exhaustless

September 27, 2021

Exhaustless Inc. Objection, Docket FAA-2020-0862

RE: Notice of proposed extension of limited waiver of the minimum slot usage requirement, 86 Fed. Reg. 52114 (September 20, 2021)

Exhaustless objects to the proposed waiver of the minimum slot usage requirements because it is unlawful.[1]

1. No Authority to Grant Property Rights for Public Assets

The airspace is a public asset, *see* 49 U.S.C. § 40103(a). The Constitution gives Congress the authority to regulate the use of the national airspace[2] and to regulate interstate and foreign commerce.[3] Congress grants permission to carriers to use the public airspace in interstate and foreign commerce (as embodied in the economic certificate) according to the terms and conditions it states in the statutes, which include the antitrust laws. Congress does not grant carriers an exclusive or propriety right to use the airspace, *see* 49 U.S.C. § 41101(c).

The DOT/FAA is charged with enforcing these terms and conditions; if a carrier does not comply, their certificate is to be revoked.

Congress extended significant subsidies to all carriers with grants and loans to help them weather the COVID-19 pandemic.[4] The FAA decided that the members of the carrier cartel should get more — they should also get an off-balance sheet subsidy of their pre-pandemic market allocation.

The FAA has no authority to grant an exclusive right, such as a slot usage waiver, to an airspace reservation. The FAA has no authority to grant antitrust immunity, or protect carriers from competition.

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1 *See* our objections to the previous proposed extensions of the waiver, Docket ID FAA-2020-0862-0255 (Dec. 28, 2020), Docket ID FAA-2020-0862-0018 (Sep. 16, 2020) and Docket ID FAA-2013-0259-2815 (March 28, 2020). *See also,* 49 U.S.C. § 41714(h) ("The term "slot" means a reservation for an instrument flight rule takeoff or landing by an air carrier of an aircraft in air transportation.").

2 *See* U.S. Const. art. IV § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]").

3 *See* U.S. Const. art. I § 8, cl. 3 (The Congress shall have Power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

4 *See* CARES Act, Consolidated Appropriations Act, 2021, and the American Rescue Plan Act of 2021.

2. No Authority to Exclude Competition

The whole of DOT, including the FAA,[5] is to place "maximum reliance on competitive market forces and on actual and potential competition to provide the needed air transportation system," 49 U.S.C. § 40101(a)(6)(A). The FAA has no authority to exclude the Exhaustless Aviation 2.0 competition for airspace reservations by adopting an anticompetitive agreement to allocate scheduled capacity – nor to modify the economic rights of an anticompetitive agreement between private parties.

The process followed by the FAA to subsidize certain air carriers and foreign air carriers by granting airspace reservations for free over Exhaustless' lawful competitive market allocation represents a regulatory action that "denies all economically beneficial or productive use of" Exhaustless' intellectual property of its market-clearing service.[6]

Exhaustless hereby notifies the FAA that the administrative modification of the terms of the carrier agreement to extend unlawful exclusive rights to airspace reservation is part of a regulatory taking of Exhaustless' proprietary right to allocate the airspace reservation market and requires compensation under the Takings Clause of the Fifth Amendment of the United States Constitution.

3. No Authority to Favor Carrier Providing Foreign Air Transportation

The waiver seeks to protect the market allocated at seven high demand airports to members of the carrier cartel that provide foreign air transportation, contrary to the air transport agreement with the E.U. that requires both governments to "apply their respective competition regimes to protect and enhance overall competition and not individual competitors."[7]

4. No Authority to Enforce IATA WSG

The FAA claims 49 U.S.C. § 40103(b)(1) as its statutory authority to enforce minimum levels of service for airspace reservations. But the Federal Aviation Act of 1958 conferred the authority

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[5] See *Spirit Airlines, Inc. v DOT*, No. 19-1248 (D.C. Cir. 2021). ("But see *Am. Airlines v. Civil Aeronautics Bd.*, 192 F.2d 417, 420 (D.C. Cir. 1951) Whatever belittling significance may be attached to the fact that [provisions detailing factors for the agency to consider] were under a title 'Declaration of Policy', they are in the statute, are peremptory, and are as much an enactment by the Congress as is any other section of the statute." (internal quotation marks omitted)).

[6] *Lucas v. South Carolina Coastal Council*, 112 U.S. 2886, 120 L. Ed. 2d 798 (1992).

