DELTA & NORTHWEST FILE FOR BANKRUPTCY: IS IT TIME TO GROUND A MAJOR AIRLINE?

I. Introduction

Prior to 1978, Congress chose to regulate the airline industry "to avoid the deleterious consequences of cutthroat and excessive competition, and thereby enhance economic stability, safety, and the sound growth and development of this young industry."[1] During the forty years of regulation, no major airlines filed for bankruptcy,[2] and no new airlines were created.[3] However, in 1978, Congress passed the Airline Deregulation Act, which forever changed the industry.[4] There have been polar views on deregulation's success from its inception to date.[5]

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1. Paul Stephen Dempsey, *Transportation Deregulation—On a Collision Course?*, 13 Transp. L.J. 329, 335 (1984).

2. *See* Marian Jelinek & Marija Ilic, Dep't of Energy, Office of Policy and Int'l Affairs, A Strategic Framework for Electric Energy: Technology and Institutional Factors and IT in a Deregulated Environment 6 (2000), http://www.pi.energy.gov/documents/mitref2.pdf. Before 1978, the U.S. airline industry was "protected from competition and assured a profit." *Id.* There was no need to file for bankruptcy because "inefficient carriers were kept afloat by enforcement of rates based on the average costs of the industry." Robert M. Hardaway, *Transportation Deregulation (1976–1984): Turning the Tide*, 14 Transp. L.J. 101, 137 (1985).

3. Michael A. Katz, *The American Experience Under the Airline Deregulation Act of 1978—An Airline Perspective*, 6 Hofstra Lab. L.J. 87, 88 (1988) (observing that between 1938 and 1978 "not one new airline began operations as a large passenger air carrier").

4. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended in various sections of 49 U.S.C.). "Congress' intent was to allow for maximum reliance on the competitive market forces, which would further efficiency and innovation in the airline industry." Laynie Giles, *Interpreting the Airline Deregulation Act of 1978: Federal Preemption Over State Deceptive Advertising Laws*, 22 Transp. L.J. 87, 92 (1994) (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992)).

5. *See* Great Aviation Quotes, http://www.skygod.com/quotes/airline.html (last visited Apr. 1, 2007). Compare remarks made by Robert L. Crandall, former CEO of American Airlines, in 1977, while addressing a Senate lawyer prior to airline deregulation ("You can't deregulate this industry. You're going to wreck it. You don't know a goddamn thing!"), and Bruce Lakefield, former CEO US Airways, while between

However, one thing is certain: deregulation's goals have come at a high cost.[6] Since deregulation began in the United States, dozens of air carriers have been merged, taken over, or have simply gone out of business.[7]

The airline industry has faced significant obstacles over the past few years.[8] Airline carriers are "caught in a squeeze between higher costs and lower revenues."[9] The trend commenced before September 11, 2001, but the terrorist attacks exacerbated the problems.[10] Despite a significant cash infusion after September 11th,[11] bankruptcies have been on the upswing.[12] On September 14, 2005, two more airlines became the latest casualties and filed for bankruptcy.[13] Atlanta-based Delta Air Lines, Inc. and Eagan, Minnesota-based Northwest Airlines Corp. filed for bankruptcy protection, becoming the

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bankruptcies in October 2004, ("This entire industry is in a death spiral, including this company, and I can't get us out of it. Deregulation is an abysmal failure and we have no more furniture left to burn."), with Richard Ferris, former CEO of United Airlines, in 1976, ("Deregulation will be the greatest thing to happen to the airlines since the jet engine."), and Alfred Kahn, the airline economist and Chairman of the Civil Aeronautics Board who was responsible for deregulating the industry ("Whenever competition is feasible it is, for all its imperfections, superior to regulation as a means of serving the public interest."). *Id.*

6. Alex Marshall, *Bad Air Days*, GOVERNING MAG., Apr. 2005, at 68 (commenting that everyone has lost under deregulation, including small localities, passengers, suppliers, and investors).

7. Katz, *supra* note 3, at 94 (noting that over 100 carriers have merged or gone bankrupt since deregulation began).

8. *See, e.g.*, Joseph C. Anselmo & Michael A. Traverna, *Bad to Worse; Bankruptcy Filings Highlight Woes in U.S. Airline Market, but Fuel Prices Also Are Taking a Toll in Europe and Asia*, 163 AVIATION WEEK & SPACE TECH. 26 (2005) (discussing that air carriers' losses in 2005 were due to oil prices, the cost of borrowing money, and labor costs).

9. Joel G. Chefitz, *A Tale of Two Mergers; American/TWA and United/USAir*, 14 DEPAUL BUS. L.J. 215, 218 (2002).

10. *Id.* at 219.

11. Michael Arndt & Wendy Zellner, *How to Fix the Airlines*, BUS. WEEK, Apr. 14, 2003, at 74. The federal government provided $5 billion in cash compensation and $10 billion in loan guarantees during 2001–2002. *Id.*

12. Chefitz, *supra* note 9, at 219.

13. Voluntary Petition, *In re* Delta Air Lines, Inc., No. 05-17923 (Bankr. S.D.N.Y. Sept. 14, 2005); Voluntary Petition, *In re* Northwest Airlines, Corp., No. 05-17930 (Bankr. S.D.N.Y. Sept. 14, 2005).

third and fourth major U.S. carriers to enter Chapter 11 since the September 11th terrorist attacks.[14]

In Parts II and III, this Comment will discuss problems in the airline industry and provide detail about Delta's and Northwest's bankruptcy filings. Further, Part IV will provide background information about bankruptcy law prior to the statutory change in October 2005. Part V will discuss one possible outcome of these bankruptcy filings, which is a merger between Delta and Northwest. Next, Part VI will evaluate the impact a merger would have on the two airlines, the domestic airline industry, and the international airline industry. Finally, this Comment will conclude with a recommendation that these two companies should merge during bankruptcy.

II. "HOUSTON, WE'VE HAD A PROBLEM."[15]

There are several reasons why the airline industry is on a dismal flight path.[16] The terror attacks of September 11th have damaged the industry.[17] Further, bombings in Britain and Egypt have re-awakened terrorism fears.[18] However, it is naïve to think that these are the only causes that have crippled the

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14. *Two Airlines Confront Bankruptcy; Debt-Ridden Delta and Northwest Assure Passengers Schedules Will Be Maintained*, THE RECORD, Sept. 15, 2005, at E6.

15. James A. Lovell, *"Houston, We've Had a Problem," in* APOLLO EXPEDITION TO THE MOON 13.1 (Edgar M. Cortright ed., 1975), *available at* http://www.hq.nasa.gov/office/pao/History/SP-350/ch-13-1.html (quoting the famous words uttered by Jack Swigert during the Apollo 13 space mission).

16. *See, e.g.*, Anselmo & Traverna, *supra* note 8 (listing oil prices, the cost of borrowing money, and labor costs as reasons for the airline industry's recent struggles).

17. *See Financial State of the Airline Industry: Hearing Before the Comm. on Commerce, Science, and Transportation*, 107th Cong. 5 (2001) [hereinafter *Hearing*] (statement of Rep. Kay Bailey Hutchison, Member, Comm. on Commerce, Science, and Transportation) ("Almost 100,000 people have been laid off in the aviation industry."); *id.* (statement of Rep. Conrad Burns, Member, Comm. on Commerce, Science, and Transportation) (discussing that load factors are down to levels where airlines cannot break even).

18. Conrad de Aenlle, *Steering Through Clouds Look Past Airlines for Industry Fliers*, INT'L HERALD TRIB., Sept. 17, 2005, at Finance 3; *see* Alan Cowell et al., *First Details of Bombs Emerge; Toll Reaches 49 and Some Bodies Aren't Recovered*, N.Y. TIMES, July 9, 2005, at A7 (describing the London subway terror attacks); Elaine Sciolino & Don Van Natta Jr., *Searching for Footprints*, N.Y. TIMES, July 25, 2005, at A1 (describing the terrorist bombings in Egypt).

industry.[19] Fuel costs have skyrocketed,[20] which is the largest contributing factor in network carriers' cost structures falling short of sustaining profitability.[21] This fuel increase is extremely troublesome because most domestic carriers had inadequate fuel hedging programs, which left them exposed to the oil price shocks.[22]

Another reason for the airline industry's turbulent outlook is that the money needed to keep up operations can only be borrowed at high interest rates.[23] Also, loans can be difficult to obtain from lenders because "after years of borrowing billions . . . the carriers have few assets left to pledge as collateral."[24] Further, labor costs, which are the largest expenses for an air carrier,[25] are out of line with the market.[26]

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19. *See Hearing*, *supra* note 17 (statement of Rep. John McCain, Member, Comm. on Commerce, Science, and Transportation) ("[T]he aviation sector was already in financial difficulties before last week's acts of terrorism . . . The airline industry does cycle with the economy, and with a poor economy the airline industry was in some significant difficulty before.").

20. Energy Information Administration, http://www.eia.doe.gov/oil_gas/petroleum/info_glance/jetfuel.html (last visited Apr. 1, 2007) (follow Weekly Spot Prices History hyperlink; then average the U.S. Gulf Coast Kerosene-Type Jet Fuel column by year) (stating average U.S. jet fuel spot price, based on U.S. Gulf Coast Kerosene-Type Jet Fuel Spot Price FOB, was $72.49 for 2001, $68.70 for 2002, $82.35 for 2003, $115.10 for 2004, $171.55 for 2005, and $192.29 for 2006).

21. David Bond, *Higher Yield Haven; Having Ridden Out 9/11, SARS, and the Iraq War, International Service Looks Like a Life Preserver to Distressed U.S. Network Airlines*, 163 AVIATION WEEK & SPACE TECH. 44 (2005).

22. Anselmo & Traverna, *supra* note 8, at 26.

23. *See* Bond, *supra* note 21, at 44 ("You can't reduce interest expenses if your survival depends on borrowing more and more to keep up operations.").

