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Airline-Airport Facilities Agreements: An Overview

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AIRLINE — AIRPORT FACILITIES AGREEMENTS: AN OVERVIEW

JOHN SABEL*

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I. INTRODUCTION

SINCE THE INCEPTION of powered flight over a century ago, aviation has undergone many phases of technological advancement and regulatory changes. The Wright Brothers' first flight, from liftoff to touchdown, encompassed a distance that is less than the wingspan of today's modern jetliner.¹ The sensation of freedom that undoubtedly accompanied that historic first flight has since been augmented with countless rules and regulations.

This article will explore the agreements between and among airlines and airports, as they relate to landing fees, terminal space leases, and gate leases. Any such agreements may not be viewed, however, in a vacuum. A multitude of factors exist that, to varying degrees, bear on these agreements, both directly and indirectly. Although by no means an exhaustive list, some of these factors include: the exclusivity of the agreement, the airline's status as signatory or non-signatory, the duration of the agreement, and non-aeronautical concessionaire agreements. Moreover, of great significance is the enactment of The Airline Deregulation Act of 1978,² which arguably changed the airline industry forever.

Accordingly, the first part of this article will provide a historical background of aviation legislation in terms of the foundation it laid for future agreements. Secondly, it will explore the introduction of The Airline Deregulation Act of 1978 and the present regulatory structure. The impact of this legislation on airlines, airports, and their previously-entered-into agreements is of great import. Next will be an analysis of the agreements' elements, including the various areas of negotiation between airlines and airports. Finally, we will conclude with an assessment of the merits of the present system and its potential problems.

¹ The flight covered a distance of 120 feet. *The Wright Brothers – First Flight, 1903*, Eye Witness to History, at <http://www.eyewitnesstohistory.com> (2003) (last visited May 31, 2005). The wingspan of the Boeing 757 is 124 feet, 10 inches. US AIRWAYS B-757/B-767 PILOT'S HANDBOOK 5-1.

² Airline Deregulation Act of 1978, Pub. L. No. 89-110, 92 Stat. 1705 (codified in various sections of U.S.C.).

II. LEGISLATIVE BACKGROUND

It is noteworthy at the outset that the term "Deregulation" should not be construed to mean absence of regulation. While a detailed examination of the aviation industry's regulatory history is necessarily beyond the scope of this article, it will nevertheless prove useful to provide a brief overview of the legislation which formed the basis for today's environment. Regulation of the Transportation industry traces its genesis to the days of the railroads.³ Of primary interest to the federal government were anti-trust concerns.⁴ For example, dating back to 1912, in *United States v. Terminal Railroad Association of St. Louis*, the Supreme Court held that the actions of some thirty-eight defendant railroads, in attempting to unify the railway terminal facilities serving St. Louis, violated the Sherman Anti-Trust Act.⁵ Further discussion of this topic will be deferred until later in this article, but, suffice it to say, such concerns have shown no indication of acquiescence in the ensuing years.

A. AIR MAIL ACTS

Aviation itself has been subjected to various forms of scrutiny and regulation as early as the days of the Air Mail Contracts, beginning with the Air Mail Act of 1925,⁶ also known as the Kelly Act, which gave the Post Office the right to contract with air carriers for airmail service.⁷ The first amendment to this act provided that airlines would be paid by the pound for carrying mail; the second amendment decreased the cost of an airmail stamp, thereby fostering the public's use of the airmail system.⁸ "The Post Office's airmail department was no longer legally forced to operate at a profit under the provisions of this second amendment; hence, the airlines could actually be subsidized."⁹ As will be seen under the discussion of Deregulation, *infra*, such subsidization ceased to exist in the Deregulated era.

³ See generally *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383 (1912).

⁴ *Id.*

⁵ *Id.* (interpreting Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (2004))).

⁶ Air Mail Act of 1925, ch. 128, 43 Stat. 805 (current version at 39 U.S.C. §§ 5401-02 (2004)).

⁷ V. FOSTER ROLLO, *AVIATION LAW: AN INTRODUCTION* 54 (5th ed. 2000).

⁸ *Id.*

⁹ *Id.*

The profitability of the airmail contracts provided little incentive for the carriage of passengers.¹⁰ The Air Mail Act of 1930,¹¹ also known as the McNary-Watres Act, was enacted in an attempt to create such an incentive for the airlines.¹² The 1930 Act authorized the Postmaster General to extend the life of existing mail contracts by converting them into route certificates, granting route extensions, or subjecting them to competitive bidding.¹³ A by-product of this was that competitive bidding became a requirement for the awarding of contracts for new routes or to airlines not currently engaged in a mail contract.¹⁴ As a result, competition between airlines became regulated, and airlines began to consolidate.¹⁵ The airlines that emerged under this scheme "were to fly almost free of competition for the next forty-five years."¹⁶ It may be said that this marked the beginning of the regulated era that prevailed within the industry until the introduction of the Airline Deregulation Act of 1978.

B. CIVIL AERONAUTICS ACT

The next significant legislation was the Civil Aeronautics Act of 1938,¹⁷ sometimes referred to as the McCarran-Lea Act. This act established a five-member board, known as the Civil Aeronautics Authority (CAA), with the responsibility of overseeing activities within the aviation industry.¹⁸ One of these responsibilities was the issuance of Certificates of Convenience and Necessity to those air carriers who were providing service at the time of enactment of the McCarran-Lea Act.¹⁹ These duties were subsequently transferred to the Civil Aeronautics Board (CAB), created under the Reorganization Act of 1939.²⁰ "A board-issued certificate is required before any carrier may provide air service in this country. The criteria for certification . . . require the applicant to be 'fit, willing and able' and that the service be

¹⁰ *Id.* at 55.

¹¹ Air Mail Act of 1930, ch. 223, 46 Stat. 259 (current version at 39 U.S.C. §§ 5401-02 (2004)).

¹² ROLLO, *supra* note 7, at 55.

¹³ *Id.*

¹⁴ *Id.* at 56.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

¹⁸ ROLLO, *supra* note 7, at 59.

¹⁹ *Id.*

²⁰ Reorganization Act of 1939, ch. 36, 53 Stat. 561 (current version at 31 U.S.C. §§ 701, 1101 (2004)).

required by the 'public convenience and necessity.'"²¹ Such regulatory legislation "was promulgated . . . to avoid the deleterious consequences of cutthroat and excessive competition, and thereby enhance economic stability, safety, and the sound growth and development of this young industry."²² The CAB retained its regulatory power until the enactment of the Airline Deregulation Act of 1978, to be discussed later in this article.²³

C. FEDERAL AVIATION ACT

The Federal Aviation Act²⁴ was enacted in 1958, ostensibly in response to several accidents within the industry.²⁵ Largely as a result of the introduction of jet transport aircraft in the mid 1950s, numerous industry growing pains were identified.²⁶ Among these were outdated Air Traffic Control (ATC) facilities and equipment, "undersized runways and crowded terminal buildings."²⁷ Perhaps most significant, the Federal Aviation Act, *inter alia*, abolished the CAA and gave its responsibilities to the newly created Federal Aviation Agency (FAA).²⁸ While many of the CAB's former duties and responsibilities were also transferred to the FAA, the CAB "retained economic control of U.S. air carriers in a practically unaltered way."²⁹ This economic control was vested in the CAB until its ultimate demise in 1985.³⁰

D. AIRPORT AND AIRWAYS DEVELOPMENT ACT

The next relevant enactment was that of the Airport and Airways Development Act of 1970,³¹ "designed to meet new demands for public air transportation needs."³² While much of

²¹ JEFFREY R. MILLER, *THE AIRLINE DEREGULATION HANDBOOK* 9 (Merton House 1981).

²² Suzanne Imes, *Airline Passenger Facility Charges: What Do They Mean for an Ailing Industry?*, 60 J. AIR L. & COM. 1039, 1042-43 (1995) (quoting Paul S. Dempsey, *Transportation Deregulation - On a Collision Course?*, 13 TRANSP. L.J. 329, 335 (1984)).

²³ MILLER, *supra* note 21, at 11.

²⁴ Federal Aviation Act, Pub. L. No. 85-726, 72 Stat. 731 (current version at 49 U.S.C. §§ 40101-19 (2004)).

