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ARTICLES

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I. Introduction

One of the striking features of the deregulated airline industry has been the adoption of hub-and-spoke delivery systems by the major airlines. Hub-and-spoke refers to delivery systems that entice airlines to maintain a large presence at some 'hub' city so that a passenger bank can be established to feed connecting flights to 'spoke' cities.[1] This practice has led to a rather skewed usage of airport facilities. In many large and medium sized airport markets, one airline dominates the airtraffic. Recently, this dominance has been a source of concern.[2] The debate revolves around the question of whether the

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1. Large capacities are needed at hub airports so that flights that converge, somewhat simultaneously, from spoke cities can be accommodated. For an idea of the level of airline dominance consider Atlanta, where Delta Airlines enplanes 58% of the 21.8 million passengers there. United enplanes 50% of 26.6 million passengers at the Chicago O'Hare Airport. Other examples include: Dallas/Ft. Worth (American Airlines), 63% of 21 million; Detroit (Northwest), 60% of 9.2 million; Minneapolis (Northwestern), 77% of 8.2 million; Pittsburgh (USAir), 86% of 8.4 million; St. Louis (TWA), 82% of 9.5 million. FAA, *Airport Activity Statistics of Certificate Route Air Carriers* (1989).

2. *See generally Airline Competition Enhancement Act: Hearing on S. 1741 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 508 (1989); Severin Borenstein, *Hubs and High Fares: Dominance and Market Power in the U.S. Airline Industry*, 20 RAND J. OF ECON. 173 (1989); Barry E.

dominance at airports serves the purpose of reducing costs to travelers or whether it serves to create the opportunity to exploit monopoly power.

The antitrust laws are a tempting mechanism through which to address airport dominance. However, whether the contracts that give rise to airport dominance are likely to be viewed as anticompetitive is a very complex issue. It involves a great deal of economic and legal analysis and exceeds the scope of this Article.[3] Instead, this

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Hawk, *Airline Deregulation after Ten Years: The Need for Vigorous Antitrust Enforcement and Intergovernmental Agreements*, 34 ANTITRUST BULL. 267 (1989); Simat, Hellieson & Eichner, Inc., *An Analysis of Airline Hub and Spoke Systems Since Deregulation*, for the Air Transport Association (1989); Scott Kilman, *An Unexpected Result of Airline Decontrol is Return to Monopolies*, WALL ST. J., July 20, 1987, at 1.

3. Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (1976 & Supp. 1991), apply to antitrust issues regarding airport dominance. The primary distinction between the two sections of the Act is that § 1 addresses multilateral behavior whereas § 2 addresses unilateral activity.

The first section is the most likely candidate to embroil an airport in an antitrust challenge. This section would probably apply in situations where contractual relationships appear to give some incumbent (dominant) airline economic advantages over others in exchange for airport renovation financing or long term commitments to provide air service. During the nearly 40 years of airline regulation, airlines rarely shifted route structures. As a result, their enterprise grew and developed along with the airports at which they operated. Even if an allegedly favored airline does not manifest a *quid pro quo* in the form of airport financing, these close historical relationships could prompt accusations from antitrust plaintiffs that airport operators have been simply co-opted by incumbent airlines.

Charges under § 1 are conducted under two alternative analyses, the Per Se approach and the "Rule of Reason." Per Se violations are those "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978). The most common types of agreements included in this category are: Price fixing, *see* United States v. Trenton Potteries Co., 273 U.S. 392 (1927); Exclusive territories, *see* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); and Concerted refusals to deal, *see* Fashion Originator's Guild of America v. Federal Trade Comm'n, 312 U.S. 457 (1941).

The alternative § 1 approach is the Rule of Reason which had its origin in Standard Oil Co. v. United States, 221 U.S. 1 (1911). The Rule was eloquently articulated in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918):

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

See also United States v. Socony-Vaccum Oil Co., 310 U.S. 150 (1940) and references therein; United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 312 (1897).

