



Negotiated Rulemaking in the Context of Part 382: A Worthy Alternative to Traditional Rulemaking or an Impossible Dream?

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Changing the regulatory landscape to address new issues, policies, or business practices can be a lengthy and challenging process. For highly regulated industries such as aviation, the process is not only challenging but also sometimes contentious and extremely

complex. Consequently, over the past 20 years, regulators have considered alternative approaches to traditional notice-and-comment rulemaking as a way to foster consensus among stakeholders and streamline the process of developing new regulations. One such alternative approach is negotiated rulemaking—a consensus-based process through which an agency develops a proposed rule by using a neutral facilitator and a balanced negotiating committee composed of representatives of all interests that the rule will affect, including the rulemaking agency itself.¹

This article reviews the history of negotiated rulemaking in the context of U.S. Department of Transportation (DOT) regulations concerning the nondiscriminatory transportation of passengers with disabilities (14 C.F.R. part 382), summarizes the DOT's recent proposal to engage in negotiated rulemaking to develop additional regulations governing the transport of such passengers, and identifies some of the challenges a negotiated rulemaking on this topic may face. It then examines the recently published Convener's Report on the DOT's proposal and, finally, analyzes the potential outcome of the DOT's attempt at using negotiated rulemaking in the context of part 382.

Negotiated Rulemaking

The negotiated rulemaking process is generally appropriate when an agency determines that: (1) a rulemaking committee can adequately represent *all* interests that will be significantly affected by a proposed rule; and (2) it is feasible and appropriate to establish a committee.² As part of the negotiated rulemaking process, an agency may use the services of a convener to assist by publishing a preliminary report identifying stakeholders who will be significantly affected by a proposed rule, discussing issues

of concern, and ascertaining whether establishment of a negotiated rulemaking committee is feasible and appropriate for the rulemaking under consideration.³

As a threshold matter, an agency may use negotiated rulemaking if it is in the public interest, which is evaluated on a case-by-case basis by considering a number of factors.⁴ While the DOT has used negotiated rulemaking before,⁵ it generally has relied on traditional notice-and-comment rulemaking. On December 7, 2015, the DOT announced its intent to explore the feasibility of conducting a negotiated rulemaking concerning accommodations for air travelers with disabilities. The DOT selected Richard W. Parker,⁶ acting as Convener, to assist the DOT in making this threshold determination, specifically the likelihood of achieving consensus on the following six topics:

1. Whether to require the availability of the same in-flight entertainment (IFE) options for passengers with disabilities as are already available to able-bodied passengers;
2. Whether to require carriers to provide greater access to in-flight medical oxygen for passengers with a demonstrable need, consistent with federal safety and security requirements;
3. The determination of an appropriate definition of "service animal" in the specific context of air transportation and the establishment of safeguards necessary to reduce the likelihood that passengers traveling with pets may falsely claim that their pets are emotional support service animals;
4. The feasibility of requiring accessible lavatories on new single-aisle aircraft;
5. Whether premium economy should be treated as a separate class of service from standard economy given that airlines are currently required to provide seating accommodations to passengers with disabilities within the same class of service; and
6. Whether to require airlines to report annually to the DOT the number of requests for disability assistance received and the time period within which wheelchair assistance is provided to passengers with disabilities.⁷

The Convener's Report

On February 8, 2016, Parker, as part of the initial evaluation process, released his Convener's Report analyzing the potential to achieve consensus on the six proposed issues utilizing the negotiated

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rulemaking process,⁸ and the feasibility of developing new rules related to air transportation of passengers with disabilities using negotiated rulemaking. His report analyzed each of the six topics and examined how negotiated rulemaking could be beneficial or detrimental to the process of developing new regulations.

Challenges in Using Negotiated Rulemaking under Part 382

As noted in Parker's report, the DOT's proposal to use negotiated rulemaking raises important questions and faces numerous challenges. By far the most significant challenge is the potential inability of stakeholders to achieve consensus on one or more of the proposed issues.⁹ Prior to publishing his report, Parker convened a preliminary committee of 45 stakeholders representing the DOT, domestic airlines, and other interest groups to acknowledge and understand the various parties' views on industry-related regulatory activities. Despite possible challenges raised by group dynamics between industry stakeholders and DOT agency culture, and whether such interactions would allow for productive negotiations in the part 382 context, Parker concluded that the prospects for reaching consensus depended heavily on the specifics of each issue.

