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REVIEW

Fly Big or Stay Home?

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Whether it be for business, vacation, medical treatment, family matters, or something else, Americans are frequently flying. It is thus no surprise that the recent events surrounding the proposed JetBlue acquisition of Spirit Airlines are of great public interest. The two airlines reached a merger agreement on July 28, 2022, and following an investigative period, antitrust regulators from the Department of Justice (DOJ) announced on March 7, 2023 that they would sue to block the merger. The DOJ claims that "by eliminating that competition and further consolidating the United States airlines industry, the proposed transaction will increase fares and reduce choice on routes across the country, raising costs for the flying public and harming cost-conscious fliers most acutely."[1] JetBlue and Spirit airlines have responded to the DOJ with counter arguments asserting that the merger would reduce the power of the "Big Four" (American Airlines, Delta Air Lines, Southwest Airlines, and United Airlines) through the creation of a new, more potent challenger. JetBlue's CEO Robin Hayes, in fact, said that their merger will create a "national low-fare, high-quality competitor to the Big Four carriers which— thanks to their own DOJ-approved mergers— control about 80% of the U.S. market."[2]

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[1] DOJ Office of Public Affairs, "Justice Department Sues to Block JetBlue's Proposed Acquisition of Spirit," *Justice News* (2023): https://www.justice.gov/opa/pr/justice-department-sues-block-jetblue-s-proposed-acquisition-spirit.
[2] David Koenig, "Biden administration sues JetBlue over $3.8 billion purchase of Spirit Airlines, claiming it could wipe out half of all low-ticket fares," *Fortune* (2023): https://fortune.com/2023/03/07/jetblue-spirit-airlines-3-8-billion-biden-doj-antitrust-sues-block-merger/.

Many others, moreover, have expressed avid support for the proposed acquisition, most notably the Association of Flight Attendants-CWA (AFA). Sara Nelson, the president of this union, wrote in a letter to Attorney General Garland and Secretary of Transportation Buttigieg, "On behalf of 50,000 Flight Attendants at 19 airlines, including more than 5,600 Flight Attendants at Spirit Airlines, the Association of Flight Attendants-CWA, AFL-CIO ("AFA") writes in strong support of the proposed merger between JetBlue Airways and Spirit Airlines."[3] She later specifies that this support results from agreements from both airlines with unions to expedite collective bargaining negotiations and provide better benefits for airline workers.[4] Though there seems to be widespread support for the acquisition, I argue that the United States DOJ has sufficient standing and valid reason to sue and enjoin the merger, since it is clear it will have anticompetitive effects.

Over the last several decades, many similar mergers and acquisitions have occurred, and those have often resulted in a less competitive airline industry. In fact, in violation of the Clayton Act and other antitrust legislation, several airline companies—perhaps one of the best representations of a zeitgeist of consolidated market power—have engaged in anti-competitive behavior, including mergers, acquisitions, and partnerships that harm the consumer. Given relevant court precedents regarding similar antitrust issues, it is clear that the government has standing and legitimate reason to take action through the judicial system in order to enjoin further harmful, anti-competitive actions in the airline industry, including in the case of the JetBlue-Spirit Merger.

The rest of this article proceeds as follows: I will first examine antitrust legislation and the relevant case law that establish a very low burden of proof in antitrust cases. I will then explain how prior airline mergers and acquisitions have violated the aforementioned antitrust laws before applying these arguments to the current proposed merger between Spirit and JetBlue.

First, it is important to establish the standards for preventing a merger according to the operative legislation. Section 7 of the Clayton Act, which provides perhaps the most forceful and relevant legal guidelines, stipulates the following:

"That no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission

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[3] Sara Nelson, "Letter to Garland and Buttigieg: 'Re: DOT OST-2023-0023; DOT OST 2023-0024,'" *Association of Flight Attendants-CWA*, (2023): 1, https://assets.nationbuilder.com/afacwa/pages/3239/attachments/original/1677529231/02242023_AFA_Support_JetBlueSpirit_Merger.pdf?1677529231.

