Transportation Antitrust Cases (2010)

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This report summarizes reported antitrust decisions in 2010 that involved transportation companies. It updates the TLA Antitrust and Unfair Practices Committee report issued in April 2010 that included antitrust related transportation decisions for 2009. This report is submitted as a report of the Antitrust Committee Andrew M. Danas, Grove, Jaskiewicz & Colbert, Washington DC, and Michael Spurlock, Beery & Spurlock Co., LPA, Columbus, Ohio, Co-Chairs.

Civil Actions – Air Transportation

LaFlamme v. Societe Air France, 702 F.Supp. 2d 136, 2010-1 Trade Cases ¶ 77,033 (No. 08-1079, E.D.N.Y. April 5, 2010).

Plaintiffs alleged that four airlines had conspired to fix prices and fuel surcharges for passenger air transportation under the auspices of an international trade organization, in violation of § 1 of the Sherman Act. The U.S. District Court for the Eastern District of New York dismissed the claims, explaining that plaintiffs' allegations were conclusory and did not meet the standard set by Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); that the meetings enjoyed limited antitrust immunity from the U.S. Department of Transportation ("DOT"); and that even if an agreement had been reached by the carriers that was not within the scope of DOT immunity, the resolution at issue was a mechanism to facilitate fuel surcharges on itineraries involving more than one airline but did not establish their amounts or even a process for determining their amounts.

Rectrix Aerodrome Centers, Inc. v. Barnstable Municipal Airport Commission, 610 F.3d 8, 2010-1 Trade Cases ¶ 77,068 (No. 09-2173, 1st Cir. June 23, 2010).

Plaintiff, a fixed base operator (FBO), alleged that an airport commission and its employees had monopolized the sale of jet fuel at the airport, in violation of § 2 of the Sherman Act (15 U.S.C. § 2). The U.S.

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Court of Appeals for the First Circuit affirmed that the commission and its employees were immune from antitrust liability pursuant to the state action doctrine. Their conduct was authorized by the state legislation underlying the commission, which despite some ambiguity, was found to express a state policy to regulate the conduct at issue and suppress competition. The court also noted that even if the state action doctrine did not apply, it was uncertain that Rectrix's antitrust claim could succeed, since property owners are not necessarily required to allow outsiders to compete in selling goods or services.

Diaz Aviation Corporation d/b/a Borinquen Air v. Puerto Rico Ports Authority, 2010 WL 2991251, 2010-2 Trade Cases ¶ 77,179 (No. 09-1583, D.P.R. July 27, 2010).

Plaintiff alleged that the Authority and its employees violated § 1 of the Sherman Act (15 U.S.C. § 1) by withholding the necessary FBO certificate that it required to provide aircraft refueling services. The U.S. District Court for the District of Puerto Rico held that the antitrust claim against the Authority and its employees was barred by the Local Government Antitrust Act (15 U.S.C. § 34, et seq.). The court explained that even if the Authority was not a state actor and/or did not have implied antitrust immunity, the LGAA broadly precludes courts from awarding antitrust damages in any action against a local government or official, and that the Authority accordingly need not show that it acted pursuant to any state policy regarding aviation fuel.

Orocovis Petroleum Corp, v. Puerto Rico Ports Authority, 2010 WL 3420004 (No. 08-2359, D.P.R. August 2, 2010).

Plaintiff alleged that the Authority and its employees violated §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2) by withholding the necessary FBO certificate that it required to provide aircraft refueling services. A magistrate of the U.S. District Court for the District of Puerto Rico nevertheless recommended that the claim be dismissed. The magistrate explained that federal antitrust laws are inapplicable to restraints imposed by the states or municipalities as an act of government, and noted that Puerto Rico had delegated broad authority to the Ports Authority to manage and operate air transportation facilities. The court subsequently adopted the recommendation. (Although the claim and opinion are broadly similar to those in the Diaz case, the two cases appear to have been handled separately.)

In re Delta/AirTran Baggage Fee Antitrust Litigation, 733 F.Supp.2d 1348 (No. 09-2089, N.D.Ga. August 2, 2010).

Plaintiffs alleged that two airlines had conspired to impose fees on checked passenger bags, in violation of §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2). The U.S. District Court for the Northern District of Georgia held that Plaintiffs had asserted sufficient allegations under § 1 to survive a motion to dismiss, but not under § 2. The court explained that plaintiffs' claims that the carriers conspired were not implausible under the standard set by Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), nor were the claims barred by the doctrine of implied preclusion or the Noerr-Pennington doctrine. However, the court held that there was insufficient evidence of attempted monopolization, for reasons including that baggage fees alone would not enable the carriers to monopolize commercial air travel to/from Atlanta, as well as that "joint" attempted monopolization by two parties was a novel theory that other courts had rejected.

