BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC

In the Matter of)
)
SCANDINAVIAN AIRLINES SYSTEM,)
)
Complainant)
)
v.) Docket OST-00-7285-2
)
THE PORT AUTHORITY OF NEW YORK)
AND NEW JERSEY and)
NEWARK INTERNATIONAL AIRPORT,)
)
Respondents.)
______________________________________)

COMPLAINT OF
SCANDINAVIAN AIRLINES SYSTEM

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COMPLAINT OF
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Pursuant to 14 CFR § 302.602(b) of the Department's Rules of Practice and the Department's April 25, 2000 Notice, Scandinavian Airlines System ("SAS") hereby joins British Airways and Virgin Atlantic Airways to request that the Department institute a proceeding to determine whether certain airport fees recently increased by the Port Authority of New York and New Jersey ("Port Authority") at Newark International Airport ("EWR") are "reasonable" within the meaning of 49 U.S.C. § 47129(a). SAS (hereinafter "the Complainant") further requests that the Department find that such fees, as increased by the Port Authority, are not reasonable, and that it order the Port Authority to refund any monies attributable to the increases, plus interest, within 30 days of the Department's final order, pursuant to 49 U.S.C. § 47129(d)(1)(B).

To ensure prompt refund of such amounts, Complainant asks the Department to require

compliance by the Port Authority with 49 U.S.C. § 47129(d)(1)(C), which provides that "the Airport shall obtain a letter of credit, or surety bond, or other suitable credit facility, equal to the amount in dispute that is due during the 120-day period established by this section, plus interest...." Pursuant to 49 U.S.C. § 47129(d)(1)(D), such suitable credit facility must be provided to the Department within 20 days of the filing of this Complaint and "shall remain in effect for 30 days after the earlier of 120 days or the issuance of a timely final order by the Secretary determining whether such fee is reasonable."

Finally, Complainant joins British Airways and Virgin Atlantic to ask the Department to declare that:

(1) where a complainant under 49 U.S.C. § 47129 demonstrates that airport fees have been instituted or increased without reasonable notice, without an explanation of the economic justification for such new or increased fees, without disclosure of relevant financial information, and without an opportunity for meaningful consultation with airport users, a "significant dispute" within the meaning of Rule 611(a) of the Department's Rules of Practice (14 C.F.R. § 302.611(a)) shall be found to exist; and

(2) any fees instituted or increased without reasonable notice, without an explanation of the economic justification for such new or increased fees, without disclosure of relevant financial information, and without an opportunity for meaningful consultation with airport users will be found unreasonable and subject to rescission and refund.

I. Facts

The fee increases that are the subject of this Complaint were confirmed in a formal notification more than a week after their March 1, 2000, effective date. In a letter dated March 8, 2000, to Philip Cain, Virgin Atlantic's Station Manager and Chairman of the Newark International Carriers Committee ("NICC"), Dennis Lombardi, the Port Authority's Manager of Properties and Commercial Development, New Jersey Airports, corrected errors that had appeared in an earlier letter that had announced a variety of increases not applicable to Complainants (Exhibit A).[1/] A copy of the March 8 letter was received by the Complainant by fax on the same date or shortly thereafter.[1/] This Complaint is timely filed under 14 C.F.R. § 302.602(b) as the 60th day after the Complainant received notice of the fee increase would fall on May 8, 2000.

As clarified in the Port Authority's letter of March 8, the Port Authority imposed 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. The increases were applicable to all carriers serving Terminal B at EWR.

[1/] Various other documents and communications regarding the Newark Terminal B rate increase are set forth in Exhibits B through J of the Complaint filed by British Airways and Virgin Atlantic on April 24, 2000. SAS hereby incorporates by reference and makes these Exhibits an integral part of SAS's instant Complaint herein, as contemplated by 14 C.F.R. § 302.603.

[2/] It is reasonable to conclude that all carriers using Terminal B received this correspondence contemporaneously.

NICC Members were aware of recent press reports that the Port Authority had earned record profits during its most recently reported year. Given the damage that these sudden and significant increases would do to their own operating budgets, they sought information from the Port Authority about its reasons for the increases.