[4] Ibid, 2.

shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[5]

In short, the Clayton Act clearly prohibits any merger or acquisition that may have substantial anticompetitive effects. Emphasis, here, should be placed on the word "may," which presents the possibility of preventing a merger without certainty of its effects.

Case precedent has also established a number of guidelines for determining whether the federal government can prevent a merger or acquisition. In *Brown Shoe Co. v United States (1962),* for example, Chief Justice Warren writes that "it is the probable effect of the merger upon the future as well as the present which the Clayton Act commands the courts and the Commission to examine."[6] Not only does Warren assert that judges should consider future effects in conjunction with present effects, but he also establishes that it is merely the "probable effect" that is relevant. In the majority opinion for *U.S. v. E. I. du Pont de Nemours & Co. (1957)*, furthermore, Justice Brennan writes, "We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of the section [Section 7 of the Clayton Act] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce."[7] Like in *Brown Shoe Co. v. U.S.,* this decision likewise establishes a low standard for proving anticompetitiveness, highlighting that there need only be a "reasonable likelihood" as opposed to certainty. In *U.S. v. General Dynamics Corp (1974)*, the Supreme Court upheld its earlier decision in *Brown Shoe Co. v. U.S.*, with Justice Stewart writing in the majority opinion that "the mere nonoccurrence of a substantial lessening of competition in the interval between acquisition and trial does not mean that no substantial lessening will develop thereafter; the essential question remains whether the probability of such future impact exists at the time of trial."[8] In perhaps the clearest description of the low standard required for proving the anticompetitive nature of an acquisition, Judge Posner of the U.S. Court of Appeals for the Seventh Circuit writes in the opinion for *F.T.C. v. Elders Grain Inc. (1989)* that "Section 7 forbids mergers

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[5] 63rd Congress, *Clayton Act*, (2004): https://www.govinfo.gov/content/pkg/COMPS-3049/pdf/COMPS-3049.pdf.
[6] *Brown Shoe Co. v. United States,* 370 U.S. 294, (Supreme Court of the United States 1962).
[7] *U.S. v. E. I. du Pont de Nemours & Co., 353 U.S. 586,* (Supreme Court of the United States 1957).
[8] *U.S. v. General Dynamics Corp.*, 415 U.S. 486, (Supreme Court of the United States 1974).

and other acquisitions the effect of which 'may' be to lessen competition substantially. A certainty, even a high probability, need not be shown."[9] These are only a small sampling of the currently effectual case precedents that establish that only a "reasonable likelihood"[10] is necessary—not certainty or even high probability. In essence, the standard of evidence for proving potential anticompetitive effects in violation of the Clayton Act is fairly low.

Many airline mergers have violated the Clayton Act and, due to a lack of forceful government intervention in many cases, created an airline industry with highly concentrated market power. In 2020, the "Big Four" airlines (American Airlines, Delta Air Lines, Southwest Airlines, and United Airlines) made up roughly 76% of the operating revenue in the industry according to data from the U.S. Bureau of Transportation Statistics.[11] Their dominance is clearly pronounced. How did we get here? The answer: a series of largely uncontested yet anticompetitive mergers. In 2001, for example, American Airlines acquired Trans World Airlines, which made them one of the largest airlines in the United States. The DOJ did not contest this merger because Trans World had previously filed for bankruptcy, leading the officials to believe it would not pose a significant threat to competition. In 2005, US Airways, which American Airlines would later acquire, merged with America West Airlines. Similar to Trans World, US Airways was bankrupt at the time of the merger, leading to minimal government involvement. Then, in 2008, Delta merged with Northwest Airlines, making Delta the world's largest airline for a short time. In 2010, United merged with Continental after avoiding antitrust litigation by transferring their Newark, N.J. assets to Southwest, which then acquired AirTran Airways. More recently, JetBlue and American Airlines began a partnership in 2020, which allows them to coordinate routes, connect perk programs, and share revenues on Northeastern routes. Now, JetBlue and Spirit are planning to further consolidate market power, and if this merger goes through, it would benefit American Airlines as well by extension.

