

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Complaint of)	
)	
JetBlue Airways Corporation)	
)	
against)	
)	Docket DOT-OST-2023-_____
The Kingdom of the Netherlands)	
)	
under the International Air Transportation Fair)	
Competitive Practices Act of 1978, as amended)	
_____)	

COMPLAINT OF JETBLUE AIRWAYS CORPORATION

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I. Introduction

JetBlue Airways Corporation (JetBlue) files this complaint against the Government of the Netherlands under the International Air Transportation Fair Competitive Practices Act, as amended, 49 U.S.C. § 41310 (IATFCPA).

The Government of the Netherlands is in violation of its obligations under the U.S.-EU “Open Skies” Air Transport Agreement (the Agreement), by failing to ensure JetBlue is provided all operating authorizations, including slots, required to conduct international air transportation at Amsterdam Airport Schiphol (AMS), the primary international airport in the Netherlands and third largest in the world,¹ and the only one that provides JetBlue with the means to access Amsterdam. This conduct also violates the IATFCPA, which prohibits a foreign government or entity from engaging in an activity that “is an unjustifiable or unreasonable discriminatory,

¹ As measured by international passenger enplanements and deplanements. Source: Airports Council International, “The top 10 busiest airports in the world revealed” (April 11, 2022), available at (<https://aci.aero/2022/04/11/the-top-10-busiest-airports-in-the-world-revealed/>).

predatory, or anticompetitive practice against an air carrier” or “imposes an unjustifiable or unreasonable restriction on access of an air carrier to a foreign market.”²

This failure violates Article 4 of the Agreement, which obligates the Netherlands and any other Member State of the European Community, upon the receipt of U.S. carrier applications, to grant approval for the exercise of traffic rights provided for under Article 3 of the Agreement “with minimum procedural delay,” including the right to perform international air transportation between any point in the United States and any point in the Member State concerned. The failure of the Netherlands to make available the authorizations at issue also denies JetBlue a fair and equal opportunity to compete under Article 2 of the Agreement.

As will be discussed below, the refusal of the Government of the Netherlands to make slots available to JetBlue is due to the Government’s noise reduction plan involving a drastic reduction in the number of annual flight movements at AMS. In support of that plan, the slot coordinator for AMS has: (a) retired slots that would otherwise be made available for re-allocation to new entrants at the airport; (b) construed the EU Slot Regulation in a manner that forecloses the possibility of a new entrant gaining access to the airport through alternative means; and (c) reportedly begun to withhold the assignment of certain slots, which ordinarily would be afforded historic precedence under the IATA Worldwide Airport Slot Guidelines (WASG) to incumbents at the airport. Meanwhile, the Government of the Netherlands claims it has no say in the slot coordinator’s decisions – even though those decisions are being taken for the express purpose of implementing the Government of the Netherlands’ planned noise-related operational reductions. To the best of JetBlue’s knowledge, the Government of the Netherlands has made no serious attempt to explain *how* the lack of any accommodations for new entrants

² 49 U.S.C. § 41310(c)(1)(A), (B).

under its planned environmental measure is consistent with the WASG and the EU Slot Regulation, which entail setting aside a specific percentage of the slot pool for new entrant air service.

This situation has a discriminatory impact on new entrants such as JetBlue because it renders first-time service to AMS impossible. The Dutch Government's conduct violates the Agreement and constitutes an "unjustifiable or unreasonable discriminatory [] or anticompetitive practice" and "imposes an unjustifiable or unreasonable restriction"³ on JetBlue's access to U.S.-AMS markets.

II. Discussion

As required under Article 4 of the Agreement, JetBlue holds a certificate of public convenience and necessity to engage in foreign air transportation between the United States and Open Skies points, including any points in the Netherlands (Order 2007-7-3). JetBlue meets all other criteria set forth in paragraphs (a), (c) and (d) of Article 4. Yet, despite JetBlue being fully qualified to perform international air transportation under the Agreement and (as discussed below) its diligent attempts to gain entry to the U.S.-Amsterdam air services market, the Government of the Netherlands has failed to ensure all required operating authorizations, including AMS slots, are made available to JetBlue. This imposes an unjustifiable and unreasonable restriction on a qualified U.S. carrier's access to an important foreign market, warranting intervention by the Department.

JetBlue recognizes that Airport Coordination Netherlands (ACNL), the slot coordinator for AMS, is an independent governing body under Dutch law charged with slot allocation and slot monitoring at AMS. The independent status of ACNL does not, however, alleviate the

³ *Id.*

Government of the Netherlands from complying with its obligations under the Agreement, including making available to qualified U.S. carriers the authorizations necessary to exercise their traffic rights as provided for under the Agreement.

