

# A Tale of Two Airports: Why DOT Found Unjust Discrimination Against Airlines at LAX But Not at Newark

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## Introduction

The law and policies of the U.S. government encourage free and unfettered competition by airlines, including open access to the nation's public airports. A vital tool in attaining this goal is the prohibition against airports unjustly discriminating against airlines in the rates and charges applied to those carriers. This prohibition is set forth in 49 U.S.C. 47107, the contractual "assurances" provided by airports to the U.S. Federal Aviation Administration (FAA) in exchange for airport improvement financial grants, the Policy on Airport Rates and Charges of the U.S. Department of Transportation (DOT), 61 Fed. Reg. 31,994 (June 21, 1996) (Policy Statement), and bilateral aviation treaties. The bar against unjust discrimination requires, among other things, that "air carriers making similar use of the airport will be subject to substantially comparable charges ... for facilities directly and substantially related to providing air transportation ... except for differences based on reasonable classifications." 49 U.S.C. 47107(a); Grant Assurance 22e.

Two recent cases involving airports on opposite sides of the country—Newark Liberty International Airport (Newark) and Los Angeles International Airport (LAX)—resulted in diametrically opposite results before the DOT. In the Newark case,<sup>1</sup> the DOT ruled (and the D.C. Circuit affirmed) that increased terminal charges and inspection fees imposed on the mostly international air carriers at Newark's International Terminal B were not unjustly discriminatory, despite the fact that hub carrier Continental Airlines was not subject to the fees. By contrast, two years later DOT ruled that newly increased terminal charges at LAX Terminals 1 and 3 unjustly discriminated against the Terminal 1 and 3 airlines in favor of competing carriers at LAX Terminals 2, 4, 5, 6, 7, and 8.<sup>2</sup> This latter decision was the first time that DOT had ruled that airport fees were unjustly discriminatory in a case litigated under the Department's expedited, or "rocket docket" procedures, and confirmed that the prohibition against unjust discrimination by airports is no "paper tiger."

What accounts for these dramatically opposite results? This article examines what was absent from the situation at Newark that caused DOT to reject the airlines' claim of unjust discrimination, and the factors which were present at LAX which led DOT to find that the new terminal charges were unjustly discriminatory. A full understanding of these different situations can assist in demonstrating how the federal government approaches its enforcement of the vitally important prohibition against unjust discrimination.

## The Laws and Policies Against Unjust Discrimination by Airports

When an airport sponsor accepts federal grant money for an airport improvement, it must give the FAA certain assurances, including the assurance that the airport will be available for public use on fair and reasonable terms and without unjust discrimination. The grant assurances include the following:

- (1) the airport will be available for public use on reasonable conditions and without unjust discrimination;
- (2) air carriers making similar use of the airport will be subject to substantially comparable—
  - (A) charges for facilities directly and substantially related to providing air transportation; and
  - (B) regulations and conditions, except for differences based on reasonable classifications, such as between—
    - (i) tenants and nontenants; and
    - (ii) signatory and nonsignatory carriers;
- (3) the airport operator will not withhold unreasonably the classification or status of tenant or signatory from an air carrier that assumes obligations substantially similar to those already imposed on air carriers of that classification or status.

49 U.S.C. 47107(a); Grant Assurance 22e; 62 Fed. Reg. 29,761 (1997).

In response to Congress' mandate that DOT publish guidelines for determining whether a fee is reasonable, 49 U.S.C. 47129(b), the Department issued the DOT Policy Statement Regarding Airport Rates and Charges.<sup>3</sup> The DOT Policy Statement makes clear that there must be a factual underpinning in order to justify discriminatory charges:

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.

61 Fed. Reg. 31994, 32015 (June 21, 1996); emphasis added.

Further, FAA Order 5190.6A describes in detail the responsibilities assumed by the owners of public-use airports developed with federal assistance. Section 4-14 makes it clear that *the airport is required to justify differences in charges imposed on carriers that use substantially comparable facilities.* See §4-14(d)(1)(c) (“In respect to a contractual commitment, a sponsor may charge different rates to similar users of the airport if the differences can be justified as nondiscriminatory and such charges are substantially comparable. *These conclusions must be based upon the facts and circumstances involved in every case.*”) (emphasis added).

In addition to the grant assurances and Policy Statement, the Anti-Head Tax Act, currently codified 49 U.S.C. 40116, allows the local airport authority to collect only reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.<sup>4</sup> Finally, the United States’ air service agreements with many foreign countries require U.S. airport fees to be reasonable and non-discriminatory.