Historically, mergers and acquisitions, such as the one pending for JetBlue and Spirit, have negatively impacted consumers as a result of decreased competition. After all, when there is lessened competition, airlines have less motive to provide high quality, low cost travel in order to attract consumers. In a study titled "Competition and Service Quality in the U.S. Airline Industry," Michael Mazzeo uses

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[9] *F.T.C. v. Elders Grain Inc.,* 868 F.2d 901, (United States Court of Appeals, Seventh Circuit 1989).
[10] *U.S. v. E. I. du Pont de Nemours & Co.*
[11] Bureau of Transportation Statistics, "Airline Rankings 2020," (2020): https://www.bts.gov/topics/airlines-and-airports/airline-rankings-2020

information from the U.S. Bureau of Transportation Statistics and concludes that flight delays are more frequent and longer on airline routes where there is no competition, which "suggests that airlines may lack sufficient incentive to provide service quality in markets where they do not face competition."[12] He continues to write that in markets with competition, airlines have greater incentive to invest in increasing quality because, since consumers have other options, low quality has revenue implications. In short, "Margins may be higher on monopoly routes because airlines that do not face competitive pressure can save the costs that would be needed to provide higher quality, on-time service."[13] In another article titled "Mergers and Product Quality: Evidence from the Airline Industry," economists Yongmin Chen and Philip Gayle arrive at a similar conclusion from studying the mergers between Delta and Northwest in 2008 and Continental and United in 2010. They determine that mergers are associated "with a quality decrease in markets where they [merging airline companies] did" compete,[14] and that these quality decreases can have a "substantial" impact on consumers.

Not only do mergers and acquisitions between previously competing airlines affect product quality, but prices usually rise as well when competition is eliminated. As evidence of this, Han Kim and Vijay Singal in "Mergers and Market Power: Evidence from the Airline Industry" find that, after studying several mergers that occurred between 1985 and 1988, "merging firms increased airfares by an average of 9.44 percent relative to other routes unaffected by the merger. Rival firms responded by raising their prices by an average of 12.17 percent."[15] They also found that these price increases, moreover, "do not appear to be the result of an improvement in quality or of an industry-wide contraction of air services to rectify a supply-demand imbalance."[16] In essence, not only do mergers and acquisitions between previously competitive firms result in quality decreases, but they also lead to higher air fares. Both of these effects are anticompetitive.

Because it is clear that mergers and acquisitions between previously competitive firms have anticompetitive effects that harm consumers, the government certainly has reason to be concerned about the proposed JetBlue-Spirit merger. Thus, to

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[12] Michael Mazzeo, "Competition and Service Quality in the U.S. Airline Industry," *Review of Industrial Organization* 22, (2003): 276. https://doi.org/10.1023/A:1025565122721.
[13] Ibid, 294.
[14] Yongmin Chen and Philip Gayle, "Mergers and Product Quality: Evidence From the Airline Industry," *International Journal of Industrial Organization* 62, (2019): 131, https://doi.org/10.1016/j.ijindorg.2018.02.006.
[15] Han Kim and Vijay Singal, "Mergers and Market Power: Evidence from the Airline Industry," *The American Economic Review* 83, no. 3, (1993): 550, https://www.jstor.org/stable/2117533.
[16] Ibid, 567.

determine the legality of this specific merger and those that may occur in the future, the court must simply determine whether the two airlines were significantly competitive prior to merging, which would establish a "reasonable likelihood" that the merger would have an anticompetitive effect on the airline industry.

Spirit Airlines has a reputation for being a low cost flight option for consumers, and throughout 2022, they began plans to expand their routes and further compete with larger airline companies. In March of that year, for example, they announced plans to open crew bases in Miami and Atlanta, and, in July, to open a crew base in Houston. Spirit is undoubtedly among one of America's fastest growing, lowest cost airlines. As they expanded and added routes, major airlines were forced to reduce their prices as a result of the introduction of low cost competition. The most prominent example of this would be when Spirit entered the Detroit-Boston route in 1996 with a notably low fare starting at $69. Shortly thereafter, Northwest Airlines, according to the court brief for *Spirit Airlines, Inc. v. Northwest Airlines, Inc. (2005)*, lowered their fare dramatically from above $300 to a matching $69. Spirit also entered the Detroit-Philadelphia market and began competing with Northwest there as well, offering flights for $49.[17] For this route, too, Northwest lowered their fare as a result of Spirit's entrance. Spirit Airlines, by virtue of being an ultra low cost competitor, lowered prices not only for Northwest flights but for many of the routes on which they competed. Before the merger announcement, Spirit was on pace to continue their rapid expansion and compete even more potently against other airline carriers, but this merger deal would end that expansion and the subsequent competition.