In re Korean Air Lines Co., Ltd Antitrust Litigation, 2010 WL 3184372 (No. 07-01891, C.D.Cal. August 2, 2010).

Plaintiffs alleged that two airlines had conspired to fix prices for passenger air transportation between the U.S. and Korea, in violation of § 1 of the Sherman Act (15 U.S.C. § 1) and §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26). The U.S. District Court for the Central District of California held that plaintiffs' claims would be dismissed to the extent that they alleged purchases made in Korea, because plaintiffs had failed to sufficiently allege that purchases of air transportation in Korea were linked to effects in the United States, as required by the Foreign Trade Antitrust Improvements Act (15 U.S.C. § 6a). The court explained that it was insufficient to show that there was merely a correlation between higher prices in the U.S. and higher prices in Korea.

Alaska Airlines, Inc. v. Carey, 2010 WL 3677783, 2011-1 Trade Cases ¶ 77,377 (No. 09-35979, 9th Cir. September 16, 2010).

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 § 1 the Sherman Act (15 U.S.C. § 1). The U.S. Court of Appeals for the Ninth Circuit affirmed the trial court's dismissal of the defendants' antitrust counterclaim, explaining that a "black market" of frequent flyer miles was not a valid market for purposes of antitrust law, as well as that an airline is entitled to control the distribution of its own products.

Malaney v. UAL Corp., 2010 WL 3790296, 2010-2 Trade Cases ¶ 77,187 (No. 10-2858, C.D.Cal. September 27, 2010).

Plaintiffs sought to enjoin the merger of United Air Lines and Continental Airlines pursuant to § 7 of the Clayton Act (15 U.S.C. § 18) on the grounds that it would increase market concentration in metropolitan areas such as Washington, DC; New Orleans; San Diego; and Seattle. The U.S. District Court for the Central District of California held that plaintiffs had not demonstrated the existence of a relevant market in which anticompetitive effects were reasonably likely. The court held that network carriers catering to business travelers did not comprise a separate market; that airport-pair markets should not be considered instead of city-pair markets; and that the national airline industry taken as a whole was not an appropriate market. Further, the court noted that even if plaintiffs had defined a viable market, they also had failed to fulfill the separate standards for injunctive relief, since they had not established any significant harm that they would personally suffer.

Civil Actions – Ocean Transportation

In re Puerto Rican Cabotage Litigation, 269 F.R.D. 125 (No. 08-1960, D.P.R., July 12, 2010).

Plaintiffs alleged that the defendant shipping companies had conspired to fix prices for seaborne transport between the continental U.S. and Puerto Rico, in violation of § 1 and § 3 of the Sherman Act (15 U.S.C. § 1 and § 3). The U.S. District Court for the District of Puerto Rico preliminarily approved a settlement between plaintiffs, who were direct purchasers, and two of the defendants. The settlement allowed plaintiffs to either receive a pro rata share of a $33,750,000 fund to be established by those defendants or a base rate freeze for future contracts with those defendants. Over the objections of the

remaining defendant, the court held that the terms of the settlement met the requirements of federal law, subject to further review at a fairness hearing to be held at a later date.

Rivera-Muniz v. Horizon Lines, Inc., 737 F.Supp.2d 57 (No. 09-2081, D.P.R., September 3, 2010).

Plaintiffs alleged that the defendant shipping companies had conspired to fix prices for seaborne transport between the continental U.S. and Puerto Rico, in violation of the Puerto Rico Antitrust Act (P.R. Laws tit. 10, § 257, et seq.). The U.S. District Court for the District of Puerto Rico held that plaintiffs, who were consumers, had standing to sue the defendants because Puerto Rican law, unlike federal antitrust law, did not prohibit claims by indirect purchasers, as well as that they had sufficiently stated a claim against the defendants given that the defendants controlled 87% of the market. (The court also observed that some of their executives had been indicted and pleaded guilty in a parallel federal criminal case). However, the court certified to the Puerto Rico Supreme Court the question of whether the Puerto Rico Antitrust Act applied only to commerce within Puerto Rico, and therefore was inapplicable to interstate commerce.

In re Hawaiian and Guamanian Cabotage Litigation, ___ F.Supp.2d ___, 2010 WL 4996730 (No. 08-1972, W.D.Wash., November 30, 2010).