A meeting was held March 7 between NICC carriers and Port Authority representatives, including Mr. Lombardi. (Relevant portions of the meeting minutes are appended as Exhibit F to the British Airways/Virgin Atlantic Complaint.) According to the minutes of that meeting, Mr. Lombardi indicated that the Port Authority was aware in September 1999 that the subject increases would be imposed, and that internal Port Authority approvals had been obtained in November 1999. He "expressed his commitment not to let this happen again." Mr. Lombardi was reminded that carriers had heard similar promises in 1998, when airport fees were last increased without adequate notification or consultation.

On March 8, one day following the meeting, Mr. Cain wrote again to Mr. Lombardi confirming Mr. Lombardi's statement that his letter of February 17 was incorrect as applied to NICC members, and that a correct statement of the increases would be forthcoming shortly. Mr. Cain reiterated the international carriers' strong opposition to the increases, challenged the Port Authority's reliance on "tremendous growth" as a reason for the increases, and asked the Port Authority "to postpone the proposed increases until it has fully justified each increase to the satisfaction of those carriers." Mr. Cain concluded: "In addition, we ask that future proposed increase become part of an open negotiating process, as opposed to being imposed upon the carriers without justification." (British Airways/Virgin Atlantic Complaint, Exhibit G.)

Mr. Lombardi responded to Mr. Cain's March 8 letter on March 20, expressed interest in improving communications between the Port Authority and the carriers "going forward," but refused to rescind the March 1 increases (British Airways/Virgin Atlantic Complaint, Exhibit H).

Mr. Cain responded further on March 27 (British Airways/Virgin Atlantic Complaint, Exhibit I). He said the NICC carriers —

> continue to question the Port Authority's assertion that a 20% increase in passenger throughout would automatically translate into an increase in per passenger costs. It is our collective experience that an inverse relationship exists between number of passengers and airline rates and charges, since capital costs become allocated among an increased amount of users. The daily operations and maintenance costs are incremental by nature and represent only a small portion of the overall cost structure of the facility.

Mr. Cain included in his March 27 letter a specific request for data that might support an evaluation of the increases. He wrote:

> [W]e respectfully request that the Port Authority provide the NICC with financial statements related to the historical capital and operating costs for Terminal B from the date of the last rate increase in 1998. In addition, proforma statements for the upcoming year should also be provided to the airlines in support of the increased rates.

Mr. Lombardi replied in a letter dated April 3, 2000 (British Airways/Virgin Atlantic Complaint, Exhibit J). He wrote:

> Your March 29th letter to me requests that the Port Authority provide the Newark International Carriers Committee (NICC) with financial statements and historical and projected costs, which we consider proprietary and inappropriate to share with your committee.

Mr. Lombardi recommended a meeting between Port Authority representatives and a representative group of carriers "to discuss your concerns and work constructively toward establishing procedures and channels of communication to prevent issues from getting this tense in the future." He concluded by stating the Port Authority's refusal to rescind the increases that became effective March 1,

2000.

Another meeting was held on April 18 between representatives of the NICC and the Port Authority. No satisfactory resolution of this dispute emerged from that meeting. Complainant does not believe that any satisfactory resolution can be anticipated through further efforts to consult with the Port Authority and EWR.

II. Legal Framework

A. 49 U.S.C. § 47129

Congress enacted 49 U.S.C. § 47129 in 1994, among other reasons, to furnish airlines an efficient mechanism for challenging the reasonableness of fees imposed on them by airport operators. The statute prescribes an accelerated procedure whereby such disputes are to be resolved not more than 120 days after the filing of a complaint. In the meantime, any new or increased fees that are the subject of the complaint are to be paid by the complainants under protest. The Department's rules applicable to proceedings concerning airport fees are found at Rule 601-610 of the Department's Rules of Practice (14 C.F.R. §§ 302.601-302.610). The rules spell out with specifity the required contents of any complaint.

