1980

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THE ANTITRUST IMPLICATIONS OF AIRLINE Deregulation

JERRY L. BEANE*

THE DEBATE over the merits of airline deregulation is now moot. The Airline Deregulation Act of 1978 (Deregulation Act) has significantly altered the aviation industry in the United States. After fifty years of economic regulation, the airlines find themselves faced with a myriad of new economic and legal problems. At the forefront of these new challenges are the issues resulting from the increased application of the federal antitrust laws to the activities of the aviation industry.

I. COMPETITION AND THE AIRLINE INDUSTRY

A central theme underlying the free enterprise system is "that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." The federal antitrust laws are designed to preserve such free and unfettered competition as the rule of trade. Certain industries, however, have, for a variety of reasons, become the subject of pervasive regulatory

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systems established by Congress. In such instances, an extensive regulatory scheme, often with administrative enforcement authority, results in a judicial effort to establish meaningful coexistence between the goals and concepts of the antitrust laws and administrative regulation.

As a vital part of the nation's transportation system, the aviation industry was viewed by Congress as invested with the public interest. Thus, in 1938, the Civil Aeronautics Act was passed. The forces at work within the industry at that time were described this way:

Competition among air carriers is being carried to an extreme, which tends to jeopardize the financial status of the air carriers and to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest, in the interests of the Postal Service, and of the national defense.

The original Act, and it successor, the Federal Aviation Act of 1958, established substantial and significant economic regulation of the airline industry. Fares, route entry and route abandonment were delegated to the Civil Aeronautics Board (CAB or Board) as appropriate subjects for regulatory consideration and control.

Certain specific types of transactions within the airline industry were required to be approved by the Board. Such approval then constituted automatic immunity from the federal antitrust laws. Additional provisions of the regulatory scheme required the Board to consider and prevent unjust, unfair and anticompeti-

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4 In United States v. Morgan, 307 U.S. 183, 191 (1939), the Court stated: "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action."


9 Id. § 1371(d)(1).

10 Id. § 1371(j).

11 Id. § 1384.
The Deregulation Act significantly alters the mandated policy considerations which are to guide the Board in its functions and changes and eliminates much of the previously automatic antitrust immunity for the airline industry.

A. Policy Considerations

For twenty years section 102 of the Federal Aviation Act of 1958 provided the mandate to the Board in the performance of its powers and duties. The section required that the Board should consider the following factors as being in the public interest and in accordance with the public convenience and necessity: "(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the United States Postal Service and of the national defense; . . ." Thus, competition within the aviation industry was to be considered only to the "extent necessary" to assure the development of an air transportation system. Competition was a secondary consideration in the economic regulation of the aviation industry.

The Deregulation Act significantly altered the policy and public interest considerations for airline regulation. Three new guidelines were established by Congress as matters to be considered as being in the public interest and in accordance with the public convenience and necessity:

(4) [t]he placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital.

(7) [t]he prevention of unfair, deceptive, predatory or anti-competitive practices in air transportation, and the avoidance of—

A. unreasonable industry concentration, excessive market domination, and monopoly power; and

B. other conditions;

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12 Id. §§ 1302, 1381.
13 Id. § 1302.
14 Id. § 1302(d).
that would tend to allow one or more air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation.

. . .

(9) [t]he encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services.\textsuperscript{15}

Thus, the dramatic change from relying on competition to the "extent necessary" to placing "maximum reliance" on competitive conditions in the marketplace dramatically alters the decisional process which the Board must make when implementing its duties and responsibilities. The intention of Congress is clear: the Board is to utilize competition to achieve regulatory goals while a competitive industry is designated as a goal in itself.

Although the precise impact of competitive considerations by the Board has yet to be fully determined, certain indications of the philosophy of the Board, as discussed later, can be ascertained. Additionally, the Deregulation Act makes substantial changes in four other sections of the Federal Aviation Act which directly relate to the application of the antitrust laws to the aviation industry.

B. Consolidation, Merger and Control

Section 408 of the Federal Aviation Act\textsuperscript{16} required Board approval for any consolidation, merger or acquisition of control of any air carrier or its properties by a person engaged in "any phase of aeronautics."\textsuperscript{17} The section mandated Board approval for any consolidation, merger, or acquisition of control unless the Board found that the same "[would] not be consistent with the public interest."\textsuperscript{18} A proviso required that the Board not approve a proposed consolidation, merger or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition.\textsuperscript{19} Thus, section 408 permitted those enumerated trans-

\textsuperscript{15} Id. § 1302(a)(4), (7), (9).
\textsuperscript{16} Id. § 1378.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id. § 1378(b).
actions that are not inconsistent with the public interest and that will not result in a monopoly.\textsuperscript{20} Judicial construction of section 408 of the Federal Aviation Act interpreted the statute as requiring that the Board first determine whether the monopoly proviso would be violated. If the proposed transaction did not violate this proviso, the Board then had to find that the disadvantage of any curtailment of competition would be outweighed by the advantages of improved service, \textit{i.e.}, that the transaction would be in the public interest.\textsuperscript{21}

