ANTITRUST AND THE TRANSPORTATION INDUSTRY: ENFORCEMENT IS HERE TO STAY

By

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Attorneys representing clients in the transportation industry need to educate their clients about the antitrust laws. The theory underlying deregulation of the transportation industry was that the antitrust laws would play a more important role in regulating the competitive excesses of an unregulated market. While many critics contend that this has not occurred, the fact remains that many segments of the transportation industry have never enjoyed an exemption from the antitrust laws. This includes most forms of transportation intermediaries and the shippers who contract for and use transportation services.

For those in the industry who have enjoyed an antitrust exemption, the handwriting appears to be on the wall. The European antitrust exemption for ocean shipping in the U.S.-Europe trades will be gone this October, thanks to regulatory action by the European Union.[2] The Surface Transportation Board has removed the antitrust exemptions for motor carrier collective rate making.[3] The Antitrust Modernization Commission has recommended a review of the antitrust exemptions for all modes of transportation, including the railroad industry.[4] There are proposals in Congress to do exactly that.[5]

While most companies know – or should know – the basics of the antitrust laws, most executives also probably think that it is "something that happens to the other guy." Alternatively, they may think that because the transportation industry has enjoyed so many exemptions from the antitrust laws – in ocean shipping; in rail transportation; in motor carrier collective ratemaking – that transportation companies still enjoy immunity or at least a reduced risk of being swept into an antitrust prosecution or lawsuit.

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[2] *Council Regulation 1419/2006*, Official Journal of the European Union (OJ) 269/1 (Sept. 28, 2006); http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:269:0001:0003:EN:PDF

[3] *STB Ex Parte No. 656, Motor Carrier Bureaus – Periodic Review Proceeding (Corrected Decision Served May 15, 2007).*

[4] *See, e.g., Report and Recommendations of the Antitrust Modernization Commission (April 2, 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm*

[5] *See, e.g., S.772, The Railroad Antitrust Enforcement Act.*

Think again. Over the past several years some of the biggest corporate names in transportation have pled guilty to criminal violations of the U.S. antitrust laws. British Airways, Quantas, Japan Airlines, Korean Air Lines have all pled guilty to criminal price fixing.[6] Executives from various companies have faced or been sentenced to multiple years in prison for antitrust violations, including government contract bid rigging. Other major companies, including the Union Pacific, Yellow-Roadway, and Fed Ex, have been accused of price fixing and sued in private antitrust class action lawsuits.

Increased antitrust scrutiny of the transportation industry is not just something that is going to occur in the next several years. It is already here. The transportation industry already is a major focus of antitrust attention at the Department of Justice. In Fiscal Year 2007, the Department of Justice secured over $630 million in criminal fines. Almost all of these fines - $600 million - were from British Airways, Korean Airlines, which each paid $300 million fines, the second largest fine in the history of antitrust enforcement. They did so while pleading guilty to price fixing charges. Since then, Quantas has agreed to pay $61 million in criminal fines. This April, JAL agreed to pay a $110 million criminal fine. Both Quantas and JAL pled guilty to criminal price fixing of air cargo shipments.

A review of the number of business review letters issued by the Antitrust Division of the Department of Justice between 1968 and 2007 also reveals that, with the possible exception of the medical profession, the largest number of requests for antitrust review of proposed activities comes from the transportation industry.[7]

Using the recent air cargo price fixing investigations and private sector fuel surcharges litigations as examples, this paper will examine what the Department of Justice looks for in prosecuting antitrust conspiracies and some of the scenarios in which companies – including those in the transportation industry - can run afoul of – or be accused of running afoul of – the antitrust laws.

The Per Se Violations

Price fixing, bid rigging, and market allocations are the three big areas in which the Department of Justice focuses its criminal antitrust investigations.[8] Section 1 of the Sherman Act declares illegal "every contract, combination …. or conspiracy, in restraint

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[6] *See, e.g., United States of America v. British Airways PLC*, Criminal No. 07-183 – JDB (D.D.C. 2007); *United States of America v. Korean Air Lines Co., Ltd.*, Criminal No. 07-184 – JDB (D.D.C. 2007); *United States of America v. Quantas Airways Limited*, Criminal No. 07-322-JDB (D.D,C, 2007).

