

LAW OFFICES

GAROFALO GOERLICH HAINBACH PC

1200 NEW HAMPSHIRE AVENUE NW • SUITE 590 • WASHINGTON DC 20036-6802
TELEPHONE 202 776-3970 • FACSIMILE 202 776-3975
WWW.GGH-AIRLAW.COM

February 7, 2014

William H. Stallings, Esq.
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
450 Fifth Street N.W., Suite 8000
Washington, D.C. 20530

Re: *United States, et al. v. US Airways Group, Inc., et al.*
U.S.D.C., District of Columbia, Civil No. 1:13-cv-01236
Comments of Allegiant Air on Proposed Final Judgment

Dear Mr. Stallings:

Allegiant Air, LLC (Allegiant) is a certificated air carrier operating scheduled passenger service at 101 airports throughout the United States, including Los Angeles International Airport (LAX). Allegiant, founded in 1997 with a single aircraft, has grown to a fleet of 68 Airbus, Boeing and McDonnell Douglas airplanes. Allegiant is widely recognized for its low fares and is considered a low cost carrier (LCC) throughout the travel industry. The airline is a wholly-owned subsidiary of Allegiant Travel Company, a publicly-traded corporation.

Pursuant to the *Antitrust Procedures and Penalties Act*, 15 U.S.C. § 16, the Department of Justice (DOJ or Department) has invited public comment on the Proposed Final Judgment (PFJ) in the case noted above (*see* 78 Fed. Reg. 71378, November 27, 2013). The comment period runs from December 9, 2013 to February 7, 2014 (*see* Court Order dated November 20, 2013).

Allegiant is prompted to submit this comment by its concerns regarding the impending divestiture of Gates 31A and 31B in LAX Terminal 3, as required by the PFJ. Allegiant has a direct interest in this matter as it plans to increase its service at LAX, using Gates 31A and/or 31B to do so. Allegiant believes a Renewed Proposed Final Judgment, to be submitted by DOJ for the Court's review by March 10, 2014, should contain a minor modification to help ensure that use of Gates 31A and 31B is prioritized throughout the term of the judgment so as to ensure primary use by LCCs, including Allegiant. Allegiant also believes it will be necessary for DOJ to continue to interact with LAX's owner and operator, Los Angeles World Airports, to help ensure the public benefits of the judgment are realized.

Background

In its Complaint against US Airways and American Airlines, the Department asserted that consolidation of these two airlines would result, *inter alia*, in a single airline, the world's largest, with excessive control over key gates at some of the nation's busiest airports. To advance their merger, and

to allay the fears DOJ identified in its Complaint, US Airways and American agreed to a settlement with DOJ in which the airlines collectively committed to relinquish control of a number of gates at airports across the country, including Gates 31A and 31B at LAX Terminal 3. In this regard the PFJ states:

The Court orders the divestiture of the Key Airport Gates and Facilities, to proceed as follows:

1. Defendants shall either (a) lease to the Acquirers the Key Airport Gates and Facilities on the same terms and conditions pursuant to which the Defendants currently lease the Key Airport Gates and Facilities, or (b) with the consent of the United States, pursuant to an agreement with the airport operator, relinquish the Key Airport Gates and Facilities to the airport operator to enable the Acquirer to lease them from the airport operator on terms and conditions determined by the airport operator[.]

PFJ, Section IV.H.

The PFJ further mandates that “Defendants shall not reacquire any interest in any part of the Divestiture Assets divested under this Final Judgment during the term of this Final Judgment.” PFJ, Section XII. The term of the judgment is 10 years, subject to extension by the Court. PFJ, Section XVI.

Allegiant’s Concern

LAX is owned and operated by Los Angeles World Airports (LAWA), a department of the City of Los Angeles. Under procedures set by LAWA, all gates at LAX fall into one of two categories: “preferential” – where a single carrier has the exclusive or primary use of the gate – or “common use” – where multiple carriers share use of the gate, with priority among the users determined according to protocols set by LAWA.

Allegiant’s understanding – developed on the basis of meetings with LAWA, LAWA’s representatives and other participants through February 5, 2014 – is that LAWA’s current intent may be as follows: While Gates 31A and 31B will no longer be classified as US Airways “preferential” gates, US Airways and “new” American Airlines (*i.e.*, the merged carrier when the US Airways brand has been phased out), as well as other non-LCC carriers, will not necessarily be foreclosed from all use of these gates. The PFJ, however, requires that all divestitures be –

accomplished so as to satisfy the United States in its sole discretion, in consultation with the Plaintiff States, that none of the terms of any agreement between an Acquirer(s) and Defendants gives Defendants the ability unreasonably to raise the Acquirer’s costs, to lower the Acquirer’s efficiency, or otherwise to interfere in the ability of the Acquirer(s) to effectively compete.

