UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

SOUTHERN AIR, INC.'S MOTION FOR LEAVE
TO INTERVENE IN SUPPORT OF RESPONDENT

Pursuant to Federal Rule of Appellate Procedure 15(d) and D.C. Circuit Rule 15(b), Southern Air, Inc. hereby moves for leave to intervene on behalf of Respondent in this case. Leave to intervene is warranted because this Motion is timely, the final agency rule challenged in this case ("the Rule") is of vital importance to Southern Air's business, and no party or proposed intervenor currently before the Court adequately represents Southern Air's particularized interests in upholding the Rule.

BACKGROUND AND INTERESTS OF PROPOSED INTERVENOR

The Federal Aviation Administration ("FAA") issued the Rule on December 21, 2011. *See Flightcrew Member and Duty Requirements*, 77 Fed. Reg. 330 (Jan. 4, 2012). The Rule resulted from a notice-and-comment rulemaking initiated by the FAA on September 14, 2010. *See* 75 Fed. Reg. 55,852 (Sept. 14, 2010).

Southern Air was actively involved in that rulemaking, and submitted extensive comments regarding the proposed rule. The FAA did not accept all of Southern Air's comments or incorporate all of its requested changes into the Rule.

In its final form, the Rule amends the FAA's existing flight, duty, and rest regulations applicable to certificate holders and their flight crew members. *See* 77 Fed. Reg. at 330. The Rule exempts all-cargo carriers—such as Southern Air—from these new duty and rest requirements, but preserves the preexisting requirements applicable to such carriers. The FAA explained that it granted the exemption from the new requirements because the "compliance costs" for all-cargo carriers "significantly exceed the quantified social benefits." *Id.* at 332; *see also id.* at 336 ("[T]he FAA has determined that this rule would create far smaller benefits for all-cargo operations than it does for passenger operations. Consequently, the FAA is unable to justify imposing the cost of this rule on all-cargo operations."). The FAA also explained that it had "in the past . . . excluded all-cargo operations from certain mandatory requirements due to the different cost-benefit comparison that applies to all-cargo operations," and that such "past precedent" further justified different treatment for all-cargo operations. *Id.*

On December 22, 2011, Petitioner Independent Pilots Association, a pilots' union whose members are employed by an all-cargo carrier, filed the petition for review in this Court. Petitioner issued a public release stating that it seeks through

its petition "to have cargo operations included in the scope" of the Rule. *Additional Points Relating to the IPA Court of Appeals Challenge to FAA Final Flight and Duty Time Rule*, *available at* https://www.ipapilot.org/petition_nprm/AdditionalPointsIPAFAAChallenge.pdf.

Southern Air occupies an unusual position in the aviation industry and among all-cargo carriers. Whereas most all-cargo carriers provide scheduled flights between fixed locations, Southern Air is a small carrier that provides a variety of unscheduled, on-demand cargo services between changing locations and at irregular times. This specialized niche allows Southern Air to provide its clients—who include international corporations and airlines and the U.S. military—with flexible cargo service, including long-haul service, to destinations across the globe. Because of Southern Air's unique business model, its pilots tend to fly unusually long routes, but also have long periods for rest and recuperation between flights. Southern Air has maintained an excellent safety record and has promulgated initiatives to reduce pilot and crew fatigue.

The Rule's exemption of all-cargo carriers from the new duty and rest requirements is essential to Southern Air's ability to compete and, indeed, to remain in business. Without the exemption, Southern Air would be faced with the enormous costs of hiring additional crew, retrofitting existing aircraft, and purchasing entirely new aircraft—prospects which threaten to drive Southern Air

out of business. Neither the FAA nor Proposed Intervenor Cargo Airline Association ("CAA") will adequately protect Southern Air's interests because they are not, and do not represent, *unscheduled* all-cargo carriers.

LEGAL STANDARD

Intervention is proper where a movant has established a sufficient "interest" in the proceeding. Fed. R. App. Pro. 15(d). The Supreme Court has noted that "the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). This Court has held that the more detailed standards applicable to intervention in a district court proceeding apply to intervention on appeal as well. *See Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282-83 (D.C. Cir. 1994). Thus, the Court grants intervention as of right where the following criteria are satisfied: (1) the request to intervene is "timely"; (2) the movant has "an interest relating to the property or transaction which is the subject of the action"; (3) "the disposition of the action may, as a practical matter, impair or impede the [movant's] ability to protect that interest"; and (4) the movant's interest is not "adequately represented by existing parties to the action." *Id.* at 1282 (citing Fed. R. Civ. P. 24(a)(2)).