### DOT’s “Rocket Docket” Procedures for Airport Cases

In 1994, Congress gave airlines and airports the ability to obtain prompt resolution of significant disputes over the reasonableness of new or increased airport fees. 49 U.S.C. 47129. This section requires the Secretary of DOT to determine the reasonableness of a challenged airport fee or fee increase within 120 days after the complaint is filed. Under this “rocket docket” procedure, DOT may determine whether the new fee is reasonable, but may not prescribe a fee. 49 U.S.C. 47129(a)(3).<sup>5</sup>

In a section 47129 proceeding, the airlines carry the burden of proof of showing that the challenged airport fees are unjustly discriminatory or otherwise unreasonable. In addition, the airlines generally must set forth their entire case in their complaint and the accompanying briefs and evidence submissions. 60 Fed. Reg. 6923; 14 C.F.R. 302.603(a). (“Carriers filing complaints ... will generally be expected to submit documentation that contains the filing party’s entire position and supporting evidence.”) “When an airline seeks a determination as to the reasonableness of a fee imposed on the airline by an airport, the airline bears the burden of proof. The airline complainants must submit evidence sufficient to show that the challenged fees are unreasonable.” *Port Authority*, DOT Final Decision, Order 2005-6-11 (Newark FD), at 14. “However, if the complainants present a prima facie case that a fee is unreasonable, the burden shifts to the airport. The airport must then submit sufficient evidence to show that the fee is, in fact, reasonable.” *Id.* In addition, airport owners or operators may not undermine the air carriers’ ability to meet such burdens by withholding financial information or data that support a new or

increased fee. If they do so, they run the risk that the new fee will be found to be unreasonable. *Id.*

### The Newark Case

In early 2005, twelve foreign carriers<sup>6</sup> and one U.S. carrier (Brendan Airways d/b/a USA 3000 Airlines), filed a section 47129 challenge against the Port Authority alleging that the airport’s increased fees at International Terminal B were unjustly discriminatory and otherwise unreasonable. The General Terminal Charge (GTC) was increased from \$5.50 to \$8.00 per passenger, and the Federal Inspection Service (FIS) fee climbed from \$13.50 to \$22.00 per passenger. The Port Authority alleged that it had been incurring significant losses at Terminal B and that it needed to raise fees to cover the losses.

Newark has three terminals, designated A, B and C, each of which has sub-terminals, designated A-1, A-2, A-3, B-1, B-2, etc. Newark treated each terminal as a separate cost center. The GTC fee applied to all passengers (domestic and international) arriving into and departing from International Terminal B. The FIS fee applied to all international passengers arriving into International Terminal B. The airlines alleged that Continental, which uses Terminal C, paid lower fees than complainants. Continental previously operated out of Terminal B but built and operated exclusively out of Terminal C. By contrast, the airlines in International Terminal B did not have leases with the Port Authority and did not operate their terminal.

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The carriers’ complaint was 20 pages and attached approximately 65 pages of exhibits. However, the carriers did not support their allegations with sworn testimony from either fact or expert witnesses. DOT made an initial determination that the case should go forward and referred the case to Administrative Law judge Richard Goodwin. But the agency somewhat ominously observed that the airlines’ “ability to present their case may be circumscribed by the limitations of their own pleadings ... because [they] did not file any testimony with the complaint, which the rules require.”<sup>7</sup>

Following a two-day hearing, the ALJ ruled that the increased fees were not unjustly discriminatory. The judge found that the air carriers using Terminals A, B-1 and C were in fundamentally different situations from the complainants because they were parties to lease agreements, while the complainants were not.<sup>8</sup> The ALJ noted that the prohibition against unjust discrimination permits reasonable distinctions so that airlines not similarly situated can be treated differently if there is a “rational basis for disparate treatment.” Newark RD, at 21. The ALJ determined that the complainants failed to meet their burden of proof because all Terminal B carriers were treated the same, whether domestic or international. *Id.* at 21-22 and n. 29. Further, the ALJ reasoned that Terminal A, B-1, and C airlines were not similarly situated because compensation to the Port Authority was incorporated into leases

and was, thus, irrelevant to fee setting for carriers using International Terminal B. The court also noted that the distinction between lessee/nonlessee is explicitly permitted by statute.

The Department affirmed the ALJ's finding of no unjust discrimination at Newark. DOT stated that "the controlling statute allows airports to treat signatory and non-signatory carriers (and carriers with leases and those without) differently." 49 U.S.C. § 47107(a)(2)(B)(i). The DOT Policy Statement also expressly permits differences in treatment of differently situated airlines, and makes clear that tenant/non-tenant and signatory/non-signatory airlines are not similarly situated. DOT Policy Statement ¶3.1.1. Newark FD, at 23. The Department explained:

[T]he record shows that Continental is a signatory airline. The Port Authority says that Continental operates Terminal C, and by doing so, agreed to bear much of the expense of that terminal on its own. *The record does not show the nature of the contractual relationship between Continental and the Port Authority, so the Department is without any factual basis for saying that the fees are unjustly discriminatory.*

