

INTRODUCTION

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The airline industry is at a crossroads. Thirty years ago, it was regulated, subject to full oversight by the Civil Aeronautics Board. It was subjected to both cost-of-service ratemaking, as well as competition restrictions due to limitations on the number of airlines allowed to provide scheduled air passenger service on any particular route. There appeared to be no rational system of air passenger service. Despite the quality of the service offered (or perhaps because of the quality of the service offered), it was considered for most to be a luxury. Air travel was not part of the normal American routine as it is today.

The rationalization of the airline industry was not easy. Upon deregulation, numerous mergers and consolidations took place. Entire flight schedules vanished as airlines consolidated power around hubs located in major business centers. The bulk of nonstop travel disappeared for most destinations, replaced instead by a system designed to fill planes to the extent possible with full-fare nonstop business and other time-sensitive passengers, with the rest of travelers serving as the reserve to fill up seats. Travel became relatively less expensive for most, and it is far more common today to encounter individuals who travel for leisure purposes.

Competition arose, but in a very weak manner. Nonstop competition between legacy carriers only existed between the carriers on hub-to-hub routes. In most cases, the competition that existed was duopolistic and insufficient to drive fares down to costs. Connect competition, based upon the location of potential reasonable connection options for individuals whose origin was not a hub, was more abundant. Hence, until recently, the cost to

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passengers seeking to travel nonstop was higher than for passengers who could afford the time of connecting. This appears to have permanently ended due to recent rises in fuel costs.

The hub system created by the airlines of course has tremendous efficiencies, allowing airlines to amass large quantities of passengers in a central location to fill planes. However, the hub system also yields tremendous costs, both in terms of physical costs and costs to competition. In terms of the former, airlines seek to provide a high level of frequency for business passengers. The level of frequency and the potential for a rapid response into a city-pair may in turn limit the ability of other carriers to enter the market to obtain traffic.

These potential competitors, low-cost carriers (LCCs), typically enter certain routes where the airlines charge high fares. The LCCs then offer a lower fare to attract traffic from the legacy carrier. The LCCs operate at lower costs because of the limited number of routes in which they operate, the typical pattern of only operating one type of aircraft (to reduce maintenance costs), and the use of nonunion labor. Legacy carriers have typically responded by increasing frequency on the routes entered by LCCs, reducing fares, and potentially increasing the size of the aircraft utilized on those routes. This type of response has been subject to numerous antitrust challenges, and was even the subject of DOT rulemaking, albeit the rulemaking was abandoned. LCCs have thrived to varying degrees, with a few establishing hubs adjacent to the hubs of legacy carriers.

Internationally, airline competition was stunted by legal developments and a quest to capture efficiencies. With respect to the former, regulation severely limits the operation of foreign carriers within the United States to only single endpoints, precluding the operation of intracountry routes. In addition, air carriers made arrangements with one another to operate end-to-end connections between U.S. destinations and foreign destinations. These alliances allowed for the amassing of international traffic from the United States and other countries but limited competition within the United States. To some degree, the formation of alliances also limited the potential for competition between carriers that could provide service on international routes. Instead, alliance competition is the norm on international routes, and many of these alliances are immunized from antitrust scrutiny.

Against this backdrop, the role of antitrust is prominent, seeking to balance the potential procompetitive benefits of conduct or transactions against their potential anticompetitive

effects. Antitrust may not be the best tool for such an endeavor, at least as it is currently informed by 1970s Chicago School industrial organization doctrine.¹ While the federal antitrust enforcement agencies have expressed concern and interest in the industry, they have hardly appeared vigorous in enforcement. To the extent they have challenged conduct in the airline industry, they have been thwarted somewhat by judicial interpretation of antitrust law.

It is appropriate, therefore, to engage in an inquiry as to the current state of the airline industry. This symposium has brought together nationally known airline experts and antitrust scholars for that purpose. What follows is a brief summary of their respective works. It is hoped that this Introduction gives the flavor of each work without spoiling the plot.

The symposium commences with a thorough discussion of the prickly issue of airline alliances and systems competition. James Reitzes and Diana Moss argue that the Department of Transportation's policy of conferring antitrust immunity to airline alliances does not necessarily yield benefits to consumers.² The benefits of alliances that first appear at the alliance's onset, increased customer traffic and lower fares, appear to disappear as the alliance consolidates its position. This suggests that competition among alliances for passengers is insufficient to protect consumers from higher fares and service reductions that are attributable to alliances wielding monopoly power. Reitzes and Moss argue that there even could be tacit or explicit collusion among immunized alliances, killing any illusion of competitive benefits. Finally, the foreclosure of necessary inputs by the alliance carriers to carriers operating independent of the alliance raises the specter of potentially disciplining the independent carrier, particularly to the extent alliance carriers operate in multiple markets.

Michael Levine argues that the focus of the Reitzes–Moss paper on key inputs into a system, namely service on city-pair routes or other traditional competitive foci, is outmoded.³ Rather, Levine argues, the bread and butter of airline profits, and of airline competition, is in the offering of the entire “network,” or

1. See Thomas L. Greaney, *Chicago's Procrustean Bed: Applying Antitrust Law in Health Care*, 71 ANTITRUST L.J. 857 (2004).

