

2007

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Recommended Citation

Roy Goldberg, *Airline Challenges to Airport Abuses of Economic Power*, 72 J. Air L. & Com. 351 (2007)
<http://scholar.smu.edu/jalc/vol72/iss2/3>

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AIRLINE CHALLENGES TO AIRPORT ABUSES OF ECONOMIC POWER

ROY GOLDBERG*

“O, it is excellent to have a giant’s strength, but it is tyrannous to use it like a giant.”

— William Shakespeare (Measure for Measure)

AIRPORTS ARE ESSENTIAL facilities for commercial airlines. Access to an airport’s runways and terminal building is critical for an airline to serve the relevant geographic and population markets, as well as to connect through-passengers to domestic and international flights. This reality imbues airports with economic power that either constitutes or closely resembles monopoly power—that is, the power to impose economic rents and conditions without the check of true competition. Such power puts many airports in a highly sensitive position: the rates, charges and other terms and conditions they impose for use of the airport can dictate whether the airline can serve that airport, and whether it can do so efficiently and profitably.

A significant number of major airports are operated by responsible administrators and oversight boards that strive hard to be fair and reasonable in dealing with the airline industry. Following meaningful consultations, they reach reasonable agreements with airlines as to the rates to be charged for landing fees, terminal rents and other facilities and services. However, the exceptions that unfortunately exist can wreak economic havoc on airlines that fall victim to an airport’s abuse of its economic power. In today’s environment, airlines should be especially wary of the airport that professes to be able to act like a purely private, commercial landlord—free to act entirely out of its own selfish, economic interests. Fortunately, in the United States there are multiple legal tools available to airlines confronted

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with an airport's economically abusive and anticompetitive conduct.

This article discusses three primary such tools: (1) the prohibitions against an airport unjustly discriminating against airlines; (2) the laws that restrict how much airports can charge airlines for use of the airport; and (3) the relevant antitrust laws. Airlines should consider all of these tools in seeking to protect themselves against economically oppressive conduct by airports.

I. THE PROHIBITIONS AGAINST UNJUST DISCRIMINATION BY AIRPORTS

Although airports in the United States generally are authorized to impose rates and charges for use of runways, terminal buildings, and other airport facilities (either by lease agreements, ordinance, or otherwise), and to impose other conditions for use of the airport, they do not have *carte blanche* authority to act like private, commercial landlords. Because airports are essential facilities for airlines (and their passengers), federal laws place important limits on the exercise of an airport's rate-setting and other functions. A paramount limitation is the law against unjust discrimination among similarly situated airlines.

A. THE AIRPORT AND AIRWAY IMPROVEMENT ACT, 49 U.S.C. 47107

A primary law in the United States against unjust discrimination by airports is Section 511 of the Airport and Airway Improvement Act of 1982 ("AAIA").¹ This law requires airports that receive federal grants for development projects to charge "reasonable" fees, and conditions approval of such funding by the U.S. Department of Transportation ("DOT") upon the airport's assurance that "the airport will be available for public use on reasonable conditions and *without unjust discrimination*."² The Act requires airports to ensure that "air carriers making

¹ See Pub. L. No. 97-248, 96 Stat. 686 (1982) (codified at 49 U.S.C. § 47107 (2006)).

² 49 U.S.C. § 47107(a)(1) (2006) (emphasis added). In *New York Airlines, Inc. v. Dukes County*, the court held that airlines enjoy a private right of action to challenge an airport's violation of section 511(a) of the AAIA, emphasizing that the "statute expressly identifies air carriers as the class Congress intended to benefit." *N.Y. Airlines, Inc. v. Dukes County*, 623 F. Supp. 1435, 1446 (D. Mass. 1985). However, some other courts have disagreed with and refused to follow this ruling. See, e.g., *Rocky Mountain Airways, Inc. v. County of Pitken*, 674 F.

similar use of the airport will be subject to *substantially comparable charges* . . . for facilities directly and substantially related to providing air transportation”³ To the extent that airline tenants are subject to different rates and charges, such differences must be “based on reasonable classifications, such as between . . . (i) tenants and nontenants; and (ii) signatory and non-signatory carriers”⁴

B. THE DOT POLICY ON AIRPORT RATES AND CHARGES

Section 113 of the Federal Aviation Administration Authorization Act of 1994 required the DOT to publish rules or guidelines for determining whether an airport fee is “reasonable.”⁵ In 1996, the Department issued its final Policy Regarding Airport Rates and Charges (“Policy Statement”).⁶

Supp. 312, 317–18 (D. Colo. 1987); *Ne. Jet Ctr. v. Lehigh Northampton Airport Auth.*, 767 F. Supp. 672, 685–86 (E.D. Pa. 1991).

