BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON D.C.

LUFTHANSA GERMAN AIRLINES	}	
v.	}	
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and NEWARK INTERNATIONAL AIRPORT	}	**Docket No. OST-2000 - _____**

COMPLAINT OF LUFTHANSA GERMAN AIRLINES

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Dated: May 1, 2000

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Pursuant to 49 U.S.C. § 47129 and the Scheduling Notice issued by the Department on April 26, 2000, and in light of the Complaint filed by British Airways Plc. ("BA") and Virgin Atlantic Airways Limited ("Virgin") on April 24, 2000, Lufthansa German Airlines ("LH") hereby files this complaint against the Port Authority of New York and New Jersey ("Port Authority") and Newark International Airport ("EWR") (collectively, "Defendants")[1]. As set forth in the BA/Virgin Complaint[2] and further detailed herein, certain increases in fees and charges recently imposed unilaterally by Defendants upon air carriers using Terminal B at EWR are unreasonable. Contrary to well-established federal law, and the United States' bilateral

[1] Lufthansa is a "foreign air carrier" and Defendants are airport owners or operators within the meaning of 14 C.F.R. §§302.601 and 603.

[2] As permitted by 14 C.F.R. 302.605(a), LH hereby incorporates by reference the evidence and testimony filed with the BA/Virgin Complaint.

obligations, Defendants have failed to provide affected carriers adequate notice of the increases, have failed to engage in any meaningful consultations with affected carriers regarding the increases, and have not provided the financial and other information necessary to determine the reasonableness and necessity of the increases. LH joins BA and Virgin in requesting that the Department: (i) determine that the increases in charges violate federal aviation law; (ii) order the Defendants to refund any monies paid by LH attributable to the unlawful increases plus interest; and (iii) in the interim, order the Defendants to post a letter of credit to ensure refund of moneys paid while these proceedings are in progress.

I. FACTS

LH has been a tenant at EWR's Terminal B since 1990. Currently LH operates two flights per day to EWR: one from Frankfurt, typically with B747-200 aircraft (transporting 389 passengers); the other from Dusseldorf, typically with A340-200 aircraft (transporting 212 passengers). LH is a long-standing member of the Newark International Carriers Committee ("NICC").

On or about March 8, 2000, LH received a copy of a letter dated March 8, 2000 (attached hereto as Exhibit A), informing LH that, effective March 1, 2000, the Port Authority had imposed upon all carriers serving Terminal B at EWR an increase in the Federal Inspection Space Charge (from $13.50 to $14.50 per passenger) and an increase in the General Terminal Charge (from $5.50 to $6.00 per each arriving and departing passenger). It is these fee increases

that form the basis of this complaint.[3] Prior to March 8, the only communications that Lufthansa had received from the Defendants concerning changes in terminal fees were (i) a letter dated February 17, 2000, attaching an incorrect list of fees, mostly inapplicable to LH, which was subsequently withdrawn by the Port Authority, and (ii) an announcement made by a representative of the Port Authority at a NICC meeting on March 7, 2000, one day before the March 8 letter was sent. Except for vague assertions at the March 7 meeting that the increases were needed to facilitate "growth," the Defendants have never advised LH of any economic justification for the increases, nor have they agreed to engage in meaningful discussions with LH regarding the nature of or need for the fee increases. Despite requests to do so, neither Defendant has furnished LH with financial information on EWR's historical and projected costs necessary to determine the need for or reasonableness of the fee change.

As set forth in BA/Virgin's Complaint, efforts by NICC's Chairman, on behalf of all NICC members (including LH) to encourage the Defendants to engage in a dialogue on the increased charges and obtain information necessary to determine whether the charges are reasonable and nondiscriminatory have been entirely unsuccessful.[4] LH has paid the increased fees to date under protest. See Exhibit B.

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[3] The Complaint is timely filed "within 60 days after such carrier receives written notice of the establishment or increase of such a fee" (March 8, 2000) and on or before May 1, 2000. See 14 C.F.R. §302.603 (b); In Re Miami International Airport Rates and Charges Instituting Order, 1996 WL 726907 (D.O.T.) at *14-15 (holding that a complaint is timely when it is filed within 60 days of receipt of written notice of the rate change) and the Department's Scheduling Notice of April 26, 2000, in Docket OST-2000-7285-2 (requiring that complaints by other carriers be submitted by May 1, 2000).