24. Anselmo & Traverna, *supra* note 8, at 26.

25. Mark C. Mathiesen, *Bankruptcy of Airlines: Causes, Complaints, and Changes*, 61 J. AIR L. & COM. 1017, 1031 (1996).

26. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, http://data.bls.gov/oes/search.jsp (last visited Apr. 1, 2007). The May 2005 Bureau of Labor Statistics showed that the average airline worker was paid $58,130 annually, versus $37,870 annually for the average worker. *See id.* (To obtain airline worker annual mean, search multiple occupations for one industry; then select sectors 48 & 49; choose air transportation, code 481000; select TOTAL, ALL OCCUPATIONS code 000000; choose May 2005, data type annual mean wage, and data output HTML. To obtain national annual mean wage, choose one occupation for multiple geographic areas; select TOTAL, ALL OCCUPATIONS code 000000; choose national; choose May 2005, data type annual mean wage, and data output HTML.).

In addition to higher costs, the method of earning passenger revenue has changed.[27] Revenues are no longer primarily derived from the business traveler.[28] Instead, leisure passengers are an increasing component of revenue.[29] Further, these travelers are making their own bookings on the Internet and are shopping around for the best price.[30]

Also, profit has declined due to excess numbers of available seats.[31] This overcapacity puts airlines in a dilemma.[32] To deal with the excess seat availability, airlines have lowered fares to keep customers, and any chance of increasing fares has been thwarted by other airlines.[33] Since the low fares do not cover the costs of providing the service, this cycle creates greater fiscal losses and perpetuates the problem.[34] This debilitating gap between rising costs and shrinking revenues has led many domestic carriers into bankruptcy.[35]

While the domestic airline industry has been hit hard, the international airline industry has not been immune from

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27. *See, e.g.*, David Field & Donna Rosato, *Airlines Delve Deeper into Net with E-Booking, Check-Ins*, USA TODAY, Feb. 29, 2000, at B1 (discussing that the Internet is gaining momentum as more and more revenue is earned from bookings made online).

28. Chefitz, *supra* note 9, at 218–19 (discussing that airlines are earning lower revenues from decreased business travel).

29. *See* Sally B. Donnelly, *Should the U.S. Keep Bailing Out Airlines?*, TIME, Dec. 1, 2003, at 22.

30. *See* Tim Boreham, *Criterion*, THE AUSTRALIAN, Dec. 13, 2005, at 25 (commenting that customers are turning to the Internet to locate the cheapest fare).

31. Dan Fitzpatrick, *Biggest Issues Facing the America West-US Airways Merger*, PITTSBURGH POST-GAZETTE, May 20, 2005, *available at* http://www.post-gazette.com/pg/05140/507674.stm (stating that overcapacity is a problem because "too many seats are chasing too few passengers").

32. *See* Bond, *supra* note 21, at 44. Domestic overcapacity causes airlines to lower fares when they can least afford it. *Id.*

33. *See Delta Rivals Bid to Thwart Cap on Fares*, DES MOINES REG., June 17, 2005, at D1 (stating that in mid-June 2005 Northwest tried to raise the $499 cap Delta had on certain one-way fares by $50, but the fare increase fell apart after Delta and American failed to match it).

34. *See* Martin Moylan, *Big Airlines Find Profitable Skies Overseas*, DULUTH NEWS TRIB., Apr. 22, 2005, *available at* 2005 WLNR 22923389.

35. Bond, *supra* note 21, at 44 (stating that "[d]omestic overcapacity wouldn't be a problem if it weren't driving down fares" and explaining that these low yields (revenue per seat mile flown) have erased the carriers' efforts of filling airplanes).

problems either.[36] International carriers also face high fuel costs, and these prices are starting to take their toll on carriers in Europe and the Asia-Pacific.[37] The European airline market was down slightly in 2005 compared to 2004.[38] Even though the Asia-Pacific market made a gross profit of $1.5 billion (USD) in 2005, that number is down over 40% from 2004.[39]

However, foreign airlines seem to be doing much better than U.S. carriers.[40] This is because foreign airlines have cheaper labor costs than the United States.[41] Additionally, airlines in Europe and Asia have been able to mitigate the impact of rising oil prices by passing on these costs to their passengers in the form of fuel surcharges.[42] Finally, foreign carriers have more pricing power since they tend to share routes with just one or a few significant rivals.[43] By comparison, U.S. airlines have cutthroat competition,[44] and some perceive bankruptcy as the best way to cut costs and remain competitive.[45]

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36. *A Surprising Boom; The Airline Industry*, THE ECONOMIST, Nov. 12, 2005 (stating that by the end of 2005 the world's airlines will have lost a total of approximately $43 billion since 2001).

37. Anselmo & Traverna, *supra* note 8, at 26.

38. *Id.* (stating that European carriers made about $1.4 billion (USD) in 2004); Giovanni Bisignani, *Asia Pacific Aviation Summit—Remarks*, Feb. 20, 2006, http://www.iata.org/pressroom/speeches/2006-02-20-01 (stating that European carriers made about $1.3 billion (USD) in 2005).

39. Bisignani, *supra* note 38; *see also* Anselmo & Traverna, *supra* note 8, at 26 (discussing that Asia's airline profits were expected to drop to $1 billion in 2005, a decline of 62% from 2004).

40. *A Surprising Boom; The Airline Industry*, *supra* note 36 ("Although American carriers are still deep in the red, in the rest of the world airlines are holding their own."). Many major carriers in Europe and Asia are doing well. *Id.* Traffic is rising as "India and China are exploding [onto] the scene." *Id.* Even the Middle East is holding its own as it emerges as a global hub between Europe, Asia, and Australia. *Id.*

41. *Id.* (stating that labor costs in the United States account for nearly 40% of total operating expenses; but, in Asia, labor accounts for 20%, and, in Europe, it is approximately 30% of total operating expenses).

42. Anselmo & Traverna, *supra* note 8, at 26.

43. Aenlle, *supra* note 18.

44. *Id.*

45. Robert M. Lawless et al., *Industry-wide Effects of Corporate Bankruptcy Announcements*, 12 BANKR. DEV. J. 293, 298 n.17 (1996) ("[A] bankruptcy filing serves as a competitive advantage to the debtor." (quoting Robert Crandall, former CEO of American Airlines)).

III. "Come fly with me, let's fly, let's fly away"[46]

Delta and Northwest are considered legacy carriers[47] and have been "flying the friendly skies"[48] since 1928 and 1926, respectively.[49] However, in more recent times, those skies have not been so friendly for the two companies.[50] On September 14, 2005, both airlines filed for bankruptcy.[51] At that time, the current debt for Delta was $28.3 billion (USD), and for Northwest it was $17.92 billion (USD).[52] Both airlines have decided to "fly away" from responsibility by seeking bankruptcy court protection from their creditors.[53]

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46. Frank Sinatra, *Come Fly With Me*, *on* Come Fly With Me (Capitol Records 1959).

47. Federico Ciliberto & Carola Schenone, *Financial Decisions, Bankruptcy, and Product-Market Competition in the Airline Industry* 3 (2005), http://lcb.uoregon.edu/departments/finance/emp_research_papers/ciliberto_schenone.pdf. Legacy carriers are carriers that existed before deregulation. *See* Bradley H. Weidenhammer, *Compatibility and Interconnection Pricing in the Airlines Industry: A Proposal for Reform*, 114 Yale L.J. 405, 407 (2004).

48. United Airlines, Advertising, http://www.united.com/page/article/0,6722,2693,00.html (last visited Apr. 1, 2007) (explaining that "Fly the Friendly Skies" was a United Airlines ad campaign slogan in the 1960s).

49. Delta, Delta Stats & Facts, http://www.delta.com/about_delta/corporate_information/delta_stats_facts/index.jsp (last visited Apr. 1, 2007); NWA, Northwest Airlines Up Close, http://www.nwa.com/corpinfo/upclose/ (last visited Apr. 1, 2007).

50. *See, e.g.*, *Leaner, Meaner in Chapter 11?: Big Changes Seen at Delta, Northwest*, New Jersey Rec., Sept. 16, 2005, at B1, *available at* http://www.redorbit.com/news/technology/241869/leaner_meaner_in_chapter_11_big_changes_seen_at_delta/index.html [hereinafter *Big Changes*] (discussing Northwest's and Delta's bankruptcy filings).

51. *See* Voluntary Petition, *In re* Delta Air Lines, Inc., No. 05-17923 (Bankr. S.D.N.Y. Sept. 14, 2005); Voluntary Petition, *In re* Northwest Airlines, Corp., No. 05-17930 (Bankr. S.D.N.Y. Sept. 14, 2005). These two companies strategically filed for bankruptcy before the new bankruptcy laws went into effect on October 17, 2005. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 (2005) (codified as amended in scattered sections of 11 U.S.C.). On April 20, 2005, President Bush signed the Bankruptcy and Abuse Prevention and Consumer Protection Act of 2005 into law, which contained changes to the federal Bankruptcy Code. Patrick E. Mears & John T. Gregg, *What Congress Hath Wrought*, 19 Prob. & Prop. 22, 23 (Nov.–Dec. 2005). "The effective date for most of these statutory revisions was October 17, 2005, which is 180 days after President Bush signed the Act." *Id.*

52. *Big Changes*, *supra* note 50, at B1.

53. *See* Voluntary Petition, *In re* Delta Air Lines, Inc., No. 05-17923 (Bankr. S.D.N.Y. Sept. 14, 2005); Voluntary Petition, *In re* Northwest Airlines, Corp., No. 05-17930 (Bankr. S.D.N.Y. Sept. 14, 2005).

