

May 2021 Aviation Regulatory Update

By Evelyn D. Sahr, Drew M. Derco and Andrew Orr

FEDERAL APPEALS COURT RULES IN FAVOR OF REALLOCATING SLOTS AT NEWARK

On May 21, 2021, the U.S. Court of Appeals for the D.C. Circuit issued a decision in the case of *Spirit Airlines v. DOT*, finding that the FAA should have reallocated peak-period flight authorizations (i.e. slots) previously held by Southwest Airlines when the airline stopped serving Newark Liberty International Airport. Following a decision by Southwest Airlines in 2019 to leave Newark Airport, the FAA announced that it would continue its existing approval policy for the next six-month period, meaning the FAA would not approve new flights in time slots that exceeded established scheduling limits, but its approvals would still grandfather certain slots approved in the previous year, including those slots previously held by Southwest. Spirit challenged this decision by the FAA, arguing that it was arbitrary and capricious because the FAA improperly failed to: i) consider the effect on competition; ii) consider less burdensome alternatives; and iii) support its decision with substantial evidence. The FAA defended itself, arguing that its decision was unreviewable because it was not final agency action. The court found that FAA's decision was indeed a final agency action because it prevented Spirit from operating as many peak-period flights as it would otherwise have done in the Summer 2020 scheduling season. The court then determined that the FAA's decision was arbitrary and capricious because the agency disregarded warnings about the effect of its decision on competition at Newark. The court pointed to the fact that the Department of Justice, the Port Authority of New York and New Jersey, and Spirit all complained that the FAA's decision would cause substantial harm to competition and hence passengers at Newark, and FAA seemingly ignored these complaints. As a result, the court vacated the FAA's decision to retire the peak-period flight authorizations previously held by Southwest. Regarding next steps, FAA will now need to show that it has adequately analyzed what effects the loss of Southwest's slots will have on traffic at EWR, and potentially hold a delay reduction meeting with carriers at Newark prior to making a new determination on how to resolve the issue.

FAA COMPLETES RULE ESTABLISHING PILOT RECORDS DATABASE

On March 26, 2021, the FAA announced, but has not yet published, a final rule, [available here](#), finalizing regulations for the use of an electronic Pilot Records Database (PRD) and requirements for air carriers and other operators to share pilot records in the PRD. The PRD is intended to serve as a repository for pilot records and will contain records from a pilot's current and former employers, as well as the FAA. This final rule requires "reporting entities", which includes all 14 CFR part 119 certificate holders, fractional ownership programs, persons holding a letter of authorization (LOA) to conduct air tour operations under § 91.147, persons conducting certain operations under part 91 or part 125 (referenced in the rule as "corporate flight departments" or "corporate operators"), and governmental entities conducting public aircraft operations (PAO) to report pilot records to the PRD. The rule then requires the same reporting entities to review PRD records prior to allowing an individual to begin service as a pilot. Important is the inclusion of "corporate flight departments", a term the FAA uses to describe operators of two or more aircraft conducting operations in furtherance of or incidental to a business,

solely pursuant to the general operating and flight rules in part 91 or operating aircraft pursuant to a Letter of Deviation Authority issued under § 125.3.

It is also important to note under the new rule potential employers cannot search the PRD indiscriminately, as an operator that wishes to view records can only see a pilot's record if the pilot has specifically granted consent to that hiring employer. Additionally, when reviewing PRD records, potential employers will only be provided specific data elements, in contrast to current practice under Pilot Record Improvement Act, in which pilot records are exchanged in their entirety.

The rule will go into effect in a number of stages; 90 days after publication of the rule reporting entities can begin submitting applications for PRD access; 180 days after publication, reporting entities can begin using the PRD for review of records; one year after publication entities must begin reporting current pilot records, historical records, and reviewing operator records in the PRD; two years after publication entities must complete historical record reporting for records dating on or after January 1, 2015; and three years after publication compliance with PRIA will no longer be available as an alternative to PRD and full compliance with PRD will be required.

DEPARTMENT OF TRANSPORTATION ISSUES MODIFICATION TO TARMAC DELAY RULE

On May 3, 2021, the Department of Transportation published an update on the final rule to modify the tarmac delay rule and obligations that U.S. and foreign air carriers must follow. Specifically, the new final rule includes requirements related to tarmac delays and to conform carrier obligations related to departure delays with the changes made to the Federal Aviation Administration Extension, Safety, and Security Act of 2016. The new rule includes the following changes:

