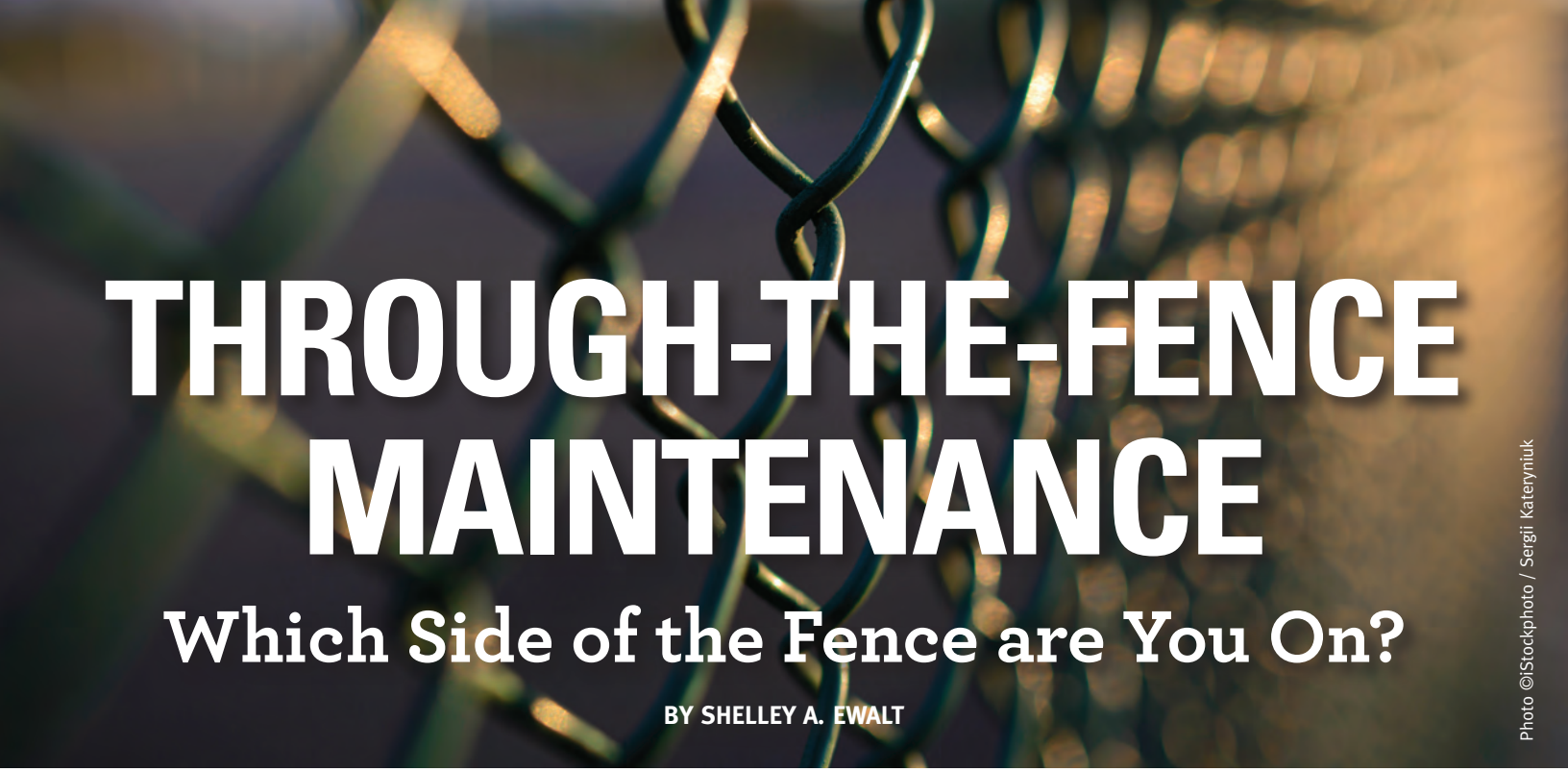

THROUGH-THE-FENCE MAINTENANCE

Which Side of the Fence are You On?

BY SHELLEY A. EWALT

Photo ©iStockphoto / Sergii Kateryniuk

WHETHER OR NOT "THROUGH-THE-FENCE" MAINTENANCE MAY BE PERFORMED FOR COMPENSATION AT AN AIRPORT DEPENDS ON THE KIND OF "FENCE" AND WHICH SIDE YOU ARE ON.