²⁵ ROLLO, *supra* note 7, at 61.

²⁶ *Id.* at 60.

²⁷ *Id.*

²⁸ *Id.* at 61.

²⁹ *Id.*

³⁰ MILLER, *supra* note 21, at 11.

³¹ Airport and Airways Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219.

³² ROLLO, *supra* note 7, at 67.

the prior legislation was directed toward the air carriers and their operations, the Airport and Airways Development Act focused on the airports. "A controversial portion of the act is the requirement for airport operating certificates for those airports served by air carriers."³³ Critics aver that the minimum safety standards set forth in the Federal Aviation Regulations for obtaining such operating certificates resulted in the federal government gaining "considerable control over airports."³⁴

E. AIRLINE DEREGULATION ACT

The final piece of legislation of historical significance is, of course, the Airline Deregulation Act of 1978 (ADA). "The overriding objective of the act is to foster competition within the airline industry. Other objectives include encouraging the entry of new and existing air carriers into new markets; continuing service to small communities; and encouraging use of secondary airports."³⁵ Among its many provisions was the demise of the CAB in 1985, at which time the Department of Transportation (DOT) assumed many of the CAB's former responsibilities.³⁶ The next section of this article will explore the impact of the ADA on airport and airline agreements, as well as the operation of the airline industry in the current deregulated environment.

III. THE AIRLINE DEREGULATION ACT OF 1978 AND ITS IMPACT ON THE CURRENT OPERATING ENVIRONMENT

As its name implies, with the ADA came an industry trend toward increased competition and away from regulation. In some instances, the move from regulation to deregulation was gradual and incremental. One such instance is the Essential Air Service³⁷ provision of the ADA, which ensured that those communities which had previously been served by a certificated air carrier would continue to have such service for a period of ten years after the enactment of the ADA.³⁸ The CAB devised procedures for identifying these "eligible points" and for determining appropriate levels of service.³⁹ An eligible point was primarily de-

³³ *Id.*

³⁴ *Id.*

³⁵ MILLER, *supra* note 21, at 11.

³⁶ *Id.*

³⁷ 14 C.F.R. § 325 (1980).

³⁸ LAWRENCE E. GESELL, AVIATION AND THE LAW 357 (3d ed. 1998).

³⁹ *Id.*

fined as “[a]ny point in the United States . . . to which any direct air carrier was authorized, under a certificate issued by the CAB . . . to provide air service on October 24, 1978, whether or not such service was actually provided.”⁴⁰ This provision was no longer enforced upon the expiration of the ten-year period.

A. HUB AND SPOKE SYSTEM

A prominent characteristic of this increase in competition under deregulation is reflected in the development of hub and spoke route structures.⁴¹ Although “[s]uch route structures were certainly not unknown under regulation . . . they were not characteristic of the pre-deregulation airlines.”⁴² Statistics indicate that in 1977 (pre-deregulation), departures from Dallas and Chicago comprised only 25.0% of American’s flights, while Denver and Chicago departures accounted for a mere 19.6% of United’s flights.⁴³ In contrast, figures for 1985, seven years after deregulation, show that the hub and spoke structure at those cities increased their share of domestic departures to 38.0% for American and 30.6% for United.⁴⁴ Under this now familiar method of operation, airlines pick up passengers at outlying airports (spoke) and fly them to a primary airport (hub).⁴⁵ While some passengers may in fact be destined for the hub airport, many passengers will be continuing their journey beyond this point.⁴⁶ After deplaning at the hub airport, these connecting passengers will “combine with passengers from other origin cities plus those who begin their journeys at the hub to make up enough traffic to fill a plane from their hub to their destinations.”⁴⁷

The success of a hub and spoke system is, in large measure, dependent upon an airline’s access to gate and terminal facilities at the hub airport. “Typically, an airline requires at least five gates to create a small hub.”⁴⁸ The existence of long-term lease agreements, discussed *infra*, greatly impacts such accessibility for

⁴⁰ 14 C.F.R. § 325.3(a) (2004).

⁴¹ Michael E. Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 YALE J. ON REG. 393, 411 (1987).

⁴² *Id.*

⁴³ *Id.* at 412.

⁴⁴ *Id.*

⁴⁵ *Id.* at 443.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Note, *The Antitrust Implications of Airport Lease Restrictions*, 104 HARV. L. REV. 548, 558-59 (1990).

airlines attempting to gain entry into a particular airport.⁴⁹ One or more airlines holding long-term, exclusive leases at a hub airport "can reduce its new entrant rival's ability to attract traffic to its service by forcing it to accommodate its schedule to the availability of a gate, thus disrupting its connections at its distant hub."⁵⁰ Through majority-in-interest clauses, discussed *infra*, incumbent airlines further have the ability to approve (or, perhaps more significantly, disapprove) critical airport construction projects, thereby influencing and controlling availability of terminal facilities.⁵¹

B. INDUSTRY CONSOLIDATION

Another important by-product of deregulation has been the consolidation of the industry. After the enactment of the ADA in 1978, the CAB's responsibilities were gradually and systematically shifted to other agencies.⁵² Initially, regulatory authority over mergers was bestowed upon the DOT, but, in 1989, it was subsequently transferred to the Department of Justice (DOJ).⁵³ Through mergers, acquisitions and bankruptcies, the industry has undergone a transformation unlike any in its history. "Since 1978, we've seen 130 airlines come and go."⁵⁴

The failure of an airline causes consternation not only for its employees and the traveling public, but for the airports with which the airline has lease agreements. Just as the airlines themselves benefit from entering into long-term lease agreements, so too do the airports. The predictable revenue stream resulting from these leases affords the airport operator a certain sense of financial security. However, the deregulated environment under which airlines operate today provides no such assurances.

⁴⁹ *Id.* at 559.

⁵⁰ Levine, *supra* note 41, at 469.

⁵¹ Robert M. Hardaway, *The FAA 'Buy-Sell' Slot Rule: Airline Deregulation at the Crossroads*, 52 J. AIR L. & COM. 1, 47 (1986).

⁵² JEFFERY R. MILLER, *THE AIRLINE DEREGULATION HANDBOOK* 11-12 (1981).

⁵³ Alberto G. Rossi, *Grounding Future Consolidations: United-US Airways Cancel Flight*, 54 ADMIN. L. REV. 883, 886 (2002).

⁵⁴ Perry Flint, *Washington's Shadow of Doubt: Airline Deregulation*, AIR TRANSPORT WORLD, May 1998, at 47 (quoting Professor Daryl Jenkins, director of the Aviation Institute of George Washington University).

1. *Bankruptcies*

The unfortunate result of deregulation has been the unprecedented number of bankruptcies within the industry.⁵⁵ Legislation was enacted in 1992 in an attempt to protect some of the nation's airport operators from this all-too-frequent occurrence.⁵⁶ The Rail Safety Enforcement and Review Act,⁵⁷ Section 19, "Airport Leases," "amends Section 365(d) of the Bankruptcy Code to provide that the unexpired airport facility leases of a bankrupt airline are deemed rejected, at the option of the airport operator, five days after a so-called termination event."⁵⁸ Under the statute, a termination event was rather narrowly defined as a Chapter 7 liquidation, conversion of an existing bankruptcy reorganization to a liquidation, or the granting of certain relief to creditors under the Bankruptcy Code.⁵⁹ The statute was further restrictive "in that it only applie[d] to an air carrier holding at least 65% of the gates of a facility that qualifies as a 'large air traffic hub,' as defined by FAA regulations"⁶⁰ Finally, the statute was applicable only for a period of 12 months, expiring in September 1993.⁶¹ Although intended to address an issue of growing concern within the industry, the limited scope of this statute necessarily rendered it ineffective.

While an airline's bankruptcy inflicts many financial hardships both on the airline and its creditors, it is often the competitor airlines that are in a position to benefit from the other's misfortune. In *Midway Airlines, Inc. v. Northwest Airlines, Inc.*, Midway, after ceasing operations due to bankruptcy, was in default on its gate lease agreement at Minneapolis/St. Paul International Airport (MSP).⁶² Northwest Airlines bid on Midway's leasehold interest, offering to satisfy the amount in default, along with an additional \$5,000.⁶³ Despite objections from the Metropolitan Airports Commission (the operator of MSP), the

⁵⁵ In recent years, many airlines have filed Chapter 13 and several have done so twice or more.