[4] See BA/Virgin Complaint, Exhibits C, D, F, G, H, and I.

II. THE INCREASED CHARGES IMPOSED BY DEFENDANTS SHOULD BE DETERMINED TO BE UNREASONABLE BY THE DEPARTMENT UNDER 49 U.S.C. § 47129.

A. Defendants' failure to comply with notice and consultation requirements under federal law automatically render the charges unreasonable.

Federal law requires that rates and charges imposed at airports receiving federal funding be "reasonable." See 49 U.S.C. §47107(a)(1) (airport receiving grant must give assurance that the airport will be available for public use on "reasonable conditions"); id. § 40116(e)(2) (authorizing publicly owned airports to collect only "reasonable" fees); id. §47129 (requiring Secretary to issue determination whether "fee imposed upon . . . air carriers . . . by the owner or operator of an airport is reasonable"). This "reasonableness requirement" applies not only to the amounts charged, but also to the process by which the rates and charges are imposed.

The Department of Transportation's "Final Policy Regarding Airport Rates and Charges" (61 Fed. Reg. 32018 (1996)) ("Policy Statement")[5] clearly provides that for fees and charges to be reasonable, airport proprietors "should consult with aeronautical users well in advance, if practical, of introducing significant changes in charging systems and procedures or in the level of charges." Id. at ¶ 1.1.1. Moreover, "the proprietor should provide adequate information to permit aeronautical users to evaluate the airport proprietor's justification for the change and to assess the reasonableness of the proposal." Id. The Policy Statement clearly dictates that airport sponsors

[5] A portion of the Policy Statement -- unrelated to the issue of notice and consultation -- was overturned by the D.C. Circuit Court of Appeals in Air Transport Association of America v. Department of Transportation, 119 F. 3d 38 (D.C. Cir. 1997), in connection with a dispute over fees imposed at LAX. The remainder of the Policy Statement has been affirmed and upheld. See Air Canada v. Dep't. of Transp., 148 F.3d 1142, 1149 (D.C. Cir. 1998) (noting that only a small part of the Policy Statement was vacated and that the rest remains presumptively valid).

and aeronautical users engage in a process of informed negotiation with respect to proposed increases, noting that the "resolution [of differences] is best achieved through adequate and timely consultation between the airport proprietor and the aeronautical users about airport fees." Id. at ¶1.1.

Appendix 1 to the Policy Statement contains a description of information that the proprietor should provide to "allow meaningful consultation and evaluation of a proposal to modify fees." 61 Fed. Reg. at 32018 at ¶1.1.2. The required information includes: information on the airport's finances for the two years preceding the rate change; economic, financial, and/or legal justifications for the changes; annual statistics on passenger and aircraft traffic for the preceding two years; and planning and forecasting information relating to the airports long range development plans. Id. at 32022.

Patently, the process by which the Defendants imposed the increased charges at EWR in no way complies with the requirements set forth in the Policy Statement. As noted above and in the BA/Virgin Complaint, the Defendants imposed the increases unilaterally -- without prior consultation, without any discernible justification or explanation, and without the financial and other information necessary to determine the necessity and reasonableness of the increases.

B. Defendants' failure to comply with notice and consultation requirements under U.S.-Germany Open Skies Agreement render the charges unreasonable.

The increased charges at EWR are also unreasonable because they are inconsistent with the United States' international obligations. The 1996 Protocol to the Air Transport Agreement of 1955 between the United States and Germany ("U.S.-Germany Open Skies Agreement" or "Agreement") contains a number of provisions specifically related to the setting of airport user fees and charges.[6] (A copy of the relevant sections of the Agreement is found in Exhibit C.) Article 7 bis of the Agreement states that user charges (1) "shall be just, reasonable, not unjustly discriminatory and equitably apportioned among categories of users" and (2) shall not exceed the "full cost to the competent charging authorities" allowing for "a reasonable return on assets, after depreciation."