Some of the listed causes for Northwest's filing included high operating costs, higher fuel costs, and a mechanics' strike.[54] Northwest's fuel bill was $3.1 billion (USD) for 2005 "compared to $2.2 billion [(USD)] for 2004 and $1.6 billion [(USD)] for 2003."[55] Also, Northwest's "[m]echanics went on strike in August rather than accept deep layoffs and pay cuts, and though the airline stayed aloft with replacements, it switched to a reduced fall schedule early and saw more delays and cancellations than usual."[56] In September 2005, Northwest first acknowledged some of the costs of the strike when it asked for permission to pay $55 million (USD) to vendors for services during its mechanics' strike.[57]

For Delta, some of the blame for its financial woes falls on Hurricane Katrina.[58] Katrina hit Delta hard because of the airline's presence in the South. Specifically, the airline had to cancel flights to New Orleans, Louisiana and Gulfport, Mississippi.[59] However, JP Morgan analyst Jamie Baker, in his research note on Delta, placed the blame on management's inability to pursue asset sales, debt-for-equity exchanges, credit card processor replacement, and wage reductions, in light of dramatically higher fuel prices.[60]

Whatever the carriers' ultimate reasons for their financial troubles, Delta and Northwest were both looking to bankruptcy

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54. *Delta, Northwest Near Bankruptcy*, ST. PETERSBURG TIMES, Sept. 14, 2005, at D1.

55. Joshua Freed, *Northwest Airlines Files for Bankruptcy*, SFGATE.COM, Sept. 14, 2005, http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/09/14/financial/f142404D80.DTL; Northwest Airlines Corp., Annual Report (Form 10-K), at 28, 30 (Mar. 16, 2006).

56. Freed, *supra* note 55.

57. *Airlines Will Be Slimmer Birds*, PITTSBURGH TRIB.-REV., Sept. 16, 2005, *available at* http://pittsburghlive.com/x/pittsburghtrib/s_374656.html.

58. Paul Beebe, *Weekend Bankruptcy?; Delta Slides Nearer to Bankruptcy*, SALT LAKE TRIB., Sept. 3, 2005, at F1. Hurricane Katrina, a category 4 hurricane, hit the Gulf Coast August 29, 2005, devastating New Orleans and causing damage in Louisiana, Mississippi, and Alabama. Howard Witt & Dahleen Glanton, *Katrina Wallops Coast; Massive Hurricane Kills Scores, Displaces Millions on Gulf*, CHICAGO TRIB., Aug. 30, 2005, at C1.

59. *Delta, Northwest Near Bankruptcy*, *supra* note 54, at D1.

60. *Id.*

as a way to relieve some of their high costs.[61] Since filing for bankruptcy, Northwest has sought to reject certain aircraft leases.[62] After its filing, Delta "asked a New York bankruptcy judge to allow it to abandon some properties and prevent utilities from turning off its power."[63] Further, Delta and Northwest have cut or are in the process of cutting their employees' jobs, pay, and benefits.[64]

IV. Bankruptcy: Is the Baggage Really Lost, or is it at Another Gate?

In 1978, Congress passed the Bankruptcy Act.[65] The purpose of the Bankruptcy Act is to allow financially troubled businesses to continue operating by giving them time to reorganize their finances.[66] Under Chapter 11 bankruptcy, a company continues to operate while creating a reorganization plan, confirmed by the court, that determines how its creditors will be repaid, and from what source.[67]

According to Robert Crandall, a former CEO of American Airlines, bankrupt airlines enjoy competitive advantages over rivals not in bankruptcy.[68] A bankrupt airline can defer debt

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61. *See Big Changes*, *supra* note 50, at B1 (explaining that in bankruptcy, Delta and Northwest will probably layoff employees, cut pensions, and reduce routes).

62. *Id.* Northwest plans to "return 13 aircraft immediately, and it has designated 102 more for potential removal." *Airlines Will Be Slimmer Birds*, *supra* note 57.

63. *Big Changes*, *supra* note 50, at B1.

64. *E.g.*, Wall St. J. Abstracts, Oct. 20, 2006, at B10 ("US Bankruptcy Judge Adlai Hardin has approved a plan by Delta Air Lines to cut $50 million a year in health benefits . . . ."); *The Future of Northwest Airlines: NWA Baggage Handlers Ratify Pay, Benefit and Job Cuts*, Minn. Pub. Radio, June 9, 2006, http://minnesota.publicradio.org/display/web/2006/06/09/baghandlers/ (explaining that the ground workers' union deal is part of Northwest's plan "to reduce its labor costs by $1.4 billion [(USD)] a year").

65. However, in 2005, changes to the Bankruptcy Code went into effect. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 (2005) (codified as amended in scattered sections of 11 U.S.C.). Since Delta and Northwest filed for bankruptcy before the law changed, this Comment is concentrating on the law as of the day that they each filed.

66. Mathiesen, *supra* note 25, at 1025 (citing H.R. Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.S.C.A.N. 5963).

67. *See* 11 U.S.C.A. §§ 1101–1174 (West Supp. 2006).

68. *See Crandall Urges Radical Change to Bankruptcy Laws*, Dallas Morning News, June 10, 1993, at D1.

payments,[69] modify labor agreements,[70] and postpone pension contributions.[71] Crandall theorizes that a bankrupt airline can lower its financing and operating costs, thereby luring customers away from competitors by offering lower prices.[72] Similarly, Nigel Milton, Virgin Atlantic's government affairs manager, said, "Chapter 11 is a type of state aid. The playing field gets tilted more and more against us."[73] These lower prices have the effect of forcing nonbankrupt airlines to reduce costs and shrink their profit margins, perhaps bringing these carriers closer to bankruptcy themselves.[74]

In addition, Chapter 11 bankruptcy reorganization allows the industry to retain more competitors than the market can handle.[75] The availability of Chapter 11 reorganization has caused overcapacity by keeping inefficient carriers in the market.[76] Often in the airline industry, bankruptcy merely postpones the inevitable.[77] It is likely that Chapter 11 has "the

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69. Mathiesen, *supra* note 25, at 1035.

70. *Id.* at 1030–31 (emphasizing that Section 1113 of the Bankruptcy Code was enacted to allow labor contracts to be modified as long as the decision is not made unilaterally).

71. *See id.* at 1035; *Airlines Will Be Slimmer Birds*, *supra* note 57 (explaining that Delta and Northwest have underfunded pension plans, and that some analysts expect the companies to dump the responsibility on the federal government like United Airlines did while it was in bankruptcy).

72. Lawless, *supra* note 45, at 298.

73. Dan Atkinson & Tom McGhie, *U.S. Bankruptcy Clash*, MAIL ON SUNDAY (London), Oct. 9, 2005, at C1. British firms feel that bankruptcy allows unfair assistance to American air carriers who can undercut British rivals. *Id.*

74. *See* Lawless, *supra* note 45, at 298 (observing that healthy airlines must reduce "their own prices to meet the prices offered by the bankrupt firm or suffer erosion of their customer base").

75. Daniel P. Rollman, Comment, *Flying Low: Chapter 11's Contribution to the Self-Destructive Nature of Airline Industry Economics*, 21 EMORY BANKR. DEV. J. 381, 412 (2004–2005) (citing Jerry Knight, *US Airways, MCI Face Uncertain Future After Chapter 11 Exit*, WASH. POST, Apr. 28, 2003, at E1 ("[A]ccording to Darryl Jenkins, '[w]e could have lost a carrier and then the whole industry would have been better off.'")).

76. *Id.* at 400.

77. *See* Jeff Mosteller, *The Current and Future Climate of Airline Consolidation: The Possible Impact of an Alliance of Two Large Airlines and an Examination of the Proposed American Airlines-British Airways Alliance*, 64 J. AIR L. & COM. 575, 579–80 (1999) (noting that Midway, PanAm, and Eastern all filed for bankruptcy prior to 1996, and none of those airlines are in business today).

unintended consequence of inhibiting or delaying airlines from achieving [a] fundamental requirement for the long-term financial health of the industry: exit or consolidation of inefficient carriers."[78] Although Delta and Northwest have already filed for bankruptcy, it may be possible to resuscitate the industry through a merger.

V. Should Northwest and Delta Merge?

Delta has indicated that it plans to emerge from bankruptcy in 2007 as a single, independent carrier.[79] However, in some analysts' opinion, bankruptcy reorganization, instead of consolidation, "screw[s] things up for the industry as a whole."[80] Therefore, it is arguable that the best option is for another carrier to merge with Delta.

Currently, United, US Airways, and Northwest have all expressed interest in acquiring Delta.[81] Nevertheless, this Comment advocates a Delta-Northwest merger for several reasons. First, Delta's management has already dismissed an offer from US Airways,[82] and Delta's creditors have rejected a second US Airways proposal,[83] indicating their preference not to merge with US Airways. Second, Northwest is seen by analysts as "a more likely suitor than United, given anti-trust concerns."[84] Further, Delta and Northwest talk regularly about code sharing and marketing agreements, so they have a good idea about "'how each other operates, [] whether they're compatible, and whether they make sense' as a merged

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78. Rollman, *supra* note 75, at 398.

79. Liz Fedor, *No Merger Dance Likely for Domestic Airlines*, STAR TRIB., Feb. 1, 2007, at D1.

80. Rollman, *supra* note 75, at 412 (citing Timothy K. Smith, *Why Air Travel Doesn't Work*, FORTUNE, Apr. 3, 1995, at 42 (quoting Univ. of Chicago economist Lester Telser)).

81. *See* Mark Tatge, *Airlines Jockey for Delta*, FORBES, Jan. 10, 2007, http://www.forbes.com/markets/2007/01/10/delta-us-airways-markets-equity-cx_mt_0110 markets14.html.

82. *Delta Rejects US Airways Offer*, CNN MONEY, Dec. 19, 2006, http://money.cnn.com/2006/12/19/news/companies/delta_usair/index.htm.

83. Del Quentin Wilber, *Delta Creditors Reject Merger; 'Timing and Risks' Worked Against US Airways Bid*, WASH. POST, Feb. 1, 2007, at D1.

84. Tatge, *supra* note 81.

operation."[85] While there may be some hurdles for a Delta-Northwest pairing,[86] a merger between the two carriers has the greatest potential to actually occur and attain regulatory approval.