The FAA uses the term "Through-the-Fence" to refer to easements that allow access for aircraft from non-airport land that lie adjacent to airport property.[1] Literally, taxiing from off-airport commercial, residential, governmental, or private parcels.[2] More recently, however, the industry has begun using the term to refer to businesses that engage in commercial aeronautical activities on an airport, but without a physical base or operating permit to conduct business at the airport. These include independent mechanics, repair stations, and maintenance businesses that provide services on the airport. But these groups may be more accurately referred to as "independent service providers," or more generically, "independent operators."[3] These terms have the advantage of being separate from issues of aircraft access, not conflicting with the FAA's use of Through-the-Fence, and being broad enough to encompass other types of businesses that also conduct business on airports.

This article will focus on independent maintenance providers and airport access. At one end of the spectrum, imagine an individual A&P mechanic who does an annual inspection for a friend's aircraft in the friend's privately-leased hangar in exchange for a small fee. At the other end of the spectrum, imagine a mobile repair unit (MRU) dispatched by an OEM or repair station to remove a corporate jet engine for overhaul while the jet is in the owner's private hangar or in a joint-use FBO hangar. These examples are widely different situations, but they share the common element of being an aeronautical activity carried out by a service provider that is not based at the airport.

FAA GRANT ASSURANCES

In exchange for federal funding for airport development projects, airports sign contracts with the federal government guaranteeing that they will comply with certain obligations that are referred to as "FAA Grant Assurances." There are 39 different grant assurances. Two are especially pertinent to

Continued on page 42

1 Airport Compliance Handbook, FAA Order 5190.6b, at 12.7 (hereinafter "Airport Handbook").

2 Minimum Standards for Commercial Aeronautical Activities, FAA AC 150/5190-7, at 1.4 (hereinafter "AC 150/5190-7"). *See* Guidebook for Through-the-Fence Operations, available at https://doi.org/10.17226/22360 (hereinafter "ACRP Report 114"). Although it is discouraged, Through-the-Fence access is not entirely prohibited. FAA guidance spells out the terms and conditions regarding residential and other types of usage.

3 AC 150/5190-7, at 1.3(b); *see also* ACRP Report 114, at 2 (distinguishing between independent operators and Through-the-Fnce operations).

Through-the-Fence Maintenance

Continued from page 41

the relationship between airports and independent service providers.

Grant Assurance 23 "Exclusive Rights": Airports are prohibited from granting an "exclusive right" to conduct an aeronautical business by way of lease, operating permit or other restrictions,[4] except under certain limited conditions that are seldom applicable. The purpose of the exclusive rights prohibition is to prevent monopolies and to promote competition at federally-obligated airports (which, incidentally, is supposed to improve safety and lower prices).[5] The FAA's position is that an exclusive right limits the usefulness of the airport and deprives the aeronautical community of the benefit of competitive services.

An airport violates the exclusive rights prohibition if it excludes others, either intentionally or unintentionally, from participating in an on-airport aeronautical activity.[6] This grant assurance is unique in that it is in effect for as long as the airport is in existence—even if the original 20-year grant period has expired.

An exclusive right may be expressly granted, for instance, by a lease agreement that promises to exclude competitors offering the same type of services.[7] It may also be inadvertently created by unreasonable minimum standards or rules that have the effect of excluding aeronautical businesses.[8] The presence of only one repair station or maintenance provider is not necessarily evidence of an exclusive right by itself.[9]

4 49 U.S.C. § 40103(e), *No Exclusive Rights at Certain Facilities*; 49 U.S.C. § 47107(a), *General Written Assurances*; and 49 U.S.C. § 47152, *Terms of Conveyances.* Grant Assurance 23 says, in part, that the airport sponsor "will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

5 Exclusive Rights at Federally-Obligated Airports, FAA AC 150/5190-6, at 1.2 (hereinafter "150/5190-6").

6 AC 150/5190-6, at 1.2.

7 *Hilton v. City of Arcadia, FL*, No. 13-93-22, Preliminary Findings and Analysis (Nov. 29, 1995).

8 AC 150/5190-6, at 1.1-1.2.

9 *Lytton v. Sheridan Cnty. Bd. of Cnty. Comm'rs*, FAA Docket 16-01-16, Director's Determination (Dec. 20, 2002).