A § 2 charge against airport operators is more difficult to imagine because both exclusion of competitors and some possession of monopoly power would have to be present. *See generally* Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945); United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964). It is somewhat implausible to think of airports excluding competitors such as other airports and exploiting monopoly power for their own benefit. There have been § 2 charges against airport operators, and the courts have either dismissed these for the above reason or because of the existence of immunity. *See, e.g.*, Interface Group, Inc. v. Massachusetts Port Authority, 816

Article considers the antitrust immunity which may be available to airport operators in the event of an antitrust challenge. In particular, the issue of state action immunity for airport operators is examined in light of recent developments of the State Action Doctrine[4] and recent case law regarding airport operators involved in antitrust challenges. Part II of this Article examines the nature of state action immunity, and Part III considers how state action immunity may apply to airport operators in the context of the emergence of hub-and-spoke delivery systems.

II. State Action Immunity: Origins and Development

In order to invalidate a state law because of its conflict with the Sherman Act, it is not sufficient that the law in question generates anticompetitive effects.[5] Unless activities by the states unduly burden interstate commerce, for example "neutraliz[ing] economic advantages belonging to the place of origin,"[6] or imposing "an artificial rigidity on the economic pattern of the industry,"[7] the states have somewhat broad latitude in their actions that impinge on competition.

The State Action Doctrine provides a framework within which states and their agents can carry on activities immune from antitrust liability. The doctrine was originally formulated in *Parker v. Brown*[8] where the U.S. Supreme Court held that the activities of governmental bodies which tended to obstruct competition were "an act of government which the Sherman Act did not undertake to prohibit."[9] The Court in *Parker*, citing legislative intent, noted that nothing in the history of the Sherman Act "suggests that its purpose was to restrain . . . activities directed by [a state's] legislature."[10] The

F.2d 9 (1st Cir. 1987); Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2d Cir. 1986), *cert. denied*, 479 U.S. 872 (1986); Rocky Mountain Airways, Inc. v. Pitkin County, 674 F. Supp. 312 (D. Colo. 1987).

4. *See infra* notes 6-31 and accompanying text.

5. There are a number of considerations that may protect an anticompetitive statute from Sherman Act liability. *See generally* Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978) (outlining criteria for preemption of state laws by federal laws); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (First Amendment can prohibit some state laws that restrict commerce.); Pike v. Bruce Church, 397 U.S. 137 (1970) (Commerce Clause prevents undue interference in interstate trade.). For a brief overview and additional references, *see* PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 139-41 (4th ed. 1988).

6. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935).

7. Toomer v. Witsel, 334 U.S. 385, 404 (1948).

8. 317 U.S. 341 (1943).

9. *Id.* at 352 (citation omitted).

10. *Id.* at 350-51.

Court's inclination for such strong protection was also based in its adherence to the principles of federalism—the notion that "[i]n a dual system of government in which, under the constitution, the states are sovereign . . ., an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[11]

The *Parker* doctrine remained essentially intact until the mid 1970s when the Court initiated a reformulation of the doctrine. The first changes marked a clear narrowing of the circumstances within which states and their agents could engage in anticompetitive activities without creating antitrust liability.[12] However, during the mid and late 1980s, the Court changed direction and began to broaden the immunities, especially those afforded local municipalities.[13] The following discussion outlines this reformulation.

The first changes to the State Action Doctrine formulated in *Parker* seem to have developed in response to the Court's desire to curtail the immunity afforded to individuals when their actions as state agents sufficiently diverged from intended state policy. For instance, in *Goldfarb v. Virginia State Bar*,[14] the Court considered an anti-competitive pricing arrangement established by the Fairfax County Bar Association, acting under guidelines promulgated by Virginia's Supreme Court.[15] The Court held that the activities of the local Bar Association, although "prompted" by state authority, were not manifestations of the state's intention.[16] The Court considered the criteria that would serve to justify local governmental and private activities as state action and ruled that the "anticompetitive activities [of state agents] . . . must be *compelled* by the direction of the State acting as sovereign."[17]

Subsequent rulings have also considered the limitations of immunity to state agents.[18] The case law that resulted in the reformu-

11. *Id.* at 351. For further discussion of federalism and the State Action Doctrine, *see, e.g.*, Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227 (1987).

12. *See infra* notes 13-18 and accompanying text.

13. It is interesting to speculate why the Court was suddenly prompted to reconsider the immunity afforded private individuals acting as state agents. One theory is that the Court became confident in its ability to take on complicated and involved economic analyses of antitrust issues. *See* Jorde, *supra* note 11, at 239 n.78.

14. 421 U.S. 773 (1975).

