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Report of the  
AVIATION COMMITTEE

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# Report of the AVIATION COMMITTEE

The congestion in the aviation infrastructure has been addressed in previous reports. This report focuses on two results of that congestion, namely: increased consumer and governmental dissatisfaction; and the urge to merge that seems to have reappeared in the airline industry. As always, recent developments in other areas also will be discussed.

## The Consequences of Congestion

The summer of 1999 reflected poorly on the operational performance of the U.S. airline industry. Subsequently, promises were made both by the airlines and the FAA, and expectations were raised. However, the summer of 2000 was an even worse experience. The FAA reported that in June and July, some 94,000 flights suffered significant delays. At United, where the situation was exacerbated by a pilot work-to-the-rule situation, the situation became so bad (with only 42% of its summer flights on time) that the company was forced into a public apology.

There is no mystery as to the immediate cause – a growing lack of airspace and airport capacity – although the airlines and the FAA trade charges as to who bears the most responsibility. The airlines point out that their schedules are within the capacity levels at most major airports, with exceedances only for short periods of time at four airports. The airlines argue that the real fault rests with an outdated air traffic control system. The FAA, while acknowledging the system deficiencies, suggests that overscheduling by airlines is a substantial part of the problem. This debate is non-productive. Capacity has to be expanded in either event. In the meantime, airlines have to live with reality. American, indeed, recently announced that it is redoing its schedules to spread out its flights at Chicago O'Hare Airport and Dallas/Ft. Worth International Airport.

There also is no question that, from a consumer standpoint, it is the airlines and not the FAA that must shoulder the blame. The anecdotal signs of consumer dissatisfaction are reported by the media on a daily basis. For example, in a consumer poll on the CNN web site in late September, more than two-thirds of those responding favored re-regulation of the U.S. airline industry. This dissatisfaction is not lost on the Congress, and it is probable that the next Congress will have a variety of aviation regulatory proposals near the top of its agenda when it convenes in January.

The same political pressures exist at the local level. In June, San Francisco International Airport reached an agreement with United under which United will operate larger aircraft and fewer flights in an effort to reduce delays. In September, the Port Authority of New York and New Jersey imposed a moratorium on the addition of peak

hour flights at La Guardia Airport. This was prompted by the AIR 21 legislation last April<sup>1</sup> that opened access at LaGuardia to approximately 200 additional daily flights with regional jet aircraft -- and more than doubled delays at the airport. The moratorium has started a major jurisdictional battle,<sup>2</sup> with airlines voluntarily agreeing to the moratorium on an interim basis while the FAA and the Port Authority sort out the issues.<sup>3</sup>

Another consequence of congestion is the further consolidation facing the industry. Network economics have been essential to the growth of the airline industry. As congestion constrains those networks, future growth is threatened. United's need to find additional hub airports does as much to explain its proposed acquisition of US Airways as does any balance sheet analysis. It is as much of a runway deal as it is a business consolidation. British Airway's efforts to acquire an interest in KLM and the further expansion of antitrust-immune international alliances reflect the same considerations.

The solution to the congestion problem comes down to one thing: money. Whether AIR 21 will resolve that problem remains to be seen. AIR 21 addressed the conflict between the Trust Fund and the General Fund with a compromise that drops the "off-budget" idea, and provides, instead, a mixed set of protections for aviation funding. For capital spending on airports and the ATC system, new protections are put in place. These protections are in the form of points of order against any future bill that provides less than the specified level of funding for these programs. This means greater funding certainty for the capital programs than has existed in the past, but less than a perfect guarantee. For FAA operations, continued spending from the General Fund is provided, but at a lower level than in the past, *i.e.*, the Trust Fund will provide a far higher share of the operations spending. Furthermore, there is very little assurance that even the reduced level of General Fund contribution to operations will really be available in future years.

Quite apart from the mixed picture on protection of future aviation funding levels, there is no doubt that the funding levels themselves have been dramatically increased. The average amount authorized for FAA operations over each of the next three fiscal years will increase by 18% over the current fiscal year. The equivalent increase for FAA capital spending will be 56%. This is a total commitment of over \$40 billion in federal aviation infrastructure funding through September 30, 2003, with no increase in targeted taxes.