A. *Antitrust Considerations: Clear for Takeoff?*

The airline industry has been subject to government regulation, so it comes as no surprise that mergers have been intensely scrutinized. Regulation of the industry began in 1938, when Congress created the Civil Aeronautics Board (CAB)[87] to oversee airline fares and determine route structures, among other regulations.[88] The Airline Deregulation Act of 1978 disbanded the CAB and gave its authority to review airline mergers to the Department of Transportation (DOT).[89] Then, in 1989, the DOT's authority shifted to the Department of Justice's (DOJ) Antitrust Division.[90]

The DOJ currently has authority over proposed mergers and applies antitrust laws when determining whether a merger is anticompetitive and should be blocked.[91] In 1890, Congress passed the Sherman Act as the first antitrust law to prohibit restraints of trade and monopolization.[92] In 1914, Congress extended antitrust protection in the Clayton Act to prohibit "mergers or acquisitions that may substantially lessen competition or tend to create monopolies."[93] The difference

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85. *Delta-Northwest Tie-Up Has Plusses*, ABC MONEY, Jan. 11, 2007, http://www.abcmoney.co.uk/news/1120074308.htm (quoting former Northwest board member and Northwest captain Mike Ristow).

86. *See infra* Part V.A.

87. Mosteller, *supra* note 77, at 577 (citing Civil Aeronautics Act of 1938, 49 U.S.C. §§ 401–722 (1938) (repealed 1958)).

88. *Id.*

89. *Id.* at 578.

90. *Id.*

91. Svetlana Mosin, *Riding the Merger Wave: Strategic Alliances in the Airline Industry*, 27 TRANSP. L.J. 271, 274 (2000); *see* 15 U.S.C. § 12 (2000) (defining "antitrust laws").

92. Mosin, *supra* note 91, at 274 (citing 15 U.S.C. §§ 1–2 (2000)).

93. *Id.* at 275 (citing Clayton Act § 7, 15 U.S.C. § 18 (2000). The Clayton Act prevents acquisitions where the effect "may be substantially to lessen competition" or that "tend to create a monopoly." 15 U.S.C. § 18.

between the two is that "the Sherman Act prohibits activities that *actually* restrain trade," while "the Clayton Act is directed at preventing activities that *may tend* to restrain trade."[94]

The DOJ and Federal Trade Commission (FTC) have "outlined their enforcement policy concerning horizontal acquisitions and mergers" in the Horizontal Merger Guidelines.[95] The Guidelines prohibit mergers that enhance market power.[96] If market concentration is too high, then the DOJ and FTC will likely prohibit a merger.[97]

However, there are two ways to fly around the antitrust laws. Basically, "[a]irlines proposing a major merger would have to convince government regulators that the combination would not significantly reduce competition, or that one or both of the airlines would fail without the merger."[98] Since it is unlikely that the failing firm defense[99] will work in this situation,[100] it is

94. Mosin, *supra* note 91, at 275.

95. *Id.* at 276 (citing Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Sept. 10, 1992)).

96. *Id.* (citing Horizontal Merger Guidelines, *supra* note 95, at 41,553 n.5). "Market power is a seller's ability to profitably maintain prices above competitive levels for a significant period of time." *Id.*

97. *Id.* (citing Horizontal Merger Guidelines, *supra* note 95, at 41,558).

98. Marilyn Adams, *Could Delta and Northwest Merge?*, USA Today, Sept. 16, 2005, http://www.usatoday.com/money/biztravel/2005-09-16-merger-speculation_x.htm.

99. The U.S. Supreme Court has said that an acquisition that would otherwise violate antitrust laws may be approved on the basis of a failing firm defense if the resources of the acquired company were "so depleted and the prospect of rehabilitation so remote that it faced the grave possibility of business failure . . . and that there was no other prospective purchaser for it." Chefitz, *supra* note 9, at 216–17. According to the DOJ Merger Guidelines, the firm must establish that it cannot meet its financial obligations, that it is unable to reorganize under Chapter 11, that it made unsuccessful good faith efforts to obtain reasonable offers, and that its assets would otherwise exit the market. *Id.* at 217.

100. Delta likely would not prevail on the failing firm defense because it has a plan for emerging from bankruptcy and for paying creditors 63–80% on their claims, illustrating that Delta probably does not meet the first prong of the test—remote prospects for rehabilitation. *See US Airways Ups Delta Bid*, S. Fla. Bus. J., Jan. 10, 2007, http://southflorida.bizjournals.com/southflorida/stories/2007/01/08/daily31.html?surround=lfn. Also, Delta has already received offers from other potential buyers, illustrating that Delta likely does not pass the second part of the test—no prospective purchasers. *See, e.g.*, Tatge, *supra* note 81 and accompanying text.

important to evaluate the merger to see if it reduces competition.

It is possible to overcome a presumption of anticompetitiveness by a showing that the merged entity will be unable to exercise market power.[101] Unlike the aforementioned rejected US Airways-Delta combination,[102] Delta and Northwest do not have significant market overlap.[103] Northwest's hub facilities are in Minneapolis and Detroit, while Delta's major hubs are in Atlanta and New York's John F. Kennedy International Airport.[104] Additionally, Northwest has a powerful Pacific operation, while Delta is strong in Latin America.[105] The combination of the two companies would be highly complementary and not raise as many antitrust concerns, largely because the merged entity would not have too much power in any one market.[106] If regulators were to have concerns about anticompetitiveness in a particular market due to a Delta and Northwest merger, then the combined entity would potentially have to give up some city pairs or route frequencies.[107] This would allow more efficient carriers to enter such markets and keep prices at competitive levels.[108]

101. Mosin, *supra* note 91, at 276.

102. Delta and US Airways have significant overlap, including "31 non-stop routes on the East Coast, accounting for $1.6 billion [(USD)] in annual revenue," which would likely have prevented regulatory approval even if Delta's creditors had accepted US Airways' bid. Tatge, *supra* note 81.

103. Martin Moylan, *The Future of Northwest Airlines: Is a Merger in Northwest Airlines' Future?*, MINN. PUB. RADIO, Dec. 8, 2006, http://minnesota.publicradio.org/display/web/2006/12/08/nwamerger1/ ("There is not a lot of overlap [between Northwest and Delta] that would suggest competitiveness problems.").

104. Tatge, *supra* note 81.

105. *Id.*

106. Annie Baxter, *The Future of Northwest Airlines: WSJ: Northwest Talking Deal with Delta*, MINN. PUB. RADIO, Jan. 10, 2007, http://minnesota.publicradio.org/display/web/2007/01/10/nwadelta/ ("Delta['s] and Northwest's routes are different enough so that a merger wouldn't pose anti-trust hurdles.").

107. *Cf.* Colin Baker, *Air France-KLM Gets Merger Approval; Air France and KLM have Cemented Their Merger and Given the First Indications of How the Company Will Be Run in the Future*, AIRLINE BUS., June 1, 2004, at 9 (highlighting the European Commission's requirement that Air France and KLM "relinquish 47 slot pairs to alleviate [competition] concerns" as a condition of merger approval).

108. *See* James Bernstein, *JetBlue is Poised to Reap Some New Routes; With Delta Expected to Shed Some Slots at LaGuardia While in Bankruptcy*, NEWSDAY, Sept. 15,

B. Domestic Mergers: Stuck on the Runway?

History indicates that airline mergers have not been completed without complications.[109] Most domestic airline mergers have been disasters, as employees with different wage scales and work rules must be integrated, and computers, routes, airplanes, and maintenance must be combined.[110] Pan American Airways (PanAm) struggled for several years after it acquired National Airlines in 1979[111] and eventually went into bankruptcy.[112] In 1986, Northwest bought Republic, but later found it a nightmare.[113] In 1987, American Airlines purchased Air California, which "failed to produce the expected savings."[114] Additionally, "US Airways and Piedmont Airlines were unable to merge corporate cultures after joining in 1989."[115] Further, American Airlines had to scale back at many of the hubs it wanted to control after its merger with Trans World Airlines (TWA) in 2000 because of the 2001 terrorist attacks.[116]

Perhaps the negative experiences that many airlines have encountered and endured have taught today's airline executives what to avoid.[117] Jeffrey Lon, an analyst for JP Morgan Securities, believes there is a greater likelihood of success "if only because everyone knows what flops the previous mergers ha[ve] been."[118] Also, airline executives have begun to realize the need to put aside egos and strive to maximize the carrier's

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2005, at A64. For example, low-fare carrier JetBlue would have an opportunity to expand existing routes if Delta gave up routes. *Id.*

109. *See* Bettina M. Whyte & Michael B. Cox, *Airline Industry Restructuring: From Stuck in the Mud to Flying High*, 16-5 AM. BANKR. INST. J. 24 (1997).

110. Mosteller, *supra* note 77, at 596.

111. James F. Peltz, *Airlines Mergers '90's-Style Might Stand a Better Chance This Time*, L.A. TIMES, Dec. 5, 1996, at D1.

112. *See PanAm 'to Blame for Lockerbie Bombing'*, THE HERALD (Glasgow), July 7, 1992, at 4.

113. Peltz, *supra* note 111.

114. Meredith Cohn, *USAir Gets Reprieve, but Doubts Persist; Airline's Bankruptcy Exit Is OK'd; It Plans Merger with America West*, BALTIMORE SUN, Sept. 17, 2005, at A1.

115. *Id.*

116. *Id.*

117. Mosteller, *supra* note 77, at 583.

118. Peltz, *supra* note 111, at D1.

profits.[119] In today's airline environment, executives are cognizant that it may be better "to buy a competitor [rather than] to bury one by adding airplanes, cutting fares and stealing passengers."[120]

C. International Mergers: Flying High?

Despite some abysmal domestic airline mergers, there are lessons to be learned from international mergers that can make the proposed Delta-Northwest merger successful. For example, airline executives can learn how to preserve competition while keeping the industry viable, how to successfully merge corporate fleets, and how to create synergies. In the next two sections, this Comment will analyze various airline mergers in Australia and the European Union to help guide Northwest and Delta if they decide to merge.

