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Order 95-5-8

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

SERVED MAY 4 1995

Issued by the Department of Transportation
on the fourth day of May, 1995

DELTA AIR LINES, INC. et al.,	
v.	Docket OST-95-80; 50264
LEHIGH-NORTHAMPTON AIRPORT AUTHORITY	

ORDER OF DISMISSAL

The Department of Transportation, pursuant to 49 U.S.C. § 47129, has determined to dismiss, for lack of jurisdiction, the amended complaint filed on April 4, 1995, by Delta Air Lines, Inc., Northwest Airlines, Inc., United Air Lines, Inc., Atlantic Coast Airlines, Inc., Allegheny Airlines, and Piedmont Airlines, Inc. (the Airlines), against the Lehigh-Northampton Airport Authority (the Authority).

Introduction

On April 4, 1995, the Airlines, pursuant to Orders 95-3-16 (March 7, 1995) and 95-1-43 (January 26, 1995), filed an amended complaint against the Lehigh-Northampton Airport Authority. The amended complaint alleges that increases in the landing fees and terminal rental charges imposed at Lehigh Valley International Airport ("ABE") for 1995 and subsequent years are unreasonable and otherwise unlawful under 49 U.S.C. § 47107, 49 U.S.C. § 40116, and section 113 of the Federal Aviation Administration Authorization Act of 1994, P.L. 103-305 (August 23, 1994) (the Authorization Act), codified at 49 U.S.C. § 47129. The Airlines filed the complaint under the expedited procedures of section 113 of the Authorization Act and DOT's regulations, 14 C.F.R. Part 302, Subpart F, adopted at 60 Fed. Reg. 6919 (February 3, 1995).

In its answer the Authority asserted that the amended complaint should be dismissed for lack of jurisdiction because it challenges a single line-item in the airport budget, involves fees imposed pursuant to a written agreement, and does not present a significant dispute. The Authority also denied that the fee increases complained of were unreasonable or unlawful.

We have reviewed the amended complaint, the Authority's answer, the Airlines' reply, and other materials and pleadings and have determined to dismiss the amended complaint on jurisdictional grounds. However, we consider the amended complaint to be a Part 13 challenge to the legality of the air carrier operating subsidies paid by the Authority and will refer this matter to the Federal Aviation Administration ("FAA") for prompt disposition in connection with its pending proceeding on this issue. The FAA will proceed forthwith to consider this and the other long-standing complaints addressing this issue. See FAA Docket Nos. 13-93-30, 13-94-18, and 13-94-19.

A. Statutory Background

The Authorization Act, signed into law on August 23, 1994, includes in section 113 specific provisions for the resolution of airport-air carrier disputes concerning airport fees. Before the adoption of section 113, an airline could seek an investigation into the lawfulness of any airport fee under the enforcement procedures adopted by the FAA, 14 C.F.R. Part 13. Those rules, however, required no set deadline for a final decision by the FAA.

To provide airlines and airport operators with an opportunity to obtain a prompt decision on significant disputes about the lawfulness of new fees and increased fees, Congress enacted section 113. The Authorization Act requires the Secretary to determine the reasonableness of a challenged fee within 120 days after a complaint is filed. [1] Although the statute created new procedures for examining the reasonableness of new or increased airport fees, it did not change the substantive rights and duties of the airports or the airlines. As we said in adopting the procedural regulations under this statute, "The new procedures replace existing procedures under 14 CFR Part 13, and impose no new substantive requirements on either carriers or airports." 60 Fed. Reg. 6919, 6927 (February 3, 1995). See also 59 Fed. Reg. 53380, 53386 (October 24 1994).

Under the new statute, an air carrier may file a complaint against a new or increased fee within 60 days of the carrier's receipt of a written notice of the fee's

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1/ The Secretary has delegated authority under 49 U.S.C. 47129 to the Assistant Secretary for Aviation and International Affairs. 49 C.F.R. 1.56a, as amended by 60 Fed. Reg. 11046 (March 1, 1995).

imposition. Within 30 days of the complaint's filing, we must determine whether "a significant dispute exists" over the fee's reasonableness. If we find that such a dispute exists, we must set the case for hearing before an Administrative Law Judge (ALJ). If we find that no such dispute exists, we must dismiss the complaint. If the case is set for hearing, the ALJ must issue a recommended decision within 60 days. We must issue our final decision on the reasonableness of the fee within 120 days of the filing of the complaint; if we fail to do so, the ALJ's decision becomes the Department's final decision.

In examining new fees and fee increases under this statute, we may determine whether they are reasonable, but we may not prescribe a fee. 49 U.S.C. § 47129(a)(3).

While the complaint is pending, the carriers must pay the new fee or fee increase, albeit under protest, and the airport may not block the airlines from using the airport. Unless the airport and the air carriers agree otherwise, the airport must obtain a bond, letter of credit, or other credit facility that is sufficient to cover the amount in dispute that is due during the 120 day period the Department has to decide the matter. The airlines are entitled to a refund or credit if we ultimately determine that the new fee or fee increase is unreasonable. 49 U.S.C. § 47129(d).

The section 113 administrative dispute resolution procedure has the following limitations:

> (e) Applicability. – This section does not apply to-
> (1) a fee imposed pursuant to a written agreement with air carriers using the facilities of an airport;
> (2) a fee imposed pursuant to a financing agreement or covenant entered into prior to the date of the enactment of this section; or
> (3) any other existing fee not in dispute as of such date of enactment.
>
> (f) Effect on Existing Agreements.--Nothing in this section shall adversely affect-
> (1) the rights of any party under any existing written agreement between an air carrier and the owner or operator of an airport; or
> (2) the ability of an airport to meet its obligations under a financing agreement, or covenant, that is in force as of the date of the enactment of this section.