*Id.* at 23-24 (emphasis added). DOT added that it did "not agree with complainants' arguments that ... the DOT Policy Statement and the bilateral agreements require that 'airlines operating similar international service at the same airport' must have similar rates.... [S]uch a reading ignores the key distinction allowed in rates by the DOT Policy Statement where tenant/non-tenants or signatory/non-signatory carriers are concerned." *Id.* at 24.<sup>9</sup>

In considering the claim of unjust discrimination, the Department was hampered by the fact that the "record in th[e] case included no evidence on the terms of the arrangements between the Port Authority and Continental or between the Port Authority and the complainants." Newark FD, at 23. *See also id.* at 4 (neither party had "submitted for the record in this case any of the agreements and other documents governing the contractual relationships between the Port Authority and any of the airlines using Newark"). However, the agency's understanding as to the facts did not support a finding of unjust discrimination. Specifically, the airlines using Terminal A had lease agreements that specified the rents or fees that must be paid by those airlines. The complaining airlines at International Terminal B were not lessees or signatories to any lease agreements. *Id.* Continental Airlines, a former occupant of International Terminal B with the complainants, built and operated Terminal C under a lease agreement with the Port Authority. Therefore, as a practical matter, the Port Authority's fee methodology, including its cost allocations, would effect only the fees paid by complainants and other Terminal B airlines. *Id.* "The occupants of Terminals A and C compensate the Port Authority for comparable costs through their lease agreements." *Id.*

The D.C. Circuit affirmed the DOT's finding of no unjust discrimination, based on the fact that Continental, unlike the complaining carriers, was a *tenant* and *signatory* carrier.<sup>10</sup> The court stated: "The record demonstrates definitively that Continental leases the land under Terminal C from the Port

Authority.... Thus, the DOT reasonably determined Continental was a lessee and hence eligible for preferential treatment under Policy Statement ¶3.1.1." 479 F.3d at 40.

The complainant airlines at Newark contended that DOT improperly applied a "per se" test to the question of discrimination, whereby the fact that Continental was a lessee or signatory, and the International Terminal Building carriers were not, caused DOT to determine that *any* difference in their fee structures was permissible. Even if Policy Statement ¶3.1.1 permitted airports to charge non-lessees more than lessees, the airlines argued, there is some maximum difference beyond which the distinction should be deemed unreasonable.

Regarding to the possibility of DOT applying a "per se" test to determine whether airport fees are unjustly discriminatory, the court recognized that "[d]etermining the difference in fees under the proposed rate increase is not unproblematic, as Continental pays the Port Authority under a fixed lease, with no per-passenger FIS or GTC fees." *Id.* at 42. "However, by adjusting Continental's lease payments for the costs it saves the Port Authority by maintaining Terminal C itself, one can estimate Continental's implied FIS and GTC fees." *Id.* The court added that "[u]nder a per se test those implied FIS and GTC fees would be immaterial, with Continental's status as a lessee dispositive as to questions of discrimination. Under the Complainants' preferred test, however, the proposed rate increase would be unreasonable unless the difference between Continental's implied fees and the new fees at ITB were commensurate with the carriers' difference in status." *Id.*

The D.C. Circuit went on to conclude that two of the arguments raised by the complaining carriers against use of a "per se" test by DOT to determine whether airport fees were unjustly discriminatory were "at least arguably valid." *Id.* First, there appeared to be merit in the carriers' argument that any ambiguity in 49 U.S.C. 47107 regarding use of a "per se" test should be resolved "to avoid conflict with various international agreements to which the United States is a party." *Id.* at 42 n. 16. Second, the court found that DOT's Policy Statement appears to foresee "a limit on rate differences based on signatory status, in that it states that extra costs and risks incurred by airport operators in serving non-signatories 'would provide a justification for imposing a surcharge, *in some amount*, on non-signatory carriers,' and concludes that the new rules 'provide adequate flexibility to airport proprietors to charge reasonable surcharges to non-signatory carriers.'" *Id.* (citing Policy Statement, 61 Fed. Reg. at 32015; court's emphasis).

