

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

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UNITED STATES OF AMERICA,

*Plaintiff,*

v.

AMR CORPORATION,  
AMERICAN AIRLINES, INC., and  
AMR EAGLE HOLDING  
CORPORATION,

*Defendants.*

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Civil Action No.: 99-1180-JTM

FILED OCT 23, 2000

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR  
RECONSIDERATION OF THE COURT'S SEPTEMBER 28, 2000,  
ORDER GRANTING DEFENDANTS' MOTION TO REVIEW**

Plaintiff United States submits this memorandum in support of its Motion for Reconsideration of the Court's September 28, 2000 Order Granting Defendants' Motion to Review Magistrate Judge Humphreys' decision of June 13, 2000 ("September 28 Order"). The United States no longer seeks the return of Professor Hovenkamp's October 2, 1998, Letter to Joel Klein. This motion is necessary, however, to correct the mistaken impression that Professor Hovenkamp's 1999 revision to the Predation Section of his treatise, P. Areeda & H. Hovenkamp, *ANTITRUST LAW* ¶740 (Supp. 1999), changed in substance following his consultation with the United States during the investigation of American Airlines.

American fostered this error by asserting in its reply brief that Professor Hovenkamp's views regarding the variability of aircraft costs changed significantly between 1996 and 1999. Contrary to American's claim, Professor Hovenkamp has long recognized that proper classification of variable costs is an important component of the average variable cost test. Moreover, he has long illustrated this point by explaining that failure to count aircraft costs as variable when "an airline shifts planes to a route" is an example of a situation where using a "superficial definition of the relevant variable costs would be wrong." The following footnote, quoted in full, is contained in Professors Areeda's and Hovenkamp's supplements to *Antitrust Law* dating as far back as 1986:

As another example in which a superficial definition of the relevant variable costs would be wrong, suppose that an airline shifts planes to a route on which a rival complains of predatory pricing. To what extent should the investment in the shifted aircraft be included for predatory pricing purposes in the defendant's costs on that route? Firstly, planes depreciate with use and that depreciation is a variable cost. Secondly, planes become obsolete with time and replacement is anticipated. That factor should also be counted. See ¶712.1. Thirdly, the shifted plane has an opportunity cost in the form of the revenues that it would have generated on the route out of which it was shifted. That also seems a short-run cost of the challenged service. Put another way, the defendant expanded capacity on the route in question in order to lower his price there; the cost of doing so -- in the form of additional capacity -- is relevant to the appraisal of his price there.

Professor Hovenkamp explains in his declaration that the footnote was not included in the Revised Edition of Volume III of the treatise (published in 1996) due to space limitations and not because of any change in his views.

As Professor Hovenkamp explains in his declaration, the view he expressed in the text of his 1999 Supplement to ¶740 regarding the proper characterization of costs when an aircraft is shifted from one route to another is consistent with the view expressed in the above quoted footnote. In the footnote, Professor Hovenkamp is addressing the need to define aircraft cost as

variable when an airline “shifts planes to a route on which a rival complains of predatory pricing.”

In 1999 he used the term “avoidable” cost, employed by Professor Baumol, to explain that the cost of an aircraft should be considered variable when considering whether an airline’s rate structure in a particular market (rather than just a discounted fare on certain seats on an already scheduled flight) is below relevant costs because the aircraft can readily be transferred from one market to another.

Given the similarity between the quoted footnote (contained in the 1986 through 1996 Supplements) and the text of the 1999 Supplement, and in light of Professor Hovenkamp’s declaration, the United States respectfully requests that the Court modify the September 28 Order by removing the following sentence from the first full paragraph of page two: “(4) that after writing the letter and consulting with the government, Hovenkamp revised the treatise, adding a footnote which suggested for the first time that the entire cost of an airplane (in addition to depreciation and obsolescence) should be considered a variable cost.”

Respectfully submitted on the 21st day of October

Plaintiff United States

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