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Order 2000-5-23

Served: May 24, 2000

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.
Issued by the Department of Transportation
on the 24th day of May, 2000

BRITISH AIRWAYS PLC and
VIRGIN ATLANTIC AIRWAYS LIMITED

v. : Docket OST-2000-7285 -15

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY and
NEWARK INTERNATIONAL AIRPORT

ORDER OF DISMISSAL

The Department of Transportation, pursuant to 49 U.S.C. 47129, has determined to dismiss the complaint filed on April 24, 2000 by British Airways PLC and Virgin Atlantic Airways Limited against the Port Authority of New York and New Jersey (the Port Authority) and Newark International Airport (the airport) for lack of significant dispute. The Port Authority's May 4 retroactive rescission of the disputed fee increases at the airport has resolved this fee dispute. We also are dismissing the May 1 follow-on complaints of Scandinavian Airlines System, Czech Airlines, Lufthansa German Airlines, and of N.V. Sabena S.A., Swissair, Swiss Air Transport Co., Ltd., and TAP Air Portugal jointly, and the May 2 late-filed complaints of Linease Aereas Allegro, S.A. de C.V. and of Societe Air France. Our dismissal of these complaints does not prevent the complainants from filing a new complaint, under section 47129, in the event they dispute a new or increased fee imposed by the Port Authority in the future.

Introduction

On April 24, British Airways and Virgin Atlantic, pursuant to 49 U.S.C. 47129, filed a complaint with the Department against the Port

Authority of New York and New Jersey and Newark International Airport. The complaint asked us to determine whether the increased per passenger federal inspection space charge (from $13.50 to $14.50) and increased per arriving/departing passenger general terminal charge (from $5.50 to $6.00) imposed at the airport's Terminal B since March 1 are reasonable under 49 U.S.C. 47129. The complaint requested the Department to institute an expedited proceeding under Subpart F of our Rules of Practice in Proceedings, 14 CFR 302. 601 et seq.

On May 1, follow-on complaints were filed by other foreign airlines disputing the same fees. On May 2, two additional foreign airlines filed complaints, accompanied by motions for leave to file an otherwise unauthorized document.

The Port Authority answered that the complaint should be dismissed on the ground that no "significant dispute" exists under our Rules of Practice in Proceedings (14 CFR 302.606(a), 65 Federal Register 6480, February 9, 2000), given its retroactive rescission of the disputed increase in airport fees, effective as of March 1, the date of implementation. The Port Authority further stated that all affected carriers will receive a credit on new statements of account for any payments made at the increased rates.

In its reply, British Airways and Virgin Atlantic moved to withdraw their complaint without prejudice. The carriers stated that rescission of the fee increase resolves the significant dispute required for the Department to assert jurisdiction. Lufthansa, a follow-on complainant, also moved to withdraw its complaint without prejudice.

We have reviewed the complaint, the follow-on complaints, the Port Authority's answer, the replies and motions to withdraw, as well as other pleadings filed in this proceeding, and have determined to dismiss the complaint and follow-on complaints because no significant dispute exists within the meaning of section 47129.

A. Statutory Background

Section 47129 contains specific provisions for the resolution of airport-air carrier disputes concerning airport fees. It requires the Secretary to determine the reasonableness of a challenged fee within 120 days after a complaint is filed. [1] Under this provision, a carrier may file a complaint against a new or increased fee (or fee in dispute on the date of enactment, August 23, 1994, Pub. L. 103-305) within 60 days of the carrier's receipt of notice of the fee's 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.

The Department adopted Rules of Practice for Proceedings Concerning Airport Fees, Subpart F, 14 CFR Part 302, pursuant to the requirements of 47129. 60 Fed. Reg. 6919 (February 3, 1995), revised at 65 Fed. Reg. 6446 (February 9, 2000). These rules, as well as Subpart A of the Department's Rules of Practice, 14 CFR Subpart A, govern the conduct of proceedings instituted under section 47129.

