

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

In the matter of)	
)	
Operating Limitations at New York's)	Docket No. FAA-2007-29320
John F. Kennedy International Airport)	
)	

**SUPPLEMENTAL COMMENTS OF THE
AIR TRANSPORT ASSOCIATION OF AMERICA, INC.**

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November 20, 2007

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Introduction

In comments filed on November 6, 2007, Virgin America Inc. (“Virgin”) contends that, in the context of schedule reductions to reduce congestion at John F. Kennedy International Airport (“JFK”), new entrants and limited incumbents—a class to which it claims to belong—should be given “special treatment.”^{1/} By “special treatment,” Virgin means, among other things, that the favored class of carriers (1) should not have to cut-back operations at JFK as part of an across-the-board schedule reduction; (2) should not have their operations at JFK frozen at historic levels; (3) should enjoy a special set-aside of scheduled arrival and departure times during restricted hours; and (4) should be permitted to schedule a minimum of 30 daily operations each during restricted hours.^{2/} Because the IATA Worldwide Scheduling Guidelines (“WSG”)—while extending some preferences to new entrants—are more even-handed in the treatment of carriers than Virgin would like, Virgin insists that the WSG be rejected as the basis for addressing congestion at JFK (or other U.S. airports).^{3/}

^{1/} See Comments of Virgin America Inc. at 3.

^{2/} See *id.* at 2, 3, 7, 11-12.

^{3/} See *id.* at 12.

In these Supplemental Comments, the Air Transport Association of America (“ATA”) wishes to respond to Virgin’s arguments.^{4/} At bottom, Virgin’s position amounts to a claim that it should be permitted to implement its business plan of skimming the cream of domestic passenger traffic between capacity-constrained JFK and other high density domestic destinations without meaningful restriction of any sort. Virgin puts forward this claim even though it was well aware that JFK already was highly congested when it commenced service at the airport only three short months ago. Apparently unfazed, Virgin asserts an entitlement to pursue its planned expansion of service at JFK notwithstanding the sacrifice that would be required of other carriers who have invested substantial resources to develop service at JFK, and without regard to the negative impact its plans would have on residents of small and mid-sized communities wishing to travel to New York and/or to connect through JFK to foreign destinations. If Virgin has its way, residents of various of those communities would find that their air travel options to New York shrink or vanish entirely because network carriers who serve their communities from JFK would be forced to reduce service as Virgin’s operations at the capacity-constrained airport expand.

Virgin’s self-serving plea for “special treatment” does not serve the public interest and should be rejected. In the balance of these Supplemental Comments, we show why.

^{4/} ATA’s members are: ABX Air, Inc.; Alaska Airlines; Aloha Airlines; American Airlines; ASTAR Air Cargo; Atlas Air; Continental Airlines; Delta Air Lines; Evergreen International Airlines; FedEx Corp; Hawaiian Airlines; JetBlue Airways; Midwest Airlines; Northwest Airlines; Southwest Airlines; United Airlines; UPS Airlines; and US Airways. Associate members are: Air Canada; Air Jamaica; and Mexicana. Southwest takes no position on the issues addressed in these Comments and, accordingly, does not join in submitting them.

1. Virgin’s Claimed Entitlement to Special Treatment Based on Past FAA Practice and Alleged Congressional Intent Is Ill-founded.

The nub of Virgin’s plea for “special treatment” is its claim that creating a special set-aside of slots for new entrants and limited incumbents reflects what Congress and the FAA have done in the past under the High Density Rule (“HDR”) and during the interim transition regime when the HDR was being phased out. But Congress explicitly terminated the HDR at JFK as of January 1, 2007, and it made no provision for special treatment of new entrant or limited incumbent carriers at the airport after that date. Virgin’s contention that Congress somehow intended to extend elements of a statutory program that Congress explicitly terminated cannot be credited.