JetBlue is ready, willing and able to serve AMS, from New York’s John F. Kennedy International Airport (JFK) and Boston’s Logan International Airport (BOS). AMS is a Level 3 “fully coordinated” airport under the WASG, subject to slot controls. On September 12, 2022, JetBlue requested ACNL to re-allocate to JetBlue two (2) slots previously held by Aeroflot, commencing with the Summer 2023 Schedule Season. These slots, if allocated to JetBlue, would support one daily, roundtrip flight between AMS and JFK/BOS using environmentally friendly Airbus A321LR aircraft, which are quieter and lower-emitting than the vast majority of aircraft serving AMS today. This request was denied by ACNL on September 19, 2022.⁴

JetBlue also made attempts to access slots from codeshare and interline partner airlines with slot holdings at AMS. After one such willing partner was identified, ACNL rejected JetBlue’s slot usage proposal on October 4, 2022. In so doing, ACNL advised JetBlue that such usage would only be permitted if JetBlue were engaged in “joint operations” with the other carrier party, involving a revenue sharing joint venture or a blocked spaced arrangement.⁵ ACNL’s position is inconsistent with the WASG (discussed below) and blatantly discriminates against low-cost carrier business model choices and other airlines that elect not to be part of an international immunized alliance.

⁴ JetBlue understands that the former Aeroflot slots were retired by the Dutch Government instead of being made available for use by a new entrant such as JetBlue. Indeed JetBlue is a new entrant at AMS under the WASG, as it would hold fewer than seven daily slots at the airport if its request were granted. WASG Edition 2 (July 2022), at Section 11.

⁵ This position entrenches the dominant position that the largest incumbents already enjoy at the airport, in particular SkyTeam members, and shields such incumbents from meaningful competition, particularly by new entrants. Such unjustified entrenchment severely undermines the pro-consumer benefits of competition, including lower fares and increased choices for travelers.

ACNL's position appears to be based on its unreasonable interpretation of the EU Slot Regulation,⁶ specifically Article 10(8) therein, which provides that "slot(s) allocated to one air carrier may be used by (an)other air carrier(s) participating in a joint operation, provided that the designator code of the air carrier to whom the slots are allocated remains on the shared flight for coordination and monitoring purposes." In guidance set forth in its Policy on Joint Operations, ACNL has declared, without any meaningful analysis, that codeshare operations do not qualify as a joint operation unless "supplemented with an agreement on a joint operation in which each of the air carriers substantially shares in operating flights, the costs, revenues and/or risks of the joint operations," in which case the arrangement "might" qualify as a joint operation.⁷ ACNL's arbitrary interpretation has a discriminatory impact and serves to facilitate slot sharing by joint venture partners at the expense of new entrant (as well as incumbent) carriers that are not members of such arrangements at AMS, with anti-competitive effects.⁸

JetBlue additionally sought to avail itself of the competition remedies imposed under various European Commission slot remedies, which establish a process for new entrants such as JetBlue to obtain slots at AMS from Air France-KLM, subject to the approval of the European Commission. On November 2, 2022, Air France-KLM denied JetBlue's request for such slots. In a virtual meeting in Fall 2022, representatives of the European Commission's Directorate-General for Competition informed JetBlue that such aviation competition matters were "not a priority" for the current Commission.

⁶ Council Regulation (EEC) No 95/93.

⁷ ACNL, Policy Rule on Joint Operations, Version 1.0 (Sep. 15, 2021), at Annex.

⁸ Even if ACNL's "joint operations" policy were a valid means of allowing joint venture partners to share slots, ACNL cannot justify prohibiting new entrants from accessing AMS slots on the basis that ACNL a) will not allocate any slots to a new entrant, and b) will not allow a new entrant to obtain slots from any other carrier.

ACNL also denied JetBlue's attempts to obtain slots following the normal WASG processes. On October 6, 2022, JetBlue, which qualifies as a new entrant under the WASG, submitted a timely request to ACNL for an allocation of slots for the Summer 2023 traffic season. This request was, again, summarily denied on November 2, 2022. More recently, ACNL denied JetBlue's request that slots, available because of FlyBe's cessation of operations, be re-allocated to JetBlue, even on a temporary ad-hoc basis.

