

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

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

**DECLARATION OF REBEKAH J. FRENCH IN SUPPORT OF
UNITED STATES’ OPPOSITION TO DEFENDANTS’ MOTION TO COMPEL**

1. My name is Rebekah J. French. I am a lawyer for the United States in the above-captioned litigation. I have had primary responsibility for responding to Defendants’ discovery demands in this case. I submit this declaration in support of the United States’ Opposition to Defendants’ Motion to Compel.

2. On November 8, 1999, Plaintiff served upon Defendants its Response and Objections to Defendants’ Second Set of Document Requests. Plaintiff raised a general objection to Defendants’ Document Requests to the extent it conflicted with 15 U.S.C. §1313(c), which protects the confidentiality of materials submitted in response to Civil Investigative Demands (“CID materials”) or could impair the law enforcement activities of the Department of Justice and raised specific objections to any document request

calling for CID materials or for materials contained in the files of open and ongoing investigations. A true and correct copy of that Response is attached to this declaration as Exhibit 1.

3. In response to American's Document Request 24, which called for Civil Investigative Demands ("CIDs") issued since January 1, 1990, containing questions concerning competition with low-cost carriers or barriers to entry at hubs, the United States produced all responsive CIDs (issued to persons other than American) from the Antitrust Division's ("Division") closed investigations of domestic airlines, including the twelve CIDs issued in the Division's investigation of predatory conduct by American at its DFW hub. The Division also produced three CIDs issued to investigate predatory conduct by carriers other than American at their hubs. These CIDs were produced because I had determined that trial staff had used or was likely to use the documents responsive to those CIDs in preparing for trial of this case.

4. The United States also produced the CID materials responsive to those three CIDs. Those documents include CID material originally produced by Pro Air, Spirit and Frontier, were contained in our production of November 8, 1999, and can be found under the following bates labels: USDOJ 000001 P9 to USDOJ 000465 P9; USDOJ 000001 NK to USDOJ 000239 NK; USDOJ 00001 F9 to USDOJ 0002300 F9; and FR 000001 to FR 001866. Because these documents were responsive to several of Defendants' document

requests (including Requests 3, 4, 7 and 26), they were, like other documents responsive to multiple requests, not labeled to correspond to any particular request.

5. The United States had previously produced, in response to American's First Set of Document Requests, any and all documents received in response to the twelve CIDs issued in the Division's investigation of predatory conduct by American at its DFW hub.

6. In those few instances in which the United States has made use, in the preparation of this case, of documents obtained from persons, other than American, by CID in other investigations, the United States has made and will continue to make, as appropriate, disclosure to American of the documents used and any documents necessary to throw light on the documents used.

7. On or about July 23, 1999, several Division attorneys working on this case met with counsel for defendants to discuss case scheduling issues. Although I was not present at that meeting, I was told that American's counsel requested that documents and information from any DOJ investigation involving competition in the domestic airline industry (in addition to the Division's investigation that led to this litigation) be subject to discovery in this case. The attorneys representing the United States explained to defendants' counsel that this could result in an unreasonable burden on Plaintiff because it would constitute overbroad disclosure of information of marginal, if any, relevance to the issues in this case. Although some of the Division's investigations involved analysis

of issues that are similar to those alleged in the United States' complaint because such issues are common to most antitrust cases (*e.g.*, relevant market definition or barriers to entry), those investigations focused on very different types of conduct than American's pricing, capacity and yield management actions that the United States alleges are predatory and are the subject of this case.

8. Nevertheless, the United States listed in its Rule 26(a)(1) Initial Disclosures, as requested by American, 53 deposition transcripts that were taken in investigations other than the Antitrust Division's investigation of American's conduct at DFW. To help focus American's attention, the United States listed those 53 depositions in a separate appendix (Appendix D). We explained in our Initial Disclosures that we were identifying persons and documents in Appendices C and D even though we doubted their relevance to this case. A true and correct copy of Plaintiff's Rule 26(a)(1) is attached as Exhibit 2 to this declaration.

9. Eight of the depositions referenced in Appendix D were taken in connection with an investigation of whether Delta's acquisition of certain slots from TWA at La Guardia Airport was anticompetitive, which investigation was closed in 1996; and thirty-one were taken in connection with an investigation, also closed in 1996, into whether agreements between travel agencies and certain air carriers to pay commission overrides to the travel agents was an unreasonable restraint of trade. To the extent that those transcripts contained information called for by the Court's February 7, 2000, order, that information

has been produced. The remaining depositions were taken in the Division's investigation of Northwest's purchase of a controlling interest in Continental Airlines and are protected by both the CID statute and the *NW/CO* protective order. Those transcripts were not covered by the Court's February 7, 2000, order because the *NW/CO* investigation included no monopolization issues. None of the fifty-three deposition transcripts referenced by American have been used by the Division in connection with this case, except to the extent that they were reviewed in order to comply with the Court's February 7, 2000, order.

10. In the pre-complaint investigation of Northwest and Continental, the United States received documents from Northwest, Continental, and third parties pursuant to CIDs. Since filing its complaint in the Northwest/Continental litigation, the United States has received more documents pursuant to discovery subpoenas. Parties and non-parties were given an opportunity to designate documents produced prior to the complaint in accordance with the protective order. The vast majority of the documents produced both pre and post complaint have been designated as confidential or highly confidential pursuant to the *NW/CO* protective order.

11. When I learned that a member of the American trial staff had used or intended to use, in connection with this case, six documents produced by Delta in response to a subpoena issued in *NW/CO*, I determined that the most efficient way of facilitating the disclosure of those documents to American, without violating the *NW/CO* protective

order, was to subpoena the documents directly from Delta in this case. Delta has since produced the six documents at issue to both the United States and American.

12. When I learned that a member of the American trial staff had used, in connection with this case, one document produced by Midwest Express in response to a subpoena issued in *NW/CO*, I reviewed all the documents produced by Midwest Express and issued a subpoena to Midwest Express requesting all documents from its *NW/CO* submission which are responsive to American's Second Set of Document Requests.

13. American has issued subpoenas to many of the airlines that produced documents in *NW/CO* seeking all of the documents produced to the United States. Many of these airlines have objected to the production of the totality of these documents to American. A true and correct copy of Northwest's objections to American's subpoena is attached to this declaration as Exhibit 3.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

"/s/"

Rebekah J. French

Executed on March 14, 2000