³ § 47107(a)(2)(A) (emphasis added).

⁴ § 47107(a)(2)(B). The original language of the Act is preserved in a Federal Aviation Administration (“FAA”) Order:

Each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such *nondiscriminatory and substantially comparable rates, fees, rentals, and charges* with respect to facilities directly and substantially related to providing air transportation and other such nondiscriminatory and substantially comparable rules, regulations, and conditions as are applicable to *all such carriers which make similar use of such airport and which utilize similar facilities*, subject to reasonable classifications such as tenant or nontenant, and signatory carriers and nonsignatory carriers. Such classification or status as tenant or signatory shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classification or status.

Fed. Aviation Admin., Airport Compliance Requirements, Order 5190.6A § 1–14(a) (Oct. 2, 1989) (emphasis added).

⁵ 49 U.S.C. § 47129(b) (2006).

⁶ Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31,994, 31,994 (June 21, 1996) [hereinafter “Policy Statement”]. As a result of a successful challenge by the Air Transport Association to portions of the Policy Statement, only parts of it remain in effect. *See Air Transp. Ass’n of Am. v. Dep’t of Transp.*, 119 F.3d 38, 40, 45 (D.C. Cir. 1997). The Policy Statement provided for landing fees to be derived pursuant to a cost-based approach. Policy Statement, *supra*, at 32,019–20. By contrast, fees for non-airfield uses, such as hangars and terminals, could be set by “any reasonable methodology” including, among other things, appraised fair market value. Policy Statement, *supra*, at 32,020–21. As discussed in the text accompanying footnotes 63–64, *infra*, the court in *Air Transport Ass’n* held it was arbitrary and capricious for the DOT to differentiate between airfield fees and non-airfield fees, and vacated several sections of the Policy Statement, including Section 2.6, which stated that, “For other facilities and land not cov-

The Policy Statement sets forth provisions that are designed to prevent airports from improperly discriminating against air carriers. Under Section 3, “[a]eronautical fees may not unjustly discriminate against aeronautical users or user groups.”⁷ To achieve that objective:

The airport proprietor must apply a consistent methodology in establishing fees for comparable aeronautical users of the airport. When the airport proprietor uses a cost-based methodology, aeronautical fees imposed on any aeronautical user or group of aeronautical users may not exceed the costs allocated to that user or user group under a cost allocation methodology adopted by the airport proprietor that is consistent with this guidance, unless aeronautical users otherwise agree.⁸

Similarly, “costs properly included in the rate base—must be allocated to aeronautical users by a transparent, reasonable, and not unjustly discriminatory rate-setting methodology. The methodology must be applied consistently and cost differences must be determined quantitatively, when practical.”⁹ Where an airport charges different rates to airline tenants, there must be a factual basis for the different treatment.¹⁰ For example, an airport typically can charge more to a non-signatory carrier than a signatory carrier because:

The costs of serving a non-signatory carrier would ordinarily be higher than a compensatory rate reflecting the costs of serving exclusively signatory carriers. For example, non-signatory carriers may increase an airport proprietor’s risk of revenue fluctuation. The increased risk in turn would justify higher reserves. In addition, the administrative costs of dealing with non-signatory carriers would ordinarily be higher. Further, an airport proprietor might be able to argue that due to their irregularity, or relative infrequency, operations by non-signatory carriers cost more to serve than a corresponding number of operations performed on a regular basis by signatory carriers. Each of these considerations would provide a justification for imposing a surcharge, in some amount, on non-signatory carriers.

ered by [the section governing fees imposed for use of the airfield], the airport proprietor may use any reasonable methodology to determine fees, so long as the methodology is justified and applied on a consistent basis to comparable facilities” Policy Statement, *supra*, at 32,020–21; *see also Air Transp. Ass’n of Am.*, 119 F.3d at 43–44.

⁷ Policy Statement, *supra* note 6, at 32,230.

⁸ *Id.*

⁹ *Id.* at 32,021.

¹⁰ *See id.* at 32,015–16.