The Deregulation Act amended section 408 in several material respects. Now, Board approval is required only for consolidations, mergers or acquisitions of control involving a "person substantially engaged in the business of aeronautics."\textsuperscript{22} The Deregulation Act also makes significant changes in the tests which the Board must apply in considering whether to approve an acquisition of control transaction. The section mandates that the Board shall approve the proposed transaction unless it finds that it "will not be consistent with the public interest."\textsuperscript{23} The section further provides that the Board shall not approve a transaction:

(1) If it would result in a monopoly or be in furtherance of any combination or conspiracy to monopolize or to any attempt to monopolize the business of air transportation in any region of the United States; or

(2) The effect of which on any region of the United States may be substantially to lessen competition or to tend to create a monopoly, or which in any other manner would be in restraint of trade.\textsuperscript{24}

The Board may, however, approve a transaction which would result in one of the proscriptions described in (1) or (2) above if it specifically finds: (a) the anticompetitive effects of the proposed transaction are outweighed in the public interest by the probable effect of the transaction in meeting significant transportation conveniences and needs of the public; and (b) such sig-


\textsuperscript{21} Foreign Study League v. CAB, 475 F.2d 865 (10th Cir. 1973); Butler Aviation Co. v. CAB, 389 F.2d 517 (2d Cir. 1968).

\textsuperscript{22} 49 U.S.C.A. § 1378 (Supp. 1979).

\textsuperscript{23} Id. § 1378(b)(1).

\textsuperscript{24} Id.
significant conveniences and needs may be satisfied by a reasonably available alternative having materially less anticompetitive effect.\textsuperscript{25}

Congress explained the new tests to be applied by the Board regarding an acquisition of control transaction:

The intent of the new section 408 of the proposed legislation is to insure that, in light of deregulation, mergers in the air carrier industry will be tested by the antitrust standards traditionally applied by the courts to unregulated industries. However, under the new section 408, even if a merger does not meet the antitrust standards of the Sherman and Clayton Acts it may nonetheless be approved if it meets "significant transportation needs of the community to be served," and if there is no "reasonably available less anticompetitive alternative" to the merger. These latter tests only apply if a merger or similar transaction does not meet the Sherman and Clayton Act standards.\textsuperscript{26}

The amended section 408 requires that the party challenging the transaction shall bear the burden of proving the anticompetitive effect of the transaction. The proponents of the transaction will bear the burden of proving that it meets the significant transportation conveniences and needs of the public and that such conveniences and needs may not be satisfied by less anticompetitive alternatives.\textsuperscript{27} The section further establishes notice provisions to the Attorney General, the Secretary of Transportation and other persons known to have a substantial interest in the proceeding.\textsuperscript{28}

Section 408 of the Federal Aviation Act thus now incorporates the traditional antitrust standards by which mergers are analyzed and tested. The section does, however, provide that mergers which might otherwise transgress such standards may be approved if they meet significant transportation needs of the public and such needs cannot be satisfied by less anticompetitive alternatives.

Board authority to approve section 408 transactions, as they relate to "interstate and overseas air transportation" will be transferred to the Department of Justice effective January 1, 1983.\textsuperscript{29}

\textsuperscript{25} Id.


\textsuperscript{28} Id.

\textsuperscript{29} Id. § 1551(a)(3).
Board authority under section 408 relating to "foreign air transportation" will be transferred to the Department of Justice on January 1, 1985.\textsuperscript{30}

C. Interlocking Relationships

Section 409 of the Federal Aviation Act\textsuperscript{31} required Board approval of interlocking officer, director or controlling shareholder interest between an air carrier, a common carrier or any other person engaged in any phase of aeronautics. The section required that Board approval be predicated on a finding that the relationship would not adversely affect the public interest.\textsuperscript{32} An interlocking relationship violating section 409 is unlawful per se unless approved by the Board.\textsuperscript{33} The courts, however, have the authority to determine whether a relationship violates section 409 without first requiring a determination by the Board.\textsuperscript{34}

The Deregulation Act amended the provisions of section 409 to prohibit the designated relationships, \textit{inter alia}, with any person "substantially engaged in the business of aeronautics."\textsuperscript{35} This amendment, as with a similar change in language in section 408, narrows the class of relationships which must be approved by the Board.\textsuperscript{36}

The authority of the Board to approve interlocking relationships under section 409, as the same relate to "interstate" and "overseas air transportation," will be transferred to the Department of Justice on January 1, 1983.\textsuperscript{37} Board authority relating to "foreign air transportation" under section 409 will be transferred to the Department of Justice on January 1, 1985.\textsuperscript{38}

D. Pooling and Other Agreements

Section 412 of the Federal Aviation Act required every air

\textsuperscript{30} Id. § 1551(b)(1)(C).
\textsuperscript{31} Id. § 1379.
\textsuperscript{32} Id. § 1379(a).
\textsuperscript{33} Hutcheson v. O'Carroll, 251 F.2d 144 (7th Cir. 1958).
\textsuperscript{34} Id.
\textsuperscript{36} Dubuc, \textit{Significant Legislative Developments in the Field of Aviation Law,} 45 J. AIR L. & COM. 1, 27 (1979).
\textsuperscript{38} Id. § 1551(b)(1)(C).
carrier to file with the Board every contract affecting air transportation between an air carrier and any other air carrier for pooling of service or equipment or relating to rates or fares and including any agreements for "controlling, regulating, preventing or otherwise eliminating destructive, oppressive or wasteful competition."39 The section required the Board to disapprove any such agreement which was adverse to the public interest and mandated approval by the Board of any such agreement which it did not find to be adverse to the public interest.40

