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Third-Party Complaint of AirTran Airways, Inc. **against** **American Airlines, Inc., US Airways, Inc., and United Airlines, Inc.**	**Docket OST-2001-8948**

Third-Party Complaint of AirTran Airways, Inc. **against** **American Airlines, Inc. and Trans World Airlines, Inc.**	**Docket OST-2001-8949**

ORDER

On February 21, 2001, AirTran Airways, Inc. ("AirTran") filed two third-party complaints based on plans then pending among American Airlines, Inc. ("American"), US Airways, Inc. ("US Airways"), United Airlines, Inc. ("United"), and Trans World Airlines, Inc. ("TWA"). United was then proposing to merge with US Airways and sell some of the latter's assets to American. American in turn was proposing to acquire TWA, whose assets included 33 slots at

Washington Reagan National Airport ("DCA"). Among other things, United was also proposing to spin off most of US Airways' operations at DCA, including a large number of slots, to a new carrier, DC Air, which was to be owned and operated by Robert Johnson. American was proposing to buy 49 percent of DC Air's stock and have the right of first refusal should Mr. Johnson decide to sell his shares. United and American were proposing to operate and market US Airways' Washington-New York-Boston shuttle jointly, coordinating service and fare levels and offering frequent flyer program reciprocity.

AirTran essentially charged United and American with conspiring to monopolize "the Washington area business traffic market" jointly in violation of 49 U.S.C. §41712, which prohibits carriers from engaging in unfair and deceptive practices and unfair methods of competition. In its complaint against American, US Airways, and United in Docket OST-2001-8948, AirTran asked the Department to require the respondents to make the 222 US Airways slots at DCA that they had designated for DC Air available for the Department to reallocate to new entrants or "limited incumbent" air carriers at the same price that United was proposing to charge DC Air for these assets. In its complaint against American and TWA in Docket OST-2001-8949, AirTran similarly asked the Department to require that TWA's slots at DCA be made available for the Department to reallocate to new entrants or "limited incumbent" air carriers at a price per slot no greater than that of the US Airways slots. AirTran argued that these slots should all be reallocated whether or not the proposed consolidations ever took place.

American, US Airways, and United filed answers to the complaint in Docket OST-2001-8948. Pursuant to Rule 6(c) of the Department's Rules of Practice, 14 CFR §302.6(c), AirTran filed a motion for leave to reply, which US Airways and United opposed. American and TWA filed answers to the complaint in Docket OST-2001-8949; AirTran filed a motion for leave to reply, which no party opposed.[1]

Subsequently, American did acquire TWA in a transaction that the Department of Justice did not challenge, but in the face of the Justice Department's opposition, United and US Airways abandoned their plans to merge. The new air carrier DC Air never came into existence.

For the reasons discussed below, we dismiss both complaints.

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[1] We will grant both of AirTran's motions and accept both replies.

The Complaint in Docket OST-2001-8948

In this complaint, AirTran contended that the arrangements between American, US Airways, and United would have the following anticompetitive effects:

> (1) They would eliminate US Airways as a viable competitor whether or not the acquisition plans ever came to fruition.
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> (2) They would let United, which already controlled more than 85 percent of the flights at Washington Dulles International Airport ("IAD"), continue to reap "monopoly rents" in "the Washington area business traffic market."
>
> (3) They would ensure that slots at DCA, which are "essential to competitive entry . . . and the possible limitation of monopoly rents," would be kept from AirTran and other competitors, whether by being "vested in a United-American duopoly" or by being "left with a crippled, non-competitive US Airways."

AirTran characterized itself as a "profitable, well-established low-fare air carrier, which, despite many attempts, has been unable to obtain any slots and gates at DCA and only limited gate space at IAD." As a result, AirTran stated, it was "offering its low-fare scheduled service to only a very small segment of the Washington area business traffic market" and could not "offer any low-fare scheduled services to business travelers wishing to use DCA, the most convenient Washington airport for most such time-sensitive travelers, including public officials."

As a remedy, AirTran asked the Department to do the following:

> (1) Enjoin the respondents from holding any of the 222 US Airways DCA slots designated for transfer to DC Air except on a transitional basis.
>
> (2) Require United to make these slots available for reallocation to "new entrants or limited incumbent air carriers" for a price no higher than the $140 million that United was proposing to charge DC Air, or require US Airways to make these slots available on the same terms if the Justice Department foreclosed the merger, in which case United should be required to pay compensation to US Airways for "injury already inflicted on [the latter]."