Pursuant to the requirements of section 113 of the Authorization Act, the Department adopted Rules of Practice for Proceedings Concerning Airport Fees, Subpart F, 14 C.F.R. Part 302. 60 Fed. Reg. 6919 (February 3, 1995). Those rules as well as Subpart A of the Department's Rules of Practice, 14 C.F.R. Part 302, Subpart A, govern the conduct of proceedings under the Authorization Act.

The Authorization Act also required the Department to issue standards or guidelines that shall be used to determine whether airport fees are reasonable. In response to this statutory mandate, the Department issued its Policy Regarding Airport Rates and Charges, 60 Fed. Reg. 6009, on February 3, 1995 (the "Policy Statement").

There are additional limitations imposed by federal law on an airport's operations and fees. When an airport accepts federal grant money for an airport improvement it must give certain assurances, including the assurance that the airport will be available for public use on fair and reasonable terms and without unjust discrimination. This requirement is contained in the former section 511 of the Airport and Airway Improvement Act of 1982 ("AAIA"), now recodified at 49 U.S.C. § 47107. Section 511 also provides, with certain exceptions, that all revenues generated by a public airport and any local taxes on aviation fuel will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport proprietor that directly and substantially relate to the air transportation of passengers or property. In addition, former section 1113(b) of the Federal Aviation Act, the Anti-Head Tax Act, recodified at 49 U.S.C. § 40116, allows the local airport authority to collect only reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of its airport facilities. See Northwest Airlines v. Kent County, 114 S.Ct. 855 (1994).

B. Factual Background

1. Memorandum of Understanding

On October 15, 1993, the Authority entered into separate but identical Memoranda of Understanding ("MOU") with USAir and United Airlines whereby the carriers and the Authority agreed that the landing fees and terminal rental rates for 1994 would be determined in accordance with a modified residual methodology the terms of which were set forth in the MOU. Exhibit 5, Authority Answer and Brief. Northwest Airlines signed a similar MOU on April 1, 1994. Id. The MOU governs the conduct of the parties until the effective date of an Airport Use Agreement being negotiated by the carriers and the Authority or the occupancy of certain improvements to the passenger terminal, whichever occurs first. MOU, Art. 1.2. Since neither of those events has occurred, the MOU also governs the landing fees and terminal rental rates for 1995. The MOU also established the method by which the Authority will finance improvements to the terminal and the carriers' role (including Majority-In-Interest provisions) in approving such improvements and other capital expenses. MOU, Articles 2-5. Carriers which have executed this standard MOU with the Authority are signatory carriers; all others are non-signatory carriers. Of the carriers filing this amended complaint under Section 47129, Northwest, United, USAir, Allegheny

and Piedmont are signatory carriers; Delta Air Lines and Atlantic Coast Airlines are non-signatory carriers.

The MOU provides a comprehensive schedule and the methodologies to be used by the Authority in calculating the rates for the rents, fees and charges that are applicable to an airline's use of the Authority's premises and the airfield. MOU, Art. 7. The rates are established on an annual basis, beginning with the rates for 1994 that are set forth in Exhibit E to the MOU. MOU, Art. 7.2-7.3. Early in each year thereafter a new Exhibit E is prepared by the Authority and sent to the signatory carriers. MOU, Art. 8.2. The rates in Exhibit E are "provisional rates" that are subject to revision as "final rates" as a result of an audit of financial data to be performed by the Authority within 120 days of the end of the fiscal year. MOU, Art. 7.5. The final rates are applied retroactively to the preceding year and, depending upon the results of the audit, the Authority gives the signatory carriers either a credit or invoice. Id.

For purposes of rate setting, the Authority divides the airport into eight cost centers:

1) Airfield;
2) Terminal;
3) Loading Bridges;
4) Parking and Roadways;
5) Aviation Leased Areas;
6) Non-Aviation Leased Areas;
7) Fixed Based Operations; and
8) Administration.

MOU, Art. 8.3.

The Administration cost center component covers the costs of managing and administering the entire airport, and the Administration costs are pro-rated to each other cost center in the same proportion that that cost center bears to total airport costs. [2] MOU, Art. 8.3. Nothing in the MOU limits the power of the Authority to make any expenditure, and the Authority has the right to make any expenditure so long as the cost is not charged to a cost center in which signatory airlines participate. MOU, Art. 5.3.

Landing fees for signatory carriers are determined by first calculating the expenses attributable to the Airfield cost center and then subtracting from this amount: (1) 50% of the airport's overall net revenue, (2) a fuel flowage fee credit

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2/ In 1995, the prorated allocation of Administration costs to the Airfield cost center was 26% and to the Terminal cost center was 23%. Airlines cover 100% of the Airfield costs and 53% of Terminal costs based upon square footage occupancy. Thus, the Airlines' total share of the Administration cost center allocation for 1995 is 26% (Airfield) plus 53% of 23% (Terminal) resulting in a total of 38%. Exhibits 2 and 2-A, Authority Answer and Brief.

of $.06 per gallon, and (3) the previous year's debt service coverage. The resulting amount, or "net requirement," is divided by the projected total maximum landing weight (in 1000 pound units) of all commercial aircraft expected to land at the airport in the coming year. MOU, Art. 8.5. The methodology for calculating other charges directly attributable to the signatory carriers, such as the Terminal and Loading Bridge areas, are also included in the MOU in Articles 8.6 and 8.7. Landing fees for non-signatory carriers are determined in a similar fashion to those for signatory carriers, except that the non-signatory carriers do not benefit from the deduction for 50% of the airport's net revenues. Authority Answer and Brief at ¶ 15; Declaration of Geoffrey A. Wheeler at ¶ 16, Exhibit 3, Authority Answer and Brief.

