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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Email	DOT/DOJ Antitrust Proposal [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/18/2025 JLS] - To: Brett Kavanaugh, et al. - From: Matthew Berry	2	04/04/2003	
002	Discussion Paper	Proposal [4 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/18/2025 JLS]	4	N.D.	

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
[DOT/DOJ Antitrust Proposal]

FRC ID:
9632

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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This document was prepared on Thursday, September 18, 2025

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SUPERSEDED

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001	Email	DOT/DOJ Antitrust Proposal - To: Brett Kavanaugh, et al. - From: Matthew Berry	2	04/04/2003	P5;
002	Discussion Paper	Proposal	4	N.D.	P5;

COLLECTION TITLE:
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cannot force Secretary to take action

"Berry, Matthew" <Matthew.Berry@usdoj.gov>
04/04/2003 02:55:20 PM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)

Subject: DOT/DOJ Antitrust Proposal

Brett,

At the end of this e-mail message, please find our analysis of the issue that you asked us to examine.

Matthew Berry
Office of Legal Counsel
U.S. Department of Justice
(202) 514-9700

FTC Act // DOJ 65

As the United States Court of Appeals for the Seventh Circuit recognized in United Air Lines, Inc. v. Civil Aeronautics Board, 766 F.2d 1107 (7th Cir. 1985), the scope of section 411 of the Federal Aviation Act ("FAA"), 49 U.S.C. § 41712, is broader than the scope of the Sherman Act. We do not believe, however, that this fact would preclude the Department of Transportation (DOT) from deferring to the Department of Justice (DOJ) on all antitrust and market competition issues involving private agreements and conduct in the absence of consumer protection issues or a clear market failure that cannot be redressed effectively under the antitrust laws.

Section 411 of the FAA addresses two distinct areas of concern: deceptive practices and anticompetitive practices. The instant proposal, however, would not impact DOT's ability to investigate or regulate deceptive practices as they involve "consumer protection issues." As a result, it is of no moment that such practices are prohibited under section 411 of the Federal Aviation Act but not the Sherman Act.

Turning to the topic of anticompetitive practices, it is true that section 411's regulation of anticompetitive practices has been interpreted to be more extensive than that of the Sherman Act. For example, the Seventh Circuit has noted that section 411 can be viewed as "forbid[ding] anticompetitive practices before they become serious enough to violate the Sherman Act." United Air Lines, 766 F.2d at 1114. See also Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963); American Airlines v. North American Airlines, 351 U.S. 79 (1956). We do not believe, however, that this difference between the scope of anticompetitive practices prohibited under section 411 and the scope of anticompetitive practices prohibited under the Sherman Act would prevent DOT from lawfully deferring to DOJ on antitrust and market competition issues in accordance with the proposal described above.

Initially, we note that there is some ambiguity in the proposal as to whether DOT would be required to defer to DOJ with respect to any anticompetitive practices prohibited by section 411 but not prohibited by the Sherman Act. While, as noted above, the reach of section 411 is clearly broader than that of the Sherman Act in the realm of anticompetitive practices, the proposal would not require DOT to defer to DOJ when a market failure exists that cannot effectively be redressed under the antitrust laws.

Assuming, however, that this proposal would require DOT to defer to DOJ with respect to

practices that are proscribed by section 411 but not by the Sherman Act, we do not believe that this would pose a problem. Under section 411, the Secretary of Transportation need only investigate unfair methods of competition if he "considers it is in the public interest" to do so. And we believe that it would be well within the Secretary's discretion to determine that it would not be in the public interest to investigate those anticompetitive practices not serious enough to violate the Sherman Act or other market competition statutes enforced by DOJ. For example, the Ninth Circuit indicated in A.V. Costantini v. Civil Aeronautics Board, 706 F.2d 1025 (9th Cir. 1983), that it was appropriate under section 411's public interest determination for the government, in evaluating a complaint, to consider whether its "scarce investigatory funds" would better be spent elsewhere. And we think that it would be entirely reasonable for the Secretary to conclude here that it would not be the best use of DOT's resources to pursue cases where anticompetitive practices were not serious enough to violate the Sherman Act but rather to focus on other priorities.

PROPOSAL

Absent consumer protection issues or a clear market failure that cannot effectively be redressed under the antitrust laws, DOT should defer to DOJ on all antitrust and market competition issues involving private agreements and conduct.

DISCUSSION

DOJ and DOT Authority

In the wake of airline deregulation, both DOJ and DOT have statutory authority over competition in the airline industry[1]. The Airline Deregulation Act of 1978 gradually ended regulation of airline pricing and entry decisions, dismantled the Civil Aeronautics Board at the end of 1984, and transferred residual regulatory responsibilities, including merger approval, to the DOT. On January 1, 1989, DOT merger review authority terminated, and airline mergers and acquisitions became subject to normal HSR filing rules and DOJ jurisdiction under Clayton §7.

DOT, however, continues to enforce § 411 of the Federal Aviation Act ("FAA"), whose key language is identical to §5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition." The FTC has no jurisdiction over airlines. In 1998, Congress also enacted a "file-and-wait" requirement at DOT for domestic codeshare and frequent flier program (FFP) agreements. DOT is authorized to delay implementation of codeshare agreements for up to six months, and of FFP agreements for up to 60 days.

DOT traditionally has deferred to DOJ on antitrust issues. In its first post-1989 review of a certificate transfer pursuant to an HSR reportable merger, DOT announced a new, narrower inquiry it would conduct under its "public interest" standard, and that it would defer to DOJ on antitrust issues:

> [In our earlier Show Cause Order[2]] we stated our perception that the sunset of section 408 [DOT merger review authority] strongly suggested Congress' intent that we consider the policy implication of proposed certificate transfers without respect to antitrust considerations, those matters now properly belonging to the Department of Justice.

Federal Express Corp. and The Flying Tiger Line, Inc., Docket 46025, Final Order, served May 2, 1989, at 2. In reaching this conclusion, DOT deferred to DOJ on antitrust issues not necessarily because it was required to, but because DOT concluded it was sound policy consistent with the intent of Congress.[3] Similarly, during DOJ's monopolization investigation of American Airlines, DOT deferred issuing final "Competition Guidelines" relating to predatory conduct by dominant hub carriers, eventually shelving them after the DOJ's lawsuit was filed. Recently, however, there are indications that DOT may seek to return to a broader regulatory role in antitrust and competition matters.

Reasons Why DOT Deference to DOJ is Appropriate

There are sound policy reasons for DOT to defer to DOJ on antitrust and competition issues:

Consistent Enforcement Standards - DOJ is more likely to take a consistent, and therefore predictable, enforcement approach that is defined by antitrust law precedent and sound economic analysis (e.g., the DOJ/FTC Merger Guidelines). In contrast, DOT's statute (FAA § 411), lacks the discipline of the body of antitrust precedent that has developed to preserve the critical balance between protection of competition and government intervention that will actually harm competition. This fact, together with DOT's historically greater focus on addressing the interests advanced by individual competitors rather than competition itself, makes its enforcement policies less predictable. In exclusionary conduct (Sherman Act § 2) situations, a broad interpretation of DOT's statute might not require a showing of "monopoly power" in a defined market. DOT might be tempted to conclude that it need not conduct a Brooke[4] analysis (below cost pricing and recoupment) in predatory pricing cases. In conspiracy cases, DOT might not conduct a Matsushita/Petroleum Products [5] analysis to distinguish conspiracy from conscious parallelism in an oligopoly. In the past, DOT has been both more lenient than the antitrust laws would require (approving overlapping hub mergers in the mid-80's, and granting immunity to competitors in concentrated markets over DOJ objections), and more restrictive (refusing to allow market-based
divestitures in AA/BA II in favor of awarding Heathrow slots to administratively "preferred" recipients).

Insulation From Political Influence - As a pure law enforcement agency, DOJ is less susceptible to political pressure and lobbying than an agency with diverse responsibilities such as DOT. DOT has broad program and promotional responsibilities that are appropriately influenced by political considerations, including airport funding, international aviation treaty negotiations, the essential air service program and the allocation of certain service rights.

Superior Discovery Tools and Procedures - DOJ conducts confidential fact investigations using compulsory process for data, documents and testimony as needed. Information received is not made public (absent litigation), and customers and informants can provide information to DOJ in confidence without running afoul of ex parte rules. In contrast, DOT proceedings are conducted on a public record subject to ex parte rules, where "interested parties" voluntarily (and selectively) submit evidence and argument. The DOT process is not confidential and not well-suited for developing a complete and unbiased factual record.

Effective Use of Government Resources - DOJ is experienced and well-equipped to conduct antitrust investigations. It has the breadth of experience over all industries, many with some of the same structural characteristics of the airline industry. DOJ's Economic Analysis Group is recognized throughout the world as unsurpassed at its work. With its large and experienced legal and economic staffs, DOJ can more efficiently devote the necessary resources to competition issues in the airline industry.

Avoiding Duplicative Investigations - DOJ and FTC have overlapping jurisdiction, but have a "clearance agreement" that prevents overlapping investigations. There is no similar agreement with DOT, although the 1998 pre-filing amendments for codeshares directed the agencies to establish preclearance procedures to prevent unnecessary duplication, 49 U.S.C. § 41720 (f). One way to avoid overlapping investigations in the airline industry is for DOT to defer to DOJ on all matters that can be addressed under the antitrust laws, even if they could arguably be addressed under the more discretionary standards of the Federal Aviation Act.

Ensuring Appropriate Grants of Antitrust Immunity - DOT may grant antitrust immunity to certain agreements between airlines, including codesharing and marketing alliance agreements. DOJ and DOT have often agreed on when a grant of immunity would harm competition and should not be granted, but DOT has also frequently disregarded DOJ advice on withholding immunity, most recently by approving a domestic capacity reduction agreement between Aloha and Hawaiian Air, the only significant inter-island competitors in Hawaii, and by immunizing the American Airlines/Swiss Air alliance without "carving out" (withholding immunity) for certain routes where the parties were the only, or two of three, actual or potential nonstop competitors on the routes. Because antitrust immunity is itself a departure from the legal rules applicable to protect market competition in virtually every other industry, DOT should be reluctant to grant it in any situation. Recognizing that immunity grants to foreign carrier alliances can at times be a useful bargaining chip in open skies negotiations, DOT nonetheless should accord significant weight to a DOJ recommendation to limit, restrict or deny it.[6]

Avoiding Unintended Harm to Competition - Judicial limitations on antitrust liability — such as the requirements of proof in conspiracy and predation cases — should not be viewed as inconvenient impediments to be circumvented by resort to a more broadly worded statute. Rather, these limitations have been put in place by the courts to ensure that unfounded antitrust intervention does not itself chill *procompetitive* activity. For example, predatory pricing challenges by definition attack price cutting and discounting, which clearly benefit consumers in the short term. Such challenges should not be undertaken without rigorous proof that they are needed to protect competition in the long run. Deference to the DOJ would assure application of these legal standards. Open-ended regulation under a broad reading of §411, in contrast, runs the risk of decisionmaking based on individual competitors' lobbying for advantage rather than the objective application of law.

[1] DOJ: Anticompetitive mergers and acquisitions (Clayton Act §7); anticompetitive agreements among competitors (Sherman Act §1); and exclusionary conduct by dominant firms (Sherman Act §2).

DOT: Consumer protection and other "unfair methods of competition" (49 U.S.C. § 41712); approval of (and antitrust immunity for) agreements between foreign and domestic airlines, including codeshare alliances (49 U.S.C. §§41713, 15); review (but not approval) of domestic codeshare and frequent flyer agreements (49 U.S.C. §41720); fitness reviews and certification of airlines (49 U.S.C. §§41102, 05).

[2] "Congress' decision to deregulate the airline industry means that we should not delay

market transactions involving the transfer of route authority unless necessary for important public policy reasons, and that we should not lightly impose restrictions or other conditions on such transactions." Show Cause Order, 3/10/89, at 7.

[3] There is legal precedent for the proposition that, under FAA §411, DOT "can forbid anticompetitive practices before they become serious enough to violate the Sherman Act." United Airlines v. Civil Aeronautics Board, 766 F.2d. 1107 (7th Cir. 1985). This does not mean, however, that it is sound policy to attempt broader regulation under §411. Indeed, past efforts by the FTC to broaden its interpretation of the identical language of §5 beyond the scope of DOJ's enforcement of its statutes have met with judicial hostility. See, e.g., E.I Du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980).

[4] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[5] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990), cert. den. sub nom. Chevron Corp. v. Arizona, 500 U.S. 959 (1991).

[6] Both the FCC and the STB are required by statute to give the views of DOJ "substantial weight" in reaching certain decisions affecting competition, 47 U.S.C. §271(d)(2)A (FCC); 49 U.S.C. §11324 (STB).

Service: **Get by LEXSTAT®**
TOC: United States Code Service; Code, Const, Rules, Conventions & Public Laws > / . . . / > SUBCHAPTER I. REQUIREMENTS **> § 41712. Unfair and deceptive practices and unfair methods of competition**
Citation: **49 usc 41712**

49 USCS § 41712

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*** CURRENT THROUGH P.L. 108-6 APPROVED 2/14/03 ***

TITLE 49. TRANSPORTATION
SUBTITLE VII. AVIATION PROGRAMS
PART A. AIR COMMERCE AND SAFETY
SUBPART II. ECONOMIC REGULATION
CHAPTER 417. OPERATIONS OF CARRIERS
SUBCHAPTER I. REQUIREMENTS

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

49 USCS § 41712 (2003)

§ 41712. Unfair and deceptive practices and unfair methods of competition

(a) In general. On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, or ticket agent, and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. If the Secretary, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.

(b) E-ticket expiration notice. It shall be an unfair or deceptive practice under subsection (a) for any air carrier, foreign air carrier, or ticket agent utilizing electronically transmitted tickets for air transportation to fail to notify the purchaser of such a ticket of its expiration date, if any.

HISTORY:
(July 5, 1994, P.L. 103-272, § 1(e), 108 Stat. 1143.)
(As amended April 5, 2000, P.L. 106-181, Title II, Subtitle B, § 221, 114 Stat. 102.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Revised Section	Source (USCS)	Source (Statutes at Large)
41712.....	49 App.:1381(a).	Aug. 23, 1958, Pub. L. 85-

726, Sec. 411(a), 72 Stat. 769; Oct. 4, 1984, Pub. L. 98-443, Sec. 7 (a), 98 Stat. 1706.

49 App.:1551(b)(1)(E). Aug. 23, 1958, Pub. L. 85-726, 72 Stat.731, Sec. 1601(b)(1)(E); added Oct. 4, 1984, Pub. L. 98-443, Sec. 3(e), 98 Stat. 1704.

The words "such action by" are omitted as surplus. The words "opportunity for a" are added for consistency in the revised title and with other titles of the United States Code.

Amendments:

2000. Act April 5, 2000 (applicable only to fiscal years beginning after 9/30/1999, as provided by § 3 of such Act, which appears as 49 USCS § 106 note), designated the existing provisions as subsec. (a) and inserted the subsection heading; and added subsec. (b).

NOTES:

CODE OF FEDERAL REGULATIONS

Office of the Secretary, Department of Transportation--International cargo transportation, 14 CFR Part 292.

Office of the Secretary, Department of Transportation--Public charters, 14 CFR Part 380.

Office of the Secretary, Department of Transportation--Nondiscrimination on the basis of disability in air travel, 14 CFR Part 382.