The types of agreements contemplated by section 412 are obviously violative of the antitrust laws and would subject air carriers to antitrust liability except for immunity resulting from Board approval. Among the types of anticompetitive agreements approved under section 412 are agreements among three major air carriers concerning the number and scheduling of flights in twenty major United States markets as a result of the 1973 fuel crisis;41 the establishment of a jointly owned common agent to maintain a pickup and delivery service for air freight;42 an agreement between two foreign air carriers for temporary changes in overseas routes and the exchange of certain routes;43 and an agreement between three major air carriers reducing flights between four city-pair markets in the United States.44

The governing standard for approval of agreements under former section 412 was whether the same was found to be "adverse to the public interest."45 In assessing and applying this standard, the Board was required to rest its approval of an agreement on a justification of serious transportation needs or important public benefits.46 Among the factors the Board was required to consider in assessing the "public interest," were the anticompetitive implications of any agreement47 and the welfare of air carrier em-

39 Id. § 1382(a).
40 Id. § 1382(b).
41 United States v. CAB, 511 F.2d 1315 (D.C. Cir. 1975).
43 Northwest Airlines, Inc. v. CAB, 539 F.2d 748 (D.C. Cir. 1976).
46 United States v. CAB, 511 F.2d 1315 (D.C. Cir. 1975).
47 Id.
ployees. In approving agreements under section 412, the Board was not required to find that the end sought to be achieved by the proposed agreement could not be attained in any less anticompetitive manner. Board approval must, however, be based upon a showing of an appropriate factual predicate.

The Deregulation Act substantially alters Board consideration and approval of pooling and other agreements. Only those agreements, as defined by statute, which affect "foreign air transportation" are required to be filed with the Board. The Board is required to disapprove any such agreement affecting foreign air transportation which is adverse to the public interest and must approve any such agreement which it does not find to be adverse to the public interest. Thus, the same legal standards and criteria which formerly governed Board consideration of all joint agreements will now control only those agreements affecting foreign air transportation.

An air carrier may file with the Board any agreement, or request for authority to discuss a cooperative working agreement, affecting interstate or overseas transportation, between such carrier and any other carrier. The Board is required to disapprove any proposed contract or request for authority to discuss agreements, even if previously approved by the Board, where the Board finds the same to be adverse to the public interest; likewise, the Board is required to approve any such agreement which it does not find to be adverse to the public interest with certain exceptions.

Even if it finds an agreement not to be adverse to the public interest, the Board may not approve:

(1) any agreement which substantially reduces or eliminates competition unless it finds the same necessary to meet a serious transportation need or to secure important benefits and does not find that such need or benefits can be reasonably obtained by less anticompetitive means;

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49 United States v. CAB, 511 F.2d 1315 (D.C. Cir. 1975).
50 Id.
52 Id. § 1382(b).
53 Id. § 1382(c)(1).
54 Id. § 1382(c)(2)(A).
(2) any agreement between an air carrier not directly engaged in the operation of aircraft and air transportation and a common carrier subject to the Interstate Commerce Act governing transportation to be received by the common carrier; and

(3) any agreement limiting the level of capacity among air carriers and markets in which they compete and fix rates, fares or charges between or among air carriers. 55

Any party opposing a proposed agreement before the Board has the burden of proving the reduction or elimination of competition and the availability of other means having less anticompetitive effect; the party defending the proposed agreement shall have the burden of proving the transportation need or public benefits of the proposal. 56

When any proposed agreement or modification or cancellation thereof is filed with the Board, or any request for authority to discuss possible agreements is made to the Board, the Attorney General and the Secretary of Transportation are to be furnished written notice and opportunity to submit written comments on the filing. 57

The scope and content of mutual aid agreements 58 are severely limited by the Deregulation Act. All mutual aid agreements approved by the Board before October 24, 1978, and in effect on that date are deemed disapproved and not in effect after October 24, 1978. 59

A carrier may not enter into a mutual aid agreement unless the same is filed with and approved by the Board; the Board may not, however, approve any such agreement unless it provides:

(1) any air carrier will not receive payments for any period which exceed sixty percent of the direct operating expenses during such period; 60

55 Id. § 1382(c)(2)(A)(i), (ii), (iii).
56 Id. § 1382(c)(2)(B).
57 Id. § 1382(d).
58 The Act defines a "mutual aid agreement" as one between air carriers providing that a party will receive payments from other carriers during which the recipient is not engaged in air transportation or is providing reduced levels of air service due to a labor strike. Id. § 1382(e)(3)(A).
59 Id. § 1382(e)(1).
60 Id. § 1382(e)(2)(A). Direct operating expenses are defined to include in-
(2) any benefits under the agreement are not payable for more than eight weeks during any labor strike and that such benefits may not be for losses incurred during the first thirty days of any labor strike;\textsuperscript{61}

(3) any party to such agreement will submit the issues causing any labor strike to binding arbitration pursuant to the Railway Labor Act if the striking employees request such binding arbitration.\textsuperscript{62}

The Deregulation Act has thus significantly altered Board authority to approve, and the standards for consideration of, pooling and other agreements. This limitation, when combined with the narrowed antitrust immunity which the Board may grant, results in increased application of the antitrust laws to the aviation industry.

