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FAA - Geographic Competition - Party in Interest

R. Michael Parker

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In August 1964 World Airways (World) and Nationwide Charters and Conventions (Nationwide) negotiated a contract in which Nationwide agreed to solicit groups to charter World's planes to Florida and Hawaii. Northeast Airlines (Northeast), which was losing revenue because of competition from defendants' Florida flights, brought suit in federal district court against Nationwide and World seeking injunctive relief. The complaint stated that defendants had violated a section of the Federal Aviation Act which prohibits common carriage when done without Civil Aeronautics Board (CAB) approval or when outside the scope of a certificate issued by the CAB. A permanent injunction was granted to Northeast, and Nationwide appealed alleging Northeast was not a "party in interest" within the meaning of the statutory provision and therefore not able to bring an action. *Held, on remand, permanent injunction granted*: Northeast is a "party in interest" with sufficient grounds for bringing suit, since it has shown that it will suffer a special injury if defendant is allowed to continue its unauthorized activity, *i.e.*, "competition of a demonstrably direct sort." *Northeast Airlines v. Nationwide Charters and Conventions*, 286 F. Supp. 362 (D.C. Mass. 1968).

Although the CAB normally enforces the provisions of the Federal Aviation Act of 1958 (FAA), in certain instances a private party may institute an action for enforcement in an appropriate federal court. Such action is limited to alleging violation of section 401(a) of the FAA.[1] Section 401(a) provides:

> No carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

The immediate controversy, however, does not stem from section 401(a) but from the section relating to "party in interest," section 1007 of the FAA.[2] A private party *must first be* a "party in interest" before it can allege a violation of the Act. Section 1007 states:

> If any person violates any provision of this chapter, or any . . . limitation of any certificate or permit issued under this chapter, the board or Administrator . . . *or, in the case of a violation of sec. 401(a)* of this title *any party in interest*, may apply to the district court of the United States . . . for the enforcement of such . . . condition or limitation . . . [Emphasis added.].

It follows from these two sections that the CAB must approve any common carrier before it may legally engage in common carriage. Furthermore, the CAB may impose limitations in the certificate of approval on

[1] 72 Stat. 754 (1958), *as amended*, 76 Stat. 143, 49 U.S.C. § 1371(a) (1964).
[2] 72 Stat. 796, 49 U.S.C. § 1487 (1964).

when and where the carrier may conduct carriage. If CAB approval is not received or if a carrier violates the limitations of that approval, then a "party in interest" as well as the CAB may seek relief from the violation in federal district court.

Litigation on what constitutes a "party in interest" centers on whether a party is certified and on whether certain elements of competition and damage are present. The first case decided on the "party in interest" question was *Flying Tiger Line v. Atchison, T. & S. F. Ry.*[3] Flying Tiger brought suit to enjoin Santa Fe's operation of a subsidiary, Santa Fe Skyway. The two airlines were in direct competition along part of their routes. Skyway was operating without CAB approval and the competition had resulted in the loss of thirty customers of Flying Tiger, which possessed only a letter of registration. The court stated that it was not necessary for a plaintiff to be a certified carrier, that a carrier operating under a letter of registration satisfied the test of a "party in interest." The court based its decision strictly on the basis of competition stating:

> [The decision will turn on] whether or not a party has a clear *legal right* which will be directly affected . . . or whether or not the parties stand in a competitive relationship to one another so that the threatened acts of a defendant will directly and seriously affect a plaintiff by changing the transportation situation[4] [Emphasis added.].

Flying Tiger, because it possessed a letter of registration, had a legal right which would be affected.

In 1948, however, the courts decided that *at least* a letter of registration was necessary. In *Trans-Pacific Airlines v. Inter-Island Steam Navigation Co.*,[5] injunctive relief was denied to Trans-Pacific which was engaged in irregular air carriage (no definite schedule). Trans-Pacific, which was competing with Inter-Island on cargo flights to Hawaii, had never received approval from the CAB for its flights. The court, after considering the legislative history and workings of the Civil Aeronautics Act, held that it should be given the same wide scope judicially accorded the Transportation Act with reference to "party in interest." The court set out these tests:

> (1) Some definite *legal right possessed* by complaint is seriously threatened and
> (2) . . . the unauthorized and therefore illegal action of the defendant carrier directly and adversely affects the complaint's welfare by bringing about some material change in the transportation situation.[6]

The first test must be satisfied by the plaintiff before the second can be considered. Since Trans-Pacific *was not approved* by the CAB, it had no *legal right to engage exclusively in air freight flights* and thus was not protected against competition.

