by the sponsor. However, once the airport sponsor offers a promotional fee waiver or discount, it must offer it to all similarly situated users of the airport willing to provide the same type and level of new service consistent with the sponsor's promotional offering.

As stated above, it would not be consistent with FAA policy for an airport to expressly craft its incentive program so that it was limited solely to interstate or intrastate service. Again, it is airport management's role to identify specific destinations for incentive programs. Those destinations could be located entirely within the airport's state, located entirely outside of that state, or a mixture of both.

Mr. Chambers' December 7, 2007 letter accurately sets forth FAA's policy that the airport has the role of selecting the destinations for the incentive program; the same incentives should be offered to any carrier that establishes new service consistent with the program; and the airport cannot specify the type of aircraft to provide the new service. However, the letter appears to have caused some confusion over its reference to interstate and intrastate air service. The letter was written in the context of specific service contemplated by the City between Santa Fe and Dallas-Forth Worth (DFW), and between Santa Fe and Los Angeles (LAX), both interstate destinations. The letter appears to have characterized that contemplated service in a shorthand manner as "interstate" when it would have been more precise to have referred to the service by the destination city. It appears that the term "interstate service" was used in the letter to refer specifically to the service contemplated by the City to DFW and LAX. With this in mind, the third paragraph would read that NMA would not be precluded from participating in an incentive program involving fee waivers or discounts for service to and from Dallas-Fort Worth and Los Angeles if NMA chose to initiate service to those destinations. Again, under FAA policy, the carrier does not choose the destination; this is a business decision of airport management.

It appears, as noted above, that the distinction between interstate and intrastate commerce first arose in November 27, 2007 e-mail communications between your client and Mr. Montman, that were later forwarded to the FAA's Southwest Region Airports Office (see below). The FAA's Southwest Region Airports Office has provided several e-mail messages from Mr. Greg Kahlstorf of NMA, and Mr. Jim Montman, who appear to be attempting to clarify FAA policy on incentive programs. We thought it might be helpful to reproduce a few of the e-mail messages below and provide some clarifying comments.

January 23, 2008 e-mail from Mr. Greg Kahlstorf (greg@pacificwings.com) to Jim Montman, Airport Manager, copied to Mr. Lacey Spriggs, FAA Southwest Region.

“Our understanding of FAA precedent is that an airport sponsor must make the same incentives available to all new entrants offering a comparable type (scheduled) and level (daily frequency) of service at a given airport. We hope that FAA will make a ruling quickly and favorably so that we can resume service to Santa Fe as quickly as possible.”

FAA Response: As indicated above, the airport must offer the promotional waiver or discount to all users that are willing to provide the type and level of new service that qualifies for the promotional period. This does not mean, however, that if an airport initiates an incentive program for new nonstop service at least three times per week to cities A and/or B, that an air carrier would be eligible to receive an incentive under the program for initiating new nonstop service three times per week to city C. Under this scenario, any air carrier desiring to provide new nonstop service at least three times per week to cities A and/or B would qualify for the fee waiver or discount. All air carriers must have the same opportunity to receive the same incentives under the same circumstances. No preferences are permitted to low cost or new entrant carriers. Airports are not permitted to tailor incentives to air carriers on an individual basis. The incentives are for the destination, not a particular air carrier. Type of service means nonstop, one-stop, etc. Level of service means frequency of service (e.g., three times per week).

November 27, 2007 (8:34 AM) e-mail from Jim Montman to Greg Kahlstorf, forwarded by Mr. Montman to Mr. Ed Chambers, FAA Southwest Region.

“According to Ed Chambers at the FAA SW Region (817-222-5673), I am only required to provide any fee waiver or discount to users of the airport that are willing to provide the same type and level of new services. Further, he indicated that to meet that test, the carrier would have to compete on the same routes, with the same or similar frequencies of service. Given that these carriers are going to provide interstate regional jet service to multiple destinations, as compared to NMA's provision of intrastate small commuter service to one destination, he indicated that this was not the same type or level of new service, and we were therefore not required to provide a fee waiver or any other discount to your airline under the economic non-discrimination grant assurance.”

FAA Response: The airport must offer the promotional waiver or discount to all users that are willing to provide the type and level of new service that qualifies for the promotional period. The airport selects the destination. It is correct that to be eligible for the fee waiver or discount, the carrier would have to compete on the same route(s) with the same frequency of service. Rather than use the terms “interstate” or “intrastate,” it would be more appropriate to use the actual destination cities requested by the airport. As a result, FAA policy would be that if the city of

Santa Fe proposed an air carrier incentive program for service to DFW and LAX, and an air carrier expressed a desire to provide service not to DFW or LAX but to Albuquerque, then that carrier would not be eligible to participate in the program. This would be because that carrier was not providing service to those destinations identified by airport management as being eligible for the incentive program.

November 27, 2007 e-mail from Mr. Greg Kahlstorf, NMA, to Mr. Lacey Spriggs, FAA Southwest Region:

“Lacy,

Is Ed Chambers correct about this? I thought the economic non-discrimination grant assurance precluded discrimination “among and between classes of air carriers” If so, how can fee waivers be granted to one class of carrier (interstate) and not another (intrastate)? Can the region take another look at this, or would we need to file a Part 16 Complaint to trigger a review?

Thanks,

Greg”

FAA Response: Any promotional incentive program must be consistent with Grant Assurance No. 22, Economic Non-discrimination. That assurance obligates an airport sponsor to “... make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.” In the context of air service promotion programs, this assurance would prohibit an airport from providing incentives for a specific type of carrier (e.g., low cost or new entrant carrier); tailoring the program to a particular air carrier; basing the incentive program on the type or size of aircraft, or number of seats; or requiring an air carrier to be a signatory in order to qualify for an incentive. If the city of Santa Fe were to offer incentives for the destinations of DFW and LAX – but not another city whether located inside or outside of New Mexico – such a program would not be unjustly discriminatory simply because another city (whether inside or outside of New Mexico) was not included in the program. The FAA makes no distinction between interstate or intrastate service in the context of air service development programs.

I hope that this response will be helpful to you. If you have any questions, please contact me at (202) 267-3222, or Jonathan Cross of the Airports and Environmental Law Division at (202) 267-3199.

Sincerely,



For J. David Grizzle
Chief Counsel

cc: James H. Montman, Santa Fe Airport Manager