In addition, signatory carriers usually assume obligations or responsibilities that non-signatory carriers do not undertake. Airport proprietors receive intangible benefits from having carriers at the airport undertake these additional responsibilities. A *surcharge for non-signatory carriers may be justifiable, in part, as compensation to the airport proprietor for the reduction in these intangible benefits when a carrier elects non-signatory status.*¹¹

Section 113 also created an expedited procedure for the DOT to give airlines and airports the ability to obtain prompt resolution of significant disputes over the reasonableness of new or increased airport fees.¹² The DOT must determine the reasonableness of a challenged fee or increase within 120 days of the complaint being filed.¹³ However, the statute does not provide a standard for the DOT to determine the reasonableness of a specific fee. In order to timely request such a determination of reasonableness under Section 47129, the carriers must file a written complaint “within 60 days after such carrier receives written notice of the establishment or increase of such fee.”¹⁴ “An airport owner or operator is considered to have imposed a fee on a carrier when it has taken all steps necessary under its procedures to establish the fee, whether or not the fee is being collected or carriers are currently required to pay it.”¹⁵

C. THE AIRLINE DEREGULATION ACT

The Airline Deregulation Act (“ADA”) contains an explicit preemption clause that reads: “[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.”¹⁶ However, Section 41713 also creates an exception from preemption for actions involving the exercise of proprietary powers and rights of “a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport”¹⁷ An airport can be expected to argue that its conduct constitutes a legitimate exercise of its proprietary powers as the owner and

¹¹ *Id.* (emphasis added).

¹² 49 U.S.C. § 47129(a)(1) (2006).

¹³ § 47129(c)(1).

¹⁴ § 47129(a)(1)(B).

¹⁵ Rules Applicable to Proceedings Concerning Airport Fees, 14 C.F.R. § 302.601(a) (2006).

¹⁶ 49 U.S.C. § 41713(b)(1) (2006).

¹⁷ § 41713(b)(3).

operator of the airport. For example, in *Montauk-Caribbean Airways, Inc. v. Hope*, the court found that the town of East Hampton was exercising its proprietary rights as owner of an airport in declining to modify a lease.¹⁸ However, there is also case law that supports the finding that airport fees are preempted if they are discriminatory and therefore not a valid exercise of proprietary powers.¹⁹ Under the proprietary powers exception to the ADA's general rule of preemption, a state or municipality that owns or operates an airport "has the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations."²⁰ "Those regulations must avoid even the appearance of irrational or arbitrary action."²¹

D. THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION

Discrimination against airlines by airports also may violate the Supremacy Clause of the U.S. Constitution,²² which invalidates state laws that "interfere with or are contrary to" federal law.²³ Congress can preempt state law by an express provision, or an intent to preempt state law may be inferred where Congress has enacted a sufficiently comprehensive scheme of federal regulation or where the federal interest is dominant so as to preclude state legislation in the same area.²⁴ Where Congress has not acted to completely supersede regulation by the states, state law is nullified to the extent that it conflicts with federal law.²⁵ "Challenges to the actions of airport operators based on the supremacy clause, including private actions against refusals by local airport proprietors to grant access to interstate carriers, have been recognized by the courts."²⁶

¹⁸ *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 96-97 (2d Cir. 1986).

¹⁹ *See Nat'l Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81, 89 (2d Cir. 1998).

²⁰ *Id.*

²¹ *Id.*

²² U.S. CONST. art. VI, cl. 2.

²³ *Chi. & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (citing *Gibbons v. Ogden*, 22 U.S. 1, 82 (1824)).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *N.Y. Airlines, Inc. v. Dukes County*, 623 F. Supp. 1435, 1442 (D. Mass. 1985) (citing *British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 564 F.2d 1002, 1010-11 (2d Cir. 1977)); *United States v. N.Y.*, 552 F. Supp. 255, 262-65 (N.D.N.Y. 1982), *aff'd*, 708 F.2d 92 (2d Cir. 1983); *see also Midway Airlines, Inc. v. County of Westchester*, 584 F. Supp. 436, 441-42 (S.D.N.Y. 1984).

