FEDERAL AVIATION ADMINISTRATION
UNITED STATES DEPARTMENT OF TRANSPORTATION

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UNITED AIRLINES, INC.,

Complainant,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

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Docket No. FAA-16-14-13

REPLY OF UNITED AIRLINES, INC. TO RESPONDENT'S SUPPLEMENTAL BRIEF ON REMAND

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I. INTRODUCTION

The Final Agency Decision ("FD") remanded two issues for further consideration by the Director of the Office of Airport Compliance and Management Analysis ("Director"): (1) the basis for, and scope of, the grandfather status of the Port Authority of New York and New Jersey ("PANYNJ"); and (2) whether civil penalties should be assessed for the violations found by the Director and Associate Administrator. FD, at 33. United Airlines, Inc. ("United") herewith submits it Reply to the Supplemental Brief of PANYNJ.

In its Supplemental Brief ("Supp. Br."), PANYNJ argues that it is grandfathered for three reasons: (1) there is a pre-1982 law that provides that all revenues, including airport revenues, are to be used to support the PANYNJ's general debt obligations; (2) there are covenants in pre-1982 bonds which provide that all revenues are to be used to support general debt obligations; and (3) DOT/FAA have always considered PANYNJ as grandfathered. Supp. Br., at 2-3. Resurrecting arguments previously rejected by the Director and/or the Associate Administrator, and therefore not at issue on this remand, PANYNJ further asserts that it has unlimited and unending rights to divert airport revenue and to use that revenue for any purpose.

At best, PANYNJ has produced support for the notion that its use of airport revenue for securing debt of other Port facilities was grandfathered as of 1982. The fact that PANYNJ may once have been grandfathered, however, does not answer the questions posed by the FD: Is PANYNJ *currently* grandfathered, and, if so, what is the extent of its ability to divert airport revenue? The arguments raised by PANYNJ are irrelevant to those questions. PANYNJ has not shown that its current use of airport revenue is lawful.

PANYNJ also asserts that it should not be subject to any civil penalties for the multiple violations found by the Director and Associate Administrator. While United takes no position at this time on whether penalties should be imposed, any remedy ordered by the Director should not have a negative financial impact on Newark Liberty International Airport ("EWR") or the airlines operating at EWR.

II. GRANDFATHER STATUS AND SCOPE

PANYNJ cites to several pre-1982 New York and New Jersey statutes that it argues support grandfather status: "These statutes provide that Port Authority revenues, including revenues from the air terminals, *be pledged as security or applied to the repayment of debt*, without regard to the facility from which they are derived, to fulfill any undertakings which the Port Authority may assume for the benefit of its consolidated bondholders." Supp. Br., at 5 (emphasis added).

The authorities cited by PANYNJ refer only to pooling of revenues to be available for debt service and a reserve fund equal to ten percent of the par value of outstanding obligations. *See, e.g.,* N.Y. UNCONSOL. L. § 7002 (McKinney 1931).

Notably, these authorities do not *require* PANYNJ to spend airport revenue on anything other than debt service or the reserve fund. This is an important distinction because the FD found several important limitations on PANYNJ's use of airport revenue, even assuming grandfather status. The FD determined that, consistent with federal law, PANYNJ could spend airport revenue only on its own facilities and only to the extent *required* by pre-1982 laws or debt covenants. FD, at 13, 15.

The pre-1982 authorities cited by PANYNJ do not *require* that airport revenue be used for other purposes, such as operating expenses of other Port facilities. So, to the extent PANYNJ uses airport revenue for operating expenses of its other facilities, such as the

World Trade Center or the PATH train, such use is not *required* by pre-1982 statutes or bond covenants, and is therefore unlawful revenue diversion.

There is no question that PANYNJ has surplus funds well beyond its reserve requirements. PANYNJ spent almost $2 billion on non-Port facilities such as the Pulaski Skyway and the WittPenn Bridge. That spending demonstrates that PANYNJ had plenty of surplus free cash not restrained by statutory requirements or covenants with bondholders.

PANYNJ has not provided information regarding the amount of debt obligation or debt service at any given time; whether airport surplus revenue over the years has exceeded the requirement for debt service and reserves; the retirement of pre-1982 debt; or any other data that would support the justification for airport revenue diversion. Nor has PANYNJ explained why a Consolidated Bond Resolution enacted in 1952 still governs debt issuance 70 years later.

