ZUCKERT SCOUTT RASENBERGER

Transportation Antitrust Cases, 2014

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

Malaney v. UAL Corp., 552 Fed.Appx. 698, 2014-1 Trade Cases ¶ 78,649 (9th Cir. no. 12-15182, January 16, 2014).

In this case, the plaintiffs appealed from the dismissal of their class action seeking to enjoin the merger of United Air Lines and Continental Airlines. The U.S. Court of Appeals for the Ninth Circuit held that the trial court properly allowed the airlines to argue that there was not a national market for air travel for antitrust purposes, even though they had taken a contrary position in earlier litigation. The court explained that even if airlines had advocated a national market theory in litigation regarding computer reservations systems 25 years earlier, that position reflected the industry at the time, which was only starting to adapt to deregulation, and that judicial estoppel did not require that the airlines be prohibited from taking a different position in the pending litigation.

Stewart v. Gogo, Inc., 2014 WL 324570, 2014-1 Trade Cases ¶ 78,666 (N.D.Cal. no. 12-5164, January 29, 2014).

In this case, the consumer plaintiffs alleged that Gogo had entered into exclusive dealing agreements with airlines to monopolize the market for in-flight internet access aboard aircraft, in violation of section 1-2 of the Sherman Act (15 U.S.C. § 1-2). The U.S. District Court for the Northern District of California held that plaintiffs' allegations were sufficient to survive Gogo's motion to dismiss. The court noted that the allegation that Gogo had a 85 percent market share was questionable, but plaintiffs nonetheless had alleged a plausible violation of the antitrust laws. In particular, they alleged substantial market foreclosure through contracts with many of the major U.S. airlines, as well as high barriers to entry because the contracts between Gogo and the airlines were not easily terminated.

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 AMR Corp., 506 B.R. 368 (Bankr.S.D.N.Y. no. 11-15463, March 14, 2014).

In this case, the plaintiffs had sought an injunction to block the merger of American Airlines and US Airways. The court held that the plaintiffs had not waived their right to a jury trial by not including it in their original complaint, because at the time they could (and did) only seek an injunction pursuant to section 16 of the Clayton Act (15 U.S.C. § 26), and would not be entitled to damages under section 4 of the Clayton Act (15 U.S.C. § 15) – and thus a jury – until the merger had been consummated and plaintiffs could bring a claim for damages. At the same time, the U.S. Bankruptcy Court for the Southern District of New York denied plaintiffs' request for a jury trial as futile, because subsequent to the consummation of the merger, they had failed to allege cognizable injuries that would entitle them to damages.

Taleff v. Southwest Airlines Co., 554 Fed.Appx. 598, 2014-1 Trade Cases ¶ 78,669 (9th Cir. no. 11-2179, February 4, 2014).

In this case, the plaintiffs sought to challenge the consummated merger of Southwest Airlines and AirTran Airways, pursuant to section 16 of the Clayton Act (15 U.S.C. § 26). The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of the case, explaining that divestiture was a drastic and rarely granted remedy, and that plaintiffs had failed to provide any evidence of injuries to themselves or consumers in general.

DPWN Holdings, Inc. v. United Air Lines, Inc., 747 F.3d 145, 2014-1 Trade Cases ¶ 78,724 (2d Cir. No. 12-4867, March 27, 2014).

In this case, the plaintiff alleged that the defendant airline was part of a conspiracy to fix the price of air cargo shipments, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. Court of Appeals for the Second Circuit held that the district court erred by accepting the plaintiff's allegation that it lacked sufficient knowledge to file an antitrust claim in the airline's bankruptcy proceeding, and thus, that its claim was not discharged by the bankruptcy proceeding. The appeals court remanded the case for further consideration of what DHL knew or should have known in time to present a claim in the bankruptcy proceeding, as well as if United had any obligation to notify DHL of the potential claim. On remand, 2014 WL 5394950, 2014-2 Trade Cases ¶ 78,906 (E.D.N.Y. No. 11-564, September 16, 2014), the district court denied United's motion to dismiss pending discovery and anticipated that the issue, with documentary and testimonial evidence, would be "front and center at the summary judgment stage."

In re International Air Transportation Surcharge Antitrust Litigation, 577 Fed.Appx. 711, 2014-1 Trade Cases ¶ 78,802 (9th Cir. No. 12-15215, June 5, 2014).