- **New Determination of When the Clock Stops After an Aircraft Leaves the Gate.** Previously the clock stopped when the FAA control tower or airport authority approved a carrier's request to return to a suitable disembarkation point. Now however, the clock stops as soon as a carrier submits its request to return to a suitable disembarkation point to the FAA control tower or airport.
- **New Calculation Before an Aircraft Leaves the Gate -- Clock Does Not Start Until Passengers No Longer Have the Opportunity to Deplane.** Under the old rule, during a departure delay, the clock started as soon as the main aircraft door was closed, even if the aircraft had not left the gate. The new rule still allows the clock to start as soon as the main aircraft door is closed, but now if a carrier can show that passengers on board the aircraft had the opportunity to deplane, even when the doors were closed, then the clock does not start until passengers no longer have the opportunity to deplane. Evidence that the carrier made announcements that deplaning was possible are sufficient to show the opportunity existed.
- **Tarmac Delay Reporting Only Required for Delays in Excess of Four (4) Hours.** Under the previous rule, U.S. and foreign air carriers were required to submit a BTS Form 244 to DOT for all delays in excess of three (3) hours.
- **Carriers No Longer Have to Retain Records Related to Delays in Excess of Three (3) Hours for Two Years.** Under the new rule, a carrier must submit a written report describing the excessive tarmac delay and its resolution, including other descriptive information of the flight and delay. These reports are due within 30 days of the date an excessive tarmac delay occurs.
- **Carriers Not Required to Update Passengers on Tarmac Delays and Flight Status Beyond Providing an Initial Notice at the 30-Minute Mark.** Under the old rule, a carrier was required to provide passengers with tarmac delay notifications on their flight's status and the cause of the delay every 30 minutes. Under the new rule, carriers will only be required to give an initial notice at the 30-minute mark during a delay. DOT still encourages carriers to keep passengers informed as appropriate however.

- **Providing Updates Every 30 Minutes of the Opportunity to Deplane No Longer Required.** Carriers are now required to provide passengers with a timely notification that they have the opportunity to deplane each time the opportunity exists at a suitable disembarkation point, e.g., when the aircraft reaches a hardstand or returns to the gate and the opportunity to deplane exists.
- **Carriers Must Provide Adequate Food and Water No Later Than Two (2) Hours After the Aircraft Door Closes and Passengers Can No Longer Deplane.** Under the previous rule, carriers had to provide adequate food and water no later than two hours after the aircraft left the gate (in the case of a departure) or touched down (in the case of an arrival) if the aircraft remained on the tarmac, unless the pilot-in-command determined that safety or security considerations preclude such service.

The publication of the final rule ends a process that spanned two years and began with the FAA's decision to create a new set of rules to define air carrier's responsibilities to passengers in the event of a tarmac delay. The final rule will go into effect on June 2, 2021. Carriers should update their tarmac delay plans to comply with the rule's new requirements. If you need assistance with this obligation, please let us know.

BOEING TO PAY AT LEAST \$17M TO SETTLE 737 ENFORCEMENT CASES

On May 27, 2021, FAA announced that they had reached a settlement agreement with Boeing, [available here](#), regarding the resolution of three enforcement cases related to issues discovered with the 737 MAX and NG aircraft. Per the settlement's terms, Boeing will pay a civil penalty of \$27.1M in resolution of the three enforcement cases, with \$17M of that civil penalty to be paid in the next 30 days. FAA has agreed to defer payment of the remaining \$10.1M of the civil penalty if Boeing completes the corrective actions listed in the settlement agreement, which include:

- Strengthening procedures to ensure that it does not install any parts that fail to conform to their approved design;
- Performing certain Safety Risk Management analyses;
- Revising its production procedures to enable the FAA to observe production rate readiness assessments, related data, and assessment results;
- Taking certain steps to reduce the chance that nonconforming parts are presented to FAA for airworthiness certification or a Certificate of Export; and
- Improving oversight of Boeing parts suppliers;

FAA DOWNGRADES MEXICO TO IASA CATEGORY 2

On May 25, 2021, the FAA announced that it has downgraded Mexico's International Aviation Safety Assessment (IASA) rating to Category 2 based on an October 2020 to February 2021 reassessment of Mexico's civil aviation authority (CAA). Under the IASA program, the FAA determines whether a country's CAA meets minimum ICAO safety standards. Based on the assessment, the FAA will either rate a country as Category 1, meaning the CAA meets ICAO standards, or Category 2, meaning the CAA has failed to meet one or more of those standards.

Air carriers with existing operations to the United States at the time of the downgrade to Category 2 status are permitted to continue operations at current levels under heightened FAA surveillance. However, expansion or changes in services to the United States by such carriers are not permitted while in Category 2, except that new services will be permitted if operated using aircraft wet-leased from a duly authorized and properly supervised U.S. carrier or a foreign air carrier from a Category 1 country that is authorized to serve the United States using its own aircraft.

The FAA has stated that it would work with Mexico's CAA to resolve the current discrepancies identified in the recent IASA audit, and to provide technical assistance and resources as they work to address these issues.