CROSS REFERENCES

This section is referred to in 49 USCS §§ 40109, 41110, 46301.

RESEARCH GUIDE

Federal Procedure:

4 Fed Proc L Ed, Aviation and Space § 7:392.

Am Jur:

8A Am Jur 2d, Aviation § 65.

54A Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1147-1149.

Annotations:

Applicability of federal antitrust laws as affected by other federal statutes or by federal constitution--Supreme Court cases. 45 L Ed 2d 841.

INTERPRETIVE NOTES AND DECISIONS

I. IN GENERAL

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14. Discrimination in special promotions
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I. IN GENERAL

1. Generally

Whatever unfair practice or unfair method employed, Federal Aviation Act (former 49 USCS Appx § 1381), like Federal Trade Commission Act (15 USCS § 45), is designed to bolster and strengthen antitrust enforcement. Pan American World Airways, Inc. v United States (1963) 371 US 296, 9 L Ed 2d 325, 83 S Ct 476.

Former 49 USCS Appx § 1381 was enacted to protect competition, not competitors. Areo Sun International v Eastern, 82-6-48, CAB Adv Dig, Aug 1982, p 14.

2. Relationship with antitrust laws

Former 49 USCS Appx § 1381 is modeled closely after prohibitory provisions of 15 USCS § 45, and Supreme Court may resolve questions of interpretation of former 49 USCS Appx § 1381 by looking to judicial interpretation of 15 USCS § 45. Pan American World Airways, Inc. v United States (1963) 371 US 296, 9 L Ed 2d 325, 83 S Ct 476.

Air taxi operators fall under authority of former 49 USCS Appx § 1381 antitrust provisions. Executive Airlines, Inc. v Air New England, Inc. (1973, DC Mass) 357 F Supp 345, 1973-1 CCH Trade Cases P 74555.

Federal Aviation Act (former 49 USCS Appx §§ 1301 et seq.) does not displace antitrust laws in air transportation industry. Foremost International Tours, Inc. v Qantas Airways, Ltd. (1974, DC Hawaii) 379 F Supp 88, 1974-2 CCH Trade Cases P 75177, affd (1975, CA9) 525 F2d 281, 1975-2 CCH Trade Cases P 60578, cert den (1976) 429 US 816, 50 L Ed 2d 75, 97 S Ct 57.

While under former 49 USCS Appx § 1381, types of activities prohibited by Sherman Act (15 USCS §§ 1 et seq.) can be reached if they are performed by air carriers, foreign air carriers, or ticket agencies, Board [now Secretary of Transportation] lacks authority to enforce Sherman Act and where portion of complaint alleging such violation does not allege violations by air carriers or ticket agents such portion of complaint must be dismissed by CAB for lack of jurisdiction. Commuter Airlines, Airport Discrimination Complaint, 81-1-51, CAB Adv Dig, Jan. 1981, p. 44.

3. Relationship with Internal Revenue Code

Violation of former 49 USCS Appx § 1381 need not be predicated independently of § 7275 of Internal Revenue Code. World Airways, Enforcement, 79-12-184, CAB Adv Dig, December, 1979, p. 108.

Lack of authority to enforce 26 USCS § 7275(c) does not preclude exercising Board j[now Secretary of Transportation] jurisdiction under former 49 USCS Appx § 1381 to prevent advertising air transportation in manner Congress has forbidden; enforcement of former 49 USCS Appx § 1381 is consistent with judicial principle that allows regulatory agency to consider congressional objectives that apply to another agency's statutes; because former 49 USCS Appx § 1381 is clearly related to 26 USCS § 7275, administrative responsibilities permit, if not require, taking into account carrier's noncompliance with § 7275. World Airways, Enforcement, 79-12-184, CAB Adv Dig, December, 1979, p 110.

4. Rulemaking

Board [now Secretary of Transportation] did not act capriciously, arbitrarily, or beyond its authority in issuing rules which (1) forbid airlines from biasing their computerized reservation systems or charging different prices to different airlines for listing in such systems, and (2) forbid deletion from airlines' computerized reservation systems of information about connecting flights of 2 airlines listed under single airline's code name; Board [now Secretary of Transportation] was not required to conduct evidentiary hearing before issuing rules, where rules were based on kind of findings normally made in adjudicative proceeding; Board [now Secretary of Transportation]did not act arbitrarily or capriciously in allowing airlines subject to anti-bias rule to employ bias against foreign airline and provides computerized reservation system to travel agents overseas that is biased against U.S. airlines. United Air Lines, Inc. v Civil Aeronautics Bd. (1985, CA7) 766 F2d 1107, 1985-2 CCH Trade Cases P 66704.

5. Authority of Secretary

Transactions in which (1) two carriers form third carrier under agreement that third carrier will have exclusive right to air traffic along west coast of South America free from competition by first carrier, and that first carrier will be free from competition by third carrier in other areas of South America and between Canal Zone and United States, (2) first carrier and second carrier conspire to monopolize and monopolize air commerce between east coast of the United States and west coast of South America and Buenos Aires, and (3) first carrier uses its 50 percent control of third carrier to prevent it from securing authority from Civil Aeronautics Board [now Secretary of Transportation] to extend its route from Canal Zone to United States, are reached by Federal Aviation Act (former 49 USCS Appx § 1381), which authorizes the Board to enjoin unfair methods of competition, and a complaint in a civil antitrust suit brought by United States, setting forth the transactions, should be dismissed, Board [now Secretary of Transportation] having power to order divestiture if it decides that transactions should be undone in whole or in part, rather than being allowed to continue. Pan American World Airways, Inc. v United States (1963) 371 US 296, 9 L Ed 2d 325, 83 S Ct 476.

Grant of authority to CAB [now Secretary of Transportation] by former 49 USCS Appx § 1381 does not withdraw from antitrust litigant the right to proceed for damages alleged to have occurred by reason of antitrust violations of the kind with which CAB has authority to deal only by issuing cease and desist order; filing of petition by first airline against second airline under former 49 USCS Appx § 1381 complaining of, inter alia, overscheduling by second airline was not binding recognition by first airline that CAB [now Secretary of Transportation] had exclusive jurisdiction over matter there at issue or that it amounted to an election of remedies which would bar subsequent action for damages in antitrust court. Aloha Airlines, Inc. v Hawaiian Airlines, Inc. (1973, CA9 Hawaii) 489 F2d 203, 1973-2 CCH Trade Cases P 74821, cert den (1974) 417 US 913, 41 L Ed 2d 217, 94 S Ct 2612.

Civil Aeronautic Board [now Secretary of Transportation] properly exercises its discretionary authority when it refuses to investigate complaint, which, accepting as true its factual allegations, fails to establish prima facie claim for relief; Civil Aeronautics Board [now Secretary of Transportation] had discretion to dismiss complaint alleging unfair method of competition (two other carriers' use of "air express" in corporate name) because insufficient facts were alleged to establish reasonable likelihood that admittedly unfair method of competition caused specific and substantial public injury. REA Express, Inc. v Civil Aeronautics Bd. (1974, CA2) 507 F2d 42.

Federal Aviation Act § 411 [former 49 USCS Appx § 1381] gives the Civil Aeronautics Board [now Secretary of Transportation]power to supervise, in an antitrust sense, the activities of regulated air carriers. Polansky v Trans World Airlines, Inc. (1975, CA3 NJ) 523 F2d 332.

Under former 49 USCS Appx§ 1381, Civil Aeronautics Board [now Secretary of Transportation] can forbid anticompetitive practices before they become serious enough to violate Sherman Act. United Air Lines, Inc. v Civil Aeronautics Bd. (1985, CA7) 766 F2d 1107,

1985-2 CCH Trade Cases P 66704.

Where essence of complaint of tour producing corporation was that airline had subsidized land portion of its below-cost inclusive tours with profits from sale of its airline seats, because airline's sales of land tours and air passage were deliberately intermixed, both should come within meaning of phrase "air transportation or the sale thereof" with result that CAB [now Secretary of Transportation] had jurisdiction of such allegations and tour producing corporation's complaint. Foremost International Tours, Inc. v Qantas Airways, Ltd. (1974, DC Hawaii) 379 F Supp 88, 1974-2 CCH Trade Cases P 75177, affd (1975, CA9) 525 F2d 281, 1975-2 CCH Trade Cases P 60578, cert den (1976) 429 US 816, 50 L Ed 2d 75, 97 S Ct 57.

6. --Primary jurisdiction

Whether or not transactions such as division of territories, allocation of routes, and air carriers meet standards of competition and monopoly provided by Federal Aviation Act (former 49 USCS Appx. §§ 1301 et seq.) is peculiarly question for Civil Aeronautics Board, subject to judicial review as provided in former 49 USCS Appx §§ 1486. Pan American World Airways, Inc. v United States (1963) 371 US 296, 9 L Ed 2d 325, 83 S Ct 476.

Suit brought by attorney general of United States at request of Civil Aeronautics Board, [now Secretary of Transportation] charging air carrier and common carrier with restraining trade and conspiring to monopolize should have been dismissed by federal district court because questions presented by complaint were entrusted to Civil Aeronautics Board [now Secretary of Transportation] by virtue of Federal Aviation Act [former 49 USCS Appx§ 1301 et seq. of this title]. Pan American World Airways, Inc. v United States (1963) 371 US 296, 9 L Ed 2d 325, 83 S Ct 476.

United States Court of Appeals does not sit to determine independently what is public interest in matters committed to judgment of Civil Aeronautics Board [now Secretary of Transportation]; court decides only whether in determining what is public interest, Board [now Secretary of Transportation] has stayed within its jurisdiction and applied criteria appropriate to that determination. Aloha Airlines, Inc. v Civil Aeronautics Board (1979) 194 US App DC 331, 598 F2d 250.

Federal district court was not ousted of jurisdiction over private antitrust case against aircraft manufacturer by reason of Civil Aeronautics Board [now Secretary of Transportation] approval of the manufacturer's stock control of air carrier. Trans World Airlines, Inc. v Hughes (1964, CA2 NY) 332 F2d 602, 8 FR Serv 2d 37D.32, Case 1, cert dismd (1965) 380 US 248, 13 L Ed 2d 817, 85 S Ct 934, 1965 CCH Trade Cases P 71391 and cert dismd (1965) 380 US 249, 13 L Ed 2d 818, 85 S Ct 934, 1965 CCH Trade Cases P 71392.

In antitrust action brought by one air carrier against another where acts complained of could not now be approved, authorized, or required by Civil Aeronautics Board [now Secretary of Transportation], court would not apply doctrine of primary jurisdiction. Aloha Airlines, Inc. v Hawaiian Airlines, Inc. (1973, CA9 Hawaii) 489 F2d 203, 1973-2 CCH Trade Cases P 74821, cert den (1974) 417 US 913, 41 L Ed 2d 217, 94 S Ct 2612.

District Court erroneously applied doctrine of primary jurisdiction where CAB's complaint alleged that 5 travel agencies and their officers or employees, arranged "charter" flights between United States and Europe and sold tickets on such flights to members of general public with prices for tickets fixed by travel agencies and not by actual air carriers, CAB claiming that such activities made travel agency indirect air carriers operating without certificates of public convenience and necessity in violation of former former 49 USCS Appx § 1371(a) or indirect foreign air carriers operating without permits issued by CAB [now Secretary of Transportation] in violation of former49 USCS § 1372(a). Civil Aeronautics Bd. v Aeromatic Travel Corp. (1973, CA2 NY) 489 F2d 251.

Congress has committed to Civil Aeronautic Board's [now Secretary of Transportation] discretion, by terms of former 49 USCS Appx § 1381, question whether and under what circumstances it will initiate investigation in response to formal complaint; discretion is not absolute and decision is reviewable final order under former 49 USCS Appx § 1486. REA Express, Inc. v Civil Aeronautics Bd. (1974, CA2) 507 F2d 42.

Decision of Civil Aeronautics Board (CAB) [now Secretary of Transportation] under § 411 of Federal Aviation Act (former 49 USCS Appx § 1381) allowing it to investigate complaints of

unfair competition if such investigation is in public interest, is reviewable. Starr v Federal Aviation Admin. (1978, CA7) 589 F2d 307 .

Civil Aeronautics Board [now Secretary of Transportation] had primary jurisdiction over antitrust action for injunctive relief and money damages brought by airline against another airline and association of small airways where allegations in case included deciding such issues as route protection and allocation along with policy of exempting air taxi operators from route certification, as such issues fell within jurisdiction of Board [now Secretary of Transportation] as delineated by Congress in former 49 USCS Appx §§ 1386 and 1381; request of money damages did not preclude finding that primary jurisdiction was with Board [now Secretary of Transportation]. Executive Airlines, Inc. v Air New England, Inc. (1973, DC Mass) 357 F Supp 345, 1973-1 CCH Trade Cases P 74555.

Although former 49 USCS Appx § 1384 did not exempt airline from operation of antitrust laws, entry of such airline into inclusive tour business and its below-cost pricing practice, switching of tours, as well as other charges of anticompetitive activity--terminating business relationship, obtaining confidential information, imitating another's brochures, boycotting, and dividing market--were within initial jurisdiction of CAB [now Secretary of Transportation] under former 49 USCS Appx § 1381. Foremost International Tours, Inc. v Qantas Airways, Ltd. (1974, DC Hawaii) 379 F Supp 88, 1974-2 CCH Trade Cases P 75177, affd (1975, CA9) 525 F2d 281, 1975-2 CCH Trade Cases P 60578, cert den (1976) 429 US 816, 50 L Ed 2d 75, 97 S Ct 57.

Action seeking damages for violation of Sherman Anti-Trust Act alleging that defendant persuaded wholesaler of travel group charter program not to do business with plaintiff, and that defendant conducted deceptive advertising campaign against plaintiff to discourage retail agents and public from participating in travel group charter was not stayed pending referral to Board [now Secretary of Transportation] under doctrine of primary jurisdiction as there was nothing to suggest that conduct complained of was either arguably lawful under Board [now Secretary of Transportation] regulations, or could be made lawful by CAB action so as to present plainly substantial conflict with maintenance of antitrust suit; Board [now Secretary of Transportation], having no power either to award compensatory damages under former 49 USCS Appx § 1381 or to immunize conduct complained of from operation of antitrust laws in suit for damages, also lacked exclusive jurisdiction over such action. International Travel Arrangers v Western Air Lines, Inc. (1975, DC Minn) 408 F Supp 431, 1975-1 CCH Trade Cases P 60225.

Claim of charter air taxi operator that defendants engaged in conspiracy to restrain trade and to monopolize certain air carrier service was not within exclusive jurisdiction of Civil Aeronautics Board [now Secretary of Transportation] since Federal Aviation Act does not completely displace anti-trust laws, Board [now Secretary of Transportation] does not have power to award relief sought, treble damages, and no injunctive relief was sought; however, stay of action was required pending resort to Board [now Secretary of Transportation] under doctrine of primary jurisdiction since sufficient showing was made that defendant's conduct was "arguably lawful" and adjudication of dispute by Board [now Secretary of Transportation] was likely to be material aid in resolution of certain crucial issues. Mark Aero, Inc. v Trans World Airlines (1976, WD Mo) 411 F Supp 610, 1976-2 CCH Trade Cases P 61181, revd on other grounds (1978, CA8 Mo) 580 F2d 288, 1978-2 CCH Trade Cases P 62135.

