The Legal and Regulatory Environment: Safety and Labor

DONALD W. MADOLE[1]

I think the first thing I should do is authorize all of you to have the same authority that a Circuit Judge has and that is if I say something that you don't understand, because I am here to share what little knowledge I have with you, you can, just like the Circuit Judge, stop me and say well now, what about that.

So now for all of you judges. I think the important thing now is the safety environment. You know that we live in a society that can send people back and forth to the moon safely. We sure ought to be able to get them from Denver to Chicago. We have the capability of doing that and let's go back historically to see what has been done and what has not been done.

When I first joined the brand new FAA in 1960, I thought I'd spend a couple of years in Washington and then go back to Colorado, but I'm still in Washington. During that time period there was a mid-air collision over Staten Island where a United Airlines DC8 went through its clearance and collided with a Super Constellation. This brought up the issues of air traffic control and the use of radar for the first time.

At that time, our government and the Department of Justice said that they wanted to find at least a couple of lawyers that had experience in jet aircraft. Well, I was one of them. John Baker, who later became President of the ALPA and was an Air Force pilot, was the other man. Both of us were less than one year out of law school. We had passed the bar and they sent us to New York to defend the U.S. government. But I can tell you that on both sides of the aviation bar, those who do this continuously, that I have not met any of those lawyers who have ever once, in my knowledge, have ever made an untruthful statement to the court or to their opposition. And I am very honored to work with people like George Tomkins who's sitting there. My colleagues here, Aaron Potters. There are some very fine lawyers and they do, in fact, try to make this system safer.

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Now, how are we going to make it safer? For one thing, I am sorry to say that I believe that General Cosada was the best administrator the FAA ever had. He made the rules and he made sure that everyone that worked for the FAA had one job and they better do it. I'm sorry to say that political appointees are not always the same. We have a problem. We have a problem with our FAA and the manner in which they are looking into Airline Safety.

First, we'll talk about the maintenance of the aircraft. Can you imagine with a major airline that corporate officials direct their lowest level management to write off inspections that were never made? They call it pencil perfect. I am amazed that our FAA inspectors did not ever go behind those so called inspections because everyone was talking about them. So what do we do about this? I think we have to continually let our friends in the press know when something like this happens. I have participated in about sixty three major airline crashes. And I would be absolutely delighted if I never had another one. Do you know how many years it has been since I have seen an airplane crash from a new cause? About fifteen years. You don't see airplane crashes from new causes. Now I'm suggesting to you that there are certain things that we need to look at.

One is why don't we have ground radar? We have the capability. Many of the runway collisions we have had in the past two or three years occurred right here at Stapleton Airport. And what about Los Angeles and the December third Northwest crash in Detroit? Can there be any excuse? I'm suggesting to all of us: the economists, the people that run the travel agencies, the people who are part of this great and wonderful industry, that we had better be putting a lot of attention into the safety issue. If we do that, then we will be able to lead the rest of the world in this area. When I talk about what can we do, obviously I don't want to talk about any cases I am handling right now. But, let's take the Chicago American Airline DC10 crash. Here is one where American Airlines found a system where they could take the engine off and do an inspection without following the procedures of McDonnell Douglas.

What happened was they had a forklift, and the forklift came up and they undid the engine and inspected the pillion supports, (metal devices that hang down under the wing). The crew went to lunch and the forklift lost some hydraulic power and when it tilted it broke the aft pillion bulkhead. Now, when that airplane took off, all three engines were working perfectly. As the engines rotated, the pillion fracture continued on across, and the engine flew up and over the wing just like it was supposed to. It was designed to do that. Remember on a jet aircraft if you look at the side of a wing of a jet aircraft, it looks almost like an arrow when it's in flight. When it's on the ground getting ready for takeoff, to create the lift to get off easily, it looks like half a grapefruit. What happened was, on the

left side of the airplane when it went up and over, it tore off the hydraulic lines and therefore the leading edge slats came back so you had one wing that stalled and the other one turned over, went upside down, the plane crashed, and as a result, 280 plus people were killed.

Now, where were the inspectors in Tulsa? Where were the FAA inspectors when this new, unauthorized procedure was being used in Chicago? By the way, the reason there was finally some admission that they know it had some crack in it, and the reason that they did not pull that airplane out of service was because United was on strike and they were flying the airplanes full. Now, that information came out in court. But what did our government do about it? Well, for one thing, the Secretary of Transportation asked that a special committee be appointed by the National Academy of Science. We discussed what we should do to make a step forward in safety. We have fail safe parts in aircraft and they have to be tested to be fail safe and we test them, but the issue has never been resolved as to what you do with a part that isn't fail safe? If it isn't fail safe because it isn't required for flight, if it breaks, could it break a part that is required for flight?