JetBlue has sought repeatedly to discuss this situation with representatives of the Government of the Netherlands, in an attempt to find a workable solution. Until only very recently, the Dutch Ministry of Infrastructure and Water Management (MIWM), which is responsible for aviation policy in the Netherlands, had elected to not meet with JetBlue, despite numerous requests made by JetBlue through the Embassy of the Kingdom of the Netherlands in Washington, D.C. Indeed, even after JetBlue had sought the Department's involvement in October 2022 and the Department had communicated with the MIWM regarding the issue, the MIWM continued to fail to meet with JetBlue. Inexplicably, the MIWM thereafter instructed JetBlue (through the Dutch Embassy on December 5, 2022) to consult with the DOT (which has no role in administering slots at AMS) on whether any slots could be made available for JetBlue's new service.

Although the MIWM eventually met with JetBlue on January 18, 2023, JetBlue is no closer to securing slots at AMS today than it was before that meeting. To the contrary, the MIWM told JetBlue that it has "no say" in the distribution of slots at AMS, and that any allocation decision resides solely with ACNL, which, the MWIM has emphasized, is "independent" from the Government of the Netherlands.⁹ In other words, and notwithstanding

⁹ When finally agreeing to meet with JetBlue, the MIWM advised that its previous reluctance to meet was due to its impression that JetBlue wanted to discuss slots. The MIWM eventually offered to "facilitate" a meeting between

the Dutch Government’s commitment, under Article 4 of the Agreement, to grant all necessary approvals to U.S. carriers for the exercise of traffic rights as provided for under Article 3 of the Agreement (which by extension includes the taking of steps to facilitate such approvals “with minimum procedural delay”), the Government of the Netherlands claims that it is in no position to do so. Instead, it has essentially outsourced a major part of that responsibility to its slot coordinator for AMS – an airport that accounts for *all* enplanements in the U.S.-Netherlands nonstop scheduled air services market. Conversely, it is inconceivable that the DOT, if asked to help facilitate access for a new entrant foreign air carrier to start first-time U.S. service under a binding international air service agreement, would refuse to do so by hiding behind the “independence” of the FAA in its role as administrator of slots at U.S. airports.¹⁰

JetBlue, a new entrant at AMS, has exhausted all reasonably available options to obtain access to the airport, and files this IATFCPA Complaint as a last resort. JetBlue’s long history of working diligently to gain access to new markets over the past 23 years, including recently the London, U.K.¹¹ market, underscores its ability and resolve to pursue all options short of asking the Department to exercise its authority under the IATFCPA, provided a meaningful path forward exists and real progress can be made. Unfortunately, no such path forward exists in this

JetBlue and ACNL “as an observer”, which occurred on February 7, 2023. At that meeting, ACNL confirmed that JetBlue’s proposal to engage in “joint operations” at AMS with a partner carrier was denied.

¹⁰ There is no dispute that under the WASG an objective of Level 3 airport slot coordination is to ensure slots are allocated “in an open, fair, transparent and non-discriminatory manner,” and that the slot coordinator act independently when making such allocations. WASG at section 1.2.1. But there is nothing in the WASG that stands for the proposition that the independent actions of a slot coordinator override commitments made at the national level under inter-governmental air service agreements. To the contrary, the slot coordination objectives laid out in the WASG are remarkably harmonious with the purpose of such agreements, in particular “Open Skies” agreements. In fact, by continuing to deny JetBlue’s slot requests, ACNL has fallen short of several slot coordination objectives in the WASG, including to “facilitate consumer choice of air services ... and enhance competition,” and “to balance access opportunities for existing and new airlines.” *Id.*

¹¹ JetBlue now operates five daily transatlantic flights to London.

case. Further efforts on the part of JetBlue to access the Amsterdam air services market, without Department intervention under the IATF CPA, would be futile.¹²

The importance of new entrant access at AMS cannot be overstated given the extent of immunized airline alliance activity in the transatlantic market. AMS is, as noted above, a major hub for one of the three principal immunized transatlantic alliances. As a prerequisite for considering applications for extraordinary grants of antitrust immunity (ATI), the Department has long required the existence of an “Open Skies” agreement, such as the U.S.-EU Air Transport Agreement. This policy serves to ensure that conditions are in place for all future new entry (not only joint ventures) to be timely, likely, and sufficient to deter or discipline potential competitive harm that might otherwise result from the immunized alliance. “Given the mere possibility of competitive harm ... it is critical that the [immunized alliance] operate within a liberalized regulatory framework that enhances competition and promotes new entry.”¹³ The Netherlands’ failure to ensure JetBlue has access to AMS – the third largest airport in the world – impedes the objectives of deterring and disciplining potential competitive harm, and undermines the Department’s longstanding and well-reasoned linkage between open entry and ATI.