7. Private right of action

While it gives Board [now Secretary of Transportation] power to supervise, in antitrust sense, activities of regulated air carrier, no private cause of action has ever been implied from former 49 USCS Appx § 1381; to imply private remedy would undercut considerable discretion required in weighing public interest, which can best be exercised by agency knowledgeable in all aspects of regulated airline industry. Polansky v Trans World Airlines, Inc. (1975, CA3 NJ) 523 F2d 332.

Airline passengers who were allegedly furnished inferior ground accommodations while on a European tour sponsored by defendant airline could not maintain private causes of action based upon provisions of § 404 [former former 49 USCS Appx § 1374(b)] and § 411 [former 49 USCS Appx § 1381] of the Federal Aviation Act. Polansky v Trans World Airlines, Inc.

(1975, CA3 NJ) 523 F2d 332 .

Statute does not create private right of action for airline ticket purchaser; statute's language, structure and legislative history show that Congress intended statute to clarify regulatory power over airlines and private right of action need not be implied to further that intent. Statland v American Airlines (1993, CA7 Ill) 998 F2d 539, cert den (1993) 510 US 1012, 126 L Ed 2d 568, 114 S Ct 603.

Shipper's action against air carrier for deceptive practices allegedly resulting in loss of shipment does not arise under former 49 USCS Appx § 1381, and thus removal is improper under 28 USCS § 1331, because former § 1381 does not create private cause of action. Angela Cummings, Inc. v Purolator Courier Corp. (1987, SD NY) 670 F Supp 92.

8. Remedies

Federal Aviation Act (former 49 USCS Appx § 1381), which allows Civil Aeronautics Board [now Secretary of Transportation], where it considers that such action would be in public interest, to investigate and determine whether any air carrier is engaging in unfair or deceptive practices, and which authorizes Board to make such practices subject of cease and desist order, cease and desist order may issue merely on agency's conclusion, after investigation determined to be in public interest, that carrier is engaged in unfair or deceptive practice, and no findings that practice was intentionally deceptive or fraudulent or that it in fact caused injury to an individual are necessary; but Board [now Secretary of Transportation] decision that cease and desist order is inappropriate does not represent approval of the practice under investigation, and may merely represent the agency's conclusion that serious prohibitory sanction of cease and desist order is inappropriate and that more flexible approach is necessary, since wrong may be of the sort calling for compensation to injured individual without requiring extreme remedy of a cease and desist order. Nader v Allegheny Airlines (1976) 426 US 290, 48 L Ed 2d 643, 96 S Ct 1978 (superseded by statute on other grounds as stated in Trans World Airlines v Mattox (1990, CA5 Tex) 897 F2d 773, 1990-1 CCH Trade Cases P 68983, 16 FR Serv 3d 122) and (criticized in Talon Telecommunication Corp. v Coleman (1995, Ala) 665 So 2d 914).

Just as litigants may sue for damages alleged to have occurred by reason of antitrust violations of the kind which Board [now Secretary of Transportation] had authority to deal only by issuing cease and desist order, antitrust litigants are entitled to preliminary injunctions when warranted by law and fact. Foremost International Tours, Inc. v Qantas Airways, Ltd. (1974, DC Hawaii) 379 F Supp 88, 1974-2 CCH Trade Cases P 75177, affd (1975, CA9) 525 F2d 281, 1975-2 CCH Trade Cases P 60578, cert den (1976) 429 US 816, 50 L Ed 2d 75, 97 S Ct 57.

II. UNFAIR PRACTICES

9. Generally

Words "unfair practices" and "unfair methods of competition", as used in former 49 USCS Appx § 1381, are to be interpreted in light of facts of each case and impact which particular practices have on competition and monopoly. Pan American World Airways, Inc. v United States (1963) 371 US 296, 9 L Ed 2d 325, 83 S Ct 476.

10. Affirmative misrepresentations

Single incident of carrier's refusal to transport live animals, accompanied by misrepresentation that United States Department of Agriculture temperature regulations required such refusal, did not justify formal proceeding; instead, industry letter was issued, advising carriers such misrepresentations would be deemed unfair and deceptive practice subject to formal proceeding under former 49 USCS Appx 1381, and warning that need for enforcement actions would be considered if further carrier misrepresentations of United States Department of Agriculture regulations occurred. Warning Letter Re Cumulative Violations, 79-4-58, CAB Adv Dig, June, 1979, p 22.

11. --Deceptive advertising

Carrier's tour brochures contained numerous errors, but although carrier was fully aware of errors before brochures were distributed, it took no remedial action other than instructing its employees to inform travel agents and potential passengers of such errors; it does not matter that merchant warned customer before purchase that terms of sale were not as advertised, for former 49 USCS Appx § 1381 is violated if first contact is consequence of misleading and deceptive advertising. Foremost International Tours v. Qantas Airways, 78-10-129, CAB Adv Dig, December 29, 1978, p. 61.

Carrier violated former former 49 USCS Appx § 1374 by unreasonably denying consumers requested transportation service, and former 49 USCS Appx § 1381 by engaging in unfair and deceptive practices; in advertising its round-trip New York-Los Angeles flights, carrier misled consumers about flight bookings and availability and purchase of tickets, failed to furnish adequate or complete information regarding obtaining discount rates, and failed to disclose total cost of ticket. Pan American, Enforcement Proceeding, 79-9-95, CAB Adv Dig, September, 1979, p 53.

Industry practices concerning advertising are irrelevant and immaterial to resolution of whether carrier violated former 49 USCS Appx § 1381; neither violation of law by competitor nor unlawful conduct treated as business environment or marketing context in which carrier operates excuses or justifies carrier's violation. Delta Air Lines, Enforcement, 79-9-140, CAB Adv Dig, September, 1979, p 76.

Carrier's advertisement is unfair and deceptive practice under former 49 USCS Appx § 1381, because carrier gives impression that its service is nonstop when it is really connecting service with equipment change; overall or net impression which advertisement makes on reader determines whether it is deceptive, misleading, or falsely represents whatever it advertises. Delta Air Lines, Enforcement, 79-9-140, CAB Adv Dig, September, 1979, p 77.

Provisions of former 49 USCS Appx § 1381 are violated whenever advertiser uses deception to bring about first contact with customer; neither intent to defraud nor injury to public or competition needs to be established in order to determine that advertisement is deceptive and means of unfair competition. Delta Air Lines, Enforcement, 79-9-140, CAB Adv Dig, September, 1979, p 78.

Carrier's advertisements, repeated twice in 2 newspapers at 3 1/2 -month interval and read by thousands of readers, represent practice engaged in by carrier and not single act that may be deemed excluded from concept of "practice" within meaning of former 49 USCS Appx § 1381. Delta Air Lines, Enforcement, 79-9-140, CAB Adv Dig, September, 1979, p 79.

If carrier does not impose limitations at time, or reasonable time after, it advertises fare, it is not unfair or deceptive practice under former 49 USCS Appx § 1381 to advertise fare as unrestricted, even when carrier reserves right in its tariff to impose capacity limits; failure to disclose right to impose limits does not by itself actually harm anyone; conversely, it could be misleading to advertise fare as subject to capacity control limitation when, in fact, carrier will not impose such restriction within time that consumers would ordinarily respond to ad. World Airways v American et al., Complaint, 79-10-7, CAB Adv Dig, October, 1979, p 5.

It is not necessary to prove actual deception before invoking powers under former 49 USCS Appx § 1381 to prevent unfair or deceptive practices; it is deceptive practice to impose capacity limitation on availability of fare which, in preceding 7 days, has been advertised as unrestricted, unless there is equally prominent disclosure of limitation. Trans World Airlines, Discount-Fare Advertising, 80-6-29, CAB Adv Dig, June, 1980, p. 23.

"No-strings-attached" advertisements violate former 49 USCS Appx § 1381 where they do not inform passengers of no cost-free rerouting policy in event of flight cancellation. Capitol International, Enforcement, 81-4-99, CAB Adv Dig, April, 1981, p 46.

12. Dealings in stock

Former 49 USCS Appx § 1381 violation cannot be established simply by showing disruptive effects of hostile takeover attempt; some additional overt act which in itself constitutes unfair deceptive practice has to occur. TXI-Nat., Acquisition/Enforcement Case, 80-2-151, CAB Adv Dig, February, 1980, p 77.

Carrier did not violate former 49 USCS Appx § 1381 because it may have bought airline stock with intent to profit by later reselling of stock; even if accompanied by some disruption

in target company, investment motivated by desire to resell cannot be considered unfair. TXI-Nat., Acquisition/Enforcement Case, 80-2-151, CAB Adv Dig, February, 1980, p 78.

13. Delay or suspension of service

Carrier whose services are suspended is expected to notify its passengers of cancellation, and attempt to find alternate transportation, and failure to do so will be considered in light of unfair or deceptive practices provisions of former 49 USCS Appx § 1381. National Airlines, Daytona Beach Suspension, 79-3-99, CAB Adv Dig, May, 1979, p 34.

Before carrier suspends service to point, it is expected to contact all passengers with reservations to inform them of cancellation and arrange alternate transportation and failure to do so will result in its actions being viewed in light of unfair and deceptive practices provisions of former 49 USCS Appx § 1381. Air Midwest et al., Essential Service, 79-6-191, CAB Adv Dig, June, 1979, p 113.

Since carrier submitted sworn statement that extensive delays on outbound charter flights were due to mechanical problems, there was no reason to believe such explanations were unfair or deceptive in violation of former 49 USCS Appx § 1381. Pieper v Capitol International Airways, 79-12-105, CAB Adv Dig, December, 1979, p. 46.

14. Discrimination in special promotions

Carrier violated former former 49 USCS Appx §§ 1374(b) and 1381 by failing to individualize its Ticket-By-Mail blacklist; multifamily dwellings, streets, schools, dormitories, zip-code areas and street addresses were blacklisted, causing many creditworthy consumers to be denied Ticket-By-Mail credit; carrier violated former 49 USCS Appx § 1381 by telling consumers that the reason they did not receive Ticket-By-Mail credit was due to the Post Office's difficulty in delivering tickets into their neighborhood, when in fact they were blacklisted. Delta Air Lines, Enforcement re Ticket-By-Mail, 78-8-101, CAB Adv Digest, August, 1978, p 66.

15. Excessive commissions

Under former 49 USCS Appx § 1381, commission differentials can be prohibited as unfair method of competition, if it appears carrier is offering excessive commissions in way that threatens industry's competitiveness. IATA Uniform Commission Rates, 78-8-87, CAB Advance Digest, August, 1978, p. 78.

16. Failure to explain denied boarding compensation

Carrier violated former 49 USCS Appx §§ 1374 and 1381 by failing to distribute written statements explaining payment of denied boarding compensation (DBC) to 10 bumped passengers, and by failing to timely tender compensation to 5 passengers. Ozark Air Lines, Denied-Boarding Violations, 78-9-134, CAB Adv Dig, December 29, 1978, p. 1.

17. Travel packages

Total price of inclusive tour is often substantially less than regular round-trip airfare alone, and since ground portion may be relatively small passengers can save considerably even without making use of it; carriers are not obligated to require that travelers use ground portion for which full tariff price is paid, and carrier did not violate former former 49 USCS Appx § 1373(b) by failing to impose such requirement; fact that carriers may anticipate that many purchasers would not use ground portion does not mean that ground portion was throwaway in violation of former former 49 USCS Appx §§ 1373(b), 1381. Quantas v Air New Zealand-Foremost Tours, 78-3-34, CAB Adv Dig, March, 1978, pp 13, 14.

18. Wrongful discounting of published fares

Flexibility in former 49 USCS Appx § 1386(b) encourages claims settlements and avoids expense and delay of legal proceedings, but authority remains to enforce former 49 USCS §§ 1374(b) and 1381 should carrier use monetary adjustments to complainants as ruse for discounting published fares. Consumer Complaint Reparations, Exemption, 78-12-49, CAB Adv Dig, December, 1978, p. 18.

19. Others

Board [now Secretary of Transportation] was justified in its findings that use by large unscheduled irregular carrier of name similar to that of scheduled carrier had caused "substantial public confusion" and constituted unfair and deceptive practice, and was justified in ordering carrier to cease and desist from such use, though board made no findings that use of name was intentionally deceptive or fraudulent or that other carrier was injured thereby. American Airlines, Inc. v North American Airlines, Inc. (1956) 351 US 79, 100 L Ed 953, 76 S Ct 600.

Civil Aeronautics Board [now Secretary of Transportation] did not act capriciously, arbitrarily, or beyond its authority in issuing rules which (1) forbid airlines from biasing their computerized reservation systems or charging different prices to different airlines for listing in such systems, and (2) forbid deletion from airlines' computerized reservation systems of information about connecting flights of 2 airlines listed under single airline's code name; Board [now Secretary of Transportation] was not required to conduct evidentiary hearing before issuing rules, where rules were based on kind of findings normally made in adjudicative proceeding; Board [now Secretary of Transportation] did not act arbitrarily or capriciously in allowing airlines subject to anti-bias rule to employ bias against foreign airline and provides computerized reservation system to travel agents overseas that is biased against U.S. airlines. United Air Lines, Inc. v Civil Aeronautics Bd. (1985, CA7) 766 F2d 1107, 1985-2 CCH Trade Cases P 66704.

Resolutions that limit ways or extent to which carriers may compensate or solicit their agents are adverse to public interest. IATA, Passenger Agency Resolutions, 80-7-112, CAB Adv Dig, July, 1980, p 70.

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Citation: **766 f2d 1107**

*766 F.2d 1107, *; 1985 U.S. App. LEXIS 31444, **;*
1985-2 Trade Cas. (CCH) P66,704

UNITED AIR LINES, INC., et al., Petitioners, BRITISH AIRWAYS PLC, et al., Intervening Petitioners, v. CIVIL AERONAUTICS BOARD, Respondent, FRONTIER AIRLINES, INC. et al., Intervening Respondents

Nos. 84-1877, 84-2351, 84-2719, 84-2835, 84-3018

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

766 F.2d 1107; 1985 U.S. App. LEXIS 31444; 1985-2 Trade Cas. (CCH) P66,704

April 4, 1985, Argued
July 3, 1985, Decided

PRIOR HISTORY: [1]**

Petitions for review of Orders of the Civil Aeronautics Board.

DISPOSITION: Petitions for review denied.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner airlines sought review of two rules issued by respondent, the Civil Aeronautics Board (Board), concerning computerized reservation systems that the airlines provided to travel agencies.

OVERVIEW: Petitioner airlines sought review of two rules issued by respondent, the Civil Aeronautics Board (Board), concerning computerized reservation systems that the airlines provided to travel agencies. The court denied the airlines' petition for review, finding that the Board's rule against biasing was necessary to protect travel agents and air travelers from being deceived by the airlines. The court further found that the Board's rules were not arbitrary or capricious. Finally, the court found that the airlines failed to show entitlement to an evidentiary hearing in the matter because they failed to demonstrate that a hearing was necessary to resolve specific factual disputes that were critical to the soundness of the Board's rules.

OUTCOME: The court denied the airlines' petition for review because it found that the rules were not arbitrary and capricious and were necessary to protect travel agents and air travelers from deception.