[7] U.S. – E.U. Air Transport Agreement, Art. 20 §1 (Apr. 30, 2007). *See also*, 86 Fed. Reg. 24428 (May 6, 2021) ("The DOT/FAA seeks to facilitate all segments of the industry's recovery from the pandemic and ensure that the transportation needs of the American people are efficiently met, especially during the economic recovery. Therefore, carriers should not assume further relief will be made available beyond the relief already provided to date through October 30, 2021.")

stated in 49 U.S.C. § 40103(b)(1) to the Federal Aviation Agency. All of the authorities of the Federal Aviation Agency were transferred to the Secretary of Transportation in 1966:

> *Provided, however*, That there are hereby transferred to the Federal Aviation Administrator, and it shall be his duty to exercise the functions, powers, and duties of the Secretary pertaining to aviation safety[.] . . . In exercising these enumerated functions, powers, and duties, the Administrator shall be guided by the declaration of policy[.][8]

The minimum slot usage rules of the IATA WSG are not related to safety; rather, they are related to the carrier maintaining "historic precedence" for its future schedule pursuant to this anticompetitive carrier agreement.[9] The maintenance of minimum slot usage rules — or production quotas — to manage utilization of the airspace or service of the route is also not related to safety.

All administrative schedule authority, including the terms of service, was terminated by the Airline Deregulation Act.[10]

The FAA has no authority to enforce the entitlements of the IATA WSG in any way, including to alter the use-or-lose provision to protect historic rights claimed by certain carriers.

5. No Next Season to Grandfather

As soon as the FAA extricates itself from the IATA conspiracy to restrain trade, Exhaustless will announce a new auction date for airspace reservations at LaGuardia, JFK, Newark Liberty, San Francisco, Los Angeles, O'Hare, and Reagan National airports to carriers for the Winter 2022 season, and subsequently for each season thereafter. All slots will be open for competition. All carriers with economic authority under 49 U.S.C. §§41102, 41103, and 41301 are eligible to participate. Carriers must either license the Aviation 2.0 Operating Standard or abandon slot-

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8 Department of Transportation Act, Pub. L. 89-670, § 6(c)(1), 80 Stat. 931, 938 (1966) (underlined emphasis added, italics emphasis in original), codified at 49 U.S.C. § 106(g).

9 IATA Worldwide Slot Guidelines (WSG), 9th Edition (Effective Jan. 1, 2019) (at Docket FAA-2020-0862, Dec. 17, 2020), §1.7.2(f) at 15 ("An airline is entitled to retain a series of slots for the next equivalent season if they were operated at least 80% of the time during the period for which they were allocated. This is referred to as historic precedence.").

10 *See* Airline Deregulation Act of 1978, Pub. L. 95-504, §40(a), adding §1601(a)(1)(C), 92 Stat. 1705, 1744 ("The following provisions of this Act (to the extent such provisions relate to interstate and overseas air transportation of persons) and the authority of the Board with respect to such provisions (to the same extent) shall cease to be in effect on December 31, 1981: Section 401(e)(1) of this Act (insofar as such section permits the Board to specify terminal and intermediate points).")

controlled origin/destinations. To participate in the auction, carriers must license the Aviation 2.0 agreement.

There can be no production quotas, or usage requirements, under Aviation 2.0 because payment by the carrier pursuant to the competitive terms of the market-clearing service confers an exclusive and proprietary right to use the seasonal airspace reservation (a form of an option). The utilization of each congestion-free airspace reservation will be an investment choice for the airline to make — balancing the potential benefits from using the reservation to provide service against the potential benefits from holding the reservation against the potential benefits to selling the reservation.

6. The Constitutional Violation

Since 1985, under the color of law, the FAA has conferred *de facto* exclusive rights to U.S. airspace to a cartel of the member carriers of the IATA and its conspiracy to restrict the trade in airspace reservations and to fix the price to $0.00 under an agreement called the Worldwide Slot Guidelines.

a. Airline Scheduling Committee Agreement (WSG) is Anticompetitive

In June 1983, the CAB approved an airline scheduling committee agreement, explaining, "We find the agreement is *substantially anticompetitive* but that it must be approved because it satisfies serious transportation needs and secures public benefits, and *no reasonably available less anticompetitive alternative currently exists*."[11]

b. HDR Adopts the WSG

In 1985, the FAA adopted administrative allocation procedures for airspace reservations at high density traffic airports, designated as an air traffic rule.[12] The Subpart S rule put the burden on regulators to facilitate the allocation of slots according to the rules of the Worldwide Slot Guidelines,[13] which grandfather the majority of slots. In other words,

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[11] Civil Aeronautics Board Reports Volume 102, Economics Cases of the Civil Aeronautics Board June to July 1983, Order 83-6-43; National Commuter-Carrier Agreement, Agreement CAB 29016 (June 15, 1983) at 601 (emphasis added). *See also*, Airline Deregulation Act of 1978, Pub. L. 95-504, § 26(a) Mergers and Control (replacing § 408(b)(1)(B) of the Federal Aviation Act), 92 Stat. 1705, 1727 (1978) ("If the Board finds that a carrier agreement will not be consistent with the public interest . . . the Board shall not approve such transaction if it may . . . be in restraint of trade . . . unless it finds that such significant transportation conveniences and needs may not be satisfied by a reasonably available alternative having, materially less anticompetitive effects." (cleaned up)).