2. Air Service Development Program

The Lehigh Valley International Airport is located within driving distance of the Newark International and Philadelphia International Airports. Air carriers serving both airports offer flights at lower fares than do the carriers serving ABE to destinations that the Authority wishes to serve. ¶ 5, Declaration of George Doughty, Executive Director, Lehigh-Northampton Airport Authority; Exhibit 1, Authority Answer and Brief. In order to increase the number of passengers from its market area, the Authority decided that an aggressive marketing and promotional program, called an "air services development program", was necessary. One element of the program was a revenue guarantee that offered a "subsidy" to any carrier that agreed to offer service to one or more of the markets specified by the Authority. ¶¶ 11-13, Doughty Declaration.

Some time in mid-1993 and prior to entering into the first MOU with any carrier at ABE, the Authority offered all airlines at ABE and other carriers the opportunity to provide service from ABE to Orlando, Florida, and specifically noted that it was willing to pay a subsidy to carriers accepting the offer. Exhibit 1-E, Authority Answer and Brief. The Authority received responses from USAir and Northwest and from Trans World Airlines ("TWA"), an airline not then serving ABE. ¶¶ 14-15, Doughty Declaration. TWA stated that it would be interested in offering the service, but only if the Authority gave a revenue guarantee of $15,500. Exhibit 1-F, Authority Answer and Brief. USAir, on the other hand, sought a subsidy of approximately $25,000 per day for one daily flight to Orlando. After reviewing the responses, TWA's proposal was considered superior. At TWA's suggestion, St. Louis service was added as a subsidized destination. ¶¶ 15-16, Doughty Declaration.

On October 29, 1993, the Authority signed an agreement with TWA that secured TWA service from ABE to Orlando and St. Louis. Exhibit 1-G, Authority Answer and Brief. The Authority guaranteed TWA a specified return by providing a subsidy to the carrier in the event that revenues dropped below a particular level. Exhibit 1-G at ¶ III. The Authority acknowledges that it paid approximately $605,000 to TWA under the revenue guarantee provisions over the 17 months

that that airline served ABE pursuant to the subsidy agreement, the last payment being made in February, 1994. However, the Authority claims that TWA paid $340,568 in landing fees, $242,092 in terminal space rentals and $439,623 in ground handling fees during the same period. ¶¶ 17-18, Doughty Declaration. TWA's service to ABE ceased on April 2, 1995. Amended Complaint at ¶ 1; Authority Answer and Brief at ¶ 20.

Because of a desire to attract customers for ABE to the Chicago and Boston markets, the Authority entered into negotiations with Midway Airlines culminating in late 1994 with a revenue guarantee agreement similar to the TWA Agreement. ¶ 19, Doughty Declaration; and Exhibit 1-H, Authority Answer and Brief. Midway billed the Authority approximately $800,000 under the revenue guarantee provisions, but because Midway cancelled service at ABE on February 25, 1995, the Authority made no payments to Midway at the time. ¶ 22, Doughty Declaration; Amended Complaint at ¶ 2; Answer and Brief at ¶ 27. However, after all briefing was completed in this matter, the Authority reported that Midway may resume subsidized service at ABE in June of 1995 and that agreement had been reached on the payment to be made to Midway. Authority Notice, May 1, 1995.

3. The 1995 Fee Increases

By Memorandum dated January 25, 1995, the Authority announced that signatory carriers' 1995 landing fees would be $1.99 per thousand pounds, that non-signatory landing fees would be $2.21 per thousand pounds and that the average terminal rental rate would be $47.17 per square foot. Complainants' Exhibit D. A date stamp on the copy of the notice addressed to USAir indicates that it was received on January 26, 1995. Id. Attached to the notice are tables showing the basis for the calculations. Table 5 shows a comparison of "Estimated 1994" Landing Fees of $1.93 to "Budget 1995" landing fees of $1.99 per thousand pounds for signatory carriers. Table 5 shows an increase for non-signatory carriers from $2.06 to $2.21 per thousand pounds. The 1994 signatory carriers' landing fee provisionally was set by the MOU at $1.68. MOU, Exhibit E. The non-signatories' landing fee was $2.06. Complainants' Exhibit I, Exhibit 1. The average terminal rental rate for 1994 was $45.19 per square foot, and for 1995 it was $47.17. Complainants' Exhibit I, Exhibits 4 and 5.

4. Administrative Proceedings

On December 27, 1993, USAir filed a formal complaint with the FAA against the Authority pursuant to 14 C.F.R. Part 13 . The complaint alleged that the Authority had begun to subsidize air service by TWA and that the subsidy violated federal law because it constituted an unlawful diversion of airport revenue under section 511(a)(12) of the AAIA, and because it amounted to an unjustly discriminatory rebate to TWA of its landing fees and other charges

imposed for using ABE facilities, in violation of section 511(a)(1) of the same statute. This complaint was assigned FAA Docket No. 13-93-30.

On March 1, 1994, the Authority filed an answer denying the allegations in USAir's complaint. The Authority contended that its start-up subsidy to TWA was a valid promotional expense rather than an unlawful diversion, that its subsidy was similar to others around the country, and that if necessary the subsidy costs should be regarded as covered by the cash payments made annually to it by Northampton and Lehigh counties. The Authority submitted that the subsidy program was not unjustly discriminatory because it had given all carriers the opportunity to submit service proposals. The Authority urged the FAA either to dismiss the complaint or to initiate a formal fact-finding investigation. The parties subsequently exchanged additional pleadings and Northwest Airlines on August 25, 1994, submitted an answer in support of the complaint.