CORE TERMS: airline, computerized, rulemaking, flight, reservation, antitrust, reservation system, biasing, travel, adjudicative, price discrimination, connecting, unfair, evidentiary hearing, air, deceptive, informal, regulation, competitor, delisting, carrier, cross-examination, notice, transportation, competitive, customer, bias, Federal Trade Commission Act, forbid, travel agent

LexisNexis(TM) HEADNOTES - Core Concepts - ◆ Hide Concepts

Transportation Law > Air Transportation > Prices, Routes & Services
HN1 Section 204(a) of the Federal Aviation Act (Act), 49 U.S.C.S. § 1324(a), empowers

it to make only rules pursuant to and consistent with the provisions of the Act. Section 411 of the Act, 49 U.S.C.S. § 1381, creates an adjudicative procedure for enforcing its substantive provisions. It authorizes the Civil Aeronautics Board (Board) to investigate and determine whether any air carrier has been or is engaged in unfair or deceptive practices or unfair methods of competition. If the Board finds, after notice and hearing, that such air carrier is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier to cease and desist from such behavior.

Administrative Law > Agency Rulemaking > Informal Rulemaking

HN2 The Administrative Procedure Act (Act), 5 U.S.C.S. § 553(c), makes clear that notice of the scope and general thrust of a proposed rule, and an opportunity to submit written comments, are all the procedure that an agency engaged in "informal rulemaking" is required to provide. An evidentiary hearing is not required. However, an agency is not allowed to conduct what is in fact an adjudicative proceeding without giving the affected parties an opportunity for an evidentiary hearing simply by calling the proceeding informal rulemaking.

COUNSEL: Edward L. Foote, Winston & Strawn, Chicago, Illinois, (United Air Lines); William C. Clark, Barret, Smith, Schapiro, Simon & Armstrong, New York, New York (British Air Line).

Thomas L. Ray, Civil Aeronautics Bd., Washington, District of Columbia; Frank T. Costello, Zuckert, Scoutt, Rosenberger & Johnson, Washington, District of Columbia, for Respondents.

JUDGES: Bauer and Posner, Circuit Judges, and Morton, Senior District Judge. *

* Hon. L. Clure Morton of the Middle District of Tennessee, sitting by designation.

OPINIONBY: POSNER

OPINION: [*1109] POSNER, Circuit Judge.

We have consolidated petitions to review two rules (containing three contested regulations) issued by the Civil Aeronautics Board concerning the computerized reservation systems that several airlines provide to travel agencies. 14 C.F.R. Parts 255, 256. Although the Board has since gone out of business as a result of the deregulation of the airline industry, the authority under which these rules were issued survived the deregulation and has been transferred to the Department of Transportation, **[**2]** which will be administering the rules if we uphold them. (To simplify exposition, we shall refer to the regulatory agency throughout as the Board.) The petitions raise difficult questions of administrative law.

Since the mid-1970s several major airlines have created computerized reservation systems, each consisting of computer terminals and printers in travel agents' offices plus telecommunications hook-ups to the airline's master computer that enable the travel agents to send as well as receive. The terminal in the agent's office displays information about flights, including fares, departure and arrival times, and seat availability. The travel agent can use the equipment to book a flight for the customer and print out the ticket. Although each airline that developed a computerized reservation system did so as a marketing tool for its own flights, each system contains flight information for other airlines as well -- without which the system would have very limited value to the agent, since no airline serves all markets and few travel agents have more than one computerized reservation system. An airline that owns such a system will charge travel agents for the use of its system and **[**3]** will charge other airlines whatever they will pay to have their flights listed in the

system. The charge to another airline generally is higher, the more competitive the other airline is with the airline owning the system.

There are six systems; five are owned by airlines. The largest system is American Airlines' -- 43 percent of all travel agencies in the United States (by revenue) use it. United's is the next largest, with 27 percent, followed by TWA with 10 and Eastern with 4. Delta and the one independent **[*1110]** system have 2 percent each. Of all airline tickets sold, 57 percent (measured by revenues) are sold through computerized reservation systems. The Board's rules are limited to systems owned by airlines; it has no regulatory authority over the independent provider.

Besides the direct charges levied on travel agents and other airlines, airlines that own computerized reservation systems derive substantial revenue from the additional airline business that they get from "biasing" the system, that is, displaying flight information in a way that favors their own flights. The airline might for example impose a "penalty" in its computerized reservation system of 30 minutes **[**4]** on a competitor's flights. Suppose (to take a hypothetical case) United had a nonstop flight leaving Denver for New York at 12:25 p.m. and Frontier had an identical flight leaving at noon. If a customer phoned a travel agent who had United's computerized reservation system and said he wanted a flight from Denver to New York that was leaving around noon, and the travel agent punched this information into the computer, the computer would display United's flight first, ahead of Frontier's. The 30-minute penalty would have put Frontier's flight in second place, as if it really left after rather than before United's flight. Since the actual departure times appear on the screen, the moderately alert travel agent will not be fooled into thinking that United's flight really is more convenient for the customer than Frontier's. But many customers don't care much about the exact time of flight, and since the screen on the computer terminal has room for only eight flights, the devices (only one of which we have mentioned) that the system's owner uses to bias the display may push an otherwise more convenient flight onto the next screen, which will be displayed only if the travel agent presses a **[**5]** button. He may not press it if he doesn't think the customer has a strong preference for a particular departure or arrival time. Although the advantage that biasing confers on an owning airline would seem to be small, apparently it is big enough to generate millions of dollars in extra passenger revenues for such airlines.

The Board's first rule under attack in this case forbids airlines to bias their computerized reservation systems, except when the biasing is directed against certain foreign airlines, or to charge different prices to different airlines for listing in their systems (price discrimination). Other provisions of the rule are not challenged by anyone, so need not be discussed. In a separate rulemaking proceeding the Board issued a rule forbidding the deletion from the airlines' computerized reservation systems of information about connecting flights of two airlines listed under a single airline's code name. Sometimes two airlines will make an arrangement in which two connecting flights, one provided by each airline, are treated as far as possible as if they were connecting flights on the same airline (for example, by having the same or a close-by gate at the connecting **[**6]** terminal), and they are listed in the various computerized reservation systems under the name of the larger airline only. See *Allegheny Substitute-Service Agreements*, 80 C.A.B. 588, 592-94 (1979). United Air Lines announced that this was a deceptive practice and that it would delete information on such connecting flights from its computerized reservation system. The Board's rule forbids delisting, thus reserving to the Board the responsibility for preventing deception of airline passengers. Although prompted by United's announcement, the delisting rule, like the rule against biasing and price discrimination, applies to all airlines that own computerized reservation systems.

The history of these rulemaking proceedings has now to be described. In 1982 the Board, along with the Justice Department's Antitrust Division, had, at the request of a Congress besieged with complaints from travel agents and from airlines that do not own computerized

reservation systems, begun to investigate biasing, price discrimination, and related practices. After completing its report to Congress, and after the Justice Department had completed its own **[*1111]** investigation, which concluded **[**7]** (though the Department did not file an antitrust suit) that airlines which own computerized reservation systems use them to weaken competition from other airlines, the Board issued an advance notice of proposed rulemaking on September 9, 1983. The notice invited interested persons to submit written comments by October 17, but the deadline was later extended to November 7. Reply comments were due two weeks later, but this deadline was later extended to December 16. In March 1984 the Board issued a formal notice of proposed rulemaking with a comment and reply period that closed on May 11, and on July 27 the Board issued its final rule. The other rulemaking proceeding, which was limited to the matter of the delisting of connecting flights, proceeded similarly. In neither proceeding was there an evidentiary hearing, that is, a hearing in which witnesses testified "live" and were subject to cross-examination. United Air Lines -- the principal opponent of the proposed rules -- had requested that the proceedings be treated as adjudication rather than rulemaking, so that there would be such a hearing.

Only United has challenged the Board's two rules in all the respects we have mentioned **[**8]** -- biasing, price discrimination, and delisting of certain connecting flights. Republic Airlines challenges the prohibition of price discrimination as having led to higher charges to Republic for listing its flights in computerized reservation systems, while British Airways makes a similar objection and also objects to one aspect of the exemption, in the anti-bias prohibition, regarding certain foreign airlines.

United challenges first of all the Board's power to issue rules, as distinct from cease and desist orders in adjudicative proceedings, to enforce the prohibition in section 411 of the Federal Aviation Act against "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." 49 U.S.C. § 1381. The provision of the Act that empowers the Board to make rules, HN1 section 204(a), 49 U.S.C. § 1324(a), empowers it to make only rules "pursuant to and consistent with the provisions of" the Act. Section 411 creates an adjudicative procedure for enforcing its substantive provisions. It authorizes the Board to "investigate and determine whether any air carrier . . . has been or is engaged in unfair **[**9]** or deceptive practices or unfair methods of competition . . . ." If the Board finds, "after notice and hearing, that such air carrier . . . is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier . . . to cease and desist from such" behavior. How, United asks, can a rule forbidding a deceptive practice or an unfair method of competition be pursuant to and consistent with section 411, when that section specifies cease-and-desist-order proceedings, traditionally akin to equity trials, for enforcing its prohibitions?

But a more natural reading of section 204(a) is that the Board can make only rules designed to carry out policies set forth elsewhere in the Act -- in section 411, for example. Section 411 announces a policy against unfair or deceptive practices and unfair methods of competition, and while at the same time it creates an adjudicative procedure for enforcing that policy, nothing in the Act indicates that it is the exclusive procedure. In this area, moreover, a page of history is worth a volume of textual explication. The Board has been issuing rules based on section 411 since 1960. See, e.g., *National Airlines, Inc., Enforcement Proceeding*, 31 C.A.B. 390, 392 (1960) **[**10]** (overbooking); 14 C.F.R. Part 250 (same); 14 C.F.R. Part 253 (notice of passenger contract terms); 14 C.F.R. Part 254 (liability for lost luggage). These rules are well known to every air traveler and no court has ever questioned the Board's authority to issue them. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 294-95, 303, 306-07, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976), is illustrative of the many cases that assume the existence of such authority. A similar exercise of rulemaking authority by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, on which section 411 of the Federal Aviation **[*1112]** Act was modeled (*American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 82, 100 L. Ed. 953, 76 S. Ct. 600 (1956)), was upheld in *National Petroleum Refiners Ass'n v. FTC*, 157 U.S. App. D.C. 83, 482 F.2d 672

(D.C. Cir. 1973), a case that has long been regarded as authoritative, and whose validity United does not challenge. Although the language of the corresponding section of the two statutes is not identical, none of the differences seem deliberate, **[**11]** let alone material.

It is true that the Trade Commission's exercise of what had been a dormant rulemaking power (other than to make rules of procedure) proved to be extremely controversial, with the result that in 1975, and again in 1980, Congress placed specific limitations on the use of the power to deal with unfair or deceptive practices. See Magnuson-Moss Act of 1975, adding 15 U.S.C. § 57a; Federal Trade Commission Improvements Act of 1980, amending 15 U.S.C. § 57a. But it was assumed that the Trade Commission had the power to issue substantive rules; Congress just wanted to limit the exercise of the power in particular ways. This hardly suggests either that the Civil Aeronautics Board lacks power to make rules to administer section 411 or that it must conform its rulemaking to procedures prescribed in amendments to the Federal Trade Commission Act. On the contrary, the legislative history of the 1984 "Sunset Act," which transferred the Board's rulemaking powers to the Department of Transportation upon the Board's demise, reveals that one reason why Congress refused to transfer those powers to the Federal Trade Commission instead **[**12]** of the Department of Transportation was "the prolonged rulemaking procedures which FTC is required to undertake under the Magnuson-Moss Act." H.R. Rep. No. 793, 98th Cong., 2d Sess. 6 (1984).

Congress, looking forward to the period after abolition of the Board, was very concerned to preserve (in the Department of Transportation) authority to enforce section 411. See Civil Aeronautics Board Sunset Act of 1984, Pub. L. 98-443, §§ 3, 7, 98 Stat. 1703, 1706 (Oct. 4, 1984); H.R. Rep. No. 793, *supra*, at 3-6; H.R. Conf. Rep. 1025, 98th Cong., 2d Sess. 14-15 (1984). And Congress was well aware that the Board had used rulemaking to enforce the section. See H.R. Rep. No. 793, *supra*, at 4. It is too late to inquire whether, as an original matter of interpretation of sections 204(a) and 411, rulemaking can be used to prevent unfair or deceptive practices or unfair methods of competition. To hold that it cannot be so used would pull the rug out from under Congress's restructuring of airline regulation.

United has somewhat more persuasive arguments against the particular exercises of the Board's power that are challenged in this case. We find it helpful in appraising these arguments **[**13]** to distinguish between the Board's prohibition of biasing, on the one hand, and of price discrimination and the delisting of certain connecting flights, on the other. Although all three prohibitions were based on the Board's antitrust analysis, the prohibition of biasing was also, and as we read the Board's order alternatively, based on the Board's power to prohibit deceptive, as distinct from anticompetitive, practices. Insofar as the Board believed that a rule against biasing was necessary simply to protect travel agents and air travelers from being deceived, the Board's proceeding clearly was adequate, and we uphold the rule without hesitation.

Remember that section 411 is essentially a copy of section 5 of the Federal Trade Commission Act. Long before there were rulemaking proceedings under section 5, the Trade Commission, in a series of cease and desist order proceedings dealing with false advertising and false labeling, had established, and the courts had accepted, the principle that the tendency of a practice to deceive consumers is a question the Commission can decide on the basis of common sense and experience, without taking testimony about consumers' actual behavior. See, **[**14]** e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92, 13 L. Ed. 2d 904, 85 S. Ct. 1035 (1965); *E.F. Drew* **[*1113]** *& Co. v. FTC* , 235 F.2d 735, 740-41 (2d Cir. 1956); *Zenith Radio Corp. v. FTC*, 143 F.2d 29, 31 (7th Cir. 1944); but cf. *Dayco Corp. v. FTC*, 362 F.2d 180, 186-87 (6th Cir. 1966). This was how the Commission in 1964 justified the use of informal rulemaking to create a rule against the deceptive advertising and labeling of cigarettes, see Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8325, 8350, 8372 (July 2, 1964); and it is mainly in the area of deceptive practices that

the Civil Aeronautics Board has promulgated rules under section 411. *American Airlines, Inc. v. North American Airlines, Inc., supra*, 351 U.S. at 86, suggests that the Board has the same freedom to base a finding of deceptive practice on its general experience as the Trade Commission does.

A traveler buys a ticket. He thinks it guarantees him a seat. He arrives at the airport and finds that he has no seat, because the airline overbooked. He is deceived, because the airline **[**15]** has never disclosed its practice of overbooking, and is angry. No trial is necessary to validate the conclusion that undisclosed overbooking is deceptive and that something should be done about it. Informal rulemaking is a sensible method for dealing with problems of deception in general, and in any event one sanctified by long usage and broad acceptance and by the parallel to proceedings under the Federal Trade Commission Act.

The biasing of computerized reservation systems is a problem of deception. There is no dispute that it occurs and that it diverts business to the biasing carriers. Few air travelers know that when they call a travel agent and ask him to book them on the most convenient flight the agent will in all likelihood be using a reservation system tilted in favor of the carrier that sold him the system. Loyal and skillful travel agents no doubt correct for the tilt, but not all travel agents are either. No doubt other tactics -- such as commission "overrides" -- are used to achieve the same type of diversion that biasing achieves, and they have not (not yet anyway) been forbidden by the Board; but we cannot prescribe the Board's enforcement priorities. Maybe biasing **[**16]** can be defended as a method by which airlines that spent hundreds of millions of dollars to develop computerized reservation systems, at considerable risk of failure, can recoup their investment with a profit commensurate with the amount of the investment, the length of time it has been outstanding, and the risk of loss -- though of course an airline can, and does, charge both the travel agents and other airlines for access to its computerized reservation system.

