I. Introduction

The American Airlines/U.S. Airways merger experienced some turbulence in August when the United States Department of Justice (DOJ) challenged the merger in federal court. After lengthy negotiations the two sides settled, creating a clear path for the merger. The parties thus avoided trial which was set to begin on Nov. 25, 2013. The following describes the obligations set forth by the settlement agreement.

II. The Parties Involved

American Airlines

American Airlines is a nationally based airline which serves consumers all over the world. It provides transportation services to more than 250 locations around the world, located in 50 countries and territories. Its main hubs in the United States are New York, Los Angeles, Chicago, Dallas and Miami.\(^1\) As of August 2013, American Airlines had a 12.8% market share of the national airline industry. At that time, it was the fourth largest airline in the United States in terms of market share.\(^2\) In November 2011, American filed for bankruptcy reorganization.\(^3\)


**U.S. Airways**

U.S. Airways is a nationally based airline which also has a worldwide presence. It provides service in 194 different countries and has hubs in Phoenix, Charlotte, Philadelphia and Washington D.C. Last year it provided transportation for 50-80 million passengers.\(^4\) U.S. Airways had an 8.4% share of the United States airline industry as of August of 2013, making it the fifth largest airline in the United States, right behind American.\(^5\)

**The New American**

The merger is structured for U.S. Airways shareholders to own 28% of the “New American” and American Airlines shareholders to own 72%. The resulting corporation will be headed by the current U.S. Airways management: most notably U.S. Airways Chairman and CEO Doug Parker will take over as CEO of New American. New American expects the merger to bring a $1 billion increase in profit compared to the total profits the companies would be able to generate on their own over the next year.\(^6\) At the time the settlement was reached, it was still subject to approval by the court handling American’s bankruptcy proceedings. The bankruptcy court approved the merger, and settlement proposal on Nov. 27, 2013.\(^7\)

**III. The Settlement Agreement**

The DOJ and plaintiff states reached a settlement agreement with New American on November 12, 2013. The plaintiff states consisted of the following states’ Attorney Generals offices: Arizona, Florida, Tennessee, Michigan, Pennsylvania, Virginia, and the District of

---


\(^7\) In Re AMR Corporation, 11-15463-shl (S.D.N.Y. 2013).
Columbia. The settlement consists of New American agreeing to divestures in many key airports across the nation. The most substantial divestures will take place at Reagan National Airport (DCA) in Washington D.C. and at LaGuardia Airport (LGA) in New York. Other divestitures will take place at the following airports: (1) Boston Logan International Airport (BOS); (2) Chicago O’Hare International Airport (ORD); (3) Dallas Love Field (DAL); (4) Los Angeles International Airport (LAX); and (5) Miami International Airport (MIA).

The divestments will be sold to low cost carriers. The DOJ describes low cost carriers as airlines which have less extensive networks than the larger airlines and concentrate on offering lower fares and other value boosting strategies. Put in a different context, every airline except New American, Delta and United is a low cost carrier. The most noteworthy low cost carriers are Southwest Airlines, JetBlue Airways, Virgin America, Frontier Airlines, and Spirit Airlines and are the most likely candidates to reap the benefits of the divestitures.

**Divestitures at DCA**

The New American will divest a total of 104 slots at DCA. Currently, 16 of those slots are being leased out to JetBlue. New American must offer to sell those 16 slots to JetBlue and then divest the other 88 slots to at least two different airline carriers. If JetBlue decides not to purchase any of the currently leased slots, the slots will be subject to the same mandates as the other slots at DCA to be sold.