Allowing the status quo to continue has a discriminatory impact on JetBlue and any other U.S. carrier seeking to launch new service to AMS. Against this backdrop, KLM, the Kingdom

¹² Although Maastricht Aachen Airport (MST) can accommodate long haul, intercontinental flights, it is not competitive with AMS for Amsterdam travel or passengers connecting via interline and codeshare partners. MST is located 125 miles from Amsterdam and has very limited scheduled passenger air service (with few connecting options). And, although Rotterdam The Hague Airport (RTM) is within 50 miles of Amsterdam, it too is not a suitable alternative. Neither MST nor RTM can be considered a realistic alternative to AMS. As a consequence, the failure of the Government of the Netherlands to ensure all required operating authorizations are made available to JetBlue as required under Article 4 of the Agreement effectively deprives JetBlue of access to the broader U.S.-Netherlands market.

¹³ Order 2008-4-17, at 13 (emphasis added) (tentatively granting approval of and antitrust immunity for transatlantic alliance agreements between Delta and certain SkyTeam partners, including KLM).

of the Netherlands' *de facto* flag carrier, freely operates nonstop service from AMS to JFK, the only slot-controlled international airport in the United States, and many other U.S. airports.¹⁴ At JFK, KLM does so with slots created and overseen by the U.S. Government. The Government of the Netherlands has deprived JetBlue of an equal opportunity to compete in the market with its award-winning, low fare service.

The pro-competitive and pro-consumer effects of JetBlue's entry into new air service markets are not abstract or theoretical, but rather time proven and demonstrable. In domestic transcontinental routes (roughly the same distance as between Europe and the Northeast U.S.), the entry of JetBlue has seen average one-way fares drop significantly and travel demand stimulated; for example, following JetBlue's entry on Boston-Los Angeles, fares fell almost 22% and traffic increased almost 40%.¹⁵ JetBlue's recent entry into the transatlantic market has also benefited consumers. Within one year of launching JFK-LHR nonstop service, JetBlue's fares for close-in business travel were between 40% and 50% lower than competitors on the route,¹⁶ while economy fares ranged between 13% and 19% less than competitors' offerings.¹⁷ If JetBlue is provided its requested slots for AMS service, consumers in the U.S.-Netherlands market will benefit from JetBlue's high-quality service and the competitive effects of its substantially lower fares.

ACNL's refusal to make slots available to JetBlue, and the Government of the Netherlands refusal to take steps necessary for such an allocation, both stem from a widely

¹⁴ For 2023, KLM offers nonstop scheduled service to 13 U.S. airports. Source: Cirium Diio Mi schedule data.

¹⁵ Based on Cirium Diio Mi O&D data for Boston-Los Angeles (LAX), Q1 2009 (pre-entry) vs. Q2 2010 (post-entry). Passengers per day each way (PDEW) for the route increased during the same period by 40%, to 1,244.

¹⁶ Source: May 13, 2022 comparison of business class or higher fares on ITA Matrix by Google for nonstop travel starting on May 14, 2022, and involving seven day stay.

¹⁷ Source: March 4, 2022 comparison of lowest priced economy fares on ITA Matrix by Google for nonstop travel between March 6 and March 7, 2022, and involving three or seven day stay.

reported Dutch government plan to impose noise-related operating restrictions at AMS by reducing annual flight movements at the airport from 500,000 to 440,000.¹⁸ This plan, which is being actively pursued and implemented by the MIWM, is required to follow the process laid out in Regulation (EU) No 598/2014 of the European Parliament and of the Council, “on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach” (EU Regulation 598/2014). This regulation provides, among other things, that each Member State’s competent authority assess the competitive effects that its proposed noise-related operating restrictions will have on airport operators; identify alternative, *i.e.*, less restrictive, measures for reducing aircraft noise; and identify the reasons why it has proposed operating restrictions over available alternatives.¹⁹

Without commenting on whether the planned operating restrictions have been undertaken in a manner that complies with EU Regulation 589/2014, one thing is certain: Article 3 of the U.S.-EU Air Transport Agreement obligates the Government of the Netherlands, when considering proposals to limit operations for environmental reasons, to do so consistently with Article 15 of the Agreement, and the Government of the Netherlands has utterly failed to meet this obligation.²⁰

Under Article 15, the adverse effects that the proposed noise-related AMS operating restrictions will have on JetBlue’s (and on any other U.S. carrier’s) exercise of traffic rights under the Agreement must be carefully evaluated by the Netherlands. If the restrictions are to be implemented, Article 15 calls on the Netherlands to mitigate any such identified adverse effects.

¹⁸ The Government of the Netherlands’ position that it has no role in slot allocation matters at AMS is particularly puzzling given its asserted authority to drastically reduce the number of annual operations at the airport.

