

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.**

In the matter of:

Notice of Slot Lease Auction – Newark

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Posting ID: 6996

COMMENTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

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Introduction

On August 6, 2008, the Federal Aviation Administration (FAA) issued a Notice (“Notice”) soliciting bids for certain “slot leases” at Newark Liberty International Airport (“Newark Liberty” or “EWR”) that are to be auctioned and awarded on September 3, 2008, with bids accepted immediately.¹ The Notice constitutes a final order of the FAA (i) determining that the slots at issue exist and are FAA property, (ii) determining that the slots at issue will be allocated by auction, (iii) commencing the auction process, and (iv) effectively revising without further rulemaking procedures the FAA’s Order of May 15, 2008, 73 Fed. Reg. 29550 (May 21, 2008), which capped hourly operations at EWR and created Operating Authorizations without which no air carrier is permitted to conduct a scheduled operation during the covered hours.

The Notice and the auctioning of the slots at issue do nothing to address congestion or delay at EWR in any way; indeed, if anything, the auction will add to congestion by authorizing additional operations at the airport during peak hours. The FAA has issued the Notice during the pendency of rulemakings in which it is proposing, *inter alia*, (i) to establish longer-term operational limits at EWR, John F. Kennedy International Airport (“JFK”), and LaGuardia Airport (“LGA”), (ii) to confiscate a portion of the slots currently held by carriers at those

¹ See <http://faaco.faa.gov/>; 73 Fed. Reg. 46136 (August 7, 2008).

airports, and (iii) to place the confiscated slots up for auction, just as it is doing with the slots at issue here.²

The Notice summarizes procedures for submitting bids in the auction, sets eligibility criteria for bidding, and establishes a timetable for the process, which will conclude in a matter of weeks. The form of Lease Agreement that will be used to award the slots is attached to the Notice, and interested parties are invited to submit comments and questions on the auction procedures and on the accompanying lease.

On behalf of itself and its member airlines,³ the Air Transport Association of America, Inc. (“ATA”) respectfully submits the following Comments.

The Notice implicitly treats as settled the question of whether the FAA has authority to auction these slots at EWR (or any other slots, for that matter) – and the question does, indeed, seem to be settled as far as the FAA is concerned. Nonetheless, although the Notice invites comment only on the auction procedures and the accompanying form of lease, ATA’s Comments will focus on the question of whether auctioning the slots at issue is lawful. In our view, it is unlawful – primarily because the FAA lacks authority to auction slots or to expend any funds to implement a slot auction. In addition, issuance of the Notice and conduct of the auction deprive ATA and its members of their procedural rights under the Administrative Procedure Act (“APA”) and the Due Process Clause of the U.S. Constitution because, by these actions, the FAA effectively has revised the May 15, 2008 Operating Limitations Order for EWR without acknowledging that it has done so, and without providing notice or an opportunity to comment

² 73 Fed. Reg. 20846 (April 17, 2008) (LaGuardia); 73 Fed. Reg. 29626 (May 21, 2008) (JFK and EWR).

³ ATA airline members are ABX Air, Inc., AirTran Airways, Alaska Airlines, Inc., American Airlines, Inc., ASTAR Air Cargo, Inc., Atlas Air, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Evergreen International Airlines, Inc., Federal Express Corporation, Hawaiian Airlines, JetBlue Airways Corp., Midwest Airlines, Inc., Northwest Airlines, Inc., Southwest Airlines Co., United Airlines, Inc., UPS Airlines, US Airways, Inc.; ATA Airline Associate Members are: Air Canada, Air Jamaica Ltd., and Mexicana.

on this highly controversial revision of the Order. At the same time, by proceeding with the scheduled slot auction at EWR during the pendency of the LGA and JFK/EWR rulemakings (where the lawfulness and wisdom of slot auctions as a matter of policy are at issue),⁴ the FAA effectively is depriving ATA members who commented in those rulemakings of their rights under the APA and Due Process Clause to have their comments (and the positions espoused therein) considered fairly, objectively, and with an open mind.