[7] *See, Antitrust Division, Department of Justice, Digest of Business Review Letters/Commodity/Service Index 1968-2007; http://www.justice.gov/atr/public/busreview/229888.htm*

[8] *See, An Antitrust Primer for Federal Law Enforcement Personnel, Antitrust Division, U.S. Department of Justice (August 2003, revised April 2005)(hereinafter "Antitrust Primer").*

of trade or commerce among the several States, or with foreign nations."[9] While attempts to engage in such activities may be punishable by other statutes, including the mail[10] and wire fraud[11] statutes, violations of Section 1 require an agreement.[12]

Evidence of price fixing, bid rigging, and other collusive activities can be established either by direct evidence, such as witness testimony, or circumstantial evidence, such as suspicious bid patterns, travel and expense reports, telephone records, and business diary entries. Frequently, Department of Justice prosecutors allege an oral agreement and overt acts. [13]

Types of overt acts that the government will seek to prove may be the issuance of price lists, the submissions of bids, phone calls among companies to exchange bid numbers or other customer information, the use of code words to conceal the conspiracy, and secret meetings. [14]

Forms of price fixing include any agreement that restricts price competition. This includes establishing or adhering to price discounts; holding prices firm; eliminating or reducing discounts; adopting a standard formula for computing prices; adhering to a minimum fee or price schedule; fixing credit terms; not advertising prices; or maintaining price differentials between different types or quantities of services. Price fixing conspiracies also frequently establish some form of policing mechanism to ensure that all participants adhere to the agreement.[15]

Market Allocations

Agreements between competitors to divide markets – either geographically or by customer – are unlawful. Frequently, competitors will refuse to sell to customers in a certain geographic area or, alternatively, quote intentionally high prices to such customers.[16]

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[9] *15 U.S.C. § 1.*
[10] *18 U.S.C. § 1341.*
[11] *18 U.S.C. § 1343.*
[12] *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955; 167 L. Ed. 2d 929; 2007 U.S. LEXIS 5901; 75 U.S.L.W. 4337 (2007).
[13] *Antitrust Primer* at 5.
[14] Id.
[15] *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What To Look For: An Antitrust Primer,* Antitrust Division, Department of Justice at 2. (Revised 2005)(hereinafter "*Price Fixing"*).
[16] Id. at 3.

Bid Rigging

Many prosecutions against transportation companies involve bid rigging. A bid-rigging conspiracy is where competitors agree in advance who will submit the winning bid. Such conspiracies can take many forms. For example, a company who would normally be expected to bid on a proposal may not do so or may withdraw a previously filed bid. Alternatively, the bidders may engage in complementary bidding or cover bidding, where the other competitors will knowingly submit bids at prices higher than the designated winner.[17]

Discovering Antitrust Violations

A good antitrust compliance policy is the first and crucial step for clients to install employee awareness of what the antitrust laws allow and do not allow. In adopting such policies, transportation companies should also be aware of the methods that the Department of Justice uses to discover evidence of violations of the antitrust laws.

Frequently, government agencies investigating other conduct, for example, fraud, gambling, money laundering, tax violations, or public corruption, discover evidence of price fixing and refer it to the Antitrust Division.[18]

Tips from the public and/or competitors also often lead to investigations by the Department of Justice. High on the list are disgruntled former employees; overcharged customers; and competitors. Purchasing managers are also likely informants, since they have the ability to see industry-wide patterns of pricing and bidding. The government frequently receives tips and testimony from purchasing agents and other victims of the conspiracy. The government will also frequently rely upon present or former middle-or upper-level management to elicit testimony about a conspiracy.[19]