E. Antitrust Immunity

The regulatory scheme established by the Federal Aviation Act has been described as "severely anticompetitive."\textsuperscript{63} Section 414 illustrates the validity of this description. That section formerly provided that any person "affected" by any order of the Board under sections 408, 409 and 412 of the Act was thereby automatically relieved from the operation of the antitrust laws insofar as may be necessary to enable such person to do anything "authorized, approved, or required by such order."\textsuperscript{64}

Judicial interpretation of this section established the concept that conduct charged as violative of the antitrust laws is immunized under section 414 when: (1) the conduct charged was approved by a specific order of the Board or was clearly contemplated by such an order; and (2) the Board monitored and supervised the complained of conduct.\textsuperscript{65} Individualized approval by the Board was not necessary, however, for antitrust immunity, so long as the

\textsuperscript{61} Id. § 1382(e)(2)(B).
\textsuperscript{62} Id. § 1382(e)(2)(C).
\textsuperscript{63} United States v. CAB, 511 F.2d 1315, 1322 (D.C. Cir. 1975).
\textsuperscript{64} 49 U.S.C.A. § 1384 (Supp. 1979).
alleged conduct was clearly within the contemplation of Board orders; thus, it suffices if the alleged conduct is the kind which the Board has approved and authorized for the future. Section 414 was construed as exempting authorized conduct only so far as the conduct complies with procedures prescribed by the Board. Thus, the section was held not applicable to acts taken in violation of the procedural safeguards imposed by the Board.

The Deregulation Act makes substantial changes in the provisions of section 414. As amended, the section now provides:

In any order made under section 1378, 1379 or 1382 of this title, the Board may, as a part of such order, exempt any person affected by such order from the operations of the "antitrust laws" set forth in subsection (a) of section 12 of Title 15 to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order, and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest.

The first significant change in section 414 is that the grant of antitrust immunity is now discretionary with the Board. In exercising such discretion, the Board must find and determine that "exemption" (immunity from the antitrust laws) is required in the public interest. In discussing the discretionary immunity grant under new section 414, the Board has stated:

The purpose of Congress in rendering grants of immunity discretionary under amended section 414 was to eliminate the practice of routinely immunizing all transactions within the scope of section 414. Section 414 now permits the Board to grant antitrust immunity to a merger (1) only to the extent necessary to permit the transaction to go forward and (2) only when the Board determines that such an exemption is required in the public interest.

The Board has stated that it believes that "full exposure to antitrust liability is consistent with the marketplace orientation

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66 Scroggins v. Air Cargo, Inc., 534 F.2d 1124 (5th Cir. 1976).
of the Airline Deregulation Act.\textsuperscript{70} Thus, since antitrust immunity will be the exception rather than the rule, proposed airline activity must now be analyzed on the assumption that the antitrust laws will be applicable to the contemplated conduct.

II. APPLICATION OF FEDERAL ANTITRUST LAWS

The federal antitrust statute with which airlines will have the most concern is the Sherman Antitrust Act. Although violations of that statute have the potential for significant monetary and injunctive relief, it must be recognized that violations of the statute are criminal felonies punishable by up to a million dollar fine for a corporation and three years in jail or up to a one hundred thousand dollar fine for individuals.\textsuperscript{71}

A. General Concepts

Section 1 of the Sherman Act declares illegal "every contract, combination . . . or conspiracy, in restraint of trade."\textsuperscript{72} Construed literally, section 1 would prohibit every form of business or commercial contract. Thus, an agreement whereby a seller agreed to furnish a certain raw material needed by the buyer in its manufacturing business, even for a limited time and in a limited quantity, would thus be illegal, since it would prohibit a competitor of the seller from competing for the buyer's limited business.

Faced with interpreting the broad and general wording of section 1 of the Sherman Act, the courts have developed and articulated a set of guiding principles a basic appreciation of which is necessary for a proper understanding of the application of the antitrust laws. In 1911 the Supreme Court, after analyzing the common law view on restraints of trade and the legislative history of the Sherman Act, held that section 1 would be construed to prohibit only "unreasonable" restraints of trade.\textsuperscript{73} Under this "rule of reason" test, the courts view all relevant factors and circumstances, including economic evidence, to determine whether a

\textsuperscript{70} Id.
\textsuperscript{71} Id. § 1.
\textsuperscript{72} Standard Oil Co. v. United States, 221 U.S. 1 (1911).
"contract, combination or conspiracy" unduly restricts and hampers competition."

