IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. USAIR GROUP, INC., Defendant.	Civil Action No. 93 0530 3/15/93

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), the United States of America files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry with the consent of USAir Group, Inc. in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On March 15, 1993, the United States filed a Complaint alleging that a proposed partial stock acquisition of USAir Group, Inc. (hereafter "USAir") by British Airways Plc (hereafter "BA") and proposed joint operations between the two companies would violate Section 7 of the Clayton Act (15 U.S.C. § 18). The Complaint alleges that the effect of the transaction may be substantially to lessen competition in the provision of scheduled airline passenger service and nonstop

scheduled airline passenger service in various U.S.-London city pair markets. Both USAir and BA provide such service. The Complaint seeks, among other relief, a permanent injunction ordering USAir to divest its authority to provide nonstop scheduled airline passenger service between Baltimore and London, between Philadelphia and London and between Charlotte and London.

On March 15, 1993, the United States and the defendant filed a Stipulation by which they consented to the entry of a proposed Final Judgment designed to eliminate the anticompetitive effects of the transaction. Under the proposed Final Judgment, as explained more fully below, USAir would be required to sell, within 45 days of its beginning to operate code-sharing service with BA from any of its gateways, its authority to fly scheduled passenger service from that gateway to London. If it should fail to do so, and the United States, in its sole discretion, has not granted a request by defendants for additional time to effect the divestiture, the route authority would be surrendered by USAir to the Department of Transportation for designation of other U.S. airlines to serve these routes.

The United States and the defendant have agreed that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate the action, except that the Court will retain jurisdiction to construe, modify, and enforce the Final Judgment, and to punish violations of the Final Judgment.

II.

EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Proposed Transaction

On January 21, 1992, USAir and BA entered into an agreement whereby BA acquired approximately 20% of USAir's equity for $300 million. USAir and BA have also agreed to begin jointly providing connecting air service between interior U.S. points and London using shared airline designator codes. USAir flights between interior U.S. points and the Baltimore, Philadelphia, Charlotte and Pittsburgh gateways will be designated with a BA flight number for connections to BA flights between the gateways and London.

In addition, the agreement permits BA to make additional stock purchases and acquire more control over USAir within the next 5 years, to the extent permitted by U.S. law. If BA makes the additional purchases, the two companies have agreed to further integrate their operations.

B. Analysis

The Complaint alleges that the proposed transaction would violate Section 7 of the Clayton Act (15 U.S.C. § 18) because its effect will be to lessen competition between USAir and BA in the provision of scheduled airline passenger service and the provision of nonstop scheduled airline passenger service in multiple U.S.-London city pair markets, and may be substantially to lessen competition generally in the provision of such service.

Air transportation between the United States and London is governed by a bilateral air services agreement between the governments of the United States and United Kingdom of Great Britain and Northern Ireland ("U.K.") pursuant to which air service must be provided via a limited number of gateway cities. The bilateral also limits the number of airlines allowed to provide nonstop service between two gateways (usually to one airline from each country), and the number of flights each airline may provide. As a result, service to all non-gateway points must connect or stop at a gateway.

Most people travelling between U.S. cities and London have no substitute for scheduled airline passenger service to which they could turn if there were a small but significant and nontransitory increase in the price of scheduled airline passenger service. Scheduled airline passenger service can be provided either without stops at intermediate points or with stops or changes of planes at one or more intermediate points. Many passengers are particularly time-sensitive and value the greater speed and reliability provided by nonstop service. Such passengers would not substitute one-stop or connecting service for nonstop service in response to a small but significant and nontransitory increase in the price of nonstop service.

BA serves London on a nonstop basis from fourteen U.S. gateways, including Philadelphia and Baltimore/Washington. It is the largest provider of U.S.-London scheduled passenger air

transportation, providing approximately 38% of all seats offered on nonstop flights between U.S. gateways and London. It provides service to non-gateway U.S. points through interline connections with flights operated by U.S. airlines. USAir serves London from three U.S. gateways: Philadelphia, Baltimore, and Charlotte. It provides roughly 3% of all nonstop seats offered between the U.S. and London.

