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**BEFORE THE
FEDERAL AVIATION ADMINISTRATION
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

DEPARTMENT OF TRANSPORTATION
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14 CFR Part 93)
Docket No. FAA-1999-4971 -- 3)
Notice No. 99-20)
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COMMENTS OF THE AIR CARRIER ASSOCIATION OF AMERICA

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COMMENTS OF THE AIR CARRIER ASSOCIATION OF AMERICA

The Air Carrier Association of America (“ACAA”) hereby submits comments on the Federal Aviation Administration’s (“FAA”) Notice of Proposed Rulemaking (“NPRM”), No. 99-20, to amend the regulations governing takeoff and landing slots and slot allocation procedures at certain High Density Traffic Airports to conform to the “Open Transborder” Agreement between the Government of the United States and the Government of Canada.

The Secretary of Transportation has broad statutory authority to allocate slots at the high density airports. The Secretary may allocate slots or adjust slot procedures under the general authority contained in the Federal Aviation Act of 1958 as amended, the high density regulations, 49 U.S.C. § 4171(c) and the Department of Transportation Act.

While the actions proposed in this NPRM may be required by bilateral agreement, this action, if not accompanied by a rule that would allow additional new entry at the high density airports, will strike yet another blow against the future of airline competition.

The FAA should suspend consideration of granting international slots or making them permanent, as proposed by this NPRM, until steps are taken to ensure the future of true competition at the high density airports.

I. **BACKGROUND**

The high density slot regulations were adopted in the late 1960s to control traffic and alleviate congestion at busy airports. When the slot regulations were first implemented, the incumbent carriers were given the slots they were operating and needed to support their operations. During the 1970s and 1980s, the large carriers distributed slots among themselves through “scheduling committees.”

The Department of Transportation has in the past taken steps to provide for new entry at high density airports. As new entrants attempted to enter the high density airport markets, the scheduling committee process broke down, leaving new entrants without access. This was the first action by the large carriers to block new entrants from entering high density airports. To counter the large carriers’ refusal to provide slots for new entrants, in 1980, Secretary of Transportation Goldschmidt decided that new entry was so crucial to deregulation efforts that the Department issued Special Federal Aviation Regulation 43 (“SFAR 43”). SFAR 43 allocated 18 slots to new entrant New York Air at National Airport, enabling New York Air to enter the Shuttle market.’ [45 FR 72637, Nov. 3, 1980]. The promotion of new entry was deemed so important that the slots provided to New York Air were withdrawn from all carriers including smaller carriers such as Air Florida.

¹Delta operates its shuttle with the slots granted to New York Air by SFAR 43. If Secretary Goldschmidt had not decided to allow badly needed new entry by New York Air back in 1980, Delta would not likely be in the shuttle business today and would probably be complaining about the need for increased competition in that lucrative market.

The preamble to SFAR 43 made it clear that a **primary objective** of the Secretary of Transportation was to **promote competition**, even in routes that were already served. The preamble stated:

. . .additional low fare service in the market will increase competition and would thus be consistent with the Airline Deregulation Act.²

The preamble also made it clear that the Department had a significant amount of authority to withdraw and allocate slots and that slots were not property that belonged to the carriers. The preamble stated:

There is no property right in access to a public facility...Plainly the Department has the power to allocate them on any basis that is not arbitrary and capricious, or otherwise contrary to law.

Secretary Goldschmidt's quick action to allocate slots under his general statutory authority was vigorously contested by the large carriers -- who hoped to avoid increased competition. Ultimately, the Secretary's decision was upheld by the United States Court of Appeals in *Northwest v. Goldschmidt*, 645 F.2d 1309 (1981).

In order to replace the anticompetitive scheduling committee process, the Department issued the buy-sell slot rules in December, 1985 (Amendment 93-49, 50 FR 52195). Under these rules, carriers were grandfathered their existing slots and allowed to buy or lease additional slots. At the time that this rule was issued, a large majority of the slots were given to the incumbent carriers. A limited number of slots were distributed to new entrants. Since that time, however, the large carriers have gradually re-acquired all of the slots intended for new entrants, thus increasing their stranglehold on the high density airports. Through mergers, alliances, and

² The slots given to New York Air were for service between New York and Washington -- a route already served by the Eastern Shuttle.

transactions involving significant airport assets, the dominant carriers continue to obtain additional slots and control the high density airports.