The D.C. Circuit even "assume[d] without deciding that a per se test would indeed be improper, so that the Final Decision would be invalid if it reject[ed] the Complainants' discrimination claim based solely on a per se test." *Id.* at 42. However, the court was unsure whether DOT had in fact applied an impermissible "per se" test to determine whether the fact that the complaining carriers were neither tenants nor signatory carriers rendered the disparity in fees per se lawful. The court stated:

While much of its language suggests a per se test, it nonetheless entertains the notion that details of the deal between Continental and the Port Authority could override the per se result: The record does not show the

nature of the contractual relationship between Continental and the Port Authority, so the Department is without any basis for saying that the fees are unjustly discriminatory.<sup>11</sup>

The court explained that DOT's statement regarding the lack of evidence concerning the contractual relationship between Continental and the Port Authority "recognize[d] that *the Airlines failed to carry their burden of persuasion concerning the degree to which fees could reasonably differ between [the International Terminal Building] and Terminal C.*" *Id.* at 42 (emphasis added). The court further stated:

As the Complainants put forward no evidence detailing the value to the Port Authority of Continental's signatory or lessee status, the DOT had no basis for finding the estimated difference in fees was not commensurate with the difference in costs the Port Authority incurred at each terminal. Given the DOT's permissible assignment of the burden of proof to the Complainants, the Final Decision's ruling was valid even if we excise its reliance on a per se test.<sup>12</sup>

The airlines also objected to DOT's reliance on the International Terminal B Carriers' ability to leave Newark as a basis for charging higher fees. They argued that DOT's approach undermined the protections afforded by section 47107 and the bilateral treaties, which assumed that international airports would remain open on relatively equal terms to all airlines that wanted to use them, and not that some airlines would face unequal rates with their recourse being to leave the airport entirely. In dismissing this contention, the court stated that "[t]he primary recourse available to non-signatory airlines that object to paying higher fees is signatory status." 479 F.3d at 43. The court pointed to DOT's finding that the complainants "had put forward no evidence tending to show the incremental fees imposed on them as non-tenants were not commensurate with the incremental risk the Port Authority incurred by letting them use [the International Terminal Building] without long term leases." *Id.* at 43 (emphasis added). The court added that, if "the Complainants felt the higher fees hurt them more than signatory status would they could sign a lease; they were not given a Hobson's choice of paying fees at a non-signatory level or else abandoning the airport entirely." *Id.*

### The LAX III Case

In February 2007—almost two years to the date after the Newark airlines had filed their complaint in the Port Authority case—seven airlines at LAX's Terminals 1 and 3—Southwest Airlines, US Airways, Alaska Airlines, AirTran Airways, ATA Airlines, Frontier Airlines, and Midwest Airlines—filed a section 47129 case against the operator of LAX—Los Angeles World Airports (LAWA). Until early 2007, the Terminal 1/Terminal 3 (T1/T3) carriers operated under holdover tenancies due to lengthy negotiations over the new five-year leases proposed by LAWA. By contrast, the airlines operating at Terminals 2, 4, 5, 6, 7, and 8 (T2/T4-8 carriers)—including American Airlines, Continental Airlines, Delta Air Lines, Northwest Airlines, and United Air Lines—operated pursuant

to long-term (40-year) leases entered into in the 1980's, that would not expire for another 15 to 19 years.<sup>13</sup>

The T1/T3 carriers filed their complaint after the Los Angeles Board of Airport Commissioners voted in December 2006 to approve new terminal rates and methodologies to apply to the T1/T3 carriers, including new terminal maintenance and operations (M&O) charges, which were retroactive to January 1, 2006. The new terminal fees included three new or increased M&O charges: access costs, security costs, and additional indirect administrative costs not previously charged to the airlines. These new or increased M&O fees replaced the prior M&O rates which charged the airlines 15 percent of direct terminal costs as a proxy for actual M&O costs. The Board also approved a new methodology for setting elements of the terminal fees based on what LAWA called "rentable" space and "market value" formulas.

LAWA previously assessed terminal rent on the T1/T3 carriers pursuant to a "usable" space formula that allocated terminal costs to the carriers based on their usable space only, *i.e.*, ticket counters, gates, hold rooms, baggage claim, and other terminal areas used by each carrier. Under the new "rentable" space formula (also referred to as the "commercial compensatory" method), LAWA assessed terminal charges based on the space occupied by the airlines plus an additional allocation of non-airline terminal common-use space, such as corridors and restrooms. The rentable space formula increased the allocable terminal space over which LAWA charged terminal rent and M&O fees. As DOT acknowledged, the rentable space method "adds to the cost area a share of all common areas—public spaces such as corridors and restrooms." FD at 23.<sup>14</sup>

In contrast to the complaint and exhibits filed in *Port Authority*—which totaled less than 100 pages—the complaint and exhibits submitted by the T1/T3 airlines in *LAX III* numbered more than 2,800 pages, and included, among other things, the leases of the T2/T4-8 carriers, declarations of several airline witnesses, and the report of an aviation economics expert. The complaint alleged, among other things, that the new, higher terminal charges and the "rentable" space methodology imposed by LAWA unjustly discriminated against them based solely on lease expiration dates as compared with other carriers with long-term leases who were not subject to the increased fees for up to 19 years.