1. Australia

U.S. carriers can learn from Australia's airline industry on how to merge without hurting competition. Until the early 1990s, the Australian domestic airline industry was a regulated duopoly.[121] Ansett, a privately owned company, and Australian Airlines, a government owned airline, had similar fleets, networks, and pricing.[122] In the late 1980s, the government merged Australian Airlines into its international airline, Qantas, and then privatized Qantas.[123] Despite the existence of two airlines and some new entrants, Qantas quickly gained

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119. Mosteller, *supra* note 77, at 583.

120. *Id.* at 581 (citing Scott McCartney, *Consolidation May Be Only Way for Airlines to Grow*, WALL ST. J., Nov. 20, 1995, at B5). In fact, United's executives think consolidations would lead to benefits for the industry. *U.S. Airways Boosts Its Offer for Delta*, CNN MONEY, Jan. 10, 2007, http://money.cnn.com/2007/01/10/news/companies/usair_delta/index.htm?cnn=yes.

121. Ross Jones, *An International Perspective on Anti-Competitive Pricing Practices by Dominant Carriers & Regulatory Rules to Facilitate Competitive Entry—Australia*, 14 DEPAUL BUS. L.J. 243 (2002) (discussing Australia's airline industry, and evaluating anticompetitive pricing practices and regulatory rules used by Australia to facilitate competitive entry).

122. *Id.*

123. *Id.* at 244.

about 90% of domestic market share.[124] In 2001, Qantas acquired Impulse, a fellow Australian airline,[125] which was losing $5 to $7 million (AUD) a month in early 2001.[126] Impulse would have left the market whether or not the Australian Competition and Consumer Commission (ACCC)[127] approved the merger.[128] However, for the merger to be approved by the ACCC, Qantas had to give up airport slots[129] and abandon certain routes.[130] As a result, Virgin Blue and other new entrants were able to expand into the market and enhance competition.[131] For example, Virgin Blue's market share grew from 15–17% in 2002[132] to approximately 35% in 2006.[133] According to Qantas' counsel Tony Bannon, "Virgin's entry into the Australian market provided competition strong enough to substantially reduce air fares."[134]

U.S. case law has established that "antitrust laws are not meant to realign competitors to assist certain competitors over

124. *Id.*

125. *Id.* at 245.

126. Ian Gerard, *Key Rivkin Witness Admits Lying*, THE AUSTRALIAN, Mar. 28, 2003, at 11.

127. On November 6, 1995, the Australian Competition and Consumer Commission (ACCC) was formed by the merger of the Trade Practices Commission and the Prices Surveillance Authority. *See* Jones, *supra* note 121, at 243 n.1.

128. *Id.* at 246. Since there were no alternative buyers, either Impulse would go into receivership, or the government would have to allow Qantas to acquire Impulse. *End of Cheap Airfares*: *Fels*, TOWNSVILLE BULL./TOWNSVILLE SUN (Austl.), May 19, 2001, at 14. The ACCC reluctantly allowed the latter. *Id.*

129. Jones, *supra* note 121, at 246.

130. *See Impulse Ready to Ground Jets*, GOLD COAST BULL. (Austl.), May 10, 2001, at 49 (noting that Impulse was required to cease its Sydney-Melbourne and Sydney-Brisbane flights).

131. Jones, *supra* note 121, at 246; *Contra End of Cheap Airfares: Fels*, *supra* note 128, at 14 (stating that the takeover of Impulse by Qantas was "not a good sign for new entrants into the market" (quoting ACCC Chairman Alan Fels)).

132. *Ansett's Demise Shakes Up Australian Domestic Market*, AVIATION DAILY, July 5, 2002, at 5.

133. Stephen Bartholomeusz, *Virgin Blue on Course to Crash Qantas' Party*, THE AGE, Nov. 24, 2006, http://www.theage.com.au/news/business/virgin-blue-on-course-to-crash-qantas-party/2006/11/23/1163871549668.html.

134. Roz Alderton, *Qantas and Air NZ Pursue Alliance in Court*, AAP NEWSFEED, May 3, 2004, *available in* LEXIS.

others,"[135] and that "[t]he antitrust laws . . . were enacted for the protection of competition not competitors."[136] However, if the DOJ followed the actions of the ACCC in relation to the Qantas-Impulse merger, then competition, as well as competitors, could be protected.[137] According to University of Iowa College of Law Professor Herbert Hovenkamp, "excess capacity can be part of the entry deterrence strategy of a dominant firm."[138] If Northwest and Delta merged, overall industry capacity would be reduced, as the newly-merged entity would fly to fewer destinations or fly the same route less often.[139] The DOJ could make Northwest and Delta give up certain slots at key airports to new entrants as a condition of their merger.[140] This would ensure competition and prevent a monopoly in various markets or routes.[141]

135. U.S. Airways Group, Inc., v. British Airways PLC, 989 F. Supp. 482, 489 (S.D.N.Y. 1997) (referencing Cargill, Inc., v. Monfort of Colo., Inc., 479 U.S. 104, 115–16 (1986)).

136. *Id.* at 489 (referencing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 77, 488 (1977)).

137. *See* Bernstein, *supra* note 108, at A64. If the DOJ approved the merger, then Delta and Northwest would be a stronger entity and less likely to fail in the future, and competition would be preserved as low-cost carriers could pick up routes and gain market share. *Id.*

138. Paul Stephen Dempsey, *Predation, Competition & Antitrust Law: Turbulence in the Airline Industry*, 67 J. AIR L. & COM. 685, 802 (2002).

139. For example, former America West President and Chief Executive Doug Parker said that the industry needs to consolidate to reduce overcapacity. *See* William Glanz, *US Airways, America West Merge*, WASH. TIMES, May 20, 2005, at A1 (explaining that, when US Airways and America West merged, the new company's plan was to operate 361 planes, 58 fewer than their combined fleets at the beginning of 2005).

140. The DOJ has the power to prevent market concentration. *See* Horizontal Merger Guidelines, *supra* note 95, at 41,558.

141. Traditionally, monopoly power is understood to be "the power to control [market] prices or exclude competition." DEBRA J. PEARLSTEIN ET AL., ANTITRUST LAW DEVELOPMENTS 230 (5th ed. 2002) (citing United States v. E.I duPont de Nemours & Co., 351 U.S. 377, 391 (1956)). A monopolization claim under Section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966). The elements for an attempt to monopolize are: "(1) specific intent to control price or eliminate competition; (2) anti-competitive conduct directed at accomplishing the unlawful

2. *The European Union*[142]

Finally, Delta and Northwest should look to the European Union (EU) for advice on how to merge successfully. In 1987, the EU began deregulating its commercial airline industry, which led to the creation of a single European aviation market.[143] In 1993, the EU removed all government restrictions on routes, fares, capacity, and barriers to cross-border investment of European airlines.[144] By 1997, the EU removed another restriction, allowing cabotage within the EU.[145] This deregulation policy made the Air France-KLM merger possible.[146]

Air France purchased Dutch airline Koninklijke Luchtvaart Maatschappij (KLM),[147] becoming the model for European airline consolidation.[148] In May of 2004, Air France's takeover of KLM was completed with approximately 90% shareholder approval.[149] Everyone was a winner with this deal. KLM passengers gained access to 90 new destinations, while Air

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objective; (3) and a dangerous probability of success." Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1378 (9th Cir. 1989).

142. The European Union initially contained six countries and was established under the Treaty of Paris (1951) and the Treaty of Rome (1957), which later were amended by the Single European Act (1986), the Treaty of the European Union (Maastricht 1992), the Treaty of Amsterdam (1997), and the Treaty of Nice (2001). GAO, Transatlantic Aviation: Effects of Easing Restrictions on US-European Markets 1 n.1 (July 2004), *available at* http://www.gao.gov/new.items/d04835.pdf. As of 2007, the EU has 27 member countries and operates as a single economic market. The World Factbook, https://www.cia.gov/cia/publications/factbook/geos/ee.html (last updated Mar. 15, 2007).

143. GAO, *supra* note 142, at 7.

144. *Id.*

145. *Id.*; *see* U.S. Dep't of Transp., http://www.dot.gov/ost/ogc/subject/faqs/international/airlineCabotage.html (last visited Apr. 1, 2007) ("Airline cabotage is the carriage of air traffic that originates and terminates within the boundaries of a given country by an air carrier of another country.").

146. GAO, *supra* note 142, at 31. Since the deregulation of air transport inside the EU in 1993, several European airlines have purchased airlines in countries other than their own. *Id.*

147. *Koninklijke Luchtvaart Maatschappij* literally means Royal Dutch Airlines. Alberto Ríos, Acronyms: A General Writer's Resource, http://www.public.asu.edu/~aarios/resourcebank/acronyms/ (last visited Apr. 1, 2007).

148. Aenlle, *supra* note 18.

149. Baker, *Air France-KLM Gets Merger Approval*, *supra* note 107.

France customers were offered forty new routes.[150] Competitors also benefited, as the two carriers had to "relinquish 47 slot pairs to alleviate concerns the EC ha[d] over reduced competition on 14 routes."[151] Additionally, labor groups retained jobs.[152] According to Patrick Alexandre, Executive Vice President of International Commercial Affairs and Operations at Air France, there was a strong desire to avoid staff cuts, which has led Air France to accept "a degree of over-staffing."[153]

Finally, investors should be pleased that the merger "could produce double the initially anticipated cost savings of EUR500 million euros (USD $635.3 million)."[154] Air France claims to have done this by obtaining merger synergies.[155] According to Paul Gregorowitsch, Executive Vice President of Commercial Affairs at KLM, "We are not doing this by cost cutting. We are doing this by doing the job more efficiently . . . [and] concentrating on growth."[156] "Synergies gained [thus] far include the grouping together of 16 local and regional management teams, joint Air France-KLM ticket counters at 12 airports, and 24 joint airport handling contracts . . . . There are now 21 shared airport lounges."[157] If Northwest and Delta could create similar synergies or concentrate on growth, perhaps they could get out of the red and rise to profitability again.

