

Antitrust and Unfair Trade Practices Committee

Developments Affecting the Transportation Industry, 2023



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This report summarizes selected court decisions and filings; agency actions; and legislative developments in 2023 which involved antitrust, unfair competition or deceptive trade practices issues within the transportation and logistics industries. It updates the TLA Antitrust and Unfair Trade Practices Committee report published in the *TTL* in April 2023 that reviewed developments in 2022.¹

Legal developments in 2023 reflected both a continuation of the Biden Administration's focus on increasing competition in supply chain logistics, as well as issues related to the use of new technologies in the transportation industry. 2023 legal developments included new Department of Justice (DOJ) and Federal Trade Commission (FTC) merger guidelines; FTC proposed regulations to ban certain types of non-compete agreements and hidden fees; FTC and private sector litigation against Amazon alleging that its business

practices related to the provision of logistics services violated the antitrust laws; and Federal Maritime Commission (FMC) rulings regarding unreasonable business practices and charges in ocean shipping.

In addition to antitrust lawsuits, many private sector 2023 court cases involved claims of unfair competition by companies against competitors or former employees for theft of trade secrets; trademark and intellectual property infringement; interference with contractual relations; interference with prospective economic advantage; and breach of contract claims, including non-compete, non-solicitation, and non-disclosure contractual agreements. In addition to discussing the appropriate scope and application of the Sherman and Clayton Acts,² the 2023 cases discussed the applicability of such laws as the Lanham Act;³ the Computer Fraud and Abuse Act;⁴ the Defend Trade Secrets Act;⁵ and various state implementations of the Uniform Deceptive

Trade Practices Act; the Uniform Trade Secrets Act; and state unfair competition laws.

The summaries provided below focus on the issues that involved antitrust and unfair competition law or deceptive trade practices. As such, other issues discussed or addressed in the cases or dispositive to their resolution may not be addressed.

Aviation

United States v. American Airlines Group⁶

In May 2023, a federal judge agreed with DOJ that the *Northeast Alliance* between American Airlines and JetBlue Airways violates the Sherman Act. American, but not JetBlue, has appealed that decision.

Garavanian v. JetBlue Airways Corp.⁷

The DOJ in 2023 also challenged the proposed merger of JetBlue and Spirit Airlines; a ruling blocking the combination subsequently was issued in 2024.⁸ A private challenge to the merger also has been filed.

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Exhaustless, Inc. v. Moody⁹

A federal judge dismissed, on procedural grounds, a complaint which alleged that certain airlines and other parties had conspired to allocate slot allocations at U.S. airports.

In re Domestic Airline Travel Litigation¹⁰

A federal judge, in a long-running case alleging that four U.S. airlines had conspired to limit industry capacity for the purpose of increasing airfares, denied a motion by the two remaining defendants (Delta Air Lines and United Airlines) for summary judgment.

In re AMR Corporation¹¹

The Second Circuit affirmed the dismissal of a private Clayton Act challenge to the 2013 merger of American Airlines and US Airways, holding that the district court had properly allowed the defendants to rebut market share-based evidence.

Air Excursions LLC v. Yellen¹²

The D.C. Circuit held that an airline could not challenge the disbursement of pandemic relief grants to a competitor because it could not show that it had been harmed, even if the grants were inconsistent with the underlying statutes.

FlightBlitz, Inc. v. Tzell Travel, LLC¹³

The Ninth Circuit held that a "concierge" travel agent could allege an antitrust conspiracy by a competitor and its subsidiary, finding that the two defendants functionally operated independently and thus were not a single entity.

Proposed acquisition of Hawaiian Airlines

On December 3, 2023, Alaska Airlines announced plans to acquire Hawaiian Airlines. As of the date of this report, the carriers have not made the filings required by the Hart-Scott-Rodino Act, DOJ has not yet taken a position on the transaction, and no public or private litigation has been filed.

Proposed acquisition of Asiana

In 2020, Korean Air announced plans to acquire Asiana. Although many antitrust authorities have approved the transaction,

the United States, Europe, and Japan have not yet done so. To address European concerns, in November 2023 the carrier proposed to divest Asiana's cargo division.

Allegiant and Viva Aerobus request for Antitrust Immunity¹⁴

DOT suspended its consideration of the antitrust immunity application filed by Allegiant and Viva Aerobus in 2021, in response to Mexico's imposition of restrictions on operations by U.S. airlines at the Mexico City Airport.