Like Spirit, JetBlue is also considered a low cost airline that drives airfares in competitive markets down, a fact demonstrated through the creation of the term "JetBlue Effect." While JetBlue is considered a "low cost carrier" (LCC), it is not considered as affordable as Spirit, which is an "ultra-low cost carrier" (ULCC). Thus, Spirit's price on routes they both fly causes JetBlue to lower their own prices. According to information compiled by Brad Shrago from the U.S. Department of Transportation in "The Spirit Effect: Ultra-Low Cost Carriers and Fare Dispersion in the U.S. Airline Industry," in quarter 3 of 2019, 36.9% of JetBlue passengers flying directly could have also flown directly with Spirit airlines.[18] This data elucidates

[17] *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, (United States Court of Appeals, Sixth Circuit 2005).

[18] Brad Shrago, "The Spirit Effect: Ultra-Low Cost Carriers and Fare Dispersion in the U.S. Airline Industry," *Research Gate*, (2023): 7, https://www.researchgate.net/publication/365187048_The_Spirit_Effect_Ultra-Low_Cost_Carriers_and_Fare_Dispersion_in_the_US_Airline_Industry.

that JetBlue and Spirit routes have a significant amount of route overlap and are, therefore, significant competitors. This competition results in several benefits for consumers, especially lower airfares that appeal to more cost-conscious air travelers who are willing to sacrifice the slightly higher quality of a JetBlue flight for the affordability of one from Spirit. Shrago corroborates this argument, concluding that his "results support this hypothesis – the presence of Frontier and Spirit are associated with significant increases in fare dispersion. Increased dispersion results because carriers reduce fares aggressively at the bottom of the fare distribution when Frontier or Spirit is present, but only modestly at higher points in the fare distribution."[19] In a word, Spirit's presence as a ULCC reduces prices among LCCs, like JetBlue, and among Legacy carriers like the "Big Four."

Supporters of this particular merger might contend, here, that the JetBlue-Spirit merger would allow the newly consolidated airline to compete more potently with the Big Four and drive down their costs. As has been demonstrated, however, the merger will eliminate a notorious ULCC and result in higher prices among routes on which they used to compete. Though their prices may remain lower than the legacy carriers, costs will likely rise, quality may decline, and options will certainly be reduced for travelers of those routes who will no longer have Spirit as an ULCC option. Legacy carriers, moreover, operate in a slightly different market, targeting wealthier clientele and offering more international flights. Thus, the merger would have major anticompetitive effects for those who typically fly with non-legacy carriers.

Spirit Airlines and other ULCCs, in essence, provide consumers with a more affordable option, which often forces LCCs like JetBlue and legacy carriers like American to lower their fares and make quality improvements. Airline mergers, which further consolidation in an industry already plagued by concentrated market power, are usually anticompetitive in nature, leading to decreased quality and increased fares when they occur between previously competitive companies. Section 7 of the Clayton Act clearly prohibits such mergers and acquisitions, and thus, the federal government has standing to and should sue to enjoin any merger or acquisition that will have anticompetitive effects. In the case of the JetBlue-Spirit merger, this is most certainly the case. Not only does Spirit lower the airfares of other airlines, but the two airlines have significant route overlap, especially in the Northeast and Southeast. Thus, any merger between the two would eliminate a major ultra low cost carrier and create a much larger airline likely to increase fares and reduce quality as a result of decreased competition. Because of this, the federal

[19] Ibid, 20.

government has standing to sue and the court has reason to grant their request to enjoin this and future mergers, acquisitions, and partnerships between the top ten airlines.