DCA received special attention by the DOJ because the process for acquiring slots there is more burdensome than at other airports. DCA is one of four airports in the U.S. that has federally issued slots, making it harder for new or expanding airlines to acquire them. This

---

makes DCA more susceptible to harms created by a highly concentrated market. Without divestiture, the merger would have given the New American control of 69% of the take-off and landing slots at DCA. The large market share and the difficulty for other airlines to enter the DCA market make it very likely that competition at DCA would have decreased dramatically with no readily available marketplace remedy. 11 New American expects to provide 44 fewer daily departures at DCA because of the divestitures. Combined, American and U.S. Airways currently service 290 daily departures out of DCA.12

**Divestitures at LGA**

LGA is another airport where the slots are controlled by the federal government, more specifically the Federal Aviation Administration. New American is required to divest 34 of its slots at LGA. Before the settlement, New American was subleasing 10 of those slots to Southwest Airlines, and will be required to offer to divest those slots to Southwest before they offer them to another airline. New American is expected to sell the remaining 24 slots in a manner that would facilitate competitive patterns of service for whichever airlines decide to acquire the slots. New American estimates that the divestitures will result in 12 fewer daily departures from LGA, down from the combined 175 departures that American and U.S. Airways currently operate at.13

**Divestitures at BOS, ORD, DAL, LAX, and MIA**

The New American will be required to divest two gates and other related facilities at the other airports listed in the settlement agreement. These divestitures do not have to be complete

---

11 DOJ’s Competitive Impact Statement, p. 5-6, Nov. 12, 2013.
transfers of ownership in the gates such as is the case with the DCA and LGA divested slots.
New American is allowed to either lease the aforementioned gates and facilities to other airlines
or relinquish the gates to the specific airport’s “airport operator” and let airlines lease the gates
directly from the airport operator.\textsuperscript{14}

The airports where divestiture is required were chosen because historically it has been
hard for other airlines to enter or expand into those markets.\textsuperscript{15}

\textbf{Restrictions on the Reacquisition of the Divested Assets and Future Transactions}

New American will not be allowed to reacquire any of the divestitures named in the
settlement agreement for ten years. They may trade, exchange, or swap divestiture assets with
other airlines as long as the relevant transaction does not result in an increased slot or gate
ownership percentage for New American.

The settlement includes a separate notification requirement for transactions made by New
American at DCA. If New American wishes to acquire any slot at DCA they must notify the
DOJ thirty days prior to the acquisition, and such acquisition may not increase New American’s
percentage of slots operated at DCA. There are no other restrictions on new acquisitions
mentioned in the settlement agreement besides those already covered by the reporting
requirements in the Hart-Scott-Rodino Antitrust Improvements Act of 1976.\textsuperscript{16}

\textbf{IV. Private Cause of Action}

The Competitive Impact Statement filed by the DOJ, specifically states that the
settlement agreement does not interfere with rights provided by Section 4 of the Clayton Act.
The Clayton Act provides a viable remedy for any private litigant who incurs an antitrust injury

\textsuperscript{15} DOJ’s Competitive Impact Statement, p. 9-10, Nov. 12, 2013.
\textsuperscript{16} DOJ’s Proposed Final Judgment, p. 22, Nov. 12, 2013.
flowing from a merger. There was a class of consumers which attempted to take advantage of this right. In August of 2013, a group of consumers and travel agents requested that the bankruptcy court file an injunction to stop the merger because of its possible anticompetitive effects. The presiding judge decided to dismiss their request for a temporary restraining order. The judge felt that the class did not present enough evidence to prove the existence of the potential harm alleged to occur if the merger took place.

V. Conclusion

The merger was completed on December 9, 2013. Even though the merger is official, the airlines expect it to take 18 to 24 months to receive a Single Operating Certificate from the Federal Aviation Administration. The merged company will keep the American brand, so it may be possible that the average consumer patronizing them has no idea that they are flying with the newly crowned market share leader in the airplane industry. Due to the sizes of the two companies and complexities that come with integrating two large corporations into one another, New American does not expect the effects of the merger to impact consumers immediately, but instead be realized over time. Still, two groups that will see an immediate benefit from the merger are American Airline shareholders and American Airline creditors, both of which were unsure about their investments in the airliner when the bankruptcy proceedings were initially announced.

19 In Re AMR Corporation, 11-15463-shl, 24 (S.D.N.Y. 2013).
The effect on consumers is not as clear. Only time will tell, whether this merger will benefit consumers because now New American has more resources that can be used to improve their product, or whether it will hurt consumers due to the creation of an even more concentrated airline market.