Instead, PANYNJ once again takes the most extreme position arguing that because it is grandfathered, the revenue diversion statutes do not apply at all and it has unlimited power to spend airport revenue as it chooses: "So long as it complies with the governing legislation, the Port Authority is in compliance with the grandfather provisions of Sections 47107 and 47133 regardless of how it uses its airport revenues, and the revenue diversion provisions incontrovertibly 'shall not apply.'" Supp. Br., at 10. PANYNJ made this very same argument to the Associate Administrator, who rejected it. FD, at 11.

PANYNJ devotes most of its Supplemental Brief to arguing that the Associate Administrator was wrong in concluding that both the wording and intent of the revenue diversion statues place limits on grandfathered payments. This remand, however, is not

the forum for re-litigating that issue. Because these arguments are misplaced here, United will not repeat the authorities it has cited previously or those relied on by the Associate Administrator in reaching his conclusions.[1] Suffice it to say that the PANYNJ's position has never been adopted by FAA or any court, and was never even asserted by PANYNJ prior to its appeal of the Director's Determination, even though it had multiple opportunities to do so.[2]

PANYNJ also argues that because it was once grandfathered, it is grandfathered for all time: "The terms of 49 U.S.C. § 47107(b)(2) only require that an airport owner or operator satisfy specific debt conditions as of September 2, 1982 in order to qualify as a grandfathered airport. *Thus, so long as the Port Authority met the debt condition on that date, the revenue diversion prohibitions are inapplicable*." Supp. Br., at 17 (emphasis added).

PANYNJ offers no support for this rather remarkable assertion, which is inconsistent with the FD, and which would lead to a result that could not have been intended by Congress. For example, consider a hypothetical in which PANYNJ had paid off all its pre-1982 debt by 1985, and then never borrowed another dime. According to PANYNJ, it would still have unlimited rights to divert airport revenue even though such revenue was no longer needed for debt service or reserves.

This argument flies in the face of the Associate Administrator's conclusion in the FD: "When Congress amended the revenue use limitations in the Airport and Airway

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[1] *See, e.g.,* Reply Of United Airlines, Inc. to Respondent's Appeal of the Director's Determination, at 37 - 41; *see also* FD, at 11-13.

[2] For example, when PANYNJ negotiated settlements with FAA because it exceeded the annual limitations on revenue diversion, it **did not** assert this position. *See* Supp. Br., at 20-21. If PANYNJ had unlimited ability to divert revenue, those settlements would have been unnecessary.

Safety Act of 1987, the House Report specifically indicated that the grandfather provisions were to address local legislation that made it 'difficult or impossible' for the sponsor to comply with the underlying prohibition on diversion. Nowhere in this statutory scheme does Congress evince an intent to throw the gates wide open, and rules of statutory construction prevent us from inferring such." FD, at 12 (internal citations omitted). PANYNJ would not only throw the gates wide open; it would tear down entirely the barricades that protect airport revenue.

PANYNJ argues for the broadest possible interpretation of the revenue diversion statutes. Yet, as the Associate Administrator found, grandfather rights should be interpreted narrowly "to preserve the primary operation of the provision." *Id.* (citing *Commissioner v. Clark,* 489 U.S. 726, 739 (1989)).

Given that PANYNJ has cited to no pre-1982 law or bond covenant that requires it to spend airport revenue on operational expenses of other facilities, it is perhaps not surprising that PANYNJ resorts to this expansive and twice-rejected position. PANYNJ's argument for unlimited and eternal grandfather powers would render irrelevant any inquiry into current debt or reserve obligations or use of airport revenue. To properly respond to the FD's directive, however, PANYNJ must provide a full accounting of post-1982 debt service, reserves, and use of surplus airport revenue. Only then would the Director be able to determine the scope, if any, of PANYNJ's grandfather authority, and to what extent that authority has been exceeded over the years.

As PANYNJ concedes, the "purpose of the grandfather provisions of Sections 47107 and 47133 is to preserve *creditors*' ability to count on the revenues of the system for repayment, thereby benefiting the public by allowing the Compact to be effectuated."

Supp. Br., at 10 (emphasis added). PANYNJ was given grandfather status to preserve the revenue stream relied upon by bondholders at the time. There is nothing in the statutes or legislative history to support the argument that Congress intended to give any airport owner or operator unfettered and unending use of airport revenues for non-aviation purposes. Yet that is precisely what PANYNJ asserts its grandfather status means.