This prohibition on exclusive rights applies to all aeronautical activities. Aeronautical activities are those which "involve, make possible, or are required for" aircraft operations and those activities that contribute to or are necessary for safe aircraft operations.[10] Aircraft maintenance is clearly an aeronautical activity within the FAA's meaning of that term. Thus, repair stations and maintenance businesses are performing an aeronautical activity and cannot be either the beneficiary of, or be excluded by, an airport's improper exclusive right. Importantly, the prohibition against exclusive rights is applicable whether or not the business is based at that particular airport.

In plain language then, an airport cannot protect a maintenance provider based at the airport by imposing conditions that keep out independent maintenance providers. However, there are other considerations to how this works in reality. There is another grant assurance that comes into play here. Also, minimum standards, rules and local airport requirements must also be considered.

Grant Assurance 22 "Economic Non-Discrimination": One of the most commonly discussed assurances is Grant Assurance 22. It requires that airports be available for use "on reasonable terms and without unjust discrimination" for all aeronautical activities, including maintenance providers.[11] At the same time, airports are allowed to set reasonable preconditions to be met by all users to promote safe and efficient airport operations.[12] Consequently, airports cannot outright exclude independent service providers from doing business on the airport; but, on the other hand, they can set reasonable conditions that must be met.

There are a few instances where the FAA has found examples of unreasonable conditions that could apply to independent maintenance providers: (1) terminating a right to do business without cause in the airport's sole discretion; (2) requiring the operator to quit the premises on seven days' notice of a breach with no opportunity to cure; and (3) requiring a waiver of appeal rights to the FAA.[13]

Examples of reasonable preconditions that the FAA has recommended are: (1) requiring proof of liability insurance; (2) indemnification in favor of the airport; (2) holding a business permit issued by the airport; (3) payment of a business permit and/or other fees; and (4) agreeing to abide to airport's rules and regulations.[14]

If an airport has no published preconditions for maintenance by independent operators, then it would likely be unreasonable for an airport to flat-out refuse access. Airports that refuse access entirely to independent operators would, most likely, be in violation of exclusive rights and economic non-discrimination grant assurances.

MINIMUM STANDARDS

The FAA recommends that airports develop and implement minimum standards that are fair, reasonable, and specific to their unique aeronautical communities.[15] While doing so is optional, well-drafted standards serve to protect users from unauthorized products and services, encourage the availability of services for all airport users, promote the utilization of airport property, and ensure efficient operations. The goal is for airports to regulate all service providers and give compensation back to the airport. However, minimum standards must be reasonable and not be used to create an exclusive right.

Most airport minimum standards envision only airport-based businesses with leases, such as FBOs, flight schools, repair stations, and charter operators. However, the FAA's guidance on minimum standards contemplates the existence of independent operators and advises that airports create a permitting process with yearly fees or revenue percentage charges.[16] But few airports do it. Where airports' minimum standards do address independent maintenance providers, having written documentation provides clear cover to require compliance and avoid claims of unjust discrimination. In practice, however, most airports do not address independent service providers one way or the other.

10 AC 150/5190-6, Appendix 1, at 1.1(a). By contrast, non-aeronautical businesses may be aviation-related—such as a specialized caterer, airport restaurant, and car rentals—but they are not necessary for aircraft operations to occur. The prohibition against exclusive rights does not apply to non-aeronautical activities.

11 Grant Assurance 22(a).

12 Grant Assurance 22(h).

13 ACRP Report 44, *Understanding Grant Assurances*, Vol. 2, at E-15.

14 AC 150/5190-7, at 1.3(b).

15 Grant Assurance 22 sections (h) and (i) provides that the sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. AC 150/5190-7, at 1.1.

16 AC 150/5190-7, at 1.3(b).

Continued on page 44

Continued from page 43

From the point of view of the maintenance provider based at the airport, its investment in facilities, tooling and equipment, along with commitment to a long-term lease, should be on even financial footing with potential competitors. So, while the airport-based repair station may not be concerned with an OEM completing work that only it can provide, it would be justifiably concerned if it is losing work to a business that is not based at the airport, is not required to comply with the same standards, and does not pay rents or fees to support the airport. If this is the case, the locally-based maintenance provider would be justified in asking the airport for equal treatment.