The buy-sell rules contain several provisions which set forth the authority of the Secretary to withdraw and distribute slots requested by the affordable fare carriers. These key provisions emphasize that:

1. Slots are not the property of the carriers.

Section 93.223 (a) states:

slots do not constitute a property right but represent an operating privilege subject to absolute FAA control. Slots may be withdrawn at any time.. .

The preamble to the regulation adds, “This amendment does not create proprietary rights in slots.”

2. Slots may be withdrawn.³

Section 93.223(c) states:

accordance with the priority list established under paragraph (b).

3. Slots are assigned a withdrawal number to facilitate slot withdrawal.

Section 93.223(b) states:

for the recall priority of slots at each airport.

³ Carriers have always known that slots could be withdrawn. To avoid possible loss of slots, carriers have traded or sold slots with high withdrawal numbers and have had affiliates operate slots to meet use-or-lose requirements.

Large Carriers Control High Density Slots

Despite this broad authority and mandate to promote competition and entry, the Department has only taken very limited actions to promote competition at high density airports. Today, the large carriers and their affiliates and partners control 98% of the slots at high density airports. As previously noted, it has been 13 years since the Department provided new entrants with permanent slots.

As noted by various parties, including the General Accounting Office, it is difficult if not impossible to purchase or even enter into long-term leases for slots. Large carriers control the high density airports, opening the doors to some, but keeping the doors locked to most who wish to compete and to all new entrants.

At LaGuardia Airport, there are approximately 720 air carrier slots and 210 commuter slots. Of the 720 air carrier slots, slots are controlled as follows:

American *	107		
<u>USAirways**</u>	<u>248</u>		
Total	355	=	50% of total air carrier slots
United	56		
Air Canada* * *	06		
<u>Delta</u>	<u>150</u>		
Total	212	=	30% of total air carrier slots

Other large carriers control about 18% of the slots with 4 operated by America West and 12 operated by Midwest Express (.02% of total).

New entrants (Frontier, AirTran, and Spirit) have 24 “exemption” slots which is approximately .03% of the air carrier slots at the airport.

There are approximately 210 commuter slots at LaGuardia. Of those commuter slots, American is buying Business Express which operates 82 slots (39% of total) while its alliance partner USAirways operates 42 commuter slots (20% of total), giving the AA/US alliance 60% of total commuter slots. The Delta and United marketing alliance operates most of the remainder of the slots including 6 held by Air Canada.

NPRM Increases Large Carriers' Hold on High Density Airports

This NPRM states that Canadian carriers hold 36 international slots at O'Hare and 42 international slots at LaGuardia,⁴ while U.S. carriers hold 35 international slots at O'Hare and 17 international slots at LaGuardia. The NPRM proposes to convert those 71 international slots at O'Hare and 59 at LaGuardia to domestic slots.

Therefore, under this proposal, American (which with its alliance partners already controls 50% of the air carrier slots and 60% of the commuter slots) and its foreign subsidiary will increase its permanent LaGuardia slots holdings by 25 slots while United and its alliance partners will increase their permanent slot holdings at LaGuardia by 34 slots. In other words, the carriers that already dominate LaGuardia will increase slot holdings by 59 slots. At O'Hare, American and United already control over 95% of the total slots with their commuter and international partners and will increase slot holdings by 83 slots! All of this is occurring while new entrants are frozen at 24 LaGuardia slots" and have neither National Airport slots (although Air Canada operates at National) nor O'Hare slots.

⁴ The international slots at LaGuardia held by Canadian carriers are 32 by Air Canada (United's codesharing partner) and 10 by Canadian Airlines (owned in part by American). Also at LaGuardia, American holds 15 international slots (along with 2 by Delta.)

⁵ Eastwind Airlines, Inc. is currently petitioning to obtain fewer high density slots than slots held by the Canadian carriers. (See Docket OST-99-4979.)

If the actions proposed in this NPRM are not accompanied by a rule that would allow additional new entry at the high density airports, the future of domestic airline competition will be further jeopardized.

The Department has broad authority to provide for new entry

The FAA and the Department can take other actions to address this total imbalance at the high density airports.

The large carriers continue to demand even greater access and control of international markets. At the same time, they have opposed all attempts to increase competition, at high density airports. Apparently, these carriers believe that it is important to have price competition in international markets if it means they can increase operations, but it is not important to provide consumers and businesses access to affordable fares into and out of the high density airports.

