

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENT PILOTS ASSOCIATION)
)
) *Petitioner*) No. 11-1483
 v.)
)
 FEDERAL AVIATION ADMINISTRATION)
)
) *Respondent*)
)
)

**MOTION OF RESPONDENT FEDERAL AVIATION ADMINISTRATION
TO REMAND THE RECORD AND TO HOLD THIS APPEAL IN
ABEYANCE PENDING REOPENED ADMINISTRATIVE PROCEEDINGS,
AND
FOR AN EXTENSION OF TIME TO FILE RESPONDENT’S BRIEF**

Introduction

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and the Local Rules of this Court, the Respondent, the Federal Aviation Administration (“FAA”), respectfully moves this Court for an order holding this appeal in abeyance and remanding the record to the FAA to permit correction of newly discovered errors in the administrative record supporting the regulation at issue in this case as it pertains to all-cargo flight operations. The FAA proposes to issue an initial supplemental regulatory evaluation that reopens the administrative record with respect to the all-cargo operations, discloses any errors, provides additional information concerning the FAA’s cost-benefit analysis, and invites additional

comments on the matters raised by petitioner on this appeal. The FAA will then issue a final supplemental regulatory evaluation, taking into account new comments received.

The FAA also moves this Court for an order extending the time to respond to petitioner's brief until 30 days after the Court rules on this motion or, if the remand is granted, in accordance with a new briefing schedule established by the Court. The undersigned counsel for the FAA have contacted counsel for petitioner and for the intervenor to advise them that these motions for a remand of the record and an extension of time will be filed. Given the complexity of the motions, neither petitioner nor intervenor is able to take a position on these motions until the motions are actually filed and served. We thus anticipate that petitioner and the intervenor will respond after they have an opportunity to consider the motions. For the reasons set forth below, we respectfully request that these motions be granted.

Statement

This appeal concerns regulations promulgated by the FAA pursuant to the Airline Safety and Federal Aviation Administration Extension Act of 2010, P.L. 111-216, 124 Stat. 2348, 2362 (2010) ("the Act"). The regulations were issued on December 21, 2011, and were published in the Federal Register as *Flight Crew*

Member Duty and Rest Requirements, 77 Fed. Reg. 330-01, 2012 WL 10131

(January 4, 2012). The regulations will become effective on January 14, 2014.

Petitioner, The Independent Pilots Association (“IPA”), filed a timely petition for review on December 22, 2011, pursuant to 49 U.S.C. § 46110(a). This Court has jurisdiction over the appeal under 49 U.S.C. § 46110(c). Petitioner filed its brief on April 24, 2012. The brief of Respondent is currently due May 24, 2012.

As required by Section 212 of the Act, the regulations specify “limitations on the hours of flight and duty time allowed for pilots to address problems relating to pilot fatigue.” In promulgating these regulations, the FAA elected to cover all passenger operations, but “removed all-cargo operations” from application of the regulations “because their compliance costs significantly exceed the quantified societal benefits.”¹ 77 FR 330-01. Specifically, the FAA found that “[t]he projected cost for all-cargo operations is \$306 million (\$214 million present value at 7% and \$252 million at 3%),” while “[t]he projected benefit of avoiding one fatal all-cargo accident ranges between \$20.35 million and \$32.55 million, depending on the number of crew members on board the aircraft.” 77 FR 330-01 at note 1.

¹ Such all-cargo carriers are free, under the regulations, to implement the regulations for their operations if they so choose.

