

1986

Casenotes and Statute Notes

Timothy Mark Bates

Recommended Citation

Timothy Mark Bates, *Casenotes and Statute Notes*, 52 J. AIR L. & COM. 193 (1986)
<https://scholar.smu.edu/jalc/vol52/iss1/6>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

FAA REGULATORY POWER — NOISE RESTRICTIONS —

The FAA has broad discretion in granting noise regulation exemptions to noncompliant carriers, but the FAA must apply consistent criteria in granting or denying exemptions, and provide a reasoned explanation for any failure to adhere to its own precedents. *Airmark Corp. v. Federal Aviation Administration*, 758 F.2d 685 (D.C. Cir. 1985).

Airmark Corporation is a charter airline which operates one B-707-100 series airplane configured with thirty-four seats.¹ It is the only known company to offer public figures an unmarked airplane for anonymous transportation at the client's demand.² Its clients include multinational corporate executives, high ranking foreign officials, and entertainment groups.³ In 1983, Airmark began its operations with a used B-707 airplane purchased from intervenor Flying Tiger Line, Inc.⁴ In August, 1984, it received FAA authority to use the airplane, and between August and December 1984 made over sixty takeoffs and landings at United States airports.⁵ Responding to congressionally mandated noise requirements,⁶ Airmark, in 1984, contracted with Aviation Technical Support of Waco, Texas, (ATS) for a Noise Reduction Nacelle (hush kit) to quiet its B-707 engines.⁷ The mandate, FAA regulation 14 C.F.R. section 91.303, required all four-engine aircraft to comply with lower noise level standards by Jan-

¹ Brief for Petitioner Airmark Corp. at 5, *Airmark Corp. V. FAA*, 758 F.2d 685 (D.C. Cir. 1985) [hereinafter cited as Petitioner].

² See *id.* According to Airmark, no other airline offers an executive configuration B-707 available for public charter. *Id.*

³ *Id.*

⁴ *Id.* at 9.

⁵ *Id.* at 5.

⁶ See *infra* notes 23-43 and accompanying text.

⁷ Petitioner, *supra* note 1, at 6.

uary 1, 1985.⁸

In anticipation of the oncoming compliance date, several new entrepreneurial firms began developing hush kits for four-engine airplanes, but could not deliver them by the deadline date.⁹ Unable to acquire a hush kit before the January 1, 1985 deadline,¹⁰ Airmark, on April 12, 1984, applied for an exemption from section 91.303, and for a general rulemaking to reevaluate the deadline and requirements of the noise compliance rule.¹¹ While the FAA did not act on Airmark's petition for a rulemaking,¹² the FAA denied Airmark's request for an exemption.¹³ Airmark petitioned for reconsideration of the exemption and supplemented its petition with a copy of its hush kit contract.¹⁴ On December 18, 1984, thirteen days before the deadline, the FAA Administrator denied Airmark's petition for reconsideration.¹⁵

⁸ 14 C.F.R. § 91.303 (1986) Final compliance: Subsonic airplanes.

Except as provided in § 91.306 (replacement airplanes) and § 91.307 (two engine aircraft), on and after January 1, 1985, no person may operate to or from an airport in the United States any subsonic airplane covered by this subpart, unless that airplane has been shown to comply with Stage 2 or Stage 3 noise levels under Part 36 of this chapter.

Id.

⁹ Petitioner, *supra* note 1, at 21. The efforts of NASA and the Boeing Aircraft Company, on which the FAA based its 1976 rulemaking and its December 18, 1984 order, never resulted in a commercially available hush kit. No FAA certificate to permit aircraft operations with such hush kits (called a Supplemental Type Certificate or STC) has ever been issued.

As of January, 1985, only Comtran hoped to receive a STC for its B-707-300 series hush kit. Aviation Technical Support projected a March, 1985 STC and the various DC-8 hush kit manufacturers projected STC's in various months of 1985. For the B-707-100, Aviation Technical Support projects a May, 1985, certification.

In the summer of 1984, Airmark entered into and funded a contract with Aviation Technical Support for a May 1985 delivery position. Airmark advised the FAA of its contract, with documentation at the end of August, 1984. *Id.*

¹⁰ Petitioner, *supra* note 1, at 6.

¹¹ Brief for Respondent, Federal Aviation Administration at 7, Airmark Corp. v. FAA, 758 F.2d 685 (D.C. Cir. 1985). [hereinafter cited as Respondent].

¹² *Id.* at note 5. A general rulemaking applies to many carriers as does the noise abatement rule. *Id.* Since the FAA did not act on Airmark's petition for a rulemaking, the issue could not be reviewed. See *Airmark*, 758 F.2d at 690 n.13.

¹³ Respondent, *supra* note 11, at 7.

¹⁴ Petitioner, *supra* note 1, at 4.

¹⁵ *Id.* at 3.

On December 21, 1984, Airmark petitioned the Court of Appeals for the D.C. Circuit to review the FAA's denial of its exemption request and to grant an emergency stay of enforcement of section 91.303 pending final resolution.¹⁶ Three days before the January 1, 1985 deadline, the FAA *sua sponte* granted Airmark a restrictive partial exemption.¹⁷ Airmark renewed its request for interlocutory relief by challenging the restrictions on the exemption.¹⁸ Although Airmark did not file a new petition to review the partial exemption, the court granted Airmark a stay from section 91.303 until after oral argument.¹⁹

The court then consolidated for argument three cases in which carriers challenged FAA denials or partial denials of exemptions from section 91.303 as arbitrary and capricious.²⁰ Additionally, several interveners challenged the FAA's authority to grant partial or full exemptions to any carrier.²¹ *Held*: the denial of exemptions and grant of a partial exemption vacated. The FAA has broad discretion in granting noise regulation exemptions to noncompliant carriers, but the FAA must apply consistent criteria in granting or denying exemptions, and provide a reasoned explanation for any failure to adhere to its own prece-

¹⁶ *Id.* Airmark sought judicial review pursuant to Federal Aviation Act § 1006, 49 U.S.C. § 1486(a) (1982):

(a) Orders subject to review; petition for review.

Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 1461 of this Appendix, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Id.

¹⁷ *Airmark*, 758 F.2d at 689.

¹⁸ *Id.* Airmark claims the restrictions on the partial exemptions has the practical effect of a denial. *Id.*

¹⁹ Petitioner, *supra* note 1, at 3.

²⁰ *Airmark*, 758 F.2d at 687.