The hypocrisy of this position was best summarized by Bob Crandall, former Chairman and CEO of American Airlines, Inc., before the Senate Aviation Subcommittee on June 4, 1997 when he stated:

For an added dose of irony, consider these facts: United holds the greatest number of slots at Chicago's O'Hare Airport and a higher percentage of O'Hare slots than British Airways and American combined will hold at Heathrow. Moreover, United holds slots at Heathrow it does not use, having loaned them to its partner, Lufthansa. Yet United continues to demand that we and British Airways divest several hundred slots at Heathrow -- **while at the same time taking the position that in the United States, new entrants do not need slots at constrained airports!** (*emphasis added*).

The large carriers have made numerous public statements in response to proposals to increase access to foreign markets, including Heathrow. Those comments all cry for increased

access and slots at foreign airports, citing, ironically, the benefits of increased competition. The U.S. carriers argue that the U.S. government must insist that slots be pulled from foreign carriers to accommodate their expansion plan. When that doesn't occur, those same large U.S. carriers ask for retribution against the foreign carriers in the U.S. For example, USAirways has recently asked the Department to deny slot grants to foreign carriers with restrictive domestic markets so that U.S. carriers like itself, American, and Delta are not placed at a competitive disadvantage. (Consolidated Response of USAirways, Inc. to Answer of Delta Airlines and American Airlines, OST-98-4890 and 4902.) Yet those same carriers oppose the opening of O'Hare, National, and LaGuardia to new entry and true competition, although those airports are more constrained than London's Heathrow! In short, while the large carriers support "open skies" throughout the world, they oppose "open skies" in the United States. At the same time, they continue to demand even additional domestic slots. Claiming that "American's network at Chicago . . . is at a significant slot disadvantage, compared to United's at Chicago," American has urged the Department to give it all available slots, United's network has a total of 1,049 O'Hare slots. All American has is 916. (*Aviation Daily*, November 23, 1998.) Poor disadvantaged American. If American is disadvantaged, what is a new entrant with no slots?

It is time for the Department of Transportation to open domestic markets as they have opened some foreign markets and attempted to open others.

⁶In his testimony, Mr. Crandall noted, "Since the spring of 1991, 54 new airlines have been able to secure viable slots and begin operations at Heathrow. In 1995, seven new carriers commenced Heathrow operations and in 1996, five more did so. Between 1992 and 1996, 546 weekly peak-hour slots were added at Heathrow. Between 1992 (American's first full year of Heathrow operations) and 1997, American has been able to increase its slot holdings by over one-third." (Testimony of Bob Crandall, Senate Aviation Subcommittee, June 4, 1997.)

In contrast, not one affordable fare carrier has been able to, "secure viable permanent slots" at LaGuardia during the same time period and have no slots at National, although Canadian carriers have permanent slots at all high density airports.

To understand why new entrant carriers need access to the high density airports, one only need examine comments made by representatives of large carriers on the issue to international airports:

A. The Need for Additional Competition

Delta is prepared to compete with AA/BA in the New York market, just as we do with United and Lufthansa to Germany and with KLM and Northwest to Amsterdam. However, we face the obstacle of not being able to mount a viable competitive presence in the market due to the fact that we cannot obtain slots and other critical facilities at Heathrow.

Despite Delta's position as the largest operator of nonstop transatlantic services, we lack a competitive presence in the U.S.-London market because we are prohibited from serving Heathrow. Our limited position in this market is not a reflection of our commercial interest but is a function of the restrictive and protective Bermuda II agreement between the U.S. and the U.K. In a truly open U.S.-U.K. environment, Delta would be a major competitive force.

[Scott Yohe, Senior Vice President, Governmental Affairs, Delta Airlines, before the Aviation Subcommittee of the Senate Committee on Commerce, Science and Transportation on June 4, 1997.1

Open skies would allow not only US Airways to offer service, but other carriers as well, creating a flourishing and competitive new market in transatlantic aviation with enormous benefits for travelers, communities and all airlines and their employees.

[Stephen M. Wolfe, Chairman and CEO, US Airways before the Senate Antitrust, Business Rights and Competition Subcommittee, April 22, 1997.1

The legal right to fly to the U.K. will do little good if U.S. carriers do not have the Heathrow assets -- that is, slots and ground facilities -- to compete and, over time to grow.