1. SOUTHERN AIR'S MOTION IS TIMELY

Southern Air's Motion is filed within 30 days of the Petition for Review, and therefore is timely. *See* Fed. R. App. P. 15.

2. SOUTHERN AIR HAS SUBSTANTIAL INTERESTS AT STAKE

Southern Air has direct and substantial interests warranting intervention in this case. *First*, the Rule's exemption for all-cargo carriers covers Southern Air's business, and is absolutely vital to Southern Air's continued viability in the competitive global cargo marketplace.

Second, Southern Air occupies a specialized niche in the all-cargo industry. Whereas most all-cargo carriers provide scheduled flights between fixed locations, Southern Air exclusively provides unscheduled service—that is, on-demand flights—between changing locations and at irregular times. Southern Air's pilots tend to fly unusually long routes, but they also have long periods of time between flights and, therefore, vastly greater opportunities for rest and recuperation than do pilots for scheduled carriers. And Southern Air has purchased a fleet of aircraft specifically designed for its long-distance cargo operations.

Finally, Southern Air "fully participated in the proceedings" before the FAA, filing extensive comments and further evincing its significant interests supporting intervention in this matter. *Synovus Fin. Corp. v. Bd. of Governors*, 952 F.2d 426, 433 (D.C. Cir. 1991).

3. SOUTHERN AIR'S SUBSTANTIAL INTERESTS MAY BE IMPAIRED

That Southern Air would be "directly affected" if Petitioner were to prevail in this suit further underscores that its intervention is appropriate. *Yakima Valley*

Cablevision, Inc. v. FCC, 794 F.2d 737, 744–45 (D.C. Cir. 1986). Indeed, if—as Petitioners seek—the Rule's duty and rest requirements for scheduled passenger operations are extended to all-cargo operations, Southern Air would again become vulnerable to the same crushing regulatory obligations that it successfully sought to avoid during the rulemaking process. Moreover, the resulting compliance costs for hiring additional crew and retrofitting and purchasing aircraft would be so great as to likely drive Southern Air out of business.

In comparable circumstances, this Court routinely has allowed industry participants that benefit from a final rule to intervene to defend the rule against challenges by other parties. *See, e.g.*, *Sw. Bell Tele. Co. v. FCC*, 180 F. 3d 307, 310 (D.C. Cir. 1999); *Military Toxics Project v. EPA*, 146 F.3d 948, 953–54 (D.C. Cir. 1998); *Consumer Union of U.S., Inc. v. FTC*, 801 F.2d 417, 419 (D.C. Cir. 1986). Because Southern Air has "a substantial interest in the outcome of the petition," it should be allowed "to intervene pursuant to Fed. R. App. P. 15(d)." *Bates v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990).

4. SOUTHERN AIR'S INTERESTS ARE NOT ADEQUATELY REPRESENTED

Southern Air easily exceeds the "minimal" burden of showing that its representation by the FAA and the CAA "may be inadequate." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). *First*, the FAA's representation is categorically inadequate to protect Southern Air because, as this Court has

explained, "governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736–37 (D.C. Cir. 2003). Indeed, because the government "must represent the broader public interest, not just the economic concerns of the [relevant] industry," relying on "the government's representation of [private] intervenors' interest is inadequate." *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994); *see also Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912–13 (D.C. Cir. 1977).

Second, the CAA also does not adequately represent Southern Air's unique interests. Representation is inadequate where the interests of a party or another intervenor and the interests of a proposed intervenor are "similar but not identical." *United States v. Amer. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980). The CAA represents *scheduled* all-cargo carriers that operate along fixed routes on fixed schedules. Southern Air, by contrast, conducts an entirely different business model of *unscheduled* cargo flights to changing destinations across the globe. Southern Air, moreover, provides its pilots longer rest periods than all-cargo carriers operating scheduled service provide their pilots. Therefore, Southern Air has a unique interest in preserving operational flexibility and low compliance costs, and is the *only* entity currently before the Court that can provide its specialized business perspective in defense of the Rule. This likely absence of another entity

that would adequately protect Southern Air's interests or present its perspective militates in favor of intervention. *See id.*

CONCLUSION

For the foregoing reasons, the Court should grant Southern Air leave to intervene in this matter.

January 23, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2012, I electronically filed the foregoing Southern Air, Inc.'s Corporate Disclosure Statement through the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I also have caused a copy of the foregoing document to be served via first-class mail, postage prepaid, on the following individual:

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I also have caused courtesy copies of the foregoing document to be served via first-class mail, postage prepaid, on the following individuals:

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