[12] 50 Fed. Reg. 52180, High Density Traffic Airports; Slot Allocation and Transfer Methods (Dec. 20, 1985), codified as 14 C.F.R. Part 93, Subpart S. (Note that this rule and the 14 C.F.R. Part 93, Subpart K rule, together, are referred to as the 'High Density Rules' (HDR)).

[13] The WSG originated in 1974 per the preface to the 10th edition.

regulator judgment became the deadlock breaking mechanism. This rule replaced the scheduling committees.[14]

> When the [airlines] fail to agree on an allocation * * * the responsibility for accomplishing allocation falls to the Government. The slot allocation alternatives available to the Government without additional regulatory authority are limited, however, and administrative processes for allocation have proven to have significant drawbacks.[15]

c. Regulations Limiting Operations adopt the WSG

In 2000, Congress prohibited the use of the HDR after 2006 at O'Hare, JFK, and LaGuardia. Congress codified its intention in prohibiting these regulations:

> The Congress makes the following findings: (1) Major airports must be available on a reasonable basis to all air carriers wishing to serve those airports. (2) 15 large hub airports today are each dominated by one air carrier, with each such carrier controlling more than 50 percent of the traffic at the hub. (3) The General Accounting Office has found that such levels of concentration lead to higher air fares. (4) The United States Government must take every step necessary to reduce those levels of concentration.[16]

The FAA continues to use the HDR but under different names. It calls the regulation 1) the HDR if referring to Reagan National, 2) the Order Limiting Operations if referring to JFK or LaGuardia, and 3) a "schedule review process" if referring to Newark Liberty, Los Angeles, San Francisco, or Chicago O'Hare airports.[17]

d. Court Agrees the Regulations are Unlawful

The U.S. Court for the D.C. Circuit ruled that carriers could compete for airspace reservations using Aviation 2.0, that the FAA rules are unlawful, and that while Exhaustless did not have standing to give the court authority to overturn the rules, the FAA could overturn the rules voluntarily. That does not mean that continuing to violate the law will be without consequence.

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[14] *See* 50 Fed. Reg. 52180, 52182 (Dec. 20, 1985) ("As a result of this amendment, the role of the scheduling committees in the allocation of slots is eliminated.*")*.

[15] *Id.*, 52181.

[16] AIR-21, Pub. L. No. 106-181, §155, 114 Stat. 61, 88 (2000), codified at 49 U.S.C. § 40117(note) Competition Plans.

[17] 86 Fed. Reg. 24428 (May 6, 2021) ("The FAA generally applies the WSG to the extent there is no conflict with U.S. law or regulation.").

> The interim rule resembled the High Density Rule and generally grandfathered the slots held by airlines under the previous regime.[18]
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> [T]he orders largely match the prior extensions in substance[.][19]
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> Petitioner Exhaustless, Inc., as noted, has developed a patent-pending product called Aviation 2.0 Operating Standard for allocating airline slots at airports. Using Aviation 2.0, carriers would compete in semi-annual auctions to purchase slots for a six-month period, with the total number of slots determined by Exhaustless using its proprietary technology. Passengers would then pay demand-calibrated congestion premiums (on top of their airfare) when purchasing tickets. Both the congestion premiums and the auction proceeds would go to Exhaustless.[20]
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> But when a petitioner's injury arises from an agency's unlawful regulation (or lack of regulation) of someone else, causation often is substantially more difficult to establish because the petitioner must demonstrate that the injury does not result from the independent action of some third party not before the court.[21]
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> [T]he interim rules are revocable at will[.][22]

e. The First Amendment

In a deregulated market, the Supreme Court has held that the free flow of price information is protected commercial speech under the First Amendment.

> [I]n the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. . . As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public

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18 *Exhaustless Inc. v FAA*, 931 F. 3d. 1209, 1211 (D.C. Cir. 2019).
19 *Id.*, at 1212.
20 *Id.*
21 *Id.* (internal quotation marks and emphasis omitted).
22 *Id.,* at 1213.

> interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[23]

7. The Only Decision

The only decision before the FAA is whether to voluntarily continue to violate the law or to extricate itself from this regulatory taking and illegal subsidy to a conspiracy.

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[23] *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (1976) (internal quotations and reference omitted).