

BEFORE THE UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor,
Complainant,

v.

EXXONMOBIL CHEMICAL COMPANY-
SYNTHETICS DIVISION,
Respondent.

OSHRC Docket No. **04-1782**

**ExxonMobil's Reply to Response of AFA to ExxonMobil's Statement of Opposition to
AFA's Request for Third-Party Status**

Respondent, ExxonMobil Chemical Co., Synthetics Division, respectfully submits this reply to the Response of the AFA to its statement of opposition to the "request for third party status" by the Association of Flight Attendants – CWA, AFL-CIO ("AFA").

Summary of Position

1. AFA's intervention is jurisdictionally improper, for the OSH Act does not cover the working conditions it now seeks to litigate here – the alleged exposure of flight attendants to the byproducts of combusted jet oil during flight operations. As the AFA has publicly and repeatedly admitted, those conditions are regulated exclusively by the FAA.

2. AFA's "response" is improper and must be struck, for it adds new allegations, new arguments, and even a new request – all of which should have been part of its original motion.

3. AFA's response also illustrates why its participation as a party is guaranteed to "unduly delay the proceeding." AFA seeks to introduce a number of new – not to mention extraneous and speculative – issues, none of which have been raised by the Secretary. To support them, the AFA seeks to introduce anecdotes rather than scientific studies, and evidence about a large class of chemicals, rather than the specific chemical at issue here. Permitting AFA to raise new issues and introduce this evidence is improper, will make it impossible to meet the

September 21st hearing date, and will substantially prejudice ExxonMobil. Yet, the AFA still fails to show why it could not fairly contribute to the case by communicating whatever materials and knowledge it has privately to the Secretary's counsel.

ARGUMENT

1. AFA's participation in this case is jurisdictionally improper, for none of the working conditions of its members that could in any way be related to the MSDS at issue are regulated by the OSH Act. The AFA, which claims to represent only flight attendants (not ground mechanics), alleges here that its members are exposed to chemicals in jet engine oils *while they are aboard an aircraft*. But this is outside the purview of the OSH Act. In 2000, OSHA and the FAA signed a memorandum of understanding in which OSHA acknowledged the FAA's exclusive authority over in-flight safety, which includes all times that flight attendants are aboard an aircraft.¹ This memorandum continued OSHA's acquiescence in FAA "complete and exclusive responsibility for the regulation of the safety of civil aircraft in operation"² As a result, the AFA's own website states, "Presently, flight attendants are not afforded OSHA protections."³ The AFA has also admitted this to Congress.⁴ Accordingly, the AFA's request for third party status should be denied on jurisdictional grounds.

¹ OSHA/FAA Memorandum of Understanding, "Safety and Health in the Aviation Industry" (August 8, 2000) <http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=283>. There, OSHA and the FAA together state: "an aircraft is "'in operation' from the time the aircraft is first boarded by a crew member, preparatory to a flight, to the time the last crewmember leaves the aircraft after the completion of that flight, including stops on the ground during which at least one crewmember remains on the aircraft, even if the engines are shut down."

² See 40 Fed. Reg. 29114 (1975).

³ The AFA website states: "Presently, flight attendants are not afforded OSHA protections. The FAA claimed exclusive jurisdiction over safety and health issues for cabin and flight deck crew in 1975. To this day, no protections exist." <<http://www.afanet.org/legislative/default.asp?id=13>>.

⁴ "OSHA does not have jurisdiction over crewmembers." AFA, "Aircraft Air Quality- What's Wrong With It and What Needs To Be Done," Submitted to the Aviation Subcommittee of the Transportation & Infrastructure Committee, US House of Representatives (June 4, 2003), available at <http://www.afanet.org/legislative/aircraft_air_quality_61303.pdf>.

2. It is improper for a response to an opposition to a motion to raise new factual allegations, new legal arguments, or new prayers. It is improper for a response to construct an entirely new motion from scratch. A response is instead supposed to argue only the legal sufficiency of the opposition or the motion. Yet, AFA's "response" does all this and more, for it makes factual allegations and legal arguments that were not part of its original motion – and not even part of the Secretary's allegations in this matter. Moreover, instead of merely asking for party status so that it is served with papers and consulted on settlement, the AFA adds a new prayer that it participate as a co-prosecutor. The AFA even brazenly asks at page 6 that its response and original motion be treated as a new document altogether. The response should be struck as procedurally improper.

3. The AFA's response starkly demonstrates why its participation is guaranteed to "unduly delay the proceeding" within the meaning of the Commission rule.

Attached to this Reply are the interrogatory answers submitted to ExxonMobil by the Secretary. They set out in 52 pages of technical detail the Secretary's theory of the case. Yet, not a *single one* of the points made by the AFA's response coincides with them. Instead, the AFA's response raises at least five new theories. Those theories (including those about the performance of jet engines in flight) raise new legal problems, such as Section 4(b)(1) preemption, which the Secretary's approach has avoided. The new theories also would expand the scope of the litigation enormously, for the evidence that the AFA seeks to introduce does not focus on the additives in the cited ExxonMobil jet oils but on a huge class of substances – organophosphates – which, according to the EPA and the OECD, differ widely in their chemical properties.⁵ Yet, this focus is legally dubious, for the Hazard Communication Standard concerns

⁵ EPA has stated that "effects of chemicals in the same class can vary widely." EPA's GUIDELINES FOR NEUROTOXICITY RISK ASSESSMENT at p.47-48 (EPA/630/R-95/001F), 63 Fed. Reg. 26926 (1998). The Organisation for Economic Co-operation and Development defines

“chemicals,” not chemical classes.⁶ Similarly, the AFA’s proposed reliance on anecdotal evidence flies in the face of the HazCom Standard’s demand (in its mandatory Appendix B) that findings be made on the basis of scientific *studies*. AFA’s theory of the case will rely on dubious evidence to inject broad factual theories that are legally irrelevant.

