



January 25, 2021

The Honorable Steven G. Bradbury  
Deputy Secretary & General Counsel  
Department of Transportation  
1200 New Jersey Ave. SE  
Washington, DC 20590

***Re: Request for Public Interest Review of the U.S. Department of Transportation's Approval of the American Airlines and JetBlue Northeast Alliance***

Dear Deputy Secretary Bradbury:

The American Antitrust Institute (AAI) writes to request a public interest review of the U.S. Department of Transportation's (DOT's) recent approval of the American Airlines Inc. (American) and JetBlue Airways Corporation (JetBlue) "Northeast Alliance" cooperative agreement.<sup>1</sup> AAI is concerned that the public was not afforded any opportunity to comment on the public interest implications of the DOT's approval of the cooperative agreement, which was pushed through with only 10 days remaining in the Trump administration. AAI takes no position on the merits of Complainant Spirit Airlines' claim that implementation of the cooperative agreement constitutes an unfair method of competition under 49 U.S.C. 41712.<sup>2</sup> Rather, AAI's comments highlight that the DOT's approval of the cooperative agreement itself raises significant competitive concerns. Namely, the remedies contained in DOT's agreement may be inadequate to restore lost competition. These issues warranted public input and commentary that would have ensured an appropriate review of the American-JetBlue cooperative agreement.

**I. Interest of the American Antitrust Institute**

AAI is an independent, nonprofit organization.<sup>3</sup> AAI's mission is to promote competition that protects consumers, businesses, and society. We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of competition policy. AAI has provided legal and economic analysis, commentary, and testimony on mergers, anticompetitive conduct, and competition policy involving the airline industry since the organization's founding in 1998.

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<sup>1</sup> *Termination of Informal Review of the American/JetBlue Northeast Alliance*, U.S. Department of Transportation (updated Jan. 13, 2021), <https://www.transportation.gov/sites/dot.gov/files/2021-01/Agreement%20terminating%20review%20DOT-AA-B6%20with%20appendix%20011021%20website.pdf>.

<sup>2</sup> *Complaint of Spirit Airlines, Inc., for Investigation of the Joint Venture Agreements announced by American Airlines and JetBlue Airways Under 49 U.S.C. §§ 41712 as an Unfair Method of Competition*, Docket DOT-OST-2021-001 (Jan. 7, 2021).

<sup>3</sup> For more information, please visit [www.antitrustinstitute.org](http://www.antitrustinstitute.org).

## II. Lack of Public Comment Weakens Enforcement and Reduces Government Transparency and Accountability

AAI is concerned that the public was not given any opportunity to comment on the DOT agreement issued on January 10, 2021, subject to the agency's authority under 49 U.S.C. 41720. The scope of anticipated coordination between American and JetBlue under the cooperative agreement is significant. The agreement outlines code-sharing, frequent flyer cooperation, sharing of existing assets, and marketing, planning, and revenue-sharing.<sup>4</sup> The agreement leans strongly in the direction of types of coordination (short of pricing and profit-sharing) that raise competitive concerns which should feature prominently in any public interest determination.<sup>5</sup>

Despite the fact that the American-JetBlue cooperative agreement involves no request for a grant of antitrust immunity, it has significant implications for competition and the welfare of commercial airline passengers that utilize airports in the New York City area (John F. Kennedy (JFK), La Guardia (LGA), and Newark (EWR), Boston Logan (BOS)), and Ronald Reagan Washington National (DCA). Moreover, the complex structural and behavioral remedies outlined in the DOT agreement raise serious questions about their effectiveness, or whether they will restore competition lost by the elimination of a rival that will result from coordination between American and JetBlue.

That the DOT did not solicit public comment on its agreement with American and JetBlue is highly irregular. As pointed out in the Southwest Airlines filing, the DOT has taken public comment in previous matters under 49 U.S.C. 41720.<sup>6</sup> By not taking public comments, the DOT deprived consumers, other airlines and industry participants, advocacy and public interest groups, and Congress, of any ability to raise public interest concerns.<sup>7</sup> Locking out public involvement in a critical enforcement decision is particularly egregious in light of massive consolidation in the domestic airline industry over the last two decades, and numerous concentrated airport hubs and nonstop and connecting markets.<sup>8</sup> DOT's process in this matter has thus reduced transparency and accountability in government enforcement and policy in a critical sector that has been hard hit by the COVID-19 pandemic and is central to supporting economic activity and growth. AAI thus urges the DOT to withdraw the DOT's January 10, 2021 agreement.

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> Paul Stephen Dempsey, Inst. Of Air & Space Law, Airline Alliances 13 (2011), <https://www.mcgill.ca/iasl/files/iasl/ASPL614-Alliances.pdf>.

