

# **Antitrust Implications in the Consolidated Landscape of the U.S. Aviation Industry**

Alex Budka  
Student Fellow  
Institute for Consumer Antitrust Studies  
Loyola University Chicago School of Law

## **Introduction**

The aviation industry, once characterized by unbridled expansion and competitive diversity, underwent a significant transformation following the tragic events of September 11, 2001. The aftermath of this unprecedented incident triggered a wave of bankruptcies, mergers, and acquisitions that reshaped the landscape of the United States airline industry. Over the years, market concentration has intensified, with four major carriers - Delta, United, American, and Southwest - now holding sway over more than eighty percent of the domestic aviation market. This consolidation, driven by factors such as limited access to terminal gates and airspace, encountered a new challenge in 2020 with the outbreak of the COVID-19 pandemic, compelling airlines to reevaluate strategies amid a rapidly changing global landscape and supply chain constraints.<sup>1</sup>

The conclusion of mass consolidation in the airline industry during the early 2000s has prompted a more recent era where legal scrutiny of airline transactions by courts has intensified significantly. This heightened scrutiny reflects a growing awareness of potential antitrust concerns, emphasizing the need for a more rigorous evaluation of airline industry transactions to safeguard competition and consumer interests. This is reflected in the recent District Court of

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<sup>1</sup> During this litigation JetBlue announced that it had reached an agreement to acquire Spirit Airlines. This proposed acquisition has yielded a separate antitrust suit by the United States seeking to prevent the merger based on alleged violations of the Clayton Act. *United States v. JetBlue Airways Corp.*, No. 23-cv-10511 (D. Mass. Mar. 7, 2023). At the time this article was written the District Court of Massachusetts had blocked the merger which led JetBlue and Spirit to terminate the agreement.

Massachusetts decision *United States v. American Airlines Group, Inc.*<sup>2</sup> The airline industry's time of consolidation is over, the focus has now shifted to protecting consumers by driving down costs and providing them with ample choices in the sky.

I. The Current Landscape of the Aviation Industry and the Emergence of the Big Four Carriers

Prior to September 11, 2001, the United States airline industry was largely unconstrained by antitrust enforcement which resulted in the aggressive expansion of large carriers building out their networks while new, smaller carriers popped up with lower prices.<sup>3</sup> However, the horrific events that unfolded on September 11, 2001 disrupted the airline industry, forcing many carriers to file for bankruptcy and pursue mergers and acquisitions in order to stay economically viable.<sup>4</sup>

Fast forward to present day. The United States domestic aviation industry is perhaps one of the most concentrated markets in the country with over eighty percent of the market dominated by one of the big four carriers (Delta, United, American, and Southwest).<sup>5</sup> Of these large carriers, Delta, United, and American are typically classified as global network carriers ("GNC") that operate at a significant scale and reach a wide range of origins and destinations ("O&Ds").<sup>6</sup> On the other end of the spectrum, low-cost carriers ("LCC"), including Southwest, typically operate one type of aircraft which reduces their operation costs and provides savings they can pass along to their customers.<sup>7</sup> Similar to LCCs, ultra-low-cost carriers, including Spirit Airlines and Frontier are able to reduce their costs even further by offering bare-bones transportation services to their customers without any other benefits or perks that the large

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<sup>2</sup> *United States v. Am. Airlines Grp. Inc.*, No. CV 21-11558-LTS, 2023 WL 3560430 (D. Mass. May 19, 2023).