Within 30 days of the filing of a complaint, the Department must determine whether "a significant dispute exists." If a significant dispute is found to exist, the Department is required to set the case for hearing before an Administrative Law Judge and, where necessary, establish "any special provisions for exchange or disclosure of information by the parties." (14 C.F.R. § 302.611(b)(4)). If

the Department is unable to find that a "significant dispute" exists, it must dismiss the complaint.[1/]

Where a complaint is adjudicated under the statute, the Secretary's final order prescribes any refund or credit of the disputed amounts deemed to be necessary.

B. DOT/FAA Policy Regarding Airport Rates and Charges

In 1995, following enactment of 49 U.S.C. § 47129, the Department and its Federal Aviation Administration jointly promulgated a new "Policy Regarding Airport Rates and Charges," 60 Fed. Reg. 6909, February 3, 1995. The policy contains a number of provisions directly relevant to the instant dispute.

First, it underscores the Department's expectation that differences between airport operators and users will be resolved in most cases at the local level, and emphasized the importance of meaningful consultation in that regard. "Such resolution," the Policy states, "is best achieved through adequate and timely consultation between the airport proprietor and the aeronautical users. Airport proprietors should engage in adequate and timely consultation with aeronautical users about airport fees." 60 Fed. Reg. At 6915.

[3/] "If the Department dismisses a complaint under 49 U.S.C. 47129, that ordinarily would not preclude the airline from filing a request for an FAA investigation under part 13 [now Part 16] of the FAA's rules of practice and procedure." *Trans World Airlines, Inc. v. City and County of Denver, Colorado*, Order 95-7-27, Dockets OST-95-221 and 50414, July 21, 1995, at 3. Complainant reserves its right to request an FAA investigation under Part 16 if the instant Complaint is dismissed by the Secretary for lack of a "significant dispute."

Second, the Policy emphasized the importance of early — not last-minute — consultations. It says: "Airport proprietors should consult with aeronautical users well in advance, if practical, of introducing significant changes in ...the level of charges." Ibid.

Third, the Policy makes clear that consultations, to be effective, must be predicated on transparency. It says: "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." Ibid. The Department appended to the policy a list of the information it "ordinarily expects...to be available to aeronautical users in connection with consultations over changes in airport rates and charges." Id. at 6918.

C. U.S. International Obligations

The Air Transport Agreements Between the Government of the United States of America and the Kingdoms of Denmark, Norway and Sweden set forth specific requirements with respect to airport fees. These requirements are found in Article 7 of the U.S.-Denmark/Norway/Sweden Agreements. In addition to requiring that such fees be "just, reasonable, not unjustly discriminatory and equitably apportioned," Article 7(c) of the U.S.-Denmark/Norway/Sweden Agreements provide:

> Each Contracting Party shall encourage consultations between the competent charging authorities or bodies...and airlines using the services and facilities, and shall encourage the competent charging authorities or bodies and the airlines to exchange 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. Each Contracting Party shall encourage the competent charging authorities to provide users with reasonable notice of any proposal for changes in user charges to enable users to express their views before changes are made.

The Port Authority's actions fail to comply with these obligations of the United States.

III. Argument: The Port Authority's refusal to engage in meaningful consultations must be found to give rise to a "significant dispute" under 49 U.S.C. § 47129.

In levying the increases that are the subject of this Complaint, the Port Authority flouted principles espoused by the Department with regard to the setting and adjustment of airport fees:

- The Port Authority's first attempt to notify affected carriers in writing was less than two weeks before the increases were to take effect. That notice contained major errors. By the time the Port Authority corrected the notification on March 8, the increases had been in effect for more than one week.

- The Port Authority has expressly refused to furnish information upon which the justification for the increases, if any, might be evaluated by users. It expressly maintained that such information is "proprietary" and "inappropriate to share" with the airline members of the NICC.

- Because the Port Authority has refused to offer any cognizable justification for the

increases, meaningful consultation on the increases have not been possible.

Complainant appreciats that, because the Port Authority has expressly refused to share essential information with the users of Terminal B, it is impossible in this Complaint to address with precision and with evidence a number of criteria for determining the existence of a significant dispute that the Department has identified in the past. Thus, for example, Complainant is unable to say how much money is involved in this dispute;[1/] does not know whether the increased fees may represent a change in the Port Authority's fee methodology; and is unable to determine whether amounts collected through the increases may be diverted to non-airport uses.