The following table lays these problems out in detail:

Page of AFA Response	AFA Argument	Status/Problem
3	Airline workers suffered nerve damage on aircraft	<ul style="list-style-type: none"> • Anecdotal evidence, not scientific studies • Raises the § 4(b)(1) issue • Not argued by Secretary
4	Organophosphates generally cause nerve damage	<ul style="list-style-type: none"> • Concerns organophosphates generally, not the particular chemical cited here. Legally irrelevant. • Anecdotal evidence, not scientific studies • Raises the § 4(b)(1) issue • Not argued by Secretary

“Organophosphorous substances” as including “substances that may cause the neurotoxicity *sometimes* seen in this class.” OECD GUIDELINE FOR TESTING OF CHEMICALS NO. 419, DELAYED NEUROTOXICITY OF ORGANOPHOSPHORUS SUBSTANCES: 28-DAY REPEATED DOSE STUDY, p. 7 (1995) (emphasis added).

⁶ See the scope provision in Paragraph (b) (limited to “chemicals” manufacturers “produce”); and the definition of “chemical” in Paragraph (c) of § 1910.1200 as an “element” or “compound,” not a class.

Page of AFA Response	AFA Argument	Status/Problem
4	Humans vary genetically in reaction to organophosphates	<ul style="list-style-type: none"> • Concerns organophosphates generally, not the particular chemical cited here. Legally irrelevant. • Raises the § 4(b)(1) issue • Not argued by Secretary
4-5	There are different ways that organophosphates can cause nerve damage.	<ul style="list-style-type: none"> • Concerns organophosphates generally, not the particular chemical cited here. Legally irrelevant. • Not argued by Secretary • Raises the § 4(b)(1) issue
5	AFA will help quantify risks of exposure to organophosphate while in flight	<ul style="list-style-type: none"> • Raises the § 4(b)(1) issue • Concerns organophosphates generally, not the particular chemical cited here. Legally irrelevant. • Not argued by the Secretary

Giving AFA full party status will make it impossible for the parties to meet the September 21st hearing date and will substantially prejudice ExxonMobil in its preparation for hearing. To avoid trial by ambush by the AFA, ExxonMobil would have to file additional document requests and interrogatories, and then conduct depositions of experts and even fact witnesses, to explore the AFA's various arguments, including its dubious arguments about organophosphates generally. Yet, there is simply insufficient time to do all this in the little time still available before trial. AFA did not seek to intervene until the discovery worked out by ExxonMobil and the Secretary was well along; ExxonMobil and the Secretary have already each responded to interrogatories and exchanged documents based on the issues raised in the citation. Yet, the AFA has still not shown any reason why it could not simply submit its material to counsel for the Secretary. Inasmuch as the AFA's participation is guaranteed to unduly delay the proceeding, its request should be denied.

Finally, the Commission should be aware that the AFA's request for intervention here is likely not being made to resolve this narrow litigation about an MSDS but to use the processes of the Commission to enhance the prospects of certain civil suits brought or soon to be brought with the AFA's help against airlines and makers of aircraft, jet engines and jet engine oils.⁷ There is now a "hotbed of lawsuit activity concerning the airline industry involving toxic air in the passenger cabin. Airlines and airplane manufacturers are getting hit with a flurry of 'toxic air' related lawsuits."⁸ That is the likely reason why the AFA seeks to inject dubiously-relevant issues about working conditions that are, by its own admission, not covered by the OSH Act.

Accordingly, the AFA's request for party status should be denied.

Respectfully submitted,

Of counsel:

James J. Doyle, Jr., Counsel
Exxon Mobil Corp. Law Dept.
13501 Katy Freeway, W1-578
Houston, Texas 77079-1398

Edd D. Prince, Attorney
Exxon Mobil Corp. Law Dept.
800 Bell Street, Rm. 1841 I
Houston, Texas 77002

Robert C. Gombar
Arthur G. Sapper
McDermott Will & Emery LLP
600 13th Street, N.W.
Washington, D.C. 20005-3096
202-756-8000 Telephone
202-756-8087 Telefacsimile

⁷ For example, *Bradford v. Alaska Airlines, Allied Signal, Inc., McDonnell-Douglas Corp., and Triumph Air Repair*, No. 98-2-15033-5 SEA (later settled). Another such suit is described in a news article at <<http://www.usatoday.com/money/biztravel/2002-05-21-toxic-air-verdict.htm>>.

⁸ Newsletter article "Flying the Unfriendly Skies" <http://www.power-of-attorneys.com/unfriendly_skies.htm>.

Certificate of Service

I hereby certify that on July __, 2005, I served a copy of the foregoing by first class mail
on:

Susan B. Jacobs, Esq.
Office of the Solicitor of Labor
201 Varick Street
New York, New York 10014
Telefacsimile No. 212-337-2112

Vincent Trivelli, Esq.
The Calwell Practice, PLLC
178 Chancery Row
Morgantown, West Virginia 26505
Telefacsimile: 304-291-2240

Arthur G. Sapper

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ORDER

The request for third party status by the Association of Flight Attendants – CWA, AFL-CIO (AFA) is denied.

So ordered.

Irving Sommer
Chief Judge, OSHRC
Washington, D.C.

Dated: _____