E. INTERNATIONAL REQUIREMENTS

The Chicago Convention and many of the United States' bilateral air services agreements obligate the United States to ensure that airports charge foreign airlines the same fees as the U.S. airlines that operate similar services.²⁷ Article 15 of the Chicago Convention provides:

Every airport in a contracting State which is open to public use by its national aircraft shall likewise . . . be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities

Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,

(a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and

(b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.²⁸

In addition, in certain circumstances "the charges imposed for the use of airports and other facilities shall be subject to review by the [ICAO] Council" ²⁹

F. REPRESENTATIVE CASES

In *New England Legal Foundation v. Massachusetts Port Authority*, the court held that new landing fees at Boston's Logan Airport improperly discriminated against general aviation where the effect of the new fee structure was to drastically increase the landing costs of smaller aircraft while decreasing that of larger ones.³⁰ For example, the landing fee of a Beechcraft 1900 would increase by 306%, while that of a Boeing 747 would decrease by 45%.³¹ The First Circuit stated:

²⁷ Convention on International Civil Aviation preamble, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, available at http://www.icao.int/icao/net/arch/doc/7300/7300_orig.pdf [hereinafter Chicago Convention].

²⁸ Chicago Convention, *supra* note 27, art. 15.

²⁹ *Id.*

³⁰ *New England Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 169 (1st Cir. 1989).

³¹ *Id.* at 159; see also Fed. Aviation Admin., Investigation into Massport's Landing Fees, Docket 13-88-3 (Dec. 22, 1988) (The DOT determined that the methodology was unfair, unreasonable, and unjustly discriminatory because it penalized

The Secretary is required . . . to see that the project for which federal grant funds are expended "will be available for public use on fair and reasonable terms and *without unjust discrimination* [The applicable law] appears to us to establish as "reasonable" any fee or charge by the airport proprietor which fairly and rationally reflects the cost to users that are comparably situated. To make such an equation it is *essential that a methodology be established which is founded upon a principled, non-arbitrary basis.*³²

In *New York Airlines, Inc. v. Dukes County*, the carrier sought damages and injunctive relief because of the refusal by the Martha's Vineyard Airport Commission to grant it access to the Martha's Vineyard Airport.³³ New York Air had filed a formal request for permission to operate at the airport.³⁴ The Commission considered the request at a meeting, and refused to permit the airline to use the terminal and ramp facilities.³⁵ The refusal was based in part on a concern regarding the competition that would result with Provincetown-Boston Airways ("PBA"), a carrier that was already serving the airport, as some Commission members believed "that the proposed service was unnecessary since other carriers, including PBA and Brockway Air, already provided adequate service."³⁶ Some members also believed the airport's facilities could not adequately accommodate New York Air's larger DC 9-30 aircraft.³⁷

In denying a motion to dismiss by the airport commissioners, the court stated:

New York Air alleges facts sufficient to state a claim under Section 511(a) of the AIP. The allegation that New York Air was excluded from the Airport because of pretextual concern with the adequacy of facilities at the Airport supports the inference, as alleged, that there was no reasonable basis for the Commission's action. New York Air also claims that the Commission's refusal was unfair and discriminatory in that it was allegedly based on the opinion that existing service at the Airport was adequate and on concern with the potential effect on competition of New York Air's proposed service. The effect of the Commission's refusal is,

the smaller business aircraft "by allocating to them a disproportionate amount of airport costs.'").

³² *New England Legal Found.*, 883 F.2d at 169 (citations omitted; emphasis added).

³³ *N.Y. Airlines Inc. v. Dukes County*, 623 F. Supp. 1435, 1440 (D. Mass. 1985).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

arguably, to grant exclusive rights to carriers already providing service to the Airport. The complaint therefore sufficiently states a claim under § 1983 for a violation of Section 511(a) of the AIP.³⁸

In a case involving Aerolineas Argentinas, the DOT and the U.S. Court of Appeals for the D.C. Circuit made it clear that airport fees may not be facially discriminatory against similarly situated air carriers. The D.C. Circuit affirmed the DOT's determination that fees imposed on U.S. carriers at the airport in Buenos Aires that were three times higher than those paid by the domestic Aerolineas Argentinas constituted unreasonable discrimination.³⁹ The discriminatory situation arose when the Argentine government unlinked its peso from the U.S. dollar in early 2002, causing the value of the peso to fall to approximately 33 U.S. cents.⁴⁰ When the Buenos Aires airport attempted to impose fees in dollars, the Argentine carrier succeeded in persuading an Argentine court to enjoin the rule, and the U.S. carriers lost their Argentine court battle.⁴¹ As a result, Aerolineas was only required to pay one-third the fees of its U.S. competitors.⁴²

Responding to a petition filed by U.S. carriers, the DOT found this to be an "unreasonable discriminatory . . . practice against" the U.S. carriers.⁴³ It concluded that "'the imposition of higher fees at Ezeiza airport on U.S. carriers than those paid by Aerolineas Argentinas constitute[d], on its face, the type of activity that 49 U.S.C. § 41310 was intended to reach.'"⁴⁴ As a remedy, Aerolineas could not continue to fly to the United States unless it placed in escrow, in the United States, the difference between what it paid in user fees in Argentina and what the U.S. airlines were paying there.⁴⁵

³⁸ *Id.* at 1448.

