U.S. Airline Industry: Issues and Role of Congress

Updated July 29, 2008

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Prepared for Members and Committees of Congress
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Summary

Mergers, airline bankruptcies, aircraft safety and maintenance concerns, extensive flight delays and cancellations, $100-plus-per-barrel oil prices, and a litany of other issues define congressional interest in the airline industry at present. Congress does not play a day-to-day role in any of these issues. Most ongoing oversight of the industry, to the extent that it does occur, takes place within the executive branch. Congress periodically addresses airline issues through legislation, but for the most part the congressional role occurs primarily through oversight.

The authority to recommend approval or disapproval of airline mergers rests entirely with the Department of Justice (DOJ). The Office of the Secretary of Transportation (OST) makes recommendations to DOJ based on its evaluation of the effect of a proposed merger on airline industry competition. Congress has no specific statutory role in the airline merger review and approval process, having legislatively charged the executive branch with that task. Members of Congress can, and do, file statements with DOJ expressing their views on a proposed merger. Congressional interest going forward is likely to focus on the proposed merger between Delta Airlines and Northwest Airlines.

Recent incidents, including passengers being held in aircraft for eight or more hours awaiting takeoff, passengers being stranded by the shutdown of bankrupt air carriers, as well as deteriorating airline on-time arrival performance, have led to increasing congressional interest in airline passenger consumer issues. Currently, most passenger rights are set forth in the airlines’ “contract of carriage” language. Existing law does, however, provide procedures and compensation rules for “bumping” and lost or damaged baggage. The main power the Department of Transportation (DOT) has to protect consumers is the department’s power to take action against air carriers for “deceptive trade practices.”

Despite impressive airline safety statistics in recent years, some aviation safety professionals and some Members of Congress have expressed concern that the industry and regulators have been lulled into complacency with regard to safety. This concern has been heightened recently in response to various findings that airlines have failed to fully comply with aircraft inspections and repairs mandated by the Federal Aviation Administration (FAA). Congressional oversight has focused on the relationship between the FAA and the airlines and the manner in which the FAA carries out its safety mandates. The House has passed legislation (H.R. 6493) addressing FAA safety oversight practices. Related provisions have also been included in a Senate FAA reauthorization proposal (see S.Amdt. 4585 to H.R. 3881).

Various issues discussed in this report are also addressed in some fashion as part of the ongoing congressional debate over FAA reauthorization. For additional information on FAA reauthorization, refer to CRS Report RL33920, Federal Aviation Administration Reauthorization: An Overview of Selected Provisions in Proposed Legislation, coordinated by Bart Elias. This report will be updated as warranted by events.
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U.S. Airline Industry: 
Issues and Role of Congress

Mergers, airline bankruptcies, aircraft safety and maintenance concerns, extensive flight delays and cancellations, $100-plus-per-barrel oil prices, and a litany of other issues define congressional interest in the airline industry at present. Congress does not play a day-to-day role in any of these issues. Most ongoing oversight of the industry, to the extent that it does occur, takes place within the executive branch. Congress periodically addresses airline issues through legislation, but for the most part the congressional role, as will be discussed, occurs primarily through oversight.¹

Deregulation of the airline industry in 1978 eliminated most governmental control over the business practices of airlines. Residual regulation over antitrust matters (merger approval/disapproval) and oversight of certain competitive practices remain, however, within the Department of Justice (DOJ) and Department of Transportation (DOT), respectively. Oversight of airline consumer practices, while limited in scope, also occurs at DOT.

As part of its authority over certain competitive practices, the Office of the Secretary of Transportation (OST) reviews airline operating agreements and marketing alliances, especially as regards non-U.S. airlines. It also has the responsibility of “certificating” airlines — meaning it determines whether a new airline is “fit, willing, and able” to provide the type of service it is seeking to provide.

Safety has never been deregulated. DOT’s Federal Aviation Administration (FAA) exercises total oversight over the airline industry’s safety activities. It is responsible for the licensing of all airline aircrew and mechanics, and for the certification of all aircraft and their appropriate maintenance and operating procedures, proscribes the operation of aircraft within the FAA operated air traffic control (ATC) system, and provides active oversight of airline compliance with maintenance and operating procedures.