But whether or not the case against biasing is open and shut is not the question. All that matters is that the relevant considerations can be fully developed in an informal, speedy, nonoral, notice-and-comment rulemaking proceeding of the sort the Board conducted. The basic issue that the Board had to decide -- the tendency of a marketing practice to deceive a significant number of consumers, whether ultimate or intermediate (here both groups are involved), see *Great Lakes Airlines, Inc. v. United States Overseas Airlines, Inc.*, 34 C.A.B. 59, 61 n.7 (1961) -- has traditionally been treated as judgmental rather than evidentiary. The agency that in informal, speedy, nonoral, notice-and-comment rulemaking **[**17]** proceedings has regulated overbooking and compensation for lost luggage and many other facets of airline marketing was authorized to use the same type of proceeding to deal with biasing.

A harder question is presented by the Board's antitrust rules, which is how the prohibitions against price discrimination and against delisting certain connecting flights must be regarded; for they, unlike the prohibition of biasing, rest entirely on the Board's antitrust analysis. The questions about the Board's antitrust analysis are more procedural than substantive, but United raises questions of both sorts.

Substantively, the Board's analysis and conclusions, although far from airtight, can hardly be thought arbitrary or capricious, which is the relevant statutory standard. **[*1114]** See 5 U.S.C. § 706(2)(A). It is difficult, though as the recent success of People Express shows not impossible, to market air transportation without the help of travel agents. And it is difficult for an airline to enlist that help effectively if its flights are not included in the travel agent's computerized reservation system. It is also difficult (risky and costly) to create a computerized **[**18]** reservation system from scratch. A large initial investment is required; there is no assurance of success; and having your own system does not liberate you from having to get access to other systems. An airline with its own system must still buy into several others. Even the largest system, American Airlines', is used by fewer than half of

the travel agencies (weighted by ticket revenues). Unless an airline limits its operations to one small region, it must, whether or not it has its own computerized reservation system, persuade several of the largest airlines to list its flights in their systems if it is to have a fair chance of competitive success. It thus is dependent for an essential facility on what may be its principal competitors; and while the airlines that own computerized reservation systems do not refuse to include their competitors' flight information, they sometimes charge substantial fees for inclusion.

If one airline owned all of the computerized reservation systems, we would have a conventional antitrust monopolization problem of the "bottleneck" variety. See, e.g., *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983). **[**19]** It would not make a critical difference whether the monopolist refused to list the flights of competing airlines altogether or merely charged high prices to list them in order to slow the growth and weaken the competition of those airlines. Although none of the airline owners of computerized reservation systems has a conventional monopoly position in the market for that service, and they are not accused of colluding, the Board found that some of them, anyway, had substantial market power. This finding, if sustained, would bring their competitive practices within the broad reach of section 411. We know from many decisions under both that section and its progenitor, section 5 of the Federal Trade Commission Act, that the Board can forbid anticompetitive practices before they become serious enough to violate the Sherman Act. See, e.g., *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 303-07, 9 L. Ed. 2d 325, 83 S. Ct. 476 (1963); *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 369-70, 14 L. Ed. 2d 443, 85 S. Ct. 1498 (1965); *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136-37 (2d Cir. 1984). The resemblance of the **[**20]** conduct in this case to what has traditionally been regarded, whether rightly or wrongly, as monopolistic behavior is close enough to avoid the Second Circuit's recent criticisms of the Trade Commission's attempt to stretch the antitrust prohibition of collusive pricing to cover parallel but independent pricing practices (such as basing-point pricing) for which there was a legitimate business justification. See *id.* at 140. Price discrimination, and denying a competitor access to an essential facility on equal terms (one way of describing the delisting of connecting flights of two airlines listed under the name of one), are traditional methods of illegal monopolization. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416, 436-38 (2d Cir. 1945); *MCI Communications Corp. v. American Tel. & Tel. Co., supra*, 708 F.2d at 1132-33. Though no airline has a monopoly market share, that is not required by section 411.

Although no more than a modest extrapolation from conventional antitrust thinking, the Board's analysis that led it to forbid price discrimination and the deletion of connecting-flight information is open to various **[**21]** objections. If the owner of a computerized reservation system used the system to weaken competition from other airlines, it is a little hard to see why those airlines would not simply switch their patronage to a competing system that was not biased against them. Competition would (one might have thought) force at least some of the owners of competing **[*1115]** systems to offer unbiased listings in order to expand the market for their systems. Even if every airline owner refused, because of the impact on its air transportation revenues, to give equal prominence to a competitor's flights, there is nothing to stop independent companies from offering a computerized reservation system with no such inhibitions -- and one does. But the one independent is small. And we have said that an airline would need to be listed, if not in all systems, at least in the largest ones, which means in the systems of its principal competitors. Of course if the owner of a system charges such a high price that no competing airline will pay it, the owner is hurt. It not only loses revenue from that airline; its system will be worth less to travel agents if it contains less information. But the owner may be **[**22]** able to extract a high enough price from competitors to slow their growth; indeed, that may be a purpose of the high prices. As for delisting connecting flights of different airlines listed under a single airline's name, United may have hoped to gain more business by thus complicating the marketing of competing services than it would lose to travel agents by providing them with

less flight information.

Analyses less rigorous than the Board's in this case have supported many decisions condemning practices thought to create a danger of foreclosing competitors from sources of supply or marketing channels, sometimes in a setting of lower market shares than in this case. See, e.g., *Ford Motor Co. v. United States*, 405 U.S. 562, 31 L. Ed. 2d 492, 92 S. Ct. 1142 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 16 L. Ed. 2d 587, 86 S. Ct. 1501 (1966). Moreover, national market share figures may understate the actual market power of the individual airlines, though perhaps not significantly. From a consumer standpoint the airline market consists of a series of discrete city pairs, each consisting of the consumer's desired origin and destination; and there are **[**23]** of course fewer airlines serving any particular city pair than there are airlines in the nation as a whole. However, the airplanes and other capital equipment of the airline industry are highly mobile, and now that the industry has been deregulated there no longer are legal barriers to airlines' redeploying their equipment, and swiftly too, to any city pair in which ticket prices are above marginal costs. See Bailey & Panzar, *The Contestability of Airline Markets During the Transition to Deregulation*, 44 Law & Contemp. Prob. 125 (Winter 1981). When the elasticity of supply is high (meaning that a slight increase in price will evoke a large increase in output, in this case of airline service between particular city pairs), potential supply must be included in estimating market shares. Thus airplanes flying between Des Moines and Salt Lake City are in the "market" for air transportation between Newark & Atlanta. Nevertheless there is some evidence that city-pair markets are not entirely meaningless -- that high concentration in some of those markets leads to high prices. See Graham, Kaplan & Sibley, *Efficiency and Competition in the Airline Industry*, 14 Bell J. **[**24]** Econ. 118, 128-37 (1983).

All this assumes of course that the structure of the market for air transportation provides a useful guide to competitive conditions in what is, at least analytically, the distinct market for computerized reservations (or perhaps for all reservations). Obviously there is some relationship between the markets. The record shows that in cities like Denver, where United accounts for a very large fraction of departing and arriving flights, United is able to persuade most travel agents (72 percent, weighted by revenue) to subscribe to its computerized reservation system. This in turn makes a listing in that system a must for airlines that want to compete in Denver, and so enables United to charge a high price for a listing, thereby impeding (no one knows by how much) the growth of competing airlines in the Denver market. Such a strategy may well be short-sighted; it may accelerate the rise of competing computerized reservation systems; but we cannot call the Board irrational for thinking, with some factual basis, that United was pursuing such a strategy. There **[*1116]** might seem to be grave doubt whether the Board could reach the same conclusion about airlines **[**25]** that have only modest shares of the market for computerized reservation systems, such as Delta with its 2 percent. But no other airline besides United is challenging the Board's findings with respect to market power.

Since the Board considered the various arguments bearing on its antitrust analysis and reached a conclusion that is plausible, if perhaps not compelling, its rules cannot be set aside as arbitrary and capricious. But a serious question remains of whether the Board gave United Air Lines all the procedural safeguards that United was entitled to.

HN2 The Administrative Procedure Act makes clear that notice of the scope and general thrust of the proposed rule, and an opportunity to submit written comments, are all the procedure that an agency engaged in "informal rulemaking" is required to provide. See 5 U.S.C. § 553(c); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758, 32 L. Ed. 2d 453, 92 S. Ct. 1941 (1972). An evidentiary hearing is not required. See, e.g., *United States v. Florida East Coast Ry.*, 410 U.S. 224, 240-46, 35 L. Ed. 2d 223, 93 S. Ct. 810 (1973); *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 281-82, 93 L. Ed. 1353, 69 S. Ct. 1097 (1949). **[**26]** A movement in the courts of appeals, particularly the Court of Appeals for the District of Columbia Circuit, to require where appropriate additional

procedures in informal rulemaking beyond those required by the Administrative Procedure Act (see, e.g., cases cited in *O'Donnell v. Shaffer*, 160 U.S. App. D.C. 266, 491 F.2d 59, 62 (D.C. Cir. 1974)), was cut short by the Supreme Court's holding and blunt language in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-48, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978).

But an agency is not allowed to conduct what is in fact an adjudicative proceeding without giving the affected parties an opportunity for an evidentiary hearing, just by calling the proceeding informal rulemaking. That would be too facile an evasion of the procedures that the Administrative Procedure Act requires for adjudicative proceedings such as (we may assume) adjudicative proceedings under section 411. See especially 5 U.S.C. § 556(d). Hence if the Board here had, without bothering with an evidentiary hearing though requested by United Air Lines to conduct one, found that **[**27]** United had violated section 411, and issued a rule restricting United's marketing of its computerized reservation system, the rule would be invalid. But this is not what the Board did -- quite. Admittedly it came close.

Although we can set aside, as quite unfounded, United Air Lines' expression of concern that these rules might be given collateral estoppel effect in private antitrust suits that are pending against United in another circuit, see *Delamater v. Schweiker*, 721 F.2d 50, 53 (2d Cir. 1983) (per curiam); cf. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22, 16 L. Ed. 2d 642, 86 S. Ct. 1545 (1966), the parts of the Board's statements explaining its prohibitions against price discrimination and the delisting of connecting flights do read like excerpts from an antitrust opinion issued at the conclusion of an evidentiary hearing. The Board finds that United and the other airline owners of computerized reservation systems have market power, and while studiously, perhaps too studiously, disclaiming any conclusion that a particular airline has abused that power and discriminated against competing airlines, leaves the reader **[**28]** in no doubt that this is precisely what it believes. In its notice of proposed rulemaking on biasing and price discrimination, the Board, while on the one hand saying that it has "made no accusations of illegal conduct," 49 Fed. Reg. at 11660, on the other hand states that "CRS carriers [i.e., the airlines that own computerized reservation systems] are engaged in unfair methods of competition" and in "conduct producing competitive harms that may be analogous to conduct that would be labeled an **[*1117]** abuse of monopoly power under section 2 of the Sherman Act," are "impeding [travel] agents' ability to use other systems in conjunction with their own," "clearly restrict the output of their product," "have the ability and strong incentives to exercise this [market] power to reduce competition in air transportation, . . .[and] some CRS owners may in fact be exercising this power today." *Id.* at 11646-47, 11655, 11657. In issuing the final rule the Board noted "example after example in which the major [CRS] vendors have: dictated fees that were discriminatory, not based on cost, not affected by the prices charged by other vendors and unchanged by pleas that **[**29]** they were excessive; forced other carriers to pay substantial net ticketing fees as a condition of CRS access; steadily increased the degree of bias in their system, with no adverse effect on their CRS market penetration; and reduced or withheld service on a selective basis to discipline air transportation competitors. Both the CRS vendors and their air carrier customers are acutely aware of the vendors' market power, and they act accordingly." 49 Fed. Reg. at 32543 (citations omitted); see also *id.* at 32547.

These findings were based primarily on the comments submitted by the Justice Department, summarizing the results of its investigation into allegations that airlines that own computerized reservation systems were violating the antitrust laws. Although the airlines had and took several months to prepare written rebuttals to the Justice Department's report, they did not have the full opportunity normally given persons accused of antitrust violations, including the "incipient" violations punishable under statutes such as section 5 of the Federal Trade Commission Act and section 411 of the Federal Aviation Act, to test the truthfulness of the allegations. **[**30]** They had no opportunity to use subpoenas or other methods of pretrial discovery, or to cross-examine the witnesses on whose depositions the Department's comments were based, or to explore the background, authenticity, and meaning of various

corporate documents on which those comments relied. For example, one of the juicier tidbits in the Justice Department's comments is a letter from the president of American Airlines to Continental Airlines turning down a request to buy computer-reservation software on the ground that Continental had begun competing with American in air fares. United Air Lines could not depose the president of American Airlines, or officers of Continental, in an attempt to rebut the damaging implication of the letter regarding the anticompetitive uses to which American Airlines had allegedly put its computerized reservations capability.

Also, despite much talk by the Board about "market power," the only effort made to establish this elusive force beyond the market-share statistics mentioned earlier in this opinion consisted of evidence that the owners of computerized reservation systems had engaged in price discrimination and other practices symptomatic of monopoly **[**31]** or market power. This illustrates the important role that findings of abuses played in the Board's analysis, but the broader point is that United Air Lines did not have the opportunity it would have had in an antitrust trial to show that the "market power" that it and other owners of computerized reservation systems appear to have really is trivial, and was not (could not have been) abused. Maybe United could have shown that the deregulation of the airline industry, and resulting entry of new firms into the industry and old airlines into new (to them) city pairs, has created attractive opportunities for non-airline vendors of computerized reservation systems, opportunities that will place tight limits on the power of the airlines that own such systems to oppress their competitors. Although such evidence would also weaken the case for prohibiting biasing, we do not think that is important. The Board can forbid a deceptive practice without finding that it is widespread or can substantially distort competition, and we saw that the Board's alternative basis for the prohibition was independent of the market-wide effects, if any, of the practice.

[*1118] On the question whether price **[**32]** discrimination may in fact be a reasonable method of pricing so unconventional a service as a computerized reservation system -- especially in the era, about to begin, when biasing, another method of recouping the investment in creating such a system, will be forbidden -- United did introduce an economist's statement that if an airline were forced to charge uniform prices to all airlines wanting to be listed in its computerized reservation system the uniform price might have to be so high that some airlines could not afford to pay it. Everyone might be worse off: some airlines might not be served at all and the providers' net revenues might be lower too. The Board rejected the economist's statement as based on incorrect assumptions. And in fact the statement is too remote from the particulars of computerized reservations systems to carry much weight. But the economist did not have as much time to immerse himself in those particulars and present a convincing statement as he would have had in an adjudicative proceeding.