That was a regulation that we proposed back in 1981. It was in the FAA's development, if you will, as opposed to rule making for some years, and the FAA didn't do it. In fact, they withdrew the notice of proposed rule making ten days before the Japan Airlines 747 came apart at Sakura, Japan. So let me suggest that those of us who know a little something about how our government operates, and how our legal system operates. . . . Let's put some time and thought into making sure that we have the safest airplanes in the world because we have the capability to do it. I know and you know that if we have safe flights, we're all going to have jobs.

MICHAEL S. OLIN[2]

When Don Madole called me about three months ago and graciously asked me to speak, I said, I'd love to come out to Denver, what do you want me to talk about? He said I want you to talk about aviation litigation and the litigation environment during this two day conference. And I said which day do you want me to take? He then said you have fifteen to twenty minutes, so I already knew I was in trouble before I got on the plane to come out here because there are so many issues and so much is going on in the tort litigation field that to talk about them in twenty minutes is well nigh impossible. What I have decided to do is take an issue that is real hot right now. The most important issue is the Warsaw Convention because it is very hot both in the courts and Congress.

The Warsaw Convention was passed in 1929 as a treaty. It was adhered to by the United States in 1934. It's a treaty among nations that governs international air transportation. As originally passed, it was based on the notion that because aviation was in its infancy and there was a risk of destroying the carrier if there was a major crash. It, therefore, limited liability for carriers. If there was an international air crash under the original Warsaw Convention, the limitation of liability for damages was about $8,300 per person. That was the law from 1934 until 1965 in the United States. There are other countries that still adhere to it as it was. But in the United States in 1965, it became apparent that $8,300 wasn't enough and that the aviation and insurance industries were advanced enough that damages could be addressed on a more realistic scale. As a result, the United States renounced its participation in the treaty in 1965, effective six months later. To avoid renuncation becoming effective, the international aviation community, with the agreement of the United States, entered into the Montreal Agreement, which was a special contract authorized by the Convention, that says that the parties can agree to do something else if everybody has agreed to do it. The Montreal Agreement did a couple of things. It said: (1) the limitation of liability is raised to $75,000, (2) there is what I call absolute liability up to that amount for any "accident," and (3) if you want to get more than $75,000, you have to prove that the carrier was guilty of willful misconduct.

Now, what does this apply to? The Montreal Agreement is not the law everywhere, but it is the law for every flight that starts, stops, or ends or has connection with an itinerary that starts, stops, or ends in the United

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States. That means that if I am going to London and I buy a ticket that goes Miami on to Atlanta, British Air from Atlanta to London and Pan Am from London back to Miami direct, the Warsaw Convention applies to the Miami-Atlanta leg. Most people don't realize that the Convention governs the Miami-Atlanta leg as well. Which means that if Mr. Madole and I are sitting next to each other on the Miami-Atlanta leg of the flight and he is going home to Washington, but I'm getting on a plane to go to London, and God forbid the plane goes down, his claim is subject to a completely different set of rules than my claim. My claim is limited to $75,000 absent willfull misconduct, whether the carrier was at fault or not. Fault is irrelevant. If the plane is hijacked by third parties and I'm injured and he's injured, whether the airline is at fault or not, they are responsible to me up to $75,000. Mr. Madole has to prove some level of fault to recover, but he's not subject to the $75,000 limit; he's subject to whatever the law is of the appropriate state in the United States that governs his particular claim - a completely different set of rules. This causes all sorts of problems because it happens all the time.

The reason that the Warsaw cause of action is hot these days is because of Lockerbie. Everybody is reading about Lockerbie and the $75,000 cap for all those people. I'm not going to talk about the litigation in detail. I think generally, throughout the United States, people are of the notion that $75,000 is an inappropriately low limit on liability for the death of people who were killed in an international air disaster. The question of fault is a different issue. But the limit is inappropriately low and so there has been a move afoot to change that and I'll talk a little bit more about that as well.