Section 47129 also required the Department to issue standards or guidelines to 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, 61 Fed. Reg. 31994, June 21, 1996, (Policy Statement). That policy encourages the direct resolution of differences at the local level between aeronautical users and the airport proprietor by adequate and

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

timely consultation, including the provision of certain information related to fees. 61 Fed. Reg. 32018, 32022. Portions of the Policy Statement have been vacated, Air Transport Association of America v. Department of Transportation, 119 F.3d 38, as amended by 129 F.3d 625 (D.C. Cir. 1997); Advance Notice of Proposed Policy on Airport Rates and Charges, 63 Fed. Reg. 43228, (August 12, 1998). The provisions regarding local negotiation and resolution were not vacated and still apply.

B. The Pleadings

1. The Complaint

On April 24, British Airways and Virgin Atlantic filed a complaint with the Department about the Port Authority's increased federal inspection service and general terminal charges at Newark's Terminal B, totaling $2.00 round trip per international passenger. The carriers claimed a "significant dispute" exists due to the absence of meaningful consultations about the fee increases and that the fee increases are not reasonable because they are not justified. The carriers contended that the Port Authority violated the Policy Statement [2] and the international obligations of the United States [3] by giving insufficient notification of the fee

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[2] The carriers relied on the Policy Statement dated February 3, 1995, 60 Fed. Reg. 6909. This, however, was an interim policy statement. The final Policy Statement, as indicated above, was dated June 21, 1996, 61 Fed. Reg. 31994. Although portions of the Policy Statement were vacated by Air Transport Association of America v. Department of Transportation, *op. cit.*, the court did not replace those portions with the interim policy statement. 119 F.3d 38, 45.

[3] The carriers referred to the Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (Bermuda II), under which each party encourages airport/airline consultations and reasonable notice of changes in fees as well as an exchange of information. Articles 10(4) and (5). Further, the complainants indicated that, following the international arbitration over fees at Heathrow Airport, the U.S. undertook to encourage airports to consult directly with airline users, provide users with reasonable notice of changes in fees, and provide necessary information to users to permit an accurate review of the reasonableness of the user charges.

increases; refusing to furnish information justifying the fees; and failing to engage in meaningful consultation with the carriers. The carriers asserted that, due to absence of necessary information from the Port Authority, they are unable to say how much money is involved in the dispute; whether the increased fees represent a change in the Port Authority's fee methodology; or whether the amounts collected may be diverted to non-airport uses. They contend, however, that the magnitude of the fee increase should not be the determinative factor in measuring the significance of a dispute, since airport operators could levy frequent incremental increases, thereby avoiding accountability and frustrating Congress's intent in enacting section 47129.

In its complaint, the carriers stated that the properties and commercial development manager, New Jersey Airports, sent Newark airport Terminal B carriers a schedule of new fees affecting international airlines, to take effect March 1. The letter, dated February 17, was received by the carriers on February 24, and it indicated that the federal inspection service (FIS) fee would be $14.50 per passenger and the general terminal charge per arriving or departing passenger would be $6.00. The airport attributed the fee changes to increases in operating costs due to passenger growth at the international terminal. Virgin Atlantic's station manager, as chairman of The Newark International Carriers Committee (NICC), objected to the fee increase by letter dated February 29 on the grounds that the airport did not provide enough notice or consultation and the carriers' budget years had already begun.

On March 7, the NICC carriers met with the Port Authority and airport officials to discuss their objections more fully and to seek justification for the fee increases. The two sides failed to resolve the issue and the Port Authority did not provide specific justification for the increases. The Port Authority acknowledged that the rate sheet attached to the February 17 letter contained some incorrect fees but that it accurately stated the increases in the FIS and general terminal charges as applied to the scheduled international carriers.

By letter dated March 8 (received March 10), the airport's properties manager clarified the fee increase as pertaining only to the FIS charge, from $13.50 to $14.50 per arriving passenger and

the general-terminal charge, from $5.50 to $6.00 per arriving or departing passenger.