³⁹ *Aerolineas Argentinas S.A. v. U.S. Dep't of Transp.*, 415 F.3d 1, 3 (D.C. Cir. 2005).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.* at 2–3.

⁴³ *See id.* at 3.

⁴⁴ *See id.*; 49 U.S.C. § 41310(c)(1)(A)–(d)(1) (2006) (stating "An air carrier . . . may file a complaint" which authorizes the DOT to "take actions . . . in the public interest to eliminate an activity of a government of a foreign country that is 'an unjustifiable or unreasonable discriminatory, predatory, or anticompetitive practice against an air carrier.'").

⁴⁵ *See Aerolineas Argentinas*, 415 F.3d at 2.

In affirming, the D.C. Circuit rejected the foreign carrier's argument that conflicting decisions by the Argentine courts do not amount to a "discriminatory, predatory, or anticompetitive practice."⁴⁶ The court pointed to the treaty between Argentina and the United States, which provided that "[u]ser charges, imposed by the competent charging authority of the other Party shall be just, reasonable, and non-discriminatory. Airlines shall not be required to pay charges higher than those paid by airlines of the charging Party."⁴⁷ It added that "Aerolineas offer[ed] no reason to believe the DOT acted unreasonably in concluding that charging Argentine and United States carriers different rates was an 'unreasonable discriminatory . . . practice' under section 41310(c)."⁴⁸

In *City of Pompano Beach v. FAA*, the court upheld an FAA determination that lease terms for a fixed base operator at the Pompano Beach Airport were unjustly discriminatory because of the more favorable terms granted in another lease to a competing FBO.⁴⁹ According to the court:

The City attempted to justify each of the discriminatory provisions in the proposed Brettman lease, arguing that they were incorporated to protect the City's and thus the public's interest. These justifications, which might have provided an adequate reason for the City's modification of its standard fixed base operator lease over time, were insufficient here, in light of the City's conduct vis-à-vis Brettman. Key to our affirmance of the hearing officer's findings and order is the fact that *the City's contemporaneous treatment of the Beckers and Brettman differed so markedly*. The City last amended its lease with John Becker and Pompano Air Center in November 1978; Brettman applied for a lease May 30, 1979; the City granted Executive Aviation a lease in July 1979; and the City then granted Brian Becker a lease in November 1981. *The differences in these leases have already been noted; we find no reasonable explanation or justification in the record as to why they exist.*⁵⁰

The court added:

Contrary to the City's foreboding warning and admonition, our affirmance of the hearing officer's findings and order is *not* a signal to cities and potential lessees of municipal property that all

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 7.

⁴⁹ *City of Pompano Beach v. Fed. Aviation Admin.*, 774 F.2d 1529, 1531-32, 37-38 (11th Cir. 1985).

⁵⁰ *Id.* at 1544 (emphasis added).

municipal leases must be identical. We applaud a city's desire to learn from experience and to be ever watchful for improvements in the way it does business in order to protect the public's interest; modifications in standard contracts and leases is one way to accomplish this worthy goal.⁵¹

In *American Airlines, Inc. v. Dept. of Transp.*, the Fifth Circuit invalidated an ordinance passed by the cities of Dallas and Fort Worth that imposed restrictions on airline passenger service from a particular airport.⁵² The court held that the ordinance was not a valid exercise of the cities' proprietary powers and was preempted by the ADA.⁵³

We do not limit the scope of proprietary rights to those which have been previously recognized. Thus, we are open to assessing whether the restrictions in the Ordinance are reasonable and non-discriminatory rules aimed at advancing a previously unrecognized local interest. The Fort Worth petitioners fail, however, to offer a viable alternative justification for the route limitations that might support extending the recognized scope of a proprietor's powers under § 4173(b)(3). To allow enforcement of the Ordinance under the proprietary powers exception extends that exception beyond its intended limited reach.⁵⁴

As the above cases demonstrate, the DOT and the courts are prepared to protect airlines against unjust discrimination by airports.