⁵⁶ Rail Safety Enforcement and Review Act, Pub. L. No. 102-365, 106 Stat. 972 (1992).

⁵⁷ *Id.*

⁵⁸ Anthony Michael Sabino, *Protecting Airport Operators' Terminal and Gate Leases from Airline Bankruptcies*, 2 J. BANKR. L. & PRAC. 75, 75 (1993).

⁵⁹ *Id.*

⁶⁰ *Id.* at 76.

⁶¹ *Id.*

⁶² *Midway Airlines, Inc. v. Northwest Airlines, Inc.*, 6 F.3d 492, 493 (7th Cir. 1993).

⁶³ *Id.*

Seventh Circuit Court of Appeals assigned the lease to Northwest.⁶⁴ It is noteworthy that, at the time of this litigation, Northwest operated a hub at MSP, leasing 75% of the gates there.⁶⁵

2. *New Entrants*

Yet another significant impact of deregulation is the number of new entrant carriers that have begun operations since 1978. As discussed *supra*, prior to deregulation, the CAB issued certificates of convenience authorizing airlines to commence operations. The litmus test for issuance of such certificates was that the carrier be "fit, willing and able," and the service was to be *required* by "the public convenience and necessity."⁶⁶ This standard resulted in the CAB's issuance of only six such certificates in the twenty years preceding deregulation. By contrast, today's standard under deregulation requires that "[t]he applicant must still be "fit, willing and able," but the board must issue a certificate if the transportation is "consistent with the public convenience and necessity."⁶⁷ This standard has resulted in the issuance of an increasing number of certificates, based in part on the fact that such consistency is presumed under the ADA. Moreover, "the burden is on any opponents of the applicant to demonstrate any inconsistency with the public convenience and necessity."⁶⁸

This acquiescence in the standard for obtaining a certificate seemingly paves the way for the new-entrant carrier. However, although clearly an essential component for entry, obtaining a certificate is but one small piece of a large and complex puzzle. The mere authority to operate an airline does not include such other requisite elements as gates and terminal space. Once granted the authority to operate, an airline must gain access to airport facilities. While deregulation has made it infinitely easier for airlines to become certificated, the same may not be said for their ability to gain access to some of the nation's airports.

The hub and spoke system, discussed *supra*, represents a formidable obstacle to the new-entrant airline. In establishing itself at a hub airport, the incumbent airline conducts a disproportionate share of the flights operating from that air-

⁶⁴ *Id.* at 497.

⁶⁵ *Id.* at 494 n.1.

⁶⁶ MILLER, *supra* note 21, at 9 (emphasis added).

⁶⁷ *Id.* at 12 (emphasis added).

⁶⁸ *Id.*

port.⁶⁹ Due to the economies of scale inherent in such an operation, it becomes a financial hardship for competitors to gain sufficient market share.⁷⁰ Assuming, *arguendo*, that a new entrant airline elects to compete with a dominant carrier at a hub airport, it must acquire the necessary facilities to do so. "Among the most remarked-upon impediments to contestability in the deregulated airline industry has been the 'shortage' of terminal facilities, especially gate space."⁷¹ Incumbent airlines can deter the new entrant by employing any of a number of strategies: tying up existing gates through the use of long-term, exclusive leases; using their Majority-In-Interest status, discussed *infra*, to limit construction of additional space; and subleasing gate space to the new entrant at above-market prices, just to name a few.⁷²

C. SLOT ALLOCATION

After having successfully overcome the gate barriers, the new entrant has positioned itself to begin service. Operating under the premise that the airline intends to, ultimately, if not initially, generate a profit from its revenues, it must schedule its flights so as to attract the greatest number of passengers. This piece of the puzzle may entail obtaining the right to take off and land at the airport, known as a "slot." "A slot . . . is a designated thirty minute window of time during which an air carrier may launch or land daily air traffic."⁷³ Certain airports, referred to as slot-controlled airports, are subject to the "high density rule," adopted by the FAA in 1968 as a measure to reduce congestion.⁷⁴ The airports initially targeted were Chicago O'Hare (ORD); New York John F. Kennedy International (JFK); New York LaGuardia (LGA); New York Newark (EWR); and Washington National (DCA).⁷⁵ Although the FAA reserved the right to include additional airports in this list, none were subsequently added.⁷⁶ Moreover, despite being initially touted as a temporary measure, the rule has been retained indefinitely.⁷⁷

⁶⁹ Levine, *supra* note 41, at 468-69.

⁷⁰ *Id.*

⁷¹ *Id.* at 463.

⁷² *Id.* at 469-70.

⁷³ Valujet Airlines, Inc. v. Trans World Airlines, Inc., No.1:95-cv-2896-GET, 1996 U.S. Dist. LEXIS 13814, at *9 (N.D. Ga. July 12, 1996).

⁷⁴ Eileen M. Gleimer, *Slot Regulation at High Density Airports: How Did We Get Here and Where Are We Going?*, 61 J. AIR L. & COM. 877, 878 (1996).

⁷⁵ *Id.*

⁷⁶ *Id.* at 878-79.

⁷⁷ *Id.* at 880.

Prior to deregulation, competing airlines convened their respective Scheduling Committees to allocate the slots equitably among them.⁷⁸ These agreements were submitted to, and commonly approved by, the CAB.⁷⁹ Any conflicts noted by the CAB were to be resolved via voluntary adjustments by the airlines themselves.⁸⁰ "Because of the requirement that schedule changes be voluntary, the schedule changes could not be made unless there was unanimity among the affected carriers. Not surprisingly, unanimity was difficult to achieve and at times impossible, particularly after deregulation."⁸¹ This phenomenon served to exacerbate the difficulties encountered by new-entrant airlines.

In an effort to ameliorate this apparent inequity, in 1985 the FAA instituted the "buy-sell rule," which provided that "permanent slots . . . could be purchased, sold, traded, or leased by any party . . . on a daily, weekly, monthly, or any other basis."⁸² Embodied within this rule was a "use-or-lose" provision, requiring airlines to use their slots a specified percentage of the time to avoid forfeiting them.⁸³ In theory, this was to make underutilized slots available for new entrants.⁸⁴ In practical application, however, the airlines in possession of the slots leased them to competitors, on a short-term basis, "to meet the minimum use requirement since the leasing mechanism also limits the competitor's ability to gain a permanent foothold at the airport."⁸⁵ Such an arrangement allows the incumbent airline to retain possession and control of the slots, while potentially charging above-market rates for the lease. Although the new entrant has gained access to the airport, it has done so on a short-term basis and at great expense.

Under the present regulatory structure, although many private airports exist today, "major air carrier airports in the United States are operated by public entities at the state, regional, or local level."⁸⁶ In our nation's capital, for example, the airports (Washington National, Washington – Dulles, and Baltimore-

⁷⁸ *Id.* at 881.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 887.

⁸³ *Id.* at 889.

⁸⁴ Gleimer, *supra* note 74, at 889.

⁸⁵ *Id.* at 910.

⁸⁶ 49 U.S.C. § 49101(5)(2004).

Washington International) are all operated by the Metropolitan Washington Airports Authority ("Airports Authority").⁸⁷ The Airports Authority is "a political subdivision constituted only to operate and improve the Metropolitan Washington Airports as primary airports serving the Metropolitan Washington area."⁸⁸ Among the authority granted to the Airports Authority is the right "to acquire, maintain, improve, operate, protect, and promote the Metropolitan Washington Airports for public purposes; to issue bonds. . .; to acquire real and personal property. . .; and to levy fees or other charges."⁸⁹

Although the right to levy fees and charges exists, that right is not without its limitations. The Federal Anti-Head Tax Act forbids any state agency to "levy or collect a tax, fee, head charge, or other charge on an individual traveling in air commerce," or on "the transportation of an individual traveling in air commerce"⁹⁰ unless they are "reasonable rental charges, landing fees, and other service charges from aircraft operators for the using airport facilities."⁹¹ Additionally, the Airport and Airways Development Act of 1970 requires that airports receiving federal subsidies be "available for public use on fair and reasonable terms and without unjust discrimination."⁹²

D. ANTI-TRUST CONSIDERATIONS

Violation of the above limitations appears in the form of anti-trust litigation. Such litigation has arisen between and among the airlines, and between the airlines and airport operators. Pertinent legislation is Section 1 of the Sherman Antitrust Act which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."⁹³ The United States Supreme Court, in *United States v. Grinnell Corp.*,⁹⁴ emphasized that under Section 2 of the Sherman Act,⁹⁵ designed to halt the growth of monopolies, the offense of monop-

⁸⁷ 49 U.S.C. § 49101(2).

