

**BEFORE THE
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.**

Petition of the :
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 AIR CARRIER ASSOCIATION OF AMERICA :
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For Rulemaking :
 :
Under 14 C.F.R. § 11.25 :
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**PETITION OF THE AIR CARRIER ASSOCIATION OF AMERICA
FOR RULEMAKING TO MODIFY 14 C.F.R. § 93.221 AND TO SUSPEND
CERTAIN PROPOSALS TO TRANSFER OR LEASE SLOTS
AT REAGAN WASHINGTON NATIONAL AIRPORT**

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Summary

Pursuant to 14 C.F.R. § 11.25, the Air Carrier Association of America (“ACAA”), which represents new entrant carriers, airports and small communities, files this petition for rulemaking to amend 14 C.F.R. § 93.221 and to suspend the transfer of Trans World Airlines’ (“TWA”) slots at Reagan Washington National Airport (“National Airport”).

Under § 93.221, an air carrier may sell or lease slots allocated to it by the Federal Aviation Administration (“FAA”) in 1985 even though those slots were originally provided to the carrier without any charge. Since the “buy-sell” rules were established, various carriers have sold and/or leased slots. Some carriers lease slots for a temporary time period while others clearly have no use for the slots except for long-term revenue production through leases. Under the buy-sell rule, TWA is apparently proposing to

lease approximately 13 slots at National Airport. Other carriers are also considering new slot lease transactions.

Carriers should not be able to select their own competitors. It should not be up to TWA or any other carrier to decide which competitor will be able to operate 13 slots at National Airport, an airport closed to new competitors. It was not the intent of those who deregulated the airline industry to allow TWA and other large carriers to replace the Civil Aeronautics Board. It is also time to remove these slot deals from behind closed doors so that all can witness the future of competition. In order for the public to enjoy the benefits of deregulation, the FAA should not continue to permit a commercial practice — permitted by its regulations — that blocks affordable fare entry into the National Airport market. ACAA petitions the FAA to modify § 93.221, which allows for the sale and lease of slots at National Airport, to: (1) require carriers to provide notice of certain air carrier slot leases and sales to the Department of Transportation (“Department”), and (2) deny air carrier slot transactions that would increase concentration at National Airport.

Background

When the buy-sell rule was implemented, the FAA distributed some slots to new entrants and believed that new entrants would be able to purchase slots to allow additional new entry at all high density airports, including National Airport. Unfortunately, that new entry has not materialized. According to various GAO studies, new entrants cannot purchase slots:

In 1986, we expressed concern that allowing airlines to buy and sell slots would reduce competition. By the early 1990s, we found that a few carriers had increased their control of slots to such an extent that they could limit access to routes beginning or ending at any of the slot-controlled-airports—

airports that are crucial to establishing new service in the heavily traveled eastern and midwestern markets.¹

As a result, concentration at National Airport has increased and few new entrants have been able to compete at that airport.

When Congress deregulated the airline industry in 1978, it recognized new entry as fundamental to a deregulated system. Under 49 U.S.C. § 40101:

the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:

(13) encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry.

The General Accounting Office (“GAO”) has issued numerous reports advising the Department to take steps to promote new competition at high-density airports. In calling for the Department to lower the barriers to entry at slot controlled airports, GAO official John H. Anderson, stated:

Our October 1996 report recommended that DOT address the operating barriers to entry by (1) creating a pool of available slots by periodically withdrawing a small percentage from the major incumbents at each of the slot controlled airports and redistributing those slots in a fashion that increases competition . . . DOT stated that it shared our concerns about operating barriers and the dominant position of some of the established carriers in some markets. DOT indicated that it planned to be more **accommodating** to new entrant requests for slots and would give serious consideration to our recommendation that the **agency periodically hold slot lotteries.**²

¹ Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets (GAO/RCED-97-4, Oct. 1996).

² No slot lotteries have been held for National Airport in 15 years. ACAA filed a “Petition For Withdrawal And Reallocation Of Temporarily Held Slots At Reagan Washington National Airport” on July 20, 2000, asking that such a lottery be held. The FAA has taken no action in connection with that petition. Therefore, the nation’s largest carriers continue their stranglehold over National Airport and the travelers utilizing that airport.

Testimony Before the House Subcommittee on Aviation, June 25, 1997 (GAO/T-RCED-97-187, p.6)

Limited Relief Under AIR-21

There was hope that Congress would be able to provide some slot relief when it passed the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21). Although AIR-21 opened up LaGuardia and to a lesser degree O'Hare—it provided minimal relief at National Airport for new entrants.