¹⁹ EU Regulation 598/2014, at Annex I, § 3.

²⁰ JetBlue understands that the Department has recently asked the Dutch Government, through the MIWM, to suspend the proposed reductions in AMS operating levels pending stakeholder consultations.

Implicit in such mitigation is the taking of steps necessary to allow new entrant U.S. carriers to serve the Netherlands. Of critical importance, Article 15.3 provides that the Netherlands “shall apply any environmental measures affecting air services under this Agreement in accordance with Article 2,” which in turn requires each Party to “allow a fair and equal opportunity for airlines of both Parties to compete in providing international air transportation,” including in the U.S.-Amsterdam market.

Moreover, Article 15.1 re-iterates the parties’ shared commitment to proceed in an “economically reasonable manner” when pursuing measures to limit the impact of international aviation on the environment. Finally, Article 15.5(c) provides that any noise-based operating restrictions shall be “non-discriminatory” and “non-arbitrary.” In derogation of these principles negotiated and agreed among the parties to the Agreement, the Dutch Government’s intended reduction in operating levels at AMS has a disproportionate impact and discriminatory effect on new entrants such as JetBlue.²¹

Refusing JetBlue the ability to operate at AMS – thereby completely shutting it out of Amsterdam – is a clear denial of competition, let alone a fair and equal opportunity to compete.²² Although JetBlue is supportive of environmental initiatives,²³ barring new entry and foreclosing

²¹ JetBlue understands that ACNL currently is withholding or otherwise delaying the re-assignment of slots, including slots that may qualify for historic precedence under the WASG, at a level that roughly translates into as many as 15,000 annual movements for the Summer 2023 traffic season. On February 7, 2023, MIWM representatives informed JetBlue that a decision on these slots would be made soon, including a possible allocation by April 2023. To the extent Dutch authorities can effect an allocation consistent with the WASG and the EU Slot Regulation, allocation of only a small fraction from this capacity to JetBlue would be sufficient to allow daily service from AMS to both New York and Boston.

²² JetBlue recognizes that Article 15.4 of the Agreement commits the parties to apply the balanced approach principle when implementing environmental measures to the aviation sector. However, ICAO Doc. 9829, *Guidance on the Balanced Approach to Aircraft Noise Management*, provides that operating restrictions should be imposed as a last resort, only after pursuing noise reduction at its source, noise abatement operational procedures and land-management options. In its proposal to drastically reduce operating levels at AMS, the Dutch Government does not address whether these other options were explored.

²³ JetBlue’s A321LR aircraft features new engine technology that renders it one of the most environmentally efficient aircraft in the transatlantic market, from both a noise reduction and emissions standpoint.

access to an air services market (Amsterdam) in furtherance of such initiatives plainly violates the Agreement.²⁴ The hard bargained-for traffic rights under the Agreement cannot be simply ignored as the Dutch Government has apparently decided to do.

In contrast, European and other foreign air carriers seeking to inaugurate first time service at slot-controlled U.S. airports, in particular JFK, have routinely been accommodated by the FAA, consistent with the U.S. Government's obligations under air service agreements to which it is a party. Indeed, since 2021 several independent foreign airlines, *i.e.*, carriers that are not members of one of the three global airline alliances, have successfully launched service at JFK, including Flair Airlines, Norse Atlantic, Neos, Air Senegal and SATA. Additionally, in the two years before the pandemic, Viva Aerobus, Volaris Costa Rica and Ethiopian all launched first-time JFK service.²⁵ Regardless of whether their access was facilitated by an allocation of slots directly from the FAA or through an FAA-approved slot lease, the fact remains that, consistent with the United States' obligations under its international air service agreements, foreign airlines have been provided with the means to enter JFK under the FAA's existing slot system that follows the WASG. Moreover, KLM currently has the equivalent of 913 annual roundtrip flights scheduled for JFK, and has increased its overall U.S. service to a level that exceeds its pre-pandemic operations.²⁶

JetBlue's inability to gain access to AMS is compounded by the fact that there is no fully functional secondary market for slots at the airport, much less a robust one. Under Article 8a of

²⁴ The problem faced by JetBlue is particularly acute because, unlike many of the largest air service markets in the world where slot controls are in place, Amsterdam has only one airport for long-haul international service.

²⁵ Source: Cirium Diio Mi schedule data. In addition to the above service launches, Condor has scheduled more departures for 2023 at JFK than any other year since it began operations at that airport (2016).

