

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

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69238

Complaints of)
Franz Soni)
Paul Tobin and Angelo Bianco)
And)
Gerard M. Kelly)
vs.)
Continental Airlines, Inc.)
_____)

Dockets No. OST-97-3287 - 19
OST-98-3623 - 13
OST-98-4504 - 13

Enforcement Proceeding

OST DOCKET NO. 99-6111 - 20

**REPLY TO AEP'S ANSWER IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS**

The reply by AEP to the Respondent's Motion to Dismiss presents a remarkable display of avoidance, circumlocution, and tortuous circular reasoning in an effort to avoid the application of specific procedural rules established by the Department of Transportation (DOT.)

The basic elements presented by the Respondent in the Motion to Dismiss are acknowledged and conceded by AEP to be true and correct. The AEP essentially argues that the procedural rules established by DOT should not be applied to them despite the mandatory language clearly set out therein. Presumably those rules should be applied to everyone else, but not to AEP.

The basic elements presented in the Motion to Dismiss are straight-forward and direct.

They are predicated on the plain language of the DOT's rules. Those basic elements are:

1. Section 302.205(a) specifically establishes as a regulatory requirement that “Within a reasonable time, but **not more than 60 days, after an answer to a formal third-party complaint is filed**, or such extension of that 60-day period as may be granted pursuant to §302.206(b)¹, **the Assistant General Counsel for Aviation Enforcement shall either issue a notice instituting a formal enforcement proceeding in accordance with §302.206(a) or issue a notice dismissing the complaint in whole or in part**, stating the reasons for such dismissal. [Emphasis added]
2. More than 60 days passed between the date on which the Respondent filed answers to the third-party complaints in this matter, and in fact more than 60 days passed between any event associated with this matter and the filing of the complaint by AEP on August 16, 1999.

All the rhetoric, hyperbole, straw-man hypotheticals, or characterization about taking arguments to conclusions crafted by AEP and then labeled logical or illogical does not change the clear and un rebutted established facts or the language of the regulations.²

Section 320.205(a) is, in effect, a statute of limitations. Actions must either be brought within the time period established by the rules or the action is barred. There is no doubt that AEP did not bring this action within the time period established by DOT's regulations. Therefore it follows that this action should be dismissed.

In an apparent effort to divert attention from the facts and law presented by the Respondent,, the AEP engages in speculation and argues that the complaint should not be

¹ AEP acknowledges that it “did not seek or obtain a formal extension of time under section 302.205(a).” [AEP Answer to Motion to Dismiss, pg. 3]

² The claim that nearly three years ago the DOT issued an NPRM in which DOT indicated that it was considering changing the 60 day rule does not of itself change the rule or benefit AEP in any way. First, issuance of an NPRM does not change an existing rule; second, the fact that a possible rule change has been pending for nearly three years would support an inference that DOT decided to not change the existing rule and/or decided to leave the existing rule in place.

dismissed because the Respondent has not shown how it has been prejudiced or harmed by AEP's failure to comply with DOT's rules. That argument assumes that the Respondent has such a burden. That assumption is not based on any law or any regulation, but on AEP's apparent presumption that it can do whatever it likes at any time and in any way; that AEP can ignore or disregard established rules and regulations and that DOT rules do not apply to them or that they are somehow immune from or not subject to the plain language of established rules or regulations.³ The answer to this presumption by AEP is that there is nothing in Section 302.205(a) or any other DOT regulation of which Respondent is aware that places a burden on the Respondent to show how it was harmed by the AEP's failure to comply with established regulations before AEP is to be subject to established DOT rules.

The DOT rules create a mandatory either / or structure – AEP is required to either file a formal complaint within 60 days or the matter is dismissed. Since AEP failed to file a complaint in accordance with and as required by DOT's rules, this matter should be dismissed forthwith.

Not only is AEP engaged in creative construction of regulations and grafting new requirements onto regulations in order to have them mean whatever AEP chooses at this point in time, they also may be manufacturing 'new facts' out of whole cloth as they postulate that Continental has undertaken substantial investigation of specific cases. That is true vis a vis Soni, Tobin & Bianco, and Kelly, "as Continental was provided with the names and complaints within a reasonable time period of the alleged incident. However," it does not otherwise accurate. In fact, never having had the laundry list of the unidentified violations set forth in the Enforcement Proceeding until October 25, 1999, Continental was not provided the opportunity to investigate

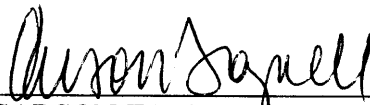
³ While in Lewis Carroll's fable 'Alice through the Looking Glass', Humpty Dumpty can proclaim "When I use a word it means just what I chose it to mean", we submit that AEP does not have the latitude to determine that the words in DOT's regulations do not mean or should not be construed to mean what they plainly state. This becomes particularly contrived as AEP attempts to reconcile the language of sections 302.206(b) and 302.204(d).

these alleged violations in detail and, as previously stated in the record, has been greatly prejudiced in its ability to defend these allegations given the passage of time.

For the above reasons and those stated in Continental's original motion, this enforcement proceeding should be dismissed.

Respectfully submitted,

CONTINENTAL AIRLINES, INC.

A handwritten signature in cursive script, appearing to read "Carson Trapnell", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, CARSON TRAPNELL, certify that on December 17, 1999, I served Reply to AEP's Answer in Opposition to Respondent's Motion to Dismiss on the following parties:

BY FEDERAL EXPRESS

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Administrative Law Judge
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by depositing a copy of the said instrument, properly enclosed in a Federal Express wrapper, in a Federal Express box regularly maintained by Federal Express, in the County of Harris, City of Houston, State of Texas, addressed to the aforementioned addresses.



CARSON S. TRAPNELL, ESQ.