Consumers Union
POLICY & ACTION FROM CONSUMER REPORTS

May 8, 2015

Docket Operations, M-30
U.S. Department of Transportation
1200 New Jersey Ave. SE
West Building Ground Floor, Room W12-140
Washington, DC 20590-0001

Comments of Consumers Union to The Federal Aviation Administration on "Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport" Docket No. FAA- 2014-1073

Introduction

Consumers Union, the policy and advocacy arm of Consumer Reports,[1] submits the following comments to the Federal Aviation Administration ("FAA") in the above-referenced Notice of Proposed Rulemaking. We support the FAA's efforts to reexamine the best use of airport slot management at congested airports, and to find new methods to increase competition and better serve airline passengers. We also respond to FAA's inquiry as to which approaches best achieve these goals.

Although this rulemaking specifically addresses only three airports – LaGuardia, JFK, and Newark – we believe the analysis may also be relevant for other congested U.S. airports.

[1] Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts this work in the areas of telecommunications reform, health reform, food and product safety, financial reform, and other areas, including air travel. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

Background

This proposed rulemaking addresses the long-standing issue of how to deal with congestion at three busy domestic airports in the New York City/Newark metropolitan area. The flight delays and cancellations caused by this congestion exact a high toll on passengers, communities, corporations, airlines, and the nation itself, in the form of passenger inconvenience, lost revenue, and wasted resources.

We recognize that at high-density airports, there is an unavoidable tension between reducing flight delays and congestion, and increasing flight choices and value, with no ideal solution. We appreciate the FAA's efforts over the years, and renewed in this proposed rulemaking, to provide passengers with an appropriate balance of all these benefits, while also keeping their safety a top priority. When capacity constraints keep the supply of flights limited, regardless of the demand, it is less effective to simply rely on free market competition to keep prices down and keep choices available. We appreciate the FAA's continuing efforts to promote competition where feasible to do so, and its efforts to promote more efficient use of limited capacity.

These congestion-related problems have existed for nearly half a century. In 1968, the FAA adopted the High Density Rule that limited departures and arrivals at LaGuardia Airport (LGA), John F. Kennedy International Airport (JFK), and Newark Liberty International Airport (EWR), as well as at two other major domestic facilities, Washington Reagan National Airport (DCA) and Chicago O'Hare International Airport (ORD). Slot constraints also apply in various forms at several other U.S. airports, including Orlando International Airport, Los Angeles International Airport, San Francisco International Airport, and Long Beach Airport.[2]

After passage of the Wendell H. Ford Aviation and Investment Reform Act of the 21st Century (AIR-21) in 2000, the High Density Rule was phased out at JFK, LaGuardia, and O'Hare. This resulted in increases in flights and opportunities for new entry, but as the FAA states in this proposed rulemaking, "the trade-off for this service was increased airport congestion and delays."

Airport Slots Are Public Resources, Not Corporate Assets

In considering the issues presented in this proposed rulemaking, it is important to bear in mind that America's commercial airports are publicly funded, through user fees paid by airline passengers and freight shippers, as well as by taxpayers generally. Aircraft take-off and landing slots provide valuable access to these facilities, particularly at congested airports in large markets such as New York City/Newark. These scarce resources belong to the public; they are not corporate assets to be bought, sold, leased, and traded at the discretion of the airlines that have been given custody of them.

Although the International Air Transport Association (IATA), the industry's global trade organization, has described slot constraints as "indicative of a failure of governments or airports

[2] See International Air Transport Association, "Analysis: Airport Slots—The Building Blocks of Air Travel," Charles Tyler, August 2010, http://airlines.iata.org/analysis/airport-slots-the-building-blocks-of-air-travel.

to invest in adequate infrastructure to keep pace with airline demand,"[3] that is too limited a view. Government policies and expenditures must address a broad array of complex and often competing priorities in the public interest. Moreover, some airports are geographically boxed in, and physically precluded from expanding, including LaGuardia and Washington Reagan National.

The IATA report asserted: "A slot is nothing more than the right to operate a service at a particular time, and there is little certainty about who is the legal owner. Airports own the runways and the terminals. Governments regard a nation's airspace as a sovereign right. And airlines counter that since they have put the effort and investment into buying aircraft and building up routes, and as slot allocation rules currently give them the right to continue using them, they should be entitled to recoup any increase in the value." We believe there is no such uncertainty about who is the legal owner of slots at commercial airports in the United States: it is the American public.

