U.S. Department
of Transportation
**Federal Aviation
Administration**

Aug 8, 2000

Mr. David Chapman
Port Attorney
Port of San Diego and
Lindbergh Field Air Terminal
P.O. Box 488
San Diego, CA 92112

Dear Mr. Chapman:

Thank you for your letters of December 1, 1999, and February 23, 2000, regarding the Port's proposal to modify enforcement of its airport noise restriction at Lindbergh Field. You asked that the Office of the Chief Counsel provide, on behalf of the FAA, a "written concurrence" on four specified "issues and conclusions." Each issue is addressed separately below.

(1) *Whether, for purposes of the Airport Noise and Capacity Act of 1990(49 U.S.C. § 47521, et. seq.), the amended Airport Use Regulations are airport regulations which first became effective prior to October 1, 1990, within the of and for all purposes related to, Section 47524 of Title 49 of the United States Code and implement 'an intergovernmental agreement including airport aircraft noise or access restriction in effect on November 5, 1990' within the meaning of and for all purposes related to, Section 47524(d)(3) of Title 49 of the United States Code.*

Section 1.1 of the amended Airport Use Regulations (AURs), which are attached to your letter as Exhibit A, indicates that they became effective in 1989. Because they became effective before October 2, 1990, they are considered "grandfathered" from requirements of ANCA and implementing Federal Aviation Regulations Part 161. See 49 U.S.C. §§ 47524(b) (applies to restrictions on operation of Stage 2 aircraft "proposed after October 1,1990") and 47524(c)(1) (applies to restrictions on operation of Stage 3 aircraft "not in effect on October 1, 1990"); 14 C.F.R. § 161.3(a). However, your letter does not provide any basis for concluding that the AURs implement an intergovernmental agreement, and thus fall within the scope of 47524(d)(3).

(2) *Whether, if the Board of Port Commissioners adopts the amendments to the AURs summarized and described in the District's letter, this action would be exempt from compliance with any requirements of Section 47524(a), (b) and (c) of Title 49 of the United States Code (and any related implementing regulations of FAR Part 161) under the*

provisions of Section 47524(d)(4) of Title 49 of the United States Code, since the proposed District actions would not further 'reduce or limit aircraft operations' at SDIA or 'affect aircraft safety. '

According to your letter "[s]ince adoption of the AURs in 1989, the number of curfew operations at [San Diego International Airport] SDIA has dramatically increased Faced with its own concerns, as well as mounting political pressure, the District has been forced to consider modifications to the AURs which may provide the District with an increased ability to enforce the existing AUR Time of Day Restrictions and deter future curfew operations at SDIA." You also indicate that the purpose of the amendments is to "decrease the number of curfew< operations" at SDIA. You maintain that because the proposed amendments would not limit existing "permitted" operations," the amendments would not reduce or limit aircraft operations" within the meaning of ANCA. In addition, the letter states that the District has not identified any basis upon which the proposed additional administrative penalties would 'affect aircraft safety' within the meaning of ANCA. Section 4.4.1 of the AURs provides an exception for an "emergency situation." Footnote ** of your letter describes a "due process requirement" in which a "curfew violation review panel" reviews curfew violations and makes penalty recommendations. In an attachment to your letter, you summarized the total number of curfew violations penalized, and the total amount of penalties assessed.

As your letter acknowledges, ANCA applies to proposed amendments to existing airport noise regulations that would "reduce or limit aircraft operations" at SDIA or affect aircraft safety." As defined under 14 CFR 161.5, airport noise and access restrictions include those that directly or indirectly limit numbers or hours of operation. If in stating that the proposed amendments would not limit existing "permitted" operations, the District means that the proposed amendments are only intended to, and would only deter and penalize, willful violations, then in our opinion ANCA does not apply. We agree that proposals to increase administrative penalties for willful violations do not affect safety or other operations within the meaning of the statute. However, as discussed below, FAA requests additional information from the District to confirm that due process requirements under the current regulation have and will continue to assure that carriers are not penalized for curfew infractions caused by weather, FAA Air Traffic Control, or any other safety-based non-emergency circumstance. FAA also seeks confirmation that curfew infractions are not counted as "violations" for purposes of escalating fines if they are not fined in the first instance.

In our opinion, ANCA applies to any proposal by the District to further directly or indirectly affect or reduce scheduled operations that were unavoidably delayed in accordance with applicable Federal Aviation Regulations. To conclude that ANCA does not apply, FAA requests more detailed information about the current regulatory practice and whether this type of operation is within the ambit of the proposal. In other words, if the purpose of the proposal is to reduce total curfew operations, then FAA requests further information to clarify how the current regulatory practice affects aircraft safety and operations and whether the proposed amendments would exacerbate any current effects.