Another 1948 case dealt with a defendant who possessed CAB approval

[3] 75 F. Supp. 188 (S.D. Cal. 1947).
[4] *Id.* at 193.
[5] 75 F. Supp. 690 (D. Hawaii 1948).
[6] *Id.* at 694.

for its flights. In *American Airlines v. Standard Airlines*,[7] Standard, an irregular air carrier, was alleged to be operating regularly scheduled flights between coasts in competition with American. Such flights would have placed Standard in the position of operating beyond the scope of its certificate. Standard answered by challenging American's "party in interest" status since Standard had approval for the route flown. The court decided that American was a "party in interest" in view of the direct competition and the allegation of operation outside the scope of authority, both of these factors bringing a case within the purview of section 401(a). The cause of action was sustained, but upon trial on the merits American failed to show Standard was operating scheduled flights and holding out to the public that it was doing so.

In a similar case involving two carriers with permits to fly within the Territory of Alaska,[8] Pacific Northern Airlines sought an injunction to prevent Alaska Airlines (Alaska Air) from operating flights from Alaska to Canada and to the United States. Alaska Air questioned Pacific's "party in interest" status by claiming the flights in question were charter flights and not regularly scheduled. Pacific and two intervenors, Pan American and Northwest, proved Alaska Air was holding itself out to the public as operating regularly scheduled flights and received an injunction preventing further violations of Alaska's certificate. The court based the relief on the aspect of competition stating:

> The proof is abundant to sustain their claim that they have been and are being competitively damaged by the defendant's operations. If these operations were and are unlawful, the plaintiff . . . [is] entitled to relief.[9]

These two cases broadened the scope of judicial determination of a "party in interest" by permitting suits against a certificated carrier violating a condition of its certificate. The acts complained of were actual and not just threatened; thus, a court had not yet actually decided an aviation case on the basis of threatened acts alone.

Case law to this point had interpreted a "party in interest" to include those who had a *clear legal right* which was *threatened by the acts* of a defendant which was engaged in *direct competition* (on a point to point basis) with plaintiff *without CAB approval* or in violation of one of the conditions of the certificate issued by the CAB. No further decisions were rendered with respect to who was a "part in interest" under the Civil Aeronautics Act (which was reenacted as the Federal Aviation Act of 1958).

In 1964 the instant case was instituted.[10] World Airlines had entered into an agreement with Nationwide pursuant to which the latter was to charter a fixed number of planes for flights to Florida and Hawaii. World's certificate allowed charter flights only when engaged "by a person for his own use or for a group of persons (by a person no part of whose busi-

[7] 80 F. Supp. 592 (D. Alas. 1948).
[8] *Id.*
[9] *Id.* at 607.
[10] Northeast Airlines, Inc. v. World Airways, Inc., 237 F. Supp. 383 (D. Mass. 1964).

ness is the formation of groups . . . or the solicitation or sale of transportation services)."[11] Nationwide, whose business was selling transportation services, was soliciting the *public* for charter service to Florida and Hawaii by attempting to classify customers into various "fraternal, social, or sporting groups with minimal entrance requirements."[12] Nationwide's actions were found to constitute "the conducting of individually-ticketed transportation under the guise of charter trips."[13] On appeal, the injunction as to the Florida flights was upheld, but since World and Nationwide had raised the "party in interest" issue, the case was remanded for further proceedings with respect to the flights to Hawaii on the specific issue of whether Northeast could be considered a "party in interest." The issue was: What level of competition is necessary to bring Northeast into the status of a "party in interest?"

The court of appeals had stated that "party in interest" required competition of a demonstrably direct sort.[14] However, direct competition in and of itself is not enough. There must also be a *special injury* to plaintiff. But the CAB has primary authority to regulate competition; thus "party in interest" is a supplemental provision to the CAB's authority and "does not make the injured party a public policeman."[15] The court's qualification of direct competition might be viewed as new to this aspect of the law; however, when viewed in context it is not. Special injury is automatically a part of competition when a point to point basis is involved. In *Northeast* competition with respect to the Hawaii flights was not on a point to point basis and thus it was necessary to couple "competition of a demonstrably direct sort" with a "special injury" to plaintiff. Plaintiff had to show that his injury was not of the type that would be suffered by everyone in the transportation field because someone had offered another trip to the public.

In tailoring its decision to this set of facts, the district court looked outside the field of aviation law and discussed the tests for competition used in two types of antitrust cases.[16] Competition in this area involves the "relevant market" test: Are the two goods or services in question part of the same relevant or similar market? This requires an investigation into the cross elasticity of services, that is, whether some change (usually the price) in one leads to an increased or decreased demand for the other or as stated in *United States v. E. I. DuPont de Nemours and Co.*:

> The market . . . is composed of products that have a reasonable interchangeability for the purposes for which they are produced—price, use, and qualities considered.[17]

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[11] Northeast Airlines, Inc. v. World Airways, Inc., 239 F. Supp. 528, 530 (D. Mass. 1965).
[12] 237 F. Supp. at 384.
[13] 239 F. Supp. at 550.
[14] World Airways, Inc. v. Northeast Airlines, Inc., 358 F.2d 691, 692 (1st Cir. 1966).
[15] *Id.* at 692.
[16] United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377 (1956); Esso Standard Oil Co. v. Secatore's, Inc., 246 F.2d 17 (1st Cir. 1957).
[17] 351 U.S. at 404.