On September 9, 1994, Delta Air Lines, Inc., filed a Part 13 complaint against the Authority in support of and in concurrence with USAir's December, 1993, complaint and requested consolidation therewith. Delta also alleged that the Authority's subsidy to TWA regulated airline prices, routes, and services in violation of section 105 of the Federal Aviation Act of 1958, as amended. [3] Delta's complaint was assigned FAA Docket No. 13-94-18.

On October 4, 1994, Delta, United, USAir, and Atlantic Coast Airlines jointly filed three pleadings. First, the complainants filed a Part 13 complaint against the Authority alleging unjustly discriminatory rebates and otherwise unlawful diversion of airport revenues in violation of 49 U.S.C. §§ 47101, 47107(b), and 41713 arising from a substantially similar subsidy arrangement between the Authority and Midway Airlines that was to take effect in the near future. This complaint was assigned FAA Docket No. 13-94-19.

Second, the joint complainants filed a complaint, identical to their Part 13 complaint, but pursuant to 49 U.S.C. § 47129, alleging that the Authority's proposed subsidy arrangement with Midway would result in an unreasonable fee subject to review under the new statute. The complaint did not challenge any fee increase or allege that an existing fee was in dispute. Third, the joint complainants moved to consolidate the three Part 13 complaints, the section 47129 complaint, and other pleadings into a single docket. They also requested that all of the proceedings be expedited.

In a letter dated October 11, 1994, the Authority objected to acceptance of the section 47129 complaint for docketing because procedures had not yet been adopted by DOT to implement the statutory provision.

3/ This provision is now codified at 49 U.S.C. § 41713.

Because no procedural rules had been published we issued Order 95-1-43 (January 26, 1995), in which we decided (1) to defer processing the section 47129 complaint pending issuance of final procedural rules, and (2) to grant the complainants leave to file an amended complaint conforming to those rules within 30 days after their publication. The order specifically reserved judgment on issues regarding the timeliness of the October 4 complaint and the existence, vel non, of any new fees or fee increases at ABE. Id. at 6-7.

The Department published its final procedural regulations on February 3, 1995. Pursuant to Order 95-1-43, therefore, an amended complaint was due to be filed not later than March 6, 1995. All parties to the ABE dispute subsequently joined in a motion to extend the deadline for an additional 30 days, until April 4, 1995, so as to allow them to explore settlement possibilities further. We granted the request by Order 95-3-16 (March 7, 1995) and set April 4, 1995, as the due date for the submission of an amended complaint.

C. The Pleadings

1. The Amended Complaint

On April 4, 1995, the Airlines filed an amended complaint with the Department. The amended complaint addresses only the 1995 and subsequent year landing fees and terminal rental rates charged by the Authority for use of ABE. Amended Complaint at 1. The amended complaint outlines the subsidy arrangements entered into between the Authority and TWA in 1993 and the Authority and Midway in 1994. Id. at 2-3. The Airlines assert that the subsidy payments to TWA and Midway were paid from airport revenues as an operating cost, and that a substantial portion of this amount was passed through to them as a direct allocation to the airfield and terminal cost centers and by reducing net remaining revenues, thereby increasing the net amount required of signatory airlines under the residual fee methodology followed by the Authority. Id. at 2-5. The Airlines estimate that in 1995 the "pass through" to them will be at least $207,804, which they calculated would be responsible for 9% of the increase in 1995 landing fees over 1994. Id. at 6-7.

The amended complaint charges that these subsidy arrangements contravene federal law in several respects. First, they represent an impermissible diversion of airport revenues in violation of 49 U.S.C. § 47107. Id. at 6. Second, the inclusion of subsidy costs in an airport rate base also allegedly "results in the per se imposition of an unreasonable fee increase" in violation of 49 U.S.C. § 47129, and the Anti-Head Tax Act, 49 U.S.C. § 40116(e)(2), as well as the proscription against unjust discrimination. 49 U.S.C. § 47107. Id. The Airlines ask that the Department deem unreasonable the fee increase imposed by the Authority for

1995 to the extent it includes any part of the TWA and Midway operating subsidies.

2. The Scheduling Notice

On April 5, we issued a notice advising interested persons of the procedural dates prescribed by our rules, such as the deadline for the filing of complaints by other air carriers, answers to the complaints, and the reply to the answer. We also set deadlines for the filing of intervention petitions and applications to participate under Rule 14 of the Rules of Practice, 14 C.F.R. 302.14.

3. The Authority's Answer

The Authority filed its Answer on April 18, 1995. It denied that the Department had jurisdiction under Section 47129 and contended that the fee increases complained of were reasonable because its subsidy arrangements with TWA and Midway were lawful. The Authority noted the "procedural irregularity" that the Airlines had chosen not to dispute the Authority's 1994 fees in their amended complaint because the amended complaint only challenged "1995 and subsequent year landing fees and terminal rates." Authority Answer and Brief at 19, n. 13.

The Authority offered three reasons in support of its claim that the Department lacked jurisdiction. First, it submitted that the new statute provides accelerated review of airport fees and that it was not intended to address individual line-items in an airport budget. Because the link between the subsidy payments and air carrier fees in this case was too indirect, the subsidy expense could not be construed as a fee subject to review under Section 47129. Id. at 19. Review of its subsidy program in these circumstances would allegedly oblige DOT to second-guess all airport budget decisions. Second, the Authority considered that the landing fees at issue were "imposed pursuant to a written agreement" within the meaning of the statute, and therefore the signatory carriers could not be heard to complain. Id. at 22-23. Third, as to the non-signatory carriers the Authority denied that this case presents a "significant dispute" because of the relatively small sums involved, the lack of any relevant change in fee-setting methodology, the small size of the fee increase, and because of the alleged absence of any meaningful legal or policy issues presented by its subsidy program. Id. at 25-28.