<sup>6</sup> *Letter of Southwest Airlines re: Request of Spirit Airlines for On-the-Record Investigation of American Airlines- JetBlue Airways "Strategic Partnership,"* Docket DOT-OST-2021-001 (Jan. 11, 2021).

<sup>7</sup> As a result of the DOT's handling of the American-JetBlue matter, Spirit Airlines filed a complaint on January 7, 2021, alleging that the agreement is an unfair method of competition, in violation of 49 U.S.C. 41712.

<sup>8</sup> See, e.g., Diana L. Moss, *Alliances and Antitrust Immunity: Why Domestic Competition Matters*, ABA Air & Space Lawyer 32(1) (2019).

### III. The American-JetBlue Cooperative Agreement Eliminates Important Competition and Raises the Bar on an Effective Remedy

In July of 2020, American and JetBlue filed cooperative agreements with DOT that form the basis for the Northeast Alliance. Coordination by American and JetBlue will have material effects on service originating at JetBlue's hub at BOS, and at EWR, JFK, and LGA. Each of these airports displays high concentration under the thresholds specified in the Federal Trade Commission/U.S. Department of Justice Horizontal Merger Guidelines.<sup>9</sup> Elimination of rivalry resulting from the cooperative agreement will significantly increase concentration.<sup>10</sup> According to the Complaint filed by Spirit Airlines, coordination will eliminate a rival on 26 nonstop routes originating at LGA, BOS, and JFK.<sup>11</sup>

While DOT rightly concluded that the American-JetBlue cooperative agreement eliminated competition and was therefore not in the public interest, denying public comment on the complex remedy contained in the DOT agreement does not serve the public interest. The DOT agreement approved the cooperative agreement between American and JetBlue subject to complex structural and behavioral remedies. One prong of the remedy involves slot divestitures at congested airports—seven slot pairs at JFK and six slot pairs at DCA. While slot divestitures have been a favored method to address competition problems in past airline mergers, slot swaps, and requests for antitrust immunity, their use in the DOT agreement raise numerous questions.

First, the slot “divestitures” at DCA are, in fact, only renewable five-year leases and will revert to American and JetBlue ownership. This undercuts the remedial value of a *permanent* change in slot ownership in reducing market share and concentration, and the ability and incentive to exercise market power. Second, if slot divestitures are inadequate to address competitive concerns raised by the agreement, additional, conditional divestitures will be required based on complex calculations of “capacity targets.” Such a condition invokes a dangerous element of “industrial planning” in an attempt to preserve competition in the markets affected by the American-JetBlue cooperative agreement. Finally, it is unclear whether and how DOT assessed the effect and interaction of proposed slot divestitures and leases with the pre-existing slot divestitures required in past airline mergers and transactions.

A second prong of the remedy contained in the DOT agreement comprises a series of behavioral requirements and commitments. These requirements cover a vast span of required conduct and prohibited conduct. For example, American and JetBlue are prohibited from: (1) exiting certain JFK routes, (2) communicating on competitively sensitive pricing, route scheduling, and capacity decisions; and (3) interfering with each other's slot and gate decisions. Moreover, the two carriers must engage in complex periodic reporting requirements involving: (1) schedule optimization, (2) market capacity and simulations; (3) slot utilization; and (4) gate utilization.

AAI has often explained in public filings and comments that behavioral remedies are difficult to monitor and enforce. They require extensive compliance and oversight by antitrust authorities and sector regulators. Moreover, they do nothing to reduce or eliminate the incentive of the parties to

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<sup>9</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (2010).

<sup>10</sup> Based on passenger data obtained from the U.S. Department of Transportation, TranStats database, <https://www.transtats.bts.gov/>.

<sup>11</sup> *Supra* note 2, at Exhibit A.

exercise market power.<sup>12</sup> Behavioral conditions—layered on top of required and prospective slot divestitures and leases—will likely enhance incentives for American and JetBlue to develop “work-arounds” to the remedies. And the complexity of the DOT’s approach effectively substitutes industrial planning for competitive market forces.

It is often the case that the best remedy for restoring competition is to deny a transaction or an agreement outright. The DOT did not choose this path in the instant proceeding. Indeed, with higher levels of concentration at key airports and on routes affected by the American-JetBlue cooperative agreement, barriers to entry by low-cost carriers (LCCs) will be commensurately higher. Such barriers will be evidenced by difficulty in obtaining slots and other airport facilities. LCCs have historically proved to be an important source of competitive discipline in airline markets and the nimblest of market participants, especially during the COVID-19 pandemic.

For the foregoing reasons, additional scrutiny and the opportunity for public comment is required to determine whether the American-JetBlue Northeast Alliance arrangement is, in fact, in the public interest.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'D. Moss', with a stylized flourish at the end.

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<sup>12</sup> John Kwoka and Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULLETIN 979 (Winter 2012).