Following nearly four weeks of hearings, the same DOT administrative law judge in *Port Authority* ruled in favor of the Terminal 1 and 3 carriers on virtually all issues raised. He found that the new and increased terminal charges at T1/T3 were unreasonable and unjustly discriminated against the complainants by using a "rentable" space formula for those airlines while simultaneously utilizing the "usable" space methodology for the long-term lease carriers at T2/T4-8.<sup>15</sup>

In finding that LAWA unjustly discriminated against the T1/T3 carriers by subjecting them to the rentable space methodology, the ALJ concluded all of the airlines at LAX occupy essentially comparable facilities and that all terminals have essentially the same passenger amenities. The fact that the T2/T4-8 carriers had long-term leases and the T1/T3 carriers had expired or short-term leases was, in the view of the ALJ, an artificial classification and a "distinction without a difference." *LAX III RD*, at 5.

In requesting that DOT reverse the ALJ's decision, LAWA argued that when it entered into 40-year leases in the 1980s with the long-term carriers, it did not bind itself not to change the methodology by which terminal rents are calculated for any other airline during the pendency of those leases. LAWA contended that it was not engaging in "unjust discrimination" because it could reasonably classify the T2/T4-8 carriers and T1/T3 carriers as tenant/signatory and non-tenant/non-signatory carriers, respectively. LAWA characterized the T1/T3 carriers as non-tenant/nonsignatory carriers because of their decision not to enter into a new lease. LAWA further claimed that it could reasonably distinguish between airlines that signed long-term leases in the 1980s under the residual rate methodology on the one hand, and airlines who did not sign leases of that duration and whose five year leases had expired, on the other hand.

In its Final Decision issued in *LAX III* on June 15, 2007, DOT found that LAWA's use of its "rentable" space methodology for base rent and M&O costs at Terminals 1 and 3 was "unjustly discriminatory."<sup>16</sup> Six aspects of the decision were determinative in DOT having reached a result opposite from the one in *Port Authority*. The remainder of this article discusses those six aspects of the *LAX III* case.

### 1. Similar Use of Comparable Facilities

In affirming the ALJ's finding of unjust discrimination, DOT pointed to the "substantial evidence ... [that] the T1/T3 carriers made similar use of the common space as did the long-term tenants." *LAX III* FD, at 62. Indeed, in its brief to the DOT, LAWA did not dispute the ALJ's finding that the T1/T3 Carriers, on the one hand, and the long-term tenants, on the other hand, engaged in similar use of the common space area of the airport. This finding was important because under the applicable statute, "air carriers making similar use of the airport" must be "subject to substantially comparable charges" unless the difference in charges is "based on reasonable classifications. . . ." 49 U.S.C. § 47107(a)(2)(B) (emphasis added). In addition, it was undisputed that LAWA was subjecting the T1/T3 airlines to a much more burdensome rate-setting formula than the T2/T4-8 airlines, despite the fact that the two groups of carriers made similar use of the same type of common-use areas within their respective terminals.

By contrast, in the *Port Authority* case there was no DOT finding that the complaining carriers and Continental made similar use of comparable facilities.

### 2. The Huge Amount of Potential Discrimination in Terms of Magnitude and Duration

*LAX III* was not a case where two airlines were subject to minor differences in terminal charges for a relatively brief period of time. To the contrary, the potential amount and duration of the discrimination in terminal rents between the T1/T3 carriers and their competitors at Terminals 2 and 4-8 was massive. Whereas the new terminal charges resulted in the T1/T3 carriers paying terminal charges of \$155 to \$172 per square foot, the T2/T4-8 carriers were to be paying between \$15 to \$66 per square foot. The disparity was calculated to be approximately \$220 million to \$265 million in the first five years alone. *LAX III* RD, at 70. Moreover, the tariff imposing the new fees had no durational limit, and the long-term leases at T2/T4-8 were of 15 to 19 more years in duration. Thus, absent

relief from DOT, the discrimination was likely to last not only for the foreseeable future but far beyond. *Id.* at 69-71.

### 3. Lack of Factual Support for Classifying the T1/T3 Carriers as "Non-Tenants" or "Non-Signatories"

In *Port Authority*, the only evidence before the DOT was that that the allegedly-favored airline—Continental—was a tenant and signatory at Newark, whereas the complaining carriers were neither. In *LAX III*, the airport's lawyers tried to make the same argument as in *Port Authority*, *i.e.*, that the discrimination in rates and charges was warranted because the complaining airlines were non-tenants and non-signatories at LAX.