The complaint alleges that USAir and BA compete in the provision of two relevant products, each offered in multiple geographic markets. First, they are the only two airlines providing nonstop service in the Philadelphia-London city pair, and two of only three airlines providing nonstop service between Baltimore/Washington and London.

Second, they compete in providing one-stop or connecting scheduled airline passenger service between nongateway U.S. points, particularly those located in the northeastern and Mid-Atlantic U.S. regions, and London. USAir and BA are two of eight U.S. or British carriers authorized to serve London from eastern U.S. gateways at which passengers travelling to and from points in the Northeastern and Mid-Atlantic regions of the U.S. could make convenient connections to London.

As measured by the number of seats on nonstop flights operated from the gateways offering reasonably convenient connections for northeastern passengers (Boston, New York, Newark, Philadelphia and Baltimore/Washington), the Herfindahl-Hirschman Index (HHI) of concentration for scheduled

airline passenger service between northeastern U.S. cities and London is 2150. A combination of BA's 38% market share of available seats and USAir's 4.5% market share of available seats would increase the HHI by 349 to 2499. Mid-Atlantic passengers can conveniently travel via Charlotte and Atlanta in addition to the northeastern gateways listed above. Using capacity measures (i.e., seats available on nonstop flights), a combination of BA and USAir would increase the HHI from 1993 to 2459.

Using gateway capacity (i.e., seats available on nonstop flights from gateways serving the region) to measure changes in concentration may overstate the adverse effects of this transaction on competition for interior U.S. passengers, however. BA is not permitted under the bilateral agreement to operate service to interior U.S. points on its own aircraft (i.e., "online service"). Passengers wishing to use BA's transatlantic service must instead travel between the U.S. interior point and the U.S. gateway on flights operated by U.S. carriers and make an interline connection to the BA flight at the gateway. Because passengers prefer online service and because it is frequently more expensive for airlines to serve passengers on an interline basis than on an online basis, BA's gateway market shares, and the HHI measurements based on them, may overstate BA's competitive impact in these markets.

Even if BA's competitive importance in interior markets is overstated by market share measurements based on seats

available from gateways, the market for such services is nonetheless concentrated, and a combination of USAir and BA would increase concentration levels by a significant degree. Increases in concentration in these markets are particularly likely to harm consumers because the airlines serving them are permitted to meet under the aegis of the International Air Transport Association ("IATA") to agree on the prices they will charge. The IATA cartel makes it significantly easier for the carriers jointly to exercise market power.

The Complaint alleges that the transaction may eliminate competition between USAir and BA and may substantially lessen competition in the relevant markets. Under the transaction, BA has purchased a 20% equity position and has the right to purchase up to 49% of USAir's equity. The airlines intend to coordinate their respective services at Philadelphia, Baltimore, Charlotte and Pittsburgh and to offer code-sharing connecting service at those points. The joint service in combination with the substantial equity ownership will give each carrier a substantial interest in the other's traffic and profits on the routes between those gateways and London, and will thereby reduce each carrier's incentive to engage in competition which may negatively affect the other carrier's traffic and profits. The reduced incentive to compete, along with the lack of reasonable substitutes for airline service in those city-pairs and the barriers to entry by other airlines, indicates that the effect of the transaction may be

substantially to lessen competition in violation of Section 7 of the Clayton Act.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States brought this action because the effect of the proposed transaction between USAir and BA may be substantially to lessen competition in the provision of scheduled airline passenger service between numerous U.S. cities and London in violation of Section 7 of the Clayton Act. On the other hand, the transaction also promises to increase efficiency and competition in a number of significant respects. The joint operations by the two carriers will permit the introduction of nonstop service between Pittsburgh and London, will result in new online competition between interior U.S. points and points beyond London, and promises new or improved online service between interior U.S. points and London. These efficiencies are unlikely to be realized by either carrier acting independently because of provisions in the U.S.-U.K. bilateral agreement that restrict service to and beyond gateways.