15. Code of Professional Responsibility, 211 Va. 295 (1970).

16. Goldfarb v. Virginia State Bar, 421 U.S. at 791.

17. *Id.* at 791 (emphasis added).

18. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (holding that activity must be authorized by a state policy in order to displace antitrust laws); Cantor v. Detroit Edison, 428 U.S. 579 (1976) (immunity denied since the anticompetitive

lation of the *Parker* doctrine was based on the desire to ensure that meaningful state participation coexisted with activities undertaken by state agents.[19] This analysis led to the deterioration of the protections afforded municipalities and other agencies.[20] In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[21] the Court articulated a two-pronged test that further restricted the types of anticompetitive activities which states could safely undertake. First, it required the obstruction to competition to be "clearly articulated and affirmatively expressed as state policy."[22] Second, and most notably, it required that "the policy must be actively supervised by the State itself."[23]

It is unclear what the Court's intention was. It seems that it was attempting to place the activities of private state agents and perhaps some state agencies under stricter antitrust scrutiny, while attempting to continue to protect activities of agents more closely associated with governmental functions. This appears to be a valid theory because the Court continues to use the *Midcal* test in subsequent cases, but restricts the application of the active supervision prong to provide more protection to municipalities.[24]

In *Town of Hallie v. City of Eau Claire*,[25] the Court interpreted the first prong of the *Midcal* test to mean that clear legislative articulation and affirmative expression is sufficiently satisfied if a legislative statute "clearly contemplate[s]" the anticompetitive activity in question or if the result is "logical" or "foreseeable."[26] More importantly, the Court exempted municipalities from being held to the active supervision requirement.[27] This modification illustrates the

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activities were not necessary to regulatory scheme).

19. *See generally* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Hoover v. Ronwin, 466 U.S. 558 (1984); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Cantor v. Detroit Edison, 428 U.S. 579 (1976).

20. The reduced immunities resulted in some large damage settlements against municipalities. *See, e.g.*, Community Communications Co. v. City of Boulder, 455 U.S. 40 (1984); *Lafayette*, 435 U.S. 389. Largely in response to these massive settlements resulting from reduced immunity, Congress passed the Local Government Antitrust Act, 15 U.S.C. § 35 (Supp. 1991), which eliminated treble damages in cases against local government entities.

21. 445 U.S. 97 (1980).

22. *Id.* at 105 (citing *Lafayette*, 435 U.S. at 410).

23. *Id.*

24. Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985).

25. 471 U.S. 34 (1985). *See also* Hoover v. Ronwin, 466 U.S. 558 (1984).

26. *Hallie*, 471 U.S. at 42.

27. *Id.* The Court did not exempt or ease the burden of the second prong for those agents who are private individuals and did not address the question of whether state agencies would be held to the active supervision prong. The rationale for the distinction between municipalities and private individuals and state agencies is that municipalities are more likely to act in the public interest, are open to more public scrutiny, and are often subject to electoral

Court's motive of easing the burden on municipalities while still maintaining pressure on private individuals to conform to the intentions of state policy.

The principles articulated in *Hallie* seem to settle the basic issues that prompted the formulation of the State Action Doctrine. The doctrine now has more rigorous standards for private actors while municipalities and other state agencies need only show that their activities were a foreseeable consequence or a logical result of some state policy.[28]

City of Columbia v. Omni Outdoor Advertising[29] is the most recent Supreme Court decision involving the *Parker* doctrine and provides further protection to municipalities by holding that evidence of conspiracy by a local municipality is not enough to generate Sherman Act liability as long as the result of the conspiracy is a foreseeable consequence of state policy.[30] The opinion suggests that subjecting governmental bodies to antitrust liability would make all anticompetitive regulation vulnerable to antitrust liability "[s]ince it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them."[31]

This case is another indication of the Court's reluctance to use the Sherman Act to rectify anticompetitive consequences originating from state initiatives. As discussed below, the Court's reluctance likely will lead to stronger protections for local governmental bodies and, in particular, airport operators.

III. State Action Immunity and Airports

Airport operators are usually classified as municipal departments such as a County Department of Aviation, a City Department of Aviation, or a Port Authority.[32] For purposes of antitrust immunity, airport operators or the authority having the ultimate responsi-

processes. Private individuals and state agencies are often less visible, and the presumption of acting in the public interest is more difficult to make. *See id.* at 434 n.9. There was an inference in *Hallie*, however, that state agencies would likely be exempt from the active supervision requirement. *See id.* at 468 n.10.