However, this time the argument did not work. LAWA's effort to portray the T1/T3 carriers as non-tenants or non-signatories (as compared with the T2/T4-8 airlines) was contradicted by its own witness at trial, who admitted under cross examination that LAWA never sought to use either the "signatory/non-signatory" or "tenant/non-tenant" classifications to justify the different treatment of the T1/T3 carriers. *See* Tr. at 3379:16-3380:4 (We are relying on an airport operator being able to make reasonable classifications such as which would be one of those classifications *so it's not signatory, non-signatory that we're looking at*. Q. What about tenant versus non-tenant? A. *We're not looking at that either*). Moreover, the T1/T3 carriers had been signatories and tenants at LAX for many years (going back to the 1980's, and in the case of US Airways back to 1958), and would have remained so were it not for LAWA's demand that they agree to unjustly discriminatory and unreasonable terms.

### 4. DOT's Rejection of the "Per Se" Test for Unjust Discrimination

In *Port Authority*, the record was unclear whether DOT would apply a "per se" test to determine whether a disparity in airport rates and charges was lawful (*i.e.*, whereby the airport could show that the two groups of carriers were "different" and then impose widely disparate rates on the two groups of carriers regardless of the costs incurred by the airport to provide facilities and services to the two groups of carriers). Arguing for a "per se" test in *LAX III*, LAWA asserted that it could impose the rentable space methodology on carriers operating pursuant to a tariff or a short-term lease since they were classified differently than carriers still serving the airport under long-term leases signed 20 years ago. However, DOT rejected this argument, and ruled that there must be a "reasonable correlation" between the airport's classification of airlines and the disparity in charges imposed on those carriers.

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***DOT ... ruled that there must be a "reasonable correlation" between the airport's classification of airlines and the disparity in charges imposed on those carriers.***

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The Department agreed with the T1/T3 carriers that the cases involving airport fixed-base operators (FBOs) cited by LAWA for the proposition that an airport proprietor may impose different fee structures on aeronautical users based solely on dates of tenancy did not support LAWA's imposition of different methodologies at LAX. One of the cases cited by

LAWA did not involve comparable leased premises, addressed minimal disparities in lease rates (2.5 percent), and was brought by an FBO that had agreed to the fees charged under its lease. Another case also involved a situation of distinctly different leased premises and obligations undertaken by the longterm lessee. LAX III FD at 64.

The Department similarly found that the

public utility rate cases cited by LAWA for the proposition that rate disparities for new customers do not constitute unjust discrimination are not directly on point. For one thing, the airport grant assurance statute contains protections to airline users in addition to the “unjust discrimination” safeguards that may not be afforded by the power and gas statutes. Second, unlike natural gas companies (which had needed stable supply arrangements for the health of the industry), airports rely not only on revenue generated by their long-term tenants but also on passenger facility charges, FAA grants, and concession revenues. Airports therefore are not as dependent upon a long-term customer as are natural gas companies. Moreover, the strength of the origin and destination market at LAX is of greater impact than an individual airline with a long-term lease. Airlines may come and go over time while the importance of the Los Angeles market to major air carriers can hardly be disputed.

*Id.* at 64-65.

DOT emphasized that “not every difference is unjust discrimination.” *Id.* at 65. For example, “retaining a long-term lease with one airline tenant and negotiating shorter term leases that may reflect increased costs with new entrants is allowable.” *Id.* The Department further explained:

An airport may lawfully impose reasonable classifications on air carriers and negotiate different terms of use and charges for such use with them. Indeed, an airport that finances its gates with passenger facility charges is in fact obligated to negotiate short term arrangements with the tenants of those gates. Furthermore, the FAA has found that an airport may reasonably assess fees on certain resident aircraft while not assessing fees on transient aircraft without engaging in unjust discrimination. However, *an airport proprietor may not impose a more burdensome fee structure on a new classification of airline user without demonstrating at least a reasonable correlation between the new fees and the airline classification.*

*Id.* (emphasis added). Thus, airports that impose discriminatory rates based on different classifications of airlines must demonstrate a “reasonable correlation” between the disparity in fees and the airline classification.

##### **5. LAWA’s Inability to Link the Discrimination to Obligations Assumed by the Airport or the T2/T4-8 Carriers**

Once DOT refused to apply a “per se” rule of unjust dis-

crimination and allow LAWA to impose widely disparate rates based solely on different lease expiration dates, the finding of unjust discrimination was a foregone conclusion because LAWA did not even attempt to argue that the airport incurs higher costs to serve the T1/T3 Carriers than the T2/T4-8 carriers. Although LAWA claimed that the “circumstances” were different when the T2/T4-8 airlines entered into their long-term leases in the 1980’s, LAWA made no attempt to link the increase in charges at T1/T3 to the debt obligations incurred by the airlines at T2/T4-8 for capital improvements to their terminals. (Tr. 2729:9-16). Nor did LAWA impose a “surcharge” on the T1/T3 carriers because they did not sign 40-year leases or did not incur the same level of debt for terminal improvements as the T2/T4-8 carriers. (Tr. 3346:15-18, 3397:14-19).

