Transportation Antitrust Cases (2011)

[reprinted from The Transportation Lawyer (April 2012)][1]

This report summarizes reported antitrust decisions in 2011 that involve transportation companies. It updates the TLA Antitrust and Unfair Practices Committee report issued in April 2011 that included antitrust-related transportation decisions for 2010.

Civil Actions – Air Transportation

Diaz Aviation Corporation d/b/a Borinquen Air v. Airport Aviation Services, Inc., 2011 WL 280852, 2011-1 Trade Cases ¶ 77,323 (No. 09-1583, D.P.R. January 20, 2011).

Plaintiff alleged that the Puerto Rico Ports Authority and an airport fixed base operator ("FBO") violated § 1 of the Sherman Act (15 U.S.C. § 1) by conspiring to deny it the approvals required to provide aircraft refueling services. The U.S. District Court for the District of Puerto Rico previously had dismissed the Authority and its officials as defendants, but denied a motion to dismiss the claims against the FBO and its employees. The court explained that the dismissal of charges as to one conspirator did not deprive it of jurisdiction over the remaining defendants, and Borinquen Air had alleged that the FBO and its employees engaged in actions that violated the antitrust laws. Subsequently, the court also denied a motion for summary judgment by the FBO, finding that there were genuine issues of material fact as to whether it had sought to hinder Borinquen Air's business. See 2011 WL 5335519, 2011-2 Trade Cases ¶ 77,670 (November 7, 2011).

Diaz Aviation Corporation d/b/a Borinquen Air v. Airport Aviation Services, Inc., 762 F.Supp.2d 388, 2011-1 Trade Cases ¶ 77,310 (No. 09-1583, D.P.R. January 18, 2011).

In an action related to the case supra, plaintiff alleged that the FBO as well as two fuel companies had monopolized the sale of aviation fuel in Puerto Rico in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the District of Puerto Rico held that Borinquen Air had failed to state a claim against the defendants. The court explained that the Sherman Act required that the channels of interstate commerce affected must be identified. Plaintiff made no allegations as to how defendants' actions were related to interstate commerce, and the court declined to presume a relationship that had not been plead. For similar reasons, the court also dismissed a claim of price discrimination in violation of § 2 of the Clayton Act (15 U.S.C. § 13).

The firm's practice encompasses virtually every aspect of transportation law, including advising airlines, ocean carriers, and bus and trucking companies about compliance with federal and state antitrust laws.

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In re: Korean Air Lines Co., Ltd. Antitrust Litigation, 642 F.3d 685, 2011-1 Trade Cases ¶ 77,417 (No. 08-56385, 9th Cir. April 18, 2011).

Plaintiffs alleged that Korean Air Lines and Asiana Airlines violated the antitrust laws of various states by conspiring to impose surcharges on passenger airfares. (The Plaintiffs in this case specifically consisted of indirect purchasers – i.e., who had purchased tickets from travel agents or consolidators who were barred from bringing a claim under the Sherman Act pursuant to Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)). The U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the District Court for the Central District of California that the state antitrust claims were preempted by the Airline Deregulation Act of 1978 (49 U.S.C. § 41713). The court held that the term "air carrier" as used in the statute should be understood to include not just U.S.-flag airlines but also foreign airlines such as Korean Air and Asiana, as well as that the antitrust claims were "related to a price" of an air carrier for preemption purposes.

In re Transpacific Passenger Air Transportation Antitrust Litigation, 2011 WL 1753738, 2011-1 Trade Cases ¶ 77,446 (No. 07-05634, N.D.Cal. May 9, 2011).

Plaintiffs alleged that the air carrier defendants had fixed prices for transpacific passenger air transportation in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the Northern District of California partially granted the defendants' motion to dismiss, holding that claims based on flights that originated in Asia were barred by the Foreign Trade Antitrust Improvement Act (15 U.S.C. § 6a). The court also held that the claims did not fall within any of the FTAIA exceptions, such as for "import trade" (since air passengers were not products) and for "domestic effects" (since any foreign injury was caused by the overall alleged conspiracy). However, the court allowed a claim based upon flights that originated in the U.S., holding that the pleading requirements of Bell Atlantic v. Twombly, 550 U.S. 544 (2007), had been met, and that other asserted defenses, such as the filed rate doctrine and the state action doctrine, were either premature or inapplicable.

Malaney v. UAL Corp., 434 Fed. Appx. 620, 2011-1 Trade Cases ¶ 77,463 (No. 10-17208, 9th Cir. May 23, 2011).