Nor is it correct to say that reserving slots for new entrants and limited incumbents at capacity-constrained airports reflects the FAA’s current policy. To the contrary, in its most recent rules and orders, the FAA has taken the opposite position. Thus, in the new O’Hare Congestion Rule—which was a follow-on to the only other Schedule Reduction Meeting the FAA has convened under the authority of 49 U.S.C. § 41722—there is no set-aside of slots (or “Arrival Authorizations” as they are referred to in the Rule) for new entrants or limited incumbents. Rather, the initial assignment of Arrival Authorizations under the Rule is based on carriers’ historic operations at the airport, with no Authorizations being specially reserved for new entrants or limited incumbents.^{5/} While new entrants and limited incumbents enjoy some preferred status in a lottery to assign Arrival Authorizations that have been returned (and a preference for the first two additional Arrival Authorizations that become available as a result of an increase in the hourly cap on operations), that is different from setting aside slots solely for

^{5/} See 14 C.F.R. § 93.25.

new entrants and limited incumbents or from authorizing them to expand operations up to a specified level at the expense of other carriers.

The same is true of the Amended Order establishing operating limitations at La Guardia Airport, where Operating Authorizations are assigned on the basis of historic holdings of slots or slot exemptions as of January 1, 2007, without any set aside for new entrants or limited incumbents. Indeed, in finalizing the Amended Order, the FAA explicitly decided not to exempt carriers from participating in a weighted lottery to withdraw Operating Authorizations where the result would be to reduce the carrier's Operating Authorizations to less than 20 on any weekday.^{6/}

In sum, Virgin's effort to depict Congress and the FAA as supporters of its claimed entitlement to "special treatment" is misleading. It reflects actions taken by Congress and the FAA at a time when large network carriers were believed to have driven out the first generation of new entrant carriers and to have achieved a dominant position in the domestic air transport market that allowed them to maintain air fares at high levels. Those concerns turned out to be largely illusory, and the days of supposed network carrier dominance are long gone. As discussed below, the realities of today's air transportation market are very different from the paradigm that animated Congress and the FAA in the past. The statutory and regulatory response reflects this change—with the HDR being terminated, and with a more even-handed approach being taken in the O'Hare Congestion Rule and the LaGuardia Operating Limitations Order.

^{6/} See Notice of Order in Docket No. FAA-2006-25755 (November 2, 2007).

2. Virgin’s Contention that Slots at JFK Must Be Set Aside for New Entrants and Limited Incumbents in Order To Promote Meaningful Opportunities for Competition by “Low-Cost Carriers” and To Comply with Congressional Directives Is Unfounded.

If Virgin is to be believed, granting new entrants and limited incumbents special relief from any access restrictions the FAA decides to impose at JFK is necessary in order to promote the public interest and preserve competition in domestic air travel markets generally and in New York city pair markets in particular. Putting aside the question whether Virgin (which today operates 16 daily services at JFK) should be viewed as a “limited incumbent,”^{7/} its effort to justify “special treatment” on competitive and public interest grounds does not withstand analysis.

As demonstrated in a new study of the domestic airline industry recently published by three former senior officials of the Department of Transportation (the “Murphy-Bennett-Schmidt Study”), overall average airfares in domestic markets in 2006 (unadjusted for inflation) were 7.2% lower than they were in 2000.^{8/} When fares were adjusted to reflect changes that had occurred in distance and density, the Study found that average fares in 2006 were 10% lower than in 2000 and 2.4% lower than in 1995.^{9/} When they adjusted the fares for inflation, the Study’s authors found that average fares in 2006 were 20% lower than in 2000 or 1995.^{10/} Obviously, competition in domestic air transportation markets is strong and has exerted marked

^{7/} See p. 4, n.6, *supra*.

^{8/} See Bennett, R., P. Murphy, J. Schmidt, A Competitive Analysis of an Industry in Transition (July 2007) at 7.

^{9/} See *id.*

^{10/} See *id.*

downward pressure on airfares. There is no need to grant special favors to airlines like Virgin in order to preserve strong competition.

Not only is competition in domestic markets strong, but so-called “low-cost carriers” (“LCCs”) have flourished and need no “special treatment” to maintain or expand their positions in the market. As the Murphy-Bennett-Schmidt Study shows, LCCs now account for 30% of domestic passengers, a share that is continuing to rise as network carriers curtail the growth of their domestic networks while the LCC’s continue to expand.^{11/} Moreover, the LCCs compete in markets that account for three of every four domestic passengers.^{12/} With LCC’s operating in markets that account for 75% of domestic air travel, it is clear that they have a strong presence in New York city pair markets and are not in need of artificial government assistance in order to compete. As explained in the Murphy-Bennett-Schmidt Study,

Low cost airlines now serve virtually all large hub and medium hub cities (based on FAA classifications), and from 2000 to the year ended September 2006 their presence has grown significantly at most of these larger cities and particularly areas such as ... New York.