Unlike in *Port Authority*, the airport in *LAX III* was not able to argue that the airlines had not met their burden of supporting their complaint with evidence of the discriminatory situation between the two groups of air carriers. To the contrary, the T1/T3 airlines had supported their complaint with over 2,700 pages of exhibits, including the long-term leases of the T2/T4-8 carriers, the report of an expert witness on airport and airline economics, and factual testimony of airport officials. However, LAWA had not presented evidence that adequately rebutted the T1/T3 airlines’ showing. The DOT stated:

LAWA has not shown any obligations undertaken by the airport, for example, that merit the additional fee imposition on the T1/T3 Carriers or, on the other hand, commensurate obligations undertaken by the T2/T4-8 Carriers that warrant their exclusion from the rentable space methodology. Rather, LAWA simply justified the new methodology on the T1/T3 Carriers by explaining its contractual commitments with the T2/T4-8 Carriers do not permit the rentable space methodology. *That reason alone is not sufficient to impose a new fee methodology on one group of carriers and not another when they both make similar use of similar ‘common space.’*

LAX III FD at 64 (emphasis added)

##### **6. LAWA’s Admission of Unjust Discrimination**

DOT’s finding that LAWA unjustly discriminated against the T1/T3 carriers also was supported by the fact that LAWA had acknowledged—in other legal forums—that its new terminal charges were unjustly discriminatory. In pleadings filed in the Delta Air Lines and Northwest Airlines bankruptcy cases, the City of Los Angeles argued that the airport should be allowed to terminate the Delta and Northwest terminal leases early in order to avoid unjustly discriminating against other airline tenants at LAX. In the Delta case, the City pointed to the fact that “airlines in Terminals 1 and 3” were subject to the new airport tariff (whereas Delta was not) and contended that “the City’s federal law obligation to treat its airlines in a nondiscriminatory fashion ... constitute[s] ‘cause’ for the Court to grant relief from the automatic stay to permit all actions related to the City’s exercise of its early termination rights under the Terminal 5 lease. . . .” A similar admission was

made in the Northwest proceeding. Having made these candid admissions in the other cases, it was difficult for LAWA to insist to the DOT that its rate structure at LAX was not unjustly discriminatory.

Based on its finding of unjust discrimination, DOT directed LAWA "to refund with interest the portion of the new or increased fees deemed unreasonable and/or unjustly discriminatory that have already been paid by the T1/T3 carriers pursuant to the Tariff, effective February 1, 2007."<sup>17</sup>

### **Conclusion**

The recent DOT decisions in *Port Authority* and *LAX III* demonstrate that the federal prohibition against unjust discrimination is no "paper tiger." The Newark case shows that there are circumstances in which an airport can subject airlines to disparate fee structures. However, the LAX decision offers an important layer of protection to airlines: if the complainant airlines support their complaint with evidence regarding the fac-

tual situation at the airport and which demonstrates a material amount of discrimination, the airport cannot escape a finding of unjust discrimination merely by insisting that the discriminated-against and favored groups of carriers are somehow "different." If the airport genuinely incurs more costs to serve the carriers charged higher fees, the difference may be lawful as long as it bears a relationship to the difference in costs in serving the respective airlines, and the fees are otherwise reasonable. But, the airport cannot impose widely disparate rates based solely on a classification such as different lease expiration dates.

An ordinary commercial landlord may be able to increase a tenant's rent once its lease expires; but a public-use airport that has received federal assistance cannot emulate such a landlord: if it charges significantly higher fees to airlines whose leases have expired, while continuing to subject other similarly-situated airlines to lower fees, there must be a cost-based justification for the difference in fees.

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## Endnotes

<sup>1</sup> *Brendan Airways, LLC v. Port Auth. of New York and New Jersey*, Docket OST-20407, Order 2005-6-11 (June 11, 2005), *aff'd in part*, 479 F.3d 21 (D.C. Cir. 2007) (hereafter *Port Authority*).

<sup>2</sup> *Alaska Airlines, Inc. et al. v. Los Angeles World Airports*, Docket OST-27331, Final Decision Order 2007-6-15 (June 15, 2007) (LAX III FD), on appeal, Case Nos. 07-1142 *et al.* (D.C. Cir.). The LAX case is referred to as *LAX III* because in the 1990's LAX was subject to two prior DOT "rocket docket" cases under 49 U.S.C. 47129 regarding its landing fees.

<sup>3</sup> 61 Fed. Reg. 31994 (June 21, 1996). In 1997, the DOT Policy Statement was vacated in part by the D.C. Circuit. *Air Transport Ass'n v. Dep't of Transportation*, 119 F.3d 38 (D.C. Cir. 1997), as amended by 129 F.3d 625 (D.C. Cir. 1997).

