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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Clarification of Departmental Position on American Airlines – JetBlue Airways Northeast Alliance Joint Venture

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT)

ACTION: **Clarification Notice**

SUMMARY: By this notice, the U.S. Department of Transportation (DOT or Department) clarifies its position on the American Airlines (American) and JetBlue Airways (JetBlue) Northeast Alliance (NEA) joint venture agreements and the January 10, 2021 agreement between and among DOT, JetBlue and American (DOT Agreement) terminating the Department's review of the NEA, following the September 21, 2021 announcement of antitrust litigation by the U.S. Department of Justice (DOJ). The Department will work closely with DOJ should it seek data and documents that will help in the resolution of DOJ's action. The DOT Agreement remains in effect during the pendency of the DOJ litigation. The Department retains independent statutory authority under 49 U.S.C. 41712 to prohibit unfair methods of competition in air transportation to further its statutory objectives to prevent predatory or anticompetitive practices and to avoid unreasonable industry concentration.[1] However, the Department intends to defer to DOJ, as the primary enforcer of Federal antitrust laws, to resolve the antitrust concerns that DOJ has identified with respect to the NEA. The Department also intends to stay the proceedings in a Spirit Airlines, Inc. (Spirit) formal complaint against the NEA's implementation while the DOJ

[1] 49 U.S.C. 40101.

action is pending. The Department will assess its next steps, if any, relating to the Spirit complaint and the NEA at the conclusion of the DOJ litigation.

DATES: [Date of publication]

FOR FURTHER INFORMATION CONTACT: Blane A. Workie or Ryan Patanaphan, Office of Aviation Consumer Protection, U.S. Department of Transportation, 1200 New Jersey Ave., SE, Washington, DC, 20590, at 202-366-9342 or by email at blane.workie@dot.gov or ryan.patanaphan@dot.gov, or Todd Homan, Director, Office of Aviation Analysis, 1200 New Jersey Ave., SE, Washington, DC, 20590, 202-366-5903, Todd.Homan@dot.gov (e-mail).

SUPPLEMENTAL INFORMATION:

Background

In 2020, American and JetBlue submitted to the Department joint venture agreements concerning the NEA, which covered code-sharing, frequent flyer, interline, revenue sharing, and asset sharing. The agreements and supporting documentation were submitted to the Department under 49 U.S.C. 41720, which requires that major air carriers submit joint venture agreements to the Department at least 30 days before the agreements take effect. Section 41720 permits the Department to extend the 30-day period up to an additional 150 days for joint venture agreements involving code-sharing and 60 days for other types of joint venture agreements.

Consistent with past precedent, the Department chose to conduct the review of the NEA informally and without establishing a docketed proceeding.[2] As permitted by 49 U.S.C. 41720, the Department extended its review and the waiting period for the NEA to November 19, 2020,

[2] *See, e.g.*, 67 Fed. Reg. 50,745 (Aug. 5, 2002) (United Air Lines and US Airways) and 67 Fed. Reg. 69,804 (Nov. 19, 2002) (Delta Air Lines, Northwest Airlines, and Continental Airlines). Both agreements were subject to an informal, non-docketed review, although third parties were given the opportunity to submit comments on the agreements due to public interest concerns, subject to access restrictions designed to ensure that confidential business information did not become public.

via a Federal Notice issued on August 20, 2020.[3] In the notice, the Department explained that it would consult with DOJ during its review, and that its focus was on whether the NEA would likely reduce competition and create the potential for collusion or other restrictions on price and service levels in markets where the carriers compete.

Section 41720 does not provide the Department the authority to approve or disapprove agreements submitted for review under that section; rather, the section gives the Department a limited period of time to review the agreements before such agreements may take effect. DOJ, which is responsible for enforcing Federal antitrust laws and has also been conducting its own review of the NEA, had not concluded its investigation at the time DOT's review period ended and DOT entered in the DOT Agreement with American and JetBlue on January 10, 2021. Section 41720 does not require DOJ to adhere to a particular timeframe for its review. If an alliance agreement appears to be problematic, the Department and DOJ have separate authority to address anticompetitive conduct. As the Department's time-limited review of the NEA was concluding, it was aware that DOJ was continuing its detailed review and identifying and examining concerns on the impact on competition.

In this context, DOT's review of the NEA under section 41720 was not designed to approve or disapprove the alliance. During the Department's review, American and JetBlue entered into negotiations with DOT. These negotiations culminated in the DOT Agreement with American and JetBlue on January 10, 2021, in which the carriers agreed to take actions to address several Departmental concerns about anticompetitive harms arising out of the NEA.[4] The DOT Agreement did not address all of the Department's concerns resulting from the NEA's

[3] 85 Fed. Reg. 51,552 (Aug. 20, 2020).