<sup>3</sup> *Id.* at \*3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at \*4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

carriers typically offer to its frequent fliers. Airlines such as JetBlue and Alaskan are considered hybrid carriers, falling somewhere between a GNC and a LCC.<sup>8</sup> Hybrid carriers offer low-cost flights while also operating a variety of aircraft and a more expansive range of O&Ds.<sup>9</sup>

Every airline, regardless of their size or classification, was faced with another major disruption brought on by the COVID-19 pandemic in March, 2020.<sup>10</sup> As a result, the pandemic forced airlines to slash capacity and alter their growth strategies including pursuing mergers, acquisitions, and alliances to cope with the lingering effects of post-pandemic travel.<sup>11</sup>

The COVID-19 pandemic also brought about supply chain constraints that severely hampered airlines' ability to purchase new planes. If carriers are placing orders with Airbus they can expect significant delays in the arrival of their new planes as Airbus' backlog at the end of 2023 stood at 8,598 aircraft.<sup>12</sup> Meanwhile, Boeing is facing its own challenges with the overall quality and demand for its planes.<sup>13</sup> The delay of new aircraft has not only delayed the normal process of aging planes out of the fleets in a timely manner, but has also restricted the airlines from being able to expand their services and provide more capacity in order to keep up with demand.<sup>14</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*6.

<sup>11</sup> *Id.*

<sup>12</sup> Airbus reports strong 2023 commercial aircraft orders and deliveries in complex operating environment, January 11, 2024, <https://www.airbus.com/en/newsroom/press-releases/2024-01-airbus-reports-strong-2023-commercial-aircraft-orders-and#:~:text=As%20a%20result%2C%20its%202023,said%20Guillaume%20Faury%2C%20Airbus%20CEO.>

<sup>13</sup> Boeing orders, deliveries dry up in January as plane-maker grapples with latest Max crisis, February 13, 2024, <https://www.cnn.com/2024/02/13/boeing-aircraft-orders-deliveries-january.html#:~:text=Boeing%20's%20aircraft%20orders%20and,manufacturer's%20strong%20finish%20in%202023.>

<sup>14</sup> Aircraft delivery delays keep limiting airlines' capacity growth, June 12, 2023, <https://www.travelweekly.com/Travel-News/Airline-News/Delivery-delays-keep-limiting-airline-capacity-growth.>

II. Airlines have pursued mergers and alliances aggressively in the past with little antitrust resistance until now

The Plaintiffs in this case include the Antitrust Division of the U.S. Department of Justice, as well as the Attorney Generals from six states (Arizona, California, Florida, Massachusetts, Pennsylvania, Virginia) and the District of Columbia. The Defendants are American Airlines Group Inc. (“American”) and JetBlue Airways Corporation (“JetBlue”). The Plaintiffs allege that the Defendants violated the Sherman Antitrust Act by forming an alliance that created an unreasonable restraint on trade in violation of Section One of the Sherman Act.<sup>15</sup> No allegations of Clayton Act violations were raised.

American is the largest airline in the world, offering a wide array of O&Ds and more capacity than any other airline in the United States.<sup>16</sup> American has aggressively bought up smaller airlines in the past, viewing consolidation as necessary to create a healthy industry.<sup>17</sup> American acquired Trans World Airlines in 2001<sup>18</sup> and US Airways in 2013.<sup>19</sup> These acquisitions have positioned American as one of the dominant carriers in both domestic and international markets.<sup>20</sup>

American is no stranger to forming alliances with other international and domestic carriers to grow in certain markets.<sup>21</sup> Most notably, the **oneworld** alliance is comprised of

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<sup>15</sup> *United States v. Am. Airlines Grp. Inc.*, No. CV 21-11558-LTS, 2023 WL 3560430, at \*2 (D. Mass. May 19, 2023)

<sup>16</sup> *Id.* at \*1.

<sup>17</sup> *Id.* at \*5.

<sup>18</sup> See American Unveils Deal to Buy TWA, Frank Swoboda, January 11, 2001, <https://www.washingtonpost.com/archive/politics/2001/01/11/american-unveils-deal-to-buy-twa/2b18c9e3-2058-485d-9a3c-afef9e56c81f/>.

<sup>19</sup> See American Airlines, US Airways unveil \$11 billion merger, Soyong Kim and Karen Jacobs, February 14, 2013, <https://www.reuters.com/article/idUSLNE91D021/>.

<sup>20</sup> *United States v. Am. Airlines Grp. Inc.*, No. CV 21-11558-LTS, 2023 WL 3560430, at \*7 (D. Mass. May 19, 2023).

