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Court Jurisdiction Over Private Antitrust Suits in the Air Transport Industry

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COURT JURISDICTION OVER PRIVATE ANTITRUST SUITS IN THE AIR TRANSPORT INDUSTRY

IN a recent decision, a Federal District Court denied a motion to dismiss a treble damage action under the antitrust laws, brought by Slick Airlines against a group of scheduled airlines.[1] The motion was based on the ground that the acts charged as a violation of the antitrust laws[2] were regulated by the Civil Aeronautics Act,[3] and hence primary jurisdiction over the controversy resided in the Civil Aeronautics Board.[4] The Board is given the duty of regulating air transportation so as to "foster sound economic conditions"[5]; to promote the service of air carriers at reasonable rates "without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices"[6]; and also develop competition "to the extent necessary to assure the sound development of an air transportation system" according to the needs of the commerce of the United States, the Postal Service and the National Defense.[7] Further when the Board finds that an air carrier, or ticket agent, has engaged "in unfair or deceptive practices or unfair methods of competition," it may issue a cease and desist order.[8]

Denying the motion the court held that when both the Civil Aeronautics Act and the Antitrust Acts are alleged to have been violated, jurisdiction may be retained by the court, for the purposes of proving a Sherman or Clayton Act conspiracy for treble damages, even though the legality of the acts alleged could only be determined by the Board.[9] The court advanced the theory that whatever position the Civil Aeronautics Board might adopt concerning the lawfulness of the activities, a court could make independent findings that the antitrust laws had been violated. The court distinguishes

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[1] Slick Airways, Inc. v. American Airlines, Inc., 107 F. Supp. 199 (D.N.J. 1952).

[2] Plaintiff's complaint charged the Defendants with the following:

"(a) A deliberate attempt, through predatory rate policies and a process of attrition, to waste the resources of the plaintiff and other freight carriers, and to cause them to operate at a substantial loss;

(b) The abuse of the privilege of intervention and participation in CAB proceedings controlling plaintiff's legal right and authority to engage in the air freight business;

(c) A campaign of unfair competition practices designed to appropriate the business." *Id.* at 203.

[3] 52 STAT. 977 (1938), 49 U.S.C.A. §401 *et. seq.* (1951). The Civil Aeronautics Board is created by 52 STAT. 980 (1938), 49 U.S.C.A. §421 (1951); and given its powers and duties by 52 STAT. 984 (1938), 49 U.C.C.A. §125 (1951), 52 STAT. 1018 (1938), 49 U.C.C.A. §642 (1951) gives individuals the right to contest the validity of activities covered by the Act. 52 STAT. 1024 (1938), 49 U.S.C.A. §646 (1951) provides for judicial review of the Board decisions.

[4] *Comment*, Primary Jurisdiction of the Civil Aeronautics Board in Antitrust Cases, 18 JRL. OF AIR LAW & COM. 238 (1951).

[5] 52 STAT. 980 (1938), 49 U.S.C.A. §402(b) (1951).

[6] 52 STAT. 980 (1938), 49 U.S.C.A. §402(c) (1951).

[7] 52 STAT. 980 (1938), 49 U.S.C.A. §402(d) (1951).

[8] 66 STAT. 628 (1952), 49 U.S.C.A. §491 (1953 Supp.).

[9] This holding was upheld in Slick Airlines, Inc. v. American Airlines, Inc., 204 F.2d 230 (3rd Cir. 1953) See 20 JRL. OF AIR LAW & COM. 372 (Summer, 1953). On the appeal the court held the defendant airlines could not appeal from the interlocutory judgment of the District Court. A writ of mandamus was held to be an inappropriate method of appeal since extraordinary circumstances could not be shown. There was no discussion of the merits of the controversy.

between the former as an evaluation of the legality of a method, and the latter as an adjudication as to objective.

The court would seem to be prepared to find an antitrust violation, even though there had been an administrative decision by the CAB that the practices should be permitted.[10] While the court recognizes that the Board has some power to act within the area of the antitrust laws: in several instances the Civil Aeronautics Act has made the antitrust laws inapplicable[11]; and further that the Board can approve agreements and activities within its statutory authority which will be a defense in an antitrust action "to the extent that the plaintiff sought to show as illegal conduct that which was approved by the Board"[12]; nevertheless it maintains that the Board has no power to approve a conspiracy which would violate the antitrust laws, in order to promote the special policies applicable to air transportation. That the effect of the rationale is to hamper the regulation of the industry by the CAB, can hardly be doubted.

However before jurisdiction could be retained the court had to dispose of the specific argument advanced by the defendant that primary jurisdiction rested with the Civil Aeronautics Board. The court found that since the Board could only issue a cease and desist order,[13] the plaintiff in a treble damage action would be prevented from obtaining damages until an appeal is made to the courts. The effect of the CAB action is to prevent future violations, it being unable to provide "remedial relief for past injuries," which the court in the *Slick* case held to be an inadequate remedy. Upon this basis the court held the doctrine of primary jurisdiction need not be applied.

The result in the *Slick* case as to the approach to be taken toward the primary jurisdiction question, or the problem of the effect of a CAB decision on particular acts, does not seem to be an inevitable one. Two other cases almost identical on the facts to the *Slick* case, but with different results are, *S.S.W. Inc. v. Air Transport Association of America,*[14] and *Apgar Travel Agency v. International Air Transport Association.*[15] In these two cases the courts decided that proceedings should be stayed pending an administrative decision as to the lawfulness and reasonableness of the acts in question by the CAB under the authority of the Civil Aeronautics Act. The assumption of the courts seems to be that an action under the antitrust laws involving a regulated industry, where provision for regulation of competition is made

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[10] ". . . the utilization of 'legal' means and methods in furtherance of a proscribed conspiracy in a regulated industry does not per se insulate and immunize the conspirator from the antitrust laws where they are the symptoms or incidents of an enveloping conspiracy with illegal means, . . . therefore a court can have jurisdiction over an illegal conspiracy even though effectuated by legal means and methods." Slick Airways, Inc. v. American Airlines, Inc., 107 F. Supp. 199, 216 (D.N.J. 1952), *cf.* U.S. v. N. Y. Great Atlantic and Pacific Tea Co., 137 F. 2d 459 (2d Cir. 1943), *cert. denied,* 320 U.S. 783 (1943).