At the local level, the current \$3 per passenger ceiling on Passenger Facility

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<sup>1</sup> Otherwise known as the Wendell H. Ford Aviation Investment Reform Act for the 21<sup>st</sup> century. P.L. 106-181 (April 5, 2000). AIR 21 was discussed in detail in the Committee's contribution to the Section's Annual Report.

<sup>2</sup> Pursuant to the Airport Noise and Capacity Act, 49 U.S.C. § 47521 *et seq.*, and 14 C.F.R. § 161, an airport access restriction may not be imposed by local authorities until and unless: (i) an extensive benefit/cost analysis has been prepared and commented upon; and (ii) for airline aircraft, the FAA has approved the restriction.

<sup>3</sup> The issue is not going away in New York or Chicago. Pursuant to AIR 21, all slot controls at LaGuardia will end on July 1, 2007; and at O'Hare on July 1, 2001.

Charges (PFCs) is raised to \$4.50 per passenger. At airports which serve as airline hubs, i.e., large airports where no more than two airlines account for at least 50% of enplanements, a request to the FAA for an increase in the PFC level or for airport grants must be accompanied by a "Competition Plan" that addresses new entrant access and expansion of existing facilities for incumbents. The FAA recently announced that the PFC increases can go into effect on April 1, 2001.

AIR 21 also makes an effort at assuring that the FAA spends these monies more effectively by implementing certain "performance based organization" strategies in the FAA's ATC management structure. The FAA's ATC responsibilities will be under the direction of a Chief Operating Officer, with responsibility for both the operational and R&D components of ATC. This person will report to the Administrator and the still to be appointed Management Advisory Council, which will have a five person Air Traffic Services Subcommittee. Most significantly, a substantial portion of this person's compensation will be determined by the extent to which he or she meets yet to be specified performance objectives, a strategy that should flow down through the FAA's ATC organization.

Whatever else is said about congestion, it now is clear to everyone that it is the single most important issue facing the U.S. aviation industry. It will shape the industry, and the laws and policies that govern the industry, for the next generation.

### **Competition Issues**

#### **1. United's Acquisition of US Airways.**

On May 24, United announced that it would acquire US Airways for \$4.3 billion in cash and \$7.3 billion in assumed net debt and aircraft operating leases. The major overlap between the two airlines is in the Washington, D.C. metropolitan area, where United has a hub at Dulles International Airport and US Airways is the largest slot holder at Reagan National Airport. The companies proposed an innovative remedy to this situation: the voluntary divestiture of assets, primarily slots, at Reagan National to permit the formation of a new airline (DC Air) owned by Robert Johnson, the founder of the BET television network.

The companies' HSR pre-merger notification still is before the Justice Department. The Congressional reaction has been strong and, generally, not in favor of the acquisition. Two concerns predominate. First, the domino effect on the rest of the industry has been raised. Whether or not the other major airlines would seek further consolidations if the United - US Airways merger proceeded, it is obvious that they could do so with that as a precedent. Second, concerns have been voiced about the practicality of the Reagan National divestiture and the viability and independence of DC Air.

## **2. United States v. American Airlines, Inc., D. Kansas No. 99-1180-JTM.**

The Justice Department's civil suit against American for allegedly predatory actions taken against new entrants is nearing the end of discovery. Dispositive motions will be filed and briefed in the January - March, 2001 period under the current schedule. On May 4, American filed a "Position Paper on Predatory Pricing," identifying the underlying legal issues that presumably will be raised in a motion for summary judgment.<sup>4</sup>

### **International**

The major international news in the last six months is something that did not happen, namely, the proposed acquisition of a substantial interest in KLM by British Airways. The U.S. government made it clear that it would not grant the necessary clearances for that transaction, clearances related primarily to maintaining the Dutch nationality of KLM for U.S. regulatory purposes, unless the U.K. entered into an Open Skies agreement with the U.S. Negotiations between the U.S. and the U.K. in that regard were scheduled to begin (and remain so scheduled as of this date) on October 18. However, in mid-September, British Airways and KLM announced that their discussions would not proceed.

### **Retail Distribution**

The DOT regulates the computer reservations systems (CRSs) that are relied upon by travel agents to display and book flights. 14 C.F.R. § 255. The thrust of the regulations is to limit the amount of airline bias in those displays and to impose other, limited restraints on the non-price marketing practices of the CRS vendors. The DOT has had a rulemaking pending for several years directed at renewing or amending these regulations. DOT Docket OST-97-2881.