Although a vast majority of stakeholders interviewed indicated a general willingness to participate in the negotiated rulemaking process, Parker ultimately recommended the establishment of individual working groups to discuss and independently evaluate the potential for consensus on each issue due to the "extraordinary heterogeneity" of the matters involved.¹⁰ The variety of issues considered by the committee also included general legal challenges beyond the scope of the immediate rule, such as the airlines' concerns with the DOT's potential jurisdictional overreach in attempting to regulate IFE technology utilized in a variety of contexts beyond aviation. Parker concluded that such issues were likely to pose challenges due to the unwillingness of industry stakeholders to accept regulation from the DOT given these limitations.

Issues Where Consensus May Be Achievable

Parker recommended the use of negotiated rulemaking to consider three issues on which he believed participants could reach a consensus: (1) determining the appropriate definition of a service animal; (2) establishing safeguards against passengers falsely claiming pets traveling with them are service animals; and (3) ascertaining appropriate ways in which carriers may attempt to reduce passenger abuse of wheelchair service.

Parker determined that the service animal definition issue would be a suitable topic for the negotiated rulemaking process because the DOT and industry stakeholders appeared to be in agreement as to the necessity and justification for new regulations on the

issue. Parker attributed this potential for consensus primarily to the industry's willingness to adopt a new standard in light of Department of Justice (DOJ) precedent under the Americans with Disabilities Act (ADA) and DOT precedent under the Air Carrier Access Act (ACAA).¹¹ Although Parker observed general dissatisfaction with the status quo and the potential for abuse created by the current ACAA standard, he noted that some participants were not willing to abandon the ACAA approach because it is specifically tailored to the air transportation environment.¹² Therefore, in Parker's opinion, the negotiated rulemaking process would be ideal in this context because it would provide regulators and stakeholders a platform by which they could collaborate to construct a rule adopting the positive attributes of the ADA standard (which is unanimously viewed as offering superior guidance) but suitably tailored to the aviation context.

Issues Where Consensus May Be Difficult to Achieve

Parker found that other topics might be more challenging to address. Regarding IFE, Parker believed that industry representatives may argue that requiring installation of accessible IFE could fall outside the scope of the DOT's jurisdiction to regulate air transportation, thereby potentially rendering the issue too complicated or contentious for resolution via negotiated rulemaking.¹³ The Convener's Report also identified potential challenges as to the necessity of a rule concerning IFE by suggesting carrier adoption of a "bring your own device" policy that would offer hearing- or vision-impaired passengers the option to stream their own content using in-flight Wi-Fi services in whatever captioned or video-described format necessary—offering a practical solution to the problem without the need for government intervention.¹⁴ However, Parker also observed that as long as carriers offer and charge passengers for IFE services, either separately or as part of the ticket price, such practices remain discriminatory as long as passengers with disabilities remain unable to use carrier-supplied IFE until complete accessibility is achieved.¹⁵

Similarly, Parker observed that those participating in the negotiated rulemaking process may also have trouble reaching a consensus on increasing passenger access to carrier-supplied in-flight medical oxygen.¹⁶ Under the current regulatory framework, carriers are not required to provide in-flight medical oxygen to passengers with disabilities, and many—especially foreign carriers—choose not to offer this service due to burdensome logistical issues associated with long-haul operations. Furthermore, this issue could face opposition related to deregulation, conflict with foreign laws, and concerns over the extraterritorial application of U.S. law to foreign air carrier operations.