I. The FAA Is Not Legally Authorized To Reallocate Or Assign Slots Through An Auction Mechanism.

The FAA does not have the legal authority to conduct an auction of slots at EWR or any other airport. The reasons why the FAA lacks such authority are set forth at length in the Comments that ATA recently submitted in response to a Notice of Proposed Rulemaking to adopt a Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport.⁵ Rather than restating our arguments in full, we incorporate by reference herein the discussion set forth at pages 6-26 of the Comments ATA submitted in Docket No. FAA-2008-0517 and attach a copy of those Comments to our present submission. The substance of those arguments is summarized briefly below.

First, as the FAA candidly has acknowledged, it does not have *regulatory* authority to allocate slots through an auction mechanism. *See* 71 Fed. Reg. 51360, 51362, 51363 (August 29, 2006) (stating that the FAA “currently does not have the statutory authority to assess market-clearing charges for a landing or departure authorization” and, consequently, cannot employ “market-based mechanisms, such as auctions or congestion pricing” to allocate capacity at

⁴ *See* p.1, n. 2, *supra*.

⁵ 73 Fed. Reg. 29626 (May 21, 2008).

congested airports).⁶ Nothing has changed since the FAA made this statement less than two years ago that would support a contrary conclusion. In particular, 49 U.S.C. § 40103(b) is the only regulatory provision that arguably authorizes the FAA to assign slots (“*by regulation or order*”) when navigable airspace has been constrained. That provision did not authorize the FAA to allocate slots by auction when the FAA correctly disclaimed authority to employ slot auctions two years ago, and the provision has not been changed since then. Recognizing these points, the FAA has been seeking statutory authority from Congress to use market-based mechanisms such as congestion pricing and slot auctions as a means to allocate use of the navigable airspace. Thus far, however, Congress has not obliged – and until it does so, the FAA, as it concedes, “cannot rely on a market-based allocation method under a purely regulatory approach.” 73 Fed. Reg. at 20852.

Second, the FAA’s newly articulated reliance on its property management or “transaction” authority – 49 U.S.C. §§ 106(l)(6) & 106(n), and 49 U.S.C. § 40110(a) – does not support the auctioning of slots either. This is because the allocation of slots is not a property management activity. It is a regulatory licensing function, not a disposition of FAA property. Slot licenses are not property in the hands of the FAA, and the FAA – like other governmental licensing authorities – does not “part[] with ‘property’ when it issues a license.”⁷ In essence, for FAA’s position to be correct, the right to operate an aircraft at EWR would have to be the analytical equivalent of a surplus filing cabinet available for sale at the agency’s convenience. To suggest the notion is to demonstrate its absurdity. Furthermore, 49 U.S.C. § 106(l)(6) –

⁶ The FAA has adhered to this position for decades. See 50 Fed. Reg. 52183 (December 20, 1985) (stating that an “auction mechanism was not proposed . . . because legislation would be required for the collection and disposition of the proceeds”).

⁷ See *Cleveland v. United States*, 531 U.S. 12, 15, 20 (2000) (Permits and licenses “do not rank as ‘property’ . . . in the hands of the official licensor,” and “a government regulator [does not] part[] with ‘property’ when it issues a license.”).

which authorizes the FAA to enter into contracts, leases, and cooperative agreements – restricts that authority to those “contracts, leases, cooperative agreements, or other transactions *as may be necessary to carry out the functions of the Administrator and the Administration.*” (Emphasis added.) The only FAA function involved here is a *regulatory* function – *i.e.*, the exercise of authority under 49 U.S.C. § 40103(b) to regulate use of the navigable airspace in the interest of safety and efficiency. Thus, the slot leases the FAA proposes to use in implementing a slot auction system necessarily would be instruments for carrying out the FAA’s *regulatory* functions. As the FAA concedes, Congress has withheld *regulatory* authority to allocate slots through an auction mechanism, and 49 U.S.C. § 106(l)(6) cannot be used to implement a *regulatory* approach that Congress has forbidden.