The Department of Justice recognizes that price fixing and bid rigging can be very difficult to detect. It thus looks to a number of different sources to determine whether there has been collusive secret activity to violate the antitrust laws. These include unusual bidding or pricing patterns or comments or actions by a seller. The Department also recognizes that collusion is more likely to occur if there are fewer sellers or only a few major players in an industry.[20]

Patterns of activity that the Department of Justice will look for in bid rigging is whether the same company always wins a specific project; whether the same suppliers submit bids and take turns in being successful; whether specific bids are higher than

[17] Id. at 2-3; *Antitrust Primer* at 8-10.
[18] *Antitrust Primer* at 11.
[19] Id. at 5.
[20] *Price Fixing* at 4.

previous bids submitted by the same firms, cost estimates, or published price lists; a fewer number of competitors bid than is normal; a company bids substantially higher on some bids than on others, with no apparent cost differences; bid prices drop whenever a new or infrequent bidder submits a bid; successful bidders subcontract work to unsuccessful bidders on the same project or to bidders who withdrew their bids.[21]

According to the Department of Justice, other suspicious indicia of price fixing are the following: identical prices, especially when they stay identical for long periods of time; the prices were previously different; or price increases do not appear to be supported by increased costs. The Department of Justice also suggests that the elimination of price discounts may be evidence of price fixing, especially in markets where discounts have historically been given. In addition, the Department states that price fixing may also be present when sellers are charging higher prices to local customers than to distant customers.[22]

Obviously, not every instance of such pricing activity constitutes actual evidence of price fixing. Many may be innocent or simply coincidental. However, these types of patterns can raise suspicions and further investigations from the Department.

Trade associations can represent a particular area of concern for possible antitrust violations. While both the courts and the Department of Justice have frequently stated that cooperative activities by competitors can actually enhance competition and market efficiency, participation in trade association activities can also facilitate price fixing collusion. Employees who shift employment or maintain social connections with employees of competitors or other business contacts can also be in a position to facilitate price fixing.[23]

The Antitrust Division's Corporate Leniency Program

One method by which the Department of Justice obtains information in breaking price fixing conspiracies is the Antitrust Division's Corporate Leniency Program. This Program rewards qualifying companies that are the first to voluntarily disclose their participation in an antitrust crime, provided that they fully cooperate in the subsequent investigation. Companies that meet the criteria under the program can avoid criminal convictions and heavy fines. Under revisions made to the Program in the 1990s, leniency is automatic for companies if there is no pre-existing investigation. Leniency may still be available under some circumstances if it occurs after an investigation has commenced.

[21] Id at 3-4.
[22] Id at 3-4.
[23] Id. at 5.

Furthermore, all officers, directors, and employees who come forward with the company to cooperate are protected from criminal prosecution.[24]

Practical Examples: The Air Cargo Price Fixing Guilty Pleas and the Civil Fuel Surcharge Litigations

The antitrust laws have existed for over one hundred years. Arguably, all clients should be aware of them and the risks that they entail. However, time and time again executives and their companies get caught in the antitrust trap.

Recent Department of Justice Investigations into the airline industry and private sector lawsuits alleging antitrust violations related to the imposition of fuel surcharges illustrate the current applicability of the antitrust laws to the transportation industry.

The Airline Investigations

In 2006 the Department of Justice, in coordination with European antitrust authorities, started an investigation of price fixing in the international airline industry. Over the past decade, the Department of Justice has placed an emphasis on investigating and breaking up international price fixing cartels. Justice Department policy in this area reflects not only the increasing importance of international trade on U.S. commerce, but also the fact that other countries are increasingly adopting antitrust laws and enforcement actions under them.