II. OTHER LAWS THAT RESTRICT HOW MUCH AIRPORTS CAN CHARGE AIRLINES FOR USE OF THE AIRPORT

While many laws governing airport rates and charges are aimed at prohibiting unjust discrimination among airlines, there is also recognition that even nondiscriminatory fees can be unlawful if they allow the airport to receive more revenue than is necessary to cover its actual costs.

A. THE ANTI-HEAD TAX ACT, 49 U.S.C. § 40116(e)(2)

Under the Anti-Head Tax Act ("AHTA"), a state or political subdivision, or any person that has purchased or leased an airport, "may not levy or collect a tax, fee, head charge, or other

⁵¹ *Id.* at 1544-45.

⁵² *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 808 (5th Cir. 2000).

⁵³ *Id.* at 804-05.

⁵⁴ *Id.* at 808 (citations omitted).

charge on (1) an individual traveling in air commerce; (2) the transportation of an individual traveling in air commerce; (3) the sale of air transportation; or (4) the gross receipts from that air commerce or transportation” unless permitted under a provision in the Act.⁵⁵ One such provision authorizes airports to charge “reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by [a] State or subdivision.”⁵⁶ This language applies to airport terminal charges as well as landing fees, and although the AHTA allows only “reasonable” rental charges, it does not set standards for determining reasonableness of the fees.⁵⁷

B. DOT POLICY STATEMENT

Under Section 2.2 of the DOT Policy Statement Regarding Airport Rates and Changes, “[r]evenues from fees imposed for use of the airfield (‘airfield revenues’) *may not exceed the costs* to the airport proprietor of providing airfield services and airfield assets currently in aeronautical use unless otherwise agreed to by the affected aeronautical users.”⁵⁸ The Policy Statement contains several additional provisions which offer specific guidance as to what an airport can and cannot do in raising funds through landing and terminal rates and charges. For example, under Section 2.4.5(b), which governs the allocation of the capital costs of facilities used for both aeronautical and non-aeronautical uses, “[t]he portion of shared costs allocated to aeronautical users . . . should not exceed an amount that reflects the respective aeronautical purposes and proportionate aeronautical uses of the facility in relation to . . . non-aeronautical use of the facility.”⁵⁹ Additionally, “the costs of facilities not yet built and operating may not be included in the rate base.”⁶⁰

C. FIFTH AMENDMENT TO THE U.S. CONSTITUTION

Under certain circumstances, a fee imposed on airlines also may constitute an unlawful taking, in violation of the Fifth Amendment to the Constitution, which provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due

⁵⁵ 49 U.S.C. § 40116(b) (2006).

⁵⁶ § 40116(e)(2).

⁵⁷ *Nw. Airlines, Inc. v. Kent County*, 501 U.S. 355, 365–66 (1994).

⁵⁸ Policy Statement, *supra* note 6, at 32,019 (emphasis added).

⁵⁹ *Id.* at 32,020.

⁶⁰ *Id.*

process of law; nor shall private property be taken for public use, without just compensation."⁶¹

D. REPRESENTATIVE CASES

In *Massachusetts v. United States*, the U.S. Supreme Court held that a "flat fee" registration tax imposed by the U.S. government on all civil aircraft that fly in the navigable airspace of the United States was lawful "[s]o long as the charges do not discriminate . . . , are based on a fair approximation of use of the system, and are structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits to be supplied"⁶² The Court added that the "requirement that total revenues not exceed expenditures places a natural ceiling on the total amount that such charges may generate"⁶³

In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, the plaintiffs challenged a one dollar charge by state and municipal authorities "per commercial airline passenger to help defray costs of airport construction and maintenance."⁶⁴ The Supreme Court held that such fees did not violate the federal Constitution, for the same charges were imposed on both interstate and intrastate flights, and thus they reflected a "fair, if imperfect, approximation of the use of facilities for whose benefit they [were] imposed," and they were not shown to be excessive in relation to the costs incurred by the taxing authorities.⁶⁵

During the 1990s, the DOT twice ruled it was unlawful for Los Angeles International Airport ("LAX") to use fair market value to determine landing fees.⁶⁶ In the first proceeding ("LAX I"), the DOT concluded that "[h]istoric cost is the simplest, most direct, and easiest-to-verify measure of cost. Moreover, in a reg-

⁶¹ U.S. CONST. amend. V (the 14th Amendment applies the same prohibition to state and local governments).

