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Administrative Law—Civil Aeronautics Act—Supersession pro tanto of the Antitrust Laws.—Pan American World Airways v. United States

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Administrative Law—Civil Aeronautics Act—Supersession *pro tanto* of the Antitrust Laws.—*Pan American World Airways v. United States*.¹—The Antitrust Division of the Department of Justice, upon request of the Civil Aeronautics Board, commenced a suit in a federal district court against Pan American, an air carrier, W. R. Grace & Co., a steamship carrier, and Pan American-Grace Airways (Panagra), their jointly owned air carrier, charging them with violations of Sections 1, 2, and 3 of the Sherman Act.² The Government alleged that Pan American and Grace by agreement had allocated routes and divided territories between Pan American and Panagra and that Pan American, by use of its fifty per cent control over Panagra, prevented the latter from extending its operations into the United States. The court found Pan American's use of its stock veto power over Panagra's route extension a violation of section 2 and ordered it to show cause why it should not be directed to divest itself of the stock. The complaint against Grace and Panagra was dismissed. Both the Government and Pan American appealed to the Supreme Court.³ **HELD:** All questions of injunctive relief against territorial divisions, route allocations and affiliations between common and air carriers lie solely within the purview of the CAB, and therefore the antitrust complaint should have been dismissed.

Mr. Justice Brennan, in his dissenting opinion, argued that the Court should have applied the doctrine of primary jurisdiction rather than finding a *pro tanto* repeal of the antitrust laws. Since primary jurisdiction⁴ is the usual method of accommodation of the antitrust and regulatory laws, the doctrine should be examined in order to determine whether the Court's decision, in the words of Mr. Justice Brennan, "works an extraordinary and unwarranted departure from the settled principles by which the antitrust and regulatory regimes of law are accommodated to each other."⁵

¹ 371 U.S. 296 (1963).

² 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-3 (1958).

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

§ 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal.

³ For a more complete statement of the facts and an analysis of the decision of the District Court, see Note, 3 B.C. Ind. & Com. L. Rev. 107-13 (1961).

⁴ Also known as preliminary jurisdiction, exclusive primary jurisdiction and preliminary resort.

⁵ 371 U.S. at 319.

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To many legal commentators and treatise writers, primary jurisdiction is merely a procedural device whereby the administrative agency is permitted to act upon the suit prior to a judicial decision. Foremost among these is Professor Kenneth Davis, who writes that "the function of the doctrine of primary jurisdiction is merely to determine which tribunal shall make the initial decision and not which shall make the final decision. . . ."⁶ Those who follow this view hold that the term establishes a time-table for two proceedings and no more. Thus, the application of the doctrine would not preclude a later antitrust suit brought in the courts. This is the meaning Mr. Justice Brennan gives primary jurisdiction when he criticizes the Court for not applying the doctrine in *Pan American*.

On the other hand, many writers have taken the position that primary jurisdiction means more than preliminary resort to the administrative agency. One writes, "The recent expansion of the primary jurisdiction doctrine . . . [has converted] it from a choice of forum rule to a substantive, judge-made exemption from the competitive dictates of the antitrust laws. . . ."⁷ Another states, "It [primary jurisdiction] does much more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects of the carrier-shipper relation."⁸ And a third, "Although frequently invoked to regulate the order of agency and judicial decision, the doctrine is not merely jurisdictional. After an agency has taken jurisdiction and acted, its ruling may be held to deprive a court of power to entertain a suit altogether, even though the agency is not given power under a statutory exempting clause to immunize from suit."⁹ Several cases applying the doctrine indicate that the latter position is the stronger.

The Court in *Keogh v. Chicago & Northwest Ry.*,¹⁰ a case wherein the plaintiff sought damages for antitrust violations, held that the remedy for damages under the Sherman Act had been superseded by the reparative remedy provided in the Interstate Commerce Act.¹¹ In *S.S.W., Inc. v. Air Transp. Ass'n*¹² the court held that to the extent that various practices, methods of competition, combinations, etc. are determined by the CAB to be permissible under the Civil Aeronautics Act (CAA), no injunctive relief is available under the antitrust laws. However, the antitrust laws do remain in effect to the extent that they provide a remedy which the CAB may not render and to the extent that they cover subject matter outside the scope of the jurisdiction of the CAB. Thus, as pointed out in *Slick Airways, Inc. v.*

⁶ 3 Davis, *Administrative Law* § 19.01, at 4-5 (1958).