28. *Id.*

29. 111 S. Ct. 1344 (1991).

30. *Id.*

31. *Id.* at 1351.

32. The airports at which the major airlines have established their hubs are all owned and operated by a municipality or a municipal authority. These include: Hartsfield International (Atlanta); Love Field (Dallas/Ft. Worth); Wayne County (Detroit); Minneapolis/St. Paul; Greater Pittsburgh International; Lambert-St. Louis Municipal. To the author's knowledge, no other large or medium-sized city has an airport that is operated other than as a municipal department or authority.

bility for the actions of airport managers, can expect, for legal purposes, to be treated as municipalities. As a result, the active supervision requirement of *Hallie* is inoperative, and the airport operator only needs to show that its activities are clearly articulated by state policy, that the activities are a logical result of state policy, or that the activity complained of was within the contemplation of the legislature.[33]

Cases that have specifically considered the issue of airport operator behavior with respect to space and facility allocation provide further insight. Recent decisions have varied, but courts generally have been inclined to grant immunity to airports in cases where airport space has been denied to potential competitors.[34]

Antitrust challenges would most likely be alleged under a § 1 theory of the Sherman Act.[35] The airport operator would be charged with complicity in restricting or suppressing competition at its airport through lease agreements. There is no case law on the specific question of airport dominance from the hub-and-spoke networks. However, there is case law addressing similar situations where an airport denies space to certain airlines, and that denial appears to promote the interests of the incumbent airline. Two examples are *New York Airlines, Inc. v. Dukes County*[36] and *Montauk-Caribbean Airways, Inc. v. Hope*.[37] In *New York Airlines*, immunity was denied to a local airport, but in *Montauk*, the court held that the airport's activities were immune from antitrust liability.[38]

The case of *New York Airlines* is an important exception to the otherwise general rule that immunity is granted to airport operators. Martha's Vineyard Airport Commission was denied immunity against a Sherman Act § 1 charge alleged by New York Airlines, Inc. (New York Air) after New York Air was prohibited from operating at its airport.[39] The Commission had operated its airport with, among others, Princetown-Boston Airways (PBA).[40] New York Air petitioned for permission to operate at the airport.[41] The facts indi-

33. See notes 19-25 and accompanying text.

34. *See, e.g.*, Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9 (1st Cir. 1987); Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2d Cir. 1986), *cert. denied*, 479 U.S. 872 (1986); Rocky Mountain Airways, Inc. v. Pitkin County, 674 F. Supp. 312 (D. Colo. 1987).

35. *See supra* note 3 and accompanying text.

36. 623 F. Supp. 1435 (D. Mass. 1985).

37. *Montauk*, 784 F.2d 91.

38. *See id.*; *New York Airlines*, 623 F. Supp. 1435.

39. *New York Airlines*, 623 F. Supp. at 1440.

40. *Id.*

41. New York Airlines, Inc. v. Duke County, 623 F. Supp. 1435, 1440 (D. Mass. 1985).

cate that the Commission, satisfied with the service of the two main airlines and concerned with the effect competition would have on PBA, denied New York Air's petition.[42]

The court recognized the Commission's authority to enter into leases and set policies for use of the airport.[43] However, immunity was denied since, as the court reasoned, the Massachsuetts Laws "do not on their face demonstrate a clear intention on the part of the state to displace competition" with monopoly.[44] "The fact that the Commission may adopt rules and regulations to insure the safety of the public is not sufficient evidence of authority to engage in anticompetitive conduct . . . ."[45] Additionally, "there are no provisions for state review, nor are there other indications that the state is actually supervising the activities of the Commission pursuant to state policy."[46]

The *Montauk* court also addressed the denial of airport facilities to a plaintiff airline but reached a contrary result and granted immunity. Montauk-Caribbean Airways filed an antitrust suit under § 1 of the Sherman Act against the Town of East Hampton, New York and the main airline at the airport, East Hampton Aire.[47] Montauk-Caribbean operated only part of the year and wished to extend its lease to provide year round service.[48] The airport denied the request.[49] The court, noting that the airport's state charter empowered it to enter into exclusive lease arrangements, found that denying the year round lease was a "foreseeable consequence"[50] of the delegated authority. Thus, the court granted immunity to the airport.[51]

The divergent results of these two cases illustrates an important problem in recognizing parameters within which local airport opera-

42. New York Air alleged that at a meeting on April 25, 1985, a representative of PBA stated that PBA would cease providing winter service if New York Air's proposed service was approved. *Id.* at 1450.