In attempting to define the "rule of reason," Justice Brandeis described the "true test of legality" to be whether the restraint merely regulates and perhaps promotes competition or whether it suppresses or even destroys competition. He identified various relevant factors to be considered when applying the rule of reason test:

(1) Facts peculiar to the business;
(2) The condition of the business before and after the restraint;
(3) The nature of the restraint and its effect;
(4) History of the restraint; and
(5) The reason and purpose for adopting the restraint."

Other factors considered by the courts in applying the "rule of reason" criteria include the motive underlying the restraint, the relative positive and negative effects of the restraint, the power of the parties in the markets they serve and whether other less restrictive means could have been employed to achieve the same desired result."

Generally, injury to the public must be established before a restraint will be held to violate the "rule of reason.""

Certain forms of conduct have been declared to constitute per se violations of section 1. Such types of conduct are considered unreasonable as a matter of law since they have a "pernicious effect on competition and lack of any redeeming virtue"—and no economic evidence will be received "as to the precise harm they caused or the business excuse for their use.""

The evolution of per se rules required the courts to make broad generalizations about the social utility of certain commercial practices."

The types of conduct condemned as per se violations of section 1 of the Sherman Act are:

(1) Price fixing;

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" Board of Trade v. United States, 246 U.S. 231 (1918).
71 Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136 (5th Cir. 1977).
72 Cherokee Laboratories, Inc. v. Rotary Drilling Serv., Inc., 383 F.2d 97 (5th Cir. 1967).
(2) Market division or allocation;
(3) Group boycott; and
(4) Tying arrangements. 80

Agreements to fix or maintain prices, whether "horizontal" or "vertical" have long been considered violative of section 1 of the Sherman Act. Horizontal agreements among competitors to fix prices have uniformly been condemned by the courts as per se violations. 81 In addition to specific price-fixing agreements, any type of joint arrangement or concerted course of conduct which raises, lowers or "stabilizes" prices is also illegal. 82 Vertical arrangements between a seller and its customers which establish the customer's resale price are also considered to be per se violations of section 1. 83

Conduct resulting in a division of markets among competitors is also illegal per se under section 1. 84 Many of the market division schemes are part of or in furtherance of price-fixing activities. 85 Horizontal market division has been held to be per se unlawful even when not involving price-fixing. 86

Group boycotts, or concerted refusals to deal, are illegal per se. 87 Since a seller, however, has a right unilaterally to refuse to deal, 88 a refusal to deal must involve concerted or joint activity. Group boycotts may involve both horizontal activities by competitors or vertical activities between customers or suppliers. 89

Tying arrangements involve transactions wherein a seller conditions its sales of a product or service (the "tying product") upon the buyer's purchase of a separate product or service (the

80 See notes 81-94 infra, and accompanying text.
82 Id.
83 Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911).
84 Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).
87 Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).
“tied product”) from the seller or from a designated third party. Generally, a tying arrangement will be held violative of the Sherman Act if the seller possesses sufficient economic power in the tying product to produce an appreciable restraint in the market for the tied item. The proper focus for determining whether the seller possesses the requisite “sufficient economic power” in the tying product is “whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.” The requirement of a not insubstantial restraint of commerce in the tied product is determined by analyzing the total volume of sales tied by the sales policy under challenge. As little as $60,800 has been held not insubstantial.

Section 2 of the Sherman Act prohibits monopolization or attempts to monopolize, either of which may be effected by the unilateral conduct of a specific person, and further prohibits any combination or conspiracy to monopolize. Thus, section 2 defines three specific offenses: (1) monopolization; (2) attempts to monopolize; (3) any combination or conspiracy to monopolize. Monopolization consists of the possession of monopoly power in a relevant market and the willful acquisition of or maintenance of that power as distinguished from development as a consequence of a superior product, business acumen or historical accident. Monopoly power is “the power to control prices or exclude competition.” The central issue is not whether prices are raised or that competition is actually excluded, but that power exists to do so.

In order to measure monopoly power, a relevant market within which to test that power must be established. Such market consists of both a geographic and a product market. The relevant geographic market is the area in which the sellers of the particular

92 Id. at 504.
93 Id. at 502.
97 Id. at 571.
product are serviced and operate and to which purchasers can practicably turn for such products or services.\textsuperscript{99} The relevant product market is one which varies with the particular type of commerce under consideration. The market consists of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.\textsuperscript{100}

The required element of deliberateness or general intent to monopolize, which must be further established when actual monopolization is claimed, has been held to be proved if the monopoly was a probable result of the actions which were undertaken.\textsuperscript{101} In most circuits, an unlawful attempt to monopolize effort may be established by the following facts: (a) The defendant had a specific intent to monopolize; and (b) there was a “dangerous probability” that the attempt would be successful in achieving monopoly in the relevant market.\textsuperscript{102} Conspiracies to monopolize involve essentially the same considerations which exist when monopoly results from internal growth.\textsuperscript{103}

In addition to criminal liability, section 4 of the Clayton Act provides that any person injured in his business or property as a result of a violation of the antitrust laws may recover damages, which are then automatically trebled, and may also recover a reasonable attorney’s fee.\textsuperscript{104} Class action procedures, actions by state attorneys general in a parens patriae capacity\textsuperscript{105} and injunctive relief, which may be granted to private parties to prevent violations of the antitrust laws,\textsuperscript{106} insure that antitrust violations are vigorously pursued by a broad spectrum of claimants.