This report provides an overview of selected airline related issues currently subject to congressional oversight and/or possible legislation. It should be pointed out that many of the issues discussed here are also addressed in some fashion as part of the ongoing congressional debate about reauthorization of the FAA. These relationships will be noted briefly as part of this discussion. Those seeking additional information on reauthorization should refer to CRS Report RL33920, Federal

¹ Title 49 of the United States Code enumerates in extensive detail most of the legal powers that the federal government exercises over airlines.
Economic Issues

Airline Mergers/Acquisitions

Congressional interest going forward is likely to focus on the proposed merger between Delta Airlines and Northwest Airlines. Although structured legally as an acquisition — Delta is the acquirer in the combination and the CEO of Delta would manage the combined firm — the proposal is most clearly viewed as a merger. It is widely believed in the aviation community that this merger could be the first of several in the industry. Press speculation, for example, focused until recently on a possible United and Continental combination as a competitive response. Although a United-Continental agreement failed, United is continuing merger talks with US Airways. Future proposed mergers will also likely be of interest to Congress.

The authority to recommend approval or disapproval of airline mergers rests entirely with DOJ. The OST makes recommendations to DOJ based on its evaluation of the effect of a proposed merger on airline industry competition. Congress has no specific statutory role in the airline merger review and approval process, having legislatively charged the executive branch with that task. Members of Congress can, and do, file statements with DOJ expressing their view of a proposed merger. During previous merger discussions individual Members of Congress have taken positions both for and against proposed mergers, hearings have been held, and some legislation has been introduced and considered. For the most part, however, merger related legislation has not been enacted, especially vis-à-vis a specific merger proposal. This does not mean, however, that congressional opinions about mergers do not matter.

Historical Perspectives. As Figure 1 shows airline mergers and acquisitions began occurring in the early to mid-1980s. During that period many of the so-called “local service carriers” of the regulated era, such as Ozark, Republic, Southern, and PSA, were combined into larger airlines. A second wave of consolidation occurred in the later 1980s at least in part driven by the “leveraged buyout” (LBO) phenomena. The effects of the First Persian Gulf War, which depressed international airline travel for the first time in post World War II history, put an end to most consolidation discussions at least for a time. Since then merger activity has been sporadic, with some notable activity around the beginning of the new Century, a significant combination in 2005, and the now proposed merger of Delta and Northwest.

During the 1980s most congressional interest in mergers seems to have been focused on service issues and on insuring that airline employees were fairly treated as firms were acquired and/or combined. Some members of Congress expressed

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their views on many of the combinations of that time period. Congressional concern was also expressed about how the merger approval process was exercised at the federal level. Many felt that the Reagan Administration DOT was too friendly to mergers, approving at least two mergers that DOJ had questioned. Ultimately, in response to these concerns Congress acted to strip DOT of its preeminent role in the merger approval process and moved it to DOJ beginning in 1989.

**Recent Merger Discussions.** Between 2000 and the end of 2007 there were three significant merger/acquisition proposals. Two, American’s acquisition of TWA (2001) and America West’s acquisition of US Airways (2005), were approved without major congressional opposition. In each instance, the airline being acquired (TWA and US Airways) was in significant financial difficulty, and the acquisition was viewed by many as a way of preserving jobs and air service.

This was not the case for the May 2000 proposal by United to acquire US Airways. That proposal engendered considerable public opposition which was very much reflected by many Members of Congress. The merger proposal had some novel features, including a proposal to create a new airline based at Reagan National Airport, and later a link to the American and TWA merger, that were designed to deflect possible anti-trust concerns related to the market power of a combined United and US Airways. These proposals, however, were insufficient to ward off considerable concern about the anti-competitive nature of the proposed combination. Ultimately, DOJ would reject the merger in July 2001 and United withdrew its offer.

Congress played a very active role in the consideration of the proposed United/US Airways merger. Although there were individual Members of Congress who were in favor of the merger, there seems to have been significantly more congressional opposition to the merger. These anti-merger positions were especially apparent during several hearings held to examine the potential competitive effects of the merger. Although no legislation blocking or otherwise altering the merger was passed, several pieces of legislation that would have required these results were introduced and considered.