[11] "Any person affected by an order made under section 488, 489, or 492 of this title, shall be, and is relieved from the operation of the antitrust laws." 52 STAT. 1004 (1938), 49 U.S.C.A. §494 (1951). In general, section 488 deals with the forms of ownership, leasing and control of air carriers, 52 STAT. 1001 (1938), 49 U.S.C.A. §488 (1951); section 489 deals with interlocking officers and directors of air carriers who have stock interests in other air carriers or corporations owning stock of other air carriers, and the sale of the securities of air carriers, 52 STAT. 1001 (1938), 49 U.S.C.A. §489 (1951); and section 494 gives the Board power to approve or disapprove contracts and agreements by air carriers which may affect air transportation, 52 STAT. 1004 (1938), 49 U.S.C.A. §492 (1951).

[12] Slick Airways, Inc. v. American Airlines, Inc., 107 F. Supp. 199, 209 (D.N.J. 1952).

[13] 66 STAT. 628 (1952), 49 U.S.C.A. §491 (1953 Supp.).

[14] 191 F. 2d 658 (D.C. Cir. 1951).

[15] 107 F. Supp. 706 (S.D. N.Y. 1952), 19 JRL. OF AIR LAW & COM. (Winter, 1953).

by Congress, should be first considered by the regulatory body. The basis for this decision seems to arise from the doctrine of primary jurisdiction as applied in *U. S. Navigation v. Cunard S.S. Co.*,[16] and related cases in other regulated areas.[17] The theory of the *Cunard* case is that when a complaint sets forth a conspiracy under the antitrust laws, and also a violation of a regulatory act, if a complete remedy has been provided under the regulatory act, if a complete remedy has been provided under the regulatory act, then primary jurisdiction should reside in the administrative body enforcing the regulatory act.[18] Using this rationale all three courts found that the Congress had failed to provide a complete remedy, *i.e.*, damages for violations are lacking. Recognizing this the courts in the *S.S.W.* and *Apgar* cases provided that until a determination by the Board, the courts would keep the actions pending, and did not feel bound to assert the primary jurisdiction in themselves.

The problem seems to lie in the answer to the question of what has been the effect of giving power of regulation over competition to the Civil Aeronautics Board. The *Apgar* opinion reads section 494 of the Civil Aeronautics Acts as giving the Board authority to make certain exemptions from the operations of the antitrust laws.[19] The court then reasons that ". . . with the broad powers of the exemption possessed by the Board under the Civil Aeronautics Act, we cannot know the extent of the exemption until the Board has acted."[20] The presumption is also made that in the determination by the Board no unconscionable result would be reached. Thus the proposition has been taken in the *S.S.W.* and *Apgar* cases that Congress intended to have the Board be the sole judge of such purely economic problems as competition and restraints of trade, and that to this extent the antitrust laws are superseded, leaving to the courts the assessment of damages,[21] after the board has acted.

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[16] 284 U.S. 474 (1952), 20 JRL. OF AIR LAW & COM.

[17] Georgia v. Penn. R.R. Co., 324 U.S. 437 (1945); Terminal Warehouse v. Penn. R.R. Co., 297 U.S. 500 (1936); Central Transfer Co. v. Terminal R.R. Association, 288 U.S. 467 (1933); Keogh v. Chicago & N.W. R.R. Co., 260 U.S. 156 (1922); Texas & Pacific R.R. Co. v. Abiline Cotton Oil Co., 204 U.S. 426 (1907).

[18] The result is reached by saying that because of later enactment of a regulatory law, the prior remedy has been superseded by the repugnancy between the two, but only to the extent of the repugnancy. Georgia v. Penn. R.R. Co., 324 U.S. 439 (1944) states that only a clear repugnancy between the old law and the new one results in the old law giving way. Mr. Justice Cardoza in Terminal Warehouse Co. v. Penn. R.R. Co., 297 U.S. 500, 514 (1936) seems to suggest a requirement of exclusiveness. "For the wrongs that it denounces (the Commerce Act) it prescribes a fitting remedy which we think was meant to be exclusive." See also U.S. Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 485 (1932). "Thus, in each case brought against a regulated company under the antitrust laws, the subject matter and remedy afforded by the regulatory statute are compared with that of the antitrust laws. If the latter either cover subject matter outside the scope of the Commission's power or provide a remedy which the Commission may not give, then they remain in effect to that limited extent."

[19] "The Board shall by order disapprove any such contract or agreement (affecting air transportation), . . . that it finds to be adverse to the public interest, or in violation of this Chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Chapter. 52 STAT. 1004 (1938), 49 U.S.C.A. §492(b) (1951).

[20] Apgar Travel Agency v. International Air Transport Association, 107 F. Supp. 706, 710 (S.D. N.Y. 1952).

[21] "There exists a repugnancy between the subject matter of the CAA and the Sherman and Clayton Acts . . . and to that extent the latter are superseded by the former, else the entire regulatory scheme be frustrated; but since the Aeronautics Act makes no provision for the remedy of damages, that remedy of the antitrust laws remains unchanged." *Id.* at p. 711.