

February 7, 2014

William H. Stallings, Chief
Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 8000
Washington, DC 20530

Re: *United States v. US Airways Group, Inc. and AMR Corp.*, No. 1:13-cv-01236 (CKK), Comments

Dear Mr. Stallings:

The merger settlement does not meet the basic smell test as being in the public interest due to lobbying of the Obama Administration by parties with a financial interest in higher airfares at the expense of airline passengers.

The court should require full disclosure of the papers leading up to the settlement, political contributions by those lobbying the Obama Administration to approve the merger settlement. See www.nytimes.com/2013/11/16/business/baffling-about-face-in-american... FlyersRights.org filed a Freedom of Information request which was denied in its entirety by the Department of Justice. See Attachment 1 & 2.

There is no doubt the proposed settlement is both unnecessary and will lead to a complete oligopoly in US air transportation.

The airline industry has some unique features that make it far more likely to abuse passengers through lack of competition including:

1. Exemption from consumer protection regulations that apply to all other travel related industries.

Airlines under judicial interpretations of the preemption clause in the Airline Deregulation Act of 1978 are exempt for all state and local consumer protection laws, are exempt from FTC, EPA and OSHA regulation, as well as tort law and consumer contract law excepting only negligence causing serious physical injury, death or some civil rights violations. See *Morales v TWA*, 504 U.S. 374, 384 (1992) [state attorney general rules covering the terms of air fare advertisements preempted]; *American Airlines v Wolens*, 513 U.S. 219, 230 (1995) [changes to a frequent flyer program preempted] www.courts.state.ny.us/Reporter/3dseries/2012/2012_09019.htm, lawyersusaonline.com/wp-files/pdfs-4/joseph-v-jetblue.pdf [all state tort law preempted unless passenger physically injured or killed in the

course of airline operations, no recovery for passengers held on tarmac for over 8 hours even if in violation of DOT rules]; *Air Transport Ass'n of America v Cuomo*, 520 F.3d 218 (2nd Cir.(NY) 2008) [state statute prohibiting tarmac confinements in excess of three hours without food, water and access to toilet facilities held unconstitutional under the Airline Deregulation Act of 1978 and Supremacy clause of the US Constitution]

2. Unlike other industries airlines are fully protected from foreign competition on domestic routes. New entrants have not been entering the US market due to concentration and this merger makes that even harder. New domestic airlines do not have access to foreign capital more than 30%.

Since the settlement was announced there has been a record number of cancellations (49,000 in January), major reductions in Delta and United frequent flyer program benefits by 20%, announced closure by United of its Cleveland (formerly Continental hub).

We would expect further reductions in service to small and medium size cities, closure or downgrading of at least two more hubs by the new American, resulting in higher prices, poorer and slower air transportation service, which is has deteriorated each decade since 1980 versus improvement each decade prior thereto.

3. Airline profits are at record levels due primarily to mergers that have already consolidated the industry.

Airline air fares have risen far in excess of inflation since 2010, and airline stock prices have more than doubled in the past year with American Airlines stock rising 1,800% !

The International Air Transport Association (IATA), the trade group for the world's biggest airlines, said this month that it expects industry profits to hit a record \$19.7 billion in 2014, an increase of more than 50% on the \$12.9 billion estimate made for 2013, also a record. Driving the trend, IATA says, are "improvements to the industry's structure" (read: big airline mergers) and lower jet-fuel prices.

CONCLUSION

Competition is the only protection consumers have against degraded service and higher prices. Accordingly, the court should require full disclosure of settlement negotiations and lobbying and hold an evidentiary hearing where passenger groups can be represented as interveners or amicus parties.


Very truly yours.

/s/ Paul Hudson
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Attachment

1



March 5, 2013

Mr. William J. Baer
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Mr. Baer:

Please find enclosed a Statement regarding the proposed merger of USAirways and American Airlines for your consideration and inclusion in any public docket which is established by DOJ for its review of this matter.

As you know this merger if approved would create the largest US airline in history and reduce the number of air carriers to four major airlines with about 80% of the domestic market. As such, this is a watershed event that could well determine if the era of robust airline price competition that began in 1978 with airline deregulation will survive, be transformed into a new oligopoly system that supports anticompetitive behavior, or revert to a pre-1978 public utility type regulated system.

We intend to provide additional input and a legal analysis on behalf of airline passenger interests as more detailed information becomes available. Should you or your staff wish to meet or have any questions on the enclosed, please do not hesitate to contact the undersigned.

We are also requesting pursuant to the Freedom of Information Act and President Obama's Executive Orders on government transparency that we be provided with a copy of any submissions made by American, USAirways and other interested parties to DOJ on this matter.