**Delta-Northwest.** Executives of the merging carriers argue that this combination is necessary for competitive reasons. In addition to creating the nation’s largest airline, they believe the new airline will be “more stable and be better able to grow to meet the challenges of the future” in what they view as a highly competitive world airline industry and a difficult economic environment.³ From their perspective the new combination, which will keep the name Delta, will provide synergies that could reduce the firms’ operating costs by up to a $1 billion from the costs that would be incurred by the two firms as separate entities. As part of their merger, they are promising not to close airport hubs, reduce air service, or fire large numbers of employees. They are also suggesting numerous other benefits that are described in detail at [http://www.newglobalairline.com/].

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Many airline industry observers are dubious of the claims made above. They find it hard to understand, for example, how a firm that plans not to cut employees and close hubs will be able to come up with the cost savings stated above. Also, the track record of airline mergers in the United States is spotty at best, with some airline analysts believing that there has never been an indisputably successful merger in the industry.\textsuperscript{4} Even those who believe the merger might be positive question the likelihood that the transition from two airlines to one will be smooth for fliers and employees, by pointing to the ongoing difficulties at US Airways caused by merger related employee and infrastructure integration issues.\textsuperscript{5}

Approval of the merger is no foregone conclusion. DOJ has stated its intention to closely examine the attributes of the merger, and DOT has begun its analysis of the competitive effects of the merger. These reviews will likely take months to complete, making it impossible to forecast when DOJ might announce its decision on the merger.

Several Members of Congress, including the Chairman of House Committee on Transportation and Infrastructure (T&I), Representative James Oberstar, and the Chairman of T&I’s Subcommittee on Aviation, Representative Jerry Costello, have reportedly expressed skepticism about the supposed positive aspects of the merger.\textsuperscript{6} They have stated an intent to hold hearings on the merger. Additional congressional committees, Senate Commerce, Senate Judiciary, and House Judiciary, are also expected to hold hearings on the issue.

**Airline Bankruptcies/Failures**

Failure is a normal feature of the U.S. business system. The failure of some firms, however, is more notable than for others. This is the case for the airline industry. In early spring 2008, four airlines filed for bankruptcy protection. Three, Skybus, Aloha, and ATA, filed for Chapter 7 bankruptcy, have stopped flying and are in the process of liquidating. Frontier filed for bankruptcy under Chapter 11 of the Bankruptcy Code and is to continue to operate while it attempts to reorganize. All of these failures have attracted some level of congressional interest. This is especially true for Aloha, which provided a significant portion of Hawaii’s inter-island transportation network.


\textsuperscript{5} Reed, Dan. “US Airways highlights drawbacks of consolidation.” *USA Today*. March 6, 2008.

\textsuperscript{6} *Aviation Daily*. “Delta-NWA Merger Obstacles Include Labor, Competition.” April 16, 2008. p. 1
Figure 1. Selected Airline Mergers, Acquisitions, and Bankruptcies, 1978-2007

Source: CRS analysis of various sources.
Bankruptcy is far from rare in the airline industry. It can almost be viewed as an accepted business practice. As can be seen in Figure 1, several major airlines have gone through multiple Chapter 11 reorganizations since 1978. For example, Continental (1983 and 1990), US Airways (2002 and 2004), and America West, which purchased US Airways in 2005, (1985 and 1991). In fact, more than 150 airlines, mainly start-up firms not shown in Figure 1 (known in airline terminology as "new entrants"), but also some well known firms, have filed for bankruptcy in the last 30 years. In the vast majority of these cases the bankruptcy led ultimately to a departure from the industry. Where a Chapter 11 process ultimately led to a successful reorganization, the airline often looked very different from the airline that had filed for protection. There is no single reason why airlines go bankrupt. recessions, fuel prices, bad management decisions, and labor problems, can all play a role. Unanticipated events like the first Persian Gulf War and September 11th, which led to significant declines in flying, have led straight to the bankruptcy court.