Id. at 86

Conversely, as the Murphy-Bennett-Schmidt Study notes, the only domestic markets that have not been significantly affected by LCC entry are those involving service to small communities, which the Study finds are heavily dependent upon network airlines for service.^{13/} Those, however, are not the markets that Virgin currently serves or is likely to serve in the future. So reserving slots for Virgin (or for other new entrant or “limited incumbent” airlines

^{11/} *See id.*

^{12/} *See id.*

^{13/} *Id.* at 7. Even though small communities receive only limited service from LCCs, the study found that between 2000 and 2006, average fares in the smallest markets (adjusted for inflation) declined by 12%. *Id.*

looking to serve densely populated markets) would provide no benefit for small communities. To the contrary, if network carriers are forced to cut back service at JFK so that Virgin can expand service offerings to high density markets that already are well served by multiple carriers, service to small and mid-sized communities undoubtedly will be the first to suffer. That can hardly be viewed as advancing the public interest.

Bearing the foregoing points in mind, it seems clear that Virgin's reliance on 49 U.S.C. § 40101(a) to support its demand for "special treatment" is misplaced. That provision sets forth a broad list of factors that the Secretary of Transportation, in carrying out her responsibilities under "subpart II" of the transportation code, is to "consider . . . , among others, as being in the public interest and consistent with public convenience and necessity." (Emphasis added.) Virgin points to a few of these factors—listed in 49 U.S.C. § 40101(a)(4), (6), (12) & (13)—as grounds for affording it "special treatment" if slots at JFK need to be capped and allocated by the FAA. Virgin's reliance on § 40101(a) is unfounded.

For one thing, the factors listed in § 40101(a) would not necessarily apply if the FAA simply acts to impose a cap on hourly operations at JFK. Any such action presumably would be taken pursuant to the FAA's authority under 49 U.S.C. § 40103(b) to "develop plans and policy for the use of navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace."^{14/} That authority is contained in subpart I of the air transportation code, not in subpart II.

Furthermore, assuming the factors listed in § 40101(a) do apply to the allocation of slots at a capacity-constrained airport, Virgin's reliance on those factors to support its plea for "special

^{14/} See 70 Fed. Reg. 15520, 15523 (March 25, 2005); Notice of Order in Docket No. FAA-2006-25755 (November 2, 2007).

treatment” still is unjustified. Virgin points to the following four out of 16 broad factors listed in § 40101(a):

- “the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.” 49 U.S.C. § 40101(a)(4);
- “maximum reliance on competitive market forces and on actual and potential competition [] to provide the needed air transportation system; and [] to encourage efficient and well-managed air carriers to earn adequate profits and attract capital ...” 49 U.S.C. § 40101(a)(6);
- “encouraging, developing, and maintaining an air transportation system relying on actual and potential competition [] to provide efficiency, innovation, and low prices ...” 49 U.S.C. § 40101(a)(12); and
- “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.” 49 U.S.C. § 40101(a)(13).

These factors, however, do not support Virgin’s position. For example, in considering whether “adequate” air transportation services are available, it is far from clear that providing additional service in city pairs that already are well served by multiple carriers is more important than preserving at least some service to small and mid-sized communities that might lose service entirely if network carriers are forced to relinquish slots at JFK so that Virgin can expand its operations in high density markets. Nor—in light of the substantial drop in average air fares detailed in the Murphy-Bennett-Schmidt Study—can it be said that transferring slots from incumbents at JFK to Virgin is critical to ensuring the availability of low-priced services. By the same token, transferring operational authority from one carrier to another by means of governmental fiat is a strange way to achieve “maximum reliance on competitive market forces

and on actual and potential competition.”^{15/} And, given the strong market and financial positions that LCCs have achieved in the past decade, there hardly seems to be a need to encourage their entry into new markets through artificial government intervention. In short, even the four factors in 49 U.S.C. § 40101(a) that Virgin relies on provide scant support for its extravagant claims of entitlement to “special treatment.”