The NICC continued to challenge the fee increase, claiming that passenger growth should lower certain fees, and requesting that the Port Authority furnish its financial statements to support the fees. By letter dated March 29, the Port Authority refused to exchange financial information, asserting that this was "proprietary and inappropriate to share" with NICC and that the fees were increased "based upon [the Port Authority's] assessment of the facility's needs and current market conditions." The airport and the carriers met again on April 18 and were unable to resolve their differences.

2. The Scheduling Notice

On April 26, we issued a Scheduling Notice advising interested persons of the procedures prescribed by our rules, such as the deadline for filing answers to the complaint, the reply to the answer, and for the filing of a suitable credit facility. In addition, we set deadlines for the filing of intervention petitions and applications for participation under Rules 19 and 20 of our Rules of Practice, 14 C.F.R. 302.19 and 302.20. The notice stated that complaints by other carriers were due by May 1. Additionally, any airline considering filing its own separate complaint must comply with the 60-day deadline set by the statute, section 47129(a)(1)(B); if the sixtieth day is earlier than May 1, the airline must file by the earlier deadline.

3. Follow-on Complaints

On May 1 [4], Lufthansa German Airlines filed a complaint with us about the disputed fees, alleging that they are contrary to federal aviation law and the United States' bilateral obligations [5], due to

[4] On May 4, Lufthansa filed a technical correction to its complaint.

[5] Lufthansa claims the fee increases are inconsistent with the 1996 Protocol to the Air Transport Agreement of 1955 between the United States and Germany requiring reasonable fees and contemplating exchange of information and reasonable notice to users.

failure by the Port Authority and the airport to provide affected carriers "adequate notice of the increases," to engage in "meaningful consultation" or to provide "financial and other information necessary to determine the reasonableness and necessity of the increases."

Lufthansa states that its complaint is timely filed since it received written notice from the Port Authority of the fee increase on March 8 (correcting the February 17 rate schedule) and that its complaint is filed within the time prescribed by our Scheduling Notice. Lufthansa asserts that it has paid the increased fees under protest.

On May 1, Scandinavian Airlines System filed a complaint, alleging essentially the same facts and arguments as those asserted by British American and Virgin Atlantic. Additionally, Scandinavian asserted that the fee increases failed to comply with the United States obligations under the Air Transport Agreements Between the Government of the United States of America and the Kingdoms of Denmark, Norway and Sweden. [6]

On May 1, Czech Airlines filed a complaint with us about the disputed fees, incorporating by reference the arguments, facts, and conclusions set forth in the British Airways/Virgin Atlantic joint complaint.

On May 1, Sabena, Swissair, Swiss Air Transport Co., Ltd. (Swissair), and TAP Air Portugal filed a joint complaint, relying on specified portions of the British Airways/Virgin Atlantic complaint and exhibits. They assert that the fees were imposed on March 1, and the only legally sufficient notice of those fees was dated March 8. [7] The joint complainants further assert that the unilateral increase failed to comply with the consultations and information exchange

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[6] These obligations require airport-airline fees to be reasonable and encourage the airports to provide users with reasonable notice of any proposal for changes in user fees, to consult and to exchange necessary information.

[7] The carriers, in the alternative, request that we accept their pleading as a joint answer in support of the initial complaint, in the event we do not find the pleading timely filed as a complaint.

requirements in the respective open-skies agreements between the United States and Belgium, Switzerland and Portugal.

4. Late-filed Complaints

On May 2, Societe Air France filed a complaint with us about the disputed fee, accompanied by a motion, pursuant to Rules 6(c) and 9(a)(2) of our Rules of Practice, to file its complaint one day late. Air France stated that May 1 was a public holiday in France and that it had only two working days, after receiving our scheduling notice, to decide whether or not it wanted to file a follow-on complaint in this case and, if so, to prepare and coordinate the filing. Air France asserted that no party to the proceeding, including the Port Authority, would be prejudiced by its day-late filing and that its position in the case is the same as that of the original complainants and the add-on carriers. Air France also argues that the Port Authority failed to comply with the Air Transport Agreement Between the Government of the United States of America and the Government of the French Republic requiring that fees be reasonable, that each party encourage airport-airline consultations, reasonable notice, and exchange of information regarding fees.