It is not discernible how the District currently handles curfew infractions caused by weather or FAA Air Traffic Control. Section 4.4.1 exempts emergencies but that term is not defined and section 4 does not include an explicit exception for delays in scheduled operations caused by weather or FAA Air Traffic Control. The summary of curfew violations penalized indicates that approximately 60% of infractions have been exempted pursuant to due process requirements, but does not include a breakdown of types of infractions that are routinely not penalized. Further, there is no definition of "violations" for purposes of the escalation of penalties under Section 4. It is unclear whether the District currently counts as "violations" curfew infractions that are not penalized or are attributable to factors beyond the control of carriers such as requirements to comply with Federal Aviation Regulations.

If scheduled operations that were delayed pursuant to Federal Aviation Regulations are currently subject to administrative penalties, then the effect of the existing administrative penalties could be to pressure carriers into choosing between federal and local administrative fines and penalties. Under 14 CFR Part 150 the FAA has disapproved airport noise regulations that impose sanctions against aircraft operators that exceed a single event noise limit on takeoff and landing as a clear interference with FAA's control over flight operations in the navigable airspace. Although FAA's disapprovals predate ANCA, clearly any proposal to increase the sanctions in this circumstance would increase possible effects upon aircraft safety and therefore be subject to ANCA. Similarly, although the current regulatory practice and any related inconsistency with FAA safety authorities and impacts on operations predates ANCA, ANCA would apply to any proposal to increase sanctions in a manner that would heighten these inconsistencies or further reduce or limit operations conducted in accordance with federal law.

In summary, to assist FAA in determining whether ANCA applies to the proposed amendments, FAA requests that the District clarify the current regulatory practice and the purpose of the proposal. If the District seeks to reduce scheduled operations conducted in accordance with federal law and delayed because of factors beyond the control of carriers, such as weather or FAA Air Traffic Control, then the District should address why such a proposal does not potentially affect safety or reduce or limit operations within the meaning of ANCA. In particular, the District should address whether the proposed escalation in penalties would compel smaller carriers at SDIA to reduce operations rather than risk further violations attributable to factors beyond their control. This information is crucial for FAA to provide the requested concurrence that the proposed amendment does not "reduce or limit aircraft operations" at SOIA or "affect aircraft safety" within the meaning of ANCA.

Finally, FAA found the summary of curfew infractions helpful and would appreciate the opportunity to review any summary that the District has prepared of year 2000 curfew infractions. We note that 1999 reflects a sharp downturn in curfew infractions (22) when compared to levels experienced in 1995-98, and is much more in line with 1989 levels (17).

(3) *Whether, if the Board of Port Commissioners proceeds with the proposed amendments to the AURs, the Board's actions would not be considered by the FAA to be impermissible or in violation of the Airport and Airway Improvement Act of 1982, as amended, or any "assurances" given by the District as the project sponsor for any federal grant made to the*

District under that Act, or any predecessor legislation, including the assurances presently codified at Section 47101(a) of Title 49 of the United States Code.

The proposed amendments increasing the amount of civil penalties for curfew violations on their face do not appear to violate the federal requirements to provide reasonable access under 49 U.S.C. § 471017(a)(1) or Assurance 22. However, future application of the penalties in specific circumstances leading to the voluntary or involuntary termination of operating privileges could raise the issue of whether the civil penalty scheme violates the requirement for reasonable access.

(4) *Whether, in the opinion of the FAA and under the circumstances described in this letter, the proposed District action amending the AURs would not create an "undue burden" on interstate commerce, or otherwise create or operate in conflict with any provisions of federal statutory or constitutional law for which the FAA has any oversight, implementation or enforcement authority.*

The proposed amendments increasing the amount of civil penalties for curfew violations on their face do not appear to create an undue burden on interstate commerce. However, the FAA may reach a different conclusion upon reviewing specific applications of the civil penalties, especially termination of operating privileges.

This letter is not an appealable final agency order within the meaning of 49 U.S.C. § 46110. It is limited to the specific issues raised in your letter of December 1,1999, regarding the proposed amendments described in Exhibit C thereto. It does not address the ability of an airport user adversely affected by the 1989 restrictions to challenge any aspect of them. Should the FAA receive additional, relevant information not heretofore available regarding the proposed amendments, the FAA reserves the right to revise its opinion based on that information.

Sincerely,

Nicholas G. Garaufis
Chief Counsel