LEGAL COLUMN

Taking on the landlord

Here, Len Kirsch examines the changing face of today's airport and offers advice for handlers who feel they may be short-changed.

Out of economic necessity, airport authorities are looking for new revenues. Rather than imposing or raising fees that can be passed on to the flying public, airport authorities are, mistakenly I believe, seeking to take over operations long run by private companies, making it more difficult to negotiate leases, operating permits and other agreements governing the provision of services: this is altogether making it harder on ground handlers and similarly situated companies to make money. This has required ground handlers, other airline service companies and FBOs to prepare for tough negotiations, to determine new strategies to persuade airport authorities to provide them with the means to manage their operations and, at times, to litigate or threaten to litigate in order to protect their investments.

Currently, I am negotiating new leases or lease amendments, or other agreements, at six airports, and I am in the process of starting, or am in the middle of litigation, with five others. At each of these airports I am dealing with issues unlike issues in the past. Below are some tips on how to use a combination of education, innovative alternatives, threats and actual litigation to protect your operations and ensure that your company will be able to profit from your operations.

In the US, there is an administrative process for ground handlers and similar companies to challenge an airport authority decision. This is called a Part 16 complaint, which is adjudicated by the Federal Aviation Administration (the FAA) in Washington DC, alleviating the need to go to federal or state courthouses.

I remain amazed how little some airport authorities know about the law governing airports, leases and contracts generally; about the ground and airline services industry; and about simple economics. You would think that airport authorities understand that its tenants need to make money. Whenever I first meet with an airport authority, I try to determine whether the Airport Authority understands its obligations under whatever law, regulation or ordnance governs a particular issue. If not, I try to educate the people I am dealing with by reciting how the law impacts the factual issues in dispute (in the light most favourable to my client's position). This can sometimes entail providing actual copies of those specific sections of a law or regulation that affect an issue and, sometimes, a well-written comprehensive memorandum of law with case citations. It is also often necessary to explain a client's business and to discuss what the client needs in order to ensure profitability.

Innovative solutions

Does an *impasse* mean that unless one party blinks, there can be non-movement on a particular issue? Not necessarily. Each party to a negotiation has something they absolutely need or must avoid. Often, but not always, there are alternatives that do not seem obvious but which protect the needs of each party or at least require both parties to give up less than first thought. The way to come up with innovative alternatives is to analyse different outcomes to determine what effect an outcome will have on any given issue. Think outside the box: maybe what sounded crazy in the beginning is not so crazy after all.

A threat, any threat, but especially a threat of litigation, must be credible. To be credible, the threat must be based on a principle of law, which directly or indirectly influences the outcome; but just as importantly, one that is actionable at relatively reasonable cost within a reasonable time period. This does not mean that there must be some precedent or acknowledgement that when the law is applied to the specific facts, the outcome is clearly in favour of the party making the threat. Ambiguity is okay, I feel. As the intent is to use the threat of litigation to obtain a better negotiating position, the lack of a clear outcome may in reality make it easier for the parties to come to an understanding, as neither party wishes to risk losing or is unwilling to test the law, since a determination may set bad precedent for the future.

Litigation and end play

Losing a lawsuit is no tragedy. This is because having brought the dispute to litigation, even if having lost the suit, the airport authority will now know that it cannot push the litigant around without risk of a new or further litigation. Multiple threats of litigation, however, are nothing more than "crying wolf." If you threaten litigation and never actually bring a lawsuit, then threats of litigation will do nothing to help your position.

Of course, winning a lawsuit is the most preferable outcome and will be more likely if sufficient time is spent researching the application of the law. In the end the cost, management time required, chances of winning and the effect of future relations with the airport authority will determine whether a lawsuit is wise.

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