In August, 2007, the Department of Justice announced that British Airways and Korean Air Lines had each agreed to plead guilty and pay criminal fines totaling $600 million for fixing prices on passenger and cargo planes. Under the plea agreements, both airlines agreed to cooperate with DOJ in its ongoing investigations.[25]

Price fixing related to fuel surcharges were key charges in both cases. With respect to British Airways, the company pled guilty to participating in a price fixing conspiracy from between March 2002 and February 2006 by fixing rates charged to customers on air cargo shipments. British Airways also pled guilty to engaging in a conspiracy between 2004 and 2006 to fix the fuel surcharge to passengers on international long-haul flights. DOJ noted that in furtherance of the conspiracy, in 2004

[24] See, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, Speech by Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, department of Justice (2007). The DOJ leniency programs are published on its website at%20http://www.justice.gov/atr/public/guidelines/guidelin.htm

[25] Press Release, Antitrust Division, Department of Justice (August 1, 2007).

British Airways fuel surcharge for round-trip passenger tickets was around $10 a ticket. By the time the conspiracy was cracked in 2006, the fuel surcharge was $110 per ticket.[26]

During the air cargo conspiracy, Justice noted that British Airways' fuel surcharge on shipments to and from the United States changed more than 20 times. It increased from four cents per kilogram of cargo shipped to as high as 72 cents per kilogram.[27]

Korean Airways also pled guilty to agreeing with competitors on the rates that they would charge to customers, both for passenger traffic and for air cargo traffic. With respect to air cargo, Korean Air was charged with agreeing to increase the fuel surcharge over time from 10 cents per kilogram to as high as 60 cents per kilogram of cargo shipped from the United States.[28]

Both Korean Airlines and British Airways were charged with engaging in price fixing by participating and agreeing, in meetings, conversations, and communications, to discuss and fix rates and then to monitor and enforce the agreed upon rates that they had implemented.

Crucial to the British Airways and Korean Air convictions were the agreements of Virgin Atlantic and Lufthansa AG to cooperate with the DOJ in its investigations. Both companies were accepted into the Antitrust Division's Corporate Leniency Program. Virgin Atlantic entered into the program after reporting its participation with British Airways in the passenger fuel conspiracy. Lufthansa was conditionally accepted after it disclosed it role in the international cargo conspiracy in which both British Airways and Korean Air were participants. Both Virgin and Lufthansa were obligated to pay restitution to the U.S. victims of their conspiracy.[29]

The leniency accorded to both Virgin and Lufthansa reflect the continued advantages to participating in the Department of Justice's Antitrust Corporate Leniency Program.

The Fuel Surcharges Civil Antitrust Actions

Currently pending in the federal courts are a number of multidistrict class actions alleging antitrust conspiracies in the application and use of fuel surcharges by various types of carriers. These include, but are not limited to, the *In Re Rail Freight Fuel Surcharge Antitrust litigation*[30]; the *In Re LTL Shipping Services Antitrust Litigation*[31];

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[26] Id.
[27] Id.
[28] Id.
[29] Id.
[30] MDL Docket No. 1869, Misc. No. 07-489 (PLF), United States District Court for the District of Columbia.

the *In Re Air Cargo Shipping Services Surcharges Antitrust Litigation*[32]; the *International Air Transportation Surcharge Antitrust Litigation*[33]; and the *In Re: Household Goods Movers Antitrust Litigation.*[34]

Also recently filed are individual antitrust actions that have been filed by shippers against carriers in connection to their use of fuel surcharges. One of the more recent ones as of late April, 2007, is a suit filed by the Archer Daniels Midland Corporation against the major U.S. railroads.[35]

It must be emphasized that as of the time this paper is being written none of these private sector lawsuits have been resolved. The allegations in the lawsuits are just that – allegations. If they have not done so already, the named defendants have or are likely to deny all claims.

However, even if the carrier defendants in these civil lawsuits ultimately are found innocent, these civil lawsuits illustrate the risks of potential liability that may arise under the antitrust laws. Defending antitrust lawsuits are expensive. It is better to avoid them altogether, if possible.

The *In Re Rail Freight Fuel Surcharge Antitrust Litigation* and the *In Re LTL Fuel Surcharges Antitrust Class Action* both provide illustrative examples of the types of activities which require a heightened sensitivity to the possibility of antitrust allegations as the industries move away from an era of antitrust exemptions.