⁸⁸ 49 U.S.C. § 49106(a)(1)(B)(3).

⁸⁹ 49 U.S.C. §§ 49106(b)(1)(A)-(C), (E).

⁹⁰ 49 U.S.C. §§ 40116(b)(1)-(2).

⁹¹ 49 U.S.C. § 40116(e)(2).

⁹² Airport and Airways Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219.

⁹³ 15 U.S.C. § 1.

⁹⁴ 384 U.S. 563 (1966).

⁹⁵ 15 U.S.C. § 2.

oly has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident."⁹⁶

Arguably among the most contentious aspects of airline anti-trust litigation are airport lease agreements. Long-term lease agreements, Majority-In-Interest clauses, hub and spoke operations, and limited slot and gate availability all give rise to the potential anti-competitive practices comprising this litigation. Prior to its dissolution in 1985, the CAB was responsible for reviewing and approving "any agreements between carriers affecting air transportation"⁹⁷ "Any agreement approved by the board was automatically given immunity from the antitrust laws and was thereby insulated from any antitrust action arising within the scope of the approved agreement."⁹⁸ The CAB's authority was significantly reduced as a result of the ADA, particularly with respect to mergers and acquisitions, when such authority was transferred to the Department of Justice.⁹⁹

To mitigate the effects of the long-term lease agreements, airlines have entered into sub-lease agreements.¹⁰⁰ Under these agreements, facilities such as gates or takeoff and landing slots are sub-leased to competitor airlines. This allows the lessor airline to retain ownership of the facilities while exerting a measure of control over its competitor lessee. Although the new-entrant carrier has gained access to an airport, it incurs considerable expense in doing so. The incumbent carrier benefits from such a sub-lease arrangement in multiple ways. First, it retains ownership of the gate(s), effectively reserving the right to reclaim them upon termination of the typically short-duration sub-lease. Second, by sub-leasing the gates, the incumbent has complied with the common provision in its own lease with the airport that the gates be used a certain minimum amount. Absent the sub-lease, the underutilized gates may be forfeited to the airport, only to potentially be leased to the new-entrant competitor on a long-term basis. Next, the incumbent airline establishes the lease rate to be paid by the sub-lessee. As might be

⁹⁶ 384 U.S. 563, 570-71 (1966).

⁹⁷ MILLER, *supra* note 21, at 7.

⁹⁸ *Id.*

⁹⁹ *Id.* at 15.

¹⁰⁰ Robert Hardaway, *Economics of Airport Regulation*, 20 TRANSP. L.J. 47, 54-55 (1991).

expected, these rates are typically above market rates, by operation of the law of supply and demand. In an agreement between Southwest Airlines and Northwest Airlines, for example, Northwest charged "\$150 per flight for a sub-lease of two gates or 'about nineteen times what Northwest pays the airport authority to lease the space.'"¹⁰¹ Finally, not uncommon in such sub-leases are clauses which require that the lessee also contract the ground handling services of the lessor.

In *Valujet Airlines, Inc. v. Trans World Airlines, Inc.*,¹⁰² plaintiff Valujet alleged violations of Sections 1 and 2 of the Sherman Act against two competitor airlines in contracting for takeoff and landing slots at New York's LaGuardia Airport (LGA).¹⁰³ Trans World Airlines (TWA) entered into negotiations with Valujet to lease six of its Atlanta (ATL) - LGA slots.¹⁰⁴ Negotiations slowed when Valujet objected to TWA's requirement that Valujet also contract for TWA's ground handling services.¹⁰⁵ Believing that Valujet was no longer interested, TWA began negotiations with Delta, a dominant, incumbent carrier operating a hub at ATL.¹⁰⁶ When TWA and Delta reached agreement on the slot leases, Valujet asserted its claim that the parties "entered into an illegal agreement and conspired to restrain trade" and that "Delta has engaged in illegal acts of monopolization and has attempted to monopolize the ATL-LGA market."¹⁰⁷ As to the Section 1 claim, the district court, citing the United States Supreme Court decision in *Monsanto Co. v. Spray-Rite Service Corp.*,¹⁰⁸ granted both defendant airlines' motions for summary judgment, holding that Valujet failed to prove "that TWA and Delta shared a conscious commitment to a common scheme designed to achieve an unlawful objective."¹⁰⁹ The court, citing *United States v. Grinnell Corp.*,¹¹⁰ highlighted the two elements of the offense

¹⁰¹ *Id.* at 54 (quoting DOT SECRETARY'S TASK FORCE ON COMPETITION IN THE U.S. DOMESTIC AIRLINE INDUSTRY: AIRPORTS, AIR TRAFFIC CONTROL, AND RELATED CONCERNS 3-2 (Feb. 1990)).

¹⁰² No.1:95-cv-2896-GET, 1996 U.S. Dist. LEXIS 13814, at *9 (N.D. Ga. July 12, 1996).

¹⁰³ *Id.* at *24.

¹⁰⁴ *Id.* at *11.

¹⁰⁵ *Id.* at *12.

¹⁰⁶ *Id.* at *17.

¹⁰⁷ *Id.* at *24.

¹⁰⁸ 465 U.S. 752, 760 (1984).

¹⁰⁹ No.1:95-cv-2896-GET, 1996 U.S. Dist. LEXIS 13814, at *30 (N.D. Ga. July 12, 1996).

¹¹⁰ 384 U.S. 563, 570-71 (1966).

of monopolization as "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident." However it declined to resolve the Section 2 claim, requiring further discovery.¹¹¹

New York Airlines v. Dukes County, Martha's Vineyard Airport Commission,¹¹² addresses anti-trust litigation as it pertains to airports. New York Air was denied access to the Martha's Vineyard Airport (MVY).¹¹³ In its antitrust argument, New York Air relied on Section 1 of the Sherman Act which "makes unlawful any 'contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states.'"¹¹⁴ In addition to alleging that such a contract in fact existed between the Airport and PBA, an incumbent airline, New York Air was also required to demonstrate the resultant injury it sustained from such action.¹¹⁵ New York Air asserted that its injury stemmed from the "loss of business opportunity . . . loss of goodwill, and loss of revenues and profits."¹¹⁶ The Airport moved to dismiss the claim, arguing that under state law and pursuant to the *Parker Doctrine*,¹¹⁷ its actions are exempt from anti-trust laws.¹¹⁸ The district court denied this motion, holding, *inter alia*, that the *Parker Doctrine* was inapplicable, because the doctrine excludes conduct undertaken "pursuant to state policy to displace competition with regulation or monopoly public service."¹¹⁹

In a challenge to the rates imposed upon them by the airport, the two plaintiff airlines in *Rocky Mountain Airways, Inc. v. County of Pitkin*¹²⁰ alleged that the charges were "excessive, unreasonable, and discriminatory in violation of federal and state law."¹²¹ The Aspen/Pitkin County Airport is owned and operated by Pit-

¹¹¹ *Valujet Airlines, Inc.*, 1996 U.S. Dist. LEXIS 13814, at *14 (citing 15 U.S.C. § 2 (2004)).

¹¹² 623 F. Supp. 1435 (D. Mass. 1985).

¹¹³ *Id.* at 1440.

¹¹⁴ *Id.* at 1450 (citing 15 U.S.C. § 1).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Parker v. Brown*, 317 U.S. 341, 352 (1943) (providing an exemption for state conduct if undertaken to displace competition with regulation of monopoly public service).

¹¹⁸ 623 F. Supp. at 1451.

¹¹⁹ *Id.*; see also *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413 (1978).

¹²⁰ 674 F. Supp. 312 (D. Colo. 1987).