As a result of its dominant position, the mega-alliance would have the power to control fares and exclude competitors.

[Lawrence M. Nagin - Executive V. P. and General Counsel, US Airways before the Senate Antitrust, Business Rights and Competition Subcommittee, April 22, 1997.1

We simply desire to be able to compete for those same passengers.

[David A. Schwarte, Managing Dir., International Affairs,
American Airlines before the Senate Antitrust, Business Rights
and Competition Subcommittee, April 22, 1997.1

Governmental bodies should have as their dual goals freeing the industry in terms of the elements of competition and protecting their citizens from the potential for anti-competitive abuse of that new open environment. This means encouraging alliances and the conditions that foster them, but at the same time developing anti-monopoly policies that provide strict scrutiny of the "superhubs" so as to maintain the opportunity for meaningful intrahub competition.

[Cyril Murphy, Vice President, International Affairs,
United Airlines before the Senate Antitrust, Business Rights
and Competition Subcommittee, April 22, 1997.1

The number of high density slots that should be made available, the large carriers have requested the following from Heathrow:

. ..if we are unable to gain sufficient slots, gates and related facilities to offer a meaningful pattern of service, it is unlikely that Delta will be able to exert any real competitive discipline on this alliance. Merely granting Delta a few token slots will not allow Delta to compete with a proposed shuttle service.

[Scott Yohe]

In fact, the total number of slots being sought by all U.S. carriers is a fraction - barely 12 percent - of the combined slots holdings of BA and AA.

[Stephen Wolf]

US Airways estimates that U.S. carriers collectively need at least 60 daily take-off and landing slots (for 30 daily round-trips) to become effective competitors with the mega-alliance at Heathrow.

[Larry Nagin]

The surrender by BA and AA, without compensation, of 210 weekly slots at Heathrow Airport and 84 and 42 weekly slots at New York JFK and Chicago O'Hare Airports, respectively. This would provide airport slot access for other carriers equal to the competitive services eliminated by alliance.

[Cyril Murphy]

Conclusion

The FAA and the Department have sufficient authority to provide slots to new entrants. The number of slots that should be distributed is less than foreign carriers hold at those same airports or large carriers have asked for at Heathrow.

As Secretary Goldschmidt did in 1980, the Department could take appropriate regulatory action to award slots within a few week period. It is time that the Department take steps so that airline competition will continue to exist.

To meet existing requests, the Department should take one of the following actions:

1. Grant slot exemptions; or
2. Withdraw slots from incumbents (as done by Secretary Goldschmidt under Amendment 93.49, and proposed by the large carriers at Heathrow); or
3. Require foreign carriers to utilize their U.S. partner's slots -- freeing up slots for affordable fare carriers.'

Until steps are taken to ensure the future of domestic airlines, the FAA should suspend consideration of granting slots to Canadian carriers, as proposed by this NPRM. Under the Deregulation Act, the Department is required to:

- place maximum reliance on competitive market forces and on actual and potential competition.

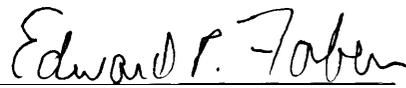
⁷ Bob Crandall's written testimony before the Senate Aviation Subcommittee, June 4, 1997, stated that, "U.S. carriers with European partners can obtain slots for transatlantic use by the reallocation of slots within these partnerships to more valuable economic uses. United alone has sufficient slots for two more daily round-trip Heathrow-U.S. services; instead, it has leased excess slots to Lufthansa. Both the Delta-Swisair-Sabena-Austrian and Northwest-KLM alliances have a number of Heathrow slots deployed on very low value operation. Northwest's partner, KLM, operates 40 weekly round-trip departures with 50-seat aircraft, and Sabena, one of Delta's European partners, operates a number of weekly round-trip departures at Heathrow using 46-seat. aircraft."

The position advocated by Mr. Crandall should apply to slots utilized by Canadian Airlines (owned in part and allied with American) and by Air Canada (allied with United).

- encourage entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry.

If the action proposed by this NPRM is taken without providing for new entry, the high density airports may be forever closed to new entry and the message will be sent to all that service to Canadian cities and other international destinations is more important than service within the United States. Moreover, such an action would appear to be an abandonment of principles set forth in the Deregulation Act. While the Department's international drive to open markets is important, that policy cannot be put ahead of the survival of domestic competition.

Respectfully submitted,



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