²¹ *Id.*

dents. *Airmark Corp. v. Federal Aviation Administration*, 758 F.2d 685 (D.C. Cir. 1985).

I. LEGAL BACKGROUND

A. Statutory Law

1. Congressional and Administrative Response to Jet Noise

In the 1960's, despite substantial airline investment in noise abatement research and fleet updating,²² jet noise remained a problem. In 1968, Congress responded to the noise problem by adding section 611 to the Federal Aviation Act of 1958,²³ which authorized the FAA to prescribe noise control and abatement standards.²⁴ At the same time, in section 611(b)(4)²⁵ Congress directed the FAA to

²² See R. RAMSEY, *LEGAL CONTROL OF AVIATION NOISE* (1969). Following World War II several groups such as the National Aeronautics and Space Administration (NASA), the Federal Aviation Agency, the Bureau of Standards of the United States, as well as airframe manufacturers, carriers, and others, conducted extensive research on aircraft noise reduction. *Id.* at 29-44. The first commercial jet flights by United States carriers began in October, 1958. Thereafter in 1959, the aviation industry formed the National Noise Abatement Council (NANAC), a non-profit organization, to combat aircraft noise pollution. *Id.* at 37. The NANAC membership included all areas of aviation, particularly pilots, engineers, and engine manufacturers. *Id.*

Early on, carriers exhibited concern for jet noise by delaying the adoption of jet engines for two years because of excessive volume. *Id.* at 39. By 1962, the carriers had spent over \$50 million on research and development for in-flight sound suppressors, and actually installed suppressors in 325 jet aircraft at a cost of \$60,000 per engine, at a total cost of over \$73 million. *Id.* By 1965, the industry's noise reduction investment reached \$150 million for suppressors alone. *Id.* at 40.

Introduction of the fan-jet engine significantly reduced noise pollution from jet operations. *Id.* Consequently, all United States airlines with aircraft on order demanded the new fan-jet engine instead of the older, noisier turbo-jet engine. *Id.* One airline actually replaced its entire fleet with the quieter engine at a cost of \$1 million per aircraft. *Id.* Furthermore, airlines at Kennedy International Airport paid more than \$11 million for runway extensions to abate noise pollution. *Id.* at 41.

²³ Federal Aviation Act of 1958, 49 U.S.C. § 1431(d)(4) (1982).

²⁴ *Id.* In prescribing and amending standards and regulations under this section, the FAA shall:

"consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply."

²⁵ *Id.*

ensure that regulations were “economically reasonable, technologically practicable and appropriate for the particular type of aircraft. . . .”²⁶

In 1969, pursuant to section 611(b)(4),²⁷ the FAA issued aircraft noise standards in part 36 of the Federal Aviation Regulations (FARs).²⁸ These regulations set noise restrictions for aircraft then under design²⁹ and established a uniform system of measuring aircraft noise.³⁰ However, the regulations did not affect aircraft already certified by 1969.³¹ Four years later, in 1973, the FAA amended part 36 to require that all newly built aircraft, even those of older design, meet the part 36 standards.³² As aircraft design and noise suppression technology developed, the FAA again amended part 36 to require that airplanes manufactured after 1975 meet stricter noise standards.³³

Part 36 is divided into three noise stage categories.³⁴ Stage one consists of jet aircraft, such as B-707s and DC-8s, designed prior to 1969, the effective date of the original noise control standards, and manufactured before 1973, when the stricter standards went into effect.³⁵ Stage two consists of aircraft built between 1973 and 1975, or designed and built between 1969 and 1973.³⁶ Stage two airplanes meet the original noise ceilings set by the FAA in 1969.³⁷ Stage three consists of aircraft built after 1975, and they must meet the strictest noise standards set by the

²⁶ *Id.*

²⁷ See *Airmark*, 758 F.2d at 687. The FAA promulgated a series of regulations addressing noise control for future aircraft design. *Id.*

²⁸ 14 C.F.R. § 36 (1986).

²⁹ *Id.*

³⁰ *Id.* See *infra* note 39 and accompanying text for a discussion of the uniform system of measuring aircraft noise.

³¹ 14 C.F.R. § 36 (1986).

³² 38 Fed. Reg. 29,569 (1973).

³³ 42 Fed. Reg. 12,360 (1977).

³⁴ See *Airmark*, 758 F.2d at 687 n.3. See *infra* note 39 for a discussion of the noise categories.

³⁵ See *Airmark*, 758 F.2d at 687.

³⁶ *Id.*

³⁷ *Id.*

FAA.³⁸ Stage three aircraft are the quietest.³⁹

In 1976, the FAA issued part 91 of the FARs⁴⁰ giving the stage two or stage three standards retroactive effect to stage one aircraft.⁴¹ Because part 91 only applied to domestic airlines, aircraft used on international routes remained unaffected.⁴² Consequently, noncompliant domestic carriers with stage one aircraft had three options: (1) buy new compliant aircraft; (2) reengine noncompliant aircraft; (3) purchase hush kits if they became available before January 1, 1985.⁴³

The first option, buying new compliant aircraft, required a huge capital expenditure.⁴⁴ However, these new aircraft are more fuel efficient as well as quieter.⁴⁵ Some

³⁸ *Id.*

³⁹ *Id.* In developing progressively tighter aircraft noise standards, the various categories of standards became known by the shorthand terms the FAA uses today. Stage one aircraft are those which were type certificated before 1969, manufactured before January 1, 1974, and not subject to any noise requirements at the time of certification. These include the B-707s involved in the present case, many of which were produced during the late 1950s and 1960s. Stage two aircraft are those certificated after 1969 or built after December 31, 1974, which must conform to the first mandatory noise standards issued by the FAA. In this category are B-747s, DC-9s, DC-10s, B-727s, and B-737s. Stage three aircraft are those for which applications for type certificates were made after November 5, 1975, which meet the lowest noise levels. The B-757s and B-767s are typical of this group. *Id.* See also Brief for Federal Respondents at 5-6, *Tradewinds Airway, Ltd. v. DOT and FAA*, 758 F.2d 685 (D.C. Cir. 1985).