In expanding the above test *Esso Standard Oil Co. v. Secatore's, Inc.*[18] stated that qualitatively different services may nevertheless be in the same relevant market because of price differentials. In this case Esso was giving "more service for a higher price" and consequently Secatore's was giving "less service for a lower price." The *Northeast* court synthesized its own test from the above as:

> [T]he determination whether admittedly different services compete with each other cannot be made by considering abstractly whether they are in the same market; rather, the court must look to the interchangeability of the two services. And this interchangeability can be determined principally by looking to the impact which one service has, or is likely to have on the other.[19]

Although the wording is different, this statement basically reiterates that there must be a threatened act which will cause special injury to the plaintiff. The major change in the law is that now the unlawful threatened acts do not have to be in the same geographical area. Interchangeability of services is not in issue when competition is on a point to point basis because interchangeability is presumed if the services are identical. But if the services are not in the same geographical area, then some element other than geography must make them interchangeable. Although the court did not use the phrase "threatened acts of defendant" which would cause competition, this element may be interpreted from the court's phrase ". . . [the] impact [that defendant's action] is likely to have on the [plaintiff]."[20] Furthermore, "party in interest" requires not only competition but competition of a "demonstrably direct sort." Stated another way, plaintiff must prove that defendant's illegal activities would be the proximate cause of his injury. This does not mean that direct competition between airlines is to be eliminated but only eliminated where the defendant is acting illegally.

Finally, there must be a "special injury" to the plaintiff. The court of appeals quoted from *Western Pacific Railway v. Southern Pacific Co.*[21] which held special injury was satisfied if "some definite legal right . . . is seriously threatened or that the unauthorized . . . action of defendant carrier may directly and adversely affect the [plaintiff's] welfare by bringing about some material change in the transportation situation."[22] This is virtually what the court said in the *Trans-Pacific Airlines* case decided twenty years earlier, and this is the test the district court used in *Northeast.*

In applying the "interchangeability" and "special injury" criteria to the facts, the district court concluded that since Hawaii and Florida were warm weather vacation areas, there was direct competition between Northeast and Nationwide, taking into consideration the price differential which

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[18] 246 F.2d 17 (1st Cir. 1957).
[19] *Id.* at 20.
[20] Northeast Airlines, Inc. v. Nationwide Charters & Conventions, 286 F. Supp. 366 (D. Mass. 1968).
[21] 284 U.S. 47 (1931).
[22] *Id.* at 51.

made these "essentially dissimilar" services competitive. In view of Nationwide's plan to expand its services, plaintiff would likely suffer an economic injury of "serious and material" proportions thus satisfying the concept of special injury.

This decision is consistent with others decided on the "party in interest" question. Defendant was engaged in an illegal activity under section 401(a) of the FAA; and if the plaintiff suffered a "special injury," it was a "party in interest." The expansion of earlier decisions rests solely on now allowing a plaintiff to seek enjoinment of activity not directly competitive on a point to point basis. Thus "interchangeability of services" has now been expressly stated whereas, prior to *Northeast*, it was implicit in the case, since competition was on a point to point basis. Looking to substance and not form, the court in effect said that if a defendant is engaged in illegal carriage, plaintiff may seek an injunction if he proves his service is interchangeable and directly competitive, whether or not they are in the same geographic area. In deciding whether or not services are interchangeable, cross elasticity is a good indicator, although the court here rejects it in form. In substance, however, if two goods or services are interchangeable, they have a high degree of cross elasticity. Florida and Hawaii have separate demand curves and in that sense represent different markets. But they are interchangeable for the purpose of vacations away from the inclement winter weather of the Northeast. To illustrate this point the cross elasticity of beef and pork will suffice. Each has its own demand curve, but the two are interchangeable from the standpoint of satisfying the meat portion of a consumer's diet. A change in the price of one will lead to a change in demand for the other, thus making their cross elasticity high. Applying this to the facts of this case, Nationwide's reduction of the cost of a vacation in Hawaii reduced the demand for Florida vacations. Since these two services have a high degree of elasticity, the illegal transaction of business by Nationwide, while not directly affecting Northeast, had such a substantial indirect effect as to make Northeast a proper "party in interest."

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