
Airline Slot Auction Rules and Related Litigation Head Toward Termination

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On May 14, 2009, the Federal Aviation Administration (FAA) proposed to rescind two rules, adopted in October 2008, under which hourly take-off and landing authorizations (slots) at the three New York area airports—LaGuardia, JFK and Newark International—were to be capped on a long-term basis, as they already were for the short term under existing FAA orders. In addition, a portion of the slots held by incumbent airlines were to be withdrawn (without any compensation) and placed up for auction.

The designation of slots to be withdrawn was to occur late in December 2008, and the first auction was to occur in mid-January 2009. Ostensibly, the goal was to help mitigate congestion and delay at the three airports—though the existing orders already did that—while establishing a “market-based” (rather than administrative) mechanism to allocate constrained airspace capacity at the three airports. Under that mechanism, slots would be auctioned and “leased” to the highest bidders, which supposedly were the airlines that valued them the most and would put them to their highest and best use. In practice, that meant, among other things, that service to smaller communities from the New York area airports would likely be curtailed.

With almost no exceptions, the airline industry opposed the “Slot Auction Rules,” as did the Port Authority of New York and New Jersey (which operates the three airports). WilmerHale was retained by the Air Transport Association of America (ATA) to represent the airline industry in the rulemaking proceeding (and in related administrative appeals) and then to challenge the final rules in court. Because they were so adamantly opposed to the auction concept—and because withdrawing their slots and initiating an auction process would severely disrupt their schedules—the airlines, acting through ATA, asked WilmerHale to take the unusual step of seeking a stay of the Slot Auction Rules from the DC Circuit while their challenge to the rules was being considered on the merits.

Because the Bush Administration was determined to conduct the first auction before leaving office, motions and supporting affidavits directed to the stay request had to be prepared and coordinated among numerous airlines in very short order, and differences between those carriers operating primarily at LaGuardia and those operating primarily at JFK or Newark had to be reconciled. When it became clear that control of the White House would shift to the Democrats just a few days after the

first auction was scheduled to occur in mid-January, the stakes became even higher—because both sides knew that if the auctions were stayed, they might never take place, since the Obama Administration might very well reconsider the rules as part of the regulatory review process that traditionally occurs when there is a change of administrations (and political parties). The battle lines thus were drawn sharply—with the Bush Administration determined to establish the precedent of auctioning slots before leaving office, while the airlines were determined to do all they could to prevent that from happening.

“For the airlines, this was a big deal,” explains WilmerHale partner [Bruce Rabinovitz](#), chair of the firm’s aviation practice group, “because they had invested hundreds of millions of dollars in airport facilities, equipment, and other resources in reliance on being able to conduct operations at these airports in accordance with their current schedules, which in turn depended on their slot holdings.”

Moreover, adds WilmerHale senior counsel [Neil King](#), who served as the point person for the litigation, “confiscating existing slot holdings would disrupt airline schedules for nationwide operations involving flights to and from the New York area airports. And, of course, in these precarious financial times, the airlines were understandably upset about the prospect of having to pay what amounts to a new ‘user fee’ for the right to conduct operations, a right that they never before had to ‘buy’ from the government.”

Passenger organizations, state officials and New York/New Jersey congressional representatives also were concerned because of the prospect that, if market conditions allowed, the airlines would pass the new “user fees” on to customers in the form of higher ticket prices. And small communities that enjoyed passenger air service to the New York area feared that slot auctions would result in a reduction or outright termination of that service.

Those were the stakes. The industry stay motions, FAA’s opposition and the industry reply all were filed by November 26, 2008. Less than two weeks later, the court issued an order granting the airlines’ request and staying the effectiveness of the Slot Auction Rules pending further order of the court. As a result, the planned withdrawal and auctioning of slots at LaGuardia, JFK and Newark did not occur before the Bush Administration left office. Although the court thereafter set a schedule for briefing the case on the merits, the FAA eventually filed a motion requesting—with the concurrence of petitioners—that the case be held in abeyance while the new administration considered its options regarding the rules. That motion was granted, and the case remains in a holding pattern on the court’s docket.

The publication on May 14, 2009, of FAA’s proposal to rescind the two Slot Auction Rules suggests that this dispute soon will draw to a close—at least for the time being—if the proposal is adopted following the submission of public comments. If that happens, as appears likely, the petitions for review in the DC Circuit will be withdrawn, and the FAA will develop alternative approaches to managing congestion and providing greater opportunities for airlines to commence or expand operations at these airports. Those alternative approaches may fracture the forces that coalesced in common opposition to the Bush Administration’s auction proposal and create new challenges for the airlines in the future.

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