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Transportation Antitrust Cases, 2009

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This report summarizes reported antitrust decisions in 2009 that involved transportation companies. It updates the TLA Antitrust and Unfair Practices Committee report issued in April 2009 that included antitrust related transportation decisions for 2008.

Civil Actions – Air Transportation

Alaska Airlines, Inc. v. Carey, 2009 WL 3633894, 2009-2 Trade Cases ¶ 76,799 (No. 07-5711, W.D.Wash. October 30, 2009).

Plaintiff alleged that the individual and corporate defendants had violated various state and federal laws by brokering the purchase and resale of the carrier's frequent flyer tickets; the defendants filed a counterclaim asserting that the carrier's efforts to prevent them from brokering the tickets itself violated of § 1 the Sherman Act.¹ The U.S. District Court for the Western District of Washington held that the carrier had a legitimate right to restrict the transfer, sale, and barter of its frequent flyer tickets, as well as to enter into agreements with other airlines to exchange frequent flyer miles; accordingly, the defendants were not conducting business in a valid secondary market and the carrier did not violate any antitrust law by enforcing its policies against the defendants.

In re: Travel Agent Commission Antitrust Litigation, 583 F.3d 896, 2009-2 Trade Cases ¶ 76,579 (No. 07-4464, 6th Cir. October 2, 2009).

Plaintiffs alleged that certain U.S. and foreign airlines conspired to reduce and eliminate travel agent commissions in violation of § 1 of the Sherman Act.² The U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal of the complaint by the trial court, for reasons including that the sporadic parallel contacts among airlines alleged by plaintiffs failed to fulfill the pleading standard established by the U.S. Supreme Court in Bell Atlantic Corp v. Twombly.³ One judge dissented, stating that the majority had applied the Twombly too strictly, and that the result was an evisceration of antitrust enforcement.

¹ 15 U.S.C. § 1.

² *Id.*

³ 550 U.S. 544 (2007).

Copeca, Inc. Western Aviation Services Corp., 2009 WL 2779921, 2009-2 Trade Cases ¶ 76,579 (No. 08-2090, D.P.R. August 25, 2009).

Plaintiff alleged that a competing fixed base operator at an airport had tied its ground baggage handling services and refueling services in violation of § 1-2 of the Sherman Act.⁴ The U.S. District Court for the District of Puerto Rico held that the plaintiff was not entitled to an injunction. The court explained that, first, plaintiff had not demonstrated an overall likelihood of success on the merits; plaintiff had shown evidence of distinct products, coercion, and economic power, but not that a “not substantial amount of commerce” had been foreclosed by the alleged tying. The court also held that plaintiff had not shown a threat of irreparable harm, because the plaintiff’s jet fuel sales business was not at risk of being eliminated, and that the public interest weighed only slightly in favor of an injunction. Subsequently, the parties agreed to dismiss the case.

Civil Actions – Surface Transportation

Lala v. Frampton, 2008 WL 4059874, 2009-1 Trade Cases ¶ 76,466 (No. 07-02144, D.Colo August 28, 2008).

In a case decided in 2008 but not published until 2009, plaintiff, the owner of an airport shuttle transportation company, alleged that defendant, the owner of a competitor, had conspired to monopolize the shuttle business between the Vail Valley and Denver International Airport, in violation of § 2 of the Sherman Act.⁵ Additionally, plaintiff alleged that an agent of defendant had broken into his home and stolen information about an unrelated business, which was provided to the police and resulted in his incarceration for motor vehicle theft. The U.S. District court for the District of Colorado held that to the extent that plaintiff’s antitrust claims were premised on harm to his business during his incarceration, the claims were barred by the Noerr-Pennington doctrine. Additionally, the court held that plaintiff had failed to define the relevant product and geographic markets, and to meet other antitrust pleading requirements.

In re LTL Shipping Services Antitrust Litigation, 2009 WL 323219 (No. 08-1895, N.D.Georgia January 28, 2009).

Plaintiffs, on behalf of a class, alleged that defendants had conspired to fix fuel surcharges for less-than-truckload freight shipments, in violation of § 1 of the Sherman Act.⁶ The U.S. District Court for the Northern District of Georgia dismissed the claim because the evidence of conspiracy offered by plaintiffs failed to fulfill the pleading standard established by the U.S. Supreme Court in Bell Atlantic Corp v. Twombly.⁷ The court stated that plaintiffs had at most alleged parallel conduct, that surcharge information was available through public

⁴ 15 U.S.C. §§ 1-2.

