



NATIONAL ASSOCIATION OF AIR TRAFFIC SPECIALISTS

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March 4, 2003

Federal Aviation Administration
Mr. Ron Page, ABU-100
Room 1034
800 Independence Ave., SW
Washington, DC 20591

Dear Mr. Page:

This is a formal challenge to the agency's inclusion of the activities performed by the Flight Service Controllers in the CY02 FAIR Act list. The agency's failure to fully address the critical issues of 'Flight Safety' and 'National Security' as they pertain to the activities of FAA Flight Service Controllers leads us to challenge the agency's determination in this case.

Specifically, the Union challenges the agency's determination that the activities performed by the Flight Service Controllers are not "inherently governmental" as defined by the FAIR Act. This formal challenge is authorized by and comports with the Federal Activities Inventory Reform Act of 1998, referred to as the FAIR Act.

Our challenge to the agency's determination that FSS activities are not inherently governmental falls into two major categories:

- First, we find that the agency has failed to comply with the intent of Congress
- Second, we find that the agency has failed to account for the issues of Flight Safety and National Security.

Congressional Intent

In enacting the FAIR Act, Congress sought to provide a process to identify functions of an agency that are not inherently governmental and thus available for possible outsourcing pursuant to the OMB Circular A76 process. Congress affirmed the policy embodied in the OMB Circular A76, in that the Federal Government will rely on the private sector for goods and services that are not inherently governmental. Congress felt that federal agencies, by using the A76 process, would identify those activities that are commercial in nature and subject those activities to competition with private industry. Congress believed the taxpayer would benefit from both lower costs and better

services/products through competition for commercial activities. The question arises; are all activities performed by an agency commercial in nature and subject to the A76 process, or, are there any activities that are not commercial in nature and should be performed by the government itself.

The legislative history of the FAIR Act reveals that congress wanted to make a distinction between those activities that directly pertain to core function or mission of the agency and all other functions in support of the agency. There was an assertion that government outsourcing and competition should not be undertaken solely because of cost effectiveness, but because it allows government executives to focus their attention on the mission and not be distracted with trying to manage all parts of the process.

Additionally, it was recognized that it is a good management practice in a government agency to focus on the core competency as an organization; the non-core responsibilities in an agency should be done by other organizations. It is clear that congress intended that those activities that assist or support the agency in performing their core functions should be subject to the A76 process. Conversely, those activities that directly relate to the core mission of the agency and the agency's core functions would not be subject to the A76 process.

The FAIR Act codifies this distinction between activities; those activities that are central to an agency's core mission which are not subject to the A76 process and those ancillary activities which may be commercial in nature and are subject to the A76 process. Those activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government are those activities that directly relate to the core mission of the agency and defined as inherently governmental. These functions include those that protect and advance United States economic interests as well as those that significantly affect the life or property of private persons. In contrast the activities that are primarily ministerial and internal in nature and the activities support the agency in carrying out its core mission are not considered inherently governmental. These functions include those that provide advice to agency officials and other support functions such as building security, operation of cafeterias, housekeeping, and routine electrical or mechanical services. The FAIR Act clearly demonstrates congressional intent to distinguish between those activities that go to the core mission of an agency and not be subject to the A76 process from the other activities that would be subject to the A76 process.

Congress has authorized the existence of the FAA and charged the FAA to "maintain and enhance safety and security in air commerce as their highest priority".¹ The core mission of the agency is aviation safety and security. To meet the core mission of the agency, the FAA performs several functions including those functions performed by the Flight Service Controllers. It clearly is the congressional intent of the FAIR Act that those core activities that are central to an agency's mission are, by definition, inherently governmental and not subject to the A76 process. To determine the functions performed

¹ Title 49 Chapter 401 Section 40101

by the Flight Service Controllers as anything other than inherently governmental will frustrate congressional intent.

The FAIR Act codifies the definition of inherently governmental as “a function that is so intimately related to the public interest as to require performance by Federal Government Employees”. The FAIR Act clearly mandates an inherently governmental function as those activities that protect and advance United States economic or property interests or to significantly effect the life or property of private persons. The reasonable person standard in the reading of this definition would conclude that those functions performed by the Flight Service Controllers (attachment 1) clearly fall into the definition of inherently governmental.

The FAIR Act lists those functions that normally do not fall within the inherently governmental definition as including building security, mail operations, housekeeping, facilities operations and maintenance. Here too, a reasonable person would plainly see that the functions performed by Flight Service Controllers differ significantly. Clearly the functions performed by Flight Service Controllers are considerably more complex and carry significant responsibilities, including responsibilities for life and property, and thus cannot fall outside the definition of inherently governmental. For the agency to conclude the functions performed by the Flight Service Controllers as anything other than inherently governmental would be arbitrary and capricious.

Flight Safety and National Security

Another useful method to review this inventory is to go back to the original OMB Circular A-76 definitions of ‘inherently governmental’ activities, and review Flight Service Station activities in the context of Flight Safety and National Security.

An inherently governmental activity involves one of four areas:

- Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise.
- Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise.
- Significantly affecting the life, liberty, or property of private persons.
- Exerting ultimate control over the acquisition, use, or disposition of property, real or personal, tangible or intangible, of the United States, including the establishment of policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.

The first three areas are clearly applicable to the case at hand, and are discussed below.

- Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise.