Capacity restrictions at Amsterdam Airport¹⁵

Airlines for America and JetBlue filed complaints at DOT pursuant to the International Air Transportation Fair Competitive Practices Act, alleging that capacity restrictions at Amsterdam Airport were discriminatory and inconsistent with the terms of the Open Skies agreement between the United States and the European Union.

Bus

Global Charter Services, Inc. d/b/a The BusBank v. Larocca, et al.¹⁶

An 18-count lawsuit by an online charter bus booking platform against two of its former employees and their new employer, a competing charter bus booking platform, alleging violation of employment agreements, misuse of proprietary information, breach of contract, misappropriation of trade secrets under the Defend Trade Secrets Act (DTSA), and other causes of action was dismissed by a federal court without prejudice because the plaintiff had not sufficiently alleged its DTSA claims and thus had not pleaded a sufficient basis for the court's subject matter jurisdiction.

Trucking

DAT Solutions, LLC v. Convoy, Inc.¹⁷

In a case involving allegations of trade secret violations arising out of the creation of a competing broker load board by a customer and licensee, a federal judge granted, with leave to amend, a motion to dismiss the plaintiff's claims of misappropriation of trade secrets under the Defend Trade

Secrets Act; the Delaware Uniform Trade Secrets Act; and state unfair competition and tortious interference with prospective interference claims. The court denied the plaintiff load broker's motion to dismiss the defendant's counterclaims alleging that the plaintiff load broker had entered into illegal contracts in restraint of trade in violation of Section 1 of the Sherman Act; monopolization and attempted monopolization in violation of Section 2 of the Sherman Act; and similar violations of the Oregon State antitrust laws.

Total Quality Logistics, LLC. v. Medellin, et al.¹⁸

A federal court denied a joint motion to dismiss a freight logistics and brokerage firm's breach of contract and business tort claims against three former employees and their subsequent employer. The plaintiff alleged that the employees had worked on the plaintiff's Mexico Program team and were hired by the defendant employer, both a customer and competitor of the plaintiff, to recreate the plaintiff's system in-house. In denying the motion to dismiss, the court held that the plaintiff had sufficiently pled a cause of action to support its misappropriation of trade secrets claims under the Texas Uniform Trade Secrets Act (TUTSA). However, it dismissed the plaintiff's claims for tortious interference with existing contracts and for tortious interference with prospective relationships since they were based on the same misappropriation of trade secrets claims and thus preempted by TUTSA.

Rey Logistics, Inc. v. Zlotshewer¹⁹

A federal court entered a default judgment in favor of a plaintiff motor carrier against the former employee of an employee leasing company that served as a recruiter for the plaintiff after the defendant failed to comply with multiple discovery requests and court orders. The plaintiff alleged that the defendant had access to a database of owner-operators and driver information that the motor carrier had developed that was subject to an NDA and an employment manual prohibiting the use of the motor carrier's computer and communications systems for personal gains

or non-company solicitations. The plaintiff further alleged that the defendant, using that data, solicited owner-operators and drivers to terminate their contracts with the plaintiff motor carrier and to transition to a competitor, where the defendant was subsequently employed. The court granted a default judgment on the motor carrier claims brought pursuant to the Defense of Trade Secrets Act; state law breach of contract and tortious interference with an existing contract; and a violation of the federal Computer Fraud and Abuse Act. The plaintiff did not seek damages but was awarded a permanent injunction against the defendant and attorney fees and costs in the amount of \$61,405 for breach of contract and a violation of the Defend Trade Secrets Act.

Total Quality Logistics, LLC v. EDA Logistics LLC²⁰

After a bench trial involving allegations that an employee of a broker who had resigned had subsequently violated a non-competition and non-disclosure agreement, a federal court found that the broker had shown that some, but not all, of the contractual obligations at issue were enforceable and that the former employee and its new employer had violated those obligations. The Court issued a 313-day injunction against the former employee from soliciting or accepting business from the customers with whom he worked with the broker. However, the Court rejected further relief to the plaintiff, including lost revenues from solicited customers, on the grounds that it had failed to substantiate allegations that the defendant former employee had engaged in unfair competition using techniques or trade secret information learned from the plaintiff broker. Since both parties prevailed on various claims, the Court concluded that neither party was the prevailing party and declined to award the broker punitive damages or attorneys' fees. An appeal has been filed.