⁷ Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abuse of Judicial Responsibility*, 67 *Harv. L. Rev.* 436, 466 (1954).

⁸ Jaffe, *Primary Jurisdiction Reconsidered. The Anti-Trust Laws*, 102 *U. Pa. L. Rev.* 577, 583-84 (1954).

⁹ Note, *Federal Regulation of Bank Mergers: The Opposing Views of the Federal Banking Agencies and the Department of Justice*, 75 *Harv. L. Rev.* 756, 761 (1962).

¹⁰ 260 *U.S.* 156 (1922).

¹¹ See also *United States Navigation Co. v. Cunard S.S. Co.*, 284 *U.S.* 474 (1932), which held that the antitrust laws were superseded to the extent that a remedy was provided by the Shipping Act.

¹² 191 *F.2d* 658 (D.C. Cir. 1951), cert. denied, 343 *U.S.* 955 (1952).

American Airlines, Inc.,¹³ the plaintiff could seek treble damages under the antitrust laws because there was no provision for them in the CAA and damages could be had only by resort to the courts.¹⁴

From the above cases the following principle may be extracted: if the subject matter of the suit is covered by the regulatory act and if the regulatory agency can award complete relief, the antitrust laws are pro tanto superseded. The only function of the courts will be a review of the agency's action to insure that the standards set out in the regulatory act were observed by the agency.¹⁵ However, if the agency cannot render complete relief, the aggrieved party alleging antitrust violations may seek relief from the courts,¹⁶ but only after a prior resort is made to the regulatory agency. Such prior resort is necessary because of the need for uniformity of regulation and because the facts may involve complicated technicalities which require the expertise of the agency's members.¹⁷ Therefore, it is submitted that the meaning given primary jurisdiction by Mr. Justice Brennan is too narrow and that the term should encompass pro tanto supersession of the antitrust laws.

An examination of the instant case indicates that it falls within the expanded meaning of primary jurisdiction and therefore was correctly dismissed by the Court. First, the CAB has jurisdiction over the methods of

¹³ 107 F. Supp. 199 (D.N.J. 1951), petition for prohibition dismissed sub nom. *American Airlines v. Forman*, 204 F.2d 230 (3d Cir.), cert. denied sub nom. *American Airlines v. Slick Airways, Inc.*, 346 U.S. 806 (1953).

¹⁴ The court also held that the *Cunard* decision, see supra note 11, was inapplicable because no supersession of the antitrust laws is contained in the CAA.

¹⁵ Review of foreign route awards is made by the President rather than the judiciary because of considerations of foreign and military policy. See case cited by the *Pan American Court, Chicago & So. Airlines v. Waterman S.S. Co.*, 333 U.S. 103 (1948).

¹⁶ The CAA contains the saving clause, "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Civil Aeronautics Act of 1938, 52 Stat. 1027, as amended, Federal Aviation Act, 72 Stat. 798, 49 U.S.C. § 1506 (1958). However, such saving clauses in regulatory acts do not prevent the application of the primary jurisdiction doctrine. For example, see the fountainhead of the doctrine, *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), where the Court held that the saving clause in the Interstate Commerce Act could not destroy the act itself. See also *Slick Airways v. American Airlines*, supra note 13, at 107 F. Supp. 207, where it was stated that the saving clause in the CAA "is not to be construed, however, as vitiating the primary jurisdiction rule whenever applicable."

¹⁷ Mr. Justice Frankfurter has cogently expressed the desirability of giving the agency an opportunity to apply its expert knowledge to the facts:

[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conf. v. United States, 342 U.S. 570, 574-75 (1952).

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competition employed in the aeronautics industry. Section 411 of the CAA provides:

The Board may, upon its own initiative or upon complaint. . . , if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent *has been or is engaged in . . . unfair methods of competition*. . . . If the Board shall find, after notice and hearing, that such . . . carrier . . . or . . . agent *is engaged in such . . . unfair methods of competition*, it shall order [it] . . . to cease and desist from such . . . methods of competition.¹⁸ (Emphasis supplied.)