¹²¹ *Id.*

kin County, a political subdivision of the state of Colorado. To fund terminal expansion, the county increased both the landing fees and terminal rental fees, resulting in the airlines paying over fifty percent of the airport's operating revenues for only twenty-nine percent of the airport's operations.¹²² Among the claims made by the plaintiff airlines were the arguments "that the Airport holds a monopoly position, and that the fees and rentals are unreasonable and therefore in violation of Section 2 of the Sherman Act."¹²³ A Colorado statute provided that the operations of airport facilities were "to be public government functions, exercised for a public purpose, and matters of public necessity."¹²⁴ The district court granted the county's motion to dismiss, holding that "Pitkin County is undeniably acting in its governmental (rather than proprietary) capacity and . . . is immune from the operation of federal antitrust laws."¹²⁵

IV. AIRLINE-AIRPORT AGREEMENTS

Facilities lease agreements between airlines and airports are intricately detailed, delineating such matters as fees, the location of facilities, duration, and exclusivity. Furthermore, these agreements also detail landing fees, rate calculation methods, and revenue/cost sharing formulas. One of the primary factors in constructing these agreements is to designate them as exclusive or non-exclusive.

A. EXCLUSIVE AGREEMENTS

If an airline has a significant presence at a particular airport, it may elect to enter into an exclusive lease agreement, which provides that only that airline will have the use of the specific facilities.¹²⁶ This means that access to these facilities would be unavailable to other airlines who may wish to gain entry.

Such exclusive agreements have the potential to be mutually beneficial to the tenant airline and the landlord airport. While the airline has encumbered itself to the extent that it has assumed an obligation to make the lease payments, it has also gained control over the gate and terminal space, to the exclu-

¹²² *Id.* at 314.

¹²³ *Id.*

¹²⁴ *Id.* at 316 (quoting COLO. REV. STAT. § 41-4-101).

¹²⁵ *Id.*

¹²⁶ Telephone Interview with Mr. Jeffrey Letwin, Solicitor, Allegheny County Airport Authority (Nov. 11, 2003) [hereinafter Letwin Interview].

sion of potential competitors. The airport, for its part, effectively relinquishes control of the facilities. However, in the process, it gains the assurance of a predictable revenue stream. At issue in *Air Canada v. Department of Transportation*¹²⁷ was an agreement between American Airlines (American) and Dade County for construction and renovation of facilities at Miami International Airport (MIA).¹²⁸ The agreement provided that "[A]merican will have exclusive use of the A/D gates so long as it averages 250 jet flights per day."¹²⁹ The funding for this construction project derived in part from increased fees charged to all airlines operating at MIA, resulted in several airlines challenging the reasonableness of the fee increases. The DOT assigned the dispute to an administrative law judge, who found the fees unreasonable, holding that American should pay a larger share of the costs.¹³⁰ The Court of Appeals for the District of Columbia, however, denied the airlines' claims, stating "[b]ecause facilities are renovated at different times, some airlines will always be subsidizing improvements to facilities used by other airlines."¹³¹ Such reasoning presupposes that the airlines will collectively continue leasing facilities at MIA, so as to realize the long-term benefits of the improvements.¹³²

Recent industry trends seem to indicate a desire on the part of airport operators to limit these exclusive lease agreements. At airports where one airline accounts for more than fifty percent of the passenger volume, federal law requires the submission of a plan to increase competition in order to be eligible for the federal financial aid necessary to fund expansion.¹³³ In December, 2000, officials at Atlanta Hartsfield International Airport (ATL) submitted such a plan, committing "to end as much as possible the practice of signing exclusive gate lease agreements and to require airlines that have lease agreements to meet usage goals or lose control of their gates."¹³⁴ The plan also proposed a new option, known as preferential gate agreements, under which "an airline would hold dominant rights to a gate.

¹²⁷ 148 F.3d 1142, 1146 (D.C. Cir. 1998).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1148.

¹³¹ *Id.* at 1151 n.14.

¹³² *Id.*

¹³³ Gary Hendricks, *Hartsfield City Limits: FAA Studies Airport's Plan to Increase Competition*, ATLANTA JOURNAL & CONSTITUTION, January 15, 2001.

¹³⁴ *Id.*

But if the airport determined the gate was under-utilized, the airport could allow another airline to use it.”¹³⁵ Another example of this trend is evident at Dallas/Fort Worth International Airport (DFW), which has vowed to “transition out of exclusive-use agreements for the future.”¹³⁶ Citing as a primary factor the concern that an under-utilized, exclusively-leased gate will be unavailable for use by another carrier, agreements for gates in a new terminal, planned to open in 2005, will contain provisions permitting another carrier to use the unused facilities of the tenant airline.¹³⁷

1. Long-Term Leases

As noteworthy as their exclusivity is the duration of lease agreements. “Historically, most airports have leased space to airlines on an exclusive basis for extended periods of time, usually 15 to 30 years.”¹³⁸ Agreements dating back to the 1940s are indicative of this tendency. “In 1942 the City and County of San Francisco . . . entered into a formal agreement . . . with Trans World Airlines . . . for a twenty-year term.”¹³⁹ The trend has since continued as evinced by the lease agreement currently in effect between the city of Philadelphia, which is the governing entity for the Philadelphia International Airport (PHL), and US Airways.¹⁴⁰ That agreement was entered into in 1974 and is set to expire in 2006.¹⁴¹ Such a thirty-two year agreement, while arguably at the upper limit in terms of duration, is not atypical. In *Montauk-Caribbean Airways, Inc. v. Hope*,¹⁴² for example, Section 352 of New York General Municipal Law authorizes the local legislative body which operates local airports “to enter into exclusive and non-exclusive contracts . . . not exceeding forty years.”¹⁴³

¹³⁵ *Id.*

¹³⁶ Bryon Okada, *Dallas/Fort Worth Airport Wants to Shorten Exclusive-Use Gate Leases*, FORT WORTH STAR-TELEGRAM, October 19, 2003, at 8B.

¹³⁷ *Id.*

¹³⁸ Stephen E. Creager, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319, 333 (1983).

¹³⁹ *Trans World Airlines, Inc. v. City of San Francisco*, 228 F.2d 473, 474 (9th Cir. 1955).

¹⁴⁰ Marcia Gelbart, *Aide Asks about Getting Gates from US Airways at Philadelphia Airport*, PHILADELPHIA INQUIRER, August 22, 2002, at 1C.

¹⁴¹ *Id.*

¹⁴² 784 F.2d 91 (2d Cir. 1986).

¹⁴³ *Id.* at 95-96.

2. *Majority-in-Interest*

Such long-term agreements, particularly in an industry as volatile as the airline industry, may cause one to question their ultimate usefulness. Perhaps one of the most significant features of the long-term exclusive lease agreements has been the majority-in-interest clause (the MII clause). As defined in the Airline Operating Agreement and Terminal Building Lease at Pittsburgh International Airport (PIT), "[m]ajority-in-interest means, during any Fiscal Year, either: (1) forty percent (40%) in number of all Signatory Airlines which, in the aggregate, paid fifty percent (50%) or more of Landing Fees paid by all Signatory Airlines for the preceding Fiscal Year; or (2) all except one (1) of the Signatory Airlines regardless of the amount of landing Fees paid by such Signatory Airline."¹⁴⁴ The MII clauses "give airlines a voice in airport decisions affecting airport-airline financial commitments."¹⁴⁵ Airlines have, in effect, "power that ranges from the right to veto expansion at an airport, to the right to approve large capital projects, to the ability to adjust landing fees or terminal rental fees, to the right to approve bond sales to raise capital for new construction."¹⁴⁶

In *Air Canada, Inc. v. Dade County & American Airlines*,¹⁴⁷ several airlines brought action against Dade County, the operator of MIA, and one airline tenant, American, alleging that an agreement between American and the County for construction of a new terminal, to be used exclusively by American, was in violation of the agreements between the airlines and the County.¹⁴⁸ Specifically, the airlines argued that, under the terms of a 1954 Trust Agreement (Trust), they had a "contractual right to approve all airport projects which are to be funded by the issuance of airport revenue bonds under Section 210" of the Trust.¹⁴⁹ The airlines relied on language in Supplemental Agreements, granting MII airlines certain approval rights. That language read, in relevant part, "[a]dditional amendments to the projects . . . shall be subject to the approval of the Majority-

¹⁴⁴ Pittsburgh International Airport - Airline Operating Agreement and Terminal Building Lease 15 (on file with the author) [hereinafter Pittsburgh Agreement].