Of all the topics considered, Parker found that installation of accessible restrooms on single-aisle

aircraft posed the biggest challenge to reaching consensus on a unified rule.¹⁷ As applied to wide-body aircraft, the rule does not specify precisely what is meant by “accessible,” but does state that an accessible lavatory must “permit a qualified individual with a disability to enter, maneuver within as necessary to use all lavatory facilities, and leave, by means of the aircraft’s on-board wheelchair.”¹⁸ “Accessible” lavatories on single-aisle aircraft are not required under the current regulatory framework, and some carriers, especially ultra-low-cost and domestic carriers whose operations are heavily reliant on single-aisle aircraft, will likely challenge any data provided by the DOT to justify such a requirement. Moreover, adding an accessible lavatory would be enormously expensive for operators of single-aisle aircraft because in most cases it requires a significant cabin retrofit and frequently (depending on the aircraft and its configuration) results in the loss of at least one row of seats. The costs associated with these retrofits and loss of seats would be passed on to consumers in the form of increased ticket prices, rendering the benefits of this requirement potentially difficult for the DOT to justify in the face of the costs involved and the lack of consensus on the issue. At a minimum, Parker reasoned, such costs would have to be factored into a cost/benefit analysis of any proposed rule.

The Risk of Delay due to Negotiated Rulemaking

A final consideration addressed in the Convener’s Report was whether the negotiated rulemaking process could be completed in a timely manner. It is axiomatic that in a dynamic, innovative industry such as aviation, government regulation can inhibit innovation and the introduction of new services that benefit consumers. As Parker noted, implementation of notice-and-comment rulemaking in the context of air travel by passengers with disabilities has been a protracted endeavor filled with uncertainty—much to the industry’s detriment. Like notice-and-comment rulemaking, the negotiated rulemaking process can sometimes take years to complete, and does not guarantee success.

Based on the DOT’s prior regulation in this area, Parker warned that a negotiated rulemaking process to address disability-related issues could take years to finalize—assuming the parties to the negotiation could even reach agreement. In an industry that rewards companies that are quick to act, this disadvantage could damage the potential of reaching consensus because industry representatives would likely become concerned over the duration of a negotiated rulemaking. However, in assessing whether a negotiated rulemaking committee to address all issues could ultimately be successful, Parker opined that the exercise itself, even if it failed to reach consensus, would be useful in providing insights into the options available to the DOT, and in evaluating the costs and benefits of those options—thus

placing the DOT in a better position to decide in each case how best to act, or whether modification of the existing rules should be undertaken at all.¹⁹

The Convening Notice

In partial contravention of the recommendations included in the Convener’s Report, on April 7, 2016, the DOT released a notice of intent to convene a negotiated rulemaking committee to negotiate and develop proposed amendments to the DOT’s disability regulations on three issues: (1) whether to require accessible IFE and strengthen accessibility requirements for other in-flight communications; (2) whether to require an accessible lavatory on new single-aisle aircraft over a certain size; and (3) whether to amend the definition of “service animals” that may accompany passengers with a disability on a flight. Thus, the DOT endorsed the use of negotiated rulemaking for consideration of two of three issues Parker specifically advised the DOT *against*—while reserving the issues of supplemental medical oxygen, seating accommodations, and carrier reporting of disability service requests for a subsequent rulemaking or other action.²⁰

Despite warnings in the Convener’s Report that the contentious and complex nature of both the IFE and lavatory access issues could undermine consensus in a negotiated rulemaking, the DOT justified its decision by citing the recommendations in the Convener’s Report, nearly 90 comments received, and statutory factors included in the Negotiated Rulemaking Act. In terms of implementation, the DOT convened the Accessible Air Transportation (ACCESS) Advisory Committee in May 2016.²¹ The ACCESS Advisory Committee consists of stakeholders from the DOT, domestic and foreign airlines, disability and consumer advocacy groups, professional associations, service animal advocacy groups, aircraft manufacturers, IFE service providers, and academic institutions—for a total of 27 committee members. The ACCESS Advisory Committee will meet for two days each month through October 2016 in Washington, D.C., and will be open to the public, except for intermittent “working group” meetings of noncommittee member consultants and representatives, which will address specific issues.

Conclusion

While certain to face challenges, the DOT’s use of the negotiated rulemaking process in the context of part 382 is a worthy alternative to traditional notice-and-comment rulemaking, provided it is done in a manner that promotes collaboration. Taking into consideration the current regulatory framework and the DOT’s enforcement posture regarding customer protection issues, negotiated rulemaking could be used as a tool to develop new rules that are thoughtful, balanced, and beneficial to passengers with disabilities, while also reflecting a realistic approach to the costs and complexities of airline operations. Nonetheless, the DOT’s decision to pursue negotiated rulemaking

for two of the most contentious and potentially complex issues—contrary to the recommendation of its own appointed Convener—is problematic and could jeopardize the success of the negotiated rulemaking process.