⁵ 15 U.S.C. § 2.

⁶ 15 U.S.C. § 1.

⁷ 550 U.S. at 544.

websites, and that opportunities arose during which the carriers could have met and agreed to conspire. These allegations, it found, failed to show that a price-fixing scheme was plausible.

All Star Carts and Vehicles, Inc. v. BFI Canada Income Fund, 596 F. Supp.2d 630, 2009-1 Trade Cases ¶ 76,521 (No. 08-1816, E.D.N.Y. February 4, 2009).

Plaintiffs, on behalf of a class, alleged that defendants had conspired to monopolize the market for small containerized waste hauling and disposal services in Long Island, in violation of § 2 of the Sherman Act.⁸ Plaintiffs asserted that the terms of the contracts utilized by the defendants, along with their large market share, were anti-competitive. The U.S. District Court for the Eastern District of New York denied defendants' motion to dismiss the claims, explaining that plaintiffs sufficiently had stated a claim of attempted monopolization; the complaint had stated a specific product market and geographic market, and had alleged that defendants had economic power sufficient to create a "dangerous probability" of monopoly power.

Alpha School Bus Co., Inc. v. Wagner, 910 N.E.2d 1134, 2009-1 Trade Cases ¶ 76,632 (No. 06-3427, Ill. App. First Dist. May 15, 2009).

Plaintiffs alleged that defendants conspired to monopolize special education school bus services in Chicago by rigging bids, in violation of the Illinois Antitrust Act,⁹ among other statutes. The trial court had dismissed the antitrust claim on the grounds that it was preempted by the Plaintiffs' claim for misappropriation of trade secrets. The appeals court held that it need not reach the issue of preemption, because the antitrust claim failed as a matter of law. For example, the appeals court noted that one of the alleged conspirators was in fact an agent of Plaintiffs, and thus his conduct as a matter of law was attributable to Plaintiffs; thus Plaintiffs effectively alleged their own participation in a conspiracy to put themselves out of business, which was not cognizable under the Illinois Antitrust Act.

Patriot Ambulance Service, Inc. v. Genesee County, 2009 WL 3125304 (No. 08-11447, E.D.Mich. September 25, 2009) and Swartz Ambulance Service, Inc. v. Genesee County, 2009 WL 3125466 (No. 08-11448, E.D.Mich. September 25, 2009).

Plaintiffs alleged that the defendants had enacted an ordinance which created exclusive ambulance provider "zones," in violation of § 1 of the Sherman Act¹⁰ and § 2 of the Michigan Antitrust Reform Act.¹¹ The U.S. District Court for the Eastern District of Michigan held that the Local Government Antitrust Act¹² barred plaintiffs' claims for damages under the Sherman Act, but not their claim for declaratory relief. However, the court further found that, plaintiffs' claims under the Michigan Antitrust Reform Act were barred because state law permitted the defendants to regulate both emergency and non-emergency ambulance operations.

⁸ 15 U.S.C. § 2.

⁹ 740 ILCS 10/1, i.

¹⁰ 15 U.S.C. § 1.

¹¹ Mich. Comp. Laws § 445.772

¹² 15 U.S.C. § 35.

Bey v. Mason Dixon Intermodal, 2009 WL 3157390, 2009-2 Trade Cases ¶ 76,764 (No. 09-84, D.Neb. September 28, 2009).

The pro se plaintiff alleged that Mason Dixon had violated the Sherman Act, Clayton Act, among other claims, by denying him access to “essential facilities.” The U.S. District Court for the District of Nebraska described the complaint – which provided virtually no information about the parties or Bey’s claims as “difficult to decipher,” and dismissed the case, adding that although Bey had cited antitrust statutes, he had not set forth any allegations supporting claims under them.

In re Household Goods Movers Antitrust Litigation, 2009 WL 4037036 (Nos. 07-764, 07-2861, and 08-486, D.S.C. November 20, 2009).