The reduction in noise generated by aircraft through this process has been substantial. The four-engine stage one aircraft such as B-707s and DC-8s according to the FAA's standardized measurements, generate approximately 155 effective perceived noise levels in decibels (EPNdB) over three miles from the start of a takeoff roll. The equivalent measurement for stage three commercial aircraft is approximately 87 EPNdB. Since decibels are logarithm units, an increase in 20 EPNdB is perceived as a doubling in loudness. Thus, the reduction in measured levels of almost 30 EPNdB represents an eightfold decrease in aircraft generated noise. *Id.*

⁴⁰ See *infra* note 8 and accompanying text.

⁴¹ *Id.*

⁴² Petitioner, *supra* note 1, at 16.

⁴³ See *Airmark*, 758 F.2d at 688.

⁴⁴ See Brief Amicus Curie of United States Senator Nancy L. Kasselbaum at 1, *Airmark Corp. v. FAA*, 758 F.2d 685 (D.C. Cir. 1985). Carriers in the United States have spent billions of dollars buying new compliant airplanes. *Id.*

⁴⁵ *Id.* See Petitioner, *supra* note 1, at 10. Major carriers bought new compliant airplanes because of fuel efficiency and other economic reasons. Noise compliance did not serve as a major purchase motivation. *Id.*

carriers found option two, re-engining stage one airplanes, economically unreasonable as the cost far outweighed the economic worth.⁴⁶ Smaller carriers without large capital funds found the third option, purchasing hush kits, the most practical since hush kits quiet the engines to acceptable noise levels, yet they do not require the large capital outlays necessary for options one or two.⁴⁷

2. *Other Legislation Affecting FAR § 91.303*

a. *Aviation Safety and Noise Abatement Act*

In 1979, Congress enacted the Aviation Safety and Noise Abatement Act (ASNA).⁴⁸ ASNA provided that Congress apply the January 1, 1985, compliance date to aircraft in foreign air commerce if the International Civil Aviation Organization (ICAO) did not adopt noise standards meeting or exceeding FAR part 36 with a comparable compliance date.⁴⁹ In 1980, the FAA determined that ICAO had not developed any of the standards called for by ASNA. Therefore, the FAA applied FAR section 91.303 to foreign carriers, prohibiting foreign aircraft that do not meet stage two or stage three noise standards from operating at United States airports.⁵⁰ Thus, under the amended version of FAR section 91.303, all foreign and domestic carriers with four-engine airplanes flying into or

⁴⁶ See Brief for Petitioner Tradewinds Airway, Ltd. at 44, *Airmark Corp. v. FAA*, 758 F.2d 685 (D.C.Cir. 1985). More prosperous carriers may be able to spend \$16-18 million to reengine their DC-8 aircraft, but smaller carriers cannot economically afford this option. *Id.* Furthermore, B-707s cannot be reengineed. *Id.*

⁴⁷ See *Id.* Hush kits cost about \$2.75 million per airplane. 281 AVI. DAILY 6 at 47 (daily ed. Sept. 10, 1985).

⁴⁸ Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. § 2122 (1982).

⁴⁹ *Id.* In ASNA, Congress also granted exemptions extending through 1988 for two and three engine jet aircraft. 49 U.S.C. § 2124. This was labeled the "small communities" exemption. *Id.* However, the exempted DC-9 and 737 aircraft operate at many of the large airports in the United States. See Brief of Intervenor Transamerica Airlines, Inc. at 22, *Airmark Corp. v. FAA*, 758 F.2d 285 (1985). [hereinafter cited as *Transamerica*]. The FAA also exempted 16 supersonic Concorde aircraft from noise restrictions. See 14 C.F.R. § 91.311 (1985). The Concorde is one of the noisiest commercial jets. See *Transamerica* at 22.

⁵⁰ See *Transamerica*, *supra* note 49, at 8.

from the United States had to meet stage two or three noise standards by January 1, 1985.⁵¹

However, the availability of hush kits by the deadline date concerned Congress. Because of these concerns, the House Conference Committee encouraged the FAA to grant exemptions from the noise compliance deadline if technology was unavailable.⁵² The committee identified five considerations to be taken into account in determining whether a carrier deserved an exemption.⁵³ These five criteria are: 1) small carrier size; 2) demonstrated good faith compliance; 3) unavailability of technology; 4) resultant financial havoc; and 5) loss of valuable air service. While these criteria are not present in any statutory or regulatory language, nevertheless, the FAA recognized these criteria as the test for granting an exemption.⁵⁴ As the deadline date approached, the FAA further recognized that nearly all the carriers requesting exemptions met the small size and unavailability of technology criteria.⁵⁵ Therefore, the FAA focused on the good faith compliance, financial havoc, and loss of valuable air service criteria.⁵⁶

If a carrier produced a hush kit contract, then it auto-

⁵¹ *Id.* See also 14 C.F.R. § 36 (1986); Foreign and domestic carriers were required to do one of three options by January 1, 1985: 1) buy new compliant airplanes; 2) reengine their existing aircraft; or 3) install hush kits in existing aircraft.

⁵² H.R. REP. NO. 96-715, 96th Cong., 1st Sess. 23, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 124. The conference committee recommended that the FAA should consider five considerations in determining exemption applications:

[T]he FAA is urged to give consideration to hardship situations involving smaller carriers where the carrier is making a good faith compliance effort but needed technology is either delayed or unavailable and rigid adherence to compliance deadlines could work financial havoc and deprive the public of valuable airline service.

⁵³ *Id.* See also *Aviation Safety and Noise Abatement: Hearings on H.R. 2458, H.R. 3547 and H.R. 3596 before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 96th Cong., 1st Sess. 108, 113-14 (1979). Two bills were introduced with provisions providing waiver of the compliance date for carriers unable to comply in a timely manner for "good cause." *Id.*

⁵⁴ Respondent, *supra* note 11, at 5.

⁵⁵ *Id.*

⁵⁶ *Id.* at 5-6.

matically met the good faith compliance criterion⁵⁷ and received an exemption if it also demonstrated both financial havoc and loss of a valuable air service. A carrier met the financial havoc criterion if the denial of an exemption forced the carrier to shut down.⁵⁸ The loss of valuable air service criterion applied only if a denial of an exemption resulted in a total cutoff of air service to a particular area.⁵⁹ Few carriers passed this stringent exemption test.⁶⁰

On November 15, 1984, after over 100 denials of exemption requests, the FAA granted its first exemption from FAR section 91.303.⁶¹ That exemption allowed Icelandair to continue operations to New York, Chicago, Baltimore, and Orlando using noncompliant aircraft until the delivery of their hush kits.⁶² The exact date of delivery was indeterminable because hush kits had not been manufactured or certified by the FAA at that time.⁶³ The FAA granted fifteen more exemptions under their general rulemaking authority,⁶⁴ and in late December, 1984, the FAA informally advised all carriers that the deadline date extended to January 5, 1985.⁶⁵

b. *Hawkins-Chiles Amendment*

As the deadline approached, civic leaders from Miami, Florida, and Bangor, Maine, pressured Congress for relief from FAR section 91.303. They argued that section 91.303 caused financial havoc to the Miami and Bangor

⁵⁷ *Id.* By producing a hush kit contract the carrier satisfied the good faith compliance criterion. *Id.*

⁵⁸ *Id.* at 6.