Meanwhile, new technology has been overtaking the retail distribution system. Travel is the single largest product or service sold on the Internet, and some estimate that Internet travel sales will approximate \$20 billion next year. Airline travel is sold on the Internet on the web sites of the airlines and on third-party sites that offer multiple airline displays. Over 70% of the latter sales are through two sites: Travelocity, the Internet arm of Sabre, the largest CRS vendor; and Expedia, the site created, and still partially owned, by Microsoft.

The issue of whether the CRS rules should be extended to Internet sites was brought to a head with the creation of Orbitz by a number of airlines. Orbitz intends to rely on a new generation of processors and software that will search every conceivable combination of flights in any given city-pair and make those choices available to

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<sup>4</sup> American's web site includes copies of all of its pleadings in the case.

consumers on the Internet.<sup>5</sup> Orbitz has faced strong opposition from Travelocity and Expedia, as well as from travel agents. That opposition led to the inclusion of Internet-related issues in the pending rulemaking.

Comments were filed on September 22 and reply comments are due by October 23. The issues raised range from the details of the CRS regulations to the broad, and nationally significant, policy issue of whether Internet content should be subject to any economic regulation or whether it should be treated as any other medium of expression. DOT action in the immediate future is unlikely.

### **Implementing AIR 21**

AIR 21 was an omnibus bill, covering aviation cats and dogs both figuratively and literally.<sup>6</sup> The implementation of some of its provisions was touched upon above. Other provisions are being implemented over time.

#### **1. Slots at Washington's Reagan National Airport.**

AIR 21 required the DOT to grant additional slot exemptions at Washington's Reagan National Airport: 12 for nonstop service outside the 1,250 mile perimeter previously established for such service, and 12 for additional nonstop service within that perimeter. Two slots are equivalent to one daily roundtrip. On July 5, 2000, the DOT awarded the slot exemptions, as follows:

<u>Carrier</u>	<u>No. of slots</u>	<u>To/From</u>
America West	4	Phoenix
America West	2	Las Vegas
Frontier	2	Denver
National	2	Las Vegas
TWA	2	Los Angeles
ATA	4	Chicago Midway
Midway	2	Raleigh/Durham
Midwest Express	2	Des Moines
Spirit	2	Melbourne or Myrtle Beach
Spirit	2	other points in FL or SC

DOT Orders 2000-7-1 and 2000-7-2 (July 5, 2000). Flights at National also have increased with the switch of the US Airways and Delta Shuttles to the newest Stage 3

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<sup>5</sup> The MIT-developed program presently is available to consumers on a Beta test site at [www.itasoftware.com](http://www.itasoftware.com). Flights are displayed on the test site but cannot be booked through that site.

<sup>6</sup> AIR 21 requires that scheduled airlines provide the DOT with monthly reports describing incidents involving animals that they carry. The DOT, in turn, is required to publish this data and to work with airlines to ensure better training of employees with respect to the handling of animals.

aircraft, aircraft that can both land and takeoff during the 10:00 p.m. to 7:00 a.m. curfew because of their low noise profiles.

## **2. NTSB Review of FAA “Emergency” Certificate Revocations.**

AIR 21 included a provision along the lines of the “Hoover Bill,” a bill named after the legendary aerobatics performer whose pilot’s license was revoked by the FAA on an “emergency” basis. While the FAA still can revoke an airman or air carrier certificate on an emergency basis, the NTSB is given a 48-hour window to overturn the FAA’s determination that an “emergency” exists and to impose the otherwise automatic stay of revocation. 49 U.S.C. § 44709(e), as amended. As implemented by the NTSB on an interim basis, the Chief Administrative Law Judge makes the determination of whether or not an “emergency” exists -- on a non-appealable basis. 65 Fed. Reg. 46237 (July 11, 2000). Initial experience with this provision indicates that great deference will continue to be given to the FAA’s determinations.

## **3. No-Smoking on Non-U.S. Airlines.**

AIR 21 required the extension of the “no smoking” rules to non-U.S. airlines operating to and from the U.S. An exception can be made only if the non-U.S. airline’s home country objects to the prohibition on grounds of extraterritoriality. 49 U.S.C. § 41706, as amended. On June 9, but effective June 5 as required by AIR 21, the DOT and FAA amended their rules to reflect this mandate. 65 Fed. Reg. 36772 and 36776 (June 9, 2000). Not surprisingly, Aeroflot is the first, and only, airline that has requested that it be exempted from the ban.