The Answers

American, US Airways, and United all filed answers opposing AirTran's complaint. American asserted that its proposed transactions with United and DC Air, all contingent on the completion of United's merger with US Airways, would "greatly stimulate competition throughout the Northeast." Essentially, American contended, these transactions would both make American a stronger competitor in the Northeast, where it was carrying relatively few passengers on key business routes, and make DC Air independent of the merged United/US Airways. American also argued that the Department does not have the jurisdiction to consider AirTran's complaint, as its authority to review mergers and acquisition was repealed as of January 1, 1989. American argued further that the relief AirTran sought is contrary to the Federal Aviation Administration's slot buy-sell rule, 14 CFR 93.221.

US Airways contended that while AirTran's proposal would result in the latter's addition of frequencies to its own existing network, by frustrating the plans for DC Air, it would also "result in an abrupt loss of service for many smaller communities throughout the eastern United States that DC Air has . . . committed to serving." US Airways maintained that DC Air would enhance competition in Washington, D.C. markets and nationwide, preserve service to US Airways' small communities, and give these points access to United's network. DC Air would also provide jobs "for tens of thousands of employees who otherwise would be facing uncertain futures." US Airways characterized AirTran's allegations and proposals as factually and legally unsupported and unsupportable and agreed with American that the relief sought is contrary to the FAA's buy-sell regulation as well as the principles of deregulation.

United, for its part, agreed with US Airways that AirTran's complaint had no basis in fact or law. United denied that the proposed transactions were anticompetitive, that it and American had "'conspired' to monopolize an artificially contrived Washington-area business traffic market," that the transactions violated 49 U.S.C. §41712 and warranted enforcement action, and that AirTran's proposals would serve the public interest. United charged AirTran with having "simply resorted to wholly unsupported allegations[2] to try

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[2] Among other things, United claimed, AirTran seriously overstated its competitive strength. In calculating United's purported share of daily frequencies at IAD, AirTran included flights operated by United's independent
(footnote continued on next page)

to leverage these transactions to obtain entry to DCA at below-market cost." Like American, United took the position that this Department does not have authority under 49 U.S.C. §41712 to challenge a merger that the Department of Justice has reviewed and cleared under the antitrust laws. United argued further that the Department does not have authority under §41712 to require United to pay monetary damages to US Airways as AirTran requested.

AirTran's Reply

In its reply to the answers, AirTran repeated its allegation that United, US Airways, and American planned to use the 222 US Airways slots at DCA to limit new, independent competition and thereby maintain high fares for business travelers. AirTran argued that bringing American into the arrangement merely meant that *de facto* control over DC Air would rest with that carrier rather than the merged United and US Airways and that DC Air still could not be relied upon to discipline either entity's pricing and service. AirTran also expressed skepticism regarding DC Air's viability. It took issue with the contention that the Department's authority under §41712 does not extend to mergers and acquisitions, arguing that this section empowers the Department to prohibit anticompetitive conduct that may not violate the antitrust laws and that is not challenged by the Department of Justice. AirTran also denied that the buy-sell rule bars the Department from withdrawing and reassigning slots. It asserted that it could and would provide service to the 44 communities that DC Air was slated to serve and that the Department could condition reallocation of slots on their use for such service.[3]

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commuter affiliate, and United argued that given the high portion of connecting traffic on its IAD flights, even the correct percentage of flights operated by United would overstate its carriage of local traffic. Based on data reported in the Department's O&D Survey, United estimated that its share of local DCA/IAD domestic nonstop passengers, including passengers carried by its commuter affiliate in the year ending September 30, 2000, was just 27.05 percent. United also denied that entry at IAD is constrained and asserted that AirTran is free to add new services there for Washington-area business travelers.

