UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

**Served:** December 21, 1989

**FAA Order No. 89-0006**

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| FEDERAL AVIATION ADMINISTRATION,<br><br>Complainant,<br><br>vs.<br><br>AMERICAN AIRLINES, INC.,<br><br>Respondent. | Docket Nos. CP89GL0118, CP89GL0120, CP89GL0127, CP89GL0128 |

DECISION AND ORDER

Respondent American Airlines, Inc. ("Respondent") has filed an interlocutory appeal from the written decision of Administrative Law Judge Burton S. Kolko issued on October 31, 1989, denying Respondent's Motion to Compel.[1/] In his decision, the law judge held that the FAA's responses to Respondent's discovery requests were filed in a timely fashion. In addition, he held that the information that Respondent seeks pertaining to whether the FAA complied with its internal procedures is irrelevant to the matters alleged in the complaints against Respondent. He held further that that information is protected from discovery by the deliberative process privilege.

1/ A copy of the law judge's written decision is attached.

On August 1, 1989, Respondent served its discovery requests on the FAA. Pursuant to 14 C.F.R. 13.220(d), the FAA's responses were due in 35 days or on September 5, 1989. 2/

On September 14, 1989, Respondent sent a letter to the FAA, in which it was stated that Respondent had not yet received a response to the interrogatories and requests for production, that the responses were "seriously overdue" and that "[b]ecause FAA has failed to comply with the 30 day time limit for filing objections to discovery as well, American will expect full responses to all requests presented." Respondent stated further in the letter, "Please be advised that American will seek redress through the Administrative Law Judge in the form of a Motion to Compel and Sanctions <u>in the event that the FAA continues to refuse to respond</u> within five (5) days of receiving this letter." (Emphasis added).

Upon receipt of this letter by telefax on September 14, 1989, FAA counsel called Respondent's counsel, and because she was not in at the time, he left a message that the FAA would respond to the discovery requests the next week. On

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2/ Section 13.220(d) provides that a party shall respond to a request for discovery not later than 30 days after service of the request. However, since Respondent sent its requests via Federal Express, the FAA had the benefit of the "mailing rule" set forth in section 13.211(e) which provides an additional 5 days to respond. Overnight express courier services are included in the definition of mail. 14 C.F.R. 13.202.

September 19, 1989, the FAA served its responses to Respondent's discovery requests.

Respondent filed a Motion to Compel on September 29, 1989. In its Motion, Respondent argued:

1) that the FAA's responses were not timely served, and, as a result, the FAA had waived its right to object to any of the requests, even on the grounds that certain information and documents are privileged;

2) that the objections that the FAA had made were inadequate in that the FAA had failed to support its claims of irrelevance, overbreadth, and privilege;

3) that the FAA's responses were incomplete, "unhelpful, vague, non-responsive and evasive."

The FAA filed its Opposition to Motion to Compel on October 16, 1989, arguing that its responses were timely, complete, and adequate.

Respondent replied on October 23, 1989, raising a new argument: that Respondent has a right to the information requested because it would reflect whether the FAA violated Respondent's due process rights by failing to follow certain procedures pertaining to the selection of a sanction which are set forth in FAA Order 2150.3A, Compliance and Enforcement Program. The FAA moved to strike the reply because it is not authorized under the applicable Rules of Practice.[3/]

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3/ There is no provision for a reply to an answer to a motion in 14 C.F.R. 13.218. Hence, it was inappropriate for Respondent to file such a reply without leave of the law judge and improper for the law judge to consider it.

Judge Kolko held that the FAA's responses were filed in a timely fashion. He explained:

> The agency shows that the parties agreed, as the rules permit, to extend the September 1 deadline to September 19, 1989. Although September 1 passed without a filing or request for extension from the FAA, American acquiesced in the delay and did not object to the agency's proposed new filing date. I conclude from these circumstances that the parties agreed on an FAA response date of September 19, which the agency met.

The law judge held further that the request for information pertaining to the FAA's compliance with FAA Order 2150.3A is irrelevant because the question before him is whether the violation(s) occurred, and if so, what penalty would be appropriate. He also held that the requested information bears no relationship to that issue, "whatever relevance it may have to litigation in other forums." Moreover, he held that the information Respondent seeks comes within the realm of prosecutorial discretion and was protected from discovery as part of the decisional and internal deliberative process.

On November 21, 1989, the law judge granted Respondent's motion for interlocutory appeal for cause under 14 C.F.R. 13.219(b).[4/] Respondent and the FAA have each filed their

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4/ Although this interlocutory appeal of a discovery matter is not inappropriate for the reasons stated by the law judge in his order, I expect that situations such as this will be the exception rather than the rule. Generally speaking, law judges should not permit interlocutory appeals to resolve discovery matters. To the extent that a party is disadvantaged by a law judge's discovery ruling, and should

briefs which contain arguments substantially similar to those that each party raised before the law judge.

1. The timeliness of FAA's response.

The first issue before me is whether the FAA filed its responses to Respondent's discovery requests in a timely fashion. All parties should be mindful of the deadlines set forth in the Rules of Practice. A party runs afoul of those Rules when it allows the time period for discovery to pass without at least informing the opposing party that it will be unable to meet the deadline. In this case, FAA counsel acted outside the bounds of common courtesy by failing to get in touch with Respondent's counsel until after Respondent's counsel had initiated contact through her letter of September 14, 1989, several days after the FAA's responses were due. The stated reason of the FAA for its failure to respond within the time provided, namely the press of other business, does not excuse the failure unless properly supported and presented prior to the passage of the due date for discovery responses.