The other thing that's coming up in the Warsaw context now, and this is real, is the type of stuff that's taught by law professors who wear tweed jackets with patches and smoke pipes and look at the ceiling as they talk - very theoretical stuff. We have a convention that up until the mid seventies, it was held, did not create a cause of action. If you were injured in an international air accident the law of whatever local forum governed and was applied, Florida law, Georgia law, etc.. If that law provided a remedy, that's the remedy you sued upon. Warsaw simply provided limitations on the remedy. Up until the mid seventies, it was almost universally held that Warsaw did not provide an independent federal remedy. In the late seventies, in a case called *Benjamin*, the Second Circuit Court of Appeals in New York did a backflip. That was the jurisdiction that first said "no remedy" and now changed its mind and said yes, Warsaw creates its own remedy independent of state law. You can now bring an action under the Warsaw Convention itself if you are injured in an international air case. Finally, we have now come almost full circle because two weeks ago the Second Circuit said that not only can you bring an action

under the Warsaw Convention, it's the only action you can bring and you have no state law remedies anymore. The Eleventh Circuit has been divided on the issue. Is Warsaw exclusive? Can you still sue on the state law remedy? If you can only sue on Warsaw, can you bring it in state court and stay there? Or does it have to go to federal court? Lots of undecided, difficult legal issues that effect the substantive rights of the people who are on these airplanes because it effects where and when and under what circumstances they can bring a claim. Can they bring a claim, like in Lockerbie in the Florida state court? Do they have to be in federal court before Judge Platt in New York? All these are issues that are being litigated right now and are going to go up and are going to be resolved some day at the Supreme Court level.

Now, under the Warsaw Convention, in the same case out of the Second Circuit, the Second Circuit ruled, agreeing with the Eleventh Circuit, that you cannot get punitive damages under the Warsaw convention. This raises an entirely new issue of substantive, public policy. Are punitive damages beneficial? Do they do what they are supposed to do? Do they act as a deterrent for bad conduct? Will the inability to assess them mean that Ford's Pinto case will never happen again, or that we just won't find out about it? We can argue that one issue for an entire day. That's not in the Supreme Court right now. There is a Warsaw case in the Supreme Court on another issue. If you claim a Warsaw cause of action (say I don't like the state remedies and I want to recover under the Warsaw cause of action) what are the damages? What kind of damage law do you have? Warsaw refers to state law damage laws. But, does it create its' own?

This is the Eastern Airlines case from Miami to the Bahamas. An L1011, all three o-rings were left out of the three engines and one by one the engines shut down. The airplane's at 30,000 feet traveling to the Bahamas with no engines. The plane is prepared for ditching. Everybody on the plane thinks they are going to die. The crew, fortunately, was able after about ten minutes, to restart one engine, turn the plane around and land at Miami International Airport. Now maybe I was foolish, but I thought that was kind of an interesting case to bring for emotional distress. If there was ever an understandable claim where people would have emotional distress, that might be it. Now, standard common law says well, if they didn't get hit, they didn't bang their head, or something didn't happen to them, you have no claim for emotional distress. Sometimes we have to try to change the law. So, we brought a claim for emotional distress for about thirty of the passengers on this aircraft and we worked our way through the District Court. That Court said we had no claim. We worked our way up to the Eleventh Circuit and lo and behold, we won. The Eleventh Circuit says no, you don't have to look at state law.

The Warsaw Convention creates a cause of action and it will allow you to recover for emotional distress because the term lesion corporelle, which is what the Warsaw Convention is written in French, encompasses that.

Now we're at the Supreme Court and that was argued in October. I have to tell you that was a great experience being in the Supreme Court. The slippery slope that you're on in that case is very, very interesting because Justice Marshall asks my partner, "you mean to tell me, Mr. Plaintiff's Lawyer, that if I'm on a plane with three engines and one of the engines goes out and I get scared, under the Warsaw Convention, because we're not talking about a domestic trip, we're talking only international, under the Warsaw Convention that's an accident? And I left some money on the table somewhere back in the past?" And the answer to that under our position was yes. It may not be very much because you weren't really in danger from one engine loss, but that is an accident as defined in *Air France v. Saks*. So as that question is asked, I say we're dead, we can't possibly win this case. But then, I think it was Justice O'Connor, and this case makes strange bedfellows folks, Justice O'Connor asks Eastern's lawyer, John Murray (another friend of ours from Miami) "you mean to tell me that if Mr. Madole and Mr. Olin are sitting next to each other on that plane and Olin bangs his head on the seat and Madole doesn't, that Olin gets to recover but Madole doesn't?" The answer to that was also "yes" because traditional notions of common law say that an impact, any kind of an impact, is enough to sustain a claim for emotional distress. So that was ridiculous and Eastern sat down and said how are we going to win this case? Nobody knows what they are going to do. They are going to rule any instant and we have another issue on the Warsaw Convention.[3]