In this case, the plaintiff – a cruise company – was held by the U.S. District Court for the Northern District of California to not be a member of the settlement class for the purposes of a settlement by an air carrier of allegations that it had fixed fuel surcharges for passenger flights. The court concluded that Carnival PLC had not purchased tickets for passengers, but rather had acted as a middleman akin to a ticket agent. Accordingly, its customers had standing to seek damages for antitrust violations, but the cruise company itself did not.

JetAway Aviation, LLC v. Board of County Commissioners of the County of Montrose, Florida, 754 F.3d 824, 2014-1 Trade Cases ¶ 78,797 (10th Cir. Nos. 12-1173 and 12-1194, June 9, 2014).

In this case, the plaintiff – a prospective fixed-base operator at an airport – asserted that the county which owned the airport and the existing FBO at the airport had conspired to deny it access to the airport, in violation of § 1-2 of the Sherman Act (15 U.S.C. § 1-2). The U.S. Court of Appeals for the Tenth Circuit affirmed the district court's finding that JetAway had failed to establish antitrust injury and thus, lacked standing to bring the claims. The decision was issued on a *per curiam* basis because one member of the three judge panel died after the case had been argued, but before the decision was finalized. Consistent with circuit practice, the two remaining judges constituted a quorum to resolve the appeal. Although the two remaining judges agreed as to the outcome, they disagreed as to the reasoning to be utilized to reach that decision.

In re Transpacific Passenger Air Transportation Surcharge Antitrust Litigation, 2014 WL 4744512, 2014-2 Trade Cases ¶ 78,917 (N.D.California No. 07-5634, September 23, 2014).

In this case, the plaintiffs alleged that five foreign air carriers had conspired to fix the prices and surcharges for international flights. The defendants had moved for summary judgment on the basis of the filed rate doctrine, because the rates and charges at issue had been actually filed with and/or were under the supervision of the U.S. Department of Transportation (DOT). The U.S. District Court for the Northern District of California held that the doctrine did bar claims based on rates that actually had been filed with DOT, but did not bar claims based on certain surcharges and rates that were not filed with DOT. In particular, the court held that unfiled fuel surcharges and unfiled fares were not sufficiently supervised by DOT to justify the invocation of the filed rate doctrine, as well as that the restrictions on certain discount fares were too different from those applicable to filed fares to justify the invocation of the filed rate doctrine.

Civil Actions – Surface Transportation

U.S. ex rel. Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390 (4th Cir No. 12-1369, December 19, 2013, amended January 8, 2014).

In this case, a qui tam action, the defendants were alleged to have violated the False Claims Act (31 U.S.C. § 3729, et seq.) by rigging bids for contracts to move household goods on behalf of the Department of Defense. As a general matter, the U.S. Court of Appeals for the Fourth Circuit affirmed the judgment against the defendants and directed that the plaintiff be awarded $24 million in monetary damages. In so doing, the Fourth Circuit reversed the trial court's holding that certain portions of the FCA claims were barred by the Shipping Act of 1984 (46 U.S.C. App. § 1701, et seq.). The Fourth Circuit explained that the Shipping Act carved out a narrow exemption to the antitrust laws for "the foreign inland segment of through transportation," but that Gosselin's price-fixing scheme had affected through rates to the U.S., and thus, was not immune from the antitrust laws and could form a basis for an FCA claim. On remand, a jury initially issued a $33.6 million decision against the defendants on the re-tried claims, but the Court overturned the verdict and entered judgment for the defendants. See 2014 WL 7359585 (E.D.Va. Nos. 02-1168 and 07-1198, December 24, 2014).

Bill Adams d.b.a Snap Towing v. Davis County, 2014 WL 2207870, 2014-2 Trade Cases ¶ 78,825 (D.Utah No. 13-111, July 7, 2014).

In this case, the plaintiff – a tow truck operator – alleged that a membership organization representing some of the tow truck operators in the county had conspired to set standards for the county's rotation list for towing referrals, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the District of Utah dismissed the claim without prejudice, finding that the pleadings did not establish that the plaintiff's intrastate towing services were provided in or had an effect on interstate commerce merely because some of the services were provided on interstate highways. The court also declined to exercise supplemental jurisdiction over claims brought under state antitrust law.

Advanced Disposal Services Middle Georgia, LLC v. Deep South Sanitation, LLC, 765 S.E.2d 364, 2014-2 Trade Cases ¶ 78,956 (Georgia Nos. S14A0784, A14A0785, November 3, 2014).