AIR-21 permitted slot exemptions for only six roundtrips within the 1,250 mile perimeter rule and six roundtrips beyond the 1,250 mile perimeter rule. On July 5, 2000, the Department awarded the AIR-21 National Airport slot exemptions to America West, Frontier, National Airlines, TWA, ATA, Midway, Midwest Express and Spirit. TWA³ was awarded new slots at National Airport, although it is not a new entrant and it does not utilize most of its existing slots.⁴ Under the Department's Orders, several "true" new entrants were denied National Airport slot exemptions. Only four carriers receiving National Airport slot exemptions are new entrants — Frontier, Spirit, National Airlines and ATA.

Since AIR-21 did not allow slot exemptions for service to large airports, new entrants operating at large airports, including AirTran Airways and Sun Country, were blocked from bringing low-fare service from National Airport to their hubs and connecting airports. Therefore, the FAA has allowed Delta and Northwest to operate

³ Order 2000-7181-93 also acknowledges that TWA is not a new entrant. It goes on to state that "TWA presently operates a total of only 13 slots a day at DCA." The Department failed to note that TWA leases out more slots than it utilizes. This hoarding of slots should also be examined by the FAA and the Department.

⁴ Carriers that lease National Airport slots, hold permanent National Airport slots and/or those which have affiliations with large carriers are not "true" new entrants.

without new entrant competition and, consequently, fares from Atlanta and Minneapolis-St. Paul to National Airport remain significantly higher than fares to Dulles where AirTran Airways and Sun Country operate.

In order to promote competition and new entry, it is essential that new entrants be able to enter National Airport. The need for the Department to take the action requested by this petition and by ACAA's July 20 petition is supported by Deputy Assistant Secretary Brad Mims:

The Department, as you know, is committed to ensuring that the airline industry remains competitive. In exercising our authority under section 411, we will bear in mind Congress' decision to deregulate the airline industry. Congress did so because it determined that each airline should be free to determine what routes it will serve and what fares it will charge.

[A. Bradley Mims, Deputy Assistant Secretary for Aviation and International Affairs, July 20, 2000]

Mr. Mims did not suggest that an airline can determine which routes it wishes to serve except for National Airport or at National that decision will be made by TWA!

The need to block further concentration at National Airport and to open it to new entry is supported by various large carriers seeking entry at other airports:

All of the available evidence in this docket confirms beyond any dispute that so long as new entry at Heathrow and Gatwick continues to be subject to an absolute government barrier to entry, granting American and BA authority to codeshare on U.S.-Heathrow/Gatwick services would reduce, rather than promote, competition, and would not be consistent with the public interest.

[United Air Lines, OST-99-6507-32, Joint Application of American Airlines and British Airways (codesharing), February 22, 2000]

Delta is barred from serving London Heathrow—the primary airport for business travelers—the largest and most important U.S.-Europe business market. Furthermore, Delta is barred from serving London from New York, the largest U.S.-London routes, and Delta's major international gateway. Delta's lack of London access, particularly to London

Heathrow, impairs Delta's competitiveness not only of U.S.-London travelers, but also in the overall U.S.-Europe marketplace.

[Delta Airlines, OST-99-6507-6, Joint Application of American Airlines and British Airways (codesharing), December 1, 1999]

Because of the unique role Heathrow Airport serves in the competition between carriers for US-UK traffic, unless new entry occurs on a significant scale on US-Heathrow routes, the American/British Airways alliance will be substantially anti-competitive.

[United Air Lines, OST-97-2058-253, Joint Application of American and British Airways for approval of antitrust immunity for alliance agreement, May 22, 1998]

As the U.S. Government knows all too well, however, several significant transatlantic markets remain protected—with entry limited, capacity constrained, and prices controlled. Promoting new entry in these limited entry markets is in full accord with U.S. international and domestic aviation policies and would stimulate new competition with the mega-carriers in the face of increasing global consolidation. **To allocate limited resources to the already dominant and entrenched network alliances at the expense of new entrant competitors is to ensure and accelerate the trend toward consolidation and monopolization.**

[Stephen M. Wolf, Docket OST-98-4854]

There are fewer new entrant competitors at National Airport than at Heathrow!

Transfer of Slots

When Joel Klein, Assistant Attorney General, Antitrust Division, U.S.

Department of Justice ("DOJ"), testified before the Senate Commerce Committee, he noted the government's responsibility to review and challenge the sale of slots if the sale would result in a lessening of competition.