Plaintiffs alleged that the defendant shipping companies had conspired to fix prices for seaborne transport between the continental U.S. and Hawaii and/or Guam, in violation of § 1 and of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the Western District of Washington held that the filed rate doctrine foreclosed plaintiffs' claims. The shippers were statutorily required to file their rates with the Surface Transportation Board (STB), and the court held that even if the STB did not engage in meaningful review of the rates, or even if some of the filings were defective, the filing requirement alone was sufficient to trigger the doctrine, which prohibits private antitrust claims. The court also rejected plaintiffs' claim that the Interstate Commerce Commission Termination Act of 1995 had nullified the filed rate doctrine. The decision has been appealed to the U.S. Court of Appeals for the Ninth Circuit (no. 10-36165).

Civil Actions – Surface Transportation

Bean d/b/a Bean's Towing and Auto Body v. Norman, 2010 WL 420057, 2010-1 Trade Cases ¶ 76,887 (No. 08-2422, D.Kan. January 29, 2010).

Plaintiff alleged that the Cherokee County Sheriff's Department failed to assign "non-preference" tow calls to him, in favor of towing companies that maintained social or political affiliations with the Sheriff's Department, in violation of §§ 1-2 the Sherman Act (15 U.S.C. §§ 1-2). The U.S. District Court for the District of Kansas denied the defendants' motion to dismiss Bean's antitrust claims, explaining that although the Local Government Antitrust Act (15 U.S.C. § 34, et seq.) barred any claim for damages, it did not bar a claim for injunctive relief. Further, Bean was entitled to maintain a claim for a permanent injunction because he had alleged an irreparable injury and because an injunction might be an appropriate remedy, since no damages were available.

Active Disposal, Inc. v. City of Darien, 2010 WL 1416461, 2010-1 Trade Cases ¶ 76,953 (No. 09-2930, N.D.Ill. March 31, 2010).

Plaintiffs alleged that ordinances enacted by Illinois municipalities which allowed only specific companies to provide waste and recycling hauling services in those communities violated § 2 of the Sherman Act (15 U.S.C. § 2). The U.S. District Court for the Northern District of Illinois held that the municipalities were immune from antitrust liability pursuant to the state action doctrine. The court explained that a state statute permitted them to enter into exclusive contracts for the hauling and disposal of garbage, and that this constituted a state policy to displace competition with regulation sufficient to trigger the exemption. The decision has been appealed to the U.S. Court of Appeals for the Seventh Circuit (no. 10-2568).

E-Z Roll Off, LLC v. County of Oneida, 785 N.W.2d 645, 2010-1 Trade Cases ¶ 77,015 (No. 2009AP775, Wis. Ct. App. May 11, 2010).

Plaintiff alleged that an agreement to charge a competing waste hauler lower fees for the use of county's transfer station violated state antitrust law (Wis. Stat. ch. 133). The trial court dismissed the claim on the grounds that E-Z had failed to submit a claim within the statutory time period for claims against governmental bodies (Wis. Stat § 893.80). The Wisconsin Court of Appeals held that applying the notice requirement law to antitrust claims would not serve a valid purpose, and accordingly remanded the case to the trial court for further proceedings.

Danner Construction Co., Inc. v. Hillsborough County, Florida, 608 F.3d 809, 2010-1 Trade Cases ¶ 77,045 (No. 09-13951, 11th Cir. June 9, 2010).

Plaintiffs alleged that a franchise system for waste collection implemented by the county violated § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. Court of Appeals for the Eleventh Circuit reversed the decision of the trial court and held that the county was immune from antitrust liability pursuant to the state action doctrine. The court explained that any anti-competitive conduct was the foreseeable result of the state's authorizing statute and that the state had clearly articulated a policy authorizing such conduct by enacting a law enabling the county to administer and regulate waste collection.

United States v. Republic Services, Inc., 723 F. Supp.2d 157, 2010-2 Trade Cases ¶ 77,097 (No. 08-2076, D.D.C. July 15, 2010); 2010 WL 3245395, 2010-2 Trade Cases ¶ 77,098 (No. 08-2076, D.D.C. July 15, 2010).

An amicus party objected that a proposed consent decree between the United States and seven states, on the one hand, and two waste hauling and disposal companies, on the other hand, did not adequately address the competitive consequences of their proposed merger. The U.S. District Court for the District of Columbia held that the consent decree was in the public interest and that the proposed divestitures would remedy the antitrust issues alleged in the complaint. The court noted that the companies would be required to divest nine landfills, ten transfer stations, and eighty-seven small container hauling routes across fifteen geographic markets, and held that it would not be necessary, as the amicus party alleged, to allow independent haulers to use the merged firms' landfills.

Shames v. California Travel and Tourism Opinion Commission, 626 F.3d 1079, 2010-2 Trade Cases ¶ 77,245 (No. 08-56750, 9th Cir. November 24, 2010).