Piquoin v. Amerifreight Sys., LLC²¹

A federal court held that plaintiff owner-operators or company driver claims for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA)

related to employment and truck leasing claims should be dismissed because the relationship between the plaintiffs and the defendant was a business relationship and lacked the required consumer nexus under the ICFA. The plaintiff's Truth-In-Leasing Act claims were not dismissed.

GateGuard v. Amazon, Inc., et al.²²

A federal court dismissed with prejudice an intercom manufacturer's claims that Amazon had engaged in unfair competition under the Lanham Act and had attempted to monopolize and secure a competitive advantage in final mile e-commerce delivery services in violation of Section 2 of the Sherman Antitrust Act. The plaintiff alleged that to facilitate deliveries Amazon had its delivery drivers persuade building employees to allow them to insert Amazon Key devices into building intercom/security systems manufactured and installed by the plaintiff. The court refused to dismiss the plaintiff's federal and state law allegations that Amazon had interfered with its contracts with its building customers; and had misappropriated plaintiff's trade secrets in violation of the Computer Fraud and Abuse Act; the Defend Trade Secrets Act; and state law.

FedEx Ground Package System, Inc. v. Route Consultant, Inc.²³

A federal court dismissed without prejudice a lawsuit by FedEx against a consultancy to FedEx contracted service providers for failure to state a claim for unfair competition and false advertising under the Lanham Act and the Tennessee Consumer Protection Act. FedEx had accused the defendant of using false or misleading statements about FedEx to manufacture a perceived crisis among potential customers of the defendant's consultancy services. The federal court found that each alleged misstatement pled by FedEx suffered some serious defect that prevented it from supporting liability based on its falsity or misleading nature.

Roberts v. Transam Trucking, Inc.²⁴

A motion for summary judgment was granted in favor of the defendant trucking company on Kansas Consumer Protection Act deceptive or unconscionable act claims

because the plaintiffs' claims that they were asked by recruiters to attend orientation programs to become driver employees of defendant but were then pressured to switch to enter into a lease and become a lease driver were at heart not a consumer transaction.

Rail

CSX Transportation, Inc. v. Norfolk Southern Railway Co.²⁵

A federal judge denied antitrust claims by CSX that Norfolk Southern had monopolized access to the Norfolk intermodal terminal but denied Norfolk Southern's request for attorney fees.

In re Rail Freight Fuel Surcharge Antitrust Litigation²⁶

A federal judge held that a complaint alleging fuel surcharge price-fixing by railroads, filed years later than other consolidated complaints regarding the same issue, was timely and could proceed.

Canadian Pacific Railway Limited²⁷

The Surface Transportation Board approved the acquisition of the Kansas City Southern Railway by the Canadian Pacific Railway, subject to certain conditions.

NPRM re Reciprocal Switching²⁸

The Surface Transportation Board also has proposed new regulations for reciprocal switching agreements, to make it easier for "captive shippers" to obtain services from other rail carriers based on the existing rail carrier's performance.

Ocean

Mediterranean Shipping Company, S.A.²⁹

The FMC issued an Order of Investigation and Hearing against Mediterranean Shipping Company, S.A. for Possible Violations of the Shipping Act, including allegations that MSC failed to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivery property as required by 46 U.S.C.

§41102(c) when it applied the definition of “Merchant” in its bill of lading to seek charges from parties other than shippers, consignees, and persons with a beneficial cargo interest.

TCW, Inc. v. Hapag-Lloyd AG and Hapag-Lloyd (America) LLC³⁰

An FMC Small Claims Officer found that the practice of billing motor carriers performing merchant haulage charges a “street turn” fee when they reutilize an empty container to load cargo for export shipments was not unreasonable and thus not a violation of the prohibition on unjust and unreasonable carrier regulations and practices set forth in 46 U.S.C. §41102(c).

H.R. 2710 - Ocean Shipping Competition Enforcement Act

A bill proposed in Congress – H.R. 2710 – would empower the Federal Maritime Commission to block agreements between ocean carriers and marine terminal operators as anti-competitive, without first obtaining a court order, as is currently required.