The CAB's jurisdiction is clearly not defeated by the fact that Pan American and Grace formed Panagra and entered into the route allocation and territorial division agreement prior to the enactment of the CAA. The words "has been or is engaged" are sufficient to include practices presently being carried out, regardless of when they began. As pointed out by the Court, the Sherman Act was applied to combinations formed before 1890.¹⁹ Furthermore, the CAB has the duty to establish "Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."²⁰ The acts charged by the Government as antitrust violations are methods of competition, thus they fall within the jurisdiction of the CAB.

Second, a complete remedy for the Government will be an order directing Pan American and Grace to cease and desist from the further practice of route allocation and territorial division and Pan American to divest itself of its Panagra stock. As seen from the preceding paragraph, the CAB can issue such orders to halt unfair methods of competition. However, since Grace is neither an air carrier nor a ticket agent, it is very probable that the CAB does not have jurisdiction over it under section 411. Nevertheless, an order directed to Pan American and Panagra would accomplish the desired result.²¹ In addition, although the CAA does not expressly grant the CAB the power to order stock divestiture, such can be logically inferred therefrom. Thus, the Court, after noting that the CAB had no power to award damages or to bring criminal prosecutions and did not have jurisdiction over every antitrust violation by air carriers, stated: "But where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, Congress must have intended to give it authority that was ample to deal with the evil at hand."²² In *Gilbertville Trucking Co. v. United States*,²³

¹⁸ 52 Stat. 1003 (1938), as amended, 49 U.S.C. § 1381 (1958).

¹⁹ The Court cited *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), in support of this observation.

²⁰ 52 Stat. 980 (1938), as amended, 49 U.S.C. § 1302(d) (1958).

²¹ Mr. Justice Brennan's fears that the CAB could not proceed against Pan American unless it could also proceed against Grace appear to be without merit.

²² *Pan American World Airways v. United States*, supra note 1, at 312.

²³ 371 U.S. 115 (1962).

cited by the Court in a footnote, it was held that the ICC had the power to compel divestiture even though such was not expressly granted by the Interstate Commerce Act. "The justification for the remedy is the removal of the violation."²⁴

Consequently, the acts charged as antitrust violations are within the jurisdiction of the CAB and that agency can grant a complete remedy. Therefore, in accordance with the primary jurisdiction principle formulated above, the CAB has sole jurisdiction over the matter and the antitrust laws are to that extent superseded. The Court thus has followed the proper course of action in dismissing the antitrust suit.

It is a well known canon of construction that repeals by implication are not favored. Yet, when the circumstances are similar to those presented in *Pan American*, the courts should be willing to find that all but review jurisdiction has been ceded to the regulatory body. The two regimes of law would surely collide if after the CAB found that the practices of the parties were in the public interest, the courts could find that they were violations of the antitrust laws. Uniformity of regulation would thereby have suffered greatly. We have not yet reached the point where all actions involving regulated industries must be brought before a regulatory agency,²⁵ although some may view *Pan American* as a step in that direction. Illustrative is the statement of the attorneys for the reclusive Mr. Howard Hughes that "the CAB, rather than the courts, should settle disputes involving control of airlines."²⁶ Finally, although the Court attempted to limit its decision to the "narrow questions" presented in the case, it may have cast doubt upon the applicability of the antitrust laws to any situation involving airlines. If that be so, a more definitive statement of the inter-relationship of the antitrust laws and the Civil Aeronautics Act will be required in subsequent cases.

CHARLES BRADFORD ABBOTT

Antitrust—Clayton Act—Section 4B—Statute of Limitations—Doctrine of Fraudulent Concealment.—*Kansas City, Mo. v. Federal Pac. Elec. Co.*¹—In February 1962 the plaintiff brought two treble damage suits against the defendant electric companies under Section 4 of the Clayton Act.² The defendants were alleged to have been implicated in a conspiracy to fix the prices of certain items of electrical equipment. The plaintiff as-

²⁴ *Id.* at 130.

²⁵ It has been suggested that we may be approaching that point. See Schwartz, *supra* note 7, at 469-70.

²⁶ Newsweek, February 25, 1963, pp. 79-80.

¹ 310 F.2d 271 (8th Cir. 1962), petition for cert. filed, 31 U.S.L. Week 3283 (U.S. Feb. 28, 1963) (No. 881).

² 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958). Section 4 of the Clayton Act provides: Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.