

## Litigator of the Week: The Paul Weiss Associate Who Challenged the FAA Decision to Ax Peak-Hour Discount Flight Slots From Newark

Aimee Brown convinced the D.C. Circuit that the FAA's decision to retire desirable takeoff slots at Newark International Airport that formerly belonged to Southwest Airlines violated the Administrative Procedures Act, a win for her client Spirit Airlines.

By Ross Todd  
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Our Litigator of the Week this week is **Paul, Weiss, Rifkind, Wharton & Garrison** associate **Aimee Brown** who in her first federal appellate argument led a successful challenge for Spirit Airlines to the way that the Federal Aviation Administration allocated flight authorizations at Newark Liberty International Airport.

After the FAA announced in 2019 that it would be retiring peak-period flight authorizations at Newark previously held by low-cost carrier Southwest Airlines, Spirit petitioned the D.C. Circuit, claiming the agency's decision was arbitrary and capricious and violated the Administrative Procedure Act. The agency's move, Spirit argued, failed to address the competitive effects of bolstering United Airlines' already dominant share of authorized slots at its primary hub, potentially driving up prices for Newark passengers without making a substantial dent in congestion at the busy airport.

Last week the court sided with Brown and Spirit and **ordered the FAA** to revisit its decision.

**Litigation Daily: Who is your client and what was at stake?**

**Aimee Brown:** Our client is Spirit Airlines, an ultra-low-cost carrier. The case deals with Spirit's ability to operate FAA-authorized flights out of Newark, one of the nation's busiest airports, during peak hours. In 2019, Southwest decided to stop operating flights out of Newark, and the FAA announced that it would retire Southwest's authorizations. Those authorizations were incredibly important to Spirit, because the airport is capacity-constrained and has historically been dominated by a single carrier, United, which operates the vast majority of flights during peak hours. Spirit has long been looking to increase its presence at Newark, and the Southwest flight authorizations represented a rare opportunity for Spirit to do so.

**Who all was on your team and how did you divide the work?**

**Joanne Young and David Kirstein** of **Kirstein & Young** have been representing Spirit for years in its effort to get flight authorizations at Newark and other airports. When Southwest announced its exit from Newark, they immediately sought the authorizations from the FAA on Spirit's behalf. After the FAA announced they were retiring Southwest's slots, Joanne and David filed a petition for review by the D.C. Circuit and brought in our team, including **Kannon Shanmugam**, the head of our appellate practice, and **Andrew Finch**, who counsels Spirit on antitrust issues. We collaborated closely with Joanne and David on the briefing.

**How did you get tapped to handle oral argument in this case?**

When the case got scheduled for oral argument, Joanne and David reached out and asked if we would be willing to handle it, given our appellate experience. Kannon immediately asked me if I was interested in doing the argument. I had clerked for the D.C. Circuit and had experience with the relevant administrative law issues, both from my clerkship and from my prior work as an attorney for the Federal Programs Branch at DOJ. I also have to thank Spirit's general counsel, **Thomas Canfield**, who was incredibly supportive when we approached him about me handling the argument. I'm so grateful that Thomas didn't hesitate to give me the opportunity to argue a case that was of such importance to Spirit and its business.

**What did you do to prepare for the oral argument?**



**Aimee Brown of Paul, Weiss, Rifkind, Wharton & Garrison.**

Courtesy photo

My preparation involved all of the usual steps—reading through all the briefs and cases and outlining my argument. I ended up writing out three or four different outlines, starting out with the most detail possible and gradually winnowing things down to a single page of the most important, high-level points. I would also go for long walks around the Capitol and rehearse my arguments out loud to try to get my phrasing to be as concise and persuasive as possible. I was wearing a mask, so people couldn't see me talking to myself, but anyone who heard me probably thought I was crazy, mumbling about the importance of historical precedence for peak flight times.

Closer to the September hearing date, I had two moots with my colleagues, including the folks in the appellate group. I think the moots are one of the most important part of argument preparation, because it's not enough to memorize or read from a script, you have to be able to think on your feet and answer questions. The moots are also where you learn how persuasive your argument is from people who haven't been living with the case. The feedback I got at the moots really helped me refine my answers to difficult questions and lead with the strongest points.

I also spent a lot of time talking with my husband about how to deal with the nerves on argument day. My husband is a classical pianist who has been performing in front of big crowds for decades, and it was really interesting to see some of the similarities between two careers that look very different on paper. My husband has a pre-concert routine that he sticks to pretty closely, and going through each of the steps helps get him in the right mental space. He helped me with some breathing exercises to calm my heart rate and recommended the simple step of pausing for a beat to collect yourself before you begin. I have a tendency to speak quickly, especially when I'm nervous, so I also wrote "SLOW DOWN" in all caps at the top of every page of the notes I had in front of me at argument.

#### **How did you do the actual argument? What was the format?**

The D.C. Circuit had the argument over Zoom and then broadcasted only the audio live. I appreciated the use of Zoom so that I could see the judges' faces and get a sense of when someone was about to talk, or how they were responding to what I was saying. I did most of my preparation from my kitchen table at home, but I opted to come into the office to do the argument because of some ongoing construction in my building. The office itself was pretty empty. I was alone in a conference room on one floor, while Kannon was in his office on the floor above listening in. Kannon sent me a string of text messages of support during the hearing, which was wonderful.

**Spirit had the option here to operate unapproved flights. Why was challenging the FAA's retirement of Southwest's peak slots the right move for your client?**

Flying unauthorized flights wouldn't get Spirit the benefits it is seeking. Spirit is looking for the long-term ability to operate its Newark flights on a consistent basis going forward. As the D.C. Circuit recognized, flying unauthorized flights doesn't provide that assurance. It increases the probability that the FAA will subject Newark to a higher level of regulation and, if that happens, Spirit would have those unauthorized flights taken away while any authorized flights could be maintained.

#### **How did you use the competition issues raised by the DOJ and the Port Authority to bolster Spirit's case?**

The competition concerns that the DOJ and Port Authority of New York and New Jersey expressed were completely consistent with Spirit's position that giving these authorizations to a low-cost carrier is essential to preserving competition at Newark. Having both agencies behind the key points that we were making—that competition was an important problem that the FAA needed to address—made it clear that Spirit's arguments are not just those of a jilted competitor. Instead, the experts at agencies charged with considering these issues also see a problem that they want the FAA to take into account.

**In conclusion on the merits, the DC Circuit wrote "If the FAA again decides to retire Southwest's peak-period slots, it should be prepared to provide a reasoned explanation for preferring to cut travel time an average of one minute rather than to cut the price of flying by as much as 45 percent on routes that would gain a second carrier." How are you feeling about the prospects of those old Southwest slots coming out of retirement with that as the FAA's guidance? And what happens next here?**

Our petition will now go back to the FAA, which will have to determine what to do about the old Southwest slots while taking into account the competitive effects of its decision. The D.C. Circuit made clear that any determination that the FAA makes on remand has to be supported by substantial evidence, and that the FAA is required to consider competitive concerns in its analysis. We are pleased that the FAA will have to take those concerns seriously on remand.

#### **What will you remember most about this matter?**

This was an argument of many firsts for me, so I'll always remember it as my first federal appellate argument, my first opportunity to argue before the Circuit for which I clerked, and my first (and probably only) argument under the strange conditions imposed by the pandemic. I'll also never forget the faith that Spirit, Kannon and the rest of our team had in me to take the lead on this. It was just an incredible experience overall.

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