On the other hand, Complainant maintains that, because the principles that the Port Authority has so clearly violated are central to the DOT/FAA Policy Regarding Airport Rates and Charges and are essential elements of the bilateral aviation relationships involved, that conduct alone must be found to give rise to a significant dispute. Indeed, the requirement for transparency must be treated as essential to the Department's ability to effectuate the intent of 49 U.S.C. § 47129; only if airport operators live up to their obligations to notify users of fee increases well in advance, share relevant financial information, and engage in meaningful consultations will airport

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[4/] Although the magnitude of an increase has been stated in past cases as one measure of the significance of a dispute, the Department should be wary of adopting a test that encourages airport operators to levy frequent incremental increases, thereby avoiding accountability and frustrating Congress's intent in enacting 49 U.S.C. § 47129.

users be in a position to furnish the detailed information the Department must have in order to formulate a reasoned evaluation of the charges within the accelerated timetable prescribed by the statute.

Conversely, if the Department does not find that a significant dispute exists in this case, it will send a clear signal to airport operators that the admonitions set forth in the DOT/FAA Policy Regarding Airport Rates and Charges are purely precatory and may be ignored with impunity. Dismissing this Complaint for lack of a significant dispute, in other words, will encourage airport operators to act unilaterally, withhold information from users, and refuse to engage in consultations. The ability of airport users to resolve disputes at the local level in keeping with the Department's strong preference would be seriously compromised.

The Port Authority has made it impossible for airport users to understand or evaluate the reasons for the increase. One of the important features of the procedure prescribed by the Department pursuant to 49 U.S.C. § 47129 is a specific mechanism for requiring the disclosure of the very financial information that the Port Authority erroneously believes is "inappropriate to share." Only by invoking this mechanism during the course of a proceeding instituted in response to this Complaint will it be possible for the Department and Complainant to determine whether the increases are reasonable.

In sum, given the pivotal importance of a meaningful consultation process to the Department's policy regarding airport fees, and the Port Authority's blatant refusal to engage in such consultations, there can be no doubt that a "significant dispute" exists within the meaning of 49 U.S.C. § 47129.

IV. Proposed Remedies

Complainant urges the Department to take the following steps:

A. Institute a proceeding under 49 U.S.C. § 47129.

For the reasons set forth in the immediately preceding discussion, the Department should find that a significant dispute exists over the fee increases that are the subject of this Complaint. Indeed, the Department would be well advised to declare, as a matter of policy, that any complaint relating to airport fees instituted or increased without a meaningful opportunity for airport users to engage in consultations will be found, *ipso facto*, to present a significant dispute within the meaning of the statute. That declaration would enhance dramatically the transparency with which airport operators deal with users.

B. Require the Port Authority to Establish a Suitable Credit Facility.

To ensure prompt refund of any amounts determined by the Department to be unreasonable, the Department should require compliance by the Port Authority with 49 U.S.C. § 47129(d)(1)(C), which provides that "the Airport shall obtain a letter of credit, or surety bond, or other suitable credit facility, equal to the amount in dispute that is due during the 120-day period established by this section, plus interest...."[1/] Pursuant to 49 U.S.C. § 437129(d)(1)(D), such suitable credit facility must be provided to

[5/] Complainant is not in a position to calculate the amount that is in dispute, as that number will be a function of the number of arriving and departing passengers who use EWR between March 1, 2000, and the date on which the Secretary issues a final order in this proceeding. Complainant asks that the Secretary require Respondents to furnish an estimate of the number of arriving and departing passengers and, based on that estimate, a calculation of amounts that will have been collected pursuant to the subject increases during the relevant period.

the Secretary within 20 days of the filing of this

Complaint and "shall remain in effect for 30 days after the earlier of 120 days or the issuance of a timely final order by the Secretary determining whether such fee is reasonable."

