Transportation Antitrust Cases 2021

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This report summarizes antitrust rulings and other selected antitrust developments from 2021 that involved transportation companies. It updates the Transportation Lawyers Association Antitrust and Unfair Practices Committee report issued in April 2021 that included antitrust-related transportation decisions from 2020.

Civil Actions – Rail Transportation

In re Rail Freight Fuel Surcharge Antitrust Litigation (No. II)[1]

In this case, the plaintiffs–over 300 rail-freight shippers–alleged that the defendants, the four largest railway companies operating in the United States (CSX Transportation, Inc.; Norfolk Southern; BNSF; and Union Pacific), engaged in a multiyear price-fixing conspiracy to increase the price of rail freight through (1) coordinated efforts to cause an industry trade group to adopt a new cost index that excluded the cost of fuel, and then implementing, in lockstep, (2) artificially inflated fuel surcharges in violation of Section 1 of the Sherman Act[2] and Section 4 of the Clayton Act.[3] Following consolidation by the U.S. Multidistrict Litigation Panel, the defendants moved to dismiss the complaints or, in the alternative, to strike new factual allegations raised by the plaintiffs on the grounds that the complaints were time-barred under the Clayton Act's four-year statute of limitations. The U.S. District Court for the District of Columbia denied the defendants' motions, concluding that the underlying factual allegations asserted in the complaints were generally not time-barred based on tolling made available to former putative class members under *American Pipe & Construction Co. v. Utah*.[4]

On March 11, 2021, the parties advised the court of a discovery dispute and requested a briefing schedule on the plaintiffs' motion to compel production of certain post-2008 transaction data for purchases of rail-freight transport from defendants. The defendants opposed production of the requested materials and moved instead for the court to reconsider its ruling that the plaintiffs' claims were tolled under *American Pipe*. In the alternative, the defendants asked that plaintiffs' request for production of 2010-2012 transaction data be denied, and that defendants only be required to produce 2009 transactional data for all plaintiffs. The court first denied the defendants' motion for reconsideration, noting that even if they had demonstrated one of the recognized circumstances when justice may require reconsideration, their argument on the merits failed. The court held that the limited lingering-effects allegations tolled by the earlier decision fell within the scope of *American Pipe*'s exception because they were predicated on the same acts and would be proven by the same evidence as the claims advanced by the putative class in earlier litigation. The court then granted, in part, and denied, in part, the plaintiffs' motion to compel, ruling that the defendants were required to produce certain transaction data for 2009 for all plaintiffs and the affiliated entities that the plaintiffs identified in their answers to interrogatories. The court did not, however, order that the defendants produce any transaction data for 2010-2012, finding the requested information "disproportionate to the needs of the litigation at this stage."[5] Separately, on July 6, 2021, the court granted the defendants' request for a one-year extension of the fact discovery deadline, reasoning that the "600 to a thousand depositions" in the case would require a lengthy extension.[6] Additionally, the court considered that the extension of fact discovery would allow for resolution of a pending interlocutory appeal pertaining to the admissibility of communications between rail carriers.

Civil Actions – Ground Transportation

De Soto Cab Company, Inc. v. Uber Technologies, Inc.[7]

In this case, the plaintiff–a San Francisco-based taxicab company that has been operating in the "ride-hail" market since the 1930s–filed a third amended complaint against Uber and affiliated entities, alleging that Uber's internal business policies, driver incentives, and purportedly predatory pricing behavior were designed

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to eliminate competition and result in an eventual monopoly. The complaint asserted ten causes of action against Uber, including monopolization, attempted monopolization in violation of the Sherman Act,[8] violation of the Lanham Act,[9] failure to charge just and reasonable rates in violation of California's Public Utilities Code ("PUC"),[10] and violation of California's Unfair Competition Law ("UCL").[11] Uber moved to dismiss the complaint for failure to state a claim upon which relief could be granted.

The U.S. District Court for the Northern District of California granted, in part, and denied, in part, Uber's motion to dismiss without further leave to amend. The court threw out the Sherman Act claim, finding that plaintiff's allegations concerning market barriers and danger of recoupment remained deficient. The court also dismissed plaintiff's claims under the PUC, concluding that it lacked authority to rule on the unreasonable rate claims, because adjudicating such claims would interfere with a state agency's exercise of jurisdiction to construct a regulatory framework for transportation-network carriers. Because the court determined that plaintiff failed to allege violation of the Sherman Act and could not state PUC claims, it granted Uber's motion to dismiss the UCL claim to the extent it was derivative of those claims. The court further held that the plaintiff lacked statutory standing to pursue certain aspects of its UCL claim, but permitted the UCL claim to be limited to the alleged violation of the Lanham Act. Finally, the court rejected plaintiff's contention that it was entitled to restitution on its UCL claim. Because Uber had not challenged plaintiff's allegations regarding injunctive relief, however, the court denied Uber's motion to dismiss the claim in its entirety.