B. Specific Aviation Industry Activities

The application of the general principles governing the two sections of the Sherman Act to several specific types of conduct

\textsuperscript{101} United States v. ParamountPictures, Inc., 334 U.S. 131 (1948).
\textsuperscript{103} ABA, ANTITRUST LAW DEVELOPMENTS 59 (1975).
\textsuperscript{105} Id. § 15(c).
\textsuperscript{106} Id. § 26 (1976 & Supp. 1978).
engaged in by the airlines provides some guidance for determining the actual and potential antitrust implications of deregulation.

1. Fares

The Deregulation Act significantly alters the regulation of fares by the Board. The Act establishes a “standard industry fare level” as the fare level in effect on July 1, 1977.107 The Act then provides that the Board shall not have any authority to determine that a fare is too high if any proposed increase filed with the Board on or after July 1, 1979, would not be more than five percent higher than the standard industry fare level. With respect to proposed decreases, the Board cannot find that a fare is too low if a proposed decrease filed after October 24, 1978, would not be more than fifty percent lower than the standard industry fare level.108

The Board is required to adjust, at least semiannually, the standard industry fare level by the percentage change from the last previous period based on the actual operating cost per available seat-mile for combined interstate and overseas transportation.109 The flexibility provided by the Act to decrease fares, along with the scheduled phaseout of the Board, means that the establishment and operation of fares will be subject to the full scope of the federal antitrust laws.

Certain initial observations regarding the treatment of airline fares under the federal antitrust laws can be made. The Robinson-Patman Act110 prohibits discrimination in the sale of “commodities” and prohibits price-cutting for the purpose of injuring competition. Airline transportation, however, should not be considered a “commodity,” and thus will not be subject to the pricing provisions of the Robinson-Patman Act.111

Several antitrust implications of pricing airline fares must be considered. Both price-fixing and sales below average variable cost are two important antitrust prohibitions affecting airline fares.

108 Id. § 1482(d)(4)(A), (B).
109 Id. § 1482(d)(6)(B).
Obviously, concerted or joint action in establishing fares, without specific Board approval and a grant of antitrust immunity, constitutes price-fixing. Although such a statement may seem unnecessary, the Board announced in January of 1979 that it had uncovered preliminary evidence that some of the nation's top carriers may have engaged in price-fixing in certain markets.\textsuperscript{112}

Although the concept of price-fixing is constantly expanding, it is generally considered to be any combination which has the effect of raising, depressing, fixing, pegging or stabilizing prices.\textsuperscript{113} Even if the members of the combination were not in a position to control the market, to the extent that they raised, lowered or stabilized prices, their action is considered to be interfering with the free play of market forces and thus constitutes price-fixing.\textsuperscript{114}

Separate and apart from the traditional “hard core” price-fixing schemes, many other arrangements, much more subtle in nature, have been held to constitute price-fixing. Among these arrangements are rules concerning the extension of credit,\textsuperscript{115} agreements concerning a maximum price for goods,\textsuperscript{116} agreements to establish or abolish discounts\textsuperscript{117} and agreements concerning a general price range within which sales are to be made.\textsuperscript{118} The antitrust implication in this area is obvious for the airline industry: no discussions, communications or “knowing winks” concerning fares can occur.

One additional aspect of price-fixing must be considered. Economists can logically and convincingly explain that within the marketplace prices for the same product sold by different sellers eventually reach the same level. Right or wrong, this general concept has enmeshed itself in the legal fabric of the antitrust laws. Price uniformity among competitors does not in and of itself violate the antitrust laws.\textsuperscript{119} As long as pricing decisions are the result of independent business judgment, no “agreement” as required by

\textsuperscript{112} 895 ANTITRUST & TRADE REG. REP. (BNA) A-2 (Jan. 4, 1979).
\textsuperscript{113} United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).
\textsuperscript{114} Id. at 224.
\textsuperscript{115} Swift & Co. v. United States, 196 U.S. 375 (1905).
\textsuperscript{118} United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
section 1 of the Sherman Act exists, even if the result of such independent decisions is that competitors reach the same level in their pricing. In antitrust jargon, "conscious parallelism" does not satisfy the requisite "contract, combination or conspiracy" required by section 1 of the Sherman Act.

Parallel pricing may be the foundation leading to a price-fixing determination. Where such parallel activity exists, the presence of additional factors may result in illegal price-fixing. Such additional factors have included price discussions and exchange of price information. Likewise, where conscious parallel pricing is contrary to the best interests of the participants, or is not otherwise supported by legitimate business reasons, such activity may also be indicative of price-fixing conspiracy.

The "parallel pricing" situation would seem to provide a particular area of vulnerability for the airline industry. With fare levels having been traditionally set by the Board, prices have been basically the same for the same routes. The Deregulation Act establishes a "zone" within which prices may rise or fall. Coupled with the active trade association situation within the airline industry, particular concern must exist among airlines with respect to parallel pricing activities.