On the merits, the Authority contended that its fee increases were reasonable. The subsidy payments of which the Airlines complained did not constitute diversion of airport revenues, in its view, but legitimate promotional costs similar to those approved by the FAA and in effect around the country. Id. at 28-31. Moreover, the subsidy program was not discriminatory because all carriers serving ABE and others were offered the opportunity to enter into the same arrangement. Id. at 31. The Authority next denied that the complaining signatory carriers should be heard because they allegedly have reaped the benefit

of lower fees brought about by off-setting revenues generated from the TWA and Midway operations at the airport. Id. at 10, 32. The Authority submitted that it paid TWA a total of $605,607 during the 17 months that TWA served ABE, and that it received $1,022,283 from that carrier in landing fees, terminal rent, and ground handling charges, for a surplus of $416,676. Exhibit 2, Authority Answer and Brief. [4] The Authority also disputed the Airlines' calculation of the dollar impact on signatory airlines contending that even using the carriers' approach the amount is $183,000 and not $207,000. Moreover, it claims that the Airlines' calculation is erroneous because it does not exclude the landed weight associated with Midway and TWA, which exclusion would lead to increased landing fees to the remaining carriers. Authority Answer and Brief at 15-17. The Authority also contends that any calculation of the effect of the subsidy would have to deduct revenues and fees paid by TWA and Midway and if so excluded, the fees to both signatory and non-signatory carriers would increase rather than decrease. See Complainants' Exhibit I at 3 and Exhibit 2 thereto. The Authority also rejected the notion that its subsidy program violated section 105 of the Federal Aviation Act, now codified at 49 U.S.C. § 41713, because (1) it did not force an air carrier into any involuntary arrangement, and (2) such contracts are within the power reserved to it by statute as an airport proprietor. Id. at 33. [5]

4. Motion to Intervene

The Airports Council International-North America ("ACI") filed a motion for leave to intervene in this proceeding. No one else filed such a motion or applied to participate under Rule 14 of our Rules of Practice. 14 C.F.R. § 302.14.

5. The Airlines' Reply

The Airlines maintained that the subsidy program is unlawful, and that their payment of a portion of its costs created an unreasonable fee increase. Complainants' Reply Brief at 1-3. Although the Airlines did not deny that their

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4/ More specifically, the Authority informed the Airlines that the subsidy program had no effect on airport rates in 1993, that it reduced landing fees from what they would have been in 1994 and 1995 (from $1.77 to $1.68 for signatory carriers and from $2.29 to $2.06 for non-signatories in 1994, and from $2.31 to $1.99 for signatories and from $2.71 to $2.21 for non-signatories in 1995), and that it only slightly increased terminal rental rates in 1994 and 1995. Complainants' Exhibit I at 2-3, and Exhibits 1-6.

5/ Further, the Authority contended that state law allows the subsidy program, that our Policy Statement is inapplicable, and that section 47129 is itself unlawful. Authority Answer and Brief at 34, 37-39. Because of our resolution of this proceeding, we do not address these contentions other than to note our rejection of a substantially similar argument concerning section 47129's constitutionality in the Continental Micronesia case. Order 95-4-14 at 12. The Authority also claimed that it should be exempt from the security requirement. Authority Answer and Brief at 40. We do not address that issue because the parties later stipulated that no security was required.

amended complaint is limited to 1995 fee increases they contended that if the evidence shows that subsidies produced fee increases in 1993 or 1994, they have then reserved their right to complain about those increases as well. Id. at 2, n. 1. The Airlines specifically assert that the statute allows them to challenge fee increases rather than an entire rate base, and therefore a budget line-item would be subject to review in appropriate circumstances. Id. at 4-5. They also denied that airports may include in fee structures unlawful or otherwise improper costs simply because a written agreement exists. Id. at 5-7. Finally, the Airlines submitted that the subsidy program issues at the heart of their case presented major, recurring questions of law, and because of this and other factors the dispute here was assertedly "significant." Id. at 7-9. [6]

6. Subsequent Pleadings

On May 1, 1995, the Authority filed a "Notice" reporting on subsidy-related developments since the filing of its Answer on April 18. The Notice stated that after Midway's termination of service to ABE in February of 1995, the airline and the Authority had disputed the amounts owing under the parties' September, 1994, subsidy contract. Notice at 1. The Notice then explained that the Authority and Midway had reached a verbal settlement agreement involving the resumption of subsidized service. The terms of the agreement are the following :

1) Midway will resume service at ABE on June 16, 1995, flying to Raleigh/Durham North Carolina, for a period of at least 6 months;

2) the Authority will provide free ground handling service to Midway for 6 months (see Notice, Exhibit 9 at 2);

3) Midway will have access to an ongoing program at ABE whereby the Authority pays airlines $1 per seat for nonstop service to selected cities (see Authority Answer and Brief, Exhibits 1-N and 1-O);

4) the Authority owes Midway $806,000 and Midway owes the Authority $110,000 pursuant to their prior subsidy contract; and

5) the Authority has paid Midway $300,000 of the amount owed.

Authority Notice, May 1, 1995, Exhibit 9.