On May 2, Lineas Aereas Allegro, S.A. de C.V. filed a complaint and a motion for leave to file an otherwise unauthorized document. Allegro asserted that acceptance of its complaint will not hinder the Department's processing of the matter nor will it prejudice any other party since the complaint does not differ substantively from the original joint complaint.

5. Answer

On May 8, the Port Authority and the airport filed its answer with us requesting dismissal of the complaints pursuant to Rule 611(c) of our Rules of Practice on the ground that no "significant dispute" exists. The Port Authority advised us that, on May 4, it rescinded the fee increases retroactively, effective March 1, the date of implementation, due to "dissatisfaction of air carriers with regard to lack of discussion and inadequate notice of increase." By letter dated May 4, the Port Authority informed the carriers of the rescission of the fee increase and of its plan to credit to the carriers'

accounts the increased amounts paid for the months of March and/or April.

6. Petitions to Intervene

On May 8, Finnair Oyj filed a petition for leave to intervene. Finnair asserts that it is a foreign flag carrier designated by the Government of Finland to provide air transportation between Finland and the United States, including service to JFK International Airport, operated by the Port Authority. Finnair states that, although it does not serve Newark, it will be affected by our conclusions regarding the Port Authority's obligations under the international agreements of the United States. The 1995 open-skies bilateral agreement between the Government of the United States and Finland contains a provision on user charges similar to or identical with user charge provisions set forth in the agreements relied upon by other complainants in this proceeding.

On May 8, the Airports Council International-North America (ACI-NA) petitioned to intervene in the event the Department allows the case to proceed (despite the Port Authority's answer) or seeks submissions from the parties on any substantive or procedural issues.

6. Replies

On May 10, British Airways and Virgin Atlantic filed a reply to the Port Authority's answer that it has rescinded the challenged fees retroactively. The carriers moved to withdraw their complaint without prejudice to refiling, if contrary to their expectation, any future increase by the Port Authority is not preceded by the required advance notice, economic justification, and an opportunity for consultations or if, following such consultations, the Port Authority nevertheless imposes "unreasonable" fees.

On May 10, Lufthansa also moved to withdraw its complaint without prejudice in light of the Port Authority's answer representing that it is rescinding the disputed fees retroactively effective March 1.

C. The Department's Decision

After considering all of the parties' submissions, we have determined to dismiss the complaints against the Port Authority and the airport with regard to the increased federal inspection service charge and general terminal charges at Newark's Terminal B. The Port Authority's rescission of the challenged fees resolves the significant dispute issue required for us to assert jurisdiction.

Significant Dispute

Some of the carriers urge us to adopt a policy that will consider a significant dispute to exist when an airport fails to produce justification for the fee increases. They also request that we consider unjustified fees to be prima facie unreasonable.

We declined to adopt specific guidelines for determining what constitutes a "significant dispute" when we adopted our Rules of Practice under section 47129 (14 C.F.R. 302, Subpart F). We said that "the circumstances at each airport and the facts behind each fee dispute vary too widely for us to be able to set out specific standards in the final rule." 60 Fed. Reg. 6919, 6921. After having had some experience handling fee disputes under the expedited procedures, we prefer to take a case-by-case approach to determine whether the dispute over a challenged fee is "significant." Because the fee has been rescinded we have no need to resolve the carriers' position regarding a significant dispute in this case and will not do so.