C. Require disclosure by the Port Authority of relevant financial information.

Neither Complainant nor the Department will be in a position to evaluate the reasonableness of the subject fee increases unless the Port Authority finally reveals the economic basis for its decision to impose those increases. Fortunately, the Department's Rules of Practice anticipate this requirement. Pursuant to Rule 611(b)(4) (14 C.F.R. § 302.611(b)(4)), the Secretary in his instituting order will "[i]nclude any special provisions for exchange or disclosure of information by the parties." Based on this provision, the Department should require the Port Authority to furnish the Department and Complainant the data and analysis upon which it based its decision to increase the subject fees.

D. Instruct the Administrative Law Judge in the instituting order that, if the Port Authority's failure to consult is proven, the subject fee increases shall be found unreasonable.

Because the efficient discharge of its responsibilities under 49 U.S.C. § 47129 clearly requires that there be meaningful consultations between airport operators and users with respect to newly established or increased airport fees, the Department should include in its order instituting a proceeding under 49 U.S.C. § 47129 an instruction to the Administrative Law Judge that would apply in this and future cases: If Complainant proves that, as alleged here, the airport operator (i) failed to provide users with adequate notice of new or increased fees, and/or (ii) refused reasonable requests for an opportunity to consult with respect to such changes, such new fees or increases shall automatically be held unreasonable.

That instruction would demonstrate clearly to the airport operator community that the Department will not tolerate a failure to engage airport users in a meaningful dialogue regarding fees in advance of their imposition. It would, at the same time, encourage the resolution of differences at the local level that the Department strongly prefers, and at the same time reduce the number of fee disputes that come to the Department's attention through complaints of this kind.

If for any reason the Administrative Law Judge is not persuaded that the Port Authority refused to engage in meaningful consultations prior to its imposition of the subject increases, the determination of reasonableness would be made based on the evidence and analysis adduced at the hearing.

E. Upon reaching a finding that the subject fee increases are not "reasonable" within the meaning of 49 U.S.C. § 47129(a), order their rescission and refund.

At the end of the proceeding, whether pursuant to the automatic finding of unreasonableness recommended in the immediately preceding section, or pursuant to an analysis of data furnished by the Port Authority, the Department should find that the subject fee increases are unreasonable within the meaning of 49 U.S.C. § 47129(a) and order that they be rescinded immediately. The Port Authority should be ordered to refund all monies attributable to the increases and collected from users from March 1, 2000, to the date of rescission. Such rescission would be without prejudice to the Port Authority proposing the increases for effectiveness on a future date pending the meaningful consultations that were found lacking in the first instance.

V. Certifications

Complainant hereby certifies, pursuant to Rule 605(c) of the Department's Rules of Practice (14 C.F.R. § 302.605(c)), that —

(1) It has served the complaint, brief, and all supporting testimony and exhibits, by electronic facsimile transmission, on the airport owner or operator and all other air carriers and foreign air carriers serving the airport. Facsimile transmissions sent today to carriers were addressed to carrier station managers at EWR, each of whom is "the person responsible for communicating with the airport on behalf of the carrier about airport fees" within the meaning of Rule 302.605(c)(1) (14 C.F.R. § 302.605(c)(1)). Courtesy copies will be sent to carrier counsel.

(2) The parties served have received the complaint, brief, and all supporting testimony and exhibits not later than the date the Complaint was filed.

(3) Complainant has previously attempted to resolve the dispute directly with the airport owner or operator.

(4) Information on which Complainant intends to rely is not included with the brief, exhibits, or testimony because the airport owner or operator has expressly refused to make that information available.

(5) Any submission on computer diskette is a true copy of the data file used to prepare the printed versions of the exhibits or briefs.

WHEREFORE, for the forgoing reasons, Scandinavian Airlines System urges the Department to institute a proceeding pursuant to 49 U.S.C. § 47129 and to find that the increase 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
SCANDINAVIAN AIRLINES SYSTEM

DATED: May 1, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Complaint of Scandinavian Airlines System on each party listed in the attached Service List by means of electronic facsimile transmission.

Michael F. Goldman

DATED May 1, 2000