Plaintiffs alleged that the California Travel and Tourism Commission had violated § 1 of the Sherman Act (15 U.S.C. § 1) by conspiring with rental car companies to uniformly pass-through to consumers a 2.5% tourism fee, which funded the commission, as well as to "unbundle" existing airport concession fees, which traditionally amounted to about 9% of rental prices. The U.S. Court of Appeals for the Ninth Circuit overruled the decision of the trial court and held that the commission was not immune from antitrust liability pursuant to the state action doctrine. The court explained that the CTTC was not a regulatory body and California had not authorized it to interfere with normal industry competition; it merely had authority to spend the revenue raised by the tourism fee.

Department of Justice

In 2010 five airlines agreed to plead guilty and pay fines for price fixing. Northwest Airlines, LLC which agreed to pay a fine of $38 million due to the participation of its predecessor, Northwest Airlines Cargo, in a conspiracy to fix prices for international air cargo. In addition, Polar Air Cargo agreed to pay a $17.4 million fine; China Airlines agreed to pay a $40 million fine; All Nippon Airways agreed to pay a $73 million fine (encompassing passenger fares in addition to cargo); and Singapore Airlines agreed to pay a $48 million fine.

Additionally, Florida West International Airways and thirteen current and former executives of ten airlines were indicted based on their participation in one or more cargo conspiracies. In prior years, numerous other air carriers as well as certain air carrier employees had pled guilty to charges of price fixing for cargo and/or passenger flights.

On August 27, 2010, DOJ announced that it had closed its investigation into the acquisition of Continental Airlines by United Airlines, pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a). In connection with the conclusion of the investigation, the carriers announced that that they would lease 18 pairs of daily take-off and landing slots at Newark Liberty Airport (EWR) to Southwest Airlines.

On September 30, 2010, DOJ announced that six international freight forwarders had agreed to plead guilty and pay fines due to their participation in six overlapping conspiracies to fix a variety of fees and charges for their services for international air cargo. In particular, EGL Inc. agreed to pay $4.5 million; Kuehne and Nagel International AG, $9.9 million; Geologistics International Management Bermuda Limited, $688,000; Panalpina World Transport (Holding) ltd., $11.9 million; Schenker AG, $3.5 million; and BAX Global, $19.7 million.

Department of Transportation

On July 20, 2010, DOT approved an application pursuant to 49 U.S.C. §§ 41308 and 41309 for antitrust immunity by American Airlines, British Airways, Finnair, Iberia, and Royal Jordanian Airlines. The DOT concluded that the grant of immunity, subject to certain conditions, would be in the public interest and would not reduce or eliminate competition. The conditions included a requirement that the carriers make slots available to competitors for up to four daily services between the U.S. and London's

Heathrow Airport; reporting requirements; and an obligation to implement a joint venture as described in the carriers' application within 18 months (docket DOT-OST-2008-0252).

On September 9, 2010, DOT tentatively denied an application pursuant to 49 U.S.C. §§ 41308 and 41309 for antitrust immunity by Delta Air Lines and Virgin Blue Airlines. The DOT stated that the applicants had not demonstrated that the public benefits would outweigh any competitive harm, or that those benefits could only be achieved by a grant of immunity. DOT noted that, among other factors, the applicants' commercial relationships would not be easily coordinated and that the U.S.-Australia market as a whole was in flux. Subsequently, DOT allowed the airlines to submit additional information to substantiate their application (docket DOT-OST-2009-0155).

On November 10, 2010, DOT approved applications pursuant to 49 U.S.C. §§ 41308 and 41309 for antitrust immunity by All Nippon Airways, Continental Airlines, and United Airlines, and – separately – American Airlines and Japan Airlines. The DOT concluded that the grant of immunity, subject to certain conditions, would be in the public interest and would not reduce or eliminate competition. The conditions were identical to those routinely imposed in other antitrust immunity proceedings, including reporting obligations and an obligation to implement a joint venture as described in the carriers' application within 18 months; no slot or other divestiture conditions were imposed (docket DOT-OST-2010-0059).

Federal Trade Commission

U-Haul International, Inc. and AMERCO, Docket C-4294, FTC File No. 081 0157 (July 14, 2010).

FTC entered into an agreement with U-Haul and its parent company to settle charges that U-Haul violated § 5 of the Federal Trade Commission Act (15 U.S.C. § 45) by inviting a competitor to collude on prices for truck rentals. According to the agreement, in 2006-08 U-Haul regional managers informed Avis Budget Group of conditional rate increases that would be implemented if Avis Budget followed, and in other ways sought to communicate with Avis Budget as well as Penske Truck Leasing Co. The consent order generally prohibits U-Haul from colluding with competitors for a period of twenty years.

Additionally, on September 14, 2010, FTC announced that it had closed its investigation into the acquisition of ExpressJet Holdings by SkyWest, pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a).

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