In 2010, the Consumer Travel Alliance re-affirmed its view that "decisions about what airlines get what slots should be changed from the current grandfathered slot system to slot auctions or government allocation of slots at airports where take-offs and landings must be limited."[4] And the leading airports association, Airports Council International-North America, concurred, in comments filed with the Department in 2011 opposing a proposed "slot swap" between Delta Air Lines and US Airways at LaGuardia and Washington National.[5] As ACI-NA President Greg Principato stated: "ACI-NA has advocated that slots should be treated as community assets that are used to benefit the airport/community of their location, and not the airlines."[6]

Moreover, there is strong evidence that low-cost carriers are not obtaining fair access to slots at congested airports. CAPA-Centre for Aviation, an independent aviation analysis firm, studied the fairness of slot allocations at LaGuardia Airport in 2011, and concluded that its research had demonstrated "just how skewed the operation at LaGuardia continues to be a decade after low-cost airlines began to seek access."[7] CAPA found that at the peak operating hour—7:00 p.m. to 7:59 p.m.—there were 76 slots in use, and the combined total of slots available to the low-cost carriers AirTran, Southwest, and Spirit totaled just 3 slots (4%). The analysis concluded: "The carriers with the lowest fares have the fewest slots for operation."

In light of these considerations, Consumers Union supports the Department's plan to exercise its authority over allocation of slots at congested airports to promote increased competition and better service to consumers.

---

[3] Id.
[4] Consumer Traveler, "Who Owns Airport Slots? The American People or the Airlines?", August 30, 2010, http://consumertraveler.com/today/who-owns-airport-slots-the-american-people-or-the-airlines/.
[5] Airports Council International-North America, Centerlines Blog, August 30, 2011, www.aci-na.org/blog/2011/08/30/airports-urge-dot-to-deny-slot-swap-request-and-uphold-airport-proprietary-rights/.
[6] Airports Council International-North America, "ACI-NA Opposes Delta/US Airways Slot Swap," August 29, 2011, http://www.aci-na.org/content/aci-na-opposes-deltaus-airways-slot-swap.
[7] CAPA-Centre for Aviation, "A Brake on Competition: The Ongoing Conundrum of Airport Slots, September 8, 2011, http://centreforaviation.com/analysis/a-brake-on-competition-the-ongoing-conundrum-of-airport-slots-58335.

"Grandfathering" of Airport Slots Should Be Curtailed

The presumptive "grandfathering" of the overwhelming majority of slots at congested airports to the major network airlines is another ill-advised consequence of these "legacy" carriers' regard for these slots as their possessions. The carriers have amassed and held onto these slots through mergers and acquisitions, including American/USAirways/AmericaWest/ TWA/Allegheny, Delta/Northwest/Republic, and United/Continental.

CAPA addressed this issue as well, in its examination of the proposed "slot swap" between Delta and US Airways. CAPA stated:

> Having served both LGA and DCA for decades, and having been granted continuing slot access, the airlines generally view slots as "theirs" to use as they wish. As airports become more congested and perhaps slot-regulated, the US government has generally led the carriers to believe that this was true. When limitations were imposed at the two airports in question, most of their flight slots were "grandfathered in" and could only be withdrawn if they failed to be used in accordance with the terms of use.[8]

Consumers Union believes the wide-scale "grandfathering" of slots is an obsolete and counter-productive practice. It harkens back to a regulated era when the federal government approved routes and fares, and when most airports were not at all constrained by capacity. Today an oligopoly comprised of the three major network carriers—American, Delta, and United—dominates the domestic airline industry, and passengers are being denied better service and lower fares offered by competing carriers – ironically enough, at some of the nation's busiest airports. We believe critical access to airport slots should be determined and maintained on the merits, not bequeathed indefinitely.

We therefore support the Department's proposal to place more emphasis, in allocating slots at congested domestic airports, on how competition and consumer choice will be best served. Consideration should be given to airlines that provide better service, increase access to new markets, and provide lower fares, keeping in mind that the slot assets in question belong to American taxpayers.

Airline Consolidation Has Further Weakened Competition At Congested Airports

As Consumers Union has noted, consolidation in the U.S. airline industry has dramatically reduced competitive choices for travelers.[9] And these effects are felt most acutely at congested airports.