Thus if we thought ourselves free to do so we might hold that the Board had used rulemaking procedures to make adjudicative fact-findings; in the accepted jargon, that **[**33]** it had crossed the line that separates "legislative" facts -- the kind that can be found reliably without an evidentiary hearing -- and "adjudicative" facts, which cannot be. Cf. *Alaska Airlines, Inc. v. CAB*, 178 U.S. App. D.C. 116, 545 F.2d 194, 200-01 (D.C. Cir. 1976). The distinction is a well established one, though variously expressed. See, e.g., *United States v. Florida East Coast Ry., supra*, 410 U.S. at 244-46; *Broz v. Schweiker*, 677 F.2d 1351, 1357 (11th Cir. 1982), modified on other grounds under the name of *Broz v. Heckler*, 721 F.2d 1297 (11th Cir. 1983); *Association of National Advertisers, Inc. v. FTC*, 201 U.S. App. D.C. 165, 627 F.2d 1151, 1161-63 (D.C. Cir. 1979); *Independent Bankers Ass'n v. Board of Governors*, 170 U.S. App. D.C. 278, 516 F.2d 1206, 1217 (D.C. Cir. 1975); 2 Davis, Administrative Law Treatise § 12:3 (2d ed. 1979). It survived *Vermont Yankee*. See 435 U.S. at 542. It is, as we have suggested, implicit in 5 U.S.C. § 556(d), setting forth procedures for certain adjudications before federal agencies. As Professor **[**34]** (now Judge) Scalia has written, even after *Vermont Yankee* the "judicial importation of cross-examination requirements, where an ancient and well-established adjudicatory issue has been kidnapped

into rulemaking," may still be proper. *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 395.

However, the distinction between legislative and adjudicative facts is not easy to apply, or facts such as market power and price discrimination -- abstractions far removed from the simple observations of the eyewitness to a car crash -- easy to classify with respect to it. In support of the conclusion that they are adjudicative facts, at least when they are contested, as they are here, and findings on them used to support a far-reaching regulation of a substantial market, we could point out that the Federal Trade Commission, while active in promulgating rules to prohibit deceptive and otherwise fraudulent practices, has promulgated only one rule (and that back in 1967) to prohibit an antitrust violation. And that rule was of the simplest kind; it forbade the discriminatory provision of advertising allowances. See section 2(d) of the Clayton **[**35]** Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(d); 16 C.F.R. Part 412 (Trade Regulation Rule Against Discriminatory Practices in Men's and Boys' Tailored Clothing Industry); 16 C.F.R. Ch. 1, at pp. 4-5 (table of contents of Subchapter D, Trade Regulation Rules). Although the Commission has long been urged to do more in the way of antitrust rulemaking, see, e.g., Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 Harv. L. Rev. 385 (1964), the urgings have fallen largely on deaf ears. And apart from the rules challenged in this proceeding and the tariff regulation at issue in *National Small Shipments Traffic Conference, Inc. v. CAB*, 199 U.S. App. D.C. 335, 618 F.2d 819 (D.C. Cir. 1980), the Civil Aeronautics Board has only one rule dealing with an antitrust type of subject -- a rule implementing the **[*1119]** statutory regulation of interlocking directorates and similar interlocking relationships. See 14 C.F.R. Part 251 (as modified by Part 287). The use of rulemaking to enforce antitrust principles remains exceptional, for reasons well illustrated by this case.

But unfortunately for **[**36]** United Air Lines, the weight of authority, much of it in the Supreme Court and therefore beyond our power to reexamine, is overwhelming against forcing an administrative agency to hold an evidentiary hearing to resolve disputed questions of antitrust fact, though we can assume there would be an exception for a fact that could not rationally be found without providing an opportunity for cross-examination or some other trial-type procedural safeguard. Subject to this qualification, and provided that the agency issues what is genuinely a rule, which is to say a prospective regulation of general applicability, it is free to base the rule on the kind of findings normally made in an adjudicative proceeding, even if it conducts no evidentiary hearing. An important, perhaps controlling, precedent is *United States v. Florida East Coast Ry., supra*, 410 U.S. at 241-46, where the Supreme Court held that the ICC could use informal rulemaking to establish incentive per diem charges for boxcars. "The incentive payments proposed by the Commission in its tentative order, and later adopted in its final order, were applicable across the board to all of the common carriers by railroad **[**37]** subject to the Interstate Commerce Act. No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances. . . . Though the Commission obviously relied on factual inferences as a basis for its order, the source of these factual inferences was apparent to anyone who read the order. . . . The factual inferences were used in the formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts." *Id.* at 245-46. As explained by Judge Friendly, "The opinion [in *Florida East Coast*] seems to say that 'hearing' provisions in regulatory statutes, which had long been regarded as requiring trial-type hearings, have been modified by the Administrative Procedure Act so that nothing more than notice and written comment is required if the action falls within the APA's expansive definition of rulemaking, and implicitly, of course, that this comports with due process. The definition of rulemaking is exceedingly broad, about the only limitation being that a rule can have only future effect." "*Some Kind of Hearing*", 123 U. Pa. L. Rev. 1267, 1307 (1975) **[**38]** (footnotes omitted). See also 1 Davis, Administrative Law Treatise § 6:23 (2d ed. 1978).

The rules in this case were applied to all providers (within the Board's regulatory domain) of

computerized reservation systems, and thus the findings of fact on which they were based "were used in the formulation of a basically legislative-type judgment, for prospective application only. . . ." Moreover, no effort to resolve a "set of disputed facts" was made. Although past abuses were used illustratively, to show that the Board was not just chasing phantoms, it did not try to determine to what extent any airline had actually violated section 411. It did not rely on the juicy tidbits of which an antitrust jury might have made much; these are not mentioned, and we are not authorized to assume that the Board relied covertly on evidence that would have been unreliable if not tested by cross-examination or supplemented by the fruits of pretrial discovery. And the Board did not come down on just one or two firms; its rules apply to the whole industry of airline-provided computerized reservations systems, the big and the small providers alike. This distinguishes *American Bancorporation, Inc. v. Board of Governors of Fed. Reserve System*, 509 F.2d 29, 37 (8th Cir. 1974), **[**39]** which involved a single acquisition by a bank holding company. Cf. *SEC v. Frank*, 388 F.2d 486, 491-92 (2d Cir. 1968) (Friendly, J.). When government acts across the board, the danger of official arbitrariness is reduced. **[*1120]** See *Philly's v. Byrne*, 732 F.2d 87, 92 (7th Cir. 1984).

Another example of the power that agencies have to make antitrust-like regulations by means of informal rulemaking is the Federal Communications Commission's chain broadcasting rules (limiting network ownership of radio stations) upheld in *National Broadcasting Co. v. United States*, 319 U.S. 190, 87 L. Ed. 1344, 63 S. Ct. 997 (1943). The Commission had based these rules, which were not antitrust rules but had an antitrust flavor, on an investigation that had revealed abuses by the three networks of the economic power created by their ownership of radio stations. The Supreme Court said that its "duty is at an end when we find that the action of the Commission was based upon findings supported by evidence." *Id.* at 224. No one seemed troubled by the fact that the evidentiary basis of the findings had been laid in a rulemaking rather **[**40]** than an adjudicative proceeding, though the regulations that resulted were farther-reaching than anything involved in this case. Admittedly the case preceded the enactment of the Administrative Procedure Act, but many years later the Supreme Court upheld a similar regulation, limiting newspaper ownership by broadcasters, even though the regulation required some divestiture and the rulemaking proceeding did not conclusively establish the factual premises of the Commission's action. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 796-97, 56 L. Ed. 2d 697, 98 S. Ct. 2096 (1978); see also *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-05, 100 L. Ed. 1081, 76 S. Ct. 763 (1956); *Recording Industry Ass'n of America v. Copyright Royalty Tribunal*, 213 U.S. App. D.C. 156, 662 F.2d 1, 8-9 (D.C. Cir. 1981).

Agencies, without having to conduct an evidentiary hearing, have been allowed to decide such antitrust questions as whether a particular firm or group of firms has or is abusing or is likely to abuse market power, which are the very questions involved in the present case. An example is the FCC's rule on **[**41]** the provision of customer equipment through separate subsidiaries of the former Bell operating companies, which we upheld last summer. See *Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984). Like the rules in this case -- more clearly than the chain broadcasting rules -- the separate-subsidiary rule was based on antitrust analysis, and was as here a rule made after notice-and-comment rulemaking. The cases in which reviewing courts have allowed agencies, over objection, to make judgments on market power and related competitive issues without adjudicative hearings include *Belenke v. SEC*, 606 F.2d 193, 198-99 (7th Cir. 1979); *Brae Corp. v. United States*, 238 U.S. App. D.C. 352, 740 F.2d 1023, 1038-40 (D.C. Cir. 1984) (per curiam); *United States v. FCC*, 209 U.S. App. D.C. 79, 652 F.2d 72, 91-96 (D.C. Cir. 1980) (en banc) ("expert witnesses and cross-examination would not add appreciably to [the FCC's] already-expert knowledge of the field," *id.* at 94); *National Small Shipments Traffic Conference, Inc. v. CAB, supra*, 618 F.2d at 828-31 ("The Air Carriers argue that the Board's decision **[**42]** must be supported by substantial evidence in the record. However, in concluding that abolishing the tariff filing requirement will increase price competition without depriving shippers of adequate rate

information or precluding enforcement of the statutory ban on discriminatory rates, the Board made a determination that was 'primarily of a judgmental or predictive nature,'" *id.* at 829); *Bell Tel. Co. of Pennsylvania v. FCC*, 503 F.2d 1250, 1268 (3d Cir. 1974); *Phillips Petroleum Co. v. FPC*, 475 F.2d 842, 844 (10th Cir. 1973); cf. *Trans World Airlines, Inc. v. CAB*, 637 F.2d 62, 71 (2d Cir. 1980).

None of these cases suggests that an agency has carte blanche to resolve antitrust issues without an evidentiary hearing. *United States v. FCC, supra*, 652 F.2d at 91, expressly disclaims such a proposition -- but goes on to uphold the agency's action. For only "if a reviewing court finds that the procedures followed by the agency in adopting a rule have not produced a body of evidence enabling it to" uphold the rule may it remand for further **[*1121]** proceedings under different procedures. Friendly, *supra*, **[**43]** 123 U. Pa. L. Rev. at 1313. It will rarely be possible to say, and it is not possible to say here, that merely because the agency denied cross-examination and the other procedural safeguards of the adjudicative process, a rulemaking proceeding in which interested persons had ample notice of the agency's proposals and sufficient if not generous time to prepare and submit comprehensive written comments provided so few procedural safeguards that the resulting rules lack an adequate factual basis.

More than authority is against United; though we are sympathetic to its position, we appreciate the arguments, as well as the cases, against it. The biggest practical difference between adjudicative and rulemaking procedure is that cross-examination is available in the former but not -- not generally anyway and not here -- in the latter. But cross-examination is perhaps not a terribly useful tool for extracting the truth about what are at bottom complex economic phenomena. Antitrust trials, whether judicial or administrative, have long been criticized for their inordinate length, cost, and complexity. See, e.g., Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics* **[**44]** , 74 Harv. L. Rev. 226, 258-73 (1960). It is a fair question whether the additional scrutiny of evidence in an antitrust trial elucidates more than it confuses the issues, and hence whether the Board would really have come up with substantively sounder rules if it had given United Air Lines all the procedural rope that United sought. Moreover, the Board's rules for adjudicative proceedings are skimpy; perhaps in practice such proceedings differ little from rulemaking proceedings. See 14 C.F.R. §§ 302.200 *et seq.* Although the comment period was fairly compressed, the airlines had been on notice since 1982, when the Board and the Justice Department began their investigations, that they might very well have to prepare a defense to a charge of anticompetitive practices. They could have put together a better economic defense than they attempted; they had two years. Furthermore, the fact that the Board is (more precisely, until its recent abolition was) engaged full-time in the regulation of the airline industry could rationally persuade it that it could dispense with procedural safeguards designed primarily to guide the lay judges we call jurors and the generalist judges **[**45]** who decide bench trials. Thus we need not decide whether the Federal Trade Commission, whose antitrust powers are not limited to a particular industry but range over much of the economy, is equally free to dispense with the conventional safeguards.

Another point in the Board's favor, and another ground for a narrow interpretation of our holding, is the legislative history of the Sunset Act, discussed earlier in this opinion. That history indicates not only that Congress approves of expeditious rulemaking proceedings to enforce section 411 but that Congress was aware of the present proceeding. The House Report mentions it specifically. See H.R. Rep. No. 793, *supra*, at 4-5. That report by the way was published after the Board had issued the rulemaking notices that contain its essential findings, and though it would be unrealistic to think that Congress implicitly approved the denial of an evidentiary hearing in this matter when it passed the Sunset Act, the legislative history at least makes clear that the use of informal rulemaking to deal with competitive problems in the airline industry is not so *outre* as United Air Lines (alone among the members of the industry) contends. **[**46]**

In the face of all this, United, to show entitlement to an evidentiary hearing in this matter, would have to show with some particularity that cross-examination or other procedures that only such a hearing would enable was necessary to resolve specific factual disputes that are critical to the soundness of the Board's rules. It has not attempted to show this. The rules are judgmental and are based primarily on the Board's accumulated knowledge of the airline industry and on inferences from general economic data that either were undisputed or could be probed adequately in a purely documentary proceeding.

[*1122] Thus the rules must be upheld in their entirety against United's challenge. Republic Airlines' and British Airways' challenges to the price discrimination feature of the Board's rules do not require extended consideration. The basis of these challenges is that eliminating discrimination hurts those who pay the lower of the discriminatory price. This is true by definition but hardly shows that the elimination of the practice is arbitrary or capricious.

That leaves for discussion only British Airways' challenge to the foreign-carrier exclusion in the anti-bias rule. **[**47]** 14 C.F.R. § 255.9(6). This challenge is a very narrow one. The Board allowed the airlines subject to the rule, all of which are U.S. airlines, to employ bias against any foreign airline that provides a computerized reservation system to travel agents overseas that is biased against U.S. airlines. British Airways does not question the propriety of this provision for self-help but complains that under the Board's rule the right of self-help may not be used -- by British Airways, for example -- against a domestic, as distinct from foreign, carrier that uses a biased computerized reservation system overseas. Suppose, for example, that TWA used such a system in Europe. The Board's rule would not forbid it to do so; the rule is limited to domestic service. And the foreign-carrier exclusion would not permit United Air Lines, say, to bias its computerized reservation system in the U.S. against TWA. TWA is not a foreign carrier, and the exclusion is for use against foreign carriers. British Airways' interest in all this, as near as we can figure out from its excessively cryptic briefing of the issue, comes from the fact that it is allied with United, and would therefore like United to be **[**48]** able to bias its computerized reservation system in British Airways' favor in the U.S., which United is not allowed to do under the Board's rule even if TWA is engaged in biasing overseas.

This is too minor and speculative a quibble to warrant judicial intervention. British Airways' challenge to the Board's rule came very late, and though it was nevertheless entertained by the Board, British Airways failed to put in evidence showing that U.S. carriers make extensive use of biased computerized reservation systems overseas or that a good way to prevent such bias would be to allow other U.S. carriers to retaliate against them in the U.S. -- to the detriment of domestic travelers. We cannot say that the Board was arbitrary or capricious in rejecting British Airways' plea for a further exception to the anti-bias rule.

The petitions for review are DENIED.

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*706 F.2d 1121, *; 1983 U.S. App. LEXIS 27038, ***

UNITED STATES of America, Plaintiff-Appellant, v. Frank Edward BACHNER, a/k/a "Richard John Cassarella", a/k/a "John Ryan", a/k/a "Jason", Defendant-Appellee

No. 81-6203

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

706 F.2d 1121; 1983 U.S. App. LEXIS 27038

June 6, 1983

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the Southern District of Florida.

DISPOSITION: Vacated and Remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant government sought review, pursuant to 18 U.S.C.S. § 3731, of an order of the United States District Court for the Southern District of Florida, which suppressed the physical evidence after appellee suspect was indicted for conspiracy and drug charges.