Nevertheless we are quite concerned, in particular, by the airlines' assertions that the airport failed to consult with them before initiating the fee increase. We are also concerned by the allegations that the airport refused to share financial information with the airlines when the airlines requested justification for the fees. As we indicated in LAX II, one of the important goals in the Policy Statement is the encouragement of airport-airline negotiations in the establishment of new fees or fee increases. Air Transport Association of America v. City of Los Angeles; Second Los Angeles International Airports Rates Proceeding, Instituting Order 95-9-24, at 17-18 ; Policy Statement, Section 1.1.1. Further, we expect

airports to make information available to the carriers, including historical financial information; economic, financial and/or legal justification for changes in fees; traffic information; and planning and forecasting information. Policy Statement, Section 1.1.2 and Appendix 1. We reinforced this expectation in our Notice on Discovery Request in American Airlines v. Puerto Rico Ports Authority, OST Docket 50178 (March 10, 1995):

> The Department in Appendix 1 to the Policy Statement listed a description of the information the Department 'considers would be useful to the airlines and other users to permit meaningful consultation and evaluation of a proposal to modify fees.' Policy Statement, Section 1.1.2. The Department further stressed that it ordinarily expected the information described in Appendix 1 to be made available to aeronautical users in connection with changes to airport rates and charges.

Late-filed Complaints

Two carriers each filed complaints on May 2, one day after the deadline published in our Scheduling Notice. They argue that we should waive the 60-day procedural deadline for filing complaints and assume that they would be included in a grant of retrospective relief to complainants that filed by May 1. Section 47129 grants us jurisdiction to issue a determination on a fee reasonableness dispute only to complainants filing within 60 days after such carrier receives written notice of the establishment or increase of such fee. 47129(a)(1)(B); Rule 602(b) of our Rules of Practice; 14 CFR 302.602(b). This deadline is jurisdictional and may not be waived. City of Los Angeles Department of Airports v. United States Department of Transportation, 103 F.3d at 1035-1036. We explained our inability to waive this deadline in adopting our Rules of Practice for Proceedings Concerning Airport Fees:

> The Authorization Act specifies that all complaints would have to be submitted within 60 days of the written notice, even if this is less than seven days after the initial complaint. The law does not

provide for entertaining later complaints. 60 FR 6923.

Conclusion

We are dismissing the complaints against the Port Authority and the airport, for lack of a significant dispute. The Port Authority's retroactive rescission of the fee increases has resolved the "significant dispute" issue under section 47129.

The Port Authority's obligation to comply with the security requirement in Section 47129(d) is moot. The Port Authority is crediting to the carriers amounts equivalent to the rescinded fee increases. Therefore, the Port Authority need not comply with section 47129's assurance of timely repayment and we are relieving the Port Authority from its obligation otherwise to obtain a letter of credit, surety bond, or other suitable credit facility for the amounts in dispute.

Our dismissal of the complaints does not prejudice the carriers from filing a new complaint, under section 47129, about a new fee or fee increase imposed by the Port Authority.

We encourage all airports to comply with their obligations under the Policy Statement and applicable bilateral aviation agreements to engage in meaningful consultations with carriers in advance of increasing fees or establishing new fees. We expect airports to justify their fees and to exchange appropriate financial information to enable the carriers to fully evaluate those proposed fees.

ACCORDINGLY, We

1. Dismiss, under 49 U.S.C. 47129, the complaints of British Airways and Virgin Atlantic against the Port Authority of New York and New Jersey and Newark International Airport;

2. Dismiss, under 49 U.S.C. 47129, the follow-on complaints of Lufthansa; Scandinavian Airlines System; Czech Airlines; and the joint complaint of Sabena, Swissair, and TAP Air Portugal against the

Port Authority of New York and New Jersey and Newark International Airport;

3. Dismiss, under 49 U.S.C. 47129, the late-filed complaints of Air France and Allegro against the Port Authority of New York and New Jersey and Newark International Airport;

4. Grant the motions of Allegro and Air France to file unauthorized documents;

5. Dismiss as moot the petitions of Finnair and of the Airports Council International-North America to intervene; and

6. Except as otherwise granted here, deny all other requests, petitions, and motions.

By:

A. BRADLEY MIMS
Deputy Assistant Secretary for Aviation
And International Affairs

(SEAL)

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