[8] *Id.*

[9] *E.g.*, Consumers Union, Statement of William J. McGee Before the Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Committee on the Judiciary, United States Senate, March 19, 2013, https://consumersunion.org/wp-content/uploads/2013/03/AA-USAirways-testimony-2-26-13.pdf.

The U.S. Department of Justice (DOJ) has recognized that competitive access to High Density Rule airports is critical for airline passenger choice. In its antitrust consent decree in the American Airlines/ US Airways merger, DOJ insisted that the two carriers agree to "divest slots and gates at key constrained airports across the country to Low Cost Carrier airlines (LCCs) in order to enhance system-wide competition in the airline industry resulting in more choices and more competitive airfares for consumers."[10] The seven airports included three High Density Rule facilities—LaGuardia, Washington National, and O'Hare—as well as airports in Boston, Dallas, Los Angeles, and Miami.

Consistent with furthering these pro-consumer objectives, we support the Department's plan to become more pro-active in managing the allocation of airport slots at the High Density Rule airports.

Regional Airlines Further Clog Already Congested Airports

Usage of slots at congested airports such as LaGuardia, JFK International, and Newark Liberty is further constrained by the practice among major network carriers of assigning slots to outsourced regional airline partners and smaller aircraft. While regional airline partners once were employed only on rural or under-populated routes, today they operate on some of the busiest routes in the country—including, for example, many of the flights between New York City and Washington, D.C. The total passenger miles flown by regional partners has grown *40-fold* since 1980, and the average trip has increased from 129 miles to 474 miles.[11] As of 2011, regional partners accounted for 6 out of every 10 advertised flights.[12]

Aside from safety and other concerns flagged previously by Consumers Union,[13] this outsourcing has also further aggravated the inefficient use of limited slots. Multiple regional carriers now operate on behalf of the Big Three major network domestic airlines into LaGuardia, Kennedy International, and Newark Liberty. American Airlines lists five American Eagle regional partners on its website;[14] its merger partner US Airways lists another eight regional partners.[15] Delta Air Lines lists six regional partners,[16] and United Airlines lists nine.[17] Any of these regional partners might fly any number of flights into one or another of these three airports from time to time. The prevalence of these regional partners is further constraining the availability of slots at these airports for more efficient and competitive use.

---

[10] U.S. Department of Justice, "Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-wide Competition and Settle Merger Challenge," November 12, 2013, http://www.justice.gov/opa/pr/justice-department-requires-us-airways-and-american-airlines-divest-facilities-seven-key.

[11] Regional Airline Association, "Industry Statistics," http://www.raa.org/?page=Industry_Statistics.

[12] Congressional Research Service, "Airline Passenger Rights: The Federal Role in Aviation Consumer Protection," 20 May 2013, http://fas.org/sgp/crs/misc/R43078.pdf.

[13] *See, e.g.*, U.S. Department of Transportation Notice of Proposed Rulemaking, Docket No. DOT-OST-2010-0140, Comments from Consumers Union, "Enhancing Airline Passenger Protections," September 23, 2010, http://www.airlineinfo.com/ostpdf79/480.pdf.

[14] http://www.aa.com/i18n/amrcorp/newsroom/regional-airline-affiliates.jsp.

[15] http://www.usairways.com/en-UK/travel_information/customers_first/carriage1.html.

[16] http://www.delta.com/content/www/en_US/traveling-with-us/where-we-fly/flight-partners.html.

[17] https://www.united.com/CMS/en-US/AboutUnited/Pages/UnitedExpressPartners.aspx.

Consistent with these concerns, we support the Department's plan to exercise its authority more actively to determine the extent to which airlines are permitted to assign use of limited slots at congested airports, to better ensure that these slots are used more efficiently.

A Secondary Market For Slot Transfers That Promotes Competition

Because slots do not belong to the airlines, but rather to the American public, transfers of slots between airlines should be conducted with a view to how the public will benefit. We believe this can still allow for appropriate deference to the transferring airline's judgment as to which slots it does not need. But designs by the transferring airline to obtain benefits in return, from the transferee airline, are more problematic, carrying with them too much potential for transfers motivated by an anticompetitive understanding between the transferring airline and the transferee airline, at the expense of competition and consumer choice.