In its brief filed with this Court on April 24, 2012, petitioner challenges this exclusion of all-cargo operations from the new regulations. Specifically, petitioner claims that (1) the Act does not permit the FAA to consider costs at all in promulgating the regulations or excluding all-cargo operations; (2) the FAA's cost-benefit analysis did not justify the decision to exclude all-cargo operations because the FAA allegedly did not explain its analysis and allegedly failed to account for benefits; and (3) the FAA failed to provide adequate notice and an opportunity to comment on its cost-benefit analysis because the FAA allegedly failed to disclose its cost-benefit analysis and methodologies. Br. of Petitioner at 21-54. As a remedy, petitioner "does not seek vacatur" of the regulations, but rather seeks a remand for the FAA "to reconsider the cargo exclusion by (1) following the standard and factors mandated by Congress, and (2) providing IPA and the public sufficient notice of the substance of the proposed rule, as well as its underlying data and analysis, to provide a meaningful opportunity to comment." Br. of Petitioner at 56.

During the course of reviewing the administrative record for the purpose of preparing the Brief of Respondent, the FAA discovered errors in calculating the scope of costs associated with the implementation of the regulations for all-cargo

operations. These errors are of sufficient amount that the FAA believes that it is prudent to review the portion of its cost-benefit analysis related to all-cargo operations and allow interested parties an opportunity to comment on that analysis.

In the interest of fairness and transparency, the FAA believes that it is appropriate to reopen the record by issuing a supplemental regulatory evaluation, strictly limited to the application of the new regulations to all-cargo operations. The FAA intends to issue an initial supplemental regulatory evaluation as expeditiously as possible and issue a final regulatory evaluation as soon as possible thereafter. The initial supplemental regulatory evaluation will fully disclose the extent and nature of the errors as well as provide further information concerning the FAA's application of its cost-benefit analysis. The FAA will invite comments on all aspects of the FAA's revised cost-benefit analysis as set forth in the notice.

In addition, the FAA will address whether it has determined that a cost-benefit analysis is legally or factually appropriate with respect to the application of the regulations to all-cargo operations. The FAA will consider any comments received and conduct these new proceedings on an expedited basis. After receiving comments, the FAA will issue a final supplemental regulatory evaluation that corrects any errors and addresses new comments concerning the application of

the regulations and a cost-benefit analysis to all-cargo operations. The agency will amend the administrative record for this case to include the initial and the final supplemental regulatory evaluations and all comments received with respect to that evaluation. As should be apparent, the new administrative proceedings outlined above will directly address each of the arguments and issues identified by petitioner in its brief filed with this Court and thus has the potential to moot some or even all the issues raised by petitioner on this appeal.

Specifically, petitioner will be accorded an opportunity to present its views to the FAA that the Act does not permit a cost-benefit analysis at all. See Br. of Petitioner at 30. The FAA will respond directly to petitioner's views and comments on that subject, and the Court will thus have the benefit of the FAA's considered review of that issue. Petitioner will likewise have an opportunity to submit additional comments, data and argument on each of the other issues raised by petitioner in its brief. For example, petitioner claims that the FAA "failed to adequately explain its cost-benefit analysis." Br. of Petitioner at 34. The FAA anticipates that this concern will be addressed directly. Similarly, petitioner argues that it did not receive adequate notice and opportunity to comment on the FAA's decision to exclude all-cargo operations (Br. of Petitioner at 42) and that it was

prejudiced by that alleged failure (Br. of Petitioner at 54). Regardless of whether that contention has merit, the proposed administrative proceedings will provide petitioner with the notice and opportunity to comment that it is seeking and thus eliminate any possible prejudice to petitioner. The FAA will respond as well to petitioner's contention that it failed to adequately disclose its cost-benefit analysis. See Br. of Petitioner at 49.

Argument

A. A Remand Of The Record Is Appropriate

In these circumstances, the FAA respectfully submits that the interests of justice warrant an order holding this case in abeyance and remanding the record to the FAA to allow the FAA to conduct the new proceedings outlined above. At the conclusion of those proceedings, the FAA will support a new briefing schedule that allows petitioner to file any additional brief directed to the final supplemental regulatory evaluation. Neither petitioner nor any other concern would be prejudiced by holding this appeal in abeyance. Indeed, a remand of the record would accord petitioner the very relief, in part at least, that it seeks from this Court, *viz.*, a remand so as to provide petitioner additional notice and opportunity to

comment on the exclusion of all-cargo operations from the regulations. See Br. of Petitioner at 56.