Endnotes

1. See, e.g., JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (ABA 5th ed. 2012).

2. 5 U.S.C. § 565(a)(1). If, however, the selected committee does not reach a consensus on the proposed rule, it may transmit a report specifying areas in which consensus could be reached. *Id.* § 566(f).

3. *Id.* § 563(b).

4. *Id.* § 563. Such factors include whether: (1) there is a need for a rule; (2) there are a limited number of identifiable interests that will be significantly affected by the rule; (3) there is a reasonable likelihood that the rulemaking committee can reach a consensus within a fixed period of time; and (4) the process will not unreasonably delay notice of the proposed rulemaking and issuance of the final rule.

5. For instance, in 1990 the DOT attempted to use negotiated rulemaking to develop its first set of regulations implementing the Air Carrier Access Act of 1986, 49 U.S.C. § 41705.

6. Richard W. Parker is a Professor of Law at the University of Connecticut School of Law and the Policy Director for the Center for Energy and Environmental Law in Hartford, Connecticut. He teaches courses in administrative law, regulation, environmental law, the legislative process, and trade and the environment. Parker previously served as Facilitator for a successful DOT negotiated rulemaking proceeding concerning issues for the Federal Motor Carrier Safety Administration, and in assisting the U.S. Department of Energy to develop new energy efficiency standards. He also has worked as a consultant to the European Commission as part of the Transatlantic Trade and Investment Partnership, and as an expert advisor on the U.S. Administrative Law Panel on Rulemaking Reform.

7. Nondiscrimination on the Basis of Disability in Air Travel; Consideration of Negotiated Rulemaking Process, 80 Fed. Reg. 75,953 (Dec. 7, 2015).

8. RICHARD W. PARKER, CONVENER, REPORT REGARDING THE FEASIBILITY OF A NEGOTIATED RULEMAKING ON SIX ISSUES INVOLVING AIR CARRIER ACCOMMODATIONS FOR AIR TRAVELERS WITH DISABILITIES 18 (2016) [hereinafter CONVENER'S REPORT].

9. When the DOT used negotiated rulemaking for the original part 382 rulemaking, it failed to produce a stakeholder consensus. The DOT's decision to defer final action in 1990 was based largely on the inability of the committee convened to reach consensus using the negotiated rulemaking process. Julia R. Beechinor, Negotiated Rulemaking: A Study of State Agency Use and Public Administrators' Opinions 30–31 (1998) (unpublished applied research project, Southwest Texas State University) (citing 55 Fed. Reg. 12,341 (Apr. 3, 1990)), <https://digital.library.txstate.edu/bitstream/handle/10877/3600/fulltext.pdf?sequence=1>.

10. CONVENER'S REPORT, *supra* note 8, at 2.

11. DOJ regulations implementing the ADA define a service animal as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The work or tasks performed by a service animal must be directly related to the individual's disability.” 28 C.F.R. § 36.104. The ACAA, meanwhile, defines a service animal as “any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability. If the animal meets this definition, it is considered a service animal regardless of whether it has been licensed or certified by a state or local government.” Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance; Nondiscrimination on the Basis of Handicap in Air Travel, 61 Fed. Reg. 56,409, 56,420 (Nov. 1, 1996).

12. CONVENER'S REPORT, *supra* note 8, at 5.

13. *Id.* at 6.

14. *Id.* at 6–7.

15. *Id.* at 7.

16. *Id.* at 18.

17. *Id.* at 4.

18. 14 C.F.R. § 382.63(a).

19. CONVENER'S REPORT, *supra* note 8, at 9.

20. Nondiscrimination on the Basis of Disability in Air Travel; Establishment of a Negotiated Rulemaking Committee, 81 Fed. Reg. 20,265 (Apr. 7, 2016) (to be codified at 14 C.F.R. pt. 382).

21. Nondiscrimination on the Basis of Disability in Air Travel; Negotiated Rulemaking Committee Membership and First Meeting, 81 Fed. Reg. 26,178 (May 2, 2016).