Congressional interest in bankruptcy is generally focused on several issues. Primary among these is the loss and/or prospective loss of air service at an airport, in a community, or sometimes in a region. Of immediate interest is the consumer fallout that accompanies a bankruptcy filing. Constituents who have been stranded or find they no longer hold valid tickets, frequently turn to congressional offices in search of redress. Also of interest to many Members is the fate of airline industry employees. Employees may lose their jobs, have their salaries reduced or see their pensions eliminated or reduced. The loss of airline pensions by former employees, for example, were a major issue following the round of airline bankruptcies that occurred after September 11th. In some hub airline cities, an airline's workforce can make up a sizable portion of the local electorate.

Congress does sometimes act to assist the airline industry in times of need. Most notably this occurred immediately after September 11th when Congress passed the Air Transportation Safety and System Stabilization Act (ATSA, P.L. 107-42). ATSA provided immediate financial assistance and long term loans to the airlines to keep them operating. ATSA did not preclude bankruptcies, but it arguably prevented additional airline failures beyond those that occurred anyway. ATSA, as the event it responded to, represented the extreme in terms of a congressional response. The more typical congressional response over time to airline bankruptcies could be characterized as disappointment combined with acceptance.

**Passenger Rights Issues**

Recent incidents including passengers being held in aircraft for eight or more hours awaiting takeoff, passengers being stranded by the shutdown of bankrupt air carriers, as well as deteriorating airline on-time arrival performance, have led to increasing interest in airline passenger consumer issues. Currently, most passenger rights are set forth in the airlines' "contract of carriage" language. The contract of carriage is the legal contract between the airline and the ticket holder which describes the rights and responsibilities of both the air carrier and the passenger. Passengers
may take legal action in federal courts based on these contracts. Historically, the DOT role in consumer protection has been limited. However, existing law does provide procedures and compensation rules for “bumping” and lost or damaged baggage. The main power DOT has to protect consumers is the department’s power to take action against air carriers for “deceptive trade practices.” The definition and interpretation of deceptive trade practices can significantly impact the scope of DOT’s enforcement authority.

Although airline deregulation was enacted 30 years ago, some observers believe that some of the perceived protections of the regulated era should be reintroduced. There are two major differences in the unregulated environment versus the regulated environment for air passenger transportation that are important to keep in mind when examining airline passenger issues. First, under regulation, air carriers did not set their prices; the Civil Aeronautics Board (CAB) did. This meant that air carriers, for the most part, competed on service and frequency rather than price. In addition, with prices fixed by the CAB, interline agreements among airlines to accept each others’ delayed passengers were simple to manage, because all the major carriers had very similar fare structures. Since deregulation, and especially with the advent of low-cost carriers as major players in the industry, the primary means of competition has become price, not service.

Second, because the CAB used a cost-plus basis for setting fares, this encouraged air carriers to maintain a significant amount of extra capacity. Air carriers could have passenger load factors as low as 55% and still make money. This meant that when there were flight delays or cancellations, most carriers had seats available to accept transfers from other airlines. In recent years, air carriers have undergone a period of intense price competition at the same time that fuel costs have risen rapidly. Most air carriers have responded by pursuing higher passenger load factors, which are now often above 80% for some airlines and are even higher on some popular routes. Such high average passenger load factors mean that, during flight delay or cancellation situations, there may be limited available seats for transferred passengers.

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7 With the deregulation of aviation, the airline contract of carriage took the place of rules “tariffs” that were, under regulation, adopted and published by the airlines and that became effective upon Civil Aeronautics Board approval. For a discussion of passenger rights tariffs under regulation see, Senate, Judiciary Committee, Oversight of Civil Aeronautics Board Practices and Procedures, Hearing, v. 2, February 19, 1975, Washington, GPO, 1975.

8 For a discussion of consumer rights see the DOT’s Aviation Consumer Protection Division’s “Fly Rights,” available at [http://airconsumer.ost.dot.gov/publications/flyrights.htm].

9 On April 16, 2008, Secretary of Transportation Mary Peters announced finalized changes to the “bumping” rule, which doubles the compensation for passengers that are involuntarily bumped to $400 if they reach their destination within two hours of their original arrival time and to $800 if they do not arrive within two hours. U.S. Dept. of Transportation, U.S. Transportation Secretary Peters Announces New Measures to Improve Air Travel Experience. Washington, DC: DOT, April 16, 2008. The current ceiling for lost and damaged passenger baggage is $3,000 per passenger.