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DOT Charter Authorization Developments (Sept. 2013)

The Department of Transportation (DOT) charter regulations, set forth in 14 CFR Part 212, require, *inter alia*, that foreign air carriers apply to DOT for advance authorization to operate certain charter flights.¹ Such authorizations, known as statements of authorization,² are in general required for foreign air carriers which do not already hold DOT economic authority encompassing the charter flights at issue.³

In practice, while most applications for statements of authorization are routinely granted, a recent case illustrates the pitfalls of this process. As discussed in more detail below, DOT's concluding order in this case also sternly warns shippers and foreign air carriers to take additional care when preparing and submitting such applications.

On August 29, 2013, Antonov Airlines (Antonov), a Ukrainian cargo carrier operating Antonov AV-124 aircraft, filed an application for a statement of authorization for one charter flight to transport military supplies and equipment, including ten, twenty-foot containers, from Leipzig, Germany to Mountain Home Air Force Base, Idaho. The cargo was to be shipped in support of German military activities.

On August 30, 2013, Kalitta Air, a U.S. cargo carrier, filed an objection to Antonov's application. Kalitta argued that Antonov had not operated any third or fourth⁴ freedom flights in 2012 and 2013, resulting in undue reliance on fifth and seventh⁵ freedom traffic in contravention of DOT policy. Kalitta asserted it could transport the cargo itself utilizing one of its Boeing 747 aircraft, albeit in two flights, and that there was no urgency noted in Antonov's application which would preclude Kalitta from transporting the cargo.

On September 6, Antonov filed a reply, arguing that, among other things, it was contracted to support NATO as part of a competitive bidding process because of the AN-124's ramp-loading ability and cargo capacity. Antonov asserted that outsized cargo was routinely added to such flights operating in support of NATO, and that such cargo was beyond the capacity of Kalitta's aircraft. Antonov also noted that the Ukrainian government had provided a statement to DOT



The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign air carriers on compliance with DOT's charter regulations.

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confirming that it would grant similar rights to U.S. carriers on the basis of reciprocity. The carriers exchanged one additional round of pleadings.

On September 18, 2013, DOT issued an order (Order 2013-9-10) denying Antonov's application. In doing so, DOT outlined the public interest and regulatory decisional criteria it applies in reviewing applications for statements of authorization, including (i) ensuring compliance with DOT's charter regulations in 14 CFR Part 212; (ii) considering the state of the U.S.'s overall aviation relationship with the applicant's homeland; (iii) the extent of the applicant's reliance on fifth/seventh freedom charters as related to its third and fourth freedom charters; (iv) the needs of shippers and travelers; and (v) any factors related to the individual circumstances of each case.

Based on these criteria, DOT determined that Antonov had demonstrated a "manifest undue reliance" on fifth and seventh freedom traffic, having failed to operate a single third or fourth freedom flight in 2012 or 2013. DOT also stated that it disagreed with one of Antonov's assertions that a denial of its application would be akin to providing a right of first refusal to U.S. carriers. In its order, DOT stated that

[W]e have long preferred that charterers be permitted the flexibility to choose an air carrier best suited to meet their requirements, we exercise discretion to ensure that permitting such flexibility does not contravene any element of our longstanding public interest decisional criteria. For the reasons described above, in the case before us, which does not involve outsize cargo and where alternative means of transport are available, we cannot make that public interest finding.⁶

DOT also stated that it had considered Antonov's argument that its pre-existing contractual arrangement with NATO merited favorable consideration, and while a shipper's needs are one of the factor's that DOT considers in deciding whether to approve or deny an application, there were a number of other factors which outweighed this one, including the "extended paucity of [Antonov's] homeland-U.S. operations."

On September 21, 2013, in response to a petition for reconsideration filed by Antonov on September 19, 2013, DOT issued an Order on Reconsideration (Order 2013-9-11) (Order) which reversed course and granted Antonov's application. Based on new information (a packing list), which only became available on September 19, Antonov determined that part of the cargo would consist of a 40 foot container and four containers approximately 25 feet long. The 40 foot container cannot, argued Antonov, be accommodated on a 747, leaving Antonov the only carrier with aircraft capable of carrying such outsized cargo. Kalitta filed an answer stating that it would withdraw its objection as a gesture of goodwill to the German Ministry of Defense, but in doing so noted that U.S. carriers have expressed concerns that AN-124 operators have included outsize items as cargo on charter flights that would otherwise not warrant approval, absent the presence of such outsize cargo.

DOT's Order notes that Antonov presented new information (the inclusion of outsize cargo) that was not initially part of DOT's decisional record. Only on the narrow grounds of the new information presented was DOT willing to reconsider its initial order, and DOT made clear that but for this new information, its original order would stand. DOT also warned that such last-minute changes to applications create a hardship, both for other carriers that may wish to file responses, and for DOT itself. In a strongly-worded warning, DOT also advised that

[W]e are putting shippers and applicant carriers on notice that, in the future, where such late-filed substantive and potentially decisional changes are made to pending applications, applicants and shippers should have no expectation or assurance that we will complete our regulatory review within the applicant's or shipper's prescribed time frame, notwithstanding any request for expedited action. We therefore urge shippers and applicant carriers to submit all pertinent information with their original application, or in

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the alternative, to supplement/amend applications as far in advance of proposed flight dates as possible.

Foreign air carriers and shippers are advised to consult with counsel for more information about the requirements of DOT's charter rules. The information contained herein is intended as a general discussion and is not intended as specific legal advice.

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¹ For carriers from homelands that are open skies treaty partners and which have the full complement of rights available under open skies agreements, typically this means seventh freedom flights. Carriers from homelands with less liberal bilaterals may require advance authorization for fifth freedom flights, and in limited circumstances even third and fourth freedom charter flights may require approval. See n. 3 below.

² Such applications are submitted on OST Form 4540, and typically require, among other things, information concerning the identity of the charterer, the flight routing and operational details, the number of third and fourth freedom flights operated by the applicant in the preceding 12 months, and a showing of reciprocity from the applicant's homeland aeronautical authority.

³ Pursuant to 14 CFR 212.9(d), DOT may require a foreign air carrier to file an application for a statement of authorization for third and fourth freedom charters if the foreign air carrier's homeland requires prior approval of such flights made by U.S. carriers; if the foreign air carrier's homeland "[h]as, over the objection of the U.S. Government, denied rights of a U.S. air carrier guaranteed by a bilateral agreement"; or if it "[h]as otherwise impaired, limited, or denied the operating rights of U.S. air carriers, or engaged in unfair, discriminatory, or restrictive practices with respect to air transportation services to, from, through, or over its territory."

⁴ I.e., traffic from its homeland to the U.S., and vice versa.

⁵ Fifth freedom flight means traffic picked up at an intermediate point on a flight between a carrier's homeland and the U.S., while a seventh freedom flight is traffic picked up in a third country and transported to the U.S. without a nexus to the carrier's homeland.

⁶ Order 2013-9-10 at 3.