

**Clear the Runways:
The United-Continental Merger is Finally Landing**

*Craig Beaker
Student Fellow, Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law*

For the past two years, there have been rumblings and rumors that United and Continental were engaged in merger talks to unite the two enormous airline providers. These rumblings turned into a roar in the spring of 2010 when both companies announced they were discussing the business opportunity. As shareholders and business executives for both companies entered into conversations about the potential merger, the Department of Justice's ("DOJ") Antitrust Division also began paying attention. With a DOJ investigation beginning in the summer of 2010, the United-Continental merger seemed like a distant, promising idea with a minefield standing in the way.

Merger Discussions

The Potential Benefits

As discussions began heating up between United and Continental during the spring of 2010, the talk finally turned to whether or not the merger would dampen competition by combining the two mega-competitors.

United and Continental were so concerned that they started a website called "Let's Fly Together."¹ In the website, they provide a detailed list of the potential benefits that could result from the merger. These benefits include: (1) giving customers greater access to a more comprehensive route network; (2) improving employee stability by providing a larger, stronger, and more geographically diverse carrier; (3) increasing profitability and sustainable long-term value for shareholders; (4) offering "the world's most comprehensive route network that will enhance service to small communities;" and (5) expanding business relationships with suppliers, business service partners, and corporate customers.²

¹ UNITED-CONTINENTAL: LET'S FLY TOGETHER (2010),
<http://www.unitedcontinentalmerger.com/merger-benefits>.

² *Id.*

Along with these purported benefits, United and Continental expect to produce \$1 billion to 2 billion in “synergies.”³ Of that amount, they anticipate \$800 to \$900 million will come from extra revenue as a result of “new passengers who will be drawn to an airline that flies to more places.”⁴

The Potential Consequence

Some experts also predicted that combining the two carriers will reduce competition in the airline industry. As a result, prices will rise as flights are reduced on a number of routes.⁵ The reduced routes will likely occur in areas where the two airlines once competed. For example, “there will be less competition on routes like New York to Chicago, and at some hubs like Washington and New Orleans.”⁶ Additionally, Tom Parsons, CEO of BestFares.com, stated that price increases will likely hit business travelers the most because they often book at the last minute.⁷

The Department of Justice Enters the Picture

Once merger discussions finally became more than just a rumor, the Department of Justice opened an investigation to determine whether the merger would stifle competition. According to a press release by the Antitrust Division, “The proposed merger would combine the airlines’ largely complementary networks, which would result in overlap on a limited number of routes where United and Continental offer competing nonstop service.” The DOJ recognized that the largest competing routes were between United’s hub airports and Continental’s Newark airport hub.⁸ These routes were particularly problematic because Continental had a high share of service at Newark airport and there were

³ *Why Merge*, N.Y. TIMES, May 9, 2010.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Dan Reed, *United, Continental merger is approved*, CHI. SUN-TIMES, Sept. 18, 2010, available at <http://www.suntimes.com/business/2723654>, CST-NWS-united19.article. Tom Parsons disagreed with experts predicting big price increases for advance-purchase tickets. Due to competition from low-fare carriers like Southwest, AirTran, and JetBlue, Parsons believes that advance-purchase ticket prices will remain at a lower level. *Id.*

⁸ United has six hubs, including: Chicago, Denver, Washington Dulles, San Francisco, Los Angeles, and Tokyo Narita. Continental has four: Houston, Newark, Cleveland, and Guam. Reed, *supra* note 7.

a limited number of slots available. Therefore, it was particularly difficult for airlines to enter this particular market.⁹

To assuage the DOJ's fears, United and Continental entered into an agreement with Southwest Airlines. Under the terms of the agreement, United and Continental agreed "to transfer takeoff and landing rights (slots) and other assets at Newark Liberty Airport to Southwest Airlines." The agreement took the form of a lease that permanently conveyed all of Continental's landing rights to Southwest. Although Southwest Airlines was the sixth largest carrier in the United States, Southwest had only limited service in the New York metropolitan area and no Newark service prior to the agreement. The DOJ reasoned that this transfer would resolve the "main issue of competition" by facilitating Southwest's entry into the New York metropolitan market. Additionally, the DOJ noted that the agreement would "significantly benefit consumers on overlap routes as well as on many other routes." This position was supported by the fact that Southwest serves 69 cities in the United States. As a result of the agreement, the DOJ closed its investigation into the merger.¹⁰

The Aftermath

Following the DOJ's green-light to the United-Continental merger, state investigations and private lawsuits sprung up throughout the United States. "Led by the office of the Ohio Attorney General, the offices of the attorneys general from California, Ohio, Texas, Virginia, Pennsylvania, North Dakota, New Jersey, Hawaii and the District of Columbia have [] been investigating the proposed merger."¹¹ While states continue to open investigations, private plaintiffs have filed lawsuits in federal district courts around the country to enjoin the merger. The most recent case, *Malaney, et al., v. UAL Corporation, United Air Lines, and Continental Airlines*, was decided on September 27, 2010.¹²

⁹ Department of Justice, Office of Public Affairs, *United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice's Antitrust Concerns* (Aug. 27, 2010), available at <http://www.justice.gov/opa/pr/2010/August/10-at-974.html>.

