Inside the Antitrust Challenge to the American Airlines–JetBlue Airways "Northeast Alliance"

By Benjamin R. Dryden

On May 19, 2023, after a month-long bench trial, a federal district court in Massachusetts found the Northeast Alliance (Alliance) between American Airlines (American) and JetBlue Airways (JetBlue—and together with American, the Parties) violated the federal antitrust laws.[1] Announced in 2020, the Alliance was a contractual joint venture that had effectively combined the Parties' operations for certain flights in and out of Boston, New York City, and Newark (collectively, Northeast). The Department of Justice's Antitrust Division (DOJ) and a coalition of six states and the District of Columbia (collectively, Government) challenged the Alliance under Section 1 of the Sherman Act,[2] which prohibits agreements that unreasonably restrain trade. The court found that although the Alliance created real, tangible benefits for consumers, the Alliance nevertheless amounted to an illegal restraint of trade by American and JetBlue. The court's decision stands as a reminder that agreements among horizontal competitors can warrant close scrutiny under the antitrust laws, even if they create benefits for the companies involved and for consumers.

The Northeast Alliance

Announced in July 2020, the Alliance was an effort to optimize the Parties' respective route networks in the Northeast by coordinating their flight schedules and making the most efficient use of their respective fleets. The core of the Alliance was a commitment by American and JetBlue to pool their respective revenues, assets, and operations in the Northeast. Importantly, the Parties did not coordinate with one another on prices; instead, each Party committed to set its airfares independently of one another. The Parties did, however, adopt a formula to share the Alliance's revenues, regardless of which Party operated a particular flight. In the court's description, this revenue-sharing formula made the Parties "indifferent to whether a passenger flies a particular [Alliance] route on an American plane or a JetBlue plane."[3]

In several ways, the Alliance provided meaningful benefits for the Parties and consumers alike. For instance, in order to permit passengers to make connections between terminals, the Parties developed a shuttle bus to connect their respective terminals at John F. Kennedy International Airport (JFK). Additionally, JetBlue was given access to nearly 100 slots, i.e., authorizations for takeoffs and landings, at JFK and LaGuardia, which JetBlue operated using larger airplanes than the small regional jets that American had historically used at JFK. The net effect was to provide much-needed new capacity out of New York City—a substantial benefit for consumers.

Commitments to the Department of Transportation

Before the Alliance could take effect, the Parties were required to notify the Department of Transportation (DOT) to allow DOT to review the proposed arrangement.[4] As part of DOT's review, DOT consulted with

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DOJ to determine whether the Alliance would reduce competition or otherwise violate antitrust laws or principles.[5] After a nearly six-month DOT review, in January 2021 the Parties reached an agreement with DOT (DOT Agreement) intended to ensure that the Alliance would achieve the procompetitive benefits the Parties expected.[6] Among other things, the DOT Agreement stipulated that the Parties would not discuss fares or "revenue management strategies" with each other with respect to flights within the scope of the Alliance.[7] Moreover, with respect to flights outside the scope of the Alliance, the DOT Agreement provided that the Parties would not discuss fares, revenue management strategies, routes, schedules, or capacity.[8]

The DOT Agreement also required American and JetBlue to divest to third-party airlines a total of 13 slot pairs at JFK and Ronald Reagan Washington National Airport. Beyond this, the Parties also committed to certain "conditional" divestitures, whereby if they failed to increase capacity in New York City by specified targets, they would automatically be required to divest additional slot pairs.[9] This latter commitment was designed both to incentivize American and JetBlue to realize the Alliance's procompetitive potential and to create an automatic remedy if they failed to achieve the benefits they predicted.

The Government's Antitrust Challenge

Despite the commitments made to DOT and the promised procompetitive benefits, approximately nine months after the DOT Agreement was signed, the Government brought a civil lawsuit challenging the Alliance under the federal antitrust laws, seeking to unwind the Alliance. The Government's complaint alleged that the Alliance constituted the "modern-day version of a nineteenth-century business trust" by essentially merging the Parties' Northeast operations.[10] At trial, the Government supported its claims with the testimony of an economist who opined that by eliminating the incentives for American and JetBlue to compete with each other within the Alliance, the Alliance created "upward pricing pressure" that would have the effect of causing American and JetBlue to raise their prices, notwithstanding their commitment not to coordinate airfares directly.[11]

Additionally, because the Northeast represents approximately two-thirds of JetBlue's overall business, the Government claimed that the Alliance would lessen JetBlue's incentives to compete with American in other markets around the country. In other words, the Government alleged, the competitive effects of the Alliance were not limited to the Northeast but instead had the effect of causing the Parties to "pull [their] competitive punches in order to maintain a good relationship."[12]

American and JetBlue vigorously denied the Government's claims. By the Parties' account, the Alliance was a procompetitive collaboration that offered consumers a broader and deeper network, with more capacity, more amenities, and more efficient schedules in the Northeast. In support of their position, the Parties offered the opinions of their own economists, who opined that the Alliance, which had already been operating for more than a year before the trial began, was not harming competition but to the contrary was improving service quality and increasing output in furtherance of competition. In the end, the federal judge presiding over the trial heard testimony from over two dozen witnesses over the course of a month-long trial that included more than one thousand exhibits.