On May 2, 1995, the Airlines replied to the Authority's Notice. The Airlines attacked the prospective subsidy arrangement between the Authority and Midway on the same legal grounds as relied upon with the past subsidy agreements in this case, and asserted that the amounts involved and the

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6/ The Airlines advance again their pending motion to consolidate their Part 13 complaints with this proceeding.

Authority's continuation of its subsidy program confirmed the "significant" nature of this dispute. Complainants' Response, passim.

D. The Department's Decision

After considering all of the parties' submissions, we have determined that we must dismiss the Airlines' amended complaint for lack of jurisdiction under the new statute. We will first explain why the amended complaint was not filed within the time prescribed by statute. Next, we will explain why, in any event, the fees complained of by the signatory air carriers were "imposed pursuant to a written agreement" within the meaning of section 47129. Finally, we will address the failure of this case to present a "significant dispute" for resolution under the new statute.

Before addressing these issues, however, it is appropriate to mention the problems presented by the pleadings in this case. The procedures adopted by Congress in section 47129 for resolution of qualifying airport fee disputes are extraordinary. Continental Micronesia, Order 95-4-14 at 21. They require an accelerated procedure with very strict deadlines. Congress clearly reserved this treatment for airport fee controversies that not only met specific conditions but were also "significant" disputes. 49 U.S.C. § 47129. The new statute simply does not address all airport fee disputes, much less all controversies concerning federal aviation law that in some sense relate to airport fees.

To meet its substantial obligations under the statute and to be faithful to the law's terms, the Department has taken several steps. First, we have adopted fairly exacting procedural regulations. These rules require parties to present their complete cases at the outset of each proceeding. 49 C.F.R. §§ 302.605, 302.607. We have stressed the need to comply with this requirement in our recent orders. See Puerto Rico Ports Authority Rates Proceeding, Order 95-4-6 at 22 and Los Angles International Airport Rates Proceeding, Order 95-4-5 at 11, note 23. Second, we review prospective cases very carefully to ensure that they meet all jurisdictional prerequisites. See Continental Micronesia, Order 95-4-14 (complaint dismissed because fees in question were imposed pursuant to a written agreement and because they were not "in dispute" on August 23, 1994) and Los Angeles, Order 95-4-5 at 20-21 (rigid time frames of the statute preclude leniency for tardy filings).

It is accordingly a fundamental part of any complaint to allege clearly, and to adduce probative evidence concerning, those facts giving rise to our jurisdiction: the new fee or fee increase at issue, the date(s) of receipt of written notice by air carriers, the amount(s) of the new fee or fee increase, the existence of relevant written agreements or financial covenants, and other factors relevant to our jurisdiction or to whether the controversy amounts to a "significant" dispute.

The Airlines' pleadings in this proceeding have been particularly deficient in this regard. They have not, for example, specifically indicated in their amended complaint the date upon which they received written notice of a fee increase for 1995. They have simply included among their exhibits a date-stamped copy of the Authority's notice to USAir of 1995 provisional landing fees dated January 25, 1995. Similarly, the Airlines' October, 1994, complaint pursuant to section 47129 utterly fails to identify any fee increase; it merely anticipates that the Midway subsidy "will cause" an increase and "estimates" that sums paid to TWA in 1993 "increased" 1994 landing fees by 12 cents per thousand pounds. Complaint at 3. It also did not challenge any existing fee imposed by the Authority. Finally, the assertion in the Airlines' Reply Brief that they have reserved the right to complain about 1993 and 1994 fee increases (Reply at 2, note 1) is plainly contrary to the letter and intent of our rules. See 49 C.F.R. § 302.605 and 60 Fed. Reg. at 6920.

The Authority's pleadings fare little better. It has forced us to locate evidence of the amount of various fees and fee increases in material submitted by the Airlines, without directing us to that information. It has not even moved for leave to file its Notice of May 1, 1995, an otherwise unauthorized document. Parties will assist us and themselves in future proceedings of this nature by expressly alleging and proving the elements of their cases at the outset, with appropriate references to statute, regulation, policy, and evidentiary materials.

1. Jurisdiction

a. Timeliness

As we have noted, the original section 47129 complaint was filed after the adoption of the Authorization Act, but prior to the issuance of the new procedural rules for such complaints. The right to file an amended complaint provided the Airlines with the opportunity to file a complaint that addressed the same issues as the original complaint and conformed to the requirements of the new procedural rules. In such circumstances, we would have reviewed the amended complaint to determine whether the fee in question was an existing fee in dispute as of the date of enactment of the statute, see Continental Micronesia, Order 95-4-14 at 12-13, and otherwise met the jurisdictional requirements for a complaint. Id. at 9-12.

In this case, however, the Airlines' amended complaint addressed only "1995 and subsequent year" fees. [7] The only evidence of record on point indicates that the

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[7]/ Section 47129 only applies to fees imposed on an air carrier. Therefore, we review only the 1995 fee increases and not anticipated future increases. We also recognize that the Airlines in their reply brief claimed that they had reserved the right to challenge 1993 and 1994 fees. Reply Brief at 2, n. 1. Whether they did so or not, our rules require that a complainant submit to us its "entire position and supporting evidence" at the time a complaint is filed. 14 C.F.R. § 302.605; 60 Fed. Reg. 6919, 6923. The Airlines failed to make the necessary allegations or to submit the

Airlines received written notice of provisional 1995 fee increases on January 26, 1995. Complainants' Exhibit D. Under the statute and the procedural regulations in Part 302, the complaint about the 1995 fees should have been filed within 60 days of January 26, or by March 27, 1995. Although the Airlines had been granted an extension until April 4, 1995, to file an amended complaint regarding their 1994 fees, this extension did not cover 1995 fee increases or any new complaint that the Airlines might have had.