Finally, PANYNJ spends several pages in the Supplemental Brief reciting the occasions on which FAA or DOT have recognized PANYNJ as grandfathered, and suggesting that FAA is now estopped from taking away PANYNJ's grandfather status. Supp. Br., at 18-23. Once again, this argument is misplaced. Just because PANYNJ was once grandfathered does not mean it is today, or that the scope of its grandfather authority cannot change. This is not a question of estoppel; it is instead a question of whether PANYNJ continues to qualify for grandfather status and, if so, the proper scope of that authority.

III. CIVIL PENALTIES

PANYNJ argues that civil penalties should not be assessed, arguing that under DOT regulations and guidelines, such penalties should only be assessed when other efforts to secure compliance have failed. PANYNJ points to its on-going discussions with FAA on the Corrective Action Plan ("CAP") and to its efforts to achieve greater transparency in its rate-making. Supp. Br., at 23-28.

PANYNJ asserts that the "concessions and evaluations" in its proposed CAP "further demonstrate the Port Authority's willingness to comply with its grant obligations." Supp. Br., at 27. But, in fact, the proposed CAP only perpetuates the PANYNJ's extreme and unsupported position on revenue diversion. For example, PANYNJ does not even commit to complying with the FD's ruling that airport revenue cannot be spent on non-Port

facilities. Instead, PANYNJ says it "does not expect to use Airport Revenue" for non-Port facilities, and suggests that if it does, FAA will have whatever remedies exist under law. CAP, at 10. So, PANYNJ actually commits to nothing. It simply says it does not *expect* to act illegally, but if it does so, FAA has remedies.

Further, despite the Associate Administrator's directive that the CAP includes an accounting of monies spent on non-Port facilities (such as the Pulaski Skyway and the WittPenn Bridge) and a plan for repayment of those monies to the airports, PANYNJ uses new accounting sleight-of-hand to attempt to show that no amounts need to be repaid. *Id.,* at 24.

Additionally, PANYNJ's proposed CAP includes a new and suspect methodology for reporting annual revenue diversion in the future, and incorrectly states that the Liberty Fees Agreement with the airlines operating at EWR complies with the FD's requirement to fully disclose data regarding airport revenue. *Id.,* at 4, 24. All told, the proposed CAP contains few concessions and does little to demonstrate "a willingness to comply with grant obligations."[3]

Nonetheless, at this time, United takes no position on whether civil penalties should be assessed. Should the Director determine that penalties or other remedies are warranted, however, United is primarily concerned with the financial impact of any such remedies on EWR and the airlines. To the extent FAA determines that money has been improperly diverted from EWR, such amounts should be returned to the airport for the benefit of its users rather than paid to the United States Treasury as a general monetary penalty. Should

[3] United has not been given an opportunity to comment on PANYNJ's proposed CAP, but will provide greater detail and further comments upon request from FAA.

the Director impose civil penalties, such penalties should not be paid from airport funds and should not increase the rates and charges paid by airlines.

IV. CONCLUSION

That PANYNJ once enjoyed grandfather status is not dispositive decades later. Congress intended that airport proprietors not default on debt obligations that relied on airport revenue and existed prior to 1982. In the most expansive reading of the grandfather provision, it also allows the continuing use of airport revenue to service post-1982 debt incurred by the airport sponsor under pre-1982 state laws if those laws *require* the use of airport revenue to service the debt.

PANYNJ has neither made a detailed accounting such that FAA can determine whether it has paid off, or re-financed, its pre-1982 debt, nor taken steps to reform its revenue diversion practices. Instead, PANYNJ doubles down on its assertion that having once been grandfathered for a time-limited purpose, it is now grandfathered forever and for all purposes – including to divert airport revenue to expenses of non-PANYNJ projects. In its Supplemental Brief, PANYNJ demonstrates that it operates EWR to generate debt service and operating revenue for the PANYNJ as a whole, as well as for non-PANYNJ projects. This is not what Congress intended, not what FAA should countenance, and not what users of the public airport system and taxpayers should pay for.

Much more than civil penalties, the PANYNJ merits reform and accountability. Airport sponsors must be required to use airport revenue for airports. Otherwise, airports become revenue generators and airport sponsors have no impetus to control costs or even to operate efficiently at airports that are essentially monopolies. United and its customers, and the American taxpayer, should pay for their fair share of the costs of airports, but airports should not be the artifice that subsidizes unrelated public projects.

October 15, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certificate that the foregoing **REPLY OF UNITED AIRLINES, INC. TO RESPONDENT'S SUPPLEMENTAL BRIEF ON REMAND** has been delivered to the Federal Aviation Administration by email to:

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