Aviation Regulatory Update

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DOT ISSUES TENTATIVE DISMISSAL OF DELTA – AEROMEXICO APPLICATION TO RENEWAL GRANT OF ANTITRUST IMMUNITY

On January 26, 2024, the Department issued an order to show cause tentatively dismissing an application previously filed by JV partners Delta and Aeromexico seeking to renew their grant of antitrust immunity for their transborder joint venture. The two carriers first applied for antitrust immunity covering the joint venture in 2015. Immunity was granted in 2016, allowing them to launch new routes between the U.S. and Mexico and collaborate to set prices among other things. In awarding immunity DOT placed a number of conditions on the joint applicants, including slot divestitures at MEX and JFK airports and that immunity had a five-year limit. The Department settled on the five-year period for immunity after considering the Government of Mexico's efforts to build additional airports near MEX that would have provided additional capacity in the region. The Department determined that the five-year limit would provide flexibility to address competition and future market developments and therefore it was decided that the five-year period would be followed by a *de novo* review by the Department of the joint venture.

In tentatively deciding to dismiss the application, DOT relied heavily on the fact that recent actions by the Government of Mexico limiting capacity at MEX airport are "fundamentally out of compliance with the existing bilateral air service agreement and international norms governing capacity management at airports." DOT alleges that the Government of Mexico prohibited all-cargo operations from MEX and reduced capacity at MEX over the last three IATA traffic seasons. In communications with the Government of Mexico, DOT alleges it was told that no additional capacity would be added at MEX considering operational and technical limitations currently afflicting the airport. DOT also noted that "despite further formal engagement with the Government of Mexico, no progress has been made at this time on resolving core issues related to the implementation of the US-Mexico Air Transport Agreement." This is also the reason why DOT issued a Notice on July 31, 2023, suspending consideration for an antitrust immunity application from American carrier Allegiant and Mexican carrier Via Aerobus. DOT further noted that "the elements defined in Order 92-8-13 between the home countries of the Joint Applicants is the fundamental prerequisite needed to allow for consideration of an immunized alliance", which DOT ultimately found to be absent. Delta and Aeromexico are required to wind-down their joint venture which is tentatively scheduled to end at the end of the IATA traffic season on October 26, 2024. In order to minimize the impact on consumers, DOT requires that two carriers to submit a wind-down schedule to the Director of the Office of Aviation Analysis "specifying the timetable for termination of the immunized agreement." DOT requested that any interested parties submit objections or comments no later than 14 calendar days from the service date of the order, or by February 9, 2024.

AMERICAN SURVIVES CHALLENGE TO ITS FEDERAL TRADEMARK INFRINGEMENT LAWSUIT

On January 23, 2024, the U.S. District Court for the Northern District of Texas ("the Court") issued a decision in a case filed by American against GTT Travel ("GTT") alleging various causes of action for federal trademark infringement. After confirming American's possession of inherently distinctive, and thus legally protectable, trademarks, the Court

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outlined well-pleaded allegations that GTT misuses American's trademarks by holding itself out as an authorized agent of American. Specifically, American alleges that GTT uses its trademarks to fraudulently misrepresent itself to customers as an online travel agency operating on behalf of American. According to the Complaint, GTT's misuse of the trademarks misleads customers into believing that certain unauthorized commercial conduct by GTT, including excess charges and hidden ticket fees, are approved by American itself.

After GTT moved for partial dismissal against American for failure to state a claim, the Court concluded that American plausibly stated claims for trademark infringement, false designation of origin, and dilution under the Lanham Act. Importantly, the Court observed that the factual content pleaded by American allowed it to reasonably infer GTT's liability for the misconduct alleged under the Lanham Act. For example, the Court concluded that American adequately alleges that it could face reputational damage due to the deceptive and second-rate nature of the travel services offered by GTT and its sub-agents. The pleadings also allege that GTT's use of the trademarks induces a likelihood of confusion as to the source, affiliation, and sponsorship of the marks, warranting further factual development. The Court agreed and denied GTT's motions, reasoning that the detail GTT sought in its Rule 12(e) motion can be sought through the discovery process.

DOT RAISES MAXIMUM CIVIL PENALTY AMOUNT; ISSUES UPDATED CIVIL PENALTY GUIDELINES

The Department of Transportation ("DOT" or "the Department") recently issued a final rule announcing further adjustments to its civil penalty amounts for 2024. Importantly, under the adjustment, the new maximum civil penalty for violations of the aviation economic regulations has increased yet again, from $40,272 to $41,577. The adjustment also includes new Federal Aviation Administration ("FAA") civil penalty amounts. Some of the civil penalty adjustments for 2024 are included below, while a full listing is available here.