OVERVIEW: Appellee suspect maintained that the search of the aircraft violated his U.S. Const. amend. IV rights. The magistrate reserved ruling on the issue of whether appellee had a legitimate expectation of privacy and recommended that the evidence be suppressed because the search was unreasonable. The district court affirmed. On appeal, the court vacated and remanded to enable the district court to determine whether appellee had a legitimate expectation of privacy. At the suppression hearing, no evidence was adduced that appellee had a reasonable expectation of privacy in the aircraft, for example, that he owned or leased the subject aircraft or otherwise had an unrestricted right of occupancy or control of it. No evidence was adduced that appellee had a reasonable expectation of privacy in the contraband seized. If appellee could show on remand that an amend. IV privacy interest personal to him was invaded when the government seized and searched the airplane and its contents, then the burden would shift to the government to prove its claim that the warrantless search and seizure fell within one of the specifically established exceptions, such as a border search.

OUTCOME: The court vacated and remanded the order, which had suppressed the physical evidence after appellee suspect was indicted for conspiracy and drug charges. The court held that there must be a determination of whether appellee had a legitimate expectation of privacy in the areas searched before he could show a violation of the Fourth Amendment.

CORE TERMS: aircraft, airplane, border, box, plane, reasonable expectation of privacy, searched, radar, search and seizure, seized, airport, seizure, border search, pilot, legitimate expectation of privacy, suppression hearing, customs, recommendation, quaalude, Fourth Amendment, motion to suppress, physical evidence, challenged search, indictment, crossing, landing, target, landed, factual determination, functional equivalent

LexisNexis(TM) HEADNOTES - Core Concepts - ✦ Hide Concepts

Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence
Criminal Law & Procedure > Appeals > Interlocutory Appeals
HN1 See 18 U.S.C.S. § 3731.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy
Constitutional Law > Search & Seizure > Scope of Protection
HN2 Two requirements must be met before a person may successfully prevail on a U.S. Const. amend. IV claim. First, there must be a search and seizure of that individual's person, house, papers, or effects, conducted by an agent of the government; stated differently, there must be an invasion of the claimant's reasonable expectation of privacy. Second, the challenged search and seizure must be unreasonable, as not all searches and seizures are proscribed by amend. IV, but only those that are unreasonable.

Constitutional Law > Search & Seizure > Scope of Protection
HN3 U.S. Const. amend. IV, as made enforceable against the states through the due process clause of U.S. Const. amend. XIV, provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

Constitutional Law > Search & Seizure > Scope of Protection
HN4 The person who asserts his rights were violated under U.S. Const. amend. IV has the burden of alleging and, if challenged, of establishing the requirements. However, if the movant establishes an expectation of privacy and that the search and seizure took place without a search warrant, then the burden of proof shifts to the state to establish that an exception to the search warrant requirement was applicable in the subject case and that the search and seizure was, in fact, a reasonable one.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy
Constitutional Law > Search & Seizure > Scope of Protection
HN5 Legitimation of expectations of privacy by law must have a source outside of U.S. Const. amend. IV, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, and one who owns, or lawfully possesses, or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy
Criminal Law & Procedure > Search & Seizure > Standing
HN6 Where the premises searched is the dwelling or is owned or rented by, or is in the possession of the accused, he has standing to attack the search. As employed in this connection the courts understand "possession" to have reference to an unrestricted right of occupancy or custody and control of the premises as distinguished from occasional presence on the premises as a mere guest or invitee.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Plain View
HN7 Not all containers and packages found by police during the course of a search will deserve the full protection of U.S. Const. amend. IV. Thus, some containers by their very nature cannot support any reasonable expectation of privacy because

their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to plain view, thereby obviating the need for a warrant.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN8 The threshold inquiry in a U.S. Const. amend. IV challenge is whether the challenger had a legitimate expectation of privacy in the invaded place.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Border Searches

HN9 Neither a warrant nor any level of suspicion is required to search vehicles, persons, or goods arriving in the United States.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Border Searches

HN10 A border search need not take place at the actual border. It may be conducted at a place considered the functional equivalent of the border, such as the port where a ship docks in this country after entering our territorial waters from abroad, or the airport where an international flight lands. Furthermore, a particular search may be the functional equivalent of a search at the border if the object of the search has been kept under constant surveillance from the border to the point of search.

COUNSEL: Thomas A. Blair, AUSA, Florida, for Appellant.

Neal A. DuPree, Asst. Fed. Pub. Def., for Appellee.

JUDGES: Fay and Clark, Circuit Judges, and Markey, * Chief Judge. Clark, Circuit Judge, specially concurring.

* Honorable Howard T. Markey, Chief Judge for the Federal Circuit, sitting by designation.

OPINIONBY: FAY

OPINION: [*1122] FAY, Circuit Judge:

The appellee, Frank E. Bachner, was charged in a four-count indictment (and later in a superseding indictment) with conspiracy to import methaqualone (quaaludes), conspiracy to distribute and possess with the intent to distribute methaqualone, importation of methaqualone, and possession with the intent to distribute methaqualone, in violation of 21 U.S.C. Sections 963, 846, 953(a), and 841(a) (1). The appellee pleaded not guilty to all of the counts in the indictment and subsequently filed a motion to suppress his post-arrest statements and **[*1123]** certain evidence seized by United States Customs Patrol Officers at the time of his arrest. Adopting in part the magistrate's **[**2]** "Review and Recommendation," the district court issued an order suppressing most of the appellee's post-arrest statements and all of the physical evidence. The government appealed under 18 U.S.C. Section 3731. n1 After a careful review of the transcript of the suppression hearing, the magistrate's Review and Recommendation, and the district court's suppression order, we conclude that the trial court has not made a sufficient factual determination on the question of whether the appellee's fourth amendment rights were violated by the challenged search and seizure. We therefore remand this case to enable the trial court to determine whether the appellee had a legitimate expectation of privacy in the areas searched and items seized by the government.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 HN1 18 U.S.C. Section 3731 provides in relevant part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**3]**

FACTS

On February 5, 1980, Customs Patrol Officer (CPO) James A. Howell received information from a confidential informant that a red, black, and white Piper Aztec aircraft, bearing number N5733Y and flown by John Ryan from Chicago, had left Vero Beach, Florida heading in a southerly direction. The informant told CPO Howell that the aircraft had only one seat and an illegal fuel tank, that Mr. Ryan had stated he was going "south for a load," that Mr. Ryan had inquired about the availability of fuel "down south," and that the aircraft was expected to return the following day.

CPO Howell subsequently checked available computer files but found no pilots named John Ryan from Chicago; FAA records revealed, however, that the aircraft was registered to William J. Retty of South Pasadena, California. Upon conferring with the FAA Miami Center, CPO Howell learned that the Aztec was not being tracked so he placed the aircraft on both local and FAA lookout status.

On February 7, 1980, United States Customs Patrol Officer Harold C. Briscoe, Jr., was flying in the vicinity of Fort Lauderdale at approximately 1:00 AM when he heard over Customs' radio a signal from an aircraft with partial **[**4]** call letters of "33 Yankee." Aware that the Aztec was on the lookout list, CPO Briscoe contacted his base and requested it to call Fort Lauderdale airport tower and obtain the aircraft's complete call letters. The tower responded that the aircraft's call letters were N5733Y, and it was an Aztec planning to land at North Perry Airport in Broward County. Upon being advised of the Aztec's complete call letters, CPO Briscoe diverted to North Perry Airport, where he saw the Aztec land and taxi to a parking area.

Shortly prior to these events, Customs officers in a radar equipped airplane patrolling in the vicinity of Bimini began tracking a target which was westbound from the vicinity of Bimini heading toward Fort Lauderdale at a speed of 140 to 150 knots. Another Customs airplane was launched to try to intercept the unidentified radar target, but after it got airborne, the radar patrol plane advised it that the target had been lost.

Following his landing at North Perry Airport, the appellee parked the Aztec at the south side of the airport and exited his aircraft where he was approached by Broward County Deputy Sheriff Michael Sokolowski, who had observed the Aztec land, taxi, and **[**5]** park. Deputy Sokolowski asked the appellee for identification and a pilot's license, but the appellee had neither. The appellee identified himself as Richard Cassarella.

[*1124] Approximately ten minutes later, the Customs aircraft landed and taxied to

Deputy Sokolowski's position, and CPO Briscoe got out of his aircraft. CPO Briscoe could see into the airplane's windows with his flashlight while he was standing on the ground outside the airplane. In addition to observing that the exterior of the airplane was dirty, he saw through the windows that there were boxes having "some kind of writing in Spanish on it," along with a wrist watch and aircharts. CPO Briscoe then stepped on the wing for a better look and saw that the chart was of the "South American area." CPO Briscoe asked the appellee if he could take a further look inside, and the appellee replied, "no," and closed the plane. With respect to the boxes in the airplane, CPO Briscoe observed that they were "virtually identical" to boxes seized a few days earlier from another aircraft which had been found to contain contraband. The boxes in the aircraft had the same "type of markings and bindings on them."

CPO Briscoe **[**6]** again asked the defendant for identification, he said he had none. Nor was he able to produce a pilot's license. When asked the origin and nature of his flight, the appellee stated that "he had departed Chicago, that he could not remember what airport he had departed from, and that he was transporting a cargo of car parts." Deputy Sokolowski placed the appellee under arrest on charges of operating an aircraft without a pilot's license. When the appellee was searched following his arrest, Deputy Sokolowski found one quaalude tablet in his pocket.

The appellee and CPO Briscoe went to an airport office where Customs telephoned the United States Drug Enforcement Administration (DEA). Upon being advised by his DEA office that an aircraft had landed at North Perry Airport and was suspected to be carrying narcotics, DEA Special Agent Avelino Fernandez traveled to the airport where he met with CPO Briscoe and Deputy Sokolowski. CPO Briscoe advised Agent Fernandez of the preceding events whereupon the officers went into the office, and the appellee was advised of his *Miranda* rights. The appellee then told the officers that he was not going to talk and that they would have to get **[**7]** a search warrant to search the Aztec.

Special Agent Fernandez told the appellee that they were going to search the Aztec; he then told CPO Briscoe in the appellee's presence to open the aircraft. CPO Briscoe obtained the key to the aircraft from the appellee; the appellee then stated that "the plane was loaded."

The aircraft was opened and searched. CPO Briscoe believed that the search was authorized as a border search. Agent Fernandez opened one of the boxes which had a small tear in the outer covering and observed white pills contained in clear plastic "sandwich" baggies which were later determined to be quaaludes. The agent observed that the aircraft contained two front seats and a rear bench seat, but the middle seats were missing and that area, as well as the baggage compartment, was filled with stacked boxes. After verifying that the first box contained quaaludes, the remaining boxes were unloaded and the aircraft was seized.

The appellee was then taken to the Fort Lauderdale DEA office, where, at Agent Fernandez's suggestion, he agreed to cooperate with the DEA. The appellee made one written statement and several oral statements implicating his non-appealing co-defendant, **[**8]** Fernando Galindo-Delvalle, who, the appellee stated, was going to provide the truck to transport the quaaludes. The appellee stated that he would be willing to arrange for Galindo-Delvalle to pick up the drugs. The appellee, wearing a body wire, met with Galindo-Delvalle twice that day, but Galindo-Delvalle failed to return later to pick up the drugs as he had agreed to do. The agents left the appellee at a hotel that night, and he was gone the next morning.

Since the agents had released the appellee before his true name was learned, he was subsequently indicted as "John Doe, a/k/a Richard John Casserella, a/k/a John Ryan." When his true name was ultimately [*1125] discovered, a superseding indictment was then returned.

Trial Court Proceedings

Prior to trial, the appellee filed a motion to suppress statements and physical evidence. The trial court referred these motions to the magistrate for a hearing which was held on July 29, 1981. Thereafter written memoranda were filed. In her Review and Recommendation to the court, the magistrate recommended that the appellee's motion to suppress statements and physical evidence be granted. As her recommendation of law, the magistrate **[**9]** adopted in its entirety the legal analysis contained in the memorandum of law submitted by the appellee. n2 The government filed timely objections to the magistrate's Review and Recommendation and requested a *de novo* hearing before the trial court. The trial court denied the government's request and with nothing further issued an order suppressing most of the appellee's post-arrest statements and all of the physical evidence. n3 From this order the government appealed.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 After a lengthy recitation of the facts, the magistrate's Review and Recommendation reads as follows:

> RECOMMENDATIONS OF LAW
>
> Following hearing on the motions, the defendant, Frank Bachner, filed 'Defendant's Argument in Support of Motion to Suppress' on August 10, 1981. The Court has examined the defendant's pleading in great detail, and as the Court concurs with the legal analysis presented by the defendant's counsel, Federal Public Defender, Neal Dupree, and as the Court could not present any Recommendations of Law more succinct or more ably presented, the undersigned hereby adopts the legal argument of Mr. Dupree as the Recommendations of Law of the Court.
>
> Therefore, being fully advised, it is hereby RECOMMENDED that the Honorable Jose A. Gonzalez grant the Motion to Suppress filed by the defendant, Frank Bachner.

[10]**

n3 Although the government objects to the suppression of appellee's post-arrest statements, it has only raised on appeal the suppression of the physical evidence seized. Brief for the United States at 3, n.3.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

DISCUSSION

The appellee has maintained throughout this litigation that the search and seizure of the aircraft and its contents violated his fourth amendment rights. n4 HN2 Two requirements must be met before a person may successfully prevail on a fourth amendment claim. First, there must be a search and seizure of that individual's person, house, papers or effects, conducted by an agent of the government; stated differently, there must be an invasion of the claimant's reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *United States v. Glasgow*, 658 F.2d 1036, 1044 (5th Cir., Unit B, 1981). Second, the challenged search and seizure must be "unreasonable," as not all searches and seizures are proscribed by the fourth amendment, but only those that are "unreasonable." *Elkins v. United States*, 364 U.S. 206, 222, 80 S. Ct. 1437, 1446, 4 L. Ed. 2d 1669 (1960). **[**11]** Both of the foregoing requirements are separate and distinct and

both must be met before there can be any violation of an individual's rights guaranteed by the fourth amendment. *Rawlings v. Kentucky*, 448 U.S. 98, 112, 100 S. Ct. 2556, 2565, 65 L. Ed. 2d 633 (1980).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 HN3 The fourth amendment to the United States Constitution, as made enforceable against the states through the due process clause of the fourteenth amendment, provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

HN4 The person who asserts his rights were violated under the fourth amendment has the burden of alleging and, if challenged, of establishing these requirements. n5 **[*1126]** However, if the movant establishes an expectation of privacy and that the search and seizure took place without a search warrant, then the burden of proof shifts to the state to establish that an exception to the search warrant requirement **[**12]** was applicable in the subject case and that the search and seizure was, in fact, a reasonable one. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564 (1961); *United States v. Harris*, 479 F.2d 508, 509 (5th Cir.1973); *Williams v. United States*, 382 F.2d 48, 50 (5th Cir.1967).

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n5 "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and *if the allegation be disputed that he establish*, that he himself was the victim of an invasion of privacy." [emphasis added] *Jones v. United States*, 362 U.S. 257, 261, 80 S. Ct. 725, 731, 4 L. Ed. 2d 697, 702 (1960), quoted with approval in *Alderman v. United States*, 394 U.S. 165, 173, 89 S. Ct. 961, 966, 22 L. Ed. 2d 176 (1969).