It is logical to assume that the Board, and the Justice Department, will allow some initial period of time for the industry to accustom itself to being subject to the strictures of antitrust laws. Such "honeymoon" may, however, prove relatively short.

The recent rash of discount fares within the industry raises another serious issue under the antitrust laws concerning the pricing of airline fares. When a business chooses to price at a non-remunerate level in order to exclude or drive out its competition, such "predatory pricing" may be a method of obtaining or maintaining a monopoly position in violation of section 2 of the Sherman Act. Obviously, any legitimate price decrease will

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120 See National Lead Co. v. FTC, 227 F.2d 825 (7th Cir. 1955), rev'd on other grounds, 352 U.S. 419 (1957).

121 Standard Oil Co. v. Moore, 251 F.2d 188 (9th Cir. 1957); Ambrook Enterprises v. Time, Inc. [1979-2] TRADE REG. REP. (CCH) ¶ 62,979.


necessarily have some impact on other firms in the market. The antitrust laws are concerned with competition, which necessarily means that vigorous and efficient firms will drive out the less efficient firms. Otherwise stated, the concern of the antitrust laws is with competition and not competitors.

Pricing is considered predatory only where the firm foregoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits.124 Prices set at or above marginal cost ordinarily will not form the basis for antitrust violation.125 Average variable cost, which is more easily ascertained from conventional business records, can generally be used as evidence of marginal cost.126 Without analyzing in detail the accounting principles involved, sales below "cost" for a particular route, particularly on a short-run basis, may well form the basis for a claim of attempt to monopolize.

As mentioned previously, section 2 of the Sherman Act can be violated by a single firm; an attempt to monopolize, even if unsuccessful, can be a violation of the statute. Thus, the pricing of discount or other introductory fares must be carefully considered. Although the issue is not without doubt, a single route may in fact be considered a "market" under section 2. Furthermore, some precedent does exist for claims that airline fare pricing below cost can result in antitrust violations.127 Issues such as the proper allocation of general and administrative expenses and other similar cost-accounting problems are not subject to definitive answer and are still being considered by the courts. Significant and prolonged pricing below cost will, however, cause serious antitrust risks.

2. Routes

The Deregulation Act makes various significant changes in standards and procedures governing route entry and exit. The

126 Id.
automatic entry program, the unused or dormant route concept, and the authority of the Board to issue certificates to test or assess experimental services provide new programs for route entry and exit. Additionally, the Act softens the “public convenience and necessity” test which had generally governed route awards.

The sunset provisions of the Deregulation Act will result in a totally unregulated airline route structure by 1981. Thus, despite the liberalization of route award authority and standards, the industry will soon be faced with no regulation in the area of routes. The antitrust laws contemplate vigorous competition in the marketplace. “Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise.”

The selection of routes to be served by a particular airline should not, in and of itself, cause significant antitrust implications. Rather, the implementation of such selection poses the greatest risk. As an example, the selection of a previously unserviced route, accompanied by a saturation of frequency of service and extended below-cost pricing, may well result in an illegal attempt to monopolize in violation of section 2 of the Sherman Act. Such result, however, is a function of performance on a selected route, rather than the selection of a route.

Situations may exist, however, where route selection could have certain antitrust implications. The systematic confrontation of a small, less financially able competitor on a route by route basis may result in a pattern of conduct held to be a violation of section 2 of the Sherman Act. Thus, although route selection generally seems to have minimal antitrust implications, care must be taken to insure that selection is based on merit of the route, rather than an obvious attempt to eliminate a competitor.

129 Id. § 1371(d)(5).
130 Id. § 1371(d)(8).
131 See id. § 1371(d)(1), (3), which provides a test of “consistent with the public convenience and necessity.”
132 Id. § 1551.
3. Trade Associations

The trade associations have played a significant role in many aspects of the aviation industry. The Air Traffic Conference (ATC), composed of most of the nation's major domestic airlines, and the International Air Transport Association (IATA), composed of most of the world's major international carriers, have been involved in regulating many aspects of the aviation industry. It is in the areas of trade associations and their activities that significant antitrust risks exist and where substantial and significant changes will have to occur.

Under section 412 of the Act, the ATC and IATA file agreements affecting air transportation with the Board. The Board has traditionally granted antitrust immunity to such agreements pursuant to its authority under section 414 of the Act. The nature of agreements approved by the Board, and instituted by these "trade associations," has been extremely comprehensive.

The ATC has regulated virtually all of the nation's travel agents, and the IATA has regulated virtually all of the nation's international travel agents. Included within the regulation of such travel agents was "rate-fixing" by virtue of the collective activities of the airlines. The Board has stated its intention to conduct overall reviews of various ATC programs to determine whether they should continue to receive Board approval. The Department of Justice continues to attack the activities of both the ATC and the IATA. It is inconceivable that the ATC and IATA will continue to operate with any recognizable resemblance to their prior activities. Although the Justice Department will have authority to approve joint agreements, such approval should not be considered as even a realistic remote possibility.