Civil Actions – Aviation

Spirit Airlines, Inc. v. U.S. Dep't of Transportation and Federal Aviation Administration[12]

In this case, the petitioner, a low-fare passenger carrier, challenged the Federal Aviation Administration's ("FAA") decision not to reallocate peak-period flight authorizations previously held by Southwest Airlines at Newark International Airport. In particular, the petitioner alleged that the decision was arbitrary and capricious because the FAA: (1) failed to consider the effect of its decision on competition; (2) did not explain why it could not use a less burdensome tool, such as a schedule reduction meeting, to address congestion; and (3) lacked substantial evidence for its decision. The FAA responded that its decision was unreviewable because it was not final agency action and, in the alternative, contested each objection. The U.S. Court of Appeals for the District of Columbia Circuit held that FAA's decision was final agency action subject to judicial review because it effectively foreclosed the petitioner from operating as many peak-period flights as it would otherwise perform. Having determined the order was final, the court then vacated FAA's decision not to reallocate the slots, finding that FAA disregarded warnings about the effect of its decision on competition at the airport. The court cautioned that "[i]f the FAA again decides to retire Southwest's peak-period slots, it should be prepared to provide a reasoned explanation for preferring to cut travel time an average of one minute rather than to cut the price of flying by as much as 45 percent on routes that would gain a second carrier."[13]

In re AMR Corporation[14]

In this case, the plaintiffs–comprised of numerous consumers and nine travel agents and travel agency owners–filed an adversary proceeding, alleging that the merger between defendants AMR Corporation and US Airways Group, Inc., which had ultimately formed American Airlines Group Inc., violated Section 7 of the Clayton Act.[15] Specifically, the plaintiffs argued that its effects may be substantially to lessen competition, or to tend to create a monopoly in the transportation of airline passengers, and sought a final judgment of divestiture to unwind the merger as well as injunctive relief to enjoin any future mergers pursuant to Section 16 of the Clayton Act.[16] The U.S. Bankruptcy Court for the Southern District of New York held a bench trial on the plaintiffs' Section 7 claim, at which it denied plaintiffs' request for permanent injunctive relief and granted judgment to the defendants. The court determined that the plaintiffs failed to carry their ultimate burden to show that the effect of the merger has been to substantially lessen competition. While the court found that the plaintiffs had sufficiently established a prima facie case of anticompetitive effects in the relevant market, the defendants effectively rebutted the plaintiffs' case with both expert and lay witness testimony on the various effects of the merger on the airline industry.

Executive Action

On July 9, 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy ("EO")[17] and a supporting Fact Sheet[18] announcing seventy-two initiatives by more than a dozen federal agencies to promptly tackle some of the most pressing competition problems across the economy. The EO contains several provisions governing the transportation sector. It directs the Department of Transportation ("DOT") to consider issuing (1) clear rules requiring the refund of fees when baggage is delayed or when service is not actually provided, and (2) rules that require baggage, change, and cancellation fees to be clearly disclosed to the customer. The EO also encourages the Surface Transportation Board ("STB") to require railroad track owners to provide rights of way to passenger rail and to strengthen their obligations to treat other freight companies fairly. The EO further encourages the Federal Maritime Commission ("FMC") to ensure vigorous enforcement against shippers charging American exporters exorbitant fees.

Department of Justice

On September 16, 2021, the Department of Justice ("DOJ") issued a statement on DOT's Newark Airport Reassignment Notice, which followed from the Spirit Airlines litigation discussed above and is discussed further below.[19] According to Acting Assistant Attorney General of the Antitrust Division Richard A. Powers,

> [DOJ] applauds [DOT's] efforts to preserve competition from low-cost airlines at Newark airport. Competition in the airline industry–and at Newark airport

> in particular–is in critically short supply. Low-cost carriers play an important role in keeping the airline industry competitive and the immense power of the major airlines in check. We look forward to working with the [DOT] to address similar concerns at capacity-constrained airports, and to bring consumers more choices and lower prices.

On September 21, 2021, DOJ, together with Attorneys General in six states and the District of Columbia, filed a complaint in the District of Massachusetts to block an "unprecedented and anticompetitive" series of agreements between American Airlines Group Inc. ("American") and JetBlue Airways Corporation ("JetBlue") through which the two airlines would consolidate their operations in Boston and New York City.[20] The complaint alleges that this extensive combination–which the defendants call the "Northeast Alliance"–would not only eliminate significant competition between American and JetBlue in these cities, but also would harm air travelers generally by significantly diminishing JetBlue's incentive to compete with American markets across the country. The complaint requests that the Northeast Alliance be adjudged to violate Section 1 of the Sherman Act[21] and that American and JetBlue be permanently enjoined from continuing and restrained from further implementing the Northeast Alliance. On November 11, 2021, American and JetBlue filed a motion to dismiss the complaint for failure to state a claim, asserting that the plaintiffs failed to plead the necessary elements of their antitrust claim.