Plaintiffs sought to enjoin the merger of United Air Lines and Continental Airlines pursuant to § 7 and § 16 of the Clayton Act (15 U.S.C. § 18 and § 26). The U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the District Court for the Central District of California, which denied the plaintiffs' request for a preliminary injunction, on the basis that the appropriate markets for antitrust analysis are city-pair markets and not a single national market for air travel. The court explained that, for example, a flight from San Francisco to Newark is not interchangeable with a flight from Seattle to Miami. No matter how much an airline raised the price of a SEA-EWR flight, a passenger would not respond by switching to the SEA-MIA flight.

US Airways, Inc. v. Sabre Holdings Corp., slip opinion (No. 11-2725, S.D.N.Y. September 12, 2011).

US Airways alleged that Sabre, a Global Distribution System ("GDS"), had required it to enter into a contract to provide "full content" to the GDS and not distribute unique fares directly to the agents in violation of §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2). The U.S. District Court for the Southern District of New York, in an unpublished decision, dismissed the monopolization claims brought under § 2 of the Sherman Act, but not the horizontal/vertical claims brought under § 1 of the Sherman Act. The court did not state its reasons for the dismissal of the monopolization claims, but Sabre had noted that the market US Airways claimed to have been monopolized was agents that did business with Sabre, which the GDS

asserted was not a proper definition for the purposes of § 2. The court also directed US Airways to submit an amended complaint, providing more details about its claims under § 1.

American Airlines, Inc. v. Travelport Limited, slip opinion (No. 11-244, N.D.Tex. November 21, 2011).

American Airlines alleged that Travelport, a Global Distribution System ("GDS"), had – along with the Sabre GDS and Orbitz Worldwide, LLC – imposed anti-competitive contract terms on airlines, intended to prevent them from providing booking services directly to travel agents, 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 Texas, in an unpublished decision, dismissed the conspiracy claims brought under § 1 of the Sherman Act, but allowed the monopolization claims brought under § 2 of the Sherman Act to proceed. The court stated that the only § 1 conspiracy that had been properly plead was between Orbitz and Travelport, but that such a conspiracy would not impact sufficient commerce to be actionable. However, the court found that American had sufficiently alleged § 2 monopolization by Travelport of agents that did business with that GDS, and by Sabre of agents that did business with that GDS as well as travel agents generally.

Civil Actions – Ocean Transportation

In re Hawaiian and Guamanian Cabotage Litigation, 2011 WL 4498838, 2011-2 Trade Cases ¶ 77,621 (No. 10-36165, 9th Cir., September 29, 2011).

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) and other antitrust laws. The U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the U.S. District Court for the Western District of Washington that the filed rate doctrine foreclosed plaintiffs' claims. The court explained that shippers were statutorily required to file rates with the Surface Transportation Board (STB), and even if certain rates were no longer subject to filing requirements, or if the STB did not engage in meaningful review of filed rates, the filed rate doctrine continued to apply because the agency had not abdicated its rate-making authority. Likewise, the court affrimed the rejection of plaintiffs' claim that the Interstate Commerce Commission Termination Act of 1995 had nullified the filed rate doctrine.

Civil Actions – Surface Transportation

Active Disposal, Inc. v. City of Darien, 635 F.3d 883, 2011-1 Trade Cases ¶ 77,381 (No. 10-2568, 7th Cir. March 14, 2011).

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. Court of Appeals for the Seventh Circuit affirmed the trial court's ruling that the municipalities were immune from antitrust liability pursuant to the state action doctrine. The court explained that an Illinois statute permitted them to enter into exclusive contracts for the hauling and disposal of garbage, including recyclables, and held that this constituted a state policy to displace competition with regulation; thus the municipalities could engage in conduct that would otherwise violate the antitrust laws.

E-Z Roll Off, LLC v. County of Oneida, 800 N.W.2d 421 (No. 2009AP775, Wis. July 13, 2011).

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 intermediate appeals court held that the notice requirement law did not apply to antitrust claims, but on further appeal, the Supreme Court of Wisconsin held that the notice requirement law did apply to antitrust claims, and that because E-Z had failed to meet the notice requirements, summary judgment was proper. Two of the seven justices dissented, stating that antitrust claims should not be subject to the notice requirement law.

Metro West Ambulance v. Clark County, Washington, 2011-2 Trade Cases ¶ 77,732 (No. 10-5809, W.D.Wash., December 22, 2011).