The In Re Rail Freight Fuel Surcharge Antitrust Litigation

The *In Re Rail Freight Fuel Surcharge Antitrust Litigation*[36] provides an illustrative example of how antitrust suits can arise through the interplay of trade association activity and the individual actions of industry competitors.

The lawsuit is essentially derived from a finding of the Surface Transportation Board that the development of a fuel surcharge formula by the Association of American Railroads was an unreasonable practice as applied to regulated rail freight because the surcharge was calculated as a percentage of the base rate of the freight as opposed to

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[31] MDL No. 1985, United States District Court for the Northern District of Georgia.
[32] MDL No. 1775, United States District Court for the Eastern District of New York.
[33] MDL No. 1793, United States District Court for the Northern District of California.
[34] MDL No. 1865, United States District Court for the District of South Carolina.
[35] *Archer-Daniels-Midland Company v. Union Pacific Railroad Company; BNSF Railway Company; CSX Transportation, Inc.; Norfolk Southern Railway Company; and Kansas Southern Railway Company*, United States District Court for the District of Minnesota.
[36] *In Re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869, Misc. No. 07-489 (PLF), United States District Court for the District of Columbia. Descriptions of the allegations in the case are taken from the Consolidated Amended Class Action Complaint, Doc. No. 91-2 (Filed April 15, 2008).

reflecting the actual costs of the fuel.[37] As a result of this finding by the STB, representatives of companies that have purchased unregulated rail freight have brought a class action against the four major Class I railroads alleging that they engaged in a conspiracy to fix prices through the adoption and application of the surcharge to their unregulated freight.

As alleged in the amended complaint that was filed in the United States District Court for the District of Columbia, the four Class I railroads engaged in a conspiracy between 2003 and 2007 to fix prices by using the AAR to modify its general freight escalation index to eliminate fuel costs as a component. The plaintiffs then allege that each of the individual railroads adopted the same public fuel cost indexes as their relevant competitor and applied these indexes in a virtually identical manner as a multiplier of its total base rate.

As additional evidence of their allegations that the four defendants railroad conspired to fix prices, the plaintiffs allege that the railroads agreed upon common trigger points to adjust the surcharges monthly. They also allege that the defendants engaged in price signaling by publishing the applicable surcharges on their websites to facilitate coordination and to monitor any deviation from collusive pricing. As evidence of the alleged conspiracy the plaintiffs note that several of the defendant railroads applied the identical fuel surcharges for a period of 38 months, even though their actual fuel expenses differed.

The shippers further allege that the defendant railroads moved from a system of long term contracts, which the plaintiffs' claim had been the standard, to shorter term contracts. The defendant railroads are also alleged to have refused to negotiate discounts on the fuel surcharges, even for customers that offered to hedge future fuel costs. In addition, the amended complaint alleges that the railroads moved from a system of single billing for multi-line through rates to individual billings from each rail carrier involved in a through movement. The plaintiffs cite this as evidence of the collusive actions taken by the rail carriers and their desire to obtain supracompetitive profits for each carrier on each segment of the movement.

As evidence of economic damages the plaintiffs cite a study that claims that between 2003 and the first quarter of 2007 the difference between the actual fuel costs of the defendant railroads and their rail fuel surcharge revenue was $6 billion.