To ensure compliance with these requirements, the Agreement contemplates consultations between the airport authority and the airlines receiving the services, and the exchange of "such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles of . . . this Article." See art. 7 bis (3). In addition the airport authority is to "provide users with reasonable notice of any proposal for changes in user charges." Id. In short, the U.S.-Germany Open Skies Agreement provides for procedures closely parallel to those set forth in the Policy Statement: new or increased charges are to be established only with justification and after notice, the provision of supporting information, and negotiation.

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[6] The Agreement defines "user charges" as "a charge imposed on airlines for the provision of airport, air navigation, or aviation security facilities or services, including related services and facilities." U.S.-Germany Open

These provisions in the U.S.-Germany Open Skies Agreement (and similar provisions contained in the 45 other Open Skies agreements concluded by the United States) also reinforce widely-held international expectations with respect to airport fee-setting procedures. See, e.g., BA/Virgin Complaint at 7-8. Industry custom has been recognized by the Department as strong evidence of reasonable practices. See Los Angeles International Airport Rates Proceeding, Final Decision on Remand 1997 WL 784476 (D.O.T.) at *18 (stating the Department's view that "airport fee practices generally accepted by airports and airlines [are] a strong indication that they are widely considered reasonable by the industry").

As set forth above, Defendants have plainly failed to comply with these bilateral requirements: they failed to provide reasonable notice of the increases, have not engaged in meaningful consultations with respect to the increases, failed to advance any discernible justification for the increase, and have provided no supporting materials that would permit review of the reasonableness of the charges.

C. The Department should entertain this and other comparable complaints under the expedited procedures set forth in 49 U.S.C. § 47129.

The Department should adjudicate this Complaint under 49 U.S.C. § 47129 and 14 C.F.R. 302.600 et seq. Congress provided for these procedures precisely to address disputes, such as this, over "whether a fee imposed upon . . . air carriers . . . by the owner or operator of an airport is reasonable." 49 U.S.C. § 47129(a). A "significant dispute" under Section 47129

Skies Agreement, art. 1 (11).

clearly exists, and LH, together with the other affected carriers, has attempted but failed to resolve the dispute directly with the airport owner or operator.

(1) *The dispute qualifies as a "significant dispute."* The fees instituted by Defendants have given rise to a "significant dispute" within the meaning of 49 U.S.C. § 47129 because they blatantly violate prescribed domestic and international procedures for the establishment of airport user fees.

The Department has made clear that no one factor will dictate its analysis of what is an important or significant dispute. See Trans World Airlines v. City and County of Denver, Order 95-7-27 ("No single factor standing alone has been determinative of whether the dispute is a significant one; rather it is a combination of factors and the circumstances surrounding the fee increase . . .."). [7] However, it has clearly and repeatedly recognized that failure to comply with basic procedural expectations is indicative that the dispute is a "significant" one. In American Airlines Inc. v. Puerto Rico Ports Authority, Instituting Order 1995 WL 144650 (D.O.T.) at *11, for example, the Department cited the proprietor's shift in approach from a "negotiation and administrative process to one in which the fees were imposed by the Authority allegedly without any prior consultation with the Airlines" as evidence of a "significant dispute." See also Rules of Practice for Proceedings Concerning Airport Fees, 60 Fed. Reg. 6919, 6921 (1995) (noting

[7] Reasonableness of a rate change is not determined by the size of the fee alone. See In Re Miami International Airport Rates and Charges, Instituting Order 1996 WL 726907, at *18 (holding that even though the dispute did not involve much money at the time of suit, it nevertheless presented a significant dispute).

that the failure of direct negotiations "would be some indication" of a significant dispute). Similarly, a lack of clarity in how the fees were calculated or how costs were allocated in arriving at the fee, and failure to provide information to support and justify the new fee, both suggest a "significant dispute." American Airlines, Inc., 1995 WL 144650 at *11. Otherwise, airport operators could effectively avoid review simply by refusing to provide the information necessary to evaluate and challenge a fee increase.