Plaintiffs, on behalf of a class, alleged that the defendants had conspired to impose fuel surcharges on customers who purchased moving services from them, in violation of § 1 of the Sherman Act¹³ and § 4 of the Clayton Act.¹⁴ The U.S. District Court for the District of South Carolina, in an unpublished decision, held that the defendants could not assert statutory immunity¹⁵ or the filed rate doctrine as defenses, because the defendants had not fulfilled the requirements of either the statute or the doctrine, even assuming that the doctrine still was applicable to household goods carriers. The court subsequently authorized, in the above-captioned decision, an interlocutory appeal of its decision to the U.S. Court of Appeals for the Fourth Circuit (pending in docket no. 10-1047).

Civil Actions – Ocean Transportation

In re Hawaiian & Guamanian Cabotage Antitrust Litigation, 647 F. Supp. 1250 (No. 08-1972, W.D.Wash. August 18, 2009).

Plaintiffs alleged that the defendants had conspired to increase fuel surcharges, share vessel capacity, and not enter into extra-tariff rate agreements with purchasers of shipping services between the continental U.S. and Hawaii and/or Guam, in violation of § 1 of the Sherman Act.¹⁶ The U.S. District Court for the Western District of Washington dismissed the claim because the evidence of conspiracy offered by plaintiffs failed to fulfill the pleading standard established by the U.S. Supreme Court in Bell Atlantic Corp v. Twombly.¹⁷ Additionally, the court held that the filed rate doctrine further precluded both claims specifically grounded in fuel surcharges and grounded in other conduct, because all of the claims ultimately implicated trade for which tariffs were filed with a federal regulatory agency.

¹³ 15 U.S.C. § 1.

¹⁴ 15 U.S.C. § 15.

¹⁵ Pursuant to 49 U.S.C. § 13703.

¹⁶ 15 U.S.C. § 1.

¹⁷ 550 U.S. at 544.

Department of Justice

On January 22, 2009, the Department of Justice (“DOJ”) announced that LAN Cargo S.A., Aerolinhas Brasileiras S.A., and El Al Israel Airlines Ltd. each had agreed to plead guilty and pay fines due to their participation in conspiracies to fix the prices of passenger and/or cargo flights. LAN Cargo and ABSA together paid \$109 million and El Al paid \$15.7 million. Subsequently, Cargolux Airlines International S.A. (\$119 million), Nippon Cargo Airlines Co. Ltd. (\$45 million), and Asiana Airlines, Inc. (\$50 million) and an employee of Martinair Holland N.V. also pled guilty. In prior years, nine other air carriers and three employees had pled guilty to charges of price fixing for cargo and/or passenger flights.

On January 30, 2009, DOJ announced that Peter Baci, a former executive of Sea Star Line LLC, had agreed to plead guilty, serve 48 months in jail, and pay a \$20,000 fine for his role in an antitrust conspiracy involving the transportation by ocean vessel of goods to and from the continental United States and Puerto Rico. DOJ stated that this was the longest sentence ever imposed for a single antitrust charge.

Department of Transportation

On July 10, 2009, the Department of Transportation (“DOT”) approved an application pursuant to 49 U.S.C. §§ 41308 and 41309 to add Continental Airlines to a group of nine Star alliance air carriers, including United Airlines and Lufthansa, that already had been granted antitrust immunity. The DOT concluded that the expansion of the immunized grouping, subject to certain conditions, would be in the public interest and would not reduce or eliminate competition. The conditions included carve-outs of specific markets in which the carriers did not face competition; reporting requirements; and an obligation to implement a joint venture as described in the carriers’ application within 18 months (docket DOT-OST-2008-0234).

Surface Transportation Board

In 2009, the Surface Transportation Board (“STB”) approved three motor carrier pooling applications pursuant to 49 U.S.C. § 14302. Motor carrier activities conducted in accordance with an STB-approved pooling application are exempt from the antitrust laws. The applications were *In re Clean Truck Coalition, LLC*¹⁸; *In re Mayflower Transit, LLC*¹⁹; and *In re United Van Lines, LLC*.²⁰

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¹⁸ STB Docket No. MC-F-21034 (November 19, 2009).

¹⁹ STB Docket No. MC-F-17950 (December 2, 2009).

²⁰ STB Docket Nos. MC-F-4901 and MC-F-6152 (December 2, 2009).