The Court's Decision

Before beginning its analysis, the court explained the three-step, burden-shifting approach that would govern the dispute:

> Restraints arising in the context of joint ventures ordinarily are subject to the rule of reason, which involves some form of burden shifting but is not a rigid framework. . . . First, the plaintiff must make an initial showing that the challenged agreement has a substantial anticompetitive effect. . . . If the plaintiff succeeds, the burden shifts to the defendant to show a procompetitive rationale for the restraint. . . . Should the defendant satisfy its obligation, the ultimate burden returns to the plaintiff. A plaintiff can prevail at this point with proof that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. Absent such proof, the plaintiff may alternatively seek to establish that, on balance, the restraint's anticompetitive effects outweigh any procompetitive benefits.[13]

Following this three-step approach, the court began by determining whether the Alliance had a significant anticompetitive impact. The court found that the Alliance hurt competition in at least four ways. First, the court held that the Alliance "replaced direct and aggressive competition . . . with cooperation," notwithstanding the fact that American and JetBlue did not coordinate on prices.[14] According to the court, "this, in and of itself, is a fundamental assault on competition and an actual harm the Sherman Act is designed to prevent."[15] Second, the court found that by aligning JetBlue's business incentives with American's—not only within the Northeast, but more broadly

throughout the country—the Alliance had weakened JetBlue's status as a disruptive "maverick" in the industry.[16] Third, the court found that the purported "optimization" of the Parties' networks was reminiscent of "market allocation" agreements, which the antitrust laws generally regard to be per se unlawful.[17] In fact, even though the Government never claimed that the Alliance was per se unlawful, the court suggested that it might have accepted a per se allegation if the Government had made such a claim. Fourth, the court found that the Government had demonstrated a harm to competition through indirect, structural evidence, with proof that American and JetBlue each have the power to set pricing in the Northeast, as well as by demonstrating that the region is heavily concentrated and has substantial barriers to entry.[18]

Once the Government met its initial burden of showing a substantial anticompetitive effect, the burden of defending the Alliance fell to American and JetBlue. They argued that the Alliance's main goal was to improve their collective ability to compete with Delta, the airline that has the largest market share in the Northeast. The court, however, rejected this defense. This justification, in the court's words, "might be 'procompetitive' in the business sense of the word, but it is not on these facts 'procompetitive' under the law."[19] The court added in a footnote that "Delta is entitled to the fruits of the success it has achieved by operating independently in the free market. . . . The principles underlying the Sherman Act . . . are thwarted when less efficient competitors use their rival's success as an excuse to collaborate, rather than continue competing."[20]

Further, the court determined that the Parties had not demonstrated that they were merging "complementary" assets, such as "pooling resources to engage in research they could not independently fund . . . [or] combining capital to fund the renovation and expansion of a terminal at an airport."[21] The court acknowledged that a joint venture that accomplished those sorts of goals "might justify ancillary restraints that otherwise appear anticompetitive."[22] The Alliance, however, "does none of these things."[23] Instead, the court concluded that "the overarching purpose" of the Alliance—putting an end to competition between American and JetBlue in the Northeast—was "a naked assault on competition" itself, and the Parties had failed to satisfy their "heavy" burden of proving otherwise.[24]

Because American and JetBlue failed to carry their burden at the second step of the three-step burden-shifting framework, the court could have ended its analysis there. For completeness, however, the court also considered the third step of the burden-shifting framework—that is, determining whether the Alliance's benefits could be obtained through "less restrictive alternative arrangements."[25] The court placed great weight on the fact that American and Alaska Airlines (Alaska) have a West Coast International Alliance (WCIA) in place. The WCIA only involves revenue sharing between a select number of American's long-distance international flights and a select number of Alaska's domestic flights, a practice that the court referred to as "non-reciprocal revenue sharing."[26] The WCIA also excludes any routes where both parties have competing nonstop flights, does not involve coordination on capacity or scheduling, and does not involve coordination on any routes. The court cited these limits on the WCIA as proof that American and JetBlue could have obtained many of the same advantages from the Alliance through a less onerous arrangement.[27]

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The court ordered the Alliance dissolved. The Parties briefly considered appealing the court's ruling to the U.S. Court of Appeals for the First Circuit. Ultimately, however, JetBlue decided to terminate the Alliance rather than continue litigation. JetBlue's decision likely reflects a recognition that the Alliance was complicating JetBlue's ongoing efforts to acquire Spirit Airlines (Spirit), a proposed merger that the DOJ, two states, and the District of Columbia are also challenging in parallel.[28]

Lessons from the Court's Decision

The court's decision offers three significant takeaways.

