

Michigan Law Review

Volume 55 | Issue 2

1956

Regulation of Business - Jurisdiction of the Civil Aeronautics Board and the Federal Trade Commission - Investigations in the Interest of the Public

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Recommended Citation

Robert W. Steele S.Ed., *Regulation of Business - Jurisdiction of the Civil Aeronautics Board and the Federal Trade Commission - Investigations in the Interest of the Public*, 55 MICH. L. REV. 305 (1956). Available at: <https://repository.law.umich.edu/mlr/vol55/iss2/15>

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REGULATION OF BUSINESS—JURISDICTION OF THE CIVIL AERONAUTICS BOARD AND THE FEDERAL TRADE COMMISSION—INVESTIGATIONS IN THE INTEREST OF THE PUBLIC—Petitioner, American Airlines, filed a memorandum with the Civil Aeronautics Board requesting that respondent's request for registration of the name North American Airlines be denied. Section 411 of the Civil Aeronautics Act provides that the board has the authority to prevent air carriers from engaging in unfair methods of competition in commerce and unfair or deceptive acts or practices, and may issue a complaint against any air carrier when it shall appear to the board that a proceed-

ing by it would be in the interest of the public.¹ The board found that the public was confused as to the origin of the two transport services, and that the speed of air travel may be diminished by the confusion when passengers check in for flights or attempt to retrieve baggage from the wrong carrier, or if passengers should direct inquiries to the wrong service. On the basis of this finding the board ordered respondent to desist from using the trade name North American. The order was set aside by the