CBERs for Liner Shipping

On October 10, 2023, the European Union announced that it will not extend the antitrust Consortia Block Exemption Regulation (CBER) for liner shipping but will let it expire on 25 April 2024.³¹ On November 17, 2023, the Competition and Markets Authority (CMA) of the United Kingdom issued a provisional decision to not recommend renewal of the CBER that the UK retained upon Brexit when it expires on 25 April 2024.³²

Intellectual Property Infringement

Schneider National Carriers, Inc. v. Raptor Auto Transport, Inc.³³

A federal court dismissed a federal Lanham Act trademark counterfeit infringement claim brought by Schneider National Carriers, Inc., alleging that after termination of an agreement between the two companies, a competing motor carrier and broker began the unauthorized utilization of empty trailers that bore the registered service marks of Schneider to transport

freight unrelated to Schneider National or any of its customers. The court held that Schneider may have tort remedies if it could prove that the defendant repeatedly stole and used Schneider trailers. However, the mere unauthorized use of a trademark after a contractual relationship had ended did not constitute counterfeiting the trademark.

ChemLogix LLC v. Bulk Tainer Logistics N. America, Inc.³⁴

In a case where ChemLogix LLC brought suit against Bulk Tainer Logistics, Ltd; Bulk Tainer Logistics North America, Inc.; and Bulk Tainer Logistics (U.S.A.), Inc. for alleged violations of its trademark rights in the BULK TAINER mark, alleging federal trademark infringement, unfair competition, and false designation or origin under the Lanham Act and common law trademark infringement and unfair competition, a federal judge denied the plaintiff’s motion to dismiss the defendants’ counterclaims and affirmative defenses that the BULK TAINER trademark had ceased to function as a trademark under theories of abandonment; generic use; invalidity; and a crowded field and failure to police, among other grounds.

Department of Justice and Federal Trade Commission Actions

2023 Merger Guidelines

On December 18, 2023, the Department of Justice and the Federal Trade Commission jointly released the 2023 Merger Guidelines, which describe factors and frameworks that the two agencies frequently utilize when reviewing mergers and acquisitions.³⁵

NPRM re Non-Compete Clauses

The Federal Trade Commission issued a Notice of Proposed Rulemaking pursuant to Sections 5 and 6(g) of the Federal Trade Commission Act proposing a Non-Compete Clause Rule. Among other things, the proposed rule would provide that it is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; to maintain with a worker a non-compete clause; or,

under certain circumstances, to represent to a work that the worker is subject to a non-compete clause. The proposed rule would include a limited exception for non-compete clauses between the seller and buyer of a business where the restricted party is an owner, member or partner holding at least a 25% ownership interest in the business entity.³⁶

NPRM re Unfair or Deceptive Fees

The Federal Trade Commission initiated a Notice of Proposed Rulemaking entitled “Rule on Unfair or Deceptive Fees,” which, if adopted, would prohibit unfair or deceptive practices relating to fees for goods or services, specifically misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose of fees.³⁷


Fulfillment by Amazon Antitrust Litigations

FTC v. Amazon³⁸

On September 26, 2023, the FTC and 17 States filed suit against Amazon in federal court in Seattle alleging that Amazon was unlawfully maintaining a monopoly in certain online e-commerce markets in violation of Section 2 of the Sherman Act and by engaging in unfair methods of competition in violation of Section 5(a) of the FTC Act and various state laws. The complaint alleged that Amazon unlawfully maintained a monopoly by conditioning Prime eligibility online market listings to the seller’s use of Fulfillment by Amazon. The FTC alleged that this raised the costs of sellers using multiple sales channels and artificially stunted the growth of independent fulfillment providers.

Hogan v. Amazon.com, Inc.³⁹

A private antitrust class action also pending in the United States district court in Seattle alleged that by requiring online sellers to purchase Fulfillment by Amazon services in order to obtain a Prime Badge on Amazon’s online marketplace Amazon was engaging in an unlawful “tying arrangement” in violation of the antitrust laws. On April 20, 2023, the court dismissed the claims on the grounds that the plaintiff

consumers were indirect purchasers that lacked standing under the antitrust laws to challenge the activities, since they involved relationships between Amazon and the online third-party sellers. The court allowed the filing of an amended complaint. 