Now, there is also pending legislation to change how the Convention works. I have to tell you that the reason that this has come about is because the Warsaw Convention is so bad. If we didn't have the $75,000 limit, with stupid rules like we've now got, we wouldn't have to come up with bad legislation to try to fix it, and the legislation that we have in Congress at the moment, it's been there the past couple of years, I think it's chances are improving of passage much to my chagrin, are basically that passengers on international air flights will buy first party insurance mandatorily. There will be a surcharge of two or three dollars a passenger and they will buy first party insurance that will be administered like third party insurance. What that means is it's like you bought life insurance from the Mutual of Omaha before you got on the plane. You'll pay your two or three dollars to the carrier who will collect it, pass it along to a

3. The Supreme Court has since ruled in the case that the Warsaw Convention will not support a claim for emotional distress under the circumstances there presented.

contractor, which is another insurance company, which will insure you above the $75,000 limit, but you still have to fight with them about how much. It's not like you are buying $100,000 or $200,000; you're buying the right to collect more than $75,000 in an amount to be determined, whatever the local if local law allows it. I'm not sure that it's a good idea, in fact, I am sure that it is not as good, in my opinion, to have first party insurance insuring you against the negligence of third parties. Wrongdoers ought to be accountable for their own wrongs.

And I don't like this absolute liability stuff either, personally. I think you ought to be accountable when you do wrong and you ought not to be accountable when you don't. The truth is, planes don't go down in this day and age unless somebody made a big mistake.

RICHARD L. WYATT, JR.[4]

Many unions still successfully use traditional methods to exert economic pressure on employers during bargaining. Others, including the unions that dominate the airline industry, increasingly complain that such techniques are no longer effective because in the current economic and political climate, the balance of power is overwhelmingly in the hands of management. Organized labor's principal argument is that employers' increasing willingness to operate with permanent replacements during strikes has rendered what has always been labor's ultimate weapon — the strike — ineffective as a bargaining tool. Consequently, organized labor has dedicated substantial resources to the development of new tactics — short of the strike but equally devastating — to exert pressure on recalcitrant managements.

One increasingly common tactic used by airline unions is to publicly question the safety of a target carrier's operations. In the airline industry, public confidence in the safety of air travel is of paramount importance. No air carrier can long survive if it is perceived as operating with less than the highest degree of safety. In the last several years, airline unions have increasingly and effectively used the safety issue to bring economic pressure on carriers with which they have disputes. One tactic has been to disguise work slowdowns as safety campaigns — which serves the twofold purpose of enabling the union to claim moral high ground while subjecting the carrier to unnecessary delays based on supposed safety concerns. Unions have also found that expressions of concern over safety provide an effective substitute for a call to boycott the carrier, a call which the public might not support if the underlying dispute is perceived as economic in nature. Allegations of safety violations may also trigger governmental investigations and penalties which bring additional pressure on management — all at no cost to the union.

Although the public interest is undoubtedly served by the raising of legitimate questions concerning the safety of a carrier's operations, the raising of such questions as a mere tactic in a labor dispute unnecessarily undermines public confidence in air travel and arguably is undeserving of protection. In the present statutory environment, however, carriers have little recourse against unfounded and highly damaging safety allegations made by unions in the course of disputes with management. Set forth below is a brief description of the way in which safety issues may be raised, followed by a proposal for a possible legislative approach to dealing with the problem.

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A. THE SLOWDOWN

Because of the pervasive nature of governmental involvement in all aspects of airline operations, airlines have proven particularly vulnerable to employee slowdowns masked as safety campaigns. The International Association of Machinists ("IAM") used such a campaign against Northwest Airlines in 1987-88. In 1991 the public was treated to the cancellation of twenty percent of American Airlines' scheduled flights after the Allied Pilots Association, the labor organization representing the American pilots, launched its own version of a slowdown. The Air Line Pilots Association's ("ALPA") "MaxSafety" campaign against Eastern in 1987-1988 remains, however, the most conspicuous example of a slowdown masquerading as a safety campaign. As part of the ALPA-sponsored program at Eastern, ALPA members repeatedly delayed or grounded flights with last minute write-ups of items that in many cases were not in fact broken. As a result, Eastern incurred unprecedented levels of late departures and canceled flights.