43. MASS. GEN. LAWS ch. 90, §§ 51F-51J (West 1989).

44. *New York Airlines*, 623 F. Supp. at 1451.

45. *Id.*

46. New York Airlines, Inc. v. Duke County, 623 F. Supp. 1435, 1452 (D. Mass. 1985). By this time, the *Hallie* Court had already nullified the active supervision requirement for municipalities so it is not clear why the court mentioned this point. The court was obviously aware of the *Hallie* decision because prior to arguing the lack of active superivsion, the court cited to the *Hallie* case. *See id.*

47. Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91, 93 (3d Cir. 1989), *cert. denied*, 479 U.S. 872 (1986).

48. *Id.*

49. *Id.*

50. *Id.* at 97.

51. *Id.* at 96.

tors can safely conduct activities. The Massachusetts laws and the New York laws delegate similar authority to airport operators.[52] Both states, as do most states, allow local airports to enter into lease arrangements with airlines.[53] In both cases, the airline was denied an opportunity to enhance its competitive position by the airport. However, in *New York Airlines*, the court judged the restraint to be outside the parameters of the first prong of the *Hallie* test while the *Montauk* court reached the opposite conclusion. Determinations of whether an activity has been "articulately and affirmatively expressed" as state policy will inevitably require a degree of judgment.

Consider the situation for airport operators that have entered into long term leasing arrangements with dominant airlines. If the arrangements are found to be anticompetitive, Sherman Act liability will hinge on whether statutory power to enter into long term leases would logically result in large concentrations of particular airlines.

A pivotal concern for airport operators is whether state legislatures had envisioned the potential effects of airline deregulation when they established mandates for managerial authority of local airports. Before airline deregulation, legislatures could anticipate that the impact on prices and service resulting from leases and other airport policies would be controlled by federal regulations. It is questionable whether granting local governments authority to enter into leases would create a situation where those governments would not be able to maintain competitive conditions under a dynamic changing industry prompted by an unconceived deregulated environment. Even most airline industry experts failed to predict the degree to which hub-and-spoke systems would proliferate when the airlines were deregulated. Thus, it is unlikely that state officials would have or could have contemplated or foreseen the emergence of dominated airports.

IV. Conclusion

New York Airlines and *Montauk*, the cases that most closely parallel the airport dominance situation, do not provide a clear basis from which to predict the response by a court called upon to decide an antitrust challenge to a dominated airport. This leaves the question of whether airports are likely to receive immunity unresolved.

If courts focus on the dominance that results from allowing air-

52. MASS. GEN. LAWS. ch. 90, §§ 51E-52 (West 1989); N.Y. GEN. MUN. LAW § 352 (McKinney 1974 & Supp. 1985).

53. MASS. GEN. LAWS. ch. 90 § 51F-51J; N.Y. GEN. MUN. LAW § 352.

ports to enter into leases and conclude that these results were not likely to have been considered by states when establishing authority for airport operators, the immunity available to airport operators may be questionable. On the other hand, if courts focus on the act of denying and granting of leases, it is likely, if not obvious, that state legislatures had expected such consequences.

In light of recent trends in the Supreme Court's reasoning, particularly the tendency to grant broader immunities to governmental bodies, it seems likely that airport operators will be offered substantial latitude in their dealings with airlines. *City of Columbia v. Omni Outdoor Advertising*[54] suggests that even policies by airports designed to give advantage to a favored airline would not be objectionable.[55] The restraint that the Court has exercised in applying the antitrust laws to local governmental activities in recent times will probably continue. Thus, it would be expected that airport operators would be shielded from antitrust liability in their relationships with airports.

54. 111 S. Ct. 1344 (1991).

55. It is interesting to speculate what the result of *New York Airlines* would be in light of *City of Columbia* since it seems that the *New York Airlines* court relied partially on the perception that the airport authority was protecting the incumbent airline, PBA, from competition. *See supra* note 42.