### **Recent Case Law**

**1. National Parks & Conservation Association v. Slater, 2000 U.S. App. LEXIS 17975 (9<sup>th</sup> Cir. July 26, 2000).** The FAA approved a 2,600’ extension to the runway at Kahului Airport in Maui, Hawaii. Although most of the flights at the airport were operated within Hawaii, there was some direct service to the mainland. The longer runway would permit those services to depart without taking a fueling stop in Honolulu. The EIS prepared by the FAA was attacked as failing adequately to take into account the prospect that additional international flights might hasten the introduction of alien species of animal and plant life into Maui. The court held that petitioner “seeks to much from the EIS. While they may disagree with the FAA’s substantive conclusions as to the alien species impact of the project, NEPA does not guarantee substantive results.” Id. at 13.

**2. City of Bridgeton v. Garvey, 212 F.3d 448 (8<sup>th</sup> Cir. 2000).** The court upheld the FAA’s award of federal funds for the expansion of Lambert-St. Louis International Airport. The FAA’s action was attacked, and upheld, on several grounds, but most significant was the court’s determination that the 65 dB LDN noise contour remains, for all purposes of federal law, the outer limit for land uses that are not compatible with an airport.

**3. D&F Alfonso Realty Trust v. Garvey, 216 F.3d 1191 (D.C. Cir. 2000).**

Pursuant to 14 C.F.R. part 77, the FAA has authority to declare a structure a hazard to air navigation if that structure penetrates any one of several imaginary surfaces around and above an airport. If the FAA makes such a determination, the burden then falls on state and/or local authorities to take appropriate zoning action. Here, the FAA determined, without a hearing, that a house built approximately 400 feet from the end of the runway at a small general aviation airport constituted such a hazard. Two issues were raised on appeal, not the least of which was standing – since the FAA’s determination was final but not directly binding on the homeowner. The court allowed affidavits to be submitted establishing a direct link between the determination and local action, thus satisfying the redressibility requirement. Second, the court held that the FAA did not follow its own standards, relying primarily on a subjective judgment that the house would be a “pilot distraction.” The matter was remanded to the FAA for further consideration.

**4. Aviators for Safe and Fairer Regulation, Inc. v. Federal Aviation Administration, 221 F.3d 222 (1<sup>st</sup> Cir. 2000).** The FAA regulates the work schedules of pilots flying for air carriers, *i.e.*, airlines -- large or small, scheduled or charter. The regulations applicable to on-demand charter operators, the small aircraft charter companies, require that each flight assignment must have at least ten consecutive hours of rest during the 24-hour period preceding the planned completion time of the assignment. The issue is what is meant by the term “rest.” There are two “rest” scenarios: the duty-to-report scenario where a pilot is on-call, is expected to maintain his or her fitness during the off-duty period (*e.g.*, no alcohol) and must take the flight if called; and the duty to be available scenario which is similar to the first except that the pilot is not required to take the flight if requested to do so.

In 1999, the FAA issued a “notice of enforcement policy” stating that a pilot on reserve “was not at rest if [he or she] had a present responsibility for work in that [he or she] had to be available for the carrier to notify of a flight assignment.” An organization of on-demand charter operators appealed. The court held that: (i) to the extent that the FAA held that the duty-to-report scenario did not constitute rest, it was reflecting long-standing agency precedent and notice and comment rulemaking was not required; but that (ii) it was not clear that the FAA held the same for the duty-to-be-available scenario. The latter scenario was not ripe for review until, and unless, the FAA’s interpretation and reasons for it had been clarified.

**5. SeaAir, Inc. v. City of New York, 2000 U.S. Dist. LEXIS 12115 (S.D.N.Y. August 21, 2000).** In this unusual case, plaintiff challenged operating restrictions imposed by the City of New York on the East 23d Street Seaplane Base. Plaintiff argued that the “rates, routes and services” language in 49 U.S.C. § 41713(b) preempted the restrictions. The district court held that since that language only applied to air carriers engaged in interstate commerce, and since plaintiff’s sightseeing tours began where they started – at East 23d Street – the specific preemption did not apply. If appealed, it is possible that the Second Circuit will reach a different result.