In addition to challenges to mergers and acquisitions of stock, the Division has also challenged acquisitions of assets that it concluded would be competitively problematic. The Division has moved to block acquisition of gates or slots when it thought such acquisitions would lessen competition, as demonstrated by its challenges to Eastern's proposal in 1989 to sell gates to USAir at the gate-constrained Philadelphia International Airport and Eastern's proposal in 1991 to sell slots and gates at Reagan Washington National Airport to United.

[July 27, 2000]

There is little question that if TWA is permitted to lease National Airport slots to one of the primary slot holders at the airport, the end result will be that one of the few carriers that already controls a significant number of slots will gain additional slot control and thus will increase its market strength and its power to predate. The largest carriers at National Airport control (through their own holdings and through affiliates and partners) 696 slots, which accounts for 97 percent of commuter and air carrier slots.⁵

These carriers already enjoy a market where there is no competition. The public interest will not be served if a few carriers are allowed to increase their stranglehold over National Airport while their competitors are blocked from entering the airport. Moreover, there is no public interest in letting the nation's largest carriers decide which competitor will be chosen to enter this closed market and to allow those carriers to add service to markets they already dominate.⁶

The Department of Justice has previously commented about the ability of large carriers to drive competitors out of markets when they have slot dominance.

Moreover, where service in a market is constrained by slot availability, a hub carrier with access to a large pool of slots has even greater ability to respond to entry in this way because the entrant will be unable to add capacity on its own.

[DOJ Comments to DOT docket quoting Don Carty,
Docket OST-97-2058-222, May 21, 1998]

⁵ These numbers do not include slots held by Air Canada. It is interesting that there is more Canadian service at National Airport than service by new entrants.

⁶ Even when new entrants bid on slots, larger carriers have the resources and the incentives to outbid and initially block the new entrant and therefore limit competition. This is apparently what happened to AirTran Airways when it lost a bid for LGA slots.

Proposal

ACAA petitions the FAA for rulemaking to modify § 93.221 so that carriers that hold or operate slots at National Airport be required to provide notice to the Office of the Secretary 60 days prior to a proposed transfer. The notice provided must disclose slot numbers, quantity of slots to be transferred, and the transferee. Consistent with recommendations by DOJ, the transfer of slots would not be permitted unless the Secretary determines that the proposed transfer would not lessen competition. If the Secretary makes such a determination, the transaction can be completed. If the sale or transfer is to a new entrant, it must be reported but no approval is needed. As a result, **14 CFR 93.221 - Transfer of Slots**, should be modified to include the following:

(f) Slots at Ronald Reagan Washington National Airport may be bought, sold or leased pursuant to subsection (a) if the following conditions are met:

(1) The transferor of air carrier slots must provide notice to the Office of the Secretary on the quantity of slots, slot number(s), and the identity of the transferee(s) 60 days prior to the proposed transfer.

(2) Air carrier slots cannot be sold or leased until the Office of the Secretary reviews the proposed sale or lease and determines in writing that such a transfer would not decrease competition. The Office of the Secretary must issue a decision on the sale or lease within 30 days of the transferor's notice or else the proposal will be deemed denied.

(3) If the transferee is a new entrant carrier that with the transfer of slots would have less than 20 operated and held slots at Ronald Reagan Washington National Airport, the Office of the Secretary is not required to review and approve the sale or lease. The number of slots held or operated by a transferee shall include the slots held or operated by a carrier it codeshares with or has joint ownership.

This modification does not create any new authority for the Department, but rather provides an open process that would allow the Department to utilize its statutory

authority to “ensure a more effective and competitive airline industry” and supports the Department’s goal to promote new entry. As Stephen Wolf argued, the result of providing these limited National Airport slots to a large carrier already dominating the airport “at the expense of new entrant competitors is to ensure and accelerate the trend toward consolidation and monopolization.”

Proposed Transfers Should Be Frozen

It is critical that FAA and the Department prevent the further concentration of the industry at National Airport by a handful of carriers and their codeshare partners. The Department cannot allow TWA to transfer 13 slots to the carriers that already dominate National Airport. In order to preserve competition while this petition is pending, the FAA should immediately block the proposed transfer of TWA’s slots and any other carrier’s proposed transfer of air carrier slots.

WHEREFORE, ACAA respectfully requests that the Department modify 14 CFR § 93.221 and suspend the transfer of TWA’s slots so that the large carriers that dominate National Airport cannot increase their stronghold through the transfer of National Airport slots.

Respectfully submitted,

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September 20, 2000

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Petition Of The Air Carrier Association Of America For Rulemaking To Modify 14 C.F.R. § 93.221 And To Suspend Certain Proposals To Transfer Or Lease Slots At Reagan Washington National Airport on September 20, 2000 by pre-postage first-class mail to each of the persons named on the attached service list.

Nancy R. Thompson