VI. IMPACTS

Merging is an excellent option for Northwest and Delta during Chapter 11 bankruptcy. However, even with consolidation, "the fight for survival [against other carriers] can

150. Colin Baker, *Air France-KLM Approved; Competition Regulators in Brussels Have Approved Air France's Takeover of KLM, Deciding the Consumer Comes Out of the Deal as a Net Winner. Washington Also Says It Will Not Oppose the Deal*, AIRLINE BUS., Mar. 1, 2004, at 9.

151. *Id.*

152. *See* Colin Baker, *Air France-KLM Pays Off*, AIRLINE BUS., May 1, 2005.

153. *Id.*

154. *Air France KLM Sees Additional Savings*, AIRWISE NEWS, Oct. 4, 2006, http://news.airwise.com/story/view/1159967941.html. The 2004 merger between Air France and KLM has "already saved EUR660 million" *Id.*

155. Baker, *Air France-KLM Pays Off*, *supra* note 152.

156. *Id.*

157. *Id.*

only be won through reduced costs and improved efficiency."[158] This will have ramifications for employees, competitors, passengers, suppliers, shareholders, and governments.[159]

A. Are Unions Becoming Black Sheep Squadrons?[160]

Approximately 40% of airline employees are represented by unions.[161] Some of the groups represented by unions include pilots, flight attendants, mechanics, reservation agents, and other workers, with each union at each company having varying salaries, benefits, and work rules.[162] Through collective bargaining, these unionized employees can negotiate increased wages and employment security.[163] Unions do serve some valuable functions, such as applying pressure for increased safety[164] and helping increase productivity by creating camaraderie.[165] However, unions also can cause business disruptions depending on how they react to merger news.[166]

1. Conflicts Within the Labor Group Itself

When an airline consolidation occurs, these unionized labor groups will be impacted, and discord will result because the

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158. Sharda Naidoo, *Majors Stall as the Little Guys Take Off*, BUS. DAY (S. Afr.), Oct. 21, 2003, at 2.

159. *See, e.g.*, Richard B. Tyler, *Other Constituency Statutes*, 59 MO. L. REV. 373, 373–75 (1994) (discussing the economic and social impacts of the takeover phenomenon and company "releveraging" of the 1980s).

160. "In World War II Marine Corps Major Greg 'Pappy' Boyington commanded a squadron of fighter pilots. They were a collection of misfits and screwballs who became the terrors of the South Pacific. They were known as . . . the Black Sheep." Military Shows: Black Sheep Squadron, http://www.tvacres.com/military_blacksheep.htm (last visited Apr. 1, 2007) (quoting the opening credits to the 1976–78 NBC military drama, Black Sheep Squadron).

161. Jody Hoffer Gittell et al., *Mutual Gains or Zero Sum? Labor Relations and Firm Performance in the Airline Industry*, 57 INDUS. & LAB. REL. REV. 163, 164 (2004).

162. Mosteller, *supra* note 77, at 598.

163. Gittell, *supra* note 161, at 164.

164. *See, e.g.*, Maria Wagland, *Oneworld and Star Pilots Work on Unified Labour Campaigns*, AIR TRANSP. INTEL., May 3, 2002 (describing how Japan Airlines' unions have been attempting to rectify unsafe staffing conditions on long-haul flights).

165. Gittell, *supra* note 161, at 164–65.

166. *See id.* at 164 (noting that employees may utilize strikes and other service disruptions in the collective bargaining process).

meshing of the employees "disrupts employee morale and erodes the surviving airline's service and performance."[167] Labor groups will be impacted if a merger occurs because the seniority system of the acquiring airline will be forced to integrate the new workers.[168] The labor relations between the merged groups will be strained because workers will compete and argue over who should represent the new group and how the group should be integrated.[169] This will inevitably lead to tense relationships and bitter fights between old and new workers in the company.[170] Unfortunately, the end result usually is that employees acquired by the merger will be placed at the bottom of the seniority scale regardless of their experience.[171]

One example of this phenomenon occurred when American Airlines (American) acquired TWA during bankruptcy proceedings.[172] The former TWA flight attendants were incorporated, but placed at the bottom of American's seniority system based on the "Agreement on Seniority Integration" the Association of Professional Flight Attendants (APFA) reached with management.[173] Integration usually has two results: (1) a tense and noncohesive company culture; and (2) unfair results in future union concessions.[174] When American subsequently made job reductions, it cut the most junior employees first.[175] The employees impacted were TWA flight attendants who were at

167. Mosteller, *supra* note 77, at 598 (quoting Peltz, *supra* note 111, at D1).

168. Lisa Catherine Tulk, Comment, *The 1926 Railway Labor Act and the Modern American Airline Industry: Changes and "Chaos" Outline the Need for Revised Legislation*, 69 J. AIR L. & COM. 615, 629–32 (2004).

169. *Id.* at 630.

170. *Id.*

171. *Id.* at 631–32.

172. *Id.* at 631 (citing Cooper v. TWA Airlines, L.L.C., 274 F. Supp. 2d. 231, 236 (E.D.N.Y. 2003)).

173. *Id.* Both American and ex-Trans World Airlines (TWA) flight attendants were represented by the Association of Professional Flight Attendants (APFA). *Id.*

174. *See* Mosteller, *supra* note 77, at 598–99. In some instances, the two cultures never successfully merged, forcing the airline to act like United Nations peacekeepers. *Id.* at 599.

175. Tulk, *supra* note 168, at 631.

the bottom of the seniority list despite their years of industry experience.[176]

2. Issues Between Unions and Management if a Merger Occurs

Even if union members of the two airlines find a way to integrate cohesively, a merger will likely have an impact on union and management relations. There has been a significant amount of media coverage on union wage concessions.[177] However, to be able to compete successfully with the Southwest's of the world,[178] major airlines will have to let go of deferred benefit plans, retirement pensions, and retiree medical coverage.[179] Some analysts conclude that efforts to solve the current airline crisis, which depend on wage reductions or a decline in union power, will only bring short-term relief, and that, in order to achieve more long-term financial goals, labor relations must improve.[180] However, that is a difficult goal.

With labor being such a large expense for carriers, employee bargaining units are in large part to blame for the predicament of the industry.[181] Unions are often too greedy when times are good for the airlines.[182] Then, when fortunes change, unions are

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176. *Id.* (citing *Cooper*, 274 F. Supp. 2d. at 238).

177. *See, e.g.*, Trebor Banstetter, *Airline Unions Facing New Cuts*, FORT WORTH STAR-TELEGRAM, Oct. 25, 2005, at C1 (discussing past concessions from unionized airline employees). A search on Google on April 1, 2007 returned 20,200 results. Google Search, http://www.google.com/search?hl=en&q=union+%22wage+concessions%22+airlines (last visited Apr. 1, 2007).

178. Southwest, along with other airlines, such as Ryanair and JetBlue, are known as Low-Cost Carriers (LCCs). *See* discussion *infra* Part VI.B.1. LCCs compete with major airlines by using a business model that focuses on reducing overhead and ticket prices to gain market share. *Id.*

179. Susan Carey, *Airlines Keep Fighting for Viability*, WALL ST. J., Nov. 8, 2004, at A5.

180. Gittell, *supra* note 161, at 178.

181. U.S. Dep't of Labor, Bureau of Labor Statistics, Career Guide to the Industries, Air Transportation, Nature of the Industry, http://www.bls.gov/oco/cg/cgs016.htm (last visited Apr. 1, 2007).

182. *See, e.g.*, Laura Goldberg, *Laboring to Get Airborne; Slow Downs Hit Airlines; Unions Accused of Using Tactic to Increase Pay*, HOUSTON CHRON., Dec. 6, 2000, at B1. For example, United gave its pilots large raises, thus increasing the expectations of all employee groups at various airlines. *Id.* Prior to September 11th, wages and labor power tilted in favor of the labor groups, and "[s]ome financial analysts and industry managers

not usually willing to reduce their pay or benefits without a fight or court intervention.[183] Rather than try to cooperate with management, union leaders have basically had a McAuliffe response.[184]

In addition to imposing higher costs in the collective bargaining process, unions or labor groups can inflict detrimental wounds through strikes or other service disruptions.[185] If Delta and Northwest merge, the new entity's management needs to improve labor relations to prevent an expensive disruption to service.[186] When unions engage in strikes, the instigators "disrupt[] the balance of power between labor unions and the airlines," which adversely affects an airline's operations and interstate commerce.[187]

Further, unions authorize illegal strikes, which can cost an airline millions of dollars.[188] For example, in 1999, American's pilots' union had a sick-out "to protest the airline's acquisition of Reno Air and its attendant unresolved labor issues."[189] Similarly, Northwest's mechanics' union violated a judge's order barring job actions, resulting in a $13 million (USD) total cost to Northwest.[190]

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saw the postattack period as an opportunity to reign in the power and wages of airline labor." Gittell, *supra* note 161, at 164.

183. *See, e.g.*, Francis Grab, *"Share the Pain, Share the Gain": Airline Bankruptcies and the Railway Labor Act*, 24 TRANSP. L.J. 1, 16–20 (1996) (illustrating that without the active participation of labor groups, the chances for a successful bankruptcy are slim); Martin Moylan, *The Future of Northwest Airlines: Judge Reaffirms Ruling Against NWA Flight Attendants Strike*, MINN. PUB. RADIO, Sept. 15, 2006, http://minnesota.publicradio.org/display/web/2006/09/15/nwaruling/ (discussing a court order blocking a union strike over pay and benefit cuts).

184. U.S. Brigadier General Anthony C. McAuliffe is remembered for officially replying, "Aw, nuts" (meaning "Go to Hell") to a German request for surrender during World War II. World War 2 Battles: Atlantic Theater, http://webpages.charter.net/wisconsinlegion-7thdistrict/WW2_Battles_Atlantic.htm (last visited Apr. 1, 2007).

185. Gittell, *supra* note 161, at 164.

186. *See* Tulk, *supra* note 168, at 626 (discussing the impact that strikes have on service and the costs of illegal job actions).

187. *Id.* at 645.

188. *Id.* at 626.