[4] The agreement can be found at https://www.transportation.gov/sites/dot.gov/files/2021-01/Agreement%20terminating%20review%20DOT-AA-B6%20with%20appendix%20011021%20website.pdf.

impacts on competition, but instead sought concessions from the carriers that were intended to mitigate some of the anticompetitive harm while providing a means for monitoring the NEA's implementation.

For example, the DOT Agreement required upfront slot divestitures of six slot-pairs at Ronald Reagan Washington National Airport (DCA), seven slot-pairs at John F. Kennedy International Airport (JFK), and a conditional divestiture of up to ten additional slots at JFK if the carriers failed to meet capacity growth targets in New York City (limited to JFK and LaGuardia Airports). In the case of the DCA slot-pairs, a perpetual-lease arrangement provided for the divested slots to be reacquired by the carriers in the event that the NEA is discontinued. The carriers also agreed to periodically report to DOT capacity figures, route changes, and slot and gate utilization metrics. The carriers agreed to adhere to antitrust protocols to limit the type of communications between them, as well as other commitments.

The DOT Agreement does not expand or restrict the Department's existing statutory and regulatory authorities, including the ability to investigate and prohibit potentially unfair, deceptive, or exclusionary practices.[5] The parties to the DOT Agreement recognized that the alliance was still subject to the antitrust laws, that DOJ was continuing its review, and that DOT retained its authority to remedy any competitive harm.

Spirit Airlines Formal Complaint

On January 7, 2021, prior to execution and public release of the DOT Agreement, Spirit filed a formal complaint with DOT that was docketed in DOT-OST-2021-0001. In its complaint,

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[5] Section 7 of the DOT Agreement specifies that "[n]othing in this Agreement shall expand or restrict DOT's existing statutory and regulatory authorities, or at any time prohibit or limit DOT from exercising those authorities, including but not limited to investigation and enforcement regarding: (1) potentially unfair or deceptive practices; (2) potentially exclusionary practices; [or] (3) acquisition or operation of additional slots or gates not currently held by American or JetBlue."

Spirit requested an on-the-record investigation of the NEA to determine whether the NEA's implementation would constitute an unfair method of competition in violation of 49 U.S.C. 41712(a).[6] Spirit also asserted that insufficient information about the NEA was made public during the Department's review, and that the remedies agreed to in the DOT Agreement were insufficient to address anticompetitive concerns.

Several entities, including other airlines, an airline association, a consumer advocacy organization, and a non-profit organization focused on competition, submitted comments supporting various aspects of Spirit's complaint.[7] Those comments were filed after the public release of the DOT Agreement. American and JetBlue filed answers opposing Spirit's complaint.

DOJ Litigation

On September 21, 2021, after completing an extended review of the NEA, DOJ announced its determination that the NEA violates the antitrust laws and that the agency has initiated action to enjoin the agreements. DOJ has shared with the Department its significant concerns with respect to the effect of the NEA on competition. The Department notes that the DOT Agreement does not, nor was it intended to, wholly address these concerns. The Department will work closely with DOJ should it seek data and documents that will help in the resolution of DOJ's action.

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[6] The Department's authority to address competition concerns is separate and distinct from that of DOJ, covering a different scope of anticompetitive conduct than DOJ's authority. Under 49 U.S.C. 41712, the Department has authority to investigate and decide whether a carrier has been or is engaging in an unfair method of competition in air transportation. The Department prohibits anticompetitive conduct that (1) violates the antitrust laws, (2) is not yet serious enough to violate the antitrust laws but may well do so if left unchecked, or (3) although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit. See, e.g., *ASTA v. United et al.*, DOT Order 2002-9-2 (Sep. 4, 2002), citing *E.I. Du Pont de Nemours and Co. v. Federal Trade Commission*, 729 F.2d 128, 136-137 (2d Cir. 1984). *E.I.Du Pont de Nemours* interpreted the Federal Trade Commission's authority under 15. U.S.C. 45, upon which 49 U.S.C. 41712 is based.

[7] The organizations included the National Air Carrier Association, Southwest Airlines, United Airlines, Travelers United, the American Antitrust Institute, Airports Council International – North America, and the Service Employees International Union.

Because of the DOJ action, and to avoid duplicative or inconsistent proceedings, DOT is separately staying the proceedings in the Spirit formal complaint while the DOJ action is unresolved. Although the DOT Agreement remains in effect, the. Department will continue coordinating with DOJ. The Department notes its own statutory authority to investigate and prohibit anticompetitive conduct if the situation warrants. However, the Department intends to defer to DOJ, as the primary enforcer of Federal antitrust laws, to resolve antitrust concerns with respect to the NEA. The Department believes that it would be inefficient and unhelpful to have two concurrent proceedings and therefore intends to defer any independent action until the DOJ antitrust litigation has concluded.

ISSUED THIS 21ST DAY OF SEPTEMBER, 2021, IN WASHINGTON, D.C.

John E. Putnam
Acting General Counsel