Thank you for your courtesies and consideration.

Sincerely,

Paul Hudson
President, FlyersRights.org
Executive Director, Aviation Consumer Action Project
800-662-1859 or 410-940-8934
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cc Hon. Eric Holder, Attorney General

Enc.

Attachment

2

STATEMENT OF FLYERSRIGHTS.ORG

AND

AVIATION CONSUMER ACTION PROJECT

RE

**PROPOSED USAIRWAYS-AMERICAN
AIRLINES MERGER**

TO

**U.S. HOUSE OF REPRESENTATIVES & SENATE
JUDICIARY COMMITTEES, U.S. DEPARTMENT
OF TRANSPORTATION, U.S. DEPARTMENT OF
JUSTICE ANTITRUST DIVISION**

BY

PAUL HUDSON

PRESIDENT, FLYERSRIGHTS.ORG

**EXECUTIVE DIRECTOR, AVIATION CONSUMER ACTION
PROJECT**

March 5, 2013

The proposed merger between American Airlines and USAirways should only be approved with regulation establishing national and international standards for enforceable airline passenger rights.

Legislation that would block anti-competitive practices that are rapidly eroding price competition in the airline industry, eliminate anti-competitive airport practices, and empower airline passenger interests to balance the interests of the air transportation industry that now completely dominate national air transportation policy is now essential if the era of price competition and consumer choice in air travel is to continue.

In June 2012, we submitted testimony to the US Dept. of Transportation (DOT) which set forth much needed reforms to enhance airline passenger rights. Copy enclosed.

However, the Advisory Committee for Aviation Consumer Protection appointed by Secretary LaHood (consisting of an airline representative, an airport representative, a state official and a travel writer) failed to support any of the 15+ proposals, and to date the DOT has failed to recommend any aviation consumer protection legislation although mandated to do so by Congress by February 2013.

It has also delayed issuing regulation requiring that ancillary fees be disclosed in real time to third party airline ticket sellers and web sites.

There have been recent efforts by airlines as noted in the recent testimony to the House Subcommittee on Regulatory Reform, Commercial & Antitrust Law of the Business Travel Coalition and the American Antitrust Institute to defeat price competition.

The 2011 acquisition of Airtran by Southwest Airlines is instructive. It discontinued service to Sarasota Florida (and five other medium size cities) in favor of Southwest service at Tampa (65 miles away) thereby reducing Sarasota enplanements by over 300,000 per year and raising airfares, travel time and expenses for passengers.

No other low cost carrier has come in to replace Airtran which provided real price competition for Southwest and other carriers and no other one really exists except on very limited routes (Southwest is no longer a low cost carrier by most

definitions but competes largely on service, lack of baggage fees and more liberal cancelation policies). The USAirways-American merger will certainly reduce competition further.

The record of prior airline mergers is clear that fares generally increase and service is reduced to smaller and medium size cities and concentrated at fortress hubs. See Table 1 at White Paper at American Antitrust Institute web site, 2013.

Unless stopped, the airline penchant for mergers (USAir-America West 2005, Delta-Northwest 2008, Republic-Midwest 2009, Republic-Frontier 2009, United-Continental 2010, Southwest-Airtran 2011) coupled with the lack of new entrants and the loss of most US low cost air carriers, will soon result in oligopoly or to re-regulated monopolies, with US air transportation operating more like AMTRAK.

Airline mergers also mean thousands of jobs lost, contractors often replace union workers, retirement plans are reduced or wiped out, airplanes are sold, routes are eliminated, quality of service typically plummets during costly airline merger transitions for two years or more, safety margins may be reduced, and passengers will pay more while departing executives take golden parachutes and remaining ones cash in with higher pay. American Airlines plans to cut at least 14,200 jobs and void union contracts -- the perks of Chapter 11.

Competition and even Chapter 11 bankruptcy can be great mechanisms for fostering efficient low cost air travel and are not necessarily unprofitable. USAirways is already quite profitable and seeks to be more so, while its CEO seeks to realize his dream of leading the largest US airline in history. There is little doubt American which has a very large cash reserve would also be profitable if it emerged from bankruptcy as a stand-alone company after shedding unaffordable union contracts, with creditors as its new shareholders, with a new more passenger and labor friendly management dedicated to better customer service, and perhaps with even some passenger representation on its board of directors.

Other Anti-Competitive Trends

Price competition was greatly enhanced by web sites that allowed consumers to comparison shop and make reservations and buy tickets. But now most airlines have taken away the ability to buy tickets or even make reservations by redirecting consumers to their web site and requiring re-entering of customer information,

thereby bombarding the customer with ancillary fees and pitches for additional services or products.