[3] AirTran took issue with United's contention that entry at IAD is not constrained, claiming that it has not been able to secure gates. AirTran also claimed that a merged United/US Airways and United's "wholly-controlled partner Atlantic Coast Airlines" would together occupy 85 percent of the gate space at IAD and thus "control access to 85 [percent] of the opportunities to conduct commercial operations at that airport." In its answer in opposition to

(footnote continued on next page)

The Complaint in Docket OST-2001-8949

In this complaint, which contains much of the same material as the complaint in Docket OST-2001-8948, AirTran contended that American's acquisition of TWA's slots, when combined with American's existing slot holdings at DCA and the additional slots it was attempting to acquire in its arrangements with United and US Airways, would have the following anticompetitive effects:

> (1) It would let American aggregate and control over half the slots of DCA, where American and United together would control over two-thirds of the slots and passenger operations.
>
> (2) It would allow American and United, which already operated over 85 percent of the flights at IAD, to "combine their dominance over the Washington area business traffic market at both IAD and DCA."
>
> (3) It would enable American and United to "extract monopoly rents from the time-sensitive passengers in that market."
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> (4) It, like the arrangements challenged in the complaint in Docket OST-2001-8948, would ensure that slots at DCA, which are "essential to competitive entry . . . and the possible limitation of monopoly rents," would be kept from AirTran and other competitors "in a vested United-American duopoly."

Once again AirTran asserted that despite its profitability, it had failed in many attempts to secure slots and gates at DCA and had secured only limited gate space at IAD. It therefore could offer its low-fare services to only a small percentage of Washington-area business travelers and not to any business travelers who use DCA.

As a remedy, AirTran asked the Department to do the following:

AirTran's motion for leave to file, United disputed AirTran's claim that it has not been able to secure gates and argued that no carrier has ever been denied access to IAD due to lack of gates.

(1) Enjoin the transfer of TWA's slots to American except on a transitional basis.

(2) If the Department finds in Docket OST-2001-8948 that American and United have engaged in unfair methods of competition, with TWA's participation as alleged in this docket, require American to divest the TWA slots for reallocation to "new entrants or limited incumbent air carriers in accordance with the ancillary selection procedures it adopts in that companion proceeding," with compensation to American for each slot to be no greater than the per-slot price set for US Airways' DCA slots.

The Answers

American and TWA both filed answers opposing AirTran's complaint. American asserted that its acquisition of TWA's assets would preserve the jobs of almost all of TWA's employees. The acquisition would also continue TWA's hub operation at St. Louis and thus enhance competition and benefit consumers. American stated that 14 of TWA's 34 slots at DCA would remain dedicated to nonstop service to St. Louis, a critical component of that hub's viability. Given the high cost of the transaction for American—*i.e.*, the $742 million purchase price for TWA plus American's assumption of more than $3 billion in debt and its provision of $330 million in interim financing—American deemed TWA's DCA slots to be an essential element of the acquisition. American argued that the Department cannot use its jurisdiction under 49 U.S.C. §41712 to vitiate the FAA's buy-sell rule. As in Docket OST-2001-8948, American argued that the Department does not have the jurisdiction to consider AirTran's complaint because its former authority to review mergers and acquisitions was repealed.[4] Noting that it and TWA had filed a joint application in Docket OST-2001-9027 for approval of the transfer of TWA's domestic and foreign certificates, exemptions, and slot allocations under 49 U.S.C. §41105, American argued that the transfer

[4] Noting that since January 1, 1989, the Department of Justice has reviewed airline mergers and acquisitions pursuant to the Clayton and Hart-Scott-Rodino Acts, American stated that on March 16, 2001, it received notice from the Justice Department that the latter had ended its investigation of the American/TWA transaction and was granting early termination of the Hart-Scott-Rodino waiting period.

proceeding was the proper forum for consideration of whether the proposed transaction is in the public interest.[5]

TWA contended that the Department should dismiss AirTran's complaint on the following grounds: (1) that the issues it raised had already been extensively reviewed by the Justice Department and the United States Bankruptcy Court, (2) that the complaint did not establish that the Department has jurisdiction to remove TWA's slots from the asset transfer that the Bankruptcy Court has approved, (3) that AirTran's proposed remedy could result in American's legitimate rejection of the Asset Purchase Agreement, and (4) that the Department should not use a discretionary equitable remedy to invalidate the FAA's long-standing buy-sell rule.

AirTran's Reply

AirTran filed a reply to the answers. In addition to repeating arguments advanced in its reply in Docket OST-2001-8948, AirTran argued that the enormous value that American attributed to TWA's DCA slots confirmed the exclusionary power that these slots confer, particularly the 20 slots that were not to be dedicated to St. Louis service.

Disposition

Although our broad authority under 49 U.S.C. §41712 does give us jurisdiction over the matters alleged in AirTran's complaints, we dismiss them, in part as moot and in part for failing to establish a basis for further investigation. Because we are dismissing the complaints, we do not reach the issue of our power to order divestiture of slots.