The Defendant railroads deny the allegations that they have engaged in a conspiracy or have actually violated the antitrust laws. However, each of the defendant railroads has also received state grand jury subpoenas and/or grand jury investigations in conjunction with investigations of these charges. In addition to the multidistrict litigation,

[37] See, Surface Transportation Board, *Ex Parte No. 661, Rail Fuel Surcharges* (January 26, 2007).

individual shippers have also filed their own lawsuits against the railroads. One, Archer-Daniels-Midland, is claiming that it has paid over a quarter of a billion dollars in fuel surcharges since 2003.[38]

The LTL Trucking Fuel Surcharge Litigation

The LTL trucking industry is also the subject of an antitrust class action. In this multidistrict litigation the plaintiffs are claiming that the named LTL carriers, operating through the Southern Motor Carriers Rate Conference, Inc., ("SMC"), have conspired to use fuel surcharges to fix prices charged to LTL shippers. The complaint alleges that for at least a four year period members of the SMC established and adhered to a weekly fuel surcharge supplement that exceeded the average fuel costs increases experienced by individual members of the SMC. The complaint alleges that the individual members of the SMC agreed and furthered their conspiracy at SMC and industry meetings, as well as by utilizing the same software programs. Monitoring of the claimed illegal agreement allegedly occurred through SMC members posting their applicable fuel surcharges on their Internet web pages. The complaint also alleges that starting in 2003 the members of the SMC departed from their prior practice of incorporating their fuel increases into their basic line haul rates and instead started using the separate fuel surcharges as a different profit center.

Focusing the Client's Attention on the Need for Independent Action

Attorneys educating clients on the risks of running afoul of the antitrust laws should always emphasize two key points. First, actually engaging in price fixing or other violations of the antitrust laws can result in criminal fines and penalties, including jail time for the individuals who engaged in the activity.

Second, even the appearance of a possible antitrust violation can result in costly litigation, including costly civil litigation. For example, the basic allegations in both the LTL Trucking Fuel Surcharge Litigation and the Rail Fuel Surcharge Litigation involve allegations that the defendants (1) participated in an industry standards setting organization; (2) helped in the development of unreasonable pricing formulas; (3) subsequently deviated from the until then standard industry form of doing business; (4) charged essentially the same rates pursuant to the same formulas at the same time as their competitors; and (5) used the internet or other rate publishing mechanisms to signal pricing actions and/or to monitor adherence to the allegedly unlawful pricing activity.

[38] *Archer-Daniels-Midland Company v. Union Pacific Railroad Company, et al*, United States District Court for the District of Minnesota, Complaint at paragraph 4.

Any one of these activities, might raise an eyebrow with respect to the antitrust laws but would not necessarily lead to a lawsuit. However, when taken together they create the appearance of a possible antitrust conspiracy.

Note the word possible: in each of these cases, there has yet been no finding of actual liability. The key thing to remember about the antitrust laws – and the proscriptions of Section 1 of the Sherman Act – is the requirement that there be an agreement. It is much more difficult, for example, for a shipper to allege that a carrier's participation in the development of an allegedly unreasonable fuel surcharge formula was part of a conspiracy to violate the antitrust laws if the carrier utilizes the formula to charge different rates than its competitors and/or negotiates a variety of contractual discounts with individual shippers.

The rail fuel surcharge litigation illustrates the risks that companies in concentrated industries face when they engage in interdependent similar actions. Last year the Supreme Court held, in *Bell Atlantic v. Twombly*, ___ U.S. __ (2007)[39] reaffirmed that conscious parallelism, i.e., the situation where two or more players in a concentrated industry engage in similar actions, is not necessarily illegal under the antitrust laws. The Court held that the bare assertion of a conspiracy as evidenced by parallel activity, without additional evidence of an agreement, may not be enough to allege an appropriate claim under the antitrust laws. Nonetheless, while the mere assertion of consciously parallel activity, without allegations of an agreement, may no longer be sufficient to state a claim under the antitrust laws, companies that are in concentrated industries or engage in common industry practices that may affect prices or competition need to be aware that those disgruntled by their actions may seek to raise claims of violations of the antitrust laws.

Conclusion

In conclusion, it is this basic point that transportation industry clients need to remember: the antitrust laws are intended to promote and protect competition. Matters affecting prices and services need to be competitive decisions that are made independently by each player in an industry. The failure to do so can result in a company being subjected to civil lawsuits, criminal fines, and, in the case of executives, prison time.

[39] See Footnote 12.