In this case, all of these indicia are present: there has been a failure of negotiations (indeed, Defendants did not negotiate at all); increased charges have been imposed without consultation, and Defendants have declined to provide any of the information necessary to determine (and exercise the statutory right to challenge) the reasonableness of the amount of the fees.

This dispute is all the more "significant" because of its international implications. As noted above, the United States' bilateral agreement with Germany requires that user charges be reasonable, requires that the United States encourage notice, consultation and the exchange of information between airport operator and carriers, and provides for the review of charges and practices inconsistent with the agreement. Clearly compliance with such international commitments is a matter of paramount importance for the United States. See 49 U.S.C. §40105(b) (requiring Department to act consistently with obligations of the United States under international agreements).

If these facts do not create a "significant dispute," airport authorities will be free to raise rates without consultation or justification, and in abrogation of international agreements. Carriers will effectively be denied their rights to challenge any such increases. The purpose of Section 47129 — to encourage discourse and negotiation on airport user fees and to provide for prompt and effective review — will be thwarted.

(2) *LH, together with other carriers, have attempted but failed to resolve the dispute directly with the Defendants.* As detailed in the facts above and in the BA/Virgin Complaint,[8] LH -- with other carriers and through the NICC, including its Chairman, Mr. Philip Cain -- has attempted to resolve this dispute directly with Defendants. Through correspondence and in meetings in March and April, the affected carriers have attempted to engage the Defendants in negotiations. These negotiations have been to no avail.

III. Relief Sought

Pursuant to 49 U.S.C. §41729, LH hereby requests that the Department: (i) determine that the increases in charges violate federal aviation law; (ii) order the Defendants to refund any monies paid by LH attributable to the unlawful increases plus interest; and (iii) in the interim, order the Defendants to post a letter of credit to ensure refund of moneys paid while these proceedings are in progress.

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[8] See BA/Virgin Complaint, Exhibits C, D, F, G, H, and I.

WHEREFORE, for the foregoing reasons, Lufthansa German Airlines respectfully urges the Department to institute a proceeding pursuant to 49 U.S.C. §47129 and to find that increases in fees levied on carriers using Terminal B at Newark International Airport effective March 1, 2000 are unreasonable and must be rescinded and refunded from their effective date.

Respectfully submitted,

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Counsel for
Lufthansa German Airlines

Dated: May 1, 2000

Certification

I, Helga S. Goss, hereby certify, pursuant to Rule 605(c) of the Department's Rules of Practice (14 C.F.R. §302.605(c)), that --

(1) I am a Legal Assistant to Lufthansa General Counsel - North America based in New York.

(2) I am the Lufthansa employee who has been principally involved in the matter of the EWR fee increases that are the subject of the foregoing Complaint. I (or, on occasion, another Lufthansa employee in my place) have been present at NICC meetings, including the meetings of March 7 and April 18, 2000.

(3) The facts and allegations contained in the foregoing Complaint of Lufthansa are true and accurate to the best of my knowledge and belief.

(4) LH has, as described herein, attempted to resolve this dispute with the Defendants, both through the NICC and by attending meetings with the Defendants.

(5) Information on which LH intends to rely (including but not limited to all financial information listed in Appendix 1 to the Department's Policy Statement Regarding Airport Rates and Charges) is not included with the brief, exhibits or testimony because Defendants have not made such information available. Such information was requested by NICC on behalf of the carriers including by letter dated March 27, 2000 (see BA/Virgin Complaint, Exhibit I).

(6) LH seeks from the Defendants the information listed in Attachment 1 to the Department's Policy Statement Regarding Airport Rates and Charges (attached hereto).

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Helga Goss
Legal Assistant to General Counsel - North America
Lufthansa German Airlines

Dated: 1 May 2000

Certificate of Service

I hereby certify that on this, the 1st day of May 2000, a copy of the foregoing Complaint of Lufthansa and all Exhibits has been served today on each of the persons named on the attached list via facsimile (or in the event facsimile transmission is unsuccessful and no email address is available) via express mail, hand-delivery.

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Patricia Byrne