The risk to competition posed by the transaction can be significantly reduced and the significant procompetitive benefits preserved if USAir's route authority between its U.S. gateways and London is transferred to one or more U.S. airlines with an incentive to compete in U.S.-London city pair markets.

To this end, the provisions of the proposed Final Judgment are designed to accomplish either (1) the sale of USAir's authority to serve U.S.-London routes to another U.S. airline or (2) in the absence of such a sale, the surrender of USAir's authority to serve that route and designation of another U.S. airline by the Department of Transportation.

Section IV. of the proposed Final Judgment would direct USAir to sell its authority to serve each of its U.S.-London routes within 45 days of the date the two carriers begin to provide joint code-sharing service at the U.S. gateway for that route to a purchaser approved by the United States Department of Justice. By making the requirement to divest contingent on the initiation of joint service, this provision ensures that the competitive harm of the transaction (loss of an independent competitor) is not suffered until the machinery that can generate the anticipated procompetitive benefits (the new online joint service) is in place.

Section V. provides that if USAir does not complete a sale as required under Section IV. of the proposed Final Judgment, it shall surrender the route authority to the United States Department of Transportation, which will then award to another United States airline the route authority that enabled USAir to serve Baltimore-London, Philadelphia-London and/or Charlotte-London.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured in his business or property as a result of conduct forbidden by the antitrust laws (including Section 7 of the Clayton Act) may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorneys fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be bought.

V.

PROCEDURE AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments

regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Registër. The United States will evaluate the comments, determine whether it should withdraw its consent, and respond to comments. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Mark C. Schechter, Chief
Transportation, Energy, and
Agriculture Section
Antitrust Division
Judiciary Center Building
555 4th Street, N.W., Rm 9104
Washington, D.C. 20001

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment requires that USAir sell its Baltimore-London, Philadelphia-London and/or Charlotte-London international route authority within a specified time after commencement of joint code-sharing operations with BA on any of those routes, or surrender the authority for designation by the Department of Transportation to another airline. Thus, compliance with the proposed Final Judgment would resolve the competitive concerns raised by the transaction with respect to nonstop and connecting service at the Philadelphia-London and Baltimore/Washington-London gateways and connecting service at the Charlotte gateway.

Under the terms of the U.S.-U.K. bilateral aviation agreement, a U.S. carrier holding authority to serve London from the Baltimore/Washington or Charlotte gateways may seek permission from the Department of Transportation to transfer that authority to another U.S. gateway point. If permission is sought from and approved by the Department of Transportation, the transfer of USAir's Baltimore or Charlotte required by the Final Judgment may result in service patterns that differ from those that exist today. The United States considered a remedy that would require the transferee carrier to use the authority to serve specified gateways. However, that alternative was rejected because such a restriction in this case could harm airline passengers traveling to London as a whole by producing an inefficient allocation of the limited authority to serve London.

Also, litigation is an alternative to a consent decree in a Section 7 Clayton Act case. The United States rejected this alternative because the sale or surrender of USAir's route authority required under the proposed Final Judgment, which likely would result in a transfer to a U.S. carrier that already provides London service and possibly could result in the transfer to a new gateway, nonetheless would reduce the anticompetitive effects of the transaction while preserving the significant procompetitive effect discussed in Part III above. With the proposed relief, the procompetitive benefits of the transaction clearly outweigh its anticompetitive effects.

Seeking to enjoin the transaction, which is the only other relief practicably available, would therefore not advance the public interest.

The United States is satisfied that the proposed Final Judgment sufficiently resolves the antitrust violation alleged in the Complaint. Although the proposed Final Judgment may not be entered until the criteria established by the APPA (15 U.S.C. § 16(b)-(h)) have been satisfied, the public will benefit immediately from the requirements of the proposed Final Judgment because the defendants have stipulated to comply with its terms pending its entry by the Court.

VII.

DETERMINATIVE MATERIALS AND DOCUMENTS

There are no materials or documents that the United States considered to be determinative in formulating this proposed Final Judgment. Accordingly, none are being filed with this Competitive Impact Statement.

Dated: March 15, 1993

Respectfully submitted,

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