ZUCKERT SCOUTT RASENBERGER

Transportation Antitrust Cases (2013)

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This report summarizes reported antitrust decisions in 2014 that involved transportation companies. It updates the TLA Antitrust and Unfair Practices Committee report issued in April 2014 that included antitrust related transportation decisions for 2013.

Civil Actions – Air Transportation

Diaz Aviation Corporation d/b/a Borinquen Air v. Puerto Rico Ports Authority, 716 F.3d 256, 2013-1 Trade Cases ¶ 78,431 (No. 12-1859, 1st Cir. June 14, 2013).

The plaintiff alleged that the defendants had violated §§ 1-2 of the Sherman Act (15 U.S.C. § 1-2) by conspiring to prevent it from selling fuel to military aircraft at the San Juan airport. The U.S. Court of Appeals for the First Circuit affirmed the ruling of the U.S. District Court for the District of Puerto Rico which held that Diaz had failed its burden against the remaining defendants, a competing vendor, Airport Aviation Services and two of its employees (certain defendants – including the Ports Authority – were dismissed before trial). The court explained that, in regard to Section 1, Diaz had failed to show any concerted action by the defendants, and that communications between AAS and the Ports Authority were innocuous. Additionally, Diaz had failed to show – pursuant to the rule of reason – that the defendants' actions were unreasonable or anticompetitive; the evidence at trial demonstrated a legitimate justification, namely maintaining safety and security at the airport. As for Section 2, Diaz had failed to proffer evidence of monopoly power; military pilots were free to, and actually did, purchase fuel from Diaz Aviation.

Dogbe v. Delta Air Lines, Inc., 2013 WL 4522572, 2013-2 Trade Cases ¶ 78,495 (No. 11-6289, E.D.N.Y. August 27, 2013).

The plaintiff alleged various claims based on his removal from a Delta Air Lines flight, including that Delta and KLM Royal Dutch Airlines subsequently violated New York's Donnelly Antitrust Act (N.Y. Gen. Bus. Law § 340, et seq.) based on KLM's refusal to accept him on a later flight due to information communicated to KLM by Delta.

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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The U.S. District Court for the Eastern District of New York held that the claims were preempted by the Airline Deregulation Act of 1978 (49 U.S.C. § 41713(b)), which prohibits states from enforcing laws "related to a price, route, or service of an air carrier." The court noted that the majority of circuit courts had given the term "service" a broad interpretation, and that the Second Circuit had recently affirmed that foreign air carriers such as KLM were within the scope of the preemption statute.

Civil Actions – Surface Transportation

Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Co., 926 F.Supp.2d 36, 2013-1 Trade Cases ¶ 78,277 (D.D.C. no. 11-1049, February 26, 2013).

The plaintiffs alleged that the Union Pacific and BNSF railroads had both fixed fuel surcharges and allocated the market for transportation of coal and petroleum coke, in violation of §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2). The U.S. District Court for the District of Columbia found that, in regard to § 1, the plaintiffs had failed to state a claim because they did not specifically allege how they were harmed; e.g., the complaint did not identify from which defendants freight transportation services had been purchased. In regard to § 2, the plaintiffs alleged that Union Pacific and BNSF had agreed not to compete for incumbent customers – but the court held that § 2 only allowed claims against a single company for monopolization. But the court dismissed the plaintiffs' claims without prejudice, allowing them to be repleaded.

In re: Rail Freight Fuel Surcharge Antitrust Litigation, 725 F.3d 244, 2013-2 Trade Cases ¶ 78,481 (D.C.Cir. no. 12-7085, August 9, 2013).

Plaintiffs alleged that the defendant railroads had conspired to fix prices for rail freight transportation services through fuel surcharges, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the District of Columbia had granted class certification for the claims, but the U.S. Court of Appeals for District of Columbia Circuit reversed and remanded the decision, finding that it was an appropriate matter for interlocutory review and that the damages model used to fulfill the "predominance" requirement for class certification was insufficient. In particular, the appeals court found that when the methodology was applied to shippers with "legacy" contracts – negotiated before any alleged conspiratorial conduct – it yielded false positives, and thus was not a sound statistical model.

Civil Actions – Ocean Transportation

Terminalift, LLC v. International Longshore and Warehouse Union Local 29, 2013 WL 2154793, 2013-1 Trade Cases ¶ 78,388 (S.D.Calif. no. 11-1999, May 17, 2013).

