

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,)
)
)
 Plaintiff,)
)
 Civil Action No. 99-1180-JTM
 v.)
)
 AMR CORPORATION,)
 AMERICAN AIRLINES, INC, and)
 AMERICAN EAGLE HOLDING)
 CORPORATION,)
)
 Defendants.)
_____)

**DECLARATION OF JOHN M. NANNES IN SUPPORT
OF PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION
TO COMPEL DOCUMENTS RESPONSIVE TO AMERICAN’S
FIRST AND SECOND REQUESTS FOR DOCUMENTS**

I, John M. Nannes, hereby declare as follows:

1. I am a Deputy Assistant Attorney General in the Antitrust Division (“Division”) of the United States Department of Justice. I have held that position since early 1998. I make this declaration in support of plaintiff’s opposition to Defendants’ Motion to Compel production of information contained in the Division’s files relating to ongoing investigation of attempts by certain major carriers (other than American) to monopolize certain city pairs emanating from their hubs (other than Dallas/Ft. Worth) by predatory conduct directed against low cost carriers.

2. The statements made in this declaration are based upon my personal knowledge, upon information made available to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

3. As Deputy Assistant Attorney General, I have supervisory responsibility for directing civil merger and non-merger investigations in a number of sections within the Antitrust Division, including the Transportation, Energy and Agriculture (“TEA”) Section, which has been assigned responsibility for airlines. I work closely with the Directors of Civil Merger and Non-Merger Enforcement and with various section chiefs and assistance chiefs to ensure that appropriate investigations are conducted and to ensure that Division policy is being consistently applied.

4. TEA attorneys, in conjunction with economists within the Division's Economic Analysis Group (“EAG”), conducted the investigation into American’s conduct directed at low cost carriers (“American predation investigation”) that culminated in the initiation of this lawsuit in May of 1999.

5. TEA attorneys, in conjunction with EAG economists, are also currently investigating conduct of certain major airlines (other than American) that have responded to low cost carrier entry at their hubs (other than Dallas/Ft. Worth) by adding capacity, lowering fares, and taking other actions that could be deemed predatory.

6. A formal Division investigation generally begins with the opening of a “preliminary inquiry” (“PI”). Opening a PI is a formal procedural step that the Division takes when it has reason to believe that an antitrust violation has occurred (or may soon occur). Because the Division shares antitrust enforcement responsibility with the Federal Trade Commission (“FTC”), the agencies have

established a clearance procedure to ensure that they are not conducting duplicative investigations. Pursuant to this procedure, when the Division desires to commence a PI, it sends the FTC a form memorandum that identifies the name of the subject(s) of the investigation, describes the alleged unlawful conduct, and identifies affected geographic and product markets.

7. Once clearance has been granted and the appropriate Director of Enforcement has approved the opening of a PI, a matter number is assigned to the PI. Once a PI is opened, Division attorneys, with the assistance of economists, legal assistants and support staff, begin to gather information and analyze the competitive effects of the allegedly anticompetitive activities. The American predation PI was opened on October 18, 1996, to investigate American's conduct in city pairs emanating from DFW. The form memorandum requesting PI authority identifies only American as a potential defendant and identifies as the geographic markets to be investigated only city pair markets emanating from Dallas/Ft. Worth, Texas.

8. If the Division later decides to investigate other companies in an industry in which a PI has already been opened, it still notifies the FTC. To facilitate prompt clearance from the FTC, the Division may prepare a request for "add-on clearance," which retains the original matter number, rather than prepare a new PI request to which a different matter number would be assigned.

9. That procedure was followed in this instance. On February 20, 1997, the Division received add-on clearance from the FTC to investigate another carrier's allegedly predatory actions against low cost carriers that had entered markets emanating from one of that carrier's hubs. Also, on December 30, 1997, the Division received add-on clearance from the FTC to investigate a number of

other large hub carriers with respect to city pair markets emanating from their hubs. Pursuant to these add-on clearances, the Division issued Civil Investigative Demands to two carriers requesting information about their practices at certain of their hubs. The hubs being investigated pursuant to these add-on clearances do not include Dallas/Ft. Worth.

10. The investigation files compiled in connection with these add-on clearances contain the following categories of documents:

- i. Interview memoranda prepared by or at the direction of attorneys;
- ii. Correspondence between the Division and the carriers under investigation;
- iii. Civil Investigative Demands (“CIDs”) issued to the carriers under investigation and to third parties with relevant information;
- iv. Responses to Interrogatories obtained pursuant to CIDs from the carriers under investigation;
- v. Documents obtained pursuant to CIDs from carriers under investigation and from third parties; and
- vi. Memoranda from staff to their supervisors, including myself and the Assistant Attorney General, Joel Klein, reporting on the status of the matter and recommending steps that should be taken by attorneys and economists.

11. I have reviewed the documents in categories 10(i), (ii), (iii), (iv) and (vi). All of these documents, which were compiled for law enforcement purposes, are subject to the law enforcement investigatory privilege. Documents in categories 10(i) and (vi) are also attorney work product, because

they were prepared by attorneys or others acting at the direction of attorneys in anticipation of possible litigation, and are also subject to the deliberative process privilege. I do not understand American to be moving to compel production of documents in categories 10(i) and (vi). If American does so, I reserve the right to supplement this declaration.

12. Documents in category 10(iv) and (v) were obtained pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 *et seq.* The Antitrust Civil Process Act limits the disclosure of materials obtained pursuant to CID, except in limited circumstances.

13. I understand that American has been provided with the CIDs and documents that were issued and produced in connection with the Division's review of American's conduct. In addition, American has been provided with three CIDs issued to third parties in connection with the investigation of the other two carriers referenced above and the documents produced by those carriers, because members of trial staff have made or intend to make direct use of some or all of those materials in this litigation. *See United States v. AT&T Co.*, 86 F.R.D. 603, 647-48 (D.D.C. 1979).

14. Documents in categories 10(ii) and (iii) that name the other carriers currently under investigation have not been disclosed to avoid prejudicing our investigation or the rights of those carriers. The CID materials that are referenced in categories 10(iv) and (v) consist of interrogatory responses, approximately 40 boxes of documents, and data files on computer discs and datatape. I have reviewed the interrogatory responses, along with indices and descriptions of the documents and data provided by the CID recipients, and have determined that the information produced pursuant to the CIDs contain confidential business and financial information, some of which might not have been

produced by the CID recipients without the confidentiality assurances provided by the CID statute.

15. I know from personal experience that CID recipients rely on the confidentiality provisions of the Antitrust Civil Process Act when they comply with CIDs. Recipients are more willing to provide information on a timely basis to the Division because they believe that the information will be kept confidential in conformity with the provisions of the Act. CID information is critical to making informed enforcement decisions in civil antitrust investigations. Release to American of CID information submitted in connection with the Division's investigation of conduct by other carriers at other hubs would have a chilling effect on the cooperativeness of witnesses in other ongoing and future investigations by the Division.

16. Production of these documents, particularly while the Division is still considering whether to bring enforcement actions against other carriers, could have an adverse effect on the progress of our investigation of those carriers and on any future attempts by the Division to prosecute the carriers under investigation.

17. In reviewing the documents at issue, I have considered the potential harm from disclosure of these materials during the course of an open investigation, the nature of this litigation with American (which involves a different carrier and a different hub from the other activities being investigated), and Defendants' allegations of need for the materials. I believe the potential harm from disclosure outweighs the need for disclosure.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on

March 14, 2000, in the District of Columbia.

“/s/”

John M. Nannes
Deputy Assistant Attorney General
Antitrust Division
United States Department of Justice