²⁶ KLM has scheduled the annual equivalent of 4,354 roundtrip flights at 13 U.S. gateways for 2023, up from 4,122 roundtrip flights serving 12 U.S. gateways in 2019. Source: Cirium Diio Mi schedule data, February 9, 2023.

the EU Slot Regulation, slots can only be transferred either (i) as part of a one-for-one exchange between air carriers or (ii) between air carriers affiliated through common ownership or control. This means that for a new entrant such as JetBlue, the only way to gain access at AMS is through reliance on the joint operations provision in Article 10(8) of the EU Slot Regulation (which ACNL says does not apply to JetBlue) or an allocation of slots from the slot pool under Article 10(6) of the EU Slot Regulation (which is no option at all given the Dutch Government's plan to drastically reduce, by more than 10%, annual operations at AMS). The slot regime at AMS does not even permit the temporary leasing of slots between un-affiliated carriers.²⁷

In sum, the Dutch Government is pursuing a capacity-reduction plan that provides no pathway for a new entrant such as JetBlue to begin service at AMS. Although both the WASG and EU Slot Regulation provide for 50% of the slot pool to be set aside specifically for new entrants, that accommodation is illusory where, as here, the slot coordinator and foreign government concerned have committed to a policy of retiring slots that would otherwise be returned to the pool while simultaneously drastically reducing the level of operations at the airport. Neither ACNL nor the Dutch Government has identified how such an approach to slot administration is consistent with the WASG, the EU Slot Regulation or the Dutch Government's obligations under the Agreement.²⁸

²⁷ This regime is even more restrictive than the FAA's interim scheduling order in place at JFK, which at least allows un-affiliated carriers to enter into leases, subject to FAA approval. 87 Fed. Reg. 65,161, 65,163 (Oct. 28, 2022).

²⁸ Even in the wake of the recent cessation of operations by FlyBe, a carrier that recently held as much as 2% of the total slots at AMS, ACNL appears unwilling to re-assign that airline's slots on a temporary, ad-hoc basis, pending the outcome of the bankruptcy administration process. On February 7, 2023, ACNL representatives informed JetBlue that this capacity could remain unused for as long as a year, despite a request submitted by JetBlue that the capacity be re-allocated to it.

III. JetBlue's Requested Countermeasures Under the IATFCPA

If the Dutch authorities do not grant JetBlue the slots (such as the ones recently made available through Aeroflot's and FlyBe's discontinuation of service at the airport) necessary for JetBlue to access AMS and enter the U.S.-Netherlands market, the Department should require KLM to provide such slots (at least two slot pairs) to JetBlue. KLM is a party to the so-called "Blue Skies Alliance" with Delta Air Lines, Air France and Virgin Atlantic Airways, for which the Department has granted ATI.²⁹ With the extraordinary privilege of ATI, KLM and its Blue Skies Alliance partners, which have agreed not to compete with each other, operate a deeply integrated and highly lucrative joint venture. They enjoy a huge percentage (more than 60%) of all slots at AMS³⁰ and a dominant share (85%) of U.S.-Amsterdam markets.³¹ In addition, the slot system at AMS, including ACNL's arbitrary interpretations and decisions, serves as a barrier to new entry by JetBlue, thereby unfairly insulating the Blue Skies Alliance from the very type of competitive conditions that the Department has deemed necessary to grant ATI.³²

²⁹ Final Order 2019-11-14, Nov. 21, 2019 (Blue Skies Alliance) (Docket DOT-OST-2013-0068).

³⁰ As discussed herein, the AMS slot system rules allow immunized joint venture partners to freely share AMS slots with each other, yet deny new entrants and non-aligned carriers the same right. When a new entrant cannot obtain *any* AMS slots directly from the slot coordinator and is prohibited from obtaining them from any other carrier, yet an alliance of the largest incumbents (operating with DOT-conferred immunity from U.S. antitrust laws) is allowed to retain a huge share of all slots and freely share slots with each other, it is abundantly clear that relevant markets are not "open" in any meaningful sense. New entrants sometimes complain about an un-level competitive playing field, but in this case, JetBlue is being prohibited from even entering the playing field.

³¹ The Blue Skies Alliance accounts for 85% of the U.S.-Amsterdam nonstop market and 82% of the New York City-Amsterdam market. At slot-controlled JFK, the Alliance accounts for 100% of the AMS nonstop market. And at three of the nation's four Level 2, schedule-facilitated, airports, the Alliance offers the only nonstop AMS service or has a dominant share of the nonstop markets for AMS service: 100% at Los Angeles International Airport (LAX); 69% at San Francisco International Airport (SFO); and 54% at Chicago O'Hare International Airport (ORD). Source: Cirium Diio Mi schedule data; market shares measured on basis of available seat miles for 2023.