2. James Reitzes & Diana Moss, *Airline Alliances and Systems Competition*, 45 HOUS. L. REV. 293, 328–30 (2008).

3. Michael E. Levine, *Airline Alliances and Systems Competition: Antitrust Policy Toward Airlines and the Department of Justice Guidelines*, 45 HOUS. L. REV. 333, 337 (2008).

hub-and-spoke system designed to aggregate passengers. Levine argues that many of the passengers in these networks are captive. To the extent they are not, these customers will find that the products offered by different networks are not identical. However, customers are able to avail themselves of non-network options to the extent they are not locked-in to a particular network. To require or compel action by the network carrier comes at a cost to consumers, Levine argues.

Shubha Ghosh and I examine the nature of judicial examination of predatory issues in the airline industry in our contribution to this symposium.⁴ The vast thrust of this paper is on the very recent issue of American Airlines and Southwest Airlines using legislation to eliminate potential competition in the scheduled air passenger service market in the Dallas–Fort Worth metropolitan area. By precluding use of Love Field by LCCs, these legacy carriers have essentially guaranteed a duopoly in the provision of service in Dallas–Fort Worth. The courts, in examining the issue, have engaged in a false and blinding analysis laden with the assumption about the nature of regulation and deregulation in the airline industry. The paper also examines, to a lesser extent, the nature of judicial analysis of predatory pricing in the industry, finding that courts fail to look at facts and any recent economic analysis of the issue, instead clinging to outdated views of predation crafted by the Chicago School of economics in the 1970s (predating deregulation). The nexus of the two arguments is that courts have viewed regulatory theory and economic theory as surrogates for proper antitrust jurisprudence: courts ignore the facts in any particular case and use theory or regulation as a surrogate for the competition policy that surrounds and drives modern deregulation.

Chris Sagers argues that the Love Field deal, and the court's reaction to it, had little to do with deregulation.⁵ Sagers argues that the focus of the Ghosh–Bush paper should instead be two-pronged. The first prong, Sagers argues, is common to all of antitrust. of the industry, have a tough row to hoe. Since the Supreme Court's decision in *Bell Atlantic v. Twombly*,⁶ things have gotten progressively worse for

4. Shubha Gosh & Darren Bush, *Predatory Conduct and Predatory Legislation: Exclusionary Tactics in Airline Markets*, 45 HOUS. L. REV. 343 (2008).

5. Chris Sagers, *Raising the Price of Pork in Texas: A Few Thoughts on Gosh, Bush, and the Future of the Antitrust Immunities*, 45 HOUS. L. REV. 395, 401–02 (2008).

6. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

the antitrust plaintiff. The second prong, Sagers argues, is the relationship between competition policy and government, “a relationship the federal courts have effectively defined but that, I think, they have mixed up on a very basic theoretical level, with bad consequences and for no good reason.”⁷ The misinterpretation of this interplay, Sagers argues, allows local and state governments to “pass out pork,” as was the case in *Love Field*. Space limits me from adequately describing Sagers’s elaborate discussion of this relationship, but suffice it to say that while he takes Professor Ghosh’s and my article to task, the lashing is well worth it in the sense that the symposium received what really is an additional substantive, insightful, elegant, and thoughtful article.

Paul Dempsey’s article provides a less than rosy picture about the nature of deregulation and airline competition.⁸ Dempsey’s empirical analysis suggests an industry constantly in cyclical peril, with the periodicity of the downturns increasing and the depth of the cycles worsening. Dempsey argues that, examining the nature of these downturns pre- and post-deregulation, the inescapable conclusion is that competition is to blame. Maintaining the status quo will lead perhaps to the demise of the industry. Dempsey appears to be suggesting return to some type of regulation, restoring health and welfare to the industry. Dempsey is indeed the holder and wielder of much impressive data to support his conclusion.

Peter Carstensen argues the difficulties in the airline industry are the result of several factors but that none of these factors suggest returning to the thrilling days of yesteryear.⁹ Carstensen points out that rather than “throwing out the competitive baby, the anticompetitive bathwater, and the entire legal bathtub,”¹⁰ it is important to know why the industry appears to be failing. Carstensen notes at least one reason is bad management decisionmaking (e.g., selling planes and then leasing them back). The deficiency, Carstensen argues, is in the market for capital and not the market for air passenger service. Carstensen further notes that returning to regulation will not be a panacea: we did not do it so well the first time, with the regulatory broth heavily infused with the spices of poor

7. Sagers, *supra* note 5, at 401.

8. Paul Stephen Dempsey, *The Financial Performance of the Airline Industry Post-Deregulation*, 45 HOUS. L. REV. 421, 423 (2008).

9. Peter C. Carstensen, *The Poor Financial Performance of Deregulated Airlines: Competition as Causation or Only Correlation? Reflections on Professor Dempsey’s Article*, 45 HOUS. L. REV. 487, 489 (2008).

10. *Id.* at 488.

information and political jockeying, with just a dash of corruption. And deregulators poorly understood the nature of the competitive airline game. This led to its own problems, and Carstensen suggests the initial rules of the deregulation game may have in fact caused much of the injury to airline longterm viability. Carstensen offers some suggestions as to how to fix these rules to foster the proper growth of competition and new entrant babies within this fairly murky competitive bathwater.

While it would be impossible to address every antitrust issue involved in airline markets, the issues addressed in the pages that follow are certainly worth a great deal of consideration, and in many instances, legislation. It is hoped the reader finds these articles as interesting and provoking as has the Author of this Introduction.