⁵⁹ *Id.*

⁶⁰ See *Airmark*, 758 F.2d at 688. The FAA granted 15 exemptions from 145 requests. *Id.*

⁶¹ Brief for Petitioner Tradewinds at 26, *Airmark Corp. v. FAA*, 758 F.2d 685 (D.C. Cir. 1985) [hereinafter cited as *Tradewinds*].

⁶² *Id.* at 26-27.

⁶³ See *supra* note 8 and accompanying text.

⁶⁴ *Airmark*, 758 F.2d at 688.

⁶⁵ *Tradewinds*, *supra* note 61, at 27. The original deadline date was extended by four days to January 5, 1985. *Id.* No apparent reason was given for the change. *Id.*

airports, and deprived airline passengers of valuable air service. In October, 1984, Congress responded to these arguments by passing the "Hawkins-Chiles Amendment."⁶⁶ This legislation required the FAA to grant exemptions from FAR section 91.303 for carriers flying to and from Miami, Florida, and Bangor, Maine, that either had entered into or issued a sworn commitment to enter into a hush kit contract.⁶⁷ Furthermore, Congress limited the exemption to the number of flights that each carrier flew to and from those airports during the preceding twelve months.⁶⁸ Twenty-five carriers received an exemption under this amendment.⁶⁹

In summation, Congress added section 611 to the Federal Aviation Act of 1958 authorizing the FAA to prescribe noise control and abatement standards.⁷⁰ The FAA, in 1969, prescribed FAR part 36 which sets the noise standards for domestic four-engine aircraft.⁷¹ There are three noise stages with stage one being the noisiest and stage three the quietest.⁷² As of January 5, 1985, all domestic four-engine aircraft must meet stage two or three noise levels of FAR part 36⁷³ per FAR section 91.303.⁷⁴ The ASNA⁷⁵ makes the noise requirements of FAR part 36 also apply to foreign aircraft.⁷⁶ In addition, the Hawkins-Chiles amendment requires the FAA to grant exemptions from FAR section 91.303 for flights to and from Miami, Florida, and Bangor, Maine, provided the carrier enters into or commits to a hush kit contract.⁷⁷ The exemption is further limited to the number of flights

⁶⁶ Pub. L. No. 98-473, § 124, 98 Stat. 1970-1971 (1984).

⁶⁷ Respondent, *supra* note 11, at 4-5.

⁶⁸ *Id.*

⁶⁹ *Airmark*, 758 F.2d at 688 n.5.

⁷⁰ See *supra* note 23 and accompanying text.

⁷¹ See *supra* note 28 and accompanying text.

⁷² See *supra* note 39.

⁷³ See *supra* note 28 and accompanying text.

⁷⁴ See *supra* note 7.

⁷⁵ See *supra* note 48 and accompanying text.

⁷⁶ *Id.*

⁷⁷ See *supra* notes 66-69 and accompanying text.

the carrier flew to those airports during the preceding twelve months.⁷⁸

B. *Judicial Review of FAA Decisions*

The scope of judicial review of FAA actions follows the broad outlines established for review of all administrative agency action. The Administrative Procedure Act (APA),⁷⁹ which governs judicial review of federal agency action, codifies the rules the courts developed for administrative review.⁸⁰ The Act states: "[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."⁸¹ Furthermore, the statute states that a court may hold unlawful any administrative agency's action that the court considers "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law," or that is "unsupported by substantial evidence" based on the record of the agency hearing.⁸²

⁷⁸ *Id.*

⁷⁹ Administrative Procedure Act, 5 U.S.C. § 706 (1982). To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action the reviewing court shall:

(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record on an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

When reviewing FAA decisions, courts accord considerable deference to determinations within the FAA's area of expertise so long as the FAA's determination is clearly based on relevant factors.⁸³ Moreover, the FAA can only grant exemptions when they serve public interest.⁸⁴ Even though FAA decisions based on relevant factors and public interest are accorded deference, they still may be overturned by a court as arbitrary and capricious for four reasons.

The first reason is when the FAA's action is inconsistent with congressional intent.⁸⁵ Since the courts are the final authorities on statutory construction, they have the responsibility to reject FAA constructions of a statute that are inconsistent with congressional intent.⁸⁶ Otherwise, the FAA could frustrate a congressional statutory mandate.

Another reason FAA decisions are found arbitrary and capricious is when FAA actions are discriminatorily administered.⁸⁷ FAA decisions must be applied consistently to all carriers in a similar manner in carrying out the statu-

⁸³ See *Motor Vehicle Mfg. Ass'n, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) (standard of review for administrative agencies decisions is the arbitrary and capricious standard). See also *Airline Pilots Ass'n v. FAA*, 454 F.2d 1052 (D.C. Cir. 1971). The FAA is entitled to considerable deference in respect to its great expertise in aviation safety. But see *Tradewinds*, *supra* note 61, at 30 n.13. The FAA Office of Environment and Energy has acted on petitions for exemptions from § 91.303. Thus, from the FAA's actions they have treated exemptions from FAR § 91.303 as economic regulation in which arguably the FAA does not have any expertise. *Id.*

⁸⁴ Federal Aviation Act of 1958, 49 U.S.C. § 1421(c) (1982). "The Secretary of Transportation from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest." *Id.*

⁸⁵ See *Airmark*, 758 F.2d at 691.

