

# Antitrust and Unfair Trade Practices Committee

## Transportation Antitrust Cases, 2022



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This report summarizes reported court decisions, agency actions, and legislative developments in 2022 which raised anti-trust, unfair competition, or deceptive trade practices issues affecting the transportation and logistics industries.<sup>1</sup> It updates the TLA Antitrust and Unfair Trade Practices Committee report published in April 2022 that included a report on similar decisions and developments in 2021.

### Civil Actions - Ocean Transportation

#### *Am. President Lines v. Matson*<sup>2</sup>

In this case, American President Lines alleged that Matson monopolized the mainland-to-Guam ocean container shipping market, in violation of the Sherman Act. The Court denied a motion to dismiss because the plaintiff had adequately alleged an injury to competition, a relevant market, monopoly power, and exclusionary conduct. But the Court also dismissed certain sister companies defendants, which had not been alleged to have been directly involved.

### Civil Actions - Ground Transportation

#### *Markson v. CRST Int'l*<sup>3</sup>

In this case, the plaintiffs alleged on

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behalf of a class that the defendants had conspired to restrain competition by refusing to hire commercial truck drivers who were "under contract" with a competitor, in violation of the Sherman Act and the Cartwright Act. The Court held that the class could not be certified pursuant to Rule 23(b) (3) because the plaintiffs' proposed damages model had not been demonstrated to reliably apply to all defendants.

Subsequently, the Department of Justice ("DOJ") submitted a Statement of Interest that did not opine on the merits but argued that no-hire/no-poach agreements are horizontal market allocations and that the courts should analyze them as per-se violations of the Sherman Act – and not under the rule of reason, which would allow a defense that the practices were economically justified.<sup>4</sup> The plaintiffs and remaining defendants later sought approval of a settlement.<sup>5</sup>

#### *Taxi Tours v. Go N.Y. Tours*<sup>6</sup>

In this case, a trial court previously had dismissed an antitrust counterclaim against certain plaintiffs, which alleged that they had conspired to disrupt the tour bus market in New York City by pressuring tourist attractions to forego doing business with the defendant. On appeal, the Court upheld the trial court ruling, finding that the defendant had failed to allege sufficient facts in support of its counterclaim, and also finding that the trial court had applied the appropriate state-law pleading standard and not a higher federal threshold.



#### *RFX v. Florida Beauty Express*<sup>7</sup>

In this case, a freight transportation broker alleged that the defendant had failed to pay its invoices, asserting a claim of a violation of the Massachusetts law prohibiting unfair or deceptive trade practices. The Court stated that an alleged breach of contract, standing alone, was not enough to trigger the statute, but in this case RFX alleged that it was strung along by promises of payment in return for continued services, which was sufficient to state a claim under the statute.

#### *Gilbert v. Zablauskas*<sup>8</sup>

In this case, a pedestrian who had been injured when run over by a delivery truck tried to assert claims against the company which employed the driver pursuant to the Connecticut Unfair Trade Practices Act ("CUPTA"). The Court held that the plaintiff did not have standing under the CUPTA because even if the company did not comply with federal and state driver oversight laws, non-compliance was not the proximate cause of her injuries.

### Civil Actions - Rail Transportation

#### *In re: Rail Freight Fuel Surcharge Antitrust Litig.*<sup>9</sup>

In this long-running litigation, the plaintiffs allege that railroads violated the

Sherman Act by conspiring to fix fuel surcharges. On appeal from the trial court was a decision that the Staggers Rail Act did not bar the introduction of interline-related discussions. The Court concurred that the statute was narrow in effect but held that it did allow the segregable portions of documents that specifically discussed interline movements to be withheld.

### Civil Actions - Aviation

#### *US Airways v. Sabre Hold.*<sup>10</sup>

In this case, US Airways alleged that Sabre had exercised monopoly power in the GDS (Global Distribution System) market, in violation of the Sherman Act. The Court denied most counts of a motion to dismiss, concluding that US Airways had plausibly alleged that Sabre had exercised monopoly power in a Sabre-only market as well as in the GDS market overall. Subsequently, at trial US Airways was awarded a nominal \$1 in damages.

#### *United States v. American Airlines*<sup>11</sup>

In this case, DOJ alleged that the "Northeast Alliance" between American and JetBlue constituted "an unprecedented and anticompetitive pact" that violated the Sherman Act. In response to a motion to dismiss, the Court held that DOJ plausibly had alleged that the agreement would harm competition and that the airlines controlled a significant share of an already-concentrated market. (For further developments, see below.)

### Civil Actions - Intellectual Property

#### *American Airlines v. Individuals & Entities*<sup>12</sup>

In this case, American alleged that defendants defrauded jobseekers by sending emails purporting to act on its behalf. The Court entered a preliminary injunction, finding that the fraudulent use of American's marks likely constituted unfair competition in addition to trademark infringement and other statutory and common law violations, and ordered the registrar of the defendants' domain names to transfer them to American without notice to the account holders.