As a threshold matter, we reject the respondent carriers' assertions that with the sunset of section 408 of the Federal Aviation Act of 1958, as amended, the source of our former authority to review and rule on mergers and acquisitions before they could be consummated, the Department lost all jurisdiction over such transactions. Congress has given us a mandate to foster and encourage legitimate competition and prohibit unfair methods of competition in 49 U.S.C. §40101 and the authority to do the latter in 49 U.S.C. §41712. Section 41712 (formerly §411 of the Federal Aviation Act of 1958, as amended),

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[5] The application was approved and the certificates transferred by Order 2001-4-7 (April 4, 2001).

> which Congress modeled on §5 of the Federal Trade Commission Act, 15 U.S.C. §45, empowers us to prohibit anticompetitive conduct (1) that violates the antitrust laws, (2) that is not yet serious enough to violate the antitrust laws but may well do so if left unchecked, or (3) "[that], although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit," *E.I. Du Pont de Nemours and Co. v. Federal Trade Commission*, 729 F.2d 128, 136-137 (2d Cir. 1984); *see United Air Lines, Inc., v. Civil Aeronautics Board*, 766 F.2d 1107, 1112, 1114 (7th Cir. 1985) and cases cited therein; *see also* H.R. Rep. No. 98-793, 98th Cong., 2d Sess. (1984) at 4-5.

Complaints of the American Society of Travel Agents, Inc. et al. against Various Air Carriers and Orbitz, L.L.C., Order 2002-9-2 at 25 (September 4, 2002). Thus, although we no longer have the power to block a merger before it is consummated, we do have authority to investigate its implementation under §41712. Furthermore, because we have a continuing responsibility to prevent unfair methods of competition, it is our practice to monitor competitive trends in addition to considering the complaints we receive. Whenever we see signs of anticompetitive behavior, we consider carefully whether enforcement action is appropriate.

In this case, however, we cannot find on the basis of the pleadings that an investigation of the matters alleged by AirTran would serve the public interest. For one thing, as noted above, United and US Airways abandoned their plans to merge in the face of opposition from the Department of Justice, and DC Air never came into existence. Much of the substance of AirTran's complaint in Docket OST-2001-8948 and much of its rationale for pursuing enforcement action are therefore moot. In addition, AirTran's speculation that the arrangements between United and US Airways would eliminate the latter as a viable competitor even if the merger should not be consummated has so far not borne fruit. As for the complaint in Docket OST-2001-8949, the Bankruptcy Court selected American's bid for TWA's assets in a competitive auction, and the Justice Department did not challenge the acquisition. *See* Order 2001-4-7. Moreover, AirTran has provided no evidence in the time that has passed since its initial filings that either the aborted United-US Airways merger attempt or American's acquisition of TWA, including the latter's slots at DCA, has resulted in a lessening of competition.

Aside from these considerations, AirTran has recently achieved its goal of entry at DCA. On August 14, 2003, the FAA granted AirTran a two-year exemption to conduct three operations there. *See* Exemption 8112, Regulatory Docket Nos. FAA-2003-14563, FAA-2003-14827, FAA-2003-14975. Earlier, on January 22, 2003, AirTran received four slot exemptions from the Department for new services to one or more communities in Florida. *See* Order 2003-1-16.[6] The carrier has announced that beginning October 23, 2003, it will offer three daily nonstop flights from DCA to Atlanta and one from DCA to Fort Lauderdale and Fort Myers, Florida. *See* "Airliners Fullest Since 1970," *The Washington Post*, page D 2, August 20, 2003.

For all of these reasons, we cannot find that AirTran's theory of monopolization warrants further investigation.

ACCORDINGLY, we dismiss the third-party complaints of AirTran Airways, Inc. against American Airlines, Inc., USAirways, Inc., and United Airlines, Inc. in Docket OST-2001-8948 and against American Airlines, Inc., and Trans World Airlines, Inc. in Docket OST-2001-8949.

This order is issued under authority assigned in 14 CFR 302.406 and shall be effective as the final action of the Department within 30 days after service.

BY:

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(SEAL)

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[6] By Order 2003-7-5 (July 2, 2003), because AirTran had not instituted this service, the Department allowed US Airways to operate the service temporarily. This order also provided that AirTran could retrieve its exemptions by announcing 30 days in advance its intention to inaugurate its services to Florida by October 25, 2003.

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