⁸⁶ See *Federal Election Comm. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1982). "The courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Id.*

⁸⁷ See *United States v. Diapulse Corp. of America*, 748 F.2d 56, 62 (2nd Cir. 1984). The "law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated." *Id.*

tory purpose.⁸⁸ Therefore, if the FAA treats similar carrier requests differently, the court will overturn the FAA's decision.⁸⁹

A third reason why a court overturns FAA decisions as arbitrary and capricious is when the FAA changes its interpretation or deviates from earlier decisions without a reasoned explanation.⁹⁰ The FAA cannot grant special rights to some carriers and deny the same rights to others. To prevent this, the FAA must give a reasoned explanation for decisional changes, and give the affected parties an opportunity to demonstrate that they meet the changes.⁹¹

The fourth reason FAA decisions are overturned as arbitrary and capricious is when the FAA does not give careful and deliberate consideration in formulating its decisions in every case. The FAA must take a hard look at the salient problems and devise criteria to solve these problems.⁹² Then the FAA must give reasoned consideration to all of the criteria in each case⁹³ and support this decision with substantial evidence.⁹⁴

Airmark contends that the FAA showed arbitrariness by denying Airmark an exemption and granting exemptions to other carriers.⁹⁵ Furthermore, the FAA has been arbitrary by granting Airmark a partial exemption with restric-

⁸⁸ See *id.* See also, Respondent, *supra* note 11, at 11. The FAA recognizes that it must apply the same standards to all carriers petitioning for exemptions. *Id.*

⁸⁹ See *supra* note 87.

⁹⁰ See *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981). "[I]t is equally settled that an agency must provide a reasoned explanation for any failure to adhere to its own precedents." *Id.*

⁹¹ *Id.*

⁹² See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1979), *cert. denied*, 403 U.S. 923 (1971). "The court must intervene if it becomes aware that the agency has not taken a hard look at the salient problems, . . . and made a reasoned decision." *Id.*

⁹³ See *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968). The court must particularly assure that the agency "has given reasoned consideration to each of the pertinent factors. . . ."

⁹⁴ *Id.*

⁹⁵ See Petitioner, *supra* note 1, at 34-35. Airmark contends the FAA has abandoned the § 611(b) criteria and imposed restrictions that do not have a basis in law. This abandonment is arbitrary and capricious. *Id.*

tions of curfew and frequency which are not imposed on other carriers.⁹⁶ Thus, the FAA has not acted evenhandedly.⁹⁷

Alternatively, Airmark stresses that the language in section 611 of the Federal Aviation Act compels the FAA to adopt a lenient exemption policy.⁹⁸ Because hush kits are not available, Congressional intent mandates that the FAA grant exemptions until hush kits can be installed.⁹⁹ Furthermore, the FAA must adopt a formal rulemaking to consider the noise compliance requirements.¹⁰⁰

The interveners agree that the FAA has acted arbitrarily, but for different reasons than Airmark.¹⁰¹ They believe that according to the criteria, Airmark and other carriers should not receive an exemption. Therefore, the FAA arbitrarily granted Airmark a partial exemption. Furthermore, the interveners challenge the FAA's ability to grant any exemptions from FAR 91.303.¹⁰²

The FAA's response is that it applied the criteria consistently to every carrier. It admits that the situation changed regarding the good faith compliance and financial havoc tests,¹⁰³ but denies granting Airmark a partial exemption was arbitrary or capricious. In addition, contrary to the intervenors, the FAA contends that it has the power to grant exemptions from noise regulations.¹⁰⁴ Furthermore, since it has not acted on Airmark's request for a general rulemaking, this issue is not ripe for

⁹⁶ See Reply Brief of Petitioner at 27-28. Buffalo Airways' partial exemption did not have a curfew. In addition, Airmark never had the opportunity to argue that a curfew should not be imposed. *Id.*

⁹⁷ *Id.*

⁹⁸ See *Airmark Corp. v. FAA*, 758 F.2d 685, 689 (D.C. Cir. 1985).

⁹⁹ *Id.* at 690.

¹⁰⁰ *Id.* at 690 n.13.

¹⁰¹ *Id.* at 692. See *supra* note 95 for a discussion of Airmark's arbitrary and capricious argument. See *Transamerica*, *supra* note 49, at 33-42. The intervenors claim the FAA's arbitrariness is shown by the grant of exemptions and partial exemptions starting three days before the deadline. *Id.*

¹⁰² *Airmark*, 758 F.2d at 691.

¹⁰³ *Id.* at 689.

¹⁰⁴ *Id.*

appeal.¹⁰⁵

II. *AIRMARK V. FAA*

Justice Tamm divides his opinion into two parts: Part A discusses the petitioners' and intervenors' challenge to the FAA's authority to grant exemptions from the noise regulations.¹⁰⁶ The petitioners contend that the Federal Aviation Act compels the FAA to adopt a lenient exemption policy, while the intervenors claim that legislation adopted after the noise regulations limits the FAA's authority to grant exemptions.¹⁰⁷ Part B addresses the argument of arbitrariness and capriciousness of the FAA by applying different criteria in similar situations.¹⁰⁸

First the court disposes of the petitioners argument that because hush kits are unavailable the language in Section 611 of the Federal Aviation Act mandates relaxation of the FAA's exemption criteria.¹⁰⁹ Petitioners relied on the language in section 611 which states that in prescribing and amending noise regulations, the FAA shall "consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft. . . to which it will apply."¹¹⁰

Although the petitioners are correct in the relevancy of the language, they are misguided as to when the FAA is to apply the requirements of economic reasonableness and technological practicability to the regulations.¹¹¹ The FAA is to apply these criteria at the inception of the regulation in question.¹¹² Even if the petitioners contention is

¹⁰⁵ *Id.* at 690 n.13.

¹⁰⁶ *Id.* at 689.

¹⁰⁷ See *infra* notes 109-133 and accompanying text.

¹⁰⁸ See *Airmark*, 758 F.2d at 689.

¹⁰⁹ *Id.*

¹¹⁰ Federal Aviation Act of 1958, 49 U.S.C. § 1431(d)(4) (1982). See also *Tradewinds*, *supra* note 61, at 16 n.6. The Senate Committee Report made it clear that the FAA should apply the safeguards of § 611(b)(4).

¹¹¹ *Airmark*, 758 F.2d at 690.