Furthermore, those four factors are just a handful of a very long list of factors that the Secretary can “consider” in exercising economic authority under subpart II. Other factors that Virgin conveniently ignores cut against its position. These include 49 U.S.C. § 40101(a)(11), which speaks of “maintaining a complete and convenient system of continuous scheduled interstate air transportation for small communities,” and 49 U.S.C. § 40101(a)(16), which directs the Secretary to consider “ensuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled air service.” As noted above, a mandatory transfer of slots from network carriers (who serve these small communities) to Virgin (which serves only the largest markets from JFK) would undermine these statutory goals.

^{15/} A more obvious and direct way to achieve “maximum reliance on competitive market forces” as far as slot holdings are concerned is to encourage an active and robust secondary market for the transfer of slots through purchase/sale transactions, leases, and trades. By granting exemptions and establishing special set-asides of slots for favored classes of carriers, the government undermines the buy/sell mechanism and largely eliminates incentives for airlines to acquire slots in the secondary market, since there is no reason to purchase or lease slots when you can acquire them free of charge (or be granted an exemption) through governmental intervention. If the FAA refrains from such intervention and allows competitive market forces to operate more freely, carriers who believe they can make more efficient use of slots than the current holder will acquire them in the secondary market or through corporate transactions, as Continental and Delta are doing at London’s Heathrow Airport.

3. Virgin's Attack on the IATA Worldwide Scheduling Guidelines Is Unwarranted.

Virgin asserts that the IATA Worldwide Scheduling Guidelines (“WSG”) do not provide an acceptable solution to congestion problems at JFK because they fail to “enhance opportunities for new entrants and limited incumbents” to the extent Virgin believes appropriate.^{16/} While conceding that the WSG “can serve to mitigate congestion and reduce delays at Level 3 Coordinated Airports,” Virgin objects to them on the ground that they “are not designed to take into account DOT’s statutory mandate to promote low-fare competition by new entrant and limited incumbent carriers in U.S. domestic markets.”^{17/} The WSG approach, Virgin contends, “may work in situations overseas where low-fare carriers cannot or do not fly to major airports,” but they “are not consistent with congressional direction in the United States.”^{18/} The major problem with the WSG in Virgin’s view seems to be that there is no assurance that slots sufficient to accommodate Virgin’s business plan will be set aside for new entrants and limited incumbents at JFK (or other capacity-constrained high-demand airports).^{19/}

Virgin’s objection to use of the WSG at JFK and other capacity-constrained U.S. airports is ill-founded. For one thing, it rests on the premise that, in addressing problems of congestion at U.S. airports, the FAA has a “statutory mandate to promote low-fare competition by new entrant and limited incumbent carriers in U.S. domestic markets.”^{20/} As noted above, however, that

^{16/} Comments of Virgin America Inc. at 12.

^{17/} *Id.*

^{18/} *Id.*

^{19/} In addition, Virgin apparently takes the position that a carrier should continue to qualify for “new entrant/limited incumbent” status until it reaches a level of 30 operations per day during restricted hours. No member of ATA supports that position.

^{20/} Comments of Virgin America Inc. at 12.

premise is questionable if the FAA's action is taken only pursuant to authority conveyed under 49 U.S.C. § 40103(b), which is contained in subpart I of the transportation code.^{21/} Indeed, Virgin's premise is overstated even when action is taken by the Secretary under subpart II of the transportation code. Rather than amounting to a "statutory mandate," the references to low-priced services and entry by new carriers in 49 U.S.C. § 40101(a) are two out of the many public interest factors the Secretary is to consider—and, as shown above, those factors do not support Virgin's claim of entitlement to special treatment.^{22/} Nor is Virgin correct in contending that the WSG works effectively only "in situations overseas where low-fare carriers cannot or do not fly to major airports."^{23/} In fact, the WSG is used to schedule operations at many Level 3 coordinated airports in Europe that are served by low-fare carriers such as Air Berlin, Air One, Brussels Airlines, Carpatair, Clickair, and Flybe, among others.^{24/}

It is true that under the WSG, new entrants and limited incumbents have no assurance of obtaining (or adding to their existing) slots whenever they wish to introduce or expand service at a capacity-constrained airport—at least when additional slots are not being made available. But, as noted above, new entrants and limited incumbents currently have no such assurance at capacity-constrained U.S. airports such as ORD and LGA either.^{25/} The O'Hare Congestion Rule and the LaGuardia Operating Limitations Order have no provisions to ensure that new

^{21/} See pp. 7-9, *supra*.