¹⁴⁵ Russell A. Klingaman, *Predatory Pricing and Other Exclusionary Conduct in the Airline Industry: Is Antitrust Law the Solution?*, 4 DEPAUL BUS. L. J. 281, 332 (1992).

¹⁴⁶ Imes, *supra* note 22, at 1079.

¹⁴⁷ No. 95-2037, 1998 U.S. Dist. LEXIS 2534 (S.D. Fla. Feb. 18, 1998).

¹⁴⁸ *Id.* at *2.

¹⁴⁹ *Id.*

In-Interest of Airlines.”¹⁵⁰ Holding that the Supplemental Agreements did not require such MII approval, the district court found “that the parties intended that the MII Airlines have approval over only those projects proposed by the County as amendments to the existing list of approved projects.”¹⁵¹ While the MII clause was not upheld in *Air Canada, Inc. v. Dade County*, such clauses remain an integral part of many of today’s existing lease agreements. “As of 1990, fifty-five airports in the United States functioned with MII clauses.”¹⁵²

B. NON-EXCLUSIVE AGREEMENTS

The other side of the exclusive lease coin reveals the non-exclusive lease agreement. Airlines which operate only a minimal number of flights at a given airport may opt for a non-exclusive lease.¹⁵³ Under such an arrangement, the facilities are shared among two or more airlines, each of which utilizes them during certain times of the day. This is cost-effective for the individual airlines, given that the lease charges are shared between them. The airport, in turn, derives benefits from the fact that its facilities are being efficiently utilized, and by retaining control of its facilities as a result of the non-exclusive lease.¹⁵⁴ At Kansas City International Airport (MCI), for example, “most key operational areas including hold rooms and gates are leased on a non-exclusive basis, meaning that the airport can re-lease those areas to other carriers if they are not fully used.”¹⁵⁵

At Love Field in Dallas (DAL), a 1998 agreement between American Airlines and Continental Airlines provides for the carriers to share two gates.¹⁵⁶ The airport’s Aviation Director ordered the share agreement pursuant to the city’s authority under a “scarce resources” clause contained in the agreement.¹⁵⁷ Under the agreement, each airline will have primary use of its own gate, but, at certain times of the day, each will

¹⁵⁰ *Id.* at *17.

¹⁵¹ *Id.* at *18.

¹⁵² Imes, *supra* note 22, at 1080.

¹⁵³ Letwin Interview, *supra* note 126.

¹⁵⁴ *Id.*

¹⁵⁵ *Kansas City Airport Bonds Get A2 Rating On Local Economy, Low-Cost Operations*, AIRPORTS, September 14, 1999, Vol.16, No. 37 at 382, available at <http://www.aviationnow.com>.

¹⁵⁶ *American, Continental Settle Differences Over Love Field Gate Sharing*, AVIATION DAILY, August 17, 1998, Vol. 333, No. 33 at 286, available at <http://www.aviationnow.com>.

¹⁵⁷ *Id.*

have access to the other's main gate.¹⁵⁸ Such a clause permits effective and efficient allocation of resources and is made possible within the framework of a non-exclusive agreement, since the airport retains a greater degree of control over its assets than would be the case in an exclusive lease agreement.¹⁵⁹

C. SIGNATORY AND NON-SIGNATORY AIRLINES

In addition to the lease agreements being classified as exclusive or non-exclusive, the individual airlines are designated as either signatory or non-signatory, depending upon whether or not they have signed a lease agreement for a specified duration. A signatory airline "has an airline operating agreement and terminal building lease substantially identical in all respects . . . and with the same expiration date."¹⁶⁰ At Denver International Airport (DIA) "[a]irlines that have executed qualifying lease agreements with the City ("signatory airlines") pay different rental rates than airlines that do not have such agreements ("non-signatory airlines"), and signatory airlines receive a credit for their share of the airport's net revenues."¹⁶¹ "Non-signatory airlines pay rates that are 20% higher than the rates charged to signatory airlines, and non-signatory airlines are not credited with any portion of net airport revenues."¹⁶² Such a 20% premium exists for non-signatory carriers operating at Pittsburgh International Airport (PIT) as well, and is the generally accepted industry standard.¹⁶³ The airport charges a premium to offset the fact that non-signatory airlines are not committing themselves to a lease for a specified term.¹⁶⁴

D. USER CLASSIFICATIONS

This leads us to the classification of the two distinct types of users of airport facilities, and the various calculation methods employed to determine their respective fees. "Airports collect the bulk of their revenues from two general groups of users: aeronautical users, such as commercial (passenger) airlines, and

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Pittsburgh Agreement, *supra* note 144, at 21.

¹⁶¹ Transworld Airlines, Inc. v. City of Denver, No.1995 DOT Av. LEXIS 456, at *9 (July 21, 1995).

¹⁶² *Id.*

¹⁶³ Informational brochure: Fees, Charges and Operational Information, 2003, Pittsburgh International Airport (copy on file with the author).

¹⁶⁴ *Id.*

non-aeronautical concessionaires, including car rental agencies, parking lots, restaurants, gift shops, and other small vendors.”¹⁶⁵ Although the latter group is not the focus of this article, a brief discussion of concessionaire agreements and their fees is nonetheless appropriate, given that such agreements have a significant impact on the aeronautical user agreements.

1. *Non-Aeronautical Users*

One example of a non-aeronautical concessionaire agreement is between the Port Authority of New York and New Jersey (Port Authority), which is the operator of Newark International Airport (EWR), and of independent concessionaires.

Under the terms of the lease, concessionaires have an exclusive or semi-exclusive right to sell various merchandise including newspapers in a particular terminal. For this right, the concessionaires pay a fixed base rent plus approximately 17-1/2 percent of their gross sales. These lease payments from the concessionaires are shared between the Port Authority and the airline[s].¹⁶⁶

Individual concessionaires enter into these special lease agreements to gain the right to use the terminal space, but “use of that space is subject to the ultimate control and regulation of the Port Authority.”¹⁶⁷

Another form of this type of agreement may be found between airports and rental car companies. At Minneapolis-St. Paul Metropolitan Airport (MSP), agreements between the Metropolitan Airports Commission (MAC) and rental car companies are further categorized as “off-Airport” and “on-Airport.”¹⁶⁸ “Off-Airport rental car companies pick up customers at the Airport, but do not otherwise rent space . . . on Airport property.” “On-Airport rental car companies rent space at the Airport from MAC and maintain service counters . . . on Airport property.”¹⁶⁹ Under MAC Ordinance 85, the fee for off-Airport companies is 8.5% of gross receipts for those transactions taking place on airport property. While not subject to Ordinance 85, on-Airport companies still pay a fee of 8.5% of gross revenues (all of which

¹⁶⁵ *Air Transport Ass’n of Am. v. Dep’t of Transp.*, 119 F.3d 38, 39 (D.C. Cir. 1997).

¹⁶⁶ *Gannett Satellite Info. Network, Inc., v. Stephen Berger*, 716 F. Supp. 140, 143 (D. N.J. 1989).

¹⁶⁷ *Id.* at 156.

¹⁶⁸ *Enter. Leasing Co. v. Metro. Airports Comm’n*, 250 F.3d 1215, 1217 (8th Cir. 2001).

¹⁶⁹ *Id.* at 1216 n.1.

are necessarily presumed to have occurred on Airport property), "as well as rental fees based on the amount of Airport space they occupy."¹⁷⁰ In *Enterprise Leasing Co. v. Metropolitan Airports Commission*, the Eighth Circuit Court of Appeals held that MAC was operating within its statutory authority in imposing such fees.¹⁷¹ The *Enterprise* court also deemed the 8.5% fee to be reasonable, noting other airports' fees to be as high as 10% of gross revenues.¹⁷²

2. Aeronautical Users

Aeronautical users consist primarily of passenger-carrying airlines, although air cargo and general aviation operations are also included.¹⁷³ The source of the airport revenues generated by these aeronautical users may be traced to the fee structure and the accounting method employed at a particular airport.¹⁷⁴

E. FEE STRUCTURES

There are two basic types of fee structures in use between airports and airlines: the residual model and the compensatory model.¹⁷⁵ Under the residual cost method, "[t]he airline assumes the greater financial risk by guaranteeing payment of airport costs."¹⁷⁶ Conversely, under the compensatory method, "[t]he airport authority assumes the financial risk for its operations, and charges airlines on a cost-recovery basis."¹⁷⁷ A third finance method, known as the modified compensatory model, is in use at PIT.¹⁷⁸ These finance methods are chosen by the airport operator and each method has its own unique advantages and disadvantages.