In adopting the procedural rules for these proceedings the Department specifically noted that all complaints would have to be submitted within 60 days of an air carrier's receipt of written notice and that the new law did not provide for entertaining late complaints. In fact, we stated that "airport fee increases become incontestable under [Subpart 302] 60 days after the airport provides written notice to the carriers of the imposition of a new or increased fee." 60 Fed. Reg. 6919, 6923 (February 3, 1995). Further, we have indicated that we intend to apply the statutory and procedural guidelines very strictly. See Los Angeles, Order 95-4-5 at 20-21.

Accordingly, the Airlines' amended complaint regarding the 1995 fee increase is untimely and must be dismissed because it was filed more than 60 days after the airlines received notice of the imposition of an increased fee. [8]

b. Fees Imposed Pursuant to Written Agreement

The new statute excludes from its coverage a fee "imposed pursuant to a written agreement." 49 U.S.C. § 47129(e)(1). The Authority contends that this provision removes the amended complaint from our jurisdiction as to those Airlines that are "signatory" carriers at ABE because the MOU provides the basis for calculating the fees at the airport. Authority Answer and Brief at 22-23. It points out that we have found a written agreement signed by the proper parties for a term certain and containing standard and customary clauses to be within the terms of the statutory exclusion in Continental Micronesia, Order 95-4-14 at 10-11. Id. Moreover, the Authority points out that the Airlines have admitted in paragraph 3 of their amended complaint that the fees at issue are imposed pursuant to a written agreement. Id.

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requisite evidence on these fees in their amended complaint; hence, they are not at issue in this proceeding.

[8]/ As noted, the Airlines' original section 47129 complaint is also deficient and must be dismissed. That complaint does not challenge an existing fee in dispute but alleges only that the Midway subsidy agreement "will cause" a fee increase and creates an unreasonable "fee structure." Complaint at 1-5. The new statute requires complaining airlines to identify new fees or fee increases with specificity, including the date upon which they receive written notice of such actions.

In reply the Airlines claim that the written agreement exception does not apply here because the fees were not set by the agreement, that the agreement here is distinguishable from Micronesia, and that the Authority does not have the right to include in its fee structure costs in violation of the DOT Policy Statement. Complainants' Reply Brief at 5-7.

The MOU, entered into by the signatory carriers, specifies in detail the schedule and methodology used for calculating the rates and charges for signatory carriers. MOU, Articles 7 and 8. The agreement identifies all of the Authority's eight current cost centers and those cost centers that give rise to the signatory carriers' rates and fees. MOU, Articles 8.31-8.5. One cost center is Administration, the costs of which are allocated to the other cost centers, including the Terminal and Airfield cost centers. After explaining how the expenses for each cost center are determined, the MOU describes in detail the methodology, as well as specific amounts and percentages that are used in determining the landing fees to be charged to the air carriers. Similar provisions describe how the terminal rental rates are to be calculated. Id.

The resulting terminal and landing fee rates appear each year in Exhibit E to the MOU. They are subject to revision and adjustment within 120 days after the end of the fiscal year. The carriers agreed that the resulting final rates can be applied retroactively to the preceding year's activities and that the airlines will be given either a credit or invoice for additional payments as circumstances warrant. MOU, Article 7.2-7.5. Annually, the Authority determines the proposed rates for the following year and submits them to the carriers together with the rate calculations in the form of a new Exhibit E to the MOU. MOU, Articles 7.2-7.5 and 8.2. These calculations were sent to the airlines as an attachment to the Authority's letter establishing the 1995 terminal rates and landing fees. Complainants' Exhibit D to Amended Complaint.

As we stated in Continental Micronesia, the existence of a written agreement signed by the proper parties, for a term certain, containing standard and customary clauses, is to be regarded as a "written" agreement within the meaning of the statute. Order 95-4-14 at 11. Given the comprehensive nature and explicit detail for the calculation and setting of fees that is contained in the Memorandum of Understanding, as well as the specific calculations found in Exhibit E, we conclude that the 1995 fees at issue in the amended complaint are fees "imposed pursuant to a written agreement" within the meaning of 49 U.S.C. § 47129(e)(1). Such fees are exempt from the expedited procedures of Section 47129.

It is important to note that residual agreements of the sort at issue here represent a commercial endeavor in which both airport and airline parties measure, bargain over, and undertake business risks. The risk involves the financial results of non-aeronautical businesses at the airport (parking, restaurants, etc.). If these businesses do well, they contribute more to an airport's revenues and signatory carriers share in that benefit. If the businesses are not successful, the

airport receives less of a contribution from them and the signatory carriers may be called upon to make up revenue shortfalls. In return for taking this risk, these airlines may secure lower landing fees and terminal rental rates. In short, a residual rate agreement (or the residual component of a hybrid agreement) is a relatively more complex instrument than any document memorializing the simple exchange of services and money between an airport and non-signatory carriers. It embodies a commercial venture to which each participant has committed itself.

Disagreements about the meaning or application of the terms of such an agreement resemble contract disputes amenable to resolution in other fora than controversies over rates and charges that the new statute was designed to address. In this case, moreover, the signatory carriers were aware that the Authority was soliciting proposals for subsidized service when they entered into the MOU. USAir even sought a subsidy from the Authority, but its offer was rejected as being too expensive. Nevertheless, the signatory carriers did not add anything to the MOU that specifically excluded such subsidy costs from the rate base. The MOU contains a broad description of Administration expenses and gives the Authority substantial expenditure discretion in Article 5.3. The Authority contends that the carriers are attempting to obtain restrictions on airport budgets from DOT that they were unable to obtain in the MOU at the bargaining table. Authority Answer and Brief at 24-25. To the extent that the carriers believe that the MOU prohibits or does not authorize the Authority to include subsidy payments in the rate base, then they may have a contract interpretation issue and could pursue contract remedies available to them.