Considering the alternatives put forward for consideration in the proposed rulemaking, and with that danger in mind, we believe the fifth alternative is clearly superior to the others. Under the fifth alternative, the transferee carrier is determined by who offers the highest price for the slot – that is, for whom the slot is most valuable. No one has prior knowledge of the identity of the transferring or transferee carrier, to use in strategizing how dominance might be increased or how other carriers might be disadvantaged. There are no non-monetary considerations as part of any quid pro quo that could be used as a means for increasing dominance or disadvantaging other carriers.

While we recognize that, theoretically, permitting slot transfers based on non-cash consideration would give carriers extra flexibility, this is not flexibility that they need. And permitting non-cash consideration would create unnecessary and significant anticompetitive risks. Carriers would be tempted to coordinate on scheduling with each other in a way that diminishes competition between themselves and from other carriers. To the extent that some non-cash quid pro quo gives greater value to the transferring carrier, that greater value is all too likely to reflect the ability of the transferring carrier to preserve or improve its market position at the airport in question. Negotiating directly with another carrier, who has the same kind of interest in preserving or improving its own market position, is likely to result in an agreement to preserve or enhance each other's market position, at the expense of new entry and consumer choice and value. If non-cash consideration is off limits, carriers will adjust by simply placing commensurately greater focus on the cash consideration, resulting in an efficient market transaction without the anticompetitive risks.

By comparison, the first alternative invites all the risks of anticompetitive manipulation outlined above. Airlines would be free to privately negotiate to buy, sell, lease, or trade slots privately, on whatever terms and with whatever side agreements. It would fall entirely to the FAA's post-negotiation review of each transfer to assess whether there might be an anticompetitive purpose or result. The second alternative differs from the first only in that the initial offer would be publicly noticed. The negotiations would still take place privately, in secret. The third alternative is actually closer to the first, in that carriers would be able to conduct private pre-negotiations before the initial offer is publicly noticed.

The fourth alternative is in some ways the worst of all. It envisions a play-by-play publication of each offer, bid, and counterbid. While this seems to embody transparency, it actually makes it easier for competing bidders to monitor each other, which makes anticompetitive coordination easier. What's even worse, carriers could supplement the open bidding information with competitively sensitive, proprietary information shared privately between them.

Any of these other alternatives would, in our view, all-too-readily give established carriers the ability to tailor the slot deals to advantage their own dominance and shut out other carriers who would bring more genuine competition. As the FAA recognizes, it is the fifth alternative that would mitigate the possibility of collusion. (Although the FAA appears to regard the fourth and fifth alternatives as similar, we see them as quite different in how they would operate in practice.)

When these alternatives are considered with appropriate recognition that the slots in question do not belong to the carriers seeking to transfer or obtain them, but rather belong to the American public, we believe the superiority of the fifth alternative is all the more compelling.

To help ensure that the fifth alternative works most effectively, we recommend a few clarifications. First, while bidding should be limited to cash bids, that should include bids where the bidder is obtaining the cash through financing. Second, bids for packages of slots should be permitted. An isolated slot may be of limited usefulness, particularly to new entrant carriers, unless it can be obtained in conjunction with other slots. Third, the FAA should consider the feasibility of mechanisms to give some advantage to new entrant and lower-cost carriers in bidding in the secondary market.

The FAA also proposes three exceptions for whatever alternative is adopted, to allow slot transfers without any public notice being posted on the FAA bulletin board. We agree that slot transfers among carriers with unified marketing control are appropriately excepted, as long as they are noticed to the FAA and reviewed to ensure they are not being undertaken to evade usage requirements. Similarly, we agree that transfers in connection with a merger will be reviewed as part of the merger investigation, and do not need to be subjected to this additional procedure.

However, we have concerns about exempting other transfers between carriers. One-for-one slot swaps can still be orchestrated for anticompetitive purposes, even if there is no additional consideration offered in the deal. So can shorter-term transfers. We would urge that the FAA strongly consider not permitting one-for-one swaps; slots that are not needed should be offered for transfer under the fifth alternative. And shorter–term transfers should not be exempted unless the term involved is *so* short as to make the competitive bidding process in the fifth alternative not feasible. And even then, no non-cash consideration should be permitted, and the FAA should monitor carefully to ensure that the transfer is not furthering anticompetitive purposes.

A Usage Requirement That Promotes Best Use of Limited Capacity

As the FAA recognizes, a key part of reducing congestion at capacity-constrained airports is maximizing efficient use of existing capacity. We support the FAA's efforts to promote this goal. Tightening the methodology for calculating usage of a slot, as the FAA proposes, is a good first step. Focusing on usage of each slot separately, rather than on aggregate usage of groups of slots, will better ensure that slots are being used efficiently, and that under-utilized slots can be freed for more efficient use by other carriers. This will help increase choices for consumers, and help increase opportunities for other carriers, including lower-cost carriers, to enter the market and compete there.