NEW YORK AND NEW JERSEY PASS HEALTHY TERMINALS ACTS

The original Healthy Terminals Act of 2020 (S.6266D), signed by Governor Cuomo in December 2020, provided that starting September 1, 2021, local government would begin calculating a prevailing wage for different classes of covered airport workers at in their locality for any airports in NY operating under the authority of PANYNJ. Then in March 2021, Cuomo signed the Healthy Terminals Act of 2021 (S.4001), which further amended the labor law in relation to airport workers, but repealed certain provisions of the "Healthy Terminals Act of 2020". Now, the law appears only to apply to JFK and LGA, instead of any airport under PANYNJ's authority. Additionally, the new law also requires airport employers to submit a sworn statement to the Commissioner of Labor with the following information:

- The total number of workers employed by the employer at a covered airport location to perform cleaning and related services, security related services, in terminal and passenger handling services, airline catering, or airport lounge services, at the covered airport location on December 30, 2020;
- The number equal to 80% of the total number of employees above (as the December 30, 2020 benchmark); and
- An affirmation that the employer will ensure that the number of covered airport workers it employs at a covered airport location between July 1, 2021 and December 31, 2022 is no less than the December 30, 2020 benchmark;

Following New York's lead, on April 29, 2021, Governor Murphy of New Jersey signed the NJ Healthy Terminals Act which also created new minimum wage and benefits requirements for certain Newark Liberty International Airport (EWR) and Newark Liberty International Train Station workers, and goes into effect on September 1, 2021. Under the NJ law, every covered airport or related located employer must pay a covered airport or related location worker the applicable prevailing wage for that worker.

We will continue to provide updates as these laws further develop, and please contact us if you have any further inquiries concerning compliance under either the NY or NJ law.

DOT ORDER REQUESTS ADDITIONAL INFORMATION REGARDING DELTA AND LATAM ANTITRUST IMMUNITY APPLICATION

On May 25, 2021, DOT issued an Order (2021-5-15) requesting additional information from Delta Air Lines, Inc. (Delta) and LATAM Group S.A. (LATAM) in regards to their joint application for antitrust immunity. Delta and LATAM originally filed a joint application for antitrust immunity in June 2020 regarding a joint venture agreement to combine their networks between North and South America. In July 2020, DOT suspended the procedural schedule to allow additional time to examine the record and to determine if it was substantially complete. After additional documents were submitted by Delta and LATAM, DOT requested additional information from the parties in February 2021. After reviewing Delta and LATAM's application and supplemental documentation, DOT determined that further information was still required to continue the evaluation of the application, which included: i) Delta and LATAM's plans absent immunity; ii) impact of the COVID-19 pandemic on current and future operations; iii) relationships between Delta and LATAM's various affiliates; and iv) any updated plans available since the original filing. DOT also reminded Delta and LATAM of the importance of discussing the merits of the application on the public record and recommended against unnecessarily broad redactions of supplementary documents.

REVISIONS TO FAA CIVIL PENALTY AMOUNTS

On May 3, 2021, the Department of Transportation issued a final rule providing the 2021 inflation adjustments to civil penalty amounts that may be imposed for violations of certain DOT and FAA regulations. The most notable civil penalty adjustments at DOT and FAA are summarized in the chart below.

Description	Existing Penalty	New Penalty
General civil penalty for violations of certain aviation economic regulations and statutes	\$34,777	\$35,188
Violation of hazardous materials transportation law	\$83,439	\$84,425
Violation by an individual or small business concern related to the transportation of hazardous materials	\$13,910	\$14,074
Minimum penalty for violation of hazardous materials transportation law related to training	\$502	\$508
Maximum penalty for violation of hazardous materials transportation law related to training	\$83,439	\$84,425
Knowingly providing false information about alleged violation involving the special aircraft jurisdiction of the U.S.	\$24,252	\$24,539
Interference with cabin or flight crew	\$36,516	\$36,948
Violation of 51 U.S.C. 50901-50923, a regulation issued under these statutes, or any term or condition of a license or permit issued or transferred under these statutes.	\$244,391	\$247,280

For the full list of civil penalty adjustments, [please use this link](#). For further inquiries, please let us know.

DOT ISSUES ORDER REVOKING CERTIFICATE AUTHORITY OF SERVANT AIR

On May 20, 2020, DOT issued an order (2021-5-13) dismissing a Notice to Resume Operations filed by Servant Air, Inc. f/k/a Dynamic Aviation, Inc. (“Servant”) and revoking its interstate certificate for reasons of dormancy. Servant originally ceased operations in March 2017, but then filed a notice to resume interstate operations in Alaska in December 2017. Servant was found fit to resume operation in May 2018, and had one year to submit the necessary information to FAA to make its authority effective. When Servant failed to provide the required information, DOT issued an order revoking Servant’s certificate authority in December 2019. Servant subsequently filed a petition for review, seeking additional time to submit the required documents and make its authority effective, and in response DOT granted the request for additional time. Servant again failed to submit the required documentation by the new deadline, and after getting further time and opportunity to respond through September 2020, DOT review of the documents identified numerous deficiencies. As a result, DOT decided to dismiss Servant’s request to resume operation and revoked its air carrier certificate.