The IAM also engaged in a slowdown against Eastern, steadfastly refusing to complete maintenance repairs in a timely fashion. The slowdown intensified during the thirty day cooling off period prior to the IAM strike of March fourth, 1989, and, as a result, a substantial percentage of Eastern's fleet was grounded for maintenance checks and repairs which IAM members simply refused to complete. In *Eastern Air Lines, Inc. v. IAM*, No. 89-0249 (S.D. Fla. February seventeenth, 1989), Eastern alleged that IAM members were taking three times as long as normal to complete the FAA-required heavy maintenance checks. The court enjoined IAM's slowdown activity. On the eve of the strike the slowdown escalated to violence and property damage and the court interpreted its injunction to permit Eastern to "lock out" the IAM mechanics and escort them off the property before the strike actually began. As the Northwest, American and Eastern experiences demonstrate, a concerted, cynical "work-to-the-book" program can effectively cause the delay or grounding of aircraft, resulting in large, unrecoverable losses of revenue and goodwill for the carrier.

To be sure, a slowdown in the form of a safety campaign is enjoinable in many circumstances, just as an outright strike would be.[5] In any such injunction proceeding, the difficulty is in proving that a slowdown

5. *E.g.*, Long Island, R.R. v. System Federation No. 156, 368 F. 2d 50 (2d Cir. 1966) (injunction to stop employees' concerted "blue-flagging" to indicate unsafe trains that should not be moved); Texas International Airlines, Inc., v. ALPA, 518 F. Supp. 203, 207 (S.D. Tex. 1981) (injunction to stop ALPA-sponsored program of reporting of equipment malfunctions designed to delay flights); Long Island R.R. Co., v. Brotherhood of Locomotive Engineers, 290 F. Supp. 100 (E.D.N.Y. 1986) (injunction preventing refusal to run trains through Pennsylvania Station for spurious safety reasons).

rather than a true concern for safety, is the motivation for the concerted actions of the employees.

Beyond that difficulty is the strategic question of whether to seek an injunction. Injunctions are hard to obtain, particularly where the union cloaks itself as the champion of public safety. And, as was seen at Eastern, injunctions are hard to police. Even if successful, a court proceeding will likely have the effect of publicizing the union's allegations, and the employer risks the appearance that it is exhorting its employees to work at less than the highest level of safety.

B. Consumer Boycotts

Safety campaigns can also effectively mask a call for a consumer boycott of a target carrier. Again, Eastern provides a timely example. In 1988, Eastern's unions began a concerted campaign of publicizing what it alleged to be unsafe maintenance practices at Eastern, coupled with pleas to support the unions and not travel on Eastern flights. As part of their public relations strategy of making Frank Lorenzo "the issue," the unions' leadership characterized him as a "cost cutter" unconcerned with safety and, as a result, Eastern itself was "unsafe." During a brief period in 1988, union members systematically produced over 1300 postcards to the Secretary of Transportation alleging specific safety violations at Eastern. The unions then lobbied Congress to force the Secretary to launch a special investigation of the high number of safety complaints at Eastern and at its sister carrier, Continental Airlines.

The result was an unprecedented Department of Transportation ("DOT") investigation which included over 1600 ramp inspections and the grounding of Eastern and Continental planes, wherever they landed, for unscheduled FAA inspections. While this was taking place, teams of government lawyers and investigators conducted interviews, depositions and meetings with more than 200 employees and corporate officials, and examined tens of thousands of pages of documents at five airports and the corporate offices. The investigation significantly eroded managerial resources, and had a significant negative impact upon the public's perception of Eastern's safety.

The DOT ultimately recognized the unions' safety allegations for what they were — merely another weapon in the unions' war against Eastern. (1) Even though the DOT exonerated Eastern of the unions' charges, Eastern never recovered from the adverse publicity created by the investigation. Although the unions point to the later indictments of Eastern maintenance personnel as confirmation of their safety claims, proof that a few violations may have occurred falls far short of validating their entire campaign. The degree of governmental and regulatory scrutiny that the un-

ions were able to bring upon Eastern through their unprecedented safety-based campaign demonstrates the brutal effectiveness that such a tactic can have, even when the underlying allegations are almost entirely without merit.

