

October 2020 Aviation Regulatory Update

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

DOT DENIES TWO PETITIONS FOR MANDATORY MASK REQUIREMENTS

On October 5, 2020, the United States Department of Transportation (DOT or the Department) summarily denied two petitions requesting that DOT issue rules mandating the use of face masks in commercial transportation.

The first petition was filed by Flyers Rights Education Fund and requested that DOT issue an interim rule mandating that airlines and airport operators require all persons to wear face masks and allowing airport operators and airlines to enforce this rule by refusing to transport individuals or removing them from airport property. The second petition came from the Transportation Trades Department of the AFL-CIO and requested that DOT promulgate a rule mandating all passengers traveling within DOT-regulated commercial transportation wear face masks or coverings.

In denying both petitions, DOT stated it shared the petitioners' concerns about the COVID-19 pandemic and the health and welfare of the traveling public and frontline transportation workers. However, DOT also stated its belief that "there should be no more regulations than necessary" and emphasized the availability of non-regulatory solutions. For example, DOT highlighted the fact that airlines and airport operators have already adopted policies requiring face mask use by passengers. DOT did however indicate it will continue to monitor guidelines published by the CDC and their incorporation by transportation stakeholders.

PANYNJ TO IMPOSE \$50 FINE FOR FAILURE TO WEAR MASK IN PORT FACILITIES

On October 27, 2020, the Port Authority of New York and New Jersey (PANYNJ) announced that it will begin imposing a fine for failure to wear a mask or face covering appropriately in Port Authority facilities. These PANYNJ facilities include airport terminals, PATH stations and trains, AirTrain stations and trains, Midtown Bus Terminal, GWB Bus Station and Oculus. Starting Monday, November 2, 2020, travelers who fail to properly wear a face covering could be liable for the new recommended fine of \$50.

FAA PANEL RECOMMENDS SIMULATOR TRAINING FOR BOEING 737 MAX BEFORE RETURNING THE MODEL TO COMMERCIAL SERVICE IN THE NEAR TERM

On October 6, 2020, the Federal Aviation Administration (FAA) published the draft Flight Standardization Board (FSB) report, [available here](#), on new proposed pilot training requirements for the Boeing 737 MAX. The FSB report incorporated findings from the Joint Operations Evaluation Board (JOEB), comprised of civil aviation authorities from the United States, Canada, Brazil, and the European Union, which recently met for nine days. In its report, the FSB states that 737 MAX pilots will now be required to undergo simulator training for the specific 737 MAX systems, and complete new training requirements for the Maneuvering Characteristics Augmentation System (MCAS), Autopilot Flight Director System (AFDS) enhancements, and additional Special Emphasis Training.

The FAA is accepting comments on the FSB report until November 2, 2020, after which a final report will be issued addressing any comments received. Following that final report, the FAA is expecting to issue a final order which will rescind the 737 MAX grounding order, and a Continued Airworthiness Notification to the International Community, advising operators of the required corrective actions that must be taken before these aircraft may re-enter commercial service.

EU COUNCIL ADOPTS NEW EC RECOMMENDATION IN RESPONSE TO THE COVID-19 PANDEMIC

On October 13, 2020, the Council of the European Union adopted a new recommendation from the European Commission (EC) on the restriction of free movement by EU member states in response to the COVID-19 pandemic. Under the adopted recommendations, every week member states provide the European Centre for Disease Prevention and Control (ECDC) with the data available on the following criteria:

- number of newly notified cases per 100 000 population in the last 14 days
- number of tests per 100 000 population carried out in the last week (testing rate)
- percentage of positive tests carried out in the last week (test positivity rate)

Based on this data, the ECDC then publishes a weekly map of EU member states, broken down by regions, or common maps, to support member states in their decision-making. On the basis of these “common maps”, the member states can then decide whether to introduce certain restrictions, such as quarantines or tests, on travelers coming from other areas. It should be noted that member states have agreed that there will be no restrictions on travelers coming from what have been deemed to be ‘green’ regions. Additionally, member states have agreed that persons travelling from an area classified other than ‘green’ could be asked to undergo quarantine and/or undergo a test for COVID-19 infection after arrival. Each member state would be free to decide on restrictions applicable to each colored region.