189. *Id.* American was awarded $45.5 million (USD) for damages when the pilots' union failed to comply with court's restraining order. *Id.* (citing Am. Airlines, Inc. v. Allied Pilots Ass'n, 228 F.3d 574, 577 (5th Cir. 2000)).

190. Goldberg, *supra* note 182, at B1.

One solution that may restore stability to the industry is to allow airline management to discharge striking workers to dissuade them from participating in these tactics.[191] While this may not help labor relations, it will at least restore power to those who have a responsibility to investors and creditors and not just to those who are only looking out for themselves.[192]

In summary, unions need to be more cognizant of the problems facing the industry and adjust their behavior accordingly to keep the airlines from taking a further nosedive.[193] While the proposed merger will impact all employees, unions can successfully blend labor groups by trying to minimize disputes between newly-integrated unionized employees and current employees, minimizing combative attitudes towards management, and creating a harmonious and positive work culture.[194]

B. Time to Earn Your Wings

In addition to affecting employees, a merger between Northwest and Delta will impact competition. Further, a merger will affect relationships the company has with customers and suppliers. As a result, the new entity will have an opportunity to "earn its wings" by proving itself as a viable company.

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191. *See* Tulk, *supra* note 168, at 645.

192. *Id.* ("Permitting airline employers to discharge striking workers would . . . restore stability to the industry.").

193. *Mesa CEO Asks Congress to Rewrite Airline Labor Law*, REGIONAL AVIATION NEWS, Mar. 21, 2005 ("Management has to be able to say 'no,' and when 'no' is the correct answer, labor needs to accept it." (quoting Mesa Air Group CEO Jonathan Ornstein)).

194. *See* Mosteller, *supra* note 77, at 598 ("Thus, airline employees can be the determining factor of an airline merger's success. Airline mergers in the past have been impaired by pilot union concerns about seniority rights. For example, strong union opposition was identified as killing the proposed 1995 acquisition of USAir by United Airlines.").

1. *Competition: The Bermuda Triangle*[195]

Since deregulation in 1978, several airlines have disappeared from the market altogether.[196] According to some philosophers and economists, this is not necessarily a bad thing.[197] Social Darwinist and English Philosopher Herbert Spencer invented the term "survival of the fittest."[198] He applied biological principles to the business world, and saw this "'survival' situation as beneficial and the very motor of progress."[199]

However, "[i]nstead of letting the market forces alone decide which airlines will survive or fail, the federal government has kept its hand in the air travel industry" by allowing Chapter 11 bankruptcy to protect businesses and keep them operating when they otherwise would have failed.[200] If we applied "survival of the fittest" concepts to airline economics today, the industry would be uninhibited to naturally evolve by allowing the weakest companies to become extinct.[201] Ultimately, if Delta and Northwest merge, one airline will disappear from the

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195. The Bermuda Triangle, a triangular area in the Atlantic Ocean with points at Miami, Bermuda, and Puerto Rico, has been an area where many people, ships and planes have mysteriously vanished. GIAN J. QUASAR, INTO THE BERMUDA TRIANGLE: PURSUING THE TRUTH BEHIND THE WORLD'S GREATEST MYSTERY 1 (2005). *But see* Lawrence David Kusche, The Bermuda Triangle Mystery—Solved, http://www.hutch.demon.co.uk/prom/bermuda.htm (last visited Apr. 1, 2007) (explaining that there really is no mystery behind the Bermuda Triangle).

196. Whyte & Cox, *supra* note 109, at 24 (listing PanAm, Midway, and Eastern (among others) are no longer in business).

197. *See* MARK SKOUSEN, THE MAKING OF MODERN ECONOMICS: THE LIVES AND IDEAS OF THE GREAT THINKERS 211–13 (2001) (providing an explanation of laissez-faire capitalism and its origins).

198. *Id.* at 211. Spencer started writing about evolution years before Darwin and coined the term in 1852. *Id.*

199. *Id.* Even Rockefeller agreed with some of Spencer's views, saying that "[t]he growth of a large business is merely a survival of the fittest . . . a law of nature and a law of God." *Id.* at 213.

200. Mathiesen, *supra* note 25, at 1045.

201. Chris Jones, *Broken System, Major Repairs*, LAS VEGAS REV.-J., Oct. 27, 2005, at D1 (referencing the comment by former CEO of America West Bill Franke that "[t]he public wants to get from Point A to Point B quickly, safely, and at a low cost. If you can't provide that product . . . you will simply be a victim.").

market, even if some of the employees, routes, and planes are kept by the acquiring airline.

If one of these two carriers exits the market, some worry that competition would be harmed; however, competition will likely *increase*.[202] Low-cost carriers like Southwest or Ryanair achieve comparative cost advantages largely through using only a single aircraft type.[203] Also, LCCs like Southwest and Jetblue have not typically followed the hub-and-spoke system; rather, they have traditionally flown point-to-point.[204] This business model leads to lower overhead costs, enabling LCCs to lower ticket prices, thus resulting in increased market share.[205] If Northwest and Delta were to merge, the new entity would inevitably have to give up some routes, allowing LCCs an opportunity to enter those markets or to pick up better route times, thereby preserving competition.[206]

2. Customers

A merger will likely lead to benefits for customers, as well.[207] Competition from low-cost airlines has added the need for consolidation and has forced bigger carriers to analyze how

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202. Michael E. Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 YALE J. ON REG. 393, 486 (1987). Levine proffers that, as long as five or six competing national brands exist, there will not likely be impediments to competition. *Id.* Even if Delta and Northwest merge, there will still be at least six nationally-recognized airlines: American Airlines, United, Continental, the newly-merged Delta-Northwest, USAirways, and Southwest. *See America West to Merge with US Airways*, LOGISTICS TODAY, June 1, 2005, at 44, http://www.logisticstoday.com/sNO/7218/LT/displayStory.asp ("The seventh and eighth largest airlines in the U.S.—*America West* and *US Airways*, respectively—have announced plans to merge their operations, which when finalized would make the new airline the sixth largest, supplanting *Southwest Airlines*.").

203. GAO, *supra* note 142, at 52.

204. *Id.*

205. Dave Hage, *Off Course*, STAR TRIB., June 26, 2005, at 1AA (reciting an interview with Alfred Kahn).

206. Bernstein, *supra* note 108 (stating that analysts hypothesize that JetBlue will be in a good position to pick up some of Delta's routes).

207. *See, e.g.*, Eric J. Stock, *Explaining the Differing U.S. and EU Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA. J. INT'L ECON. L. 825, 865 (1999) (explaining that mergers have the ability to generate significant efficiencies, which translate into lower costs for the firm's customers).

they operate and how to emulate what low-cost carriers do.[208] For example, legacy carriers like Delta and Northwest are trying to reduce costs,[209] which will lead to better fares for customers. Furthermore, the increase of LCCs to areas where Northwest or Delta are abandoning or reducing services will lead to lower ticket prices on those routes.[210]

Additionally, customers will benefit from a Northwest and Delta combination because they "will have network and travel options that low-cost airlines cannot provide."[211] Finally, customers with frequent flyer miles will likely be able to combine their miles into the new company's frequent flyer program.[212]

3. Suppliers

A merger will also affect suppliers. For example, Boeing, an airplane manufacturer, has a significant interest in encouraging reorganization over liquidation.[213] Commonly, Chapter 11 liquidation is the result of a failed reorganization attempt.[214] Reorganization is an attempt to readjust the affairs of the troubled business so the company can continue to operate, while liquidation involves the disposition of the company's assets for cash.[215] If one of these airlines sold its assets instead of merging,

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208. Aenlle, *supra* note 18 (paraphrasing Jonathan Wober, an analyst who follows European airlines for HSBC in London).

209. GAO, COMMERCIAL AVIATION: LEGACY AIRLINES MUST FURTHER REDUCE COSTS TO RESTORE PROFITABILITY 3 (Aug. 2004), *available at* http://www.gao.gov/new.items/d04836.pdf; *see also* Ciliberto & Schenone *supra* note 47, at 3 (explaining that Delta and Northwest are legacy carriers).

210. *See* S. CHARLES MAURICE & CHRISTOPHER R. THOMAS, MANAGERIAL ECONOMICS 26–65 (6th ed. 1999) (discussing supply, demand, and market equilibrium). As supply increases, the price an individual competitor can charge decreases. *Id.* at 65.

211. Naidoo, *supra* note 158, at 2 (quoting Jimmy Eickelgruen, Delta Airlines sales manager in Europe, Middle East, and Africa).

212. *See* Glanz, *supra* note 139 (illustrating that merging airlines have used this practice in the past). For example, "[US Airways and America West] said passengers will receive credit for all frequent flyer miles they accrue." *Id.*

213. *See* Rollman, *supra* note 75, at 412.

214. Bruce H. White & William L. Medford, *Liquidation Trustee Liability: What You Can't See Can Hurt You*, 21 AM. BANKR. INST. J. 32, 32 (Feb. 2002).

215. John C. Anderson & Peter G. Wright, *Liquidating Plans of Reorganization*, 56 AM. BANKR. L.J. 29, 29 (1982).

then the market would be saturated with airplanes, thus preventing a company like Boeing from being able to sell more new planes.[216] Therefore, some suppliers will be in a better position if a merger occurs, as opposed to a future liquidation of one of the airlines.

C. Birds of a Feather Flock Together

If a merger between Northwest and Delta does occur, it will have a significant impact on investors and foreign governments.[217]

1. Investors and Alliances

Airlines are quite restricted with regard to sources of global capital.[218] Airlines used to make money, so investors bought stock in many of these companies.[219] Today those stocks are often becoming total losses for the shareholders.[220]

Most countries have a restriction on foreign ownership of airlines, but airline alliances are a way around that restriction.[221] Often, alliances "involve code-sharing, where one airline can market and sell seats on another airline's flight as if it" were selling seats on its own airplane.[222] Alliance members coordinate frequent flyer programs, baggage handling,

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216. Rollman, *supra* note 75, at 412 (noting that Boeing has an interest in limiting the market for used aircraft resulting from liquidation).