<sup>21</sup> *Id.*

thirteen airlines around the world.<sup>22</sup> The intended purpose of the **oneworld** alliance is to provide customers with access to flights and destinations that would not be possible for any one carrier to offer.<sup>23</sup> Thereby, **oneworld** allows American to offer connecting flights on other airlines that they normally would not be able to provide to its customers, expanding its global network and benefiting its customers by creating new efficiencies in the market that did not previously exist.<sup>24</sup>

Additionally, American is a founding member of the West Coast International Alliance (“WCIA”) which was formed with Alaskan to strengthen its presence on the West Coast.<sup>25</sup> It is important to note that the WCIA does not include any coordination amongst the partners that reduces the total number of flight offerings for any route the two carriers currently compete against each other for customers.<sup>26</sup> Both American and Alaskan believe that the WCIA has effectively achieved its intended purpose of strengthening American’s presence on the West Coast, while also benefiting Alaskan through the revenue sharing structure.<sup>27</sup>

The second defendant, JetBlue, is the sixth largest airline in the United States and is often characterized as a hybrid airline.<sup>28</sup> JetBlue has historically prided itself on being a disrupter in the airline market by offering high-quality service while keeping costs low for its customers.<sup>29</sup> Now offering multiple services on multiple types of aircraft, JetBlue is considered to be a hybrid carrier, similar to Alaskan.<sup>30</sup> JetBlue focuses the bulk of its operations on the East Coast in what

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<sup>22</sup> See <https://www.oneworld.com/>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *United States v. Am. Airlines Grp. Inc.*, No. CV 21-11558-LTS, 2023 WL 3560430, at \*8 (D. Mass. May 19, 2023).

<sup>26</sup> *Id.*

<sup>27</sup> American Airlines’ Alaska Air Deal Differs From Its JetBlue Deal. Does That Matter? Ted Reed, October 7, 2022, <https://www.forbes.com/sites/tedreed/2022/10/07/american-airlines-alaska-air-deal-differs-from-its-jetblue-deal-does-that-matter/?sh=6d0231ec11f0>.

<sup>28</sup> *United States v. Am. Airlines Grp. Inc.*, No. CV 21-11558-LTS, 2023 WL 3560430, at \*14, \*28 (D. Mass. May 19, 2023).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

it refers to as “focus cities,” including Boston and New York. In the northeast region, JetBlue has effectively placed pressure on its competitors, including American, to reduce prices.<sup>31</sup> As a result of JetBlue’s presence in the northeast, consumers have directly benefited from its high-quality, but low-cost flights.

### III. How the Northeast Alliance Created an Unreasonable Restraint on Trade

The alliance at issue in this case is the Northeast Alliance (“NEA”), which was modeled after the WCIA, and was formed in 2020 as a response to increased competition in the northeast by Delta and United.<sup>32</sup> The NEA was intended to provide many of the same benefits that the WCIA provides including codesharing, loyalty benefits for both airlines’ frequent flier members, and revenue sharing on certain routes within the agreement.<sup>33</sup>

One key distinction between the WCIA and the NEA involves the optimization of routes between the parties to the alliance.<sup>34</sup> Under the NEA if one carrier was better positioned to offer a specific route the other carrier would cease to offer a competing flight for that route, effectively eliminating competition between JetBlue and American while also providing customers with one less option to choose from.<sup>35</sup> This is in stark contrast to the WCIA, where American and Alaska directly competed on only a few number of routes, and specifically excluded any of those routes from the WCIA.<sup>36</sup> The NEA, however, aligned two carriers that previously were in vigorous competition with each other for a large number of direct routes in the northeast region.<sup>37</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at \*10.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at \*8.

<sup>37</sup> *Id.*

Optimization in this context essentially means the parties would decide which carrier is best suited to offer a specific flight for each route. The end result will lead to fewer options for consumers on flights in the Northeast region that will become more expensive. The NEA essentially eliminated the downward pricing pressure that JetBlue has historically placed on GNC, such as American, directly leading to airlines increasing their prices because they will not be competing with any low-cost provider in the congested Northeast.