^{22/} See pp. 8-9, *supra*.

^{23/} See Comments of Virgin America Inc. at 12.

^{24/} These low-fare carriers provide service at the following Level 3 airports among others: Barcelona, Berlin-Tempelhof, Berlin-Tegel, Brussels, Dublin, Duesseldorf, Frankfurt, Geneva, London-Gatwick, Lisbon, Madrid, Manchester, Milan-Malpensa, Munich, Paris-Orly, Rome-Ciampino, and Valencia.

^{25/} See pp. 3-4, *supra*.

entrants or limited incumbents obtain their desired operating authorizations at the expense of incumbents—and that is as it should be. No airline, including Virgin, has the absolute right to implement its business plan with governmental assistance at the expense of incumbent air carriers.

In sum, Virgin is simply wrong if it believes (i) the FAA has a statutory mandate to ensure that new entrants and limited incumbents obtain the slots (or exemptions) that are necessary to initiate or expand operations at a capacity-constrained domestic airport, or (ii) that the current regulatory regimes at O’Hare and LaGuardia provide such assurance. The fact that the WSG do not provide such assurance either does not mean, therefore, that the Guidelines are an inappropriate mechanism to resolve congestion problems at U.S. airports. Under the WSG, new entrants/limited incumbents do enjoy preferential status when a slot pool exists,^{26/} just as they enjoy preferred status when up to two additional Operating Authorizations per hour are created under the O’Hare Congestion Rule.^{27/} Moreover, under the WSG, as under the O’Hare Congestion Rule, a new entrant or limited incumbent is always free to acquire desired operating authorizations by purchase, lease, or trade in the secondary market—so long as the FAA or the Department does not prohibit the transfer.^{28/}

To be sure, the WSG does not grant new entrants/limited incumbents special treatment in circumstances where a determination has been made—as it has at JFK—that the existing level of hourly operations at the airport must be reduced to relieve congestion.^{29/} As noted above (*see p.*

^{26/} See WSG § 6.8.1.4.

^{27/} See 14 C.F.R. § 93.30(c).

^{28/} See WSG § 6.10.2.

^{29/} The WSG are basically silent on this point, stating only that, in such a case, “a collective solution should be sought from all airlines involved.” See WSG § 6.9.5.

4, *supra*), the LaGuardia Operating Limitations Order does not provide special treatment to limited incumbents in those circumstances either; instead, it forces them to participate on the same basis as all other carriers in a weighted lottery to withdraw Operating Authorizations.^{30/} Virgin's demand that it be treated more favorably in these circumstances at JFK than would be the case at LGA has nothing to do with the public interest and everything to do with the financial interests of its shareholders.

Conclusion

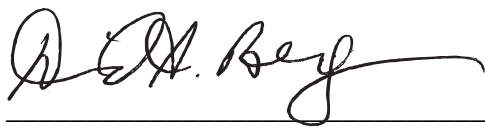
In sum, the FAA should reject Virgin's demand that any program to cap and allocate slots at JFK must afford special treatment to new entrants and limited incumbents through a preferential set-aside of scheduled arrival and departure times, and by permitting them to schedule a minimum of 30 daily operations each during restricted hours. Virgin is wrong in contending that such special treatment is mandated by statute and compelled by public interest considerations. And its objections to use of the WSG as a mechanism to relieve congestion at JFK (and other capacity-constrained U.S. airports) are unfounded. At the end of the day, Virgin's position amounts to little more than special pleading by an airline that seeks to implement in full its business plan—developed with full awareness of the constraints at JFK—leaving to others the task of solving the serious congestion problems that Virgin knew existed

^{30/} See Amended Operating Limitations Order at New York LaGuardia Airport, ¶ 8.

when it commenced operations last August. Virgin instituted service at JFK with its eyes open and has no legitimate claim to benefit from special governmental largesse.

Respectfully submitted,

AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

A handwritten signature in black ink, appearing to read "D.A. Berg", written over a horizontal line.

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