2. Significant Dispute Determination

We have already disposed of the signatory carriers' complaint regarding the 1995 fee increases. However, two of the complainants, Delta and Atlantic Coast Air Lines, are non-signatory carriers. As to these carriers, we believe that their fee dispute does not constitute a significant dispute. The new statute requires dismissal of an airline's complaint regarding a new or increased fee if we determine that no significant dispute exists. 49 U.S.C. 47129(c)(2). In adopting the procedural rules for airport rates and charges proceedings, we discussed the purpose of the statute's limitation to "significant disputes" as follows: "Congress established the extraordinary dispute resolution program in section 47129 to ensure that carriers and airports can obtain a prompt decision when there is an important fee dispute." 60 Fed. Reg. at 6921 (emphasis added). Based upon our review of the pleadings, we have concluded that the dispute over the reasonableness of the increased fees at ABE as it applies to non-signatory carriers is not an important dispute involving issues that require expedited proceedings.

Several factors lead us to this conclusion. First, the amount of money for non-signatory carriers in this dispute does not appear to be substantial. The Authority asserts that it approximates only $65,000 in the aggregate for the 1995

fee increases. Authority Answer and Brief at 26. The Airlines made no specific response to this figure. By comparison, the amount at issue at Los Angeles International Airport ($48 million; Order 95-4-5 at 17) and Puerto Rico (tens of millions of dollars; Order 95-4-6 at 14) were substantially larger. Second, the overall increase is only approximately 7 percent. In 1994, the landing fee was $2.06 per thousand pounds for non-signatory carriers and the fee increased to $2.21 for 1995. Complainants' Exhibit D, Table 5. In contrast, the landing fees tripled at Los Angeles and increased by 24 to 54 percent in Puerto Rico. Id. Third, the subsidy costs account for only a portion of this increase and the Airlines do not challenge the entire increase. Fourth, there has been no change in the Authority's rate-setting methodology relative to inclusion of the subsidy between 1994 and 1995. Id.; Cf. Order 95-4-6 at 14.

An additional factor in our analysis has been the failure of both the signatory and non-signatory carriers adequately to explain how the subsidy has effected an increase in fees. The Airlines assert that if 50% of the subsidy booked in 1994 is deducted from the net requirement, then the landing fee is reduced to $1.83, which they allege means that the inclusion of the subsidy into the airport rate base increases the 1995 landing fees by $.16 or 9%. Amended Complaint, ¶ 6. On the other hand, the Authority maintains that any calculation that excludes the subsidy must also exclude the landing and ground handling fees the subsidized carriers paid, as well as the landed weight associated with those carriers. The Authority offers extensive calculations showing that the 1995 landing fees for non-signatory carriers would have increased from $2.06 to $2.71 rather than merely to $2.21, if TWA and Midway operations are excluded from its fee calculations. Exhibits 1 and 2 to Complainants' Exhibit I. Likewise, the Authority asserts that the signatory carriers' 1995 fees would have increased from $1.68 to $2.31 rather than only to $1.99, if TWA and Midway operations are excluded from the rate calculations. Id. The Airlines do not offer any comprehensive calculations to dispute the Authority's calculations, nor do they offer an explanation as to why the landing fees, ground handling fees and landed weight for TWA and Midway should not be excluded from the calculations that determine the impact of removing the subsidy. In these circumstances, the Airlines' claim that the subsidy has resulted in a fee increase and that a significant dispute exists with regard to the fee increase is substantially undercut for the non-signatory carriers. If the dismissal of the signatory carriers' complaint had not been required on the grounds explained above, we think that a similar conclusion could be reached concerning the existence of a significant dispute with regard to increased fees for signatory carriers.

E. Conclusion

The crux of this case is the lawfulness of the Authority's airport subsidy program. Diversion and discrimination issues are otherwise appropriate for consideration in Part 13 proceedings at the FAA. The basic facts and argument in this case are

before the FAA now as part of their analysis of the subsidy program. FAA Dockets 13-93-30, 13-94-18 and 13-94-19. We will refer the matters raised in this docket to the FAA and ask that they be processed expeditiously so that all parties will have the benefit of a decision on this issue. In deciding to dismiss this complaint, we in no way endorse or condemn the subsidy at issue here. We simply conclude that the parties have failed to demonstrate that this issue is appropriate for expedited resolution under section 47129.

ACCORDINGLY,

1. The Department dismisses under 49 U.S.C. § 47129 the complaint of Delta Air Lines, Northwest Airlines, United Air Lines, USAir, Atlantic Coast Airlines, Allegheny Airlines, and Piedmont Airlines against the Lehigh-Northampton Airport Authority, filed on April 4, 1995;

2. We transfer the above complaint to the Federal Aviation Administration for expedited consideration together with FAA Docket Nos. 13-93-30, 13-94-18, and 13-94-19;

3. We accept the Notice of the Lehigh-Northampton Airport Authority, filed May 1, 1995;

4. We grant the motion for leave to file the Complainants' Response to Authority's Notice, filed May 2, 1995;

5. We dismiss as moot the motion of Airports Council International - N.A. to intervene in the proceeding in this docket;

6. Except as otherwise granted here, we deny all other outstanding complaints, petitions, and motions; and

7. We will not accept petitions for reconsideration of this order.

By:

PATRICK V. MURPHY
Acting Assistant Secretary for Aviation
and International Affairs

(SEAL)