¹¹² *Id.*

true that presently today the regulations are technologically impracticable because hush kits are unavailable is true, it does not mean that in considering the regulation's deadline date eight years ago, the FAA did not consider the criteria.¹¹³ The FAA, by selecting a deadline date eight years in advance, sought to force the industry to develop commercially available hush kits.¹¹⁴ They reasonably concluded that a firm deadline date would spur the development and implementation of hush kits,¹¹⁵ and the FAA's conclusion came true in that the approaching deadline date caused a stir of industry activity and future availability of hush kits.¹¹⁶ Therefore, because these criteria are to be applied at the adoption of the regulations, and since there is no serious contention that the regulations were technologically impracticable or economically unreasonable at the time of their adoption eight years ago, section 611 is not controlling.¹¹⁷

The intervenors took the approach that two pieces of legislation adopted after the initial noise regulations, the Hawkins-Chiles Amendment¹¹⁸ and Aviation Safety and Noise Abatement Act (ASNA),¹¹⁹ showed Congressional

¹¹³ *Id.* The court said, "We find nothing in section 611 that compels the FAA to adjust the deadline due to the current unavailability of hush kits. The FAA has already determined the economic reasonableness and technological practicability of its noise regulations." *Id.*

¹¹⁴ *Id.* at 12. "This policy accords with Congressional intent. In originally enacting section 611, Congress intended that the FAA impose 'standards which require the full application of noise reduction technology.'" S. REP. NO. 1353, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2688, 2690.

¹¹⁵ *Airmark*, 758 F.2d at 690.

¹¹⁶ See Respondent, *supra* note 11, at 14. The court also noted that to require the FAA to reevaluate its regulations or deadline would erode the FAA's rulemaking authority and send a signal to the regulatory world that deadlines are easily susceptible to extensions or exemptions. This would cause confusion in the future as industry might lag thinking deadlines can be changed. See *Airmark*, 759 F.2d at 690. The absence of an approaching deadline caused Boeing not to receive a single order for a B-707 hush kit during the 1970's. Boeing quit the business of making hush kits in 1978. Respondent, *supra* note 11, at 14.

¹¹⁷ *Airmark*, 758 F.2d at 690. However, the court did go on to explain that even if this contention had been brought up, the FAA had followed these guidelines in their promulgation of the regulations. *Id.*

¹¹⁸ Pub. L. No. 98-473, § 124, 98 Stat. 1837, 1930 (1984).

¹¹⁹ Pub. L. No. 96-193, 94 Stat. 50 (1984).

intent that the FAA should not exempt four-engine aircraft absent extraordinary and unanticipated circumstances not presented in the cases under review.¹²⁰ Although the Senate version of ASNA contained a provision that allowed the FAA to grant exemptions for "good cause,"¹²¹ the Conference Committee excluded this language.¹²² Consequently, the intervenors contend that exclusion of the "good cause" language showed Congressional intent to not allow any exemptions.¹²³

The court rejected the intervenors argument on two grounds. First the court noted that repeal by implication is disfavored.¹²⁴ The court believed if Congress intended to repeal the FAA's exemption authority they would have clearly expressed the desire.¹²⁵ Secondly, according to legislative history, the conferees espoused that the "good cause" language is unnecessary because the FAA already has authority to grant exemptions.¹²⁶ Therefore, the court stated that the committee's exclusion of the good cause language does not show intent to do away with the FAA's power to grant exemptions, but is a recognition of that power.¹²⁷

Another claim by the intervenors is that the Hawkins-Chiles Amendment proves the lack of FAA exemption authority.¹²⁸ Again the court looked at legislative history and a statement by Senator Baker: "[I]t is my understanding that the provision temporarily exempting Miami International Airport . . . is in no way intended to inhibit the Secretary of Transportation from granting exemptions in

¹²⁰ *Airmark*, 758 F.2d at 690-91.

¹²¹ S. 413, 96 Cong., 1st Sess. § 303, (1979).

¹²² *Id.*

¹²³ *Airmark*, 758 F.2d at 691.

¹²⁴ *Id.* See *Watt v. Alaska*, 451 U.S. 259 (1981). (repeal by implication is disfavored).

¹²⁵ *Airmark* 758 F.2d at 691.

¹²⁶ See *Aviation Safety and Noise Abatement: Hearings on H.R. 2458, H.R. 3547 and H.R. 3596 before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 96th Cong. 1st Sess. 112-13 (1979). (Testimony of Administrator Bond indicated "good cause" language was unnecessary).

¹²⁷ *Airmark*, 758 F.2d at 691.

¹²⁸ *Id.* Pub. L. 98-473, § 124, 98 Stat. 1837, 1970 (1984).

similar situations.”¹²⁹ The court also considered the statement of Senator Hawkins who said: “[N]othing in the exemption we have provided in any way effects [sic] the broad authority the Secretary possesses to grant exemptions from this or any other regulation at other places or under other circumstances from those specified in the amendment.”¹³⁰ The court concluded that section 611 did not compel the FAA to grant exemptions and that neither the ASNA nor the Hawkins-Chiles Amendment expressly or impliedly limited the FAA’s exemption authority.¹³¹

After the court established in the first part of the opinion that the FAA had broad authority to grant or deny exemptions, it went on to decide that the FAA exercised this power arbitrarily and capriciously.¹³² The court stated that the standard of review for the case is narrow and the court is not to substitute its judgment for that of the FAA.¹³³ However, the FAA cannot treat like cases differently.¹³⁴ The FAA’s brief recognized these standards and responded that “the agency [has] no choice but to apply the same criteria to all airlines petitioning for exemptions.”¹³⁵ Any other policy would fly in the face of Congress’ intent that air carriers be treated evenhandedly.”¹³⁶ However, balanced against these standards is the rule of law that an agency is free to alter its past rulings and practices even in an adjudicatory setting.¹³⁷ Such an alteration can be made so long as the agency gives a reasoned explanation for any failure to adhere to its own precedent.¹³⁸ The petitioners and intervenors claimed that the FAA applied different criteria to similarly situated car-

¹²⁹ *Airmark*, 758 F.2d at 691 n.19.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 691.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* See Respondent, *supra* note 11, at 11.

¹³⁷ *Airmark*, 758 F.2d at 691-92.

¹³⁸ *Id.* See *supra* note 86 and accompanying text.

riers in an arbitrary and capricious fashion.¹³⁹

The court stated that if the FAA requires one carrier to meet all five factors before it grants an exemption, then it must require the same five factors of other carriers.¹⁴⁰ After looking over several petitions for exemptions, the court ruled that the FAA arbitrarily granted and denied exemptions.¹⁴¹ The court then gave examples of the FAA's arbitrary application of the five criteria.