Department of Transportation

On September 20, 2021, DOT published a notice of proposed reassignment of schedules at Newark Liberty International Airport ("Newark"), providing notice of its intention to approve schedule plans, for a single low-cost carrier ("LLC") or ultra-low-cost carrier ("ULCC"), to operate the sixteen peak afternoon and evening runway timings previously approved for operation by Southwest Airlines at Newark.[22] DOT requested comments on various aspects of the proposal, including its tentative decision to approve schedule plans for a single carrier to operate in the sixteen peak-hour runway timings as soon as possible, its tentative decision to limit eligibility to LLC and ULCC carriers, and its proposed evaluation criteria.

On December 1, 2021, Allegiant Air, LLC ("Allegiant") and Aeroenlaces Nacionales, S.A. de C.V. doing business as Viva Aerobus ("Viva") requested approval of and antitrust immunity for their Commercial Alliance Agreement.[23] The Joint Applicants claimed that implementation of their Alliance Agreement–the first of its kind among ultra-low-cost carriers and not involving a network carrier–would bring significant new competition and service options to the U.S.-Mexico market, including lower fares, additional capacity on existing routes, and increased overall transborder capacity by adding new nonstop flights on routes now served only via connecting service. Coordinated operations under the Alliance Agreement, they argued, would not significantly reduce or eliminate competition in any market. The Joint Applicants also asserted that the alliance would achieve important benefits for the traveling public through new service and low ULCC fares on origin-and-destination city-pairs that neither Allegiant nor Viva could provide independently, but also more generally by enhancing growth, creating U.S. jobs, and reducing the carbon cost of transborder travel.

Surface Transportation Board

On November 23, 2021, the STB announced that it had accepted for consideration the application filed by Canadian Pacific Railway and Kansas City Southern Railway concerning their potential merger.[24] The STB found that the application was complete as it contained all information required by the STB's regulations. The STB also adopted a procedural schedule for consideration of the application.

Federal Maritime Commission

On July 12, 2021, DOJ and the FMC signed their first interagency Memorandum of Understanding ("MOU"), which sets forth the terms by which the FMC and DOJ will share information related to, and cooperate in, the enforcement of antitrust and other laws applicable to the U.S.-international ocean liner shipping industry.[25] In particular, the MOU establishes a framework for the DOJ's Antitrust Division and the FMC to confer, at least annually, to discuss and review law enforcement and regulatory matters related to competitive conditions in the maritime industry. The MOU also provides for the exchange of information and expertise that may be relevant and useful to the agencies' oversight and enforcement responsibilities.

Endnotes

1 MDL Docket No. 2925, 2021 WL 1909777 (D.D.C. May 12, 2021).
2 15 U.S.C. § 1.
3 15 U.S.C. § 15.
4 414 U.S. 538 (1974).
5 MDL Docket No. 2925, 2021 WL 1909777, at *23 (D.D.C. May 12, 2021).
6 MDL Docket No. 2925, 2021 WL 2809277 (D.D.C. July 6, 2021).

[7] No. 16-CV-06385-JSW, 2021 WL 5860917 (N.D. Cal. Nov. 18, 2021).
[8] 15 U.S.C. § 2.
[9] 15 U.S.C. § 1125.
[10] Pub. Util. Code, § 451.
[11] Bus. & Prof. Code, § 17200.
[12] 997 F.3d 1247 (D.C. Cir. 2021).
[13] *Id.* at 1257.
[14] 625 B.R. 215 (Bankr. S.D.N.Y. 2021).
[15] 15 U.S.C. § 18.
[16] 15 U.S.C. § 26.
[17] Exec. Order No. 14036 (July 9, 2021).
[18] Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021).
[19] Press Release, DOJ, Justice Department Issues Statement on the Department of Transportation's Newark Airport Reassignment Notice (Sept. 16, 2021).
[20] Compl., *U.S. and Plaintiff States v. Am. Airlines Grp., et al.*, No. 1:21-CV-115588 (Sept. 21, 2021).
[21] 15 U.S.C. § 1.
[22] 86 Fed. Reg. 52285 (Sept. 20, 2021).
[23] Joint Application for Approval of and Antitrust Immunity for Commercial Alliance Agreement, Docket DOT-OST-2021 (Dec. 1, 2021).
[24] Press Release, STB, STB Accepts CP/KCS Merger Application for Consideration (Nov. 23, 2021).
[25] Memorandum of Understanding between the Federal Maritime Commission and the Antitrust Division, Department of Justice relative to Cooperation with respect to promoting competitive conditions in the U.S.-International Ocean Liner Shipping Industry (July 12, 2021).