### Department of Transportation

Previously, the Department of Transportation ("DOT") proposed to reassign 16 dormant runway timings at Newark Liberty International Airport ("Newark"), to a single low-cost carrier ("LLC") or ultra-low-cost carrier ("ULCC"), to enhance competition.<sup>13</sup> On July 5, 2022, DOT issued an order reassigning the timings to Spirit Airlines.<sup>14</sup>

On August 29, 2022, DOT released new interpretive guidance of its authority to regulate and prohibit unfair and deceptive practices in air transportation, notably stating that in addition to its own decisions, it also could rely on FTC precedents to clarify the elements of unfairness and deception.<sup>15</sup> The guidance was said to have been issued in response to President Biden's July 9, 2021 order on "Promoting Competition in the American Economy."<sup>16</sup>

On September 30, 2022, DOT issued a final order approving a grant of antitrust immunity (allowing fare and other coordination) to Delta Air Lines and LATAM Airlines (including various subsidiaries of LATAM).<sup>17</sup> Additionally, as previously reported, Allegiant Air and Viva Aerobus filed their own application for antitrust immunity on December 1, 2021;<sup>18</sup> shortly before this article went to press (on January 12, 2023), DOT issued a procedural order setting answer/reply deadlines for the application.

On October 20, 2022, DOT published a Notice of Proposed Rulemaking ("NPRM") which would require additional disclosures by airlines and travel agents about the ancillary fees applicable to airfares, including for baggage, changes/cancellations, and for families to sit together. The NPRM described itself as a product of President Biden's July 9, 2021 order which directed DOT and other agencies to take new measures to promote competition.

### Surface Transportation Board

On September 28-30, 2022, the STB convened a hearing on the proposed merger of the Canadian Pacific and Kansas City Southern railroads, pursuant to its authority under the ICC Termination Act.

As this article went to press, a decision was still pending, but the DOJ had submitted a statement cautioning that STB should not draw an inference that DOJ does not believe that the transaction lacks the potential to cause harm.<sup>19</sup>

### Federal Maritime Commission

On February 28, 2022, DOJ and the Federal Maritime Commission ("FMC") announced new coordination efforts to enforce competition laws and promote competition in ocean freight transportation.<sup>20</sup> On May 31, 2022, the FMC issued a report finding that, despite the pandemic, there was no concentration in the transpacific ocean carrier market and only minimal concentration in the transatlantic market.<sup>21</sup>

On June 16, 2022, President Biden signed the Ocean Shipping Reform Act of 2022 ("OSRA 22"),<sup>22</sup> which amended various provisions of the Shipping Act, which is enforced by the FMC. Notably, common carriers have new obligations in the billing and collection of charges, including detention and demurrage charges.<sup>23</sup> As required by OSRA 22, on October 14, 2022, the FMC published an NPRM that would require additional information to be included in detention and demurrage invoices, as well require certain billing/dispute procedures.<sup>24</sup>

OSRA 22 also amended the provisions of the Shipping Act which prohibit unreasonable refusals to deal, to specifically prohibit a common carrier from unreasonably refusing to deal or negotiate, including for vessel space accommodations provided by an ocean common carrier.<sup>25</sup> On September 21, 2022, the FMC published an NPRM seeking public comments on how the Commission will interpret and implement this provision of OSRA 22.<sup>26</sup>

OSRA 22 further added anti-retaliation and discrimination provisions to the Shipping Act, generally prohibiting such acts by common carriers, marine terminal operators, and ocean transportation intermediaries against a shipper, an agent of a shipper, an ocean transportation intermediary, or a motor carrier.<sup>27</sup> These provisions took effect immediately, but on December 15, 2022 the FMC announced that it had

asked the top 20 shipping lines serving the U.S. to provide information about how they are complying with the new requirements.<sup>28</sup>

### Department of Justice

On September 21, 2021, DOJ filed a complaint to block an “unprecedented and anticompetitive” series of agreements between American and JetBlue Airways, pursuant to which the two airlines had consolidated certain operations in Boston and New York City.<sup>29</sup> As this article went to press, the case had been tried before Judge Leo Sorokin and was awaiting decision.

Additionally, on September 30, 2022, DOT issued an unusual statement denying that it had reached “a very different judgment” than DOJ regarding the antitrust implications of the alliance, as had been publicly alleged by American and JetBlue.<sup>30</sup>

On August 25, 2022, DOJ announced that China International Marine Containers Group had abandoned its plans to acquire two subsidiaries of Maersk, Maersk Container Industry and Maersk Container Industry Qingdao, after objections following a DOJ investigation of the proposed transaction.<sup>31</sup>

### Federal Trade Commission

On November 10, 2022, by a 3-to-1 vote the FTC issued a policy statement, superseding all prior policy statements and advisory guidance, on the scope and meaning of “unfair competition” under Section 5 of the Federal Trade Commission Act.<sup>32</sup> The FTC stated that its policy “makes clear that Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions,” and set forth criteria to be considered by the FTC, as well historical examples of such activities. 