Additionally, on October 28, 2020, the EC published a number of documents related to the EU response measures to the resurgence of the pandemic with regard to transportation:

- The EC’s “Communication on additional COVID-19 response measures” set out the next steps in key areas to reinforce the EU’s response to the pandemic, which included: (1) Improving the flow of information to allow informed decision-making; (2) Establishing more effective and rapid testing (see recommendation presented below); (3) Making full use of contact tracing and warning apps across borders; (4) Effective vaccination; (5) Effective communication to citizens; (6) Securing essential supplies; and (7) Facilitating safe travel.
- The EC’s “Recommendation on COVID-19 testing strategies, including the use of rapid antigen tests” included recommendations that EU Member States urgently create a framework for evaluation, approval and mutual recognition of rapid tests and mutual recognition of tests results.
- The EC’s “Guidance on persons exempted from the temporary restriction on non-essential travel to the EU as regards the implementation of Council Recommendation 2020/912 of 30 June” provided additional guidance on the categories of third country persons whose travel is considered essential and who are therefore exempted from restrictions, specifically with regard to transport personnel, passengers in transit through the EU, and passengers travelling for imperative family reasons.

NINTH CIRCUIT AFFIRMS DISMISSAL OF CUSTOMER’S CLAIMS ARISING FROM MALWARE ATTACK

On July 17, 2020, the U.S. Court of Appeals for the 9th Circuit affirmed the dismissal of a class action lawsuit filed against Delta Airlines and 24[7] AI, Inc. The case arose from a 2017 instance in which hackers gained access to the personal data of Delta customers who booked flights through Delta’s website. The plaintiff then filed a putative class action against Delta and [24]7.AI, Inc., a technology company that provided services to Delta, alleging claims for (1) breach of contract

as third-party beneficiary; (2) breach of contract against Delta; (3) unjust enrichment against Delta; (4) bailment against Delta; (5) violation of the Stored Communications Act (SCA), 18 U.S.C. §§ 2701 et seq., against [24]7; and (6) violation of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. §§ 1030 et seq., against both Defendants.?

In 2019, the U.S. District Court for the Central District of California dismissed the claim, with leave to amend, on the grounds that the plaintiff's claims were either insufficiently pled or preempted by the Airline Deregulation Act (ADA).?The District Court found that the plaintiff's breach of contract claims, as third-party beneficiaries to a contract between Delta and [24]7 or an implied contract, was preempted by the ADA. The District Court dismissed the unjust enrichment claim as preempted by the ADA, because asserting that claim required imposing a state-created obligation that outside the parties' private agreement. Regarding the plaintiff's bailment, SCA and CFAA claims, the District Court found that the plaintiff had not pled sufficient facts to plausibly support those allegations. The Court of Appeals affirmed the district court's dismissal, finding that the "thorough and well-written orders of the district court correctly articulate[d] and appl[ied] the law to the factual allegations of this case".

EMIRATES FINED \$400,000 FOR OPERATING FLIGHTS IN FAA-PROHIBITED AIRSPACE

On October 1, 2020, the DOT issued a consent order, [available here](#), fining Emirates for operating flights carrying the JetBlue Airways designator code in prohibited airspace. The airline was ordered to cease and desist from future similar violations. DOT alleges that for 19 days in July 2019, Emirates operated flights carrying the B6 code over parts of Iranian airspace in violation of a Notice to Airmen (NOTAM) prohibiting U.S. airmen and operators from conducting flight operations in the overwater area of the Tehran Flight Information Region and above the Persian Gulf and the Gulf of Oman due to heightened military activities and increased political tensions in the region. DOT alleges that by carrying the B6 code on these flights in prohibited airspace, Emirates violated the conditions of its authority to operate and engaged in passenger operations to and from the United States without proper DOT authority.

FAA SENDS TWO UAS RULES TO OMB FOR FINAL REVIEW

On October 5, 2020, the FAA sent two draft unmanned aircraft system (UAS) rules to the Office of Management and Budget (OMB) for final review prior to publishing them in the Federal Register. The two rules involve the remote identification of UAS and the operation of UAS over people. Under the current UAS regulations contained in 14 CFR Part 107, UAS operators must continually operate the UAS within line of sight and are prohibited from operating the UAS over people. The remote identification rule, which has been sought by U.S. law enforcement, is likely to mandate that all UAS transmit a unique identifier, much like an aircraft transponder, so that authorities may locate and communicate with UAS operators conducting flights in prohibited areas. The second rule is likely to revise Part 107 to allow certain operations over people. OMB will have 90 days to review the draft rules, and FAA has said that both rules will likely be ready for publication in the Federal Register in December.