The plaintiff, which was engaged in the business of moving cargo on and off ocean-going ships and littoral vessels, alleged that a labor union had conspired with an association that represented shipping companies and a terminal operator to prevent Terminalift from performing work at, and bidding for, work at the Port of San Diego, 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 California granted a motion by the union to dismiss the claims. In regard to section 1, the court held that Terminalift had not sufficiently alleged an agreement between the union and the association to support a conspiracy claim. Additionally, the court held that Terminalift had not stated a claim for monopolization because it had alleged not that a monopoly but an oligopoly existed, which was not within the scope of section 2, as well as that it had failed to establish a dangerous probability of success.

Department of Justice

On January 2, 2013, DOJ announced that it would not challenge the creation of a joint venture by Columbia Fuel Services, Inc. and Lamar Aviation, Inc. – the only providers of flight support services at the Groton-New London Airport in Groton, Connecticut. DOJ concluded that the joint venture ("Mystic Jet Center") would not be in a position to impose supra-competitive prices because of the availability of fuel and hangars at surrounding airports, and the potential for the establishment of new fixed-base operators (FBOs) at the Groton-New London Airport.

On March 8, 2013, DOJ announced that two Japanese freight forwarders – K Line Logistics Ltd. and Yusen Logistics Co. Ltd. – had pleaded guilty to participating in a conspiracy to fix fuel surcharges and security fees for the forwarding of cargo by air from Japan to the U.S. K Line agreed to pay a $3.5 million fine and Yusen agreed to pay a $15.4 million fine. Including these charges, 16 forwarders have agreed to plead guilty and pay fines of more than $120 million.

On March 21, 2013, DOJ announced that a federal grand jury in Puerto Rico had indicted a former executive of Crowley Liner Services for participating in a conspiracy to fix rates and surcharges for forwarding of cargo by water between the continental U.S. and Puerto Rico. In connection with the same conspiracy, six additional individuals and three companies have agreed to plead guilty or were convicted at trial; the companies paid more than $46 million in fines, and the individuals were sentenced to prison terms ranging from seven months to five years.

On June 20, 2013, DOJ announced that that it had closed its investigation into the acquisition of a 49% stake in Virgin Atlantic Airways Ltd. by Delta Air Lines, Inc. without imposing any conditions on the transaction.

On August 13, 2013, DOJ announced that it (in coordination with various state attorneys general) had filed a lawsuit seeking to block the proposed merger of American Airlines and US Airways. DOJ asserted that the merger would substantially lessen competition for commercial air travel in local markets throughout the U.S. and result in passengers paying higher airfares.

On August 14, 2013, DOJ announced that a Florida airline services company, Aviation Fuel International, Inc., and its former owner/operator had been charged with wire fraud and honest services fraud, in connection with a scheme to defraud Ryan International Airlines by making kickback payments to a procurement official at Ryan. Although the defendants were not charged with antitrust violations, the conspiracy was discovered as a result of an investigation of anticompetitive conduct in the airline charter services industry. Previously, four other individuals had pleaded guilty to participation in the same scheme.

On November 12, 2013, DOJ announced that it had entered into a settlement with US Airways Group, Inc. and AMR Corp. (the parent of American Airlines) that would resolve its competitive concerns about their planned merger. Most notably, they would be required to divest 52 daily slot pairs at Reagan National Airport and 17 daily slot pairs at LaGuardia Airport, in addition to gates and facilities at five other airports, all on commercially reasonable terms. Subsequently, an effort by private parties to block the transaction under § 16 of the Clayton Act (15 U.S.C. § 26) was denied. See In re AMR Corp., 502 B.R. 23, 2013-2 Trade Cases ¶ 78,602 (No. 11-15463, S.D.N.Y. Bankr. November 27, 2013).

Surface Transportation Board

On January 17, 2013, the STB approved a motor carrier pooling application filed by the North American Chassis Pool Cooperative pursuant to 49 U.S.C. § 14302. The STB held that the agreement among ten

motor carriers to pool resources to acquire and lease intermodal chasses for marine containers would not unduly constrain competition; the ten applicants accounted for a very small percentage of the carriers that provided intermodal transportation for marine chasses and would continue to compete with one another.

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