PFJ, Section IV.N.2.

In our view, this requirement cannot be reconciled with US Airways’ or “new” American’s retaining access to the divested gates, even if such access is non-preferential.

An additional, related concern is access to Gates 31A and 31B by non-LCC carriers other than US Airways and “new” American. This issue is discussed more fully below.

Requested Action

In its Competitive Impact Statement in this case, the Department stated:

[G]ate divestitures at O'Hare (ORD), Los Angeles (LAX), Boston (BOS), Dallas Love Field (DAL), and Miami (MIA) would expand the presence of potentially disruptive competitors at these strategically important airports located throughout the country.* ORD and LAX, two of American's major hubs, are among the most highly congested airports in the country, and competitors have historically had difficulties obtaining access to gates and other facilities at those airports to be able to enter or expand service.

78 Fed. Reg. at 71398 col. 1.

*We estimate that each gate can support between eight and ten round trips per day and thus, two gates at each of these key airports will provide for commercially viable and competitive patterns of service for the recipients of the divested gates.

Ibid., n. 6.

Consistent with the above, and based on consultations with DOJ, Allegiant's understanding of the Department's objective regarding Gates 31A and 31B is that both gates should be devoted entirely to LCC service; that is, that there will be a net increase of two gates' worth of LCC service at LAX. Only in this manner can the concerns that triggered DOJ's suit against US Airways and American be vindicated, at least vis-à-vis LAX.

Allegiant is confident DOJ will take all steps necessary to accomplish this objective. The language of the PFJ, however, is somewhat general when it comes to the assets other than slots. Given that the final judgment in this case will control for at least the next 10 years, Allegiant believes it is essential that the obligations created and accepted under the judgment be unmistakable. **To that end, Allegiant urges that a Renewed Proposed Final Judgment (RPFJ) include the following as a new second sentence of Section XII:**

As used in the immediately preceding sentence, "reacquire any interest" means any utilization whatsoever of a Divestiture Asset.

This modification should eliminate any misunderstanding.

Additionally, in the case of LAX, accomplishment of DOJ's objective will require the cooperation and participation of LAWA. Allegiant believes that LAWA, in the public interest, must ensure that Gates 31A and 31B, as common use facilities, are prioritized for LCC service above all other uses. Only in this manner can the public-interest benefits of DOJ's efforts be realized.

Under the protocol LAWA typically uses for establishing priority for common use gates, there is a risk that even with US Airways and "new" American excluded, a non-LCC could gain the primary or exclusive use of one or both gates. **Allegiant submits, therefore, that it will be necessary for the**

GAROFALO GOERLICH HAINBACH ^{PC}

William H. Stallings, Esq.

February 7, 2014

Page 4

Department to continue to work directly with LAWA to ensure that the protocol for Gates 31A and 31B, in particular, provides LCCs an irrevocable preference throughout the term of the final judgment. This preference must necessarily include the ability of an LCC desiring use of a gate at a particular time of day to preempt a non-LCC using the gate at that time of day, subject to reasonable advance notice to permit the non-LCC to adjust its schedules and/or gate use pattern accordingly.

As stated in the Competitive Impact Statement, DOJ expects the gate divestitures “to expand the presence of potentially disruptive competitors” at LAX and elsewhere. That will not occur if non-LCCs wind up with much or all of the use of these facilities.

To ensure there is no misunderstanding, the agreement DOJ reaches with LAWA should be made available publicly, whether, for example, as an exhibit to the final judgment or otherwise. While Allegiant believes that LAWA, in the public interest, will assist the Department in implementation of the final judgment, Allegiant and other interested carriers will need to understand clearly the priority protocol that will apply to these gates for the next 10 years.

Thank you for your consideration of these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Aaron A. Goerlich', is written over a horizontal line.

Aaron A. Goerlich
Garofalo Goerlich Hainbach PC

Counsel for Allegiant Air, LLC

cc: Michael D. Billiel, Esq.
Antitrust Division, DOJ
michael.billiel@usdoj.gov