C. A Legislative Proposal

That the public interest is served by the raising of legitimate questions of airline safety does not justify continued toleration of the use of unfounded safety allegations to gain financial advantage in labor disputes. As our nation's labor laws are currently interpreted, however, unions are free to make such allegations without fear of liability, and carriers have little recourse other than to mount their own public relations campaign — which will almost certainly have the effect of further publicizing the union's charges and thus do more harm than good. A legislative solution to the problem may therefore be necessary, and could be formulated along the following lines.

First, in order to ensure that legitimate safety concerns are not discouraged, Congress could provide statutory protection for the "whistleblower," an individual employee who in good faith reports what he believes to be a violation by his employer of safety related statutes or regulations. At present, the Federal Aviation Act contains no protection of whistleblowers, but Congress has previously seriously considered the issue. The House passed whistleblower legislation in 1988, and the Senate Labor Committee approved similar legislation, S. 436, on April 25, 1990.

Second, in order to ensure that even legitimate safety related claims are not misused to gain an advantage in a labor dispute, Congress should require that reports by "whistleblowers" be made in good faith and in a timely fashion. Persons making allegations of unsafe practices should not be allowed to hide behind statutory protections to hoard evidence of possible violations for later disclosure at an advantageous moment in an economic dispute with their employer. For example, during the DOT investigation of Eastern, neither ALPA nor IAM presented evidence to the DOT of any management practice that raised safety concerns until the DOT was almost ready to issue its report, despite the fact that much of the evidence concerned activity that had occurred much earlier and had apparently been known to the unions but was withheld for strategic reasons.

Third, the public interest requires that the carrier as well as the government be alerted to any alleged violation as soon as evidence of that violation becomes available or substantial allegations of unsafe practices are made to the government. Such notification could be required of the individual, but certainly should be required of the governmental authority to whom the individual makes the allegation. For either the unions or the

government to fail to promptly alert the carrier to alleged violations so that it may take steps to remedy any legitimate problem that exists would serve to place parochial economic or prosecutorial goals over the public interest.

Finally, the labor laws should be amended so that allegations of unsafe practices made in the context of a labor dispute are subject to the same standards of libel and slander as they would be outside of that context. Under current law, statements made by unions or their members during labor disputes must be shown to have been made maliciously in order for a victimized employer to recover the libel or slander. False or unfounded claims of safety violations in the airline industry are deserving of no such heightened protection.

D. Conclusion

The increasingly common use by unions of spurious safety concerns in labor disputes in the airline industry raises significant difficulties for the target carriers, as well as additional questions regarding whether such charges serve any legitimate public interest. An airline faced with such allegations has few attractive choices, since the publicity that is likely to accompany even a successful attempt to enjoin the union's conduct may be as damaging as the union's own efforts to publicize the dispute. The battle likely will be fought in the public relations arena, and counter-publicity may be the carrier's only really effective weapon. The volatility of the issue and the absence of any truly effective defense to such charges suggests that new legislation, designed to protect legitimate safety claims, but to discourage the kind of abuses that have recently occurred, may be necessary.[6]

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6. In a letter to ALPA President Duffy, dated April 22, 1988, Transportation Secretary Burnley stated:

> I object strongly to efforts to make safety a pawn in a labor-management dispute. There are well established mechanisms for addressing labor-management issues, and a campaign focusing on allegations of safety mismanagement for the sole purpose of pressuring the people on the other side of the table is not one of those mechanisms. The FAA tells me that only six out of more than 1,300 allegations could be substantiated. . .I appreciate knowing that ALPA's postcard campaign is essentially over. . .

After ALPA and the IAM petitioned the DOT to reopen the investigation, Secretary of Transportation Burnley harshly criticized the union's "safety" campaign, calling ALPA's petition "a transparent attempt to put pressure on Eastern by raising new safety concerns." DOT News Release, December 14, 1988.

JAMES WEISS[7]

Sometimes it's good to be a procrastinator. I must admit that I have that tendency, particularly when it comes to preparing presentations such as this one, where my objective is to provide timely information. And, especially, when the industry I'm dealing with is the airline industry where everything seems to change about once a day.

Had I begun my preparation when this program was announced, Eastern would have still been flying, Midway would still have been solvent, Pan Am still would have been solvent and independent of United, and TWA wouldn't have been on the verge of liquidation or being taken over by Kirk Kerkorian.

Had I prepared my remarks just two weeks ago, on the airport access issue I would have discussed in detail the fourth Circuit's *Omni Outdoor Advertising v. Columbia Outdoor Advetising*, 891 F.2d 1127 (4th Cir. 1991), which might have placed Denver's decisions concerning access to its planned new airport in considerable antitrust jeopardy.