Plaintiff alleged that a local government and other defendants, by establishing a single-franchise ambulance system, had violated § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the Western District of Washington held that the municipality was shielded by the state action immunity doctrine, as was the ambulance company that had been awarded the franchise. State law broadly authorized municipalities to regulate local ambulance services, and the court found that Clark County had not exceeded the boundaries of its statutory authority.

Department of Justice

On February 24, 2011, DOJ announced that Horizon Lines LLC had agreed to plead guilty and pay a $45 million fine due to its participation in a conspiracy to fix prices for the transportation of freight by water between the continental U.S and Puerto Rico from at least May 2002 until April 2008. Subsequently, Sea Star Line LLC agreed to plead guilty and pay a $14.2 million fine, and one of its former executives was indicted. In 2008, five former executives of Horizon and Sea Star agreed to plead guilty to participation in the same conspiracy.

On April 8, 2011, DOJ announced that pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a) it had conditioned the acquisition of ITA Software, Inc. by Google, Inc. on Google's development and licensing of travel software as well as internal firewalls. DOJ stated that these terms would preserve competition among airfare comparison and booking websites and ensure that those websites which used ITA's software would be able to continue to power their websites and to compete against any airfare website that Google might introduce. See also U.S. v. Google, Inc. and ITA Software, Inc., 2011-2 Trade Cases ¶ 77,617 (No. 11-688, D.D.C. October 5, 2011).

On April 26, 2011, DOJ announced that it had closed its investigation into the acquisition of AirTran Airways by Southwest Airlines Co. pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a). DOJ did not impose any conditions on the transaction.

On April 26, 2011, DOJ announced that two former executives of Societe Air France had been indicted for participating in a conspiracy to fix surcharges on air cargo shipments, and on May 27, 2011, EVA Airways agreed to plead guilty and pay a $13.2 million fine for participating in a conspiracy to fix surcharges on air cargo shipments. Subsequently, two executives of Cargolux Airlines International and a former executive of Cielos Airlines pleaded guilty to participating in similar conspiracies. Since an investigation became public in 2006, a total of 21 air carriers and 7 individuals have pleaded guilty to participating in conspiracies to fix prices for international cargo and/or passengers. Including the new charges filed in 2011, indictments are still outstanding against 14 additional individuals and one additional air carrier.

On August 12, 2011, DOJ announced that two executives, of an airline fuel supply company and a flight service management company, had pleaded guilty to charges of wire fraud and that they separately had conspired to defraud Ryan International Airlines by making kickback payments to a procurement official at Ryan. Although the executives were not charged with antitrust violations, DOJ stated that the

case had arisen out of an investigation of anticompetitive conduct in the airline charter services industry. Subsequently, two additional executives pleaded guilty.

On September 26, 2011, DOJ announced that six Japanese freight forwarders had agreed to plead guilty and pay fines totaling $46.8 million due to their participation in a conspiracy to fix certain fees – including fuel surcharges and security fees – for the transportation of freight by air between Japan and the U.S. from September 2002 until at least November 2007. Subsequently, another Japanese freight forwarder plead guilty and agreed to pay a $1.84 million fine. DOJ noted that in 2010 six other freight forwarders had plead guilty and paid fines for their participation in various conspiracies to fix fees for air freight destined to the U.S.

On October 11, 2011, DOJ announced that although the Federal Aviation Administration had approved a "swap" of slots by US Airways and Delta Air Lines DOJ was continuing to investigate certain elements of the transaction. US Airways would acquire slots at Washington Reagan National Airport, while Delta would acquire slots at New York LaGuardia Airport, and slots at both airports would be divested to other airlines. DOJ stated that it was continuing to investigate the consequences of the transaction at Reagan National, which is slot-constrained and has high fares, but the transaction would not have competitive implications at LaGuardia.

Department of Transportation

On June 10, 2011, DOT approved an application pursuant to 49 U.S.C. §§ 41308 and 41309 for antitrust immunity by Delta Air Lines and Virgin Australia Airlines, reversing a tentative decision issued in 2010 that would have denied the application. DOT stated that supplemental information submitted by the airlines had established that they would establish a more deeply integrated relationship than previously had been planned, including for services to cities beyond their gateways in the U.S. and Australia. The airlines also had submitted further information about the state of the U.S.-Australia market and agreed to maintain their existing market capacity for at least two years (docket DOT-OST-2009-0155).

[1] 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.

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