The first of the criteria which the FAA asserted as essential, "valuable air service", is not mentioned in the grant of exemptions to Ports of Call Travel Club, Buffalo Airways or Airmark Corporation;¹⁴² however, the "valuable air service" criterion applied in denying exemptions to other carriers.¹⁴³ Since the FAA did not apply this criterion equally to all carriers, the court concluded the FAA acted arbitrarily.¹⁴⁴

Another criterion that the FAA applied inconsistently is "good faith compliance."¹⁴⁵ The FAA changed its early approach that mere negotiation of a hush kit contract did not satisfy the "good faith compliance" requirement.¹⁴⁶ In Tradewinds' exemption petition, the FAA said that a hush kit contract represented some evidence of "good faith compliance."¹⁴⁷ Later the FAA went full circle saying that negotiating a hush kit contract conclusively estab-

¹³⁹ *Id.* While both the petitioners and intervenors claimed the FAA has been arbitrary, they based their contention on different reasons. See Tradewinds, *supra* note 61, at 51-61. Tradewinds claims the FAA applied the criteria arbitrarily by granting exemptions to other carriers and not to them. *Id.* See also Transamerica, *supra* note 49, at 52. Transamerica claims the FAA has been arbitrary because two days before the deadline they issued exemptions contrary to congressional intent. *Id.*

¹⁴⁰ *Airmark*, 758 F.2d at 692.

¹⁴¹ *Id.*

¹⁴² *Id.* See also Rich International Airways, Inc., FAA Docket No. 24,231 (Jan. 4 1985). The FAA did not mention valuable air service in granting Rich Airways a partial exemption.

¹⁴³ *Airmark*, 758 F.2d at 692.

¹⁴⁴ *Id.* at 693.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

lished a good faith compliance effort.¹⁴⁸ In a matter of two months, the FAA went from saying that a hush kit contract did not satisfy the good faith compliance criterion, to saying that it definitely does satisfy the criterion.¹⁴⁹ Although the court conceded that circumstances may have changed during this two month period,¹⁵⁰ the FAA did not give a rational explanation for the complete change of the good faith compliance criterion.¹⁵¹ Furthermore, at the end of the two month period, the FAA once again refused to recognize a hush kit contract as evidence of good faith compliance.¹⁵²

Next, the court considered the "financial havoc" criterion.¹⁵³ Under the FAA's initial interpretation of this criterion any carrier that purchased noncompliant airplanes is precluded from claiming financial havoc.¹⁵⁴ Thus, the only carriers that met the financial havoc requirement had stage one airplanes at the inception of the regulations in 1976.¹⁵⁵ The FAA's interpretation disallowed most exemptions because many of the carriers seeking exemptions are products of deregulation and did not own any airplanes in 1976.¹⁵⁶ However, the FAA granted a partial exemption to Buffalo Airways on December 28, 1984, even though the carrier did not own a stage one airplane until 1984.¹⁵⁷ Again the FAA arbitrarily changed the rules of the game in respect to the financial havoc criterion, and thereby discriminated against other carriers.¹⁵⁸

With these facts in mind, the court found that the FAA arbitrarily denied Airmark a full exemption.¹⁵⁹ First, the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 694.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 695.

FAA did not measure Airmark's "valuable air service" although this is a required criterion.¹⁶⁰ Second, Airmark benefitted from the later lenient financial havoc test because Airmark purchased a noncompliant airplane, yet passed this test.¹⁶¹ Other carriers did not pass the financial havoc test because they purchased stage one airplanes.¹⁶² Third, a more lenient good faith compliance test applied to Airmark since the FAA changed its earlier position that entering a hush kit contract did not demonstrate good faith.¹⁶³ Because of this disparity by the FAA in applying and changing criteria, the court vacated Airmark's partial exemption and granted them time to reapply for a full exemption.¹⁶⁴

In conclusion, the court found that the FAA arbitrarily and capriciously exercised its exemption power, and the FAA instead of the court should determine what criteria the FAA should use.¹⁶⁵ The court vacated the denials of exemptions and partial grant to Airmark.¹⁶⁶ The court also stated that while the FAA retains broad discretion in determining whether granting or denying exemptions best serves the public interest, any criteria the FAA chooses must apply to all exemption requests in a consistent manner.¹⁶⁷ Furthermore, any deviation from past rulings requires a reasoned explanation.¹⁶⁸

III. PRACTICAL IMPLICATIONS AND CONCLUSIONS

The court left open what criteria the FAA may choose

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 693.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 695.

¹⁶⁵ *Id.* "We will not prescribe particular criteria for the FAA to apply; the FAA retains broad discretion to determine whether the public interest will be best served by granting or denying petitions."

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

as long as the FAA consistently applies them.¹⁶⁹ Since the judgment, the FAA determined that two classes of petitioners warrant an exemption from FAR section 91.303.¹⁷⁰ First, those petitioners that satisfy all five requirements set out by Congress in the Conference Report on the Aviation Safety and Noise Abatement Act (ASNA) receive an exemption.¹⁷¹ Consequently, any carrier that demonstrates 1) small size; 2) a good faith compliance effort; 3) that needed technology is delayed or unavailable; 4) that a denial would result in financial havoc; and 5) performance of valuable air service deserves an exemption. However, all five criteria must apply in each case.¹⁷²

The second group of carriers that receive noise regulation exemptions are those carriers designated in the Department of Transportation (DOT) orders as serving essential air service.¹⁷³ These carriers get an exemption regardless of whether they satisfy any of the five criteria.¹⁷⁴ The list generally reflects carriers similarly situated

¹⁶⁹ *Id.* See *supra* note 165 and accompanying text for a discussion of the court's holding.

¹⁷⁰ See Petition of Lineas Aeras Del Caribe, S.A. Grant of Exemption No. 4302, 50 Fed. Reg. 19,102 (1985). This grant of exemption sets out in detail the five FAA criteria and their definitions. *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* Notwithstanding the five criteria test, the FAA has determined that carriers which have been designated in DOT orders to perform service on routes which have been designated as essential air service routes pursuant to § 419 of the Federal Aviation Act of 1958 (current version at 49 U.S.C. § 1389 (1982)) warrant special consideration because maintenance of air service on such routes is, by statute, deemed to be in the public interest. *Id.* at 19,103. The grant of exemption for Lineas Aeras del Caribe, S.A., sets out in detail the FAA standards for an exemption based on essential air service. *Id.*

¹⁷⁴ *Id.* Notwithstanding the five criteria for a noise exemption from § 91.303, the FAA will give a carrier an exemption from § 91.303 for a designated essential air service route if the petitioner shows that it:

- (1) is operating noncomplying aircraft on a route for which it has been found by a DOT order to be providing essential air service and
- (2) has a firm contract with a hush kit manufacturer which, before January 1, 1985 applied for an STC; is continuing active efforts to obtain the STC; and such contract is supported by a non-refundable deposit of at least \$75,000, for the installation of hush kits on each of its aircraft at the earliest available date, and (3) acquired the aircraft for which it seeks an exemption prior to January 1, 1985. See

as those carriers receiving exemptions because of the Hawkins-Chiles Amendment.¹⁷⁵

While the five criteria are a good starting point, additional criteria should be added to avoid granting a competitive advantage to noncompliant carriers. Therefore, two additional criteria should be considered to equalize the competitive market until all carriers comply with the noise regulations. These criteria are based on the premise that FAR deadlines should not provide a competitive advantage for noncompliant carriers over compliant carriers.