On computer reservation systems (CRS), I would have speculated on what Department of Transportation (DOT) might do, and I would have given no consideration to the rumors that System One might merge with WORLDSPAN. Since then, though, the United States Supreme Court has reversed the Fourth Circuit's *Omni* decision and DOT has proposed CRS rules that go much further than anyone expected. Their importance now has to be considered in the context of CRS and airline industries that may consolidate even further.

On this panel, I'll stick with the airport access issues. But, as I discuss airport access, keep in mind that from an antitrust lawyer's perspective, airport access and CRS are not entirely separate. CRS is one of the barriers to entry into airline markets that is most often cited by those who take an interest in those issues. Particularly when a CRS is controlled by an airline that is also the primary carrier serving one of the hub cities in the market being examined. And, when an airline complains that its access to a market is blocked, or that a market has been monopolized, it usually has CRS factors as well as airport access in mind.

Turning now to airport access, it is indeed helpful to be addressing these issues in Denver. Not that there are necessarily problems here, but the new airport does serve to focus the discussion.

Stapleton Airport is one of the few airports that is a hub for two airlines: United and Continental. The city is in the process of building the first new airport in about twenty years. Their intention is to improve the

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service facilities, not only for the two hub carriers, but also to increase airline service by making it more attractive for other airlines to begin or increase their service to the airport. The result will be that Denver passengers will become less dependent on the hub carriers for service and competition.

How can the city accomplish those goals? Certainly it can't rely on how others developed their airports in the past. If you think the airline industry has changed a lot in the past few months, think how much it has changed in the last twenty years. Today a big concern is hub concentration. There is even a well-publicized Justice Department (DOJ) investigation into whether certain hubs have been illegally monopolized. Twenty years ago, when the last major airport was built (DFW), hubbing was a distant concept. Only Atlanta had anything approaching a hub operation. Some of the airports that today are absolutely full, were leasing large blocks of long-term space to carriers on very favorable terms solely to get them to come into the airport. The last thing that concerned most cities was the available space for other airlines. The big change then, has been the need to accommodate the hub carriers, that are so important to the city's service, while not foreclosing other airlines' ability to offer competitive service.

If this sounds like a balancing, or "rule of reason" process, it is intended to. For even though hub concentration has been fingered by the General Accounting Office (GAO), Justice and others as one of the culprits in higher air fares, hubs do not per se create competitive problems. Indeed, many cities have actively sought to become hubs for carriers because of the increased traffic through a city. Improved air service can lead to increased economic activity at a city. Hubs are also highly efficient ways to move people and cargo that results in increased competition and better service nationally. Keep in mind that, without United's and Continental's cooperation, the new Denver airport probably would never be built.

The flipside, of course, is that such cooperation does not come cheap. United wants fourty five gates at the new airport and a subsidy to take them; Continental wants over thirty, (which it has agreed to pay for, but it is in bankruptcy). Assuming those financial problems are resolved and they get the gates they want, together they will take up most of the new space. In addition, both airlines sought assurances that Stapleton would not be used again for scheduled service as a condition for supporting the new facility. That is undoubtedly why the city is now trying to figure out what to do with Stapleton. Suggestions have ranged from developing it as a park or shopping mall to using it as a branch of the Smithsonian Air and Space Museum.

That's not all. United and Continental not only want most of the

space, they want the best space, possibly even locating it in ways that will preclude any other carrier from obtaining large blocks of contiguous gates. They are already in a dispute with one another; United has complained that Continental is getting the best of the new facility.

You might look at the situation in Denver and predict that it is an antitrust suit waiting to happen. An aggrieved airline might claim that it tried but failed to obtain good space at the Denver airport because it was blocked by the incumbents' airport leases and that entry is essential to its competitive survival in particular markets. An added feature of such a case would be the dominant market position of United's CRS that Continental claims has been responsible for its relatively poor performance in obtaining bookings of Denver originating passengers. However, Denver would be an unlikely forum for a successful case because it has two hub carriers. Even if an airline failed to obtain favorable gates, its failure to thrive would probably be due more to the economics of airline hubs rather than the availability of good space at those airports. It seems that three hubs at one airport is at least one too many. In the three instances where there have been three hub carriers: Denver (UA,CO,FR); DFW (AA,DL,BN) and Dulles (UA,CO,Presidential), no more than two carriers have survived.