<sup>4</sup> See *Northwest Airlines v. County of Kent*, 510 U.S. 355 (1994); *Second Los Angeles International Airport Rates Proceeding*, Order 97-12-31 (December 23, 1997) (LAX II Remand Decision); *Miami International Airport Rates Proceeding*, Order 97-3-26 (March 19, 1997).

<sup>5</sup> Pursuant to the requirements of the 1994 FAA Authorization Act, DOT adopted Rules of Practice for Proceeding Concerning Airport Fees, Subpart F, 14 C.F.R. Part 302. 60 Fed. Reg. 6919 (February 3, 1995).

<sup>6</sup> British Airways PLC, Scandanavian Airlines System, Societe Air France, Swiss International Airlines, Virgin Atlantic Airways Limited, Deutsche Lufthansa AG, TAP Air Portugal, Alitalia-Linee Aeree Italiane-S.p.A., El Al Israel Airlines Limited, Air Jamaica Limited, KLM Royal Dutch Airlines, and Singapore Airlines.

<sup>7</sup> DOT Instituting Order, Order 2005-3-21, at 2 (March 16, 2005).

<sup>8</sup> "Recommended Decision of Administrative Law Judge Richard C. Goodwin," OST-2005-20407-116 (May 10, 2005) (Newark RD).

<sup>9</sup> The Department did however rule that two expense reclassification costs in tile amount of \$2.13 million per year were unreasonable, that an unreasonable methodology was used for allocating city rent, and that an incorrect calculation was used for one component of concession revenue in the amount of \$900,00 per year. *Id.* at 2.

<sup>10</sup> The D.C. Circuit also ruled that foreign airlines have no standing to challenge airport fees under the "rocket docket" procedures of 49 U.S.C. 47129. 479 F.3d 21. Section 47129 did not apply to foreign air carriers because it used the term "air carrier," which the court defined to mean "U.S. air carrier." The court did not decide whether foreign airlines could pursue similar relief against unjustly discriminatory or otherwise unreasonable fees under 14 C.F.R. Part 16 (under which, unlike 47129,

it typically takes a year or more for claims to be resolved), or whether such relief could include refunds of unlawful fees. *Id.* at 31 n. 3. It is also possible that a foreign air carrier could seek a refund of unlawful airport fees in federal district court under 42 U.S.C. 1983.

<sup>11</sup> *Id.* at 42 (citing Order 2005-6-11, at 23-24).

<sup>12</sup> *Id.* at 43 (emphasis added).

<sup>13</sup> The foreign airlines operating out of the Tom Bradley International Terminal at LAX (TBIT Carriers) operated under a lease with LAWA that expired on March 31, 2007.

<sup>14</sup> As a result of the switch from usable space to rentable space, the airlines at Terminal 1 (Southwest and US Airways) had their allocable space increase from 50 to 88 percent. The increase at Terminal 3 was from 60 to 88 percent. LAX III Final Decision (FD) at 23-24. By virtue of the new M&O charges, the increased space cost allocations also applied to airport wide expenses allocated to the T1/T3 terminals. These included security expenses and costs associated with the planned "people mover" that will transport passengers to the central terminal area. *Id.* at 24.

<sup>15</sup> "Recommended Decision of judge Richard C. Goodwin," OST-2007 27331-184 (May 15, 2007) (LAX III RD).

<sup>16</sup> Order 2007-6-15 (LAX III FD) at 69. Because LAWA did not apply the rentable space formula at TBIT until several weeks after TBIT filed its complaint, DOT did not rule whether the imposition of the rentable space formula on the TBIT Carriers. (but not the T2/T4-8 airlines) constituted unjust discrimination. The TBIT airlines have a claim for unjust discrimination pending before DOT.

<sup>17</sup> LAX III FD at 68. Separate from its determination that the new fees at Terminals 1 and 3 were unjustly discriminatory, the Department ruled that the manner in which the airport calculated terminal base rent using "fair market value" was improper. However, DOT opened the door to the airport employing a "fair market value" formula to set terminal rents if certain conditions were met. LAX III FD, at 3. Specifically, the airport's "failure, to use an objective measure, *i.e.*, an independent appraiser basing the fair market value on other comparable aeronautical terminal facilities, renders LAWA's determination of fair market value as unreasonable." *Id.* at 58. In concluding that LAWA could use fair market value to unilaterally impose terminal rents in some circumstances, DOT refused to consider the overwhelming evidence in the record of LAX's monopoly power (*id.* at 63), and the airlines' argument that use of fair market value to set terminal rents abused such power. The Department also did not reconcile its decision with the D.C. Circuit's prior rulings regarding the use of fair market value to set airport fees.