However, it is not necessary in this case for me to decide whether the Respondent agreed after the expiration of the due date to extend the FAA's time to respond, because I believe

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(footnote 5 continued)

that ruling effect the ultimate decision issued by the law judge, there will be an adequate opportunity to raise the discovery issue should that decision be the subject of an appeal on the merits.

that under the circumstances of this case, the sanction that Respondent urges me to adopt -- waiver of the FAA's right to object to interrogatories and requests for production -- is too onerous and I will not impose it here for the following reasons. First, as Respondent points out, waiver of a party's right to file objections to discovery requests is a sanction sometimes imposed by Federal courts when, without good cause or an agreement for an extension of time, a party fails to file its responses to discovery requests on time under the Federal Rules of Civil Procedure. However, I am not bound by the Federal Rules of Civil Procedure and will only follow case law implementing those Rules when it is appropriate in these administrative proceedings. Second, assuming that there are circumstances under which it would be appropriate to sanction a party for failure to comply with a discovery deadline, it would not seem to be appropriate where the party seeking the sanction has not demonstrated any prejudice by the delay.[5/] Respondent has not argued that it has been prejudiced; indeed,

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5/ Hence, my position is consistent with the well-established general rule of the NTSB. See Administrator v. Smith, NTSB Order EA-1924 (July 29, 1983), Administrator v. Seiler, 3 NTSB 3327, 3329 (1981)(holding that a law judge could sanction a party's failure to comply with a discovery order when such noncompliance prejudiced the other party). The case of Administrator v. Henry, NTSB Order EA-2262 (January 8, 1986), in which the NTSB held that it was not necessary for the requesting party to demonstrate prejudice, is clearly distinguishable because that case involved a persistent, unexplained refusal by a party to comply with a discovery order.

it would be hard-pressed to do so in light of the short delay involved and the fact that the hearing was not scheduled to be held until December 11, 1989, almost 3 months later.

2. Relevance and privilege.

Respondent requests information which relates to the FAA's decisionmaking process in each case as it occurred before the FAA issued the Order of Civil Penalty which serves as the FAA's complaint in each proceeding. Respondent claims that such pre-Order information would be relevant were Respondent to seek review of a final decision of the Administrator on the merits of these cases in the U.S. Court of Appeals, where Respondent could argue that the sanction imposed by the FAA was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. Specifically, Respondent would argue in the U.S. Court of Appeals that its due process rights were denied by the FAA when the FAA decided to take civil penalty action against Respondent, rather than administrative action (e.g., a warning letter or a letter of correction), because the FAA did not comply with certain provisions in FAA Order 2150.3A.

I agree with the law judge that the internal deliberations of employees of the FAA pertaining to the selection of the sanction in this matter are irrelevant. As the law judge so aptly put it, "Respondent attempts to put in issue FAA compliance with its internal procedures, but the question before me in each proceeding is whether the violation or

violations alleged occurred, and if so, the appropriate penalty to be assessed." (Emphasis added). The question in these proceedings is not whether an administrative action would have been a better choice by the FAA.

I also agree with the law judge that the documents and information sought by Respondent regarding these internal deliberations are protected from discovery by the deliberative process privilege, at least to the extent that they contain deliberative material. As the NTSB stated in one case pertaining to whether to grant a motion to compel production of copies of all FAA documents pertaining to determination of the length of a suspension, "[t]he determination of the length of a suspension is a matter that comes within the prosecutional discretion of the enforcement agency in that it is ultimately the result of a subjective process involving internal recommendations and deliberations." Administrator v. Hutt & Viking Aviation, Inc., NTSB Order EA-2642 (December 23, 1987).

Although the deliberative process privilege is a qualified privilege which may be overcome by a showing that Respondent's actual need for disclosure outweighs the harm that could result to the agency from that disclosure, no such showing has been, or could be made. Respondent will not be denied due process rights by the law judge's refusal to order the FAA to release copies of documents which would reveal the internal decisionmaking process regarding the selection of the sanction

in each of these cases. At this stage in the proceedings, it is purely speculative whether Respondent ever will seek review of a final decision on the merits in any of these cases. Moreover, although a U.S. Court of Appeals would review the civil penalty to determine whether it is arbitrary, capricious or an abuse of discretion, the appellate court would not review the agency's lawful exercise of its prosecutorial discretion in selecting one type of sanction rather than another. See Go Leasing, Inc. v. NTSB, 800 F.2d 1514, 1518-19 and 1521 (9th Cir. 1986).

3. Completeness and adequacy of the FAA's responses.

Finally, due to the fact that the law judge did not rule on the issue of the completeness of the FAA's responses to Respondent's discovery requests, these cases are remanded to the law judge for findings on this issue.[6/] I must point out that many of the FAA's responses do appear to be incomplete, particularly with regard to the FAA's failure to identify whether any documents for which it claims privilege actually exist. At the same time, I must note that the nature of the FAA's responses may well be the direct result of the unreasonable overbreadth and the burdensomeness of many, if

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6/ I expect that the law judge will resolve these discovery issues, as well as the merits of these cases, and will not grant any further motions for interlocutory appeal on discovery matters, as explained in footnote 4, supra.

not most, of Respondent's requests. The purpose of discovery is to gain useful and relevant information that is necessary to the presentation of a party's case. To the extent that Respondent's discovery requests seem calculated to be more a burden to respond to than a vehicle to obtain information that is useful and relevant, I expect that the law judge will admonish Respondent's counsel in an appropriate manner.

THEREFORE, the decision of the administrative law judge is affirmed in part as stated above, and these cases are remanded to the law judge for determination on the issue of the appropriateness of Respondent's requests, and to the extent that those requests are appropriate, the completeness of the FAA's responses to Respondent's discovery requests.[7/]

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 20th day of December, 1989.

7/ See footnote 6, supra.