Why? Every hub needs some local traffic to support it and there are few local markets large enough to support three hub carriers. Certainly Denver is not likely to be one of them. In addition, air traffic at Denver has actually declined over the past several years. So, for the time being, at least, there will be plenty of good space at the new facility. Denver is one of the few airports with either a decline in traffic or two hub carriers. Most airports that have a hub carrier, have only one and, except for recently, traffic growth at most of them has been robust.

It should also be recognized that airlines are not the only ones who could bring an antitrust suit on the basis of lack of access to an airport. Airport vendors would have standing to the extent that they can show they have been illegally excluded from a facility that is essential to their business. The potential antitrust violations that arise from foreclosing airport access include monopolization or attempted monopolization, refusals to deal and conspiracies to eliminate competition.

Monopolization or attempted monopolization would be proven very differently by an airline plaintiff than by a vendor plaintiff. A claim by an airline would likely be that the incumbent obtained a dominant position at the airport and as a result is using that position to exclude competition and dictate service and fares in air passenger markets served via that airport. This, I assume, is the gist of the Justice Department's current investigation into hub dominance. The potential to exclude competition is what the Department of Justice has claimed it was trying to prevent by

blocking last years sale of Eastern's Philadelphia gates to US Air (A year later the same sale by Midway to USAir, was allowed since Midway failed at PHL and there was no other buyer) and by opposing the sale of National Airport slots to United, preferring instead Northwest.

At first blush, a hub dominance case may appear to be straightforward, since many major airports are dominated by one, or at most two, hub carriers. In most cities, like Denver, there is only one airport that serves scheduled airline traffic so reasonable access to that airport is essential to providing competitive airline service to that city. In fact, however, other than in a few slot-constrained airports, access is never blocked entirely. The case will most likely come down to how much and what kind of space is essential and whether that space is essential to provide competitive service in markets that have been monopolized.

The last question that distinguishing a case against an airline from a case against an airport food concession monopoly is "what is essential to be competitive". The difference is that an airline, unlike a food vendor, does not sell service in a city. An airline sells service between cities; i.e., in city-pair markets like, for example, Denver-New York. The monopolization question that would have to be answered concerning an airline, would be whether given the airline's position at Denver, is it foreclosing competition in the Denver-New York market?

Does the would-be competitor have to have a hub at Denver in order to compete, and is the defendant airline controlling a non-duplicable essential facility? These are, of course, much harder questions to answer than simply what is happening at Denver. You also have to examine the market significance of everyone who serves or could serve Denver-New York nonstop and, possibly, everyone who offers connecting service over a hub in between. I am not going to get into the details of what you have to prove to win a case like this, but, if you are interested, I invite your attention to the *Aspen Highlands* case. The plaintiffs won it on a refusal to deal theory. If you read the case, you will know how hard it is to make out a monopolization case and you will also see why the Justice Department investigation is taking so long, and why so few of these cases have been brought.

Before last week, the more likely antitrust cause of action would have been under a conspiracy theory. Such cases were usually much easier to prove than monopolization cases, particularly under circumstances like the leasing or building of an airport, where the city is involved and everything is "of record". This is because the city can be a co-conspirator.

There is a law, called the Local Government Antitrust Act, which protects the city from being sued for damages for antitrust violations. But, a city can still be found to conspire with a private entity so that damages can be found against the private entity. Moreover, injunctive relief can be

sought against the city which could disrupt it's lease and terminal planning. This is significant because the city enters into contracts with the airlines or vendors to use the airport, and each contract, by definition, excludes someone from use of the space. If the purpose or effect of the contract is unreasonably exclusionary, the private party can be found liable for conspiring with the city in entering into the contract.

Sounds crazy? It is, as the Supreme Court just recognized in overturning the *Omni* case. There has long been an important defense to this type of case which is known as the State Action Doctrine. Under that doctrine, if the state has authorized the airport authority to allocate airport space, its actions in doing so are exempt from antitrust prosecution, even if it conspired with private parties in carrying out its functions. Moreover, private parties petitioning the airport authority to allocate the most favorable space to them, or to exclude others, are also exempted under what is known as the *Noerr-Pennington* doctrine.

In short, while you shouldn't expect an antitrust case involving Denver any time soon, airport access issues are on prosecutors' front burners. They will at least become a rationale for blocking some mergers and acquisitions. So the antitrust principles we are discussing today should be relevant for some time.