The suggested sixth criterion is called "fair acquisition cost." As the noise regulation deadline approached, noncompliant airplane prices rapidly decreased.¹⁷⁶ While the deadline date was not the sole cause of this decline in price,¹⁷⁷ it was a major force in driving prices downward.¹⁷⁸ The reason for depressed prices is clear. If the airplanes did not become compliant by the deadline date, they would be grounded.¹⁷⁹ Until hush kits became available and installed, the noncompliant airplanes would be negative cash producers as the cost of maintenance, storage, and insurance would have to be paid on a non-income producing airplane. Therefore, these noncompliant airplanes were put on the market at depressed prices on the reasonable assumption that the FAR deadline would

supra note 9 for a discussion of Supplemental Type Certification (STC).

¹⁷⁵ See *supra* notes 66-78 for a discussion of the Hawkins-Chiles Amendment which is analogous to the above exemption test for essential air service.

¹⁷⁶ See Avmark Newsletter, Jan. 1984 at 3. Avmark, Inc., commented that imminent FAR § 36 enforcement badly depressed the value of DC-8 airplanes. Furthermore, they said that hush kits would increase the plane's value. See also Avmark Newsletter, Jan. 1985 at 3. Avmark expects that the value of noncompliant airplanes will increase to a level "well above the current cost of airframe and hush kits. . . ." *Id.*

¹⁷⁷ See Petitioner, *supra* note 1, at 9. Fuel prices were rising and other planes were more fuel efficient and thus it is argued that fuel costs are a reason for the depressed prices. *Id.* But see Transamerica, *supra* note 49, at 9. Because buyers and sellers knew that noncompliant airplanes would be grounded January 1, 1985, the noncompliant planes sold at considerably depressed prices. *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See Transamerica, *supra* note 49, at 9.

be enforced.¹⁸⁰ However, without the enforcement of the deadline, the noncompliant plane can fly and produce money for the owner. This is the reason for the sixth criterion. Noncompliant airplanes purchased at lower prices than normal are cheaper to fly than compliant airplanes. Thus, the compliant carrier is at an economic disadvantage because he relied on and complied with the FAA's regulations.

Applying the sixth criterion serves two purposes. First, the sixth criterion equalizes the costs for compliant and noncompliant carriers by raising the cost of operating noncompliant aircraft. The cost equalization is achieved by charging a variable fine based on the number of air miles flown by noncompliant aircraft. By applying this fine, the true cost of a noncompliant plane is levied against the owner, thereby equalizing or balancing the market situation between compliant and noncompliant carriers. Secondly, all monies collected from the fines could be placed into a noise abatement fund for research regarding noise reduction. Consequently, carriers would be flying on a true market cost basis and funds would be generated for noise reduction research.

The seventh criterion suggested is "time." The "time" criterion is enforced via a fixed fine. Each noncompliant carrier would be fined a set rate per noncompliant airplane for each day the noncompliant airplane flew prior to January 1, 1985. Such a system would penalize the older noncompliant carriers more, without severely crippling carriers that started after deregulation. A fixed fine based on "time" would make the present system fair because noncompliant carriers would have to pay for lagging in their compliance. The compliant carriers have already paid by bringing their fleet of airplanes within the noise regulations. Furthermore, even though they should have been aware of and complied with the deadline, carriers

¹⁸⁰ See *id.*

formed after deregulation would not be shut down, yet they would pay for their inexperience or mismanagement.

While adopting these two extra criteria may equalize the market forces and competition between compliant and noncompliant carriers, they are not to be taken as immutable. The main purpose is to prevent noncompliant carriers from gaining an unfair advantage through administrative exemptions from deadlines. Therefore, if the scenario changes, as Buffalo Airways claims, then the last two criteria should be modified or dropped.¹⁸¹

Buffalo Airways claimed in a September 1985 letter that its hush kits resulted in a fuel penalty of 15 percent over the original estimates.¹⁸² If this is incorrectable and hush kits turn out to be heavy fuel consumers, then they are a high cost to the noncompliant carriers and general public. Therefore, a ratio would need to be developed to change any rate of fine to take into account the unexpected high fuel consumption and any other unforeseen costs. Such a ratio is within the purposes of these criteria to not give any carrier an advantage over another because of FAA noise deadlines.

In conclusion, aviation noise is a serious problem. To alleviate some of the noise, the FAA developed strict noise standards and gave the carriers a deadline compliance date seven years in advance. Compliance with the noise regulations cost the compliant carriers millions of dollars. As a result of the approaching deadline, noncompliant airplanes sold at depressed prices. Noncompliant carriers who purchased the cheap airplanes should not be given a competitive advantage over the compliant carriers who spent millions to honor the deadline. To allow this financial advantage is unfair and encourages future disobedience of FAA deadlines. As an alternative to ground-

¹⁸¹ See 281 AVIATION DAILY 6 at 47. (daily ed. Sept. 10, 1985). Buffalo Airways claims that its airplanes retrofitted with hush kits manufactured by Comtram, suffered a 15% fuel loss penalty. Comtram, which promised a 2% penalty, denied Buffalo's claims. Comtram admits, however, that it has never done any inflight or wind tunnel tests for cruise fuel consumption. *Id.*

¹⁸² *Id.*

ing the noncompliant airplanes, two fines are suggested. Money from the fines could be used to further noise abatement research and equalize the market airplane cost. However, the main purpose of the alternative criteria is to prevent noncompliant carriers from gaining an unfair economic advantage over compliant carriers.

Timothy Mark Bates

Comments