Third, as the FAA implicitly concedes by not mentioning it, the Independent Offices Appropriations Act, 31 U.S.C. § 9701, does not give the FAA authority to implement a slot auction scheme. And, even if it did, the auction proceeds would belong to the United States Government and would have to be deposited into the general fund of the U.S. Treasury pursuant to the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b), rather than being retained by the FAA for use in reducing delays and enhancing capacity at New York area airports, as the FAA apparently plans to do.

Fourth, whether viewed as a regulatory action or as property management, the auctioning of slots would place the FAA in violation of the express language of the 2008 Consolidated Appropriations Act, which prohibits the FAA from expending any funds “to finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of enactment of [the appropriations legislation].”⁸ Auctioning

⁸ See Consolidated Appropriations Act, 2008, P.L. 110-161, Section 103.

off the right to use navigable airspace, which heretofore has been made available to carriers without charge, would amount to the imposition of new “aviation user fees,” thereby violating this explicit prohibition.⁹

In sum, the FAA may not auction slots or otherwise charge for granting permission to use the navigable airspace unless Congress gives it specific authority to do so – as it has in the case of the Federal Communications Commission, which Congress has explicitly authorized to establish and implement a competitive bidding process to obtain the right to use certain airwaves.¹⁰ In the case of the FAA, Congress not only has withheld any such authority, but has laid down an explicit prohibition against promulgating “new aviation user fees not specifically authorized by law.” By expending funds on a process to auction slots at EWR, the FAA already is violating this express congressional prohibition, and its violation will become even worse if it auctions the slots on September 3 as scheduled.

II. The Notice And Actions Taken Thereunder Deprive ATA And Its Members Of Their Procedural Rights Under The Administrative Procedure Act And The Due Process Clause Of The U.S. Constitution.

As noted, the Notice constitutes a final order of the FAA (i) determining that the slots at issue exist and are FAA property, (ii) determining that the slots at issue will be allocated by auction, (iii) commencing the auction process, and (iv) effectively revising without further rulemaking procedures the FAA’s Order of May 15, 2008, 73 Fed. Reg. 29550 (May 21, 2008), which does not provide for auctioning slots at all, let alone for a five-year period that extends well beyond the termination date of the May 15 Order, and which does not contemplate any

⁹ Auctioning slots – which is intended to, and/or may effectively, require carriers to use particular equipment – is also inconsistent with 49 U.S.C. § 41109(a)(2)(B).

¹⁰ See 47 U.S.C. § 309(j).

exemption of slots from “use-or-lose” requirements.¹¹ But the FAA did not provide interested parties, including ATA and its members, notice and opportunity to comment before the Notice was issued. This is a violation of the APA – which requires agencies to provide notice of the action the agency plans to take and an opportunity for interested persons to comment before the action is made final, *see* 5 U.S.C. § 553 – and of procedural rights inherent in the Due Process Clause of the U.S. Constitution. Moreover, by proceeding with the scheduled slot auction at EWR while the LGA and JFK/EWR rulemakings are pending,¹² the FAA effectively is depriving ATA members who commented in those rulemakings of their rights under the APA and Due Process clause to have their comments considered by the decision maker fairly, objectively, and with an open mind. The lawfulness, and the merits as a matter of policy, of slot auctions supposedly are at issue in those rulemakings. But the commencement of the slot auction process here effectively predetermines the outcome of those issues in the LGA and JFK/EWR rulemakings, thus rendering the solicitation of comments in those proceedings an empty gesture.

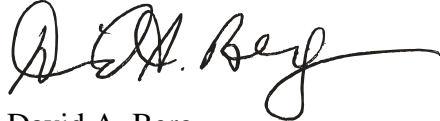
¹¹ It is also worth noting that the purported slots at issue become available for use only at the start of the upcoming winter traffic season, even though the FAA has yet to assign slots to U.S. carriers for use during that period. Nor does the FAA clearly establish that the purported slots to be auctioned exist under the terms of its May 15 Order, as the slots have not previously been allocated to anyone.

¹² *See* p. 1, n. 2, *supra*.

Conclusion

For the reasons stated above, the Notice of Slot Auction – Newark and the auction process that has commenced pursuant to the Notice are unlawful.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D.A. Berg", with a long, sweeping horizontal stroke extending to the right.

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