1. Residual Method

Under the residual model, all revenues (including concessionaire revenues) generated at the airport are offset against all costs.¹⁷⁹ Any residual revenue is refunded to the airlines at year

¹⁷⁰ *Id.* at 1216.

¹⁷¹ *Id.* at 1223.

¹⁷² *Id.* at 1222 n.10.

¹⁷³ Hardaway, *supra* note 100, at 54.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Letwin Interview, *supra* note 126.

¹⁷⁹ *Id.*

end, in proportion to their level of usage of the airport.¹⁸⁰ *A fortiori*, any deficit is correspondingly charged to the airlines.¹⁸¹ The impact on the tenant airlines of the non-aeronautical concessionaire agreements discussed *supra*, is most prominent in this model.¹⁸² The airport develops a budget, making necessary modifications at mid-year. Any surplus or deficit in revenue as a result of gains or losses relating to the concessionaire agreements is reflected in this budgetary recalculation process. The amount refunded to the airlines in the event of a surplus, or, conversely, the amount charged to the airlines in the event of a deficit, is directly impacted by the concessionaire agreements.¹⁸³ At Stapleton International Airport (Stapleton) in Denver, Colorado, concessionaire "revenues exceed the costs attributed by Denver for the provision and use of the facilities."¹⁸⁴ The City and County of Denver, as owner and operator of Stapleton, retains this surplus revenue in the Stapleton Capital Improvement and Replacement Fund, which has "[h]istorically . . . been used for capital expenditures and extraordinary maintenance costs at Stapleton."¹⁸⁵ Such a practice exemplifies the overlap and impact of non-aeronautical concessionaire agreements upon aeronautical user agreements. In *Northwest Airlines, Inc. v. County of Kent, Michigan*,¹⁸⁶ the tenant airlines challenged the validity of the fee structure at Kent County International Airport (Kent). The claim, in relevant part, challenged Kent's allocation of revenues and costs among the three distinct user groups: commercial airlines, general aviation, and non-aeronautical concessionaires.¹⁸⁷ Under the airport's accounting system, general aviation was being undercharged, while concessionaires were being overcharged.¹⁸⁸ The airlines alleged, *inter alia*, that a portion of the airfield costs should have been allocated to the concessionaires.¹⁸⁹ Affirming the Sixth Circuit Court of Appeals, the United States Supreme Court held that the fee structure was reasonable and applied the three part test developed in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*,

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *City of Denver v. Cont'l Airlines*, 712 F. Supp. 834, 835 (D. Colo. 1989).

¹⁸⁵ *Id.*

¹⁸⁶ 510 U.S. 355 (1994).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 356.

¹⁸⁹ *Id.*

*Inc.*¹⁹⁰ Under the *Evansville-Vanderburgh* test, a fee is held to be reasonable if it reflects a "uniform, fair and practical standard," is based upon a fair approximation of use, "and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred."¹⁹¹ The residual method was in use at Los Angeles International Airport (LAX) until the end of 1992; however, the City of Los Angeles, the operator of LAX, elected to adopt the compensatory method instead.¹⁹² Perhaps anticipating a challenge to the reasonableness of its fee structure, the city concluded "that the practice of setting the annual landing fee so that total airport revenues would match total airport expenses resulted in a landing fee that was heavily subsidized by non-aeronautical revenues."¹⁹³

2. *Compensatory Method*

Under the compensatory model, airline rates are fixed via arms-length negotiations between airport and airline representatives.¹⁹⁴ Such rates vary among tenant airlines, based upon their status as signatory or non-signatory. Any surplus revenue goes to the airport, and any budget deficit is borne by the airport.¹⁹⁵ The terminal complex rental fees for signatory airlines at PIT are calculated by multiplying the number of square feet of leased space by the terminal complex rental rate.¹⁹⁶ The terminal complex rental rate is "[d]etermined by dividing the net cost of the Terminal Complex Area . . . by the total number of square feet of Leased Premises of *all* Signatory Airlines"¹⁹⁷ At Denver International Airport (DIA), "[t]he City uses a "commercial compensatory" methodology to establish the terminal complex rental rates.¹⁹⁸ Under this methodology, the passenger airlines pay the fully allocated cost of the space that they lease or use . . . plus their share of common use facilities and services. Signatory airlines would pay an average terminal complex rental

¹⁹⁰ 405 U.S. 707 (1972).

¹⁹¹ *Id.* at 714, 716-17.

¹⁹² *L.A. Dep't of Airports v. United States Dep't of Transp.*, 103 F.3d 1027, 1029 (D.C. Cir. 1997).

¹⁹³ *Id.*

¹⁹⁴ Letwin Interview, *supra* note 126.

¹⁹⁵ *Id.*

¹⁹⁶ Pittsburgh Agreement, *supra* note 144, at 69.

¹⁹⁷ *Id.* at 70 (emphasis added).

¹⁹⁸ *Transworld Airlines, Inc. v. City of Denver*, 1995 DOT Av. LEXIS 456, at *8 (July 21, 1995).

rate of \$61.98 per square foot, and non-signatory airlines would pay \$74.38 per square foot.”¹⁹⁹ Common use facilities are defined as “[t]hose areas and facilities used in common by the several airlines.”²⁰⁰ Such areas include “[l]anding fields, runways, aprons, taxi-ways, sewerage, water facilities, various lights and signals, control tower service and other conveniences supplied by the airport.”²⁰¹ As can be seen from these figures, non-signatory airlines are charged a 20% premium as compared to signatory airlines, an industry-wide standard.

The modified compensatory model, not surprisingly, features a combination of the other two models. Individual portions of the lease agreement subscribe to either the residual or the compensatory model.²⁰² Airside agreements (gates and gate space) may be a combination of the two models, and landside agreements (ticket counter space) may be a combination of the two models.²⁰³ Those portions of the agreement that subscribe to the residual model are accordingly subject to the residual rules as relates to budget surpluses and deficits, as discussed *supra*. Similarly, those portions of the agreement which follow the compensatory model must conform to the compensatory rules pertaining to surpluses and deficits.²⁰⁴

A variant of the above method was used at the Raleigh-Durham Airport in *Raleigh-Durham Airport Authority v. Delta Air Lines, Inc.*²⁰⁵ Known as a “cost of services system,” this method separates each operating area’s revenues and costs from the others.²⁰⁶ The two principle operating areas are land-side (terminal, concessions) and airside (aviation) operations.²⁰⁷ This “[t]wo cash register system . . . requires land-side and airside operations to support themselves independently of the profits or losses of the other.”²⁰⁸

In addition to the basic models used for calculating fees and rates, the location of the specific facilities has also been the subject of lease negotiations. Airlines place a certain inherent value

¹⁹⁹ *Id.*

²⁰⁰ *Transworld Airlines, Inc. v. City of San Francisco*, 220 F.2d 473, 474 (9th Cir. 1956).

²⁰¹ *Id.*

²⁰² Letwin Interview, *supra* note 126.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ 429 F. Supp. 1069, 1079 (D.N.C. 1976).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1078.