First, the decision emphasizes how suspicious the DOJ and other antitrust enforcement agencies can be of joint ventures, strategic alliances, and other collaborations that can have the effect of entangling rivals, especially in markets that are concentrated among a small number of firms. Such partnerships may have the effect of turning rivals into "frenem[ies]," as a deputy assistant attorney general of the DOJ recently put it.[29] Such collaborations not only eliminate any competition between the parties in the specific area of their cooperation, but they can also have "spillover" consequences that may affect competition in other areas. Remember, for instance, that the district court determined that the Alliance had diminished JetBlue's motivations to compete with American not only in the Northeast but also in other geographic regions.

Second, the court's decision serves as a timely reminder that for collaborations among competitors to survive antitrust scrutiny, they must have a distinct procompetitive purpose and impact. For instance, a

procompetitive purpose might be found from combining the complementary assets of two businesses to create an altogether new capability that neither business would have the ability or inclination to develop independently. However, even this goal might not be sufficient to withstand antitrust scrutiny on its own because the collaboration must also impose as few restrictions on competition as reasonably practical. Therefore, when the benefits of a collaboration can be obtained equally through two different models, businesses should choose the model that imposes the least competitive restraint.

Third, JetBlue's decision to dissolve the Alliance rather than appeal will no doubt play a significant role in the parallel litigation over JetBlue's proposed acquisition of Spirit, which is set for trial in October of this year before a different judge. The complaint in the merger case explains that the so-called Big Four airlines—American, Delta, United, and Southwest—together make up nearly 80 percent of the domestic airline industry. A combination of JetBlue and Spirit, neither of which is among the Big Four, thus raises the question of whether the proposed merger will "substantially . . . lessen competition, or . . . tend to create a monopoly."[30] Anticipating this question, the complaint alleges that one consequence of the Alliance is that "JetBlue no longer competes with American Airlines on [the majority of its flights]—and if this acquisition happens, Spirit won't either."[31] The Government's theory, in other words, is that JetBlue's acquisition of Spirit is not merely the number-six airline (JetBlue) merging with the number-seven airline (Spirit); instead, because of the Alliance, the effect is more like the number-one airline (American plus JetBlue) merging with the number-seven airline. By dissolving the Alliance, however, JetBlue may well have mooted this Government argument. Whether this dissolution is enough for JetBlue and Spirit to prevail in their merger litigation will be one of the key issues facing that court.

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Endnotes

1. United States v. Am. Airlines Grp. Inc., No. 21-11558-LTS, 2023 WL 3560430 (D. Mass. May 19, 2023).
2. 15 U.S.C. § 1 ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.").
3. *Am. Airlines*, 2023 WL 3560430, at *11.
4. *See generally* 49 U.S.C. § 41720.
5. Dep't of Transp., Review of American/JetBlue Agreements, 85 Fed. Reg. 51,552, 51,553 (Aug. 20, 2020).
6. Agreement with U.S. Department of Transportation Regarding Northeast Alliance Between American Airlines, Inc. and JetBlue Airways Corporation (Jan. 10, 2021), https://www.transportation.gov/sites/dot.gov/files/2021-01/Agreement%20terminating%20review%20DOT-AA-B6%20with%20appendix%20011021%20website.pdf.
7. *Id.* at 2.
8. *Id.*
9. *Id.* at 5.
10. Complaint at 3, United States v. Am. Airlines Grp. Inc., No. 21-11558 (D. Mass. filed Sept. 21, 2021), https://www.justice.gov/media/1167621/dl?inline.
11. United States v. Am. Airlines, No. 21-11558-LTS, 2023 WL 3560430, at *23 (D. Mass. May 19, 2023).
12. Complaint, *Am. Airlines*, ¶ 73.
13. *Am. Airlines*, 2023 WL 3560430, at **30–31.
14. *Id.* at *33.
15. *Id.*
16. *Id.* at *34.
17. *Id.* at **35–36.
18. *Id.* at **36–38.
19. *Id.* at *39.
20. *Id.* at *39 n.94.
21. *Id.* at *40.
22. *Id.*
23. *Id.* at *41.
24. *Id.* at *40.
25. *Id.* at *43.
26. *Id.* at *8.
27. *Id.* at *9, **43–44.
28. *See generally* Complaint, United States v. JetBlue Airways Corp., No. 22-10511 (D. Mass. filed Mar. 7, 2023), https://www.justice.gov/d9/case-documents/attachments/2023/03/07/412272.pdf.
29. Andrew Forman, Deputy Assistant Att'y Gen., The Importance of Vigorous Antitrust Enforcement in Health Care (June 3, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust.
30. *See generally* 15 U.S.C. § 18.
31. Complaint, *JetBlue*, ¶ 15.