FAA PROPOSES CIVIL PENALTIES AGAINST TEN PASSENGERS FOR ALLEGEDLY INTERFERING WITH FLIGHT ATTENDANTS

The FAA issued four separate Press Releases on May 5th, 10th, 17th, and 24th in regards to fifteen instances in which passengers interfered with flight attendants on commercial flights. Federal law currently requires that passengers refrain from interfering with aircraft crew and strictly prohibits threatening to assault, or actually physically assaulting, aircraft crew or any other passengers on board an aircraft. The FAA has strictly enforced a zero-tolerance policy in these cases for several months.

- \$32,750 – A passenger allegedly failed to comply with multiple flight attendants' instructions to wear a facemask, threw an empty alcohol bottle that almost struck another passenger, threw food into the air, shouted obscenities at crewmembers, and grabbed and struck two different flight attendants.
- \$16,500 – A passenger allegedly refused to comply with two flight attendants' instructions to wear a facemask. The passenger then became combative and began using offensive language, and when asked to leave the plane, hit a flight attendant with his bags.
- \$9,000 – A passenger refused to comply with several requests to return to her seat during takeoff.
- \$9,000 – A passenger allegedly failed to comply with multiple flight attendants' instructions to wear a facemask and due to this, was removed from the plane.
- \$10,500 – A passenger repeatedly ignored flight attendants' instructions and then proceeded to become abusive to flight attendants who repeatedly instructed him to put on a facemask. At one point, while not wearing a mask, the passenger even coughed and blew his nose into a blanket, further disrupting crewmembers from their duties.
- \$9,000 – A passenger acted disruptively while boarding his flight by yelling, slamming overhead bins, and shouting profanities at crewmembers that included threats to harass a flight attendant. This passenger ended up being removed from the plane.
- \$52,000 - A passenger interfered by trying to open the cockpit door, repeatedly refusing to comply with crewmembers' instructions, and physically assaulting a flight attendant by striking him in the face and pushing him to the floor. The passenger then threatened a flight attendant while a group, which included another passenger, attempted to restrain him.
- \$27,000 – A passenger was accused of yelling and forcefully banging his hands on the seat in front of him, disturbing nearby passengers. The passenger then proceeded to yell that he was going to kill someone and that he had a bomb and was going to blow up the aircraft. The flight had to be diverted and the passenger was taken into police custody after the plane landed.
- \$18,500 – A passenger allegedly drank and continued to drink alcohol not provided by the airline, even after being told to stop by a flight attendant. The passenger also repeatedly removed his facemask and caused other disturbances that forced the flight attendants and pilots to be distracted from performing their duties.
- \$9,000 – A passenger allegedly refused to comply with a flight attendant's repeated instruction to wear a facemask. Later, the passenger walked to the front of the plane to use the lavatory and sat in the exit row because the lavatory was occupied. Then, when a flight attendant told the passenger she could not sit in the exit row, she got up, stood close to the flight attendant without wearing a facemask over her mouth and nose, and screamed at the flight attendant.
- \$15,000 – A passenger allegedly yelled obscenities at a flight attendant and followed him to the first-class section, then assaulted the flight attendant by hitting him with her body and almost pushing him into the lavatory. The plane was diverted by the captain and the passenger was removed from the aircraft.

- \$15,000 – A passenger allegedly drank his own alcohol and talked on his cell phone during the flight after flight attendants told him it was prohibited. After the flight attendant again told him those activities were not allowed, he repeatedly yelled at the flight attendant, distracting them from performing their duties.
- \$15,000 – A passenger allegedly pushed and/or shoved a flight attendant when flight attendants walked down the aisle to document which passengers were not wearing facemasks.
- \$10,500 – A passenger was allegedly not wearing his facemask or not wearing it so it covered his mouth and nose after the boarding door had closed and following multiple announcements about the requirement to wear facemasks. Flight attendants repeatedly instructed him to wear his facemask properly, and each time, the passenger refused to comply with the instructions and shouted profanities at the flight attendants. When gate agents, and eventually law enforcement, boarded the aircraft and asked the passenger to leave the aircraft, the passenger became combative and irate and loudly refused to get off.
- \$9,000 – A passenger allegedly refused a flight attendant instruction to pull his facemask up so it covered his nose. The flight attendant then gave the passenger a mask, and he threw it on the floor, and said he would not comply with the facemask policy. The cabin crew alerted the captain about the passenger's behavior, and the captain arranged for law enforcement to meet the aircraft when it arrived in Houston.

Passengers have 30 days after receiving an FAA enforcement letter to respond to the agency.