Office of the Secretary (OST) 2024 Adjustments

Penalty	Citation	Existing penalty	New penalty (existing penalty x 1.03241)
General civil penalty for violations of certain aviation economic regulations and statutes	49 U.S.C. 46301(a)(1)	$40,272	$41,577

Federal Aviation Administration (FAA) 2024 Adjustments

Penalty	Citation	Existing penalty	New penalty (existing penalty x 1.03241)
Violation of hazardous materials transportation law	49 U.S.C. 5123(a)(1)	$96,624	$99,756

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Penalty	Citation	Existing penalty	New penalty (existing penalty x 1.03241)
Violation of hazardous materials transportation law resulting in death, serious illness, severe injury, or substantial property destruction	49 U.S.C. 5123(a)(2)	$225,455	$232,762
Minimum penalty for violation of hazardous materials transportation law relating to training	49 U.S.C. 5123(a)(3)	$582	$601
Maximum penalty for violation of hazardous materials transportation law relating to training	49 U.S.C. 5123(a)(3)	$96,624	$99,756
Knowing presentation of a nonconforming aircraft for issuance of an initial airworthiness certificate by a production certificate holder	49 U.S.C. 44704(d)(3)(B)	$1,144,489	$1,181,592
Knowing failure by an applicant for or holder of a type certificate to submit safety critical information or include certain such information in an airplane flight manual or flight crew operating manual contrary to 49 U.S.C. 44704(e)(1)-(3)	49 U.S.C. 44704(e)(4)(A)	$1,144,489	$1,181,592
Physical or sexual assault or threat to physically or sexually assault crewmember or other individual on an aircraft, or action that poses an imminent threat to the safety of the aircraft or individuals on board	49 U.S.C. 46318	$42,287	$43,658

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DOT RELEASES AIR TRAVEL CONSUMER REPORT FOR OCTOBER 2023

On January 5, 2024, DOT released its Air Travel Consumer Report ("ATCR") for the month of October 2023. In addition to providing consumers with information on the quality of services provided by airlines, the ATCR also influences DOT's enforcement activities and rulemaking approach. The 633,349 flights operated in 2023 were 7.27% more than the 590,444 flights operated in October 2022. The on-time arrival rate for reporting airlines was up to 84.1 percent, from 80.3% in the previous month and 83.4% in October 2022. October 2023 featured a cancellation rate of 0.3 percent which was down from 1.2 percent in September 2023 and 0.8 percent in October 2022. Tarmac delays were similarly down. "In October 2023, airlines reported six tarmac delays of more than three hours on domestic flights, compared to 57 tarmac delays of more than three hours on domestic flights reported in September 2023. In October 2023, airlines reported zero tarmac delays of more than four hours on international flights, compared to six tarmac delay reported in September 2023."

JETBLUE MAY END MERGER DEAL WITH SPIRIT AFTER COURT RULING

On January 26, 2024, JetBlue filed a notice with the SEC stating it and Spirit may miss deadlines for "certain conditions of closing" that were relevant to the merger agreement between the two airlines. This notice follows the January 16, 2024, decision by a federal judge which blocked the $3.8 billion dollar merger between the two airlines. JetBlue also informed Spirit that "accordingly, the merger agreement may be terminable on and after January 28, 2024" as a result of the order from a governmental entity. Spirit responded to JetBlue's notice with its own filing, stating that "there is no basis for terminating the merger agreement." The injunction that blocked the merger was handed down after a month-long trial which featured lawsuits from the U.S. Department of Justice, Massachusetts, New York, California, Maryland, New Jersey, North Carolina, and the District of Colombia. The Court held that the merger would "substantially lessen competition in violation of the Clayton Act and would likely incentivize JetBlue further to abandon its roots as a maverick, low-cost carrier." Importantly, U.S. District Judge William Young reasoned that the merger would further consolidate an airline oligopoly and would likely incentivize JetBlue to abandon its low-cost carrier model once Spirit was eliminated from the marketplace. The merger would have created the fifth-largest U.S. carrier, behind American Airlines, Delta Air Line, United Airlines, and Southwest Airlines. The decision marks a rare victory for the United States Department of Justice ("DOJ") after several unsuccessful merger challenges in recent months. Antitrust regulators will likely look to Judge Young's decision when considering whether to challenge Alaska Air's proposed $1 billion deal to buy Hawaiian Airlines. In light of the Biden administration's continued scrutiny of mergers, especially those between airlines, the ruling forecasts turbulence ahead for any airline seeking to pursue merger activities.

LABOR DEPARTMENT UNVEILS FINAL INDEPENDENT CONTRACTOR RULE

On January 9, 2024, the U.S. Department of Labor ("DOL") released further information regarding its final rule addressing when employers can classify workers as independent contractors under federal labor law. The final version of the rule is set to take effect March 11, 2024, under the Fair Labor Standards Act and, among other things, "establishes a six-factor test for determining whether a worker is an employee or independent contractor." The six factor-test is non-exhaustive and considers: 1) Opportunity for profit or loss depending on managerial skill; 2) Investments by the worker and the potential employer; 3) Degree of permanence of the work relationship; 4) Degree of permanence of the work relationship; 5) Extent to which the work performed is an integral part of the business and; 6) Skill and initiative. The rule is set to replace a narrower test proposed by the previous administration which never went into effect.