¹⁰ Department of Justice, *supra* note 8.

¹¹ *Id.*

¹² *Malaney, et al., v. UAL Corporation, United Air Lines, Inc., and Continental Airlines, Inc.*, No. 3:10-cv-02858-RS (N.D. Ca. Sept. 27, 2010).

Plaintiff's Theories and Judge Seeborg's Decision

Plaintiffs included forty-nine individuals who sought a preliminary injunction under the Clayton Act to enjoin the merger of Continental and United.¹³ To meet the injunction standard, Plaintiffs were required to establish that they were likely to succeed on the merits.¹⁴ Therefore, they were required to “first show the existence of a relevant market and then establish that the pending acquisition is ‘reasonably likely to cause anticompetitive effects’ in that market.”¹⁵ Plaintiffs claimed there were three alternative relevant markets upon which the anticompetitive effects of the merger could be analyzed.¹⁶

First, Plaintiffs proposed a market limited to network carriers competing for business travelers.¹⁷ Plaintiffs argued that United and Continental competed for business passengers against each other, Delta, American and USAir, but they do not compete against any low cost carriers (“LCCs”).¹⁸ Basically, Plaintiffs claimed that network carriers, like United and Continental, are distinguishable from LCCs because LCCs do not “offer the package of services that network carriers provide and which business travelers require.”¹⁹ Second, Plaintiffs proposed that the market should include thirteen airport-pairs that would experience significant decreases in competition if the merger proceeded.²⁰ Finally, Plaintiffs claimed that the relevant market should be the national airline industry as a whole.²¹

In his decision, Judge Seeborg first found that LCCs should be included in the relevant market because “LCCs do in fact compete with network carriers for the business traveler.”²² He noted that network carriers compete with LCCs for at

¹³ *Id.* at 2. The merger was scheduled to close on October 1, 2010.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 9 (citing *US v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004)).

¹⁶ *Id.* at 13.

¹⁷ *Id.*

¹⁸ *Id.* at 14. Low cost carriers are defined as carriers which “traditionally operate on a point-to-point basis, focusing on high density routes rather than small communities and utilizing a single aircraft type.

¹⁹ *Id.* These services include: multiple classes of service, a higher frequency schedule, and frequent flyer programs.

²⁰ *Id.*

²¹ *Id.* at 20.

²² *Id.*

least fifty percent of their revenue.²³ He also reasoned that LCCs have increasingly entered into airline routes where network carriers operated and there was no indication that these LCCs would exit the market as a result of the merger.²⁴

Judge Seeborg quickly dispensed with Plaintiff's second argument (airport-pairs) on the grounds that it ignores an analysis of city-pairs.²⁵ According to testimony by one expert, "airport-pairs are an inaccurate market because they 'miss out on some of the important sources of competition that come from [] the fact that many customers fly from alternative airports.'"²⁶ Essentially, airport-pairs fail to take into account the effect that substitutable airports have on competition.²⁷

Finally, Judge Seeborg found that Plaintiff's "national airline market as a whole" argument had little merit because "plaintiffs have not shown how...a flight from San Francisco to Newark would compete with a flight from Seattle to Miami."²⁸ In defining the market, the judge noted the national airline industry market failed to examine individual markets involving passenger origins and destinations as well as overlooking all LLCs and network carriers.²⁹

Because Plaintiffs were unable to demonstrate a viable relevant market, Judge Seeborg denied Plaintiffs' motion for a preliminary injunction.³⁰

Conclusion

Evaluating the United-Continental agreement, Judge Seeborg and the DOJ both recognized the importance of city-pairs when defining the relevant market. City-pairs provide an accurate relevant market because it takes into account the

²³ *Id.* at 15.

²⁴ *Id.* at 16.

²⁵ *Id.* at 19.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 21.

²⁹ *Id.*

³⁰ *Id.* Based upon Judge Seeborg's words, it does not appear that Plaintiffs were even close to meeting the injunction standard. According to the opinion, "plaintiffs cannot show a likelihood of success on, or even a serious question going to, the merits of their claim." *Id.*

fact that other airports in the same city, or even nearby cities, provide a reasonable substitute for consumers. The DOJ concluded their investigation after United and Continental agreed to transfer takeoff and landing rights to Southwest at Newark Airport. This agreement, according to the DOJ, was sufficient to maintain competition in the New York metropolitan market as well as spur competition in overlap routes. The DOJ recognized that United and Continental do not have any hubs in the same cities. Furthermore, there was no evidence that United or Continental controlled landing or takeoff rights in other cities to impede entry and stifle competition.

Based upon the level of competition today in the airline industry, it is unlikely that the rise of one mega-carrier would lead to the demise of competition in the industry. However, as airline companies continue to adjust their strategies to establish sustainable and profitable businesses, antitrust authorities should be wary of the creation of an oligopolistic market where mega-carriers become the norm instead of the exception.