⁶² *Massachusetts v. United States*, 435 U.S. 444, 466-67 (1978).

⁶³ *Id.* at 467; *see also id.* at 463 n.19 (a user fee must be a "fair approximation of the cost of benefits supplied").

⁶⁴ *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 709 (1972), *superseded by statute*, Anti-Head Tax Act, 49 U.S.C. § 40116 (2006).

⁶⁵ *Id.* at 717-19.

⁶⁶ Los Angeles Int'l Airport Rates Proceeding, Order 95-6-36, 1995 DOT Av. LEXIS 391, at *49-50 (Dep't of Transp. June 30, 1995) [hereinafter *LAX I*] ("Allowing an airport to include an estimated fair market value for airfield land in the landing fee rate base will enable the airport to recover a surplus above its airfield costs, which would be contrary to law."); Second Los Angeles Int'l Airport Rates Proceeding, Order 97-12-31, 1997 DOT Av. LEXIS 673, at *1 (Dep't of Transp. Dec. 23, 1997) [hereinafter *LAX II*].

ulatory system in which the proprietor's revenue is limited to the costs of providing services, historic cost valuation provides for full reimbursement of actual costs incurred by the proprietor."⁶⁷ In 1999, the D.C. Circuit affirmed the DOT's ruling that LAX should calculate landing fees at historical cost, not fair market value, though not on the assumption in LAX I that historic cost is the exclusive method for determining actual costs. Instead, the court followed the policy reasons outlined in LAX II:⁶⁸

[The] issue is whether the City may include in the landing fee a rental charge for the airfield land based on the land's estimated fair market value, that is, whether the charge represents a cost that may reasonably be imposed on the airlines using the airfield. In concluding that this charge is unreasonable, we rely on several factors. Among other things, the charge cannot be justified as compensation for the airport's opportunity costs in using its land for airport facilities, since the City made a commitment to continue using LAX as an airport and the airport's overall revenues compensate the City for using the land as an airport. There is no economic policy reason for allowing the use of fair market value, because the City needs no additional incentive to use its property at LAX as an airport, for the airport provides significant economic benefits to the Los Angeles area. There is also no evidence that the fair market value charge is needed to deter excessive use of LAX.⁶⁹

As a result of the D.C. Circuit's affirmation, LAX refunded \$112.8 million to various airlines for the landing fee overcharges.⁷⁰

In 1997, the same court held that it was arbitrary and capricious for the DOT to require that fees charged by airports for use of the airfield be based on the historic cost of assets while allowing fees for non-airfield facilities to be based on "any reasonable methodology," including fair market value.⁷¹ The court stated:

⁶⁷ LAX I, *supra* note 66, at *51.

⁶⁸ City of Los Angeles v. Dep't of Transp., 165 F.3d 972, 975-76 (D.C. Cir. 1999).

⁶⁹ LAX II, *supra* note 66, at *3.

⁷⁰ See DEP'T OF AIRPORTS, L.A. INT'L AIRPORT REFUNDING REVENUE BONDS, ANNUAL FIN. INFO. 13 (Nov. 30, 2001), available at http://www.lawa.org/docs/LAX_ar2001.pdf.

⁷¹ See Air Transp. Ass'n of Am. v. Dep't of Transp., 119 F.3d 38, 43-44 (D.C. Cir. 1997).

[E]xperience prior to the Secretary's regulation is not a particularly reliable guide since airports may well have thought that the statutory limitation (reasonableness) on all airport fees prior to 1994 implied some sort of cost-based methodology. . . . [B]y linking airfield fees to historic cost and capping airfield fees at total cost but permitting any reasonable methodology and imposing no cap for non-airfield fees, the regulation certainly implies that non-airfield fees need not be cost-based. Nor is the fact that airlines typically have reached agreement with airports as to these fees of any special significance. Airlines have incentives to enter into agreements with airports, even if they are monopolists. And an individual airline may not have a large incentive to challenge the reasonableness of a monopoly rent, since its competitors at an airport would also be paying the same monopoly rent (by virtue of the prohibition against discriminating among aeronautical users)

It may well be that, as the Secretary suggests, airports would face some restraint on the exercise of any market power that they might have. But we do not think the Secretary has adequately explained how those generally unspecified restraints will ensure, in the absence of meaningful guidelines, that non-airfield fees are reasonable.⁷²