All businesses who utilize independent contractors in the U.S. should review these factors as they may warrant employer-employee obligations. Please contact us if you have any questions regarding independent contractors qualifying as employees under the final rule.

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PFC REVENUES FINANCING PROJECTS AT NYC AREA AIRPORTS

On January 8, 2024, the Port Authority of New York and New Jersey (“PANYNJ”) announced plans to use passenger facility charge (“PFC”) revenue for three infrastructure projects at Newark Liberty International Airport (“EWR”), John F. Kennedy International Airport (“JFK”), and LaGuardia Airport (“LGA”). The FAA authorized a $4.50 collection level for the PANYNJ’s new application which requests $275,050,000 in PFC funding. Estimated charges at EWR will become effective on June 1, 2025, while estimated charges at JFK and LGA become effective on July 1, 2025, with all estimated charges set to expire on April 1, 2026.

U.S. CUSTOMS AND BOARDER PROTECTION UPDATES TRUSTED TRAVELER PROGRAMS WEBSITE

U.S. Customs and Boarder Protection (“CBP”) recently updated their Trusted Travelers Programs (“TTP”) website to now include the ability to accept updated documents. The TTP includes popular traveling programs such as TSA PreCheck, Global Entry, and others, which allow registered passengers to expedite the security, entry, and clearance portions of their travels. The updates to the website include more TTP topics on the portal which CBP hopes will reduce unscheduled visits to TTP Enrollment Centers, thereby allowing more efficient visits for passengers with scheduled visits. Passengers can also ask more directed questions regarding TTP applications through the website.

FEDERAL JUDGE DISMISSES NEGLIGENCE CLAIM AGAINST AMERICAN

On January 12, 2024, the United States District Court for the Central District of California (the “Court”) dismissed a negligence claim against American Airlines (“American”) related to a passenger’s injury while boarding. The injured passenger alleged that American was negligent when it failed to warn her about a reclined seat which obstructed her path while boarding. After noting that air carriers must ensure seats are upright during takeoff and landing, the Court distinguished boarding by explaining that air carriers are not required to guarantee upright seats during the boarding process. Furthermore, the Court held that American did not breach its duty of care because no federal safety regulations required warning the passenger about the reclined seat.

Additionally, while the passenger failed to properly assert in her complaint that American, as a common carrier, was strictly liable for her injuries, the Court nevertheless addressed the issue. Even if she had properly alleged a strict liability claim against American, the Court concluded that “common carrier status does not trigger strict liability” in California. As such, the Court determined that there was no basis for the passenger’s negligence claim against the airline.

COURT GRANTS SKYWEST’S MOTION FOR SUMMARY JUDGEMENT IN EMPLOYMENT DISCRIMINATION AND RETALIATION LAWSUIT

The United States District Court for the District of North Dakota (the “Court”) issued an opinion granting summary judgement for Defendant SkyWest Airlines (“SkyWest”) in an employment disability discrimination and retaliation case. The action stems from a lawsuit filed by a hearing-impaired former employee alleging that SkyWest violated the Americans with Disabilities Act (“ADA”) and the North Dakota Human Rights Act (“NDHRA”) when the airline terminated him as a part-time ramp agent. Even assuming the hearing-impaired employee constituted a “qualified individual” within the meaning of the ADA, the Court reasoned that summary judgement was appropriate based on SkyWest’s direct threat defense. Importantly, the Court highlighted evidence showing that the hearing-impaired employee was unable to consistently communicate with others on the noisy tarmac. Since the hearing-impaired employee could not safely perform his ramp agent duties due to his disability, the Court determined that SkyWest’s direct threat defense was justified.

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The Court also acknowledged that SkyWest did reasonably accommodate the hearing-impaired employee by offering him a comparable position as a gate agent. While the employee declined the position as a gate agent, doing so does not change the fact that the gate agent position had the same location, hours, and pay as the ramp agent position. In other words, SkyWest offered a reasonable accommodation, making summary judgement appropriate. Being that it had a legitimate, nondiscriminatory reason to terminate the hearing-impaired employee based on the direct threat he posed to the safety of himself and others, the Court granted SkyWest's motion for summary judgement.

ECKERT SEAMANS ATTORNEYS AT LAW

This Aviation Regulatory Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at 202.659.6622 or esahr@eckertseamans.com; Drew Derco at 202.659.6665 or dderco@eckertseamans.com; Jay Julien at 202.659.6648 or jjulien@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.

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