In today's antitrust climate, mere trade association membership, regardless of the ostensibly "legitimate" activities of the group, raises significant antitrust exposure. The risk that some

135 Id. § 1384.
136 In re Members of the Air Traffic Conferences of America, CAB Docket No. 34,142, CAB Order No. 79-5-16 (May 1, 1979), at 4.
137 TRADE REG. REP., No. 416, Dec. 17, 1979, at 7 (referring to Reply of the Department of Justice, Competition for Agency Services Show Cause Proceeding, CAB Docket No. 36,596).
trade association members may engage in illegal activities under
the protective umbrella of the association, thus exposing other
members to potential liability, is real. Predicting the member-
ship, scope of activities and overall value of the ATC and
IATA in several years is virtually impossible. Permissible ac-
tivities of trade associations include joint advertising cam-
paigns, education and training, research and development proj-
ects, code of ethics, lobbying and certain types of statistical
gathering activities. Thus, to the extent that airline trade asso-
ciations in the future limit their activities within the boundaries,
they can continue to serve the industry.

The principal danger of trade association membership and
activity is the potential for a determination that the trade associa-
tion and its members are engaged in a price-fixing conspiracy.
Statistical reports by the association concerning disclosure of prices
may have the effect of fixing prices. The disclosure of current
or estimated cost data and price statistics, or estimated future
transactions, may furnish the basis for a determination of an
"unspoken" price-fixing conspiracy.

The activities of the ATC and IATA will change dramatically
in the next few years. These organizations, their memberships
and functions must be scrutinized closely by the industry to insure
that the new era of competition does not result in an unwitting
antitrust violation.

4. Other Activities

With approval of the Board, airlines have engaged in various
other types of joint activity, outside the scope of the ATC and
IATA. In 1947, the airlines jointly created Air Cargo, Inc., to
serve as the agent for the airlines in handling of air cargo. The
agreement creating this entity was approved by the Board. The
existence and operation of Air Cargo, Inc., has generated sub-
stantial private antitrust litigation. Requests for Board approval

128 See C. HILLS, ANTITRUST ADVISER § 7.18 (2d ed. 1978).
131 Scroggins v. Air Cargo, Inc., 534 F.2d 1124, 1127 (5th Cir. 1976).
132 Scroggins v. Air Cargo, Inc., 534 F.2d 1124 (5th Cir. 1976); Big Bear Cartage v. Air Cargo, Inc., 419 F. Supp. 982 (N.D. Ill. 1976); Breen Air Freight,
for joint airline activity continue. Among the most recent was a request by the airlines for the Board to grant antitrust immunity to discussions concerning how and where to print on airline tickets information about what airlines will do in the event a flight is cancelled or late.\textsuperscript{143}

Joint activity, whether creating a wholly owned subsidiary to perform some type of agency function or to have discussion regarding the format of tickets, will not exist in the era of full competition. The Board, and certainly the Justice Department, will not be sympathetic nor understanding to a perceived need for joint activity. Thus, the era of joint enterprise in the aviation industry has ended.

\section*{III. Conclusion}

The federal antitrust laws and comprehensive federal regulatory systems have coexisted for many years. Despite the difficulty of the task, the courts have attempted to construe the duties and responsibilities of the administrative agencies, and the scope and coverage of the antitrust laws, to attain a coordinated end.\textsuperscript{144} Within this conflicting and sometimes guideless framework, both regulators and industry operated.

Regulation by the CAB was generally guided by the premise that airlines were public utilities, utilizing the public airways and providing an indispensable public service. Thus, many facets of airline activities were regulated on the basis of assuring a fair and adequate return on investment to the airlines, with competition being a somewhat insubstantial consideration. The airline industry has been chosen to be the first "victim" or "beneficiary," depending on a given point of view, of deregulation. Regardless of the merits of the concept, it is alive, well and real.

Predicting all of the antitrust implications of airline deregulation is obviously impossible. Certain general conclusions, however, concerning the impact of deregulation can be reached. Initially, and perhaps foremost, deregulation will require a new approach

\textsuperscript{143} \textit{Lind v. Air Cargo, Inc.}, 470 F.2d 767 (2d Cir. 1972), \textit{cert. denied}, 411 U.S. 932 (1973).

\textsuperscript{144} \textit{United States v. Morgan}, 307 U.S. 183 (1939).
by airlines to analyzing and making business decisions. The antitrust consequences of each business activity must be analyzed and considered in detail prior to undertaking a given course. Thus, the airline industry will be required to approach its activities with new considerations and consequences in mind.

The concept of joint activity among the airlines has been a fact of life in the industry for many years. Deregulation has substantially altered, if not completely eliminated, this concept. Each joint or collective activity within the industry must now be analyzed anew and tested under the strictures of the antitrust laws. In essence, joint activity will be the exception rather than the rule.

Despite the continued existence of executive authority to immunize certain types of airline activity from the antitrust laws, deregulation will mean, as a practical matter, that the airline industry will be subject to the full scope of the antitrust laws. Competition, with its inevitable losers in the marketplace is the benchmark of the law of antitrust. A rapid acceptance and implementation of that concept by the aviation industry will ease the transition into the era of deregulation. The argument over the concept is moot. The consequences are too great not to heed the mandate.
Comments, Casenotes and Statute Notes