Endnotes

- ¹ This report is submitted as a report of the Antitrust and Unfair Trade Practices Committee.
- ² 15 U.S.C. §§ 1-38; 15 U.S.C. §§ 12-27.
- ³ 15 U.S.C. §§ 1051, et seq.
- ⁴ 18 U.S.C. § 1030, et seq.
- ⁵ 18 U.S.C. § 1832, et seq.
- ⁶ D. Mass. No. 21-11558, 1st Cir. No. 23-1802.
- ⁷ D. Mass. No. 23-10678.
- ⁸ *United States v. JetBlue Airways Corp.*, D. Mass. No. 23 10511.
- ⁹ D. Mass. No. 23-12051. See also *Endres v. United States*, Fed. Cl. No. 23-1536.
- ¹⁰ 2023 U.S. Dist. Lexis, (MDL Docket No. 2656) (D.D.C. No. 15-1404, Sept. 12, 2023).
- ¹¹ 2d Cir. No. 22-901.
- ¹² D.D.C. No. 22-5125.
- ¹³ 9th Cir. No. 22-55524.
- ¹⁴ See <https://www.regulations.gov/docket/DOT-OST-2021-0152>.
- ¹⁵ See <https://www.regulations.gov/docket/DOT-OST-2023-0028>, <https://www.regulations.gov/docket/DOT-OST-2023-0148>, and <https://www.regulations.gov/docket/DOT-OST-2023-0151>.
- ¹⁶ 2023 U.S. Dist. Lexis 79350*; 2023 WL 329592 (E.D. Ill. April 26, 2023).
- ¹⁷ 2023 U.S. Dist. Lexis 70734*; 2023 WL 3058057 (D. Or. April 24, 2023).
- ¹⁸ 2023 U.S. Dist. Lexis 197618*, 2023 WL 2789396 (W.D. Tex., Nov 2, 2023).
- ¹⁹ 2023 U.S. Dist. Lexis 177415*, 2023 WL 6323096 (E.D. Pa. Sept 28, 2023).
- ²⁰ 2023 U.S. Dist. Lexis 132862*; 2023 U.S.P.Q.2D (BNA) 895 (S.D. Ohio. July 31, 2023).
- ²¹ 2023 U.S. Dist. Lexis 209009*; 2023 WL 8113379 (N.D. Ill. Nov. 22, 2023).
- ²² 2023 U.S. Dist. Lexis 26905*; 2023 WL 2051739 (S.D. N.Y. Feb. 16, 2023).
- ²³ 2023 U.S. Dist. Lexis 40600*, 2023 WL 2466624 (M.D. Tenn., March 10, 2023).
- ²⁴ 2023 U.S. Dist. Lexis 174613*; 2023 WL 6376756 (D.Kan. Sept. 29, 2023).
- ²⁵ E.D.Va. No. 18-0530.
- ²⁶ D.D.C. No. 20-0008.
- ²⁷ STB Docket No. FD 36500; D.C. Circuit Nos. 23-1125, 23-1165, and 23-1274.
- ²⁸ 88 Fed. Reg. 63897 (September 23, 2023).
- ²⁹ FMC, Docket No. 23-08 (August 10, 2023).
- ³⁰ FMC Docket No. 1992(l) (Served, December 2023).
- ³¹ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4742
- ³² https://assets.publishing.service.gov.uk/media/65576800d03a8d00d07fb57/Liner_Shipping_Consortia_Block_Exemption_provisional_decision_PDF.pdf
- ³³ 2023 U.S. Dist. Lexis 126555*; 2023 U.S.P.Q.2D (BNA) 866; 2023 WL 4685376 July 21, 2023).
- ³⁴ 2023 U.S. Dist. Lexis 157150*; 2023 WL 5751404 (E.D. Pa. Sept. 5, 2023).
- ³⁵ <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>
- ³⁶ FTC, *Notice of Proposed Rulemaking, Non-Compete Rule*, 88 Fed. Reg. 3482 (Feb. 19, 2023).
- ³⁷ FTC, *Notice of Proposed Rulemaking, Trade Regulation Rule on Unfair or Deceptive Fees*, 88 Fed. Reg. 77420 (Nov. 9, 2023).
- ³⁸ (W.D.Wash.; Case No., 2:23-cv-1495-JHC).
- ³⁹ 2023 U.S. Dist. Lexis 69475*, 2023 WL 3018866 (W.D. Wash. April 20, 2023).