The cost of a ticket can increase by \$25 to over \$100 or more, when coupled with hidden fees that are not disclosed in transparent ways on either third party or airline web sites (especially checked baggage fees).

The US DOT has the sole authority to issue and enforce regulations to prohibit “unfair or deceptive” airline practices, but it has rarely done so without the approval of the airlines.

And its record of enforcement by fines is dismal, with fines regularly reduced by 50% or more and nearly all violations settled by consent orders or findings in favor of the airline with zero fines.

Its handling of consumer complaints is even worse. It rejects 90% of complaints as not within its jurisdiction as allegedly not violating any DOT rule and merely asks the airline to respond.

It does not prohibit unfair terms in airline drafted contracts of carriage that make such contracts illusory with misleading words and that provide no practical means of enforcement for the consumer in case of violation.

It uses passenger complaints largely for statistical purposes and deceptively refers consumers to small claims courts that lack jurisdiction over airlines.

(See DOT web site, “Tell It to the Judge” publication. Airlines can at will and regularly do remove any lawsuit filed in state or local courts to US District Court where the litigation costs far exceed any potential consumer recovery, see Paul S. Hudson, Airline Passenger Tarmac Confinements and Delays, ABA Air & Space Lawyer, vol. 23, No. 2, 2010)

Tort cases against airlines are regularly dismissed by the courts under federal preemption doctrine, and if not dismissed outright, passengers generally are barred from recovery for damages unless they are physically injured or killed.

(See New York Courts to Passenger Victims of 11 Hour Tarmac Confinement: It’s an Airline “Service”, No Recovery Allowed Except for Physical Injury or Death,

Aviation Consumer Action Project, Jan. 2013, enclosed; Air & Space Lawyer article above.)

The International Air Transport Association (IATA) and its members have recently approved a new business model requesting personal information from passengers not presently required in order to provide passengers with a “customized” price quote. This system if approved by the DOT could make price competition a thing of the past for international flights, and also raises serious new privacy concerns. Eventually such systems would allow for price fixing and setting based on how big your wallet is and how desperate or motivated you are to travel, completely contrary to the fixed, transparent pricing that replaced individually negotiated prices for most consumer goods in the early 20th Century America.

Due to the lack of low cost airlines in the US, we now support allowing selected foreign low cost carriers to fly domestic routes.

In sum, we believe this proposed merger of American and USAirways should be restructured or disapproved by the Justice Department, unless competition is clearly not reduced and passenger rights are well protected by new legislation and rulemaking.

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FlyersRights.org (fka the Coalition for an Airline Passengers' Bill of Rights) was founded in 2007 as non-profit corporation to advocate for the rights and interests of airline passengers by Kate Hanni after she was stranded on the tarmac for many hours with 10,000 others. It organized a coalition that successfully advocated for the adoption of the 3 Hour Rule adopted by the DOT in 2009 that prohibits airlines from confining passengers on the tarmac for extended periods without returning to the terminal. In 2012, a passenger rights section it supported was included in the FAA Reauthorization Act that encouraged the DOT to issue further aviation consumer protections. With over 25,000 member-supporters it is the largest airline passenger organization in the U.S. It publishes a weekly newsletter, maintains a free emergency telephone hotline 1-877-FLYERS-6 to assist airline passengers and an anonymous tips hotline. It relies on individual donations and receives no funding from government or the airline industry.

The Aviation Consumer Action Project (ACAP) was founded in 1971 as a 501 (c) (3) nonprofit corporation to act a voice for air travelers on national aviation issues, especially safety and airline passenger consumer rights. It is funded by contributions from individuals and foundation grants. It receives no funding and has no business relationships with the airline industry or any government agency.

ACAP has been a principal advocate for truth in scheduling, lost baggage and bumping compensation, medical kits on airliners, realistic emergency evacuation testing, passenger cabin air standards, smoking ban, and airline competition. It organized a coalition after 9/11 to advocate for the establishment of the TSA and much stronger aviation security.

Its activities include public education, publication of consumer guides and research reports, serving on national advisory committees (FAA Aviation Rulemaking Advisory Committee, TSA Aviation Security Advisory Committee, American Society of Heating, Refrigeration & Air Conditioning Engineers (ASHRAE) Committee on Aviation Cabin Air Quality), representation of aviation consumer and the public interest in rulemaking and litigation activities, testifying before legislative bodies and national and international commissions.

Paul Hudson has been executive director of ACAP since 1997 and president of FlyersRights.org since 2012. He is a New York attorney who has advocated for airline passenger rights and interests in the Courts, before Congress, the Executive Branch and in the public and professional media since 1989.