Since the new proceedings would concern only the application of the regulations to all-cargo operations, the new regulations will continue in force with respect to passenger operations, as those regulations become effective in January 2014. We anticipate that the new proceedings with respect to all-cargo operations would be concluded quickly, and therefore would accord sufficient time for this Court to resolve any challenge to the FAA's decision before the new regulations become fully effective in January 2014. The public interest is served by allowing the FAA to correct its errors and by allowing petitioner and any other interested persons a new opportunity to provide additional comments to the agency with respect to those errors as well as on the other issues presented by this appeal. A remand of the record would ultimately provide to this Court a correct and more complete administrative record for considering and resolving the issues presented by petitioner.

An order remanding the record on the request of an agency and holding an appeal in abeyance pending such remand is a well-established procedure in this Court's practice and is often granted in circumstances such as those presented here.

See, e.g., *Continental Cellular v. F.C.C.*, 923 F.2d 200 (D.C. Cir. 1990) (Table) (granting a motion to hold the appeal in abeyance and remanding the record to the agency for further proceedings); *Southern California Edison Co. v. F.E.R.C.*, 2004 WL 326225 (D.C. Cir. 2004) (unreported) (granting motion to remand the record based on the agency's representation that it "intends to act expeditiously on remand"); *Arkla Energy Resources Co. v. F.E.R.C.*, 1993 WL 557869 (D.C. Cir. 1993)(unreported) (remanding the record where a "[r]emand of the record could obviate the need for any further proceedings in this court *or narrow the issues ultimately presented to the court.*") (emphasis added); *Continental Air Lines, Inc. v. C.A.B.*, 551 F.2d 1293, 1315 (D.C. Cir. 1977) (appeal held in abeyance and record remanded so that the Court could have the benefit of the "articulated reasoning" of the agency). During the period in which the appeal is held in abeyance, the FAA will advise the Court every 60 days concerning the status of the new administrative proceedings, or at such other interval as may be ordered by the Court.

B. An Extension Of Time Is Appropriate

The Brief of Respondent is currently due May 24, 2012. No purpose would be served by filing the Brief of Respondent in the current appeal where some or all

of the issues presented by petitioner could be mooted by the new administrative proceedings contemplated by the FAA. At a minimum, petitioner's complaints that it was not accorded adequate notice and an opportunity to comment on the FAA's use of a cost-benefit analysis would be completely mooted. It is possible that petitioner might even elect to abandon its appeal after a new evaluation by the FAA on this issue. Extending the briefing time and holding this case in abeyance until completion of these new administrative proceedings will thus conserve the resources of this Court and the parties and is in the interests of justice.

We thus respectfully request an extension of time to file the Brief of Respondent until either 30 days after this Court issues an order on the motion to remand the record or until such time the Court may order in establishing a new briefing schedule after the FAA has completed the proceedings outlined above and issued a new order based on the supplemental administrative record. Again, to the extent that petitioner may wish to challenge any new decision of the FAA, any such challenge could be consolidated with this appeal and new briefing ordered at that time.

CONCLUSION

For all the forgoing reasons, we respectfully ask this Court to remand the record and hold this appeal in abeyance to allow the FAA to issue an initial supplemental regulatory evaluation concerning the application of the new regulations to all-cargo operations and reopen the administrative record on that issue. We also request an order extending the time for the FAA to file the Brief of Respondent in this appeal until either 30 days after the Court rules on this motion to remand the record or, if the remand is granted, in accordance with any new briefing schedule that the Court may establish following completion of the remand proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2012, I served the Forgoing Motion of Respondent Federal Aviation Administration to Remand the Record and to Hold this Appeal in Abeyance Pending Reopened Administrative Proceedings, and For an Extension of Time to File Respondent's Brief upon the following named counsel by electronic service through the ECF process and by e-mail:

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