A second point of contention is how the revenue will be shared between American and JetBlue within the NEA. The revenue sharing mechanism in the NEA was structured to achieve what the parties called “metal neutrality”, which rendered each party indifferent to what airline a customer chooses for any route within the NEA.<sup>38</sup> American and JetBlue argue that “metal neutrality” is essential for them to be able to compete with Delta and United.<sup>39</sup>

American and JetBlue’s implementation of “metal neutrality” has directly resulted in the airlines offering fewer competing flights while still making profits under the alliance, regardless of whether or not they are the ones providing the flight. What was once vigorous competition for customers between the two airlines in the Northeast would cease to exist under the NEA.

After the NEA was implemented the parties no longer competed as separate airlines in the northeast region.<sup>40</sup> Under the agreement the parties operated as one airline, constantly optimizing their schedules and cooperating with each other, rather than competing.<sup>41</sup> The agreement also has led to missed opportunities for JetBlue to expand, specifically in London and in New York.<sup>42</sup> These missed opportunities have further hurt consumers because JetBlue is no

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<sup>38</sup> *Id.* at \*11.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at \*14.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at \*15.

longer entering a market that is dominated by GNCs. Therefore, JetBlue will not be able to become a low-cost option and place additional pricing pressure on large GNCs for new routes.

The largest issue surrounding the implementation of the NEA is the fact that the optimization and capacity coordination by the parties has directly led to a reduction in the number of flights being offered by both parties in the region.<sup>43</sup> The parties have agreed not to offer competing flights within the NEA effectively eliminating a competing flight that previously existed before the NEA.<sup>44</sup> When there is less supply and growing demand, market participants raise their prices to adjust for the difference, thereby hurting consumers.

#### IV. The Anticompetitive Effects of the NEA

Judge Leo T. Sorokin authored the opinion out of the United States District Court of Massachusetts. The court applied Section 1 of the Sherman Antitrust Act which prohibits contracts, combinations, and conspiracies that restrain trade or commerce.<sup>45</sup> Due to the nature of the alliance and cooperation amongst the parties the court invoked many of the same principles and tools used for a merger analysis.<sup>46</sup> These principles are also called on to resolve antitrust challenges to joint ventures such as the NEA where “effects [of the alliance] resembled those of a merger.”<sup>47</sup> Under Section 1 of the Sherman Antitrust Act the plaintiff has the burden to show (1) the existence of an agreement between or among separate entities that (2) unreasonably restrains trade and (3) impacts interstate commerce.<sup>48</sup> The court focused the bulk of its analysis on whether the NEA amounted to an unreasonable restraint on trade.<sup>49</sup>

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<sup>43</sup> *Id.* at \*17.

<sup>44</sup> *Id.*

<sup>45</sup> 15 U.S.C.A. § 1.

<sup>46</sup> *Id.*

<sup>47</sup> *United States v. Am. Airlines Grp. Inc.*, No. CV 21-11558-LTS, 2023 WL 3560430, at \*14, \*28 (D. Mass. May 19, 2023).

<sup>48</sup> *Id.* at \*29.

<sup>49</sup> *Id.*

In order to determine whether the restraint on trade amounted to unreasonable the court used the rule of reason framework.<sup>50</sup> This framework requires the plaintiff to make the initial showing that the NEA has a substantial anticompetitive effect which can be shown through direct harm to the competitive process or indirect proof that such harm is likely to occur.<sup>51</sup> Here, the Plaintiffs have proven actual and substantial anticompetitive harm that has resulted from the NEA in three different ways.<sup>52</sup>

First, the NEA fostered cooperation amongst two former rivals that competed with each other on many of the same flights within the agreement.<sup>53</sup> The effect of the NEA resulted in the eliminated of all competition between American and JetBlue in their efforts to optimize their schedules and operate as one airline.<sup>54</sup> The “metal neutrality” essentially rendered the airlines agnostic as to which airline customers chose in the end because they would receive profits regardless. The effect of the “metal neutrality” essentially eliminated any incentive for either airline to compete with each other by offering cheaper prices than their competitors.<sup>55</sup>

Second, the NEA has resulted in JetBlue losing opportunities to expand its low-cost services into other markets.<sup>56</sup> JetBlue has a unique role in the market as an independent low-cost provider.<sup>57</sup> Based on the expert witness testimony, the court noted that the spirit of partnership between American and JetBlue is likely to have anticompetitive effects on other routes outside of

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<sup>50</sup> *Id.* at \*30.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at \*32.