From the point of view of OEMs and larger repair stations, obtaining individual business licenses from airports is impractical. These businesses have thousands of customers based at hundreds of airports across the country and they may be called out on short notice to provide services via mobile repair units. But it is difficult for them to predict when and where they will be asked to go. A locally-based maintenance business is often not able to provide services because many types of business jets require maintenance be completed only by those with specialized ratings, expertise, and tooling. However, when an OEM or repair station makes frequent visits to a particular airport that has permitting requirements (which always goes hand-in-hand with fees and charges), the maintenance provider cannot plead impracticality and is advised to comply.

PRACTICAL CONSIDERATIONS

The most common requests that an airport will make of independent service providers involve insurance, indemnification, fees, and security.

Insurance Airports may require proof that independent service providers have minimum levels of liability insurance. If the level is reasonable, given the type of activity and compared to other similar providers at the airport, such a requirement would comply with grant assurance and

minimum standards principles. There may also be a requirement that the airport itself be a named insured on the policy. As long as this is equally required of on-airport service providers, it would be considered a reasonable requirement. Practically-speaking, it is generally easy for OEMs and most repair stations to comply with these requests, although it requires some planning ahead to get the necessary paperwork in place. If the premium is a financial hardship to independent mechanics or small businesses, one recourse is to challenge the airport on whether the amount is reasonable given the scope of the activity.

Indemnification: Airports commonly require that independent service providers agree to indemnify the airport in case accidents, damages, or lawsuits that may arise from any activity of the provider on the airport (not limited to the provider's actions or negligence). As long as there is reasonableness and equal treatment to similar aeronautical businesses at the airport, this requirement would be reasonable.

Fees and Charges: The biggest issue for most independent service providers is whether or not the airport charges in exchange for access to the airport. Fees generally come in two types—an annual license fee and a percentage of revenues. To comply with the FAA's grant assurance, the fees must be reasonable in comparison to similar aeronautical activities. But in practice, independent service providers are not similarly-situated to on-airport providers; so it is challenging to determine reasonableness.

From the viewpoint of an OEM or repair station, the advisable approach is to emphasize to the airport that the services it provides are aeronautical activities that are necessary to keep the aircraft in operation, but are limited in scope and time. Consequently, there is little-to-no lost revenue to the airport. This approach may help limit the provider's exposure to fees.

From the viewpoint of an independent mechanic or small maintenance business (even if the airport charges are deemed reasonable), it may still be enough to deter them from providing the services. Whether this is good or bad, it is simply a fact of the FAA grant assurances and guidance.

Security Considerations: One other important consideration is the aircraft's physical location on the airport. Will the maintenance provider be working in the aircraft owner's private hangar, an FBO's joint-use hangar, or at another airport location? Is it an airport with security access controls? How will this be dealt with? How will the independent service provider gain access to the location?

Airports with the highest degree of security controls are those with scheduled airline service. Both FAA and TSA regulations are involved and—even for airport-based operators—they are often difficult to navigate. At these airports, gaining access to the aircraft may involve advance planning and the cooperation of the hangar owner and customer. The airport will generally take the position that granting access is not within their authority. Gaining access at such a controlled airport will generally require that the independent service provider be escorted and constantly kept under the surveillance of the aircraft owner with the security badge and clearance at the airport.

Even at airports with fewer security controls, the customer who is requesting the work should assist the independent maintenance provider in understanding and complying with the airport's local security requirements in advance.

CONCLUSION

The starting point of consideration regarding airport access for independent service providers is ensuring that the federally-obligated airport is complying with the grant assurances—specifically, exclusive rights and economic nondiscrimination. From there, the next step involves looking at the airport's minimum standards and whether the standards are reasonable and applied fairly. Finally, the provider will have to deal with the airport's specific requests, which often involve insurance, indemnification, charges, and security. **A**

Shelley A. Ewalt, Partner, is based in Princeton, New Jersey. Shelley's practice focuses on aviation and airport law, and a comprehensive range of transportation and aviation regulatory compliance issues. Represented clients include FBOs, repair stations, flight departments, charter and scheduled air carriers, and aviation service support providers. Her career in aviation spans over 25 years, with experience ranging from front-line MRO operations and management roles to legal roles. She is an active general aviation pilot with a commercial pilot's license with multi-engine and instrument ratings. Shelley can be reached at sewalt@mklawnyc.com or +1.703.399.6078.