217. The United States has concerns about foreign investment since it "provides foreign interests with the opportunity to gain control of United States businesses." Mark L. Hanson, Comment, *The Regulation of Foreign Direct Investment in the United States Defense Industry*, 9 NW. J. INT'L L. & BUS. 658, 658 (1989).

218. Matthew Brelis, *Globally Bound WWII-Era Rules Put Foreign Markets and Capital Out of Reach of World's Airlines*, BOSTON GLOBE, Dec. 15, 2002, at H1.

219. Andrew Leckey, *Why It Pays to Fly, but Not Invest in Airlines; The Leckey File*, BALTIMORE SUN, Nov. 7, 2004, at C4. Alfred Kahn said, "Maybe it's sex appeal, but there's something about an airplane that drives investors crazy." Great Aviation Quotes, *supra* note 5.

220. *See, e.g.*, *Northwest Files Plan, Seeing Exit From Bankruptcy This Year*, N.Y. TIMES, Jan. 13, 2007, at C2. For example, Northwest said it plans to "cancel its current common and preferred stock," resulting in holders of those shares receiving nothing. *Id.*

221. Charles N.W. Schlangen, Comment, *Differing Views of Competition: Antitrust Review of International Airline Alliances*, 2000 U. CHI. LEGAL F. 413, 413 (2000).

222. Brelis, *supra* note 218, at H1.

marketing, and ticketing, which is similar to how airlines would interact after a merger.[223]

To expand the network, the new entity will need the ability to connect to the networks of other SkyTeam[224] members.[225] Analysts predict that "international competition will not be between individual carriers but between their alliances."[226] Luckily, Northwest and Delta are already members of the same alliance,[227] so a merger between the two should not create any conflicts based on alliance membership. However, if the two airlines were part of different alliances, then foreign airlines would likely fight against the merger out of fear that their alliance would lose a member, permitting a different alliance to gain a larger network.

2. Alliances and Open Skies Agreements

To more closely integrate pricing and route schedules, alliance partners often request immunity from national antitrust laws.[228] The DOT reviews airline alliance's antitrust applications[229] and will not grant approval to an alliance without an open skies agreement with the foreign airline's home nation.[230] There is currently more profit potential

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223. Schlangen, *supra* note 221, at 413.

224. SkyTeam is an international alliance composed of Aeroflot-Russian Airlines, Aeromexico, Air France/KLM, Alitalia, CSA Czech Airlines, Continental, Korean Air, Northwest, and Delta. SkyTeam Airline Alliance, http://www.skyteam.com/EN/aboutSkyteam/aboutSkyTeam.jsp (last visited Apr. 1, 2007).

225. *See* Martin J. Moylan, *NWA Seeks Antitrust Exemption: Airline Touts Trans-Atlantic Network*, ST. PAUL PIONEER PRESS, July 19, 2005, at C1 ("We can't grow in the market alone . . . . But with the ability to link to the networks of other airlines, we can grow our own network." (quoting Megan Rosia, Northwest's Managing Director of Government Affairs and Associate General Counsel)).

226. Martin J. Moylan, *Open Skies, Open Markets*, ST. PAUL PIONEER PRESS, Apr. 3, 2005, at D1.

227. SkyTeam Airline Alliance, *supra* note 224.

228. GAO, *supra* note 142, at 18.

229. *See* U.S. Dep't of Transp., Office of the Assistant Secretary for Aviation and International Affairs, http://ostpxweb.ost.dot.gov/aviation/intlaffairs.htm (last visited Apr. 1, 2007).

230. Schlangen, *supra* note 221, at 425 (referencing Dep't of Transp., Order Granting Approval and Antitrust Immunity for certain Alliance Agreements, Joint Application of United Air Lines, Inc. and Scandinavian Airlines System, Docket

internationally than there is in domestic air travel.[231] This is partly due to increasing globalization of business, the rise of the middle class in other nations like India, strong leisure travel, and a lack of low-fare carriers who have transatlantic routes.[232] Therefore, the United States is desperate to negotiate open skies pacts with other nations.[233]

Open skies agreements eliminate restrictions on prices airlines can charge, times per week airlines can fly to the other country, and the kind of aircraft they can use.[234] Under an open skies agreement, an air carrier from either country can fly from any city in one country to any city in the other country.[235] Currently, the United States has open skies agreements with 77 nations[236] and is working to negotiate a deal with all European Union members.[237]

The United States has some pacts with other countries that are not considered open skies agreements.[238] For example, the United States signed an aviation pact in July 2004, with China that increased flights between the two countries from 54 to 249 over 6 years.[239] Also, the United States does not have a true open skies agreement with the United Kingdom, but travel between the two nations is governed by a bilateral air services

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OST96-1411-15, at 3 (Nov. 1, 1996) and Dep't of Transp., Order, Joint Application of American Airlines, Inc. and British Airways PLC, Docket OST-97-2058-36, at 4 (Mar. 21, 1997)).

231. Moylan, *Big Airlines Find Profitable Skies Overseas*, *supra* note 34. "Some of the same dynamics that have turned [] domestic operations into huge money losers could play out internationally as well," but for now, the international markets are proving more promising. Moylan, *Open Skies, Open Markets*, *supra* note 226, at D1.

232. Moylan, *Big Airlines Find Profitable Skies Overseas*, *supra* note 34.

233. Moylan, *Open Skies, Open Markets*, *supra* note 226, at D1.

234. Moylan, *Big Airlines Find Profitable Skies Overseas*, *supra* note 34.

235. *Id.*

236. Rick Westhead, *More Open-skies Deals on Way*, TORONTO STAR, Nov. 28, 2006, at D1.

237. Moylan, *Open Skies, Open Markets*, *supra* note 226, at D1.

238. *See, e.g.*, *id.* (discussing an aviation pact between the United States and China that is *not* an open skies agreement).

239. *Id.* Of the additional flights, 111 will be cargo-only flights, and 84 will be passenger flights. *Id.*

agreement known as Bermuda II.[240] Pursuant to Bermuda II, nonstop service to London is permitted from 26 gateway cities in the United States, but only American Airlines and United can provide service to Heathrow Airport.[241] This agreement does not restrict U.S. airlines from flying to London's Gatwick Airport.[242]

Because the United States already has open skies agreements with the countries to which Delta and Northwest fly, based on the SkyTeam alliance, it is unlikely that a merger will raise antitrust concerns in those countries.[243] However, even if there are some antitrust concerns, foreign governments likely will only require the new entity to give up routes or airport slots, similar to what was required for the Air France-KLM merger. [244]

VII. CONCLUSION

The successful rehabilitation of airlines in bankruptcy must be facilitated without compromising the stability of airlines that are not in bankruptcy.[245] There is overcapacity in the industry, but this excess capacity can be removed by reducing the number of competitors.[246] If Northwest and Delta were to merge during bankruptcy, capacity would be reduced, thus providing some relief to the industry.

Delta and Northwest can merge successfully by learning from foreign mergers. Australia can serve as an illustration of how to get regulatory approval specifically by preserving competition in order to leave room for LCCs to gain market share.[247] Even the KLM-Air France merger can teach Delta and

240. U.S. Airways Group, Inc., v. British Airways PLC, 989 F. Supp. 482, 485 (S.D.N.Y. 1997).

241. *Id.*

242. *Id.*

243. *See* Scott Kimpel, *Antitrust Considerations in International Airline Alliances*, 63 J. AIR L. & COM. 475, 497–505 (1997) (discussing air transportation regulation in the European Union).

244. *See* Baker, *Air France-KLM Approved*, *supra* note 150, at 9.

245. 139 CONG. REC. H1254 (daily ed. Mar. 16, 1993) (statement of Rep. Hamilton Fish, Jr.).

246. *See* Rollman, *supra* note 75, at 398–99.

247. Jones, *supra* note 121, at 246 (noting that the ACCC allowed Qantas to

Northwest how to successfully merge by creating synergies.[248] Thus, by following in the footsteps of KLM-Air France, Delta and Northwest can achieve a greater likelihood of profit than if they emerge from bankruptcy as two distinct entities.

Further, a merger would have positive impacts on other players in the airline industry. Customers will have more choices, such as selecting efficient LCCs that have lower ticket prices or flying the new entity that has a much larger travel network. Airline employees will also benefit because, even though they will likely take some pay cuts and have difficulty integrating union members, merging still allows for more job retention than eventual liquidation.[249] Finally, the newly-merged entity will be able to continue to keep the money-making portion of its business, which consists of international routes, because foreign governments and foreign alliance members likely will not object to the merger.[250] Therefore, despite what items may have shifted during landing, a merger between Delta and Northwest is the best solution for all parties and has the greatest probability of gaining governmental approval.

*Kristina McQuaid**

acquire Impulse, while ensuring room for Virgin Blue to expand).

248. *See* Baker, *Air France-KLM Pays Off*, *supra* note 152.

249. *E.g.*, Keith L. Alexander, *Few to Lose Jobs In Airline Merger; Management Positions Most at Risk*, WASH. POST, May 21, 2005, at E1 (explaining that America West and US Airways plan to reduce 12–13% of their routes due to their announced merger, which will likely result in layoffs, but that a majority of employees will be retained, as compared to complete unemployment for the workers of a liquidated airline).

250. *See* Moylan, *Big Airlines Find Profitable Skies Overseas*, *supra* note 34. Delta and Northwest are already members of the same alliance. SkyTeam Airline Alliance, *supra* note 224.

*J.D. Candidate 2008, University of Houston Law Center; B.B.A. Finance/Economics 2000, Texas Wesleyan University. This Comment received the Vinson & Elkins Writing Award for an Outstanding Comment on a Topic in International Law. I would like to thank Professor Darren Bush for his thoughts, suggestions, and insightful debates. Also, I would like to thank my family, specifically my parents Amy and Jerry Adams, for their constant support and encouragement. I am especially grateful to my husband, Declan McQuaid, for his patience, support, and love.