"The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. . . . The prosecutor's argument [made in the trial court, challenging the accused's standing] gave petitioners notice that they were to be put to their proof on any issue as to which they had the burden. . . ." *Rakas v. Illinois*, 439 U.S. 128, 130 n.1, 99 S. Ct. 421, 424 n. 1, 58 L. Ed. 2d 387 (1978).

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Ordinarily, we would have no problem in concluding on this record that the appellee failed to establish the first fourth amendment requirement. Although clearly a governmental search and seizure took place in this case, it has not been established that the appellee's reasonable expectation of privacy was invaded.

The only evidence of record that goes to the "reasonable expectation of privacy" issue is the appellee's presence at the site where the aircraft was searched. At the suppression hearing, no evidence was adduced that the appellee had a reasonable expectation of privacy in the aircraft, as for example, that he owned or leased the subject aircraft or otherwise has an unrestricted right of occupancy or custody or control of said aircraft; n6 nor was any evidence adduced that the appellee had a reasonable expectation of privacy in the contraband seized, as for example, that he actually or constructively possessed the subject quaaludes, whether lawfully or unlawfully. n7 *Rakas v. Illinois, United States v. Jeffers*, 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951). Absent such a showing, the fourth amendment requirement of a reasonable expectation of privacy **[**14]** was not established.

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n6 HN5"Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book 1, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas v. Illinois*, 439 U.S. 128, 143 n. 12, 99 S. Ct. 421, 430 n. 12, 58 L. Ed. 2d 387 (1978).

HN6"Where the premises searched is the dwelling or is owned or rented by, or is in the possession of the accused, he has standing to attack the search. As employed in this connection we understand 'possession' to have reference to an unrestricted right of occupancy or custody and control of the premises as distinguished from occasional presence on the premises as a mere guest or invitee." *State v. Leveson*, 151 So.2d 283, 285 (Fla.1963).

The only evidence about the appellee's connection with the airplane established that the airplane belonged to someone other than the appellee. The aircraft was not searched until the appellee had flown it to its destination, parked and locked it, and had walked away. The extent to which a commercial pilot could have any reasonable expectation of privacy under these circumstances should have been expressly considered and ruled upon by the trial court. **[**15]**

n7 The only evidence concerning the contents of the aircraft was the appellee's initial representation that the sealed boxes contained car parts that he had flown from Chicago. The appellee argues, however, that the white plastic bags around the suspected narcotics enclosed in sealed cardboard boxes evidenced a clear expectation of privacy in the narcotics. But according to the testimony at the suppression hearing one of the boxes had a tear in it which enabled the Customs officers to see inside of it. (R.Vol. 2 of 2, at 44). The United States Supreme Court has counseled that HN7"not all containers and packages found by police during the course of a search will deserve the full protection of the fourth amendment. Thus, some containers (for example, a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." *Arkansas v. Sanders*, 442 U.S. 753, 99 S. Ct. 2586, 2593-94, 61 L. Ed. 2d 235 (1979). Thus, whether the appellee had a reasonable expectation of privacy in the contents of the sealed boxes when said contents could be determined by looking through the tear of one of the boxes is a factual determination that must be made by the trier of fact on remand of this cause.

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[*1127] We cannot, however, dispose of this case on that ground because the record is incomplete. The development of a complete record was not due to the government's failure to challenge in the trial court the appellee's right to contest the subject search and seizure, *Cf., Combs v. United States*, 408 U.S. 224, 92 S. Ct. 2284, 33 L. Ed. 2d 308 (1972); n8 rather, full amplification was prevented by the exclusion of relevant evidence. At the outset of the hearing, the government's attorney rightfully requested that the magistrate, prior to the government introducing evidence relating to the lawfulness of the subject search and seizure, compel the appellee to comply with his burden of establishing his legitimate expectation of privacy in the area searched and items seized by the government. The magistrate denied the government's request and enigmatically asserted that "'standing' is 'not necessarily a threshold question' and that this case 'does not appear to be one of those

instances where the threshold question exists. '" The magistrate reserved ruling on the issue of whether the appellee had a legitimate expectation of privacy and, without any other mention **[**17]** of this threshold substantive question, went on to consider whether the subject search and seizure was "unreasonable." This approach conflicts with the decisional requirements delineated by the Supreme Court for successfully asserting a fourth amendment claim. As previously discussed, "ordinarily 'it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he . . . establish, that he himself was the victim of an invasion of privacy. '" *United States v. Salvucci*, 448 U.S. 83, 86, 100 S.C.t 2547, 2550, 65 L. Ed. 2d 619 *quoting Jones v. United States*, 362 U.S. 257, 261, 80 S. Ct. 725, 731, 4 L. Ed. 2d 697. And, this circuit has unequivocally stated that HN8↑"the threshold inquiry in a fourth amendment challenge is whether the challenger had a legitimate expectation of privacy in the invaded place." *United States v. Glasgow*, 658 F.2d 1036, 1044 (5th Cir. Unit B 1981); *United States v. Hawkins*, 681 F.2d 1343, 1344 (11th Cir.1982). n9 We find nothing in the facts of this case that would necessitate or justify a departure from this course.

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> In *Combs*, the government had not challenged the [defendant's] standing at the suppression hearing and the issue of standing was not raised until the appellate level, where the government conceded that its warrant was not based on probable cause. Because the record was virtually barren of the facts necessary to determine the [defendant's] right to contest the search and seizure, the [United States Supreme] Court remanded the case for further proceedings. 408 U.S., at 227 [92 S. Ct. at 2286].

Rakas v. Illinois, 439 U.S., at 131 n. 1, 99 S. Ct. at 424 n. 1. **[**18]**

n9 In *Hawkins*, we made the following observation:

> The question has been raised as to when the defendant must demonstrate 'standing' to question the search, although a correct analysis will show that a focus on 'standing' is not now the proper approach to the ultimate question. After *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), the proper analysis proceeds directly to the substance of a defendant's Fourth Amendment claim to determine whether the defendant had a reasonable and legitimate expectation of privacy in the article at the time of the search and consequently, whether the Fourth Amendment has been violated.

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Aside from arguing that a search warrant was not constitutionally required, "the government was initially entitled to defend against [the appellee's] charge of an unlawful search by asserting that [the appellee] lacked a reasonable expectation of privacy in the searched [airplane and its contents]." *Steagald v. United States*, 451 U.S. 204, 209, 101 S. Ct. 1642, 1646, 68 L. Ed. 2d 38. The appellee, **[**19]** the proponent of the motion to suppress, had

the burden of establishing that his own fourth amendment rights were violated by the challenged search and seizure; and, the government's challenge to the appellee's right to assert a fourth amendment claim gave the appellee notice that he was to be put to his proof on any issue as to which he had the burden. *Rakas v. Illinois*, 439 U.S. at 128, n. 1, 99 S. Ct. at 421, n. 1, 58 L. Ed. 2d 387. The appellee should have assumed his burden and established that a fourth amendment **[*1128]** privacy interest personal to him was invaded when the government seized and searched the airplane and its contents, and the government should have been given a full opportunity to rebut the appellee's assertions of a privacy interest in the items seized. Then, the trial court should have made a factual determination on whether the appellee had a legitimate expectation of privacy in the aircraft and its contents. "Since there has not yet been any factual determination of whether [the appellee] had an interest in the [items or areas searched and seized]," *Combs*, 408 U.S. at 228, 92 S. Ct. at 2286, we must remand this **[**20]** case to the trial court.

If on remand the appellee can show that a fourth amendment privacy interest personal to him was invaded when the government seized and searched the airplane and its contents, then, and only then, does the burden shift to the government to prove its claim that the warrantless search and seizure falls within one of the specifically established exceptions as a border search.

Border searches constitute a well-hewn exception to the mandate of the fourth amendment. HN9 "Neither a warrant nor any level of suspicion is required to search vehicles, persons or goods arriving in the United States. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73, 93 S. Ct. 2535, 2539, 37 L. Ed. 2d 596 (1973). The rationale for this doctrine, which 'has a history as old as the fourth amendment itself,' *United States v. Ramsey*, 431 U.S. 606, 619, 97 S. Ct. 1972, 1981, 52 L. Ed. 2d 617 (1977), is the fundamental necessity for national protection against unlawful entries from without." *United States v. Stone*, 659 F.2d 569, 572 (5th Cir., Unit B, (1981)). In furtherance of this crucial policy, the parameters of the doctrine have **[**21]** expanded to encompass searches far beyond the physical boundaries of the United States:

> HN10
> A border search need not take place at the actual border. It may be conducted at a place considered "the functional equivalent of the border," such as the port where a ship docks in this country after entering our territorial waters from abroad, *United States v. Prince*, 491 F.2d 655 (5th Cir.1974), or the airport where an international flight lands. *United States v. Klein*, 592 F.2d 909 (5th Cir.1979). *United States v. Richards*, 638 F.2d 765, 771 (5th Cir.1981). Furthermore, a particular *search* may be the functional equivalent of a search at the border if the object of the search has been kept under constant surveillance from the border to the point of search. *United States v. Johnson*, 588 F.2d 147, 154 (5th Cir.1979).

Id. (emphasis in original).

In order for the government to invoke the border search exception in this case, it must prove that the airplane piloted by the appellee crossed an international border of the United States. In *United States v. Stone*, the former Fifth Circuit made **[**22]** it abundantly clear that if a border crossing can be established then a search at the border or its functional equivalent would be proper and appropriate, even though the origin of the aircraft has not been proven; stated differently "it is not necessary that the [aircraft] . . . have been under actual observation from outside United States territory until its arrival and search." *United States v. Ivey*, 546 F.2d 139, 142 (5th Cir.1977). "Customs agents are entitled to draw reasonable

inferences from circumstances and base their actions on common sense judgments." *United States v. Messersmith*, 692 F.2d 1315, 1320 (11th Cir.1982). As noted in *Stone*,

> in no case has a border search been invalidated because the object's departure from foreign soil was not demonstrated. Instead, a legion of cases have made clear that the propriety of a border search rests on the "critical fact" of whether or not a border crossing has occurred:
>
> > The *critical fact* is that the envelopes crossed the border and entered this country . . . It is their entry from without that makes a resulting search "reasonable." *United States v. Ramsey*, 431 U.S. 606, 620, 97 S. Ct. 1972, 1981, 52 L. Ed. 2d 617 (1977) **[**23]** (emphasis added).
>
> **[*1129]** *United States v. Johnson*, 588 F.2d 147, 155 (5th Cir.1979).

659 F.2d at 573 (emphasis in original).

At the suppression hearing, after eliciting testimony from CPO Briscoe about the prior radar sighting of an aircraft in the Bimini area heading westbound at 140 to 150 knots towards Fort Lauderdale, the government's attorney sought to establish the link between this radar target and the airplane which the appellee landed a few minutes later. The appellee's attorney objected, stating that "there's been nothing in here to show that it's his plane or what plane it was" (R.Vol. 2 of 2, at 22); the magistrate sustained the objection. n10 We disagree with the magistrate's evidentiary ruling. Through its questioning of CPO Briscoe the government's attorney was trying to show that the airplane spotted on the radar was probably the airplane piloted by the appellee. Had the government been permitted to pursue its line of inquiry it might have demonstrated that the airplane detected by radar in Bimini heading towards Fort Lauderdale, was in fact the airplane piloted and subsequently landed by the appellee **[**24]** at the Broward County airport. Evidence tending to establish a nexus between the aircraft spotted on radar coming from Bimini and the airplane subsequently landed by the appellee in the United States should not have been excluded, since such evidence goes to the critical question of whether there was a border crossing. The government was entitled to offer evidence to show that the appellee had, in fact, crossed a border. Whether there has been a border crossing is a question of fact that needs to be determined on remand of this cause only after the appellee has proven that his own fourth amendment rights were violated by the challenged search and seizure.

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n10 The relevant portion of the Suppression Hearing reads:

> Q. When you picked up the Piper Aztec, approximately what speed was it going?
> A. We did not get behind it. We got in contact with the Aztec just as he was landing at North Perry.
> Q. With relation to the timing of the Piper Aztec and the timing of the aircraft that was coming in from Bimini, do you have any conclusion as to whether or not --

MR. DUPREE: I'll object to that, Your Honor. There's being nothing in here to show that it's his plane or what plane it was.
THE COURT: I'll sustain the objection.

Upon the conclusion of the suppression hearing, both sides were granted leave to submit supplementary memoranda. In its memorandum the government asserted, as a factor justifying a border search, that the appellee's airplane had been spotted on radar coming from Bimini. The response contained in the appellee's reply memorandum was that "again the record is devoid of any such 'factor. '" (R.Vol. 1 of 2, at 48). It appears that the only reason why the record is "devoid of any such factor" is because the magistrate excluded such evidence by sustaining the appellee's objection to the government's attempt to establish a link between the radar target sighting in Bimini and the appellee's airplane.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**25]**

The suppression order is vacated and the matter remanded for proceedings consistent with this opinion.

VACATED and REMANDED.

CONCURBY: CLARK

CONCUR: CLARK, Circuit Judge, specially concurring:

I concur in vacating the district court's order which suppressed the evidence, but I would reverse and remand for trial. I disagree with the following statement in the majority opinion: "In order for the government to invoke the border search exception in this case, it must prove that the airplane piloted by the appellee crossed an international border of the United States." (Majority opinion slip op. at 3273, at 1128.) Instead, I would hold that the government may make an inquiry of the pilot of any plane landing at a border point or its functional equivalent. Our court held in *Stone*: "Neither a warrant nor any level of suspicion is required to search vehicles, vessels, persons or goods arriving in the United States. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73, 93 S. Ct. 2535, 2539, 37 L. Ed. 2d 596 (1973)." *United States v. Stone*, 659 F.2d 569 at 572 (5th Cir. Unit B 1981).

Determination of whether a plane is arriving in the United States **[**26]** is no easy task because of the apparent difficulty of discovering **[*1130]** and tracking airplanes with electronic devices. Given that limitation, I would authorize the United States Customs officers to make an initial inquiry n1 of each pilot landing a plane at any airport within flying range of the border. That range would vary according to the type of plane. In the present case, such an inquiry was made. The responses disclosed that the pilot did not have identification, a pilot's license, nor evidence of the filing of a flight plan. Bachner stated that "he had departed Chicago, that he could not remember what airport he had departed from, and that he was transporting a cargo of car parts." As pointed out by the majority, a view through the aircraft window disclosed boxes, marked in Spanish, which were virtually identical to boxes containing contraband seized several days earlier from another aircraft.

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n1 In *United States v. Gollwitzer*, 697 F.2d 1357 (11th Cir.1983), our court held that customs officers patrolling the Intracoastal Waterway on the east coast of Florida had the authority to stop a 42-foot boat capable of ocean travel to ask the boat's operators where

they were coming from and who owned the boat. Our court held that unsatisfactory responses to such questions may provide a basis for the reasonable suspicion to board and search the boat. I find this case supportive of my position.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**27]**

My view does not contravene either *United States v. Stone*, 659 F.2d 569 (5th Cir. Unit B 1981) or *United States v. Garcia*, 672 F.2d 1349 (11th Cir.1982), both of which point out the uncertainty in the law of the old Fifth Circuit and the Eleventh Circuit with respect to the evidence required to prove a border crossing. Since there is no clear law on the subject, and since a private plane landing at a point within range of the border could easily have come from a foreign country, I conclude that the *Terry* type interrogation approved in *United States v. Gollwitzer*, 697 F.2d 1357 (11th Cir.1983) (See note 1) is not a violation of the Fourth Amendment.

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