We share the FAA's related concern, that carriers might still have the potential to hold onto excess capacity while meeting the more narrowly focused 80-percent usage requirement, by flying smaller planes or by flying planes with many empty seats. This is particularly the case with major carriers, who have many smaller aircraft at their disposal through the regional airline partners they outsource to. We support the FAA's proposal to monitor these aspects of usage to ensure that slots are being used efficiently, or are freed for more efficient use by other carriers. The FAA should consider incorporating these aspects into how usage is assessed.

We agree that carriers who newly enter the market at one of these airports, or who undergo significant expansion there, may need a temporary period during which they are not strictly held to the usage requirement, as they establish themselves there. We agree that a period of up to 180 days seems appropriate.

We also urge the FAA to consider whether the 80-percent usage requirement can be increased. We agree that 100 percent is impossible, that there needs to be some flexibility for unforeseen fluctuations. And we recognize that carriers who are used to the aggregate method of calculating usage may need some time to adjust to the more narrowly focused slot-by-slot method. But we believe it may be feasible, in the reasonably near future, once that adjustment is made, to expect established carriers to meet a higher threshold, 85 percent, or even 90 percent. The higher that threshold can reasonably be set, the more it will encourage the most efficient possible use of the airport's limited capacity.

Revisiting the Long-term Grandfathering of Slots

We also urge the FAA to reconsider its "historic precedence" presumption that slots should be continuously grandfathered to the same carriers, year after year. We recognize that carriers are used to making capital investments based on guaranteed slot availability. But these corporate expectations need to be tempered against the public goals of providing opportunities for competition from other carriers, and improving choice and value for consumers. The FAA should look for a reasonable middle ground—considerably short of a "clean slate" each year, but still a meaningful reform from the current "if you have it now, and as long as you use it, you get to keep it forever" approach.

We would suggest that the goal should be for a significant portion of the slots at each of these airports – perhaps a fourth, or perhaps even a third – to be freed up for new bidding for

each season, with no grandfathering presumption. These freed up slots should be fairly representative to reflect anticipated carrier needs and desires for providing effective service. All carriers would be permitted to bid for the open slots, subject to the set-aside of an appropriate portion of those slots for new entrant carriers to have the first opportunity, as the FAA proposal already envisions.

The minimum portion of slots required to be made available for bidding would include slots voluntarily released by carriers. Indeed, the total slots available might sometimes potentially even exceed the required portion. But there would always be a significant minimum number of slots available, spread appropriately throughout the slot-limited period, for carriers seeking to enter the market or expand operations—while still giving due regard to the investments made by the established carriers.

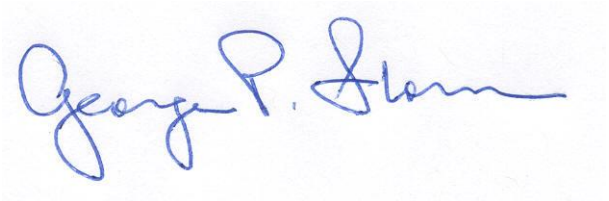
Safety Considerations Should Remain Foremost

Other aspects of the proposed rule—such as specific periods of the day to be covered, strict limits on unscheduled operations during those periods, and the FAA's reservation of authority to re-time or temporarily suspend a slot—all seem designed with safety in mind. We agree that safety – at the airports, in the skies, for passengers, and for surrounding communities —must always remain the top priority, and must never be compromised. We fully support the FAA's continued commitment to administer slots at these airports with safety as the top priority.

Conclusion

Consumers Union has been pleased to support the many initiatives the FAA and the Department have pursued in recent years to protect the rights of airline passengers. In the case of managing slots at High Density Airports, we support the FAA's efforts here to "encourage the efficient transfer and use of slots in a transparent environment that permits meaningful opportunities for all carriers to participate."[18] We believe those efforts will be most likely to succeed if the FAA follows the recommendations set forth above.

Respectfully submitted,



William J. McGee
Consultant, Aviation and Travel

George P. Slover
Senior Policy Counsel

[18] 80 Fed. Reg. 1290 (Jan. 8, 2015).