If a Flight Service Controller should fail to notify customs/immigration when a pilot comes into this country, the United States can fine and jail the pilot and confiscate their aircraft. This along with keeping pilots out of any restricted airspace whether it is military or presidential temporary flight restrictions could cause the United States to take action. It is obvious to even the casual observer that these actions are inherently governmental responsibilities, and failure to act constitutes a material breach on the part of the government.

- Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise.

Flight Service Controllers help protect the people and territory of the United States day in and day out. The work the Flight Service Controller does with customs, immigration, law enforcement, drug enforcement agency, and the military is invaluable in protecting this country and its citizens. Whether it's identifying a suspicious aircraft or pilot from the identification number a pilot may give and not only contacting and forwarding the information on to law enforcement officials, but assisting the law enforcement agency in whatever manner they request.

Significantly affecting the life, liberty, or property of private persons.

This is what the Flight Service Controller does every single day through pilot weather briefings, in-flight services, search and rescue services, assisting the military, assisting law enforcement, and assisting drug enforcement agencies.

- Exerting ultimate control over the acquisition, use, or disposition of property, real or personal, tangible or intangible, of the United States, including the establishment of policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.

In attempting to meet the requirements of the FAIR Act the agency has incorrectly classified the functions performed by the Flight Service Controllers as other than inherently governmental. The agency's determination is contrary to the intent of congress and counter-intuitive. This classification significantly and negatively affects safety and security of the flying public. For the reasons set forth, the agency must reclassify the functions performed by the Flight Service Controllers as inherently governmental.

Sincerely,



Walter W. Pike
President

Attachment 1

The definition of an inherently governmental activity is an activity that is so intimately related to public interest as to mandate performance by government personnel. Below are some of the duties, FAA orders, and manuals that explain why Air Traffic Control positions in the Flight Service Option were and should continue to be considered inherently governmental.

1. *FAAO 7110.10, Chapter 3, Pilot Briefing. Pilot Weather briefings are defined as The translation of weather observations and forecasts, including surface, upper air, radar, satellite, and pilot reports into a form usable by the pilot or flight supervisory personnel to formulate plans and make decisions for the safe and efficient operation of aircraft.* These briefings also include information on NOTAM's, flow control, and other items as requested. The feasibility study, done in an expedited fashion by Grant Thornton, listed NOTAMS as the only inherently governmental function performed by FSS air traffic controllers. The study conclusion is flawed in that the input of the NOTAMs into the system is but one aspect of NOTAMS. The delivery and interpretation of this NOTAM information to pilots has a significant effect on the National Airspace System (NAS). It is accurate to state that every operational position in the Flight Service Station works with NOTAMs in one fashion or another.
2. *FAAO 7110.10, Chapter 6, Section 7, Law Enforcement Messages. a. Aircraft Lookout Alerts. 2. Do not disseminate lookout alerts outside the official FAA facilities and offices as this data is inherently sensitive. Unauthorized dissemination could result in criminal prosecution or administrative action against the offender.* FSS controllers also provide information to Immigration, Customs and the Drug Enforcement Agency. Clearly the intent is that these duties should be inherently governmental.
3. *FAAN 6000.192 Interim Maintenance Procedures and Guidelines for the Operation and Maintenance of NAS Defense Programs Systems (NSDPS).*
 - 1.a. The FAA provides air movement data to the Department of Defense in support of the Air Sovereignty and Homeland Defense missions. In addition, this data is provided to Customs and other government agencies.
 - 1d. The HOST (IFR & VFR Flight Following) provides IFR real time data. Model One Full Capacity (M1FC) and Operational and Supportability Implementation System (OASIS) provide (DVFR) movement data. FSS controllers also input the data into M1FC or OASIS to provide that movement data that supports the Air Sovereignty and Homeland Defense missions.

- Section 3.a. FAA owned equipment/components providing aircraft movement data services to other agencies shall be operated, maintained, and repaired in accordance with guidance and orders by the FAA workforce. This notice was written as a result of the events on September 11, 2001. It highlights the need for a major change in the FAA mission as it relates to homeland defense. The FAA NDP was established to support this critical mission, as well as assisting other agencies requiring FAA Services.
4. North American Aerospace Defense Command (NORAD) Regulation 55-2 is generally used in the test mode only, however, after the events of September 11 2001 this regulation has become more prominent and addresses duties which FSS controllers are responsible. It identifies the use of the United States and Canadian National Security of Air Traffic and Air Navigational Aids (SCATANA) and the Emergency Security Control of Air Traffic (ESCAT) plans. *Civil and military air traffic control facilities and other aeronautical facilities will disseminate to air traffic and aircraft operators and will implement those instructions and restrictions received from the ARTCCS. When an IFR or DVFR flight plan has been filed, it will be examined by the appropriated aeronautical facility to insure that it conforms with the ESCAT restrictions placed in effect by the appropriate military authority.* These restrictions are more prevalent since 9/11/01, including the first anniversary of 9/11/01 when all flight plans into and out of the metro New York City area had to be filed through Flight Service to get approval. No other vendor or agency was allowed to accept the flight plans from general aviation aircraft. The continued Temporary Flight Restrictions in the Washington, DC area has Leesburg AFSS handling special codes for pilots to fly into and out of the restricted area.

In addition to the above, FSS controllers provide pilots with weather briefings, search and rescue and assist the military in flight plan handling and messaging. These duties are intimately related to the public interest and mandate performance by government personnel.