### Endnotes

- <sup>1</sup> This report is submitted as a report of the Antitrust and Unfair Trade Practices Committee: Andrew M. Danas, Grove, Jaskiewicz & Colbert, Washington DC; Jeremy R. Handschuh, Mitchell-Handschuh Law Group, Atlanta Georgia; Jol A. Silversmith, KMA Zuckert, Washington DC; Michael M. Spurlock, Beery & Spurlock Co., LPA, Columbus, Ohio, Co-Chairs.
- <sup>2</sup> F.Supp.3d, No. 21-cv-02040, 2022 WL 4598538 (D.D.C. Sept. 30, 2022).
- <sup>3</sup> No. 5:17-cv-01261-SB-SP, 2022 WL 790960, (C.D. Cal. Feb. 24, 2022).
- <sup>4</sup> <https://www.justice.gov/atr/case-document/file/1520056/> (Jul. 15, 2022).
- <sup>5</sup> 2022 WL 17883620 (Oct. 31, 2022).
- <sup>6</sup> 210 A.D.3d 451, 178 N.Y.S.3d 482 (N.Y. App. Div. 2022).
- <sup>7</sup> 2022 WL 1568445, No. 21-cv-11612-AK (D.Mass. May 18, 2022).
- <sup>8</sup> 2022 WL 1404219, No. UWY-CV-18-6041805-S (Conn. Super. Apr. 29, 2022).
- <sup>9</sup> 34 F.4th 1 (D.C. Cir. 2022).
- <sup>10</sup> 2022 WL 874945, No. 11 Civ. 2725 (LGS) (S.D.N.Y. Mar. 24, 2022).
- <sup>11</sup> Slip op., No. 1:21-cv-11558-LTS (D.Mass. Jun. 9, 2022).
- <sup>12</sup> 2022 WL 4594177, No. 22-cv-22080-Williams (S.D.Fla. Aug. 19, 2022).
- <sup>13</sup> 86 Fed. Reg. 52285 (Sept. 20, 2021).
- <sup>14</sup> Order 2022-7-1, Docket No. DOT-OST-2021-0103.
- <sup>15</sup> 87 Fed. Reg. 52677 (Aug. 29, 2022)
- <sup>16</sup> Executive Order 14036  
(<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>).
- <sup>17</sup> Order 2022-9-20, Docket No. DOT-OST-2020-0105.
- <sup>18</sup> Docket DOT-OST-2021-0152.
- <sup>19</sup> Comments of the United States Department of Justice, Canadian Pacific Railway – Control – Kansas City Southern Railway Company, Finance Docket No. 36500 (January 24, 2023)
- <sup>20</sup> Justice Department and Federal Maritime Commission Reaffirm and Strengthen Partnership to Promote Fair Competition in the Shipping Industry (<https://www.justice.gov/opa/pr/justice-department-and-federal-maritime-commission-reaffirm-and-strengthen-partnership>).
- <sup>21</sup> Fact Finding Investigation 29 Final Report, Effects of the COVID-19 Pandemic on the U.S. International Ocean Supply Chain: Stakeholder Engagement and Possible Violations of 46 U.S.C. § 41102(c).
- <sup>22</sup> Public Law 117-147.
- <sup>23</sup> 46 U.S.C. § 41104(a)(14) and (15) and 46 U.S.C. § 41104(d).
- <sup>24</sup> 87 Fed. Reg. 62341 (Oct. 14, 2022).
- <sup>25</sup> 46 U.S.C. § 41104(a)(10).
- <sup>26</sup> 87 Fed. Reg. 57674 (Sept. 21, 2022).
- <sup>27</sup> 46 U.S.C. § 41102(d).
- <sup>28</sup> FMC Probing Shipping Lines’ Anti-Retaliation Compliance (<https://www.fmc.gov/fmc-probing-shipping-lines-anti-retaliation-compliance/>).
- <sup>29</sup> Compl., U.S. and Plaintiff States v. American Airlines Group, et al., No 1:21-cv-115588 (D.Mass. Sept. 21, 2021).
- <sup>30</sup> Statement of the Department of Transportation Regarding Cooperation with the Department of Justice on Airline Industry Competition and Consumer Protection Issues (<https://www.transportation.gov/briefing-room/statement-department-transportation-regarding-cooperation-department-justice-airline>).
- <sup>31</sup> Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation (<https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk>).
- <sup>32</sup> Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act ([https://www.ftc.gov/system/files/ftc\\_gov/pdf/p221202sec5enforcementpolicystatement\\_002.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf)).