Late in 2006, and again in March 2007, the airport commission and the City of Los Angeles once again authorized increases that will more than triple airport rents and other fees based primarily on the lost income from the airport's common use areas, which it cannot lease to some other commercial tenant.⁷³ Several affected airlines promptly challenged the fee increases with the DOT, and others filed suit in federal court.⁷⁴

III. THE ANTITRUST LAWS

When airports act in an anticompetitive manner, such conduct may also be challenged under the antitrust laws. Section 1 of the Sherman Act makes unlawful any "contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States" ⁷⁵ A plaintiff that successfully proves injury from a contract, combination, or conspiracy in restraint of inter-

⁷² *Id.*

⁷³ Ashley Surdin, *LAX Terminal Fee Increases Approved*, L.A. TIMES, Mar. 6, 2007, at B3.

⁷⁴ *Id.*

⁷⁵ 15 U.S.C. § 1 (2006).

state commerce may recover three times the amount of actual economic damages.⁷⁶

Although airports that are publicly owned may assert that their conduct is exempt from the antitrust laws, such an argument is not necessarily fatal to an airline's challenge. In *New York Airlines*, the carrier alleged that in refusing to grant it access to the Martha Vineyard's Airport, the airport commission acted pursuant to an unlawful conspiracy with other airlines, in violation of Section 1 of the Sherman Act.⁷⁷ The commission and its members argued that their refusal to grant access was shielded from antitrust liability under the so-called "state action" doctrine recognized in *Parker v. Brown*⁷⁸ and its progeny.⁷⁹

However, the court refused to view *Parker* as giving airports *carte blanche* power to engage in conduct that would violate the antitrust laws if committed by private parties.⁸⁰ Rather, for the *Parker* exemption to apply, two standards must be met: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy' [and] second, the policy must be "actively supervised" by the state itself."⁸¹ To pass these tests, "the political subdivision claiming exemption must illustrate the requisite legislative intent by demonstrating by convincing reasoning that the challenged restraint is necessary to the successful operation of the legislative scheme that the state as sovereign has established."⁸²

The court then observed that the airport commission was authorized by state law to "lease airport facilities, to determine charges and rentals for the use of airport property, to enter into contracts and to expend funds for the maintenance, operation and construction of the airport, and to adopt rules and regulations for the use of the airport to insure the public safety."⁸³ None of these authorizations demonstrated a clear legislative intent "to displace competition by the provision of monopolistic public services or to authorize anticompetitive conduct in the management of the Airport. There [was] no indication that an-

⁷⁶ 15 U.S.C. § 15 (2006); see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1979).

⁷⁷ *N.Y. Airlines, Inc. v. Dukes County*, 623 F. Supp. 1435, 1440-41 (D. Mass. 1985).

⁷⁸ 317 U.S. 341, 360 (1943).

⁷⁹ *N.Y. Airlines*, 623 F. Supp. at 1451; see also *Parker*, 317 U.S. at 360.

⁸⁰ *N.Y. Airlines*, 623 F. Supp. at 1451-52.

⁸¹ *Id.* at 1451.

⁸² *Id.*

⁸³ *Id.*

ticompetitive conduct is necessary to the operation of the statutory scheme.”⁸⁴ Moreover, there were “no provisions for state review, nor [were] there other indications that the state [was] actively supervising the activities of the Commission pursuant to state policy. . . . Under these circumstances, the Commission’s action is not clearly exempt from challenge under the antitrust laws.”⁸⁵

IV. CONCLUSION

As essential facilities, airports wield a massive amount of economic power which, if unchecked, can dramatically impact the ability of an airline to serve that airport in an efficient and profitable manner. This situation can mean increased difficulties for airlines as airports attempt to enjoy the benefits of such power, while trying to resist the fundamental responsibilities that should coexist and restrain the exercise of such power. Airport commissions want to have unfettered discretion to set rates and charges and impose terms and conditions, while also trying to perpetuate a fiction that they are private commercial entities that should be allowed to act in their own economic self-interests at all times. Fortunately, the United States Congress, courts, the DOT, and the FAA have put into place a web of laws, policies, and rulings that an airline can utilize to level the playing field in airport-airline relations.

⁸⁴ *Id.* at 1451–52.

⁸⁵ *Id.* at 1452.

