IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

RESPONSE OF THE UNITED STATES TO
DEFENDANTS' MOTION FOR CLARIFICATION

Defendants have moved for clarification of the Court's May 9, 2000 Memorandum and Order ("Order"), seeking rulings (1) that the Order does not preclude Defendants (collectively referred to hereinafter as "American") from taking discovery from other airlines concerning conduct at other hubs; and (2) that the Order permits the United States to withhold only CID questions and responses from airlines that are the subjects of the open and ongoing investigations of the Antitrust Division of the United States Department of Justice ("United States"). American's motion should be denied, as it is unnecessary, inappropriate, and advocates an unduly restrictive and illogical interpretation of the Order.

I. AMERICAN'S MOTION FOR CLARIFICATION CONCERNING CONDUCT AT OTHER HUBS IS UNNECESSARY, INAPPROPRIATE AND PREMATURE

The Court correctly precluded American from obtaining materials received by the United

States in connection with its open and ongoing investigations of other airlines. American now seeks a ruling that the Order does not preclude it from taking discovery from other airlines concerning their conduct at hubs other than Dallas/Ft. Worth. The Order was neither intended to, nor does it, address American's right to take discovery of those other airlines. The Order limits the scope of American's discovery of the United States.[1]

If American is seeking a ruling that would impact compliance with its outstanding subpoenas to other airlines, a motion for clarification of this Order is not the appropriate vehicle.[2] Should an issue of American's right to take discovery of other airlines' conduct at other hubs arise in the context of those subpoenas, the issue should be resolved in the normal process. Only if the interested parties reach an impasse should the issue be presented to the Court -- in the form of a motion to enforce the subpoenas or a motion for a protective order. Thus, until such a dispute arises, American is not entitled to a ruling on the scope of third party discovery and is certainly not entitled to such a ruling in the context of this Order. American's motion should therefore be denied.

II. THE ORDER DOES NOT REQUIRE THE UNITED STATES TO TURN OVER CONFIDENTIAL DOCUMENTS RECEIVED PURSUANT TO ITS OPEN AND ONGOING INVESTIGATIONS

In sustaining the government's privilege claim as to "ongoing investigation of other carriers at other hubs," the Court held that "Plaintiff will not be ordered to produce the CID questions or

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[1]In recognition that the scope of discovery under Fed. R. Civ. P. 26 is broader than the scope of admissibility of evidence at trial, the United States has not objected to otherwise unobjectionable discovery of such information concerning other airlines.

[2]If American is seeking a ruling on the relevance and admissibility of particular evidence at trial, a motion for clarification of the Order is not the appropriate vehicle either. American should file a motion in limine and Plaintiff will respond.

responses *related to* the two carriers at hubs other than Dallas Fort/Worth." *Order* at 15. In holding that the government's interests outweighed the defendants' need for information obtained pursuant to a CID and in using the language "related to" the two carriers, the Court clearly denied American's motion as to *any* recipient of a CID in these ongoing investigations, whether the recipient is one of the subject airlines themselves or a third party (such as another airline, a travel agent or a corporate customer) and for as long as the investigations remain open.[3]

Despite the clarity of the Order on this point, American seeks a ruling that the United States is permitted to withhold only the "CID questions or responses between the DOJ and target airlines," *Memorandum* at 4. Apparently, American believes the law enforcement investigatory privilege protects from disclosure only the materials submitted by targets of investigations, not the third parties. To state the obvious, disclosure of third parties' responses to CID questions would chill ongoing investigations just as much as would disclosure of materials produced by the subject airlines. Information (both documents and written answers to interrogatories) produced pursuant to CIDs contains confidential business and financial information, some of which may not be produced absent the confidentiality assurances of the CID statute. Such information, whether produced by subjects of investigation or by third parties, is critical to the ability of the United States to make law enforcement decisions in its investigations. For this reason, the United States did not in its briefing

[3]Since the briefing on American's motion to compel, the Antitrust Division of the U.S. Department of Justice has issued additional CIDs to third parties in connection with the ongoing investigations of other airlines. It is highly improbable that the Court, in upholding the investigatory files privilege application to those ongoing investigations, contemplated revisiting the issue of disclosure of CID materials each time the United States receives a response to subsequently issued CIDs.

and supporting declaration distinguish between subject airlines and third parties who respond to CIDs and, notably, neither did American. Had the Court intended to make such an unprecedented distinction, it surely would have done so explicitly. The Order requires no clarification on this point, and American's motion should be denied.

III. CONCLUSION

American's motion for clarification should be denied.

Dated this 5th day of June. 2000

Respectfully submitted,

PLAINTIFF UNITED STATES

By "/s/"

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