FAA ISSUES EXTENSION OF MINIMUM SLOT USAGE REQUIREMENTS

On October 2, 2020, the FAA issued an extension of limited waiver, [available here](#), of the minimum slot usage requirements through March 27, 2021. It applies to JFK, LGA, and DCA. Additionally, the FAA also extended the COVID-19-related policy for prioritizing flights canceled at designated International Air Transport Association (IATA) Level 2 airports in the United States for purposes of establishing a carrier's operational baseline in the next corresponding scheduling season through March 27, 2021. The FAA noted that the relief announced in this notice is currently only available for the Winter 2020/2021 scheduling season, which runs from October 25, 2020 through March 27, 2021. Additionally, the FAA is amending the return deadline to a simple, rolling four-week time period beginning October 15, 2020, for purposes of planned operations four weeks from that date on November 12, 2020. The four-week return

period will not apply to slots for the period from October 28, 2020 through November 11, 2020. Usage will be waived for COVID-19 cancellations during this period consistent with the other conditions applied to the waiver. Under this waiver, the conditions applicable to Level 2 airports are as follows:

(1) All schedules as initially submitted by carriers and approved by FAA and not intended to be operated must be returned at least four weeks prior to the date of the FAA-approved operation to allow other carriers an opportunity to operate these times on an ad hoc basis without historic precedence. Compliance with this condition is required for operations scheduled from November 12 through the rest of the season; therefore, carriers should begin notifying FAA of returns or other schedule adjustments on October 15. Times for previously approved flights for the period from October 28, 2020 through November 11, 2020 are not subject to this condition.

(2) The priority for FAA schedules approved for Winter 2020/2021 does not apply to net-newly approved operations for initial use during the Winter 2020/2021 season. New approved times would remain eligible for priority consideration in Winter 2021/2022 if actually operated in Winter 2020/2021 according to established processes.

PRINCESS CRUISE LINE SEEKS DISMISSAL OF COVID-19 DEATH SUIT

On October 1, 2020, Princess Cruise Lines filed a motion to dismiss a negligence lawsuit brought by the widow and daughter of a deceased passenger. The plaintiffs allege that the deceased individual contracted COVID-19 on a Ruby Princess cruise from Australia to New Zealand, then died after returning to Los Angeles. Princess Cruise Lines asserts that the plaintiffs' claims are preempted by a maritime law known as the Death on the High Seas Act (DOHSA) which covers deaths from an injury that occurred three nautical miles from shore. Princess asserts that while the deceased individual died on land in the U.S., DOHSA preempts the negligence claims because the entirety of the cruise trip occurred between Australia and New Zealand and the individual must have contracted COVID-19 offshore. As support for the dismissal, Princess cited *Maa v. Carnival Corp. & PLC*, another claim in California federal court involving the death of an individual alleged to have caught COVID-19 on a cruise between Buenos Aires and Barbados. In that case, the court dismissed the claims on the grounds that DOHSA applied even when the individual died on land in the United States.

U.S. CHAMBER OF COMMERCE OPPOSES BANS ON CHINESE MADE UAS

In October 2020, the U.S. Chamber of Commerce's Chamber Technology Engagement Center published a report, [available here](#), titled "Building the Foundation for the Future of Transportation," which partially focused on unmanned aircraft systems (UAS) and the Chamber's specific recommendations for the FAA and Congress in this area. One issue the Chamber raised was the recent push in Congress to impose country of origin restrictions on Chinese manufactured UAS and certain components, which would likely prohibit federal agencies from purchasing, operating, or funding Chinese-produced UAS and components, and would potentially also prohibit the operation of Chinese-manufactured UAS over federal lands. The Chamber opposes any such action by Congress, claiming that these actions will ultimately harm U.S. competitiveness for UAS, based on the adverse impact these policies would have on UAS supply chain and the many U.S. companies who rely on Chinese-produced UAS and components.

FAA PROPOSES \$464,300 CIVIL PENALTY AGAINST AMERICAN SOUTHEAST INFLATABLES AND OXYGEN, INC.

On October 16, 2020, the FAA proposed a \$464,300 civil penalty against American Southeast Inflatables and Oxygen, Inc., based on allegations that the company performed unauthorized and improper maintenance work on emergency equipment. The FAA alleges that between June 2018 and January 2019, the Miami-based company performed unauthorized and improper maintenance on two evacuation slides and one safety raft which were then installed on a

Boeing 737. The FAA further alleges that all three pieces of equipment then failed to work properly when the crew deployed them after the aircraft overran the end of the runway at Jacksonville Naval Air Station on May 3, 2019. The FAA also alleges that American Southeast performed unauthorized maintenance on an additional 41 emergency evacuation slides between December 2017 and May 2019. Furthermore, the FAA alleges the company failed to employ a sufficient number of employees with proper training and expertise to ensure maintenance was performed according to FAA regulations. The company has 30 days to respond to the FAA.

FAA PROPOSES \$57,000 PENALTY AGAINST MURFREESBORO AVIATION

On October 16, 2020, the FAA proposed a \$57,000 civil penalty against Murfreesboro Aviation based on allegations that the company failed to comply with FAA drug and alcohol testing requirements. The FAA alleges that between October 2018 and October 2019, Murfreesboro Aviation failed to conduct pre-employment drug tests and receive verified negative results before hiring or transferring the five employees into safety-sensitive positions, and further failed to include four of the five employees in random drug and alcohol testing pools. Murfreesboro Aviation has 30 days to respond to the agency.