<sup>53</sup> *Id.* at \*33.

<sup>54</sup> *Id.*

<sup>55</sup> American-JetBlue Alliance Is Blocked as Anticompetitive, May 19, 2023, [https://www.bloomberglaw.com/bloomberglawnews/antitrust/BNA%2000000188359ad4d5a3fcff9f08970000?bna\\_news\\_filter=antitrust](https://www.bloomberglaw.com/bloomberglawnews/antitrust/BNA%2000000188359ad4d5a3fcff9f08970000?bna_news_filter=antitrust).

<sup>56</sup> *Id.* at \*34.

<sup>57</sup> *Id.*

the NEA. Competition amongst the newly acquainted partners is likely to subdue in other markets in an effort to maintain the spirit of partnership.<sup>58</sup>

As a result of the NEA American stopped providing flights on routes it had previously competed with JetBlue as part of its optimization under the agreement in the northeast region.<sup>59</sup> The direct reduction in the number of flights offered in the region is the type of behavior directly targeted by the Sherman Act and will result in higher costs for consumers because of the limited supply in the Northeast region.<sup>60</sup>

The second step in the rule of reason framework then shifts the burden to American and JetBlue to show a procompetitive rationale for the restraint on trade.<sup>61</sup> The court rejected the parties argument that the NEA is needed in order to better compete with Delta and United in the northeast stating that, “federal antitrust law does not permit competitors to stop competing with each other to gain a larger market share”.<sup>62</sup> The court also rejected the Defendant’s attempt to classify the NEA as a joint venture that promotes efficiency in the northeast region that they could not otherwise provide on their own, pointing to the fact that both airlines are choosing to compete as one carrier which directly results in the loss of one choice for consumers in the northeast and eliminating options.<sup>63</sup> It is clear that the primary purpose of the NEA is to strengthen American and JetBlue’s profit share in the region and does not provide any beneficial rationale for the restraint on trade.<sup>64</sup> Ultimately, American and JetBlue could not meet its burden of demonstrating a pro-competitive reason for the restraint on trade.<sup>65</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*35.

<sup>60</sup> *Id.* at \*36.

<sup>61</sup> *Id.* at \*30.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at \*41.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at \*31.

## **Conclusion**

In analyzing the case brought against American and JetBlue, the court invoked Section 1 of the Sherman Antitrust Act to scrutinize the NEA. The NEA sought to optimize routes and coordinate flights between American and JetBlue in the northeast region. The court, applying a rule of reason framework, found the NEA to unreasonably restrain trade, noting actual and substantial anticompetitive harm to consumers. Despite American and JetBlue's assertion of a procompetitive rationale to better compete against Delta and United, the court concluded that the primary purpose of the NEA was to strengthen market share without providing a valid justification for the restraint on trade. Given the significant impact on the affordability of flights in the Northeast, the court correctly held that the alliance would result in an unreasonable restraint on trade.

Any future alliances and mergers will likely need to demonstrate that they compete on relatively few routes within a specified region. If there are any routes that the airlines do compete for customers, those routes will likely need to be excluded from the alliance. Airlines attempting to frame alliances as joint ventures which create a new efficiency in the market will need to demonstrate that the service offered through the joint venture will benefit a majority of the consumers in a novel way. This decision underscored the delicate balance between collaboration and competition within the aviation industry, emphasizing the importance of preserving consumer choice and preventing undue concentration. In an industry where mergers and alliances were once commonplace, they have now become far more scrutinized with an eye towards protecting the consumer.