²⁰⁸ *Id.*

on the location of their leased space, with convenience and accessibility for their passengers among the prime considerations. In *Southern Airways, Inc. v. City of Atlanta*,²⁰⁹ Southern Airways was dissatisfied with the allocation plan for future gate space, to be made available as a result of construction of a proposed mid-field terminal at Atlanta Hartsfield International Airport (ATL).²¹⁰ Southern proposed that the average rent cost per square foot be increased or decreased, depending on the location of the space, ranging from a 25% premium to a 25% discount.²¹¹ After unsuccessful attempts to resolve the dispute with Eastern Air Lines, a competitor airline, "Southern requested the city of Atlanta to rule upon the matter. The city refused to do so, stating that 'gate allocations is a matter for the airlines to agree upon among themselves.'"²¹² In contrast to the policy at ATL, PIT allocates space based on the total number of assigned aircraft parking positions held by signatory airlines. Under this system, each signatory airline with fewer than fourteen assigned aircraft parking positions is entitled to preferential assignment of one position; for those signatory airlines with fourteen or more assigned aircraft parking positions, fifteen percent of the total number are preferentially assigned. The balance of these parking positions is exclusively assigned.²¹³

3. *Landing Fees*

The last, and perhaps most significant, element of the agreements to be discussed is landing fees. The typical landing fee structure is based upon aircraft weight and the number of landings, "the weight of each plane to be calculated by taking the maximum allowable landing weight . . . as fixed by the Federal Aviation Administration."²¹⁴ The landing fees are expressed in terms of a rate per one thousand pounds of maximum allowable landing weight. In an agreement entered into in 1971 between the Raleigh-Durham Airport Authority and its tenant commercial airlines, the rate was thirteen cents per one thousand pounds landed.²¹⁵ At Los Angeles International Airport (LAX),

²⁰⁹ *S. Airways, Inc. v. City of Atlanta*, 428 F. Supp. 1010 (N.D. Ga. 1977).

²¹⁰ *Id.* at 1013.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Pittsburgh Agreement, *supra* note 144, at 36.

²¹⁴ *Raleigh-Durham Airport Auth. v. Delta Air Lines, Inc.*, 429 F. Supp. 1069, 1070 (E.D.N.C. 1976).

²¹⁵ *Id.*

the rate was calculated using the residual method, discussed *supra*, until 1992, and was thus variable from year to year. In 1982, the rate was seventy-five cents per one thousand pounds; in 1989 it decreased to twenty-six cents; in 1992 it was fifty-one cents per one thousand pounds.²¹⁶ The 2003 published rate for non-signatory airlines at the Pittsburgh International Airport (PIT) was \$2.09 per one thousand pounds.²¹⁷ To provide a frame of reference, at the maximum allowable landing weight for a Boeing 737-400 airliner of 121,000 pounds, the 1971 rate at Raleigh-Durham would have yielded a landing fee of \$15.73 per landing (acknowledging that the B-737-400 was not yet in use at that time).²¹⁸ By comparison, the 2003 PIT rate results in a landing fee of \$252.89.²¹⁹ This seemingly wide disparity in fees is due in part to the thirty-year lapse of time, as well as to the difference in rates for signatory and non-signatory airlines.

There have been numerous challenges to the reasonableness of the fees established by airports. In *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.*,²²⁰ several airlines challenged the constitutionality of a one dollar per commercial airline passenger charge, intended "to help defray the costs of airport construction and maintenance."²²¹ The United States Supreme Court reversed the lower courts' decisions and validated such a charge, provided that it reflects a "uniform, fair and practical standard," is based upon a fair approximation of use, "and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred."²²²

In *New England Legal Foundation v. Massachusetts Port Authority*,²²³ airport users challenged the validity of a new landing fee structure at Boston-Logan International Airport (BOS).²²⁴ In 1988, the Massachusetts Port Authority (Massport) enacted a program, known as the Program for Airport Capacity Efficiency (PACE), designed to "maximize the efficient use of Logan Air-

²¹⁶ L.A. Dep't of Airports, v. United States Dep't of Transp., 103 F.3d 1027, 1029 (D.C. Cir. 1997).

²¹⁷ Informational brochure: Fees, Charges and Operational Information, 2003, Pittsburgh International Airport (copy on file with the author).

²¹⁸ US AIRWAYS B-737 PILOT'S HANDBOOK, 2-6.

²¹⁹ *Id.*

²²⁰ 405 U.S. 707, 708 (1972).

²²¹ *Id.* at 709.

²²² *Id.* at 716-17.

²²³ 883 F.2d 157, 159 (1st Cir. 1989).

²²⁴ *Id.*

port.”²²⁵ The new landing fee structure contained within PACE departed from the standard landing weight-based method and, instead, calculated landing fees based on a flat fee of \$91.78 per landing, plus a charge of \$0.5417 per one thousand pounds of landed aircraft weight.²²⁶ This resulted in disproportionately higher fees for smaller aircraft and a reduction in fees for airlines. Relying on *Evansville-Vanderburgh*, the district court held that the fee structure was “reasonable because it had been fixed according to [a] uniform, fair and practical standard . . . and was non-excessive in comparison with the governmental benefit conferred.”²²⁷ The First Circuit Court of Appeals affirmed the lower court’s decision.

*Indianapolis Airport Authority v. American Airlines, Inc.*²²⁸ involved another dispute over the reasonableness of fees charged. After the expiration of several airlines’ leases, the Indianapolis Airport Authority unilaterally imposed a new user fee on the airlines, in the form of an increase in the per square foot rental charge, from \$17.55 to \$21.95.²²⁹ The airlines alleged that this fee, allocated on the amount of space used, assigned disproportionately lower costs to smaller users such as concessionaires.²³⁰ A second component of the disproportionate charges resulted from the Airport Authority’s failure to collect landing fees from general aviation users. The airlines, meanwhile, were subjected to an increase in the landing fee rate, from \$0.46 to \$0.6771 per one thousand pounds gross landing weight.²³¹ The Airport Authority reasoned that the cost of collecting those fees from general aviation users would equal nearly half of the amount of the fee itself.²³² Instead, the Airport Authority imposed a “fuel flowage fee,” a charge per gallon of fuel consumed. The flowage fee, however, failed to generate adequate revenue in relation to general aviation costs. The Seventh Circuit Court of Appeals affirmed the district court’s holding that the disproportionality of the fee was unreasonable and the court invalidated the fee.²³³

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 162.

²²⁸ 733 F.2d 1262 (7th Cir. 1984).

²²⁹ *Id.* at 1275.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 1276.

V. CONCLUSION

During the more than forty years of regulation, the airlines have enjoyed government subsidies, protection from competition, and anti-trust immunity. Since the advent of deregulation in 1978, however, the airline industry has undergone monumental changes. Dozens of upstart airlines have emerged and failed under this deregulated structure. The relatively few new-entrant, low-cost carriers that have survived have gained a foothold and now provide formidable competition to the established carriers that remain. These new-entrant carriers take issue with the long-term, exclusive agreements between established carriers and airport proprietors. But, through such leases, the established carriers have provided a predictable revenue stream for airport proprietors for decades. It is the very existence of these agreements which has made available the facilities that the new-entrant carriers now enjoy. Revenues generated through these agreements have been used to fund airport construction and expansion projects, the benefit of which has accrued to new-entrant carriers in recent years. The established carriers have subsidized the infrastructure of today's aviation environment in such areas as the development, expansion, and renovation of hub airports. While competitors raise objections to the existing agreements on anti-trust grounds, they nevertheless derive revenues from these facilities without having incurred the commitments and obligations associated with such agreements.

While non-signatory airlines are charged an industry-standard premium of twenty percent above the lease rates for signatory carriers, this differential is designed to compensate the airport proprietor for the carriers' unwillingness to commit to a lease for a specified term. It does not address the fact that the established carriers have incurred long-term obligations in exchange for their long-term, exclusive leases. Recognizing the vast obligations and commitments assumed by the established carriers as a result of entering into long-term agreements many years ago, some commensurate level of contribution by the new-entrant carriers would be appropriate, such as requiring a portion of revenues to be directed to an airport improvement fund, whether nationally or at individual airports. Contributions from carriers which have not participated in long-term leases would be at a higher percentage than their competitors. Under such a system, all carriers could choose to avail themselves of the benefits of long-term lease agreements, provided they are willing to assume the obligation of commitment.

Finally, the composition of the airport's fee structure in lease agreements has also seen challenges from the airlines. These challenges have most commonly been in reference to the allocation of costs and revenues among the airport's users, namely aeronautical and non-aeronautical. As government entities, airports and their proprietors may establish these fees. As long as the airport and its facilities are accessible to its users on a non-discriminatory basis, the fees are generally deemed to be reasonable. Potential future disputes may be avoided by establishing a nationwide formula for allocation of costs and revenues, with individual adjustments for specific airports to be negotiated between the carriers and the airport proprietor.

Comments