In this case, the appellants – a solid waste collection and disposal company and a Georgia county – sought to enjoin another such company from providing its services in unincorporated areas of the county. The appellant, Deep South, responded that the exclusive franchise granted to Advanced Disposal violated §§ 1-3 of the Sherman Act (15 U.S.C. §§ 1-3), as well as certain constitutional provisions. The trial court agreed with Deep South, but on appeal the Supreme Court of Georgia reversed. In regard to the antitrust claims, the court explained that local governments were immune from antitrust liability when they engaged in anti-competitive conduct pursuant to a clearly expressed state policy, and that Georgia expressly had contemplated such conduct for solid waste collection.

Surface Transportation Board

CSX Transportation, Inc. v. Surface Transportation Board, 774 F.3d 25, 2014 WL 7093363, (D.C.Cir. No. 13-1313, December 16, 2014).

In this case, the STB (in response to an administrative complaint) determined that CSX had "market dominance" over certain routes (49 U.S.C. § 10707), a predicate to a further ruling on the reasonableness of it rates in those markets. CSX sought interlocutory review of the STB's determination. The U.S. Court of Appeals for the District of Columbia Circuit held that the appeal was premature because it did not amount to a final order of the STB, as well as that the STB's adoption of bifurcated procedures for hearing rate complaints, even if it comprised a new methodology that should have been subject to notice-and-comment rulemaking, did not provide a separate basis for an appeal.

Department of Justice

On February 24, 2014, DOJ announced that an employee of a Florida airline services company, Aviation Fuel International, Inc., had pled guilty to charges of obstruction of justice in connection with a scheme to defraud Ryan International Airlines by making kickback payments to a procurement official at Ryan. Although AFI and the individual employee 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 pled guilty to participation in the same scheme; subsequently in 2014, an additional individual also pled guilty.

On February 27, 2014, DOJ announced that Compania Sud Americana de Vaspores S.A. (CSAV), a Chilean corporation, had agreed to plead guilty and pay a $8.9 million criminal fine for its involvement in a conspiracy to fix prices, allocate customers, and rig bids of international ocean shipping services for roll-on, roll-off cargo such as cars and trucks, to and from the United States. Subsequently DOJ announced that Kawasaki Kisen Kaisha Ltd. (K-Line) and Nippon Yusen Kabushiki Kaisha (NYK), Japanese corporations, also had agreed to plead guilty and to pay, respectively, a $67.7 million criminal fine and a $59.4 million fine.

On April 25, 2014, the U.S. District Court for the District of Columbia formally approved a consent decree that resolved DOJ and state antitrust concerns regarding the merger of US Airways Group, Inc. and AMR Corp. (the parent of American Airlines) that would resolve its competitive concerns about their planned merger. The provisions included that they would be required to divest 52 daily slot pairs at Reagan National Airport, 17 daily slot pairs at LaGuardia Airport, and gates and facilities at five other airports. See United States v. US Airways Group, Inc., 2014 WL 1653269, 2014-1 Trade Cases ¶¶ 78,748, 78,749 (No. 13-1236, D.D.C. April 25, 2014).

On June 26, 2014, DOJ announced that Martin Marietta Materials, Inc. had agreed to divest itself of two railyards in Texas, among other conditions, in order to proceed with its proposed $2.7 billion acquisition of Texas Industries, Inc. DOJ and the State of Texas filed a lawsuit challenging the transaction in the U.S. District Court for the District of Columbia. The conditions also included DOJ approval of the buyer of the railyards, in Dallas and Frisco.

On July 30, 2014, DOJ announced that Landmark Aviation had agreed to divest itself of fixed base operator (FBO) assets at Scottsdale Municipal Airport order to proceed with its proposed $330 million acquisition of Ross Aviation. DOJ filed a lawsuit challenging the transaction in the U.S. District Court for the District of Columbia. DOJ noted that Landmark and Ross were the only FBO's at Scottsdale, and that the assets must be sold to either Signature Flight Support or another buyer approved by DOJ.

On September 22, 2014, DOJ announced that it would not challenge a proposal by Flexi-Van Leasing, Inc. and Direct ChassisLink, Inc. to enter into a pooling agreement for chassis use at the ports of Los Angeles and Long Beach. DOJ stated that Flexi-Van and Direct ChassisLink would continue to compete and would not share pricing information, but the agreement would allow the interchange of chassis throughout the port complex, improving their utilization and productivity.

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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