³² KLM might argue that it would be unfair for the Department to require KLM to provide slots to JetBlue at this time, some years after the Department granted ATI to the Blue Skies Alliance. Such an argument lacks any merit. As noted above, the Department has imposed slot transfer conditions when granting ATI in cases where the Department concluded that such a condition was necessary to ensure competition with the alliance receiving ATI. Of course, such conditions were based on a DOT analysis of competition in relevant markets as it existed before ATI was granted and an immunized alliance had been implemented. It would make no sense, however, for the Department to take the position that it will not impose a new or modified slot transfer requirement after having granted ATI, regardless of how market and competitive conditions may have deteriorated.

The fundamental predicate for the Department to grant ATI to the Blue Skies Alliance was the U.S.-EU “Open Skies” Agreement. More fundamentally, however, it is not the Agreement’s mere *existence*, but rather its adherence to by both parties and its *effect* on relevant markets that would satisfy that predicate.³³ The existence of an Open Skies agreement represents the promise, but not the assurance, that relevant markets will actually be “open.” And if a market is not truly “open” to new entry, the Department should not allow an alliance to operate with ATI in that market without taking the steps to provide for open entry. JetBlue’s inability to obtain slots at AMS demonstrates that the U.S.-Amsterdam market is closed to new entry – a state of affairs that makes a mockery of the Department’s Open Skies and ATI policies.³⁴ Indeed, the Department has recently recognized that, even where an Open Skies agreement is in place, a slot system at a key airport can constitute a barrier to entry if new entrants are unable to obtain any or a sufficient number of slots, but that such a barrier is not insurmountable if the Department conditions a grant of ATI to an airline alliance on either a foreign government or (if necessary) members of the alliance making a sufficient number of slots available to new entrants.³⁵

³³ Order 99-7-22 (July 30, 1999) (American/British Airways Alliance), at 2 (“the record analysis of the potential impact of the Alliance must assume the existence, *de jure* and *de facto*, of an Open Skies Agreement. [*D]e facto* Open Skies ... must include adequate provision for new and expanded U.S. carrier service through [relevant] airports, ..., and that the ability of U.S. carriers to provide such service notwithstanding [slot] constraints ... would be a critical consideration in our evaluation of the proposed Alliance.”).

³⁴ In October 2022, the Netherlands embassy in Washington, DC, organized and hosted an event celebrating the 30th anniversary of the signing of the U.S.-Netherlands Open Skies agreement, which was the first such bilateral agreement. <https://iacwashington.wildapricot.org/event-4968724>. Ironically, this event occurred at a time when JetBlue was unable to persuade the Dutch authorities to even meet with JetBlue to discuss its plans to use U.S. carrier traffic rights available under the Agreement to begin operating U.S.-AMS routes.

³⁵ See Final Order 2010-7-8 (July 20, 2010) and Order to Show Cause 2010-2-8 (Feb. 13, 2010) (American/British Airways Alliance); Final Order 2017-4-6 (Apr. 10, 2017) and Order to Show Cause 2016-12-13 (Dec. 14, 2016) (Delta/Aeromexico Alliance).

The Department has legal authority to revisit its approval of alliance agreements and grants of ATI, including to add or modify conditions, anytime.³⁶ In addition, the Department has required the Blue Skies Alliance (and other ATI alliances) to submit “annual progress reports” and less frequent “self-assessment” reports focusing, among other things, on the alliance’s competitive impact, specifically including at AMS.³⁷ Such reporting would be meaningless if the Department were unwilling to review (based on those reports and preferably also other, more objective, available information) whether grants of ATI remain in the public interest.³⁸ In sum, the Department has the authority to review whether an alliance should continue to enjoy ATI if the alliance may be anticompetitive or shielded from new entrant competition and, if so, to impose a new condition requiring the transfer of slots to a new entrant that otherwise faces an insurmountable barrier to entering relevant markets to compete with the immunized alliance.³⁹ For this reason, should inter-governmental efforts not be successful in resolving this matter, the

³⁶ Order 2019-11-14 (Nov. 21, 2019) (Blue Skies Alliance), at 13, ordering ¶ 8 (stating the Department “may amend, modify, or revoke this authority at any time, without hearing”).

³⁷ *Id.* at 12, ordering ¶¶ 1b, 3. *See also* Order to Show Cause 2019-8-2 (Aug. 2, 2019), at 12-13 (requiring the Blue Skies Alliance carriers to report to DOT on competitive entry and slot issues at AMS).

³⁸ When the Department granted ATI to the Blue Skies Alliance, it declined to include a slot transfer condition requested by Kalitta Air, which was unable to secure access to AMS for its all-cargo flights. The Department, in rejecting Kalitta’s request, stated that a “more appropriate form[] of recourse” would be for Kalitta to file an IATFCPA complaint. Order 2019-11-14 at 4. Kalitta at that time was differently situated to JetBlue today because Kalitta had received AMS slots but ACNL subsequently revoked such slots due to operational difficulties that prevented Kalitta from maintaining its schedule. The Department concluded that a slot remedy would not resolve Kalitta’s operational problems. By contrast, JetBlue’s application for AMS slots has been denied and ACNL has rejected JetBlue’s efforts to obtain slots from another carrier.

³⁹ JetBlue’s only interest in submitting this complaint is to obtain the modest number of AMS slots necessary to introduce its planned New York/Boston-AMS services. JetBlue would prefer that the Dutch Government honor its obligations under the Agreement and ensure that JetBlue promptly receives the operating authorizations and slots it requires. Affording JetBlue access to AMS should not require a slot transfer from KLM or any other carrier. If, however, the Dutch authorities continue to foreclose JetBlue’s access to AMS and its ability to exercise traffic rights for which the U.S. Government has successfully bargained under the Agreement, the Department should use its authority to enable JetBlue’s access to this important market (home to the third largest airport in the world by passengers) through other means. ATI is an extraordinary, DOT-conferred privilege that has enabled alliances such as Blue Skies, involving large incumbent carriers to secure very large shares of lucrative international markets. Making a limited number of slots available to new entrants is a small price for an immunized alliance to pay to vindicate the public interest in ensuring new entry and competition.

Department should require KLM to make a sufficient number of slots available to JetBlue to facilitate its entry into the U.S.-Amsterdam market with two daily roundtrip flights.

IV. Conclusion

Access to AMS is critical to the maintenance of a positive aviation relationship between the United States and the Netherlands – ironically, the United States’ celebrated first Open Skies partner. If left unaddressed, JetBlue’s inability to gain any access whatsoever to AMS will be damaging to that relationship. The Government of the Netherlands’ continued failure to ensure JetBlue receives access to AMS is clearly “unjustifiable” and “unreasonable” under 49 U.S.C. § 41310(c)(1), and the time has come for the Department to invoke its congressionally conferred authority in order to address and remedy activity that has an obvious discriminatory effect. This urgency to act is heightened given that JetBlue has been denied operating authority. Indeed, the Department has “consistently viewed any denial of U.S. carrier rights to operate services provided for in [U.S.] aviation agreements as a most serious violation of this country’s bilateral rights.”⁴⁰ Under longstanding precedent, “the denial of operating authority is the maximum penalty that a bilateral aviation partner can impose.”⁴¹

The Netherlands’ continuing discriminatory and anti-competitive treatment of JetBlue lacks any legitimate justification, is unreasonable and violates Articles 4 and 2 of the Agreement. The Government of the Netherlands’ failure to take the steps necessary for JetBlue to receive all required operating authorizations for AMS service imposes substantial competitive harm on JetBlue, as it deprives it of any access to the Amsterdam air services market, traffic rights to

⁴⁰ Order 93-11-22, at 6 (emphasis added).

⁴¹ Order 93-5-13, at 4 (emphasis added).

which JetBlue is entitled under Article 3 of the Agreement. The standards for the Department to take action under the IATFCPA are met.

For all the foregoing reasons, JetBlue respectfully requests that the Department:

1. Promptly issue an Order Instituting Proceeding requiring Answers to this Complaint to be filed within 14 calendar days, and
2. Thereafter issue an Order to Show Cause providing that, unless the Government of the Netherlands causes all required operating authorizations for two daily, roundtrip nonstop flights between JFK/BOS and AMS to be issued to JetBlue, all prior grants of antitrust immunity for alliance agreements among any combination of airlines that includes KLM, including without limitation Order 2019-11-14, shall be conditioned on a requirement that KLM divest two AMS slot pairs to JetBlue in support of such service, at commercially viable times.

* * *

Action by the Department under 49 U.S.C. § 41310(c)(1) is warranted to eliminate the unjustifiable, unreasonable and discriminatory conduct detailed herein and to bring the Government of the Netherlands into compliance with Articles 4 and 2 of the Agreement. JetBlue urges such action to be taken expeditiously.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert C. Land". The signature is written in a cursive style with a large, prominent initial "R".


Robert C. Land
Senior Vice President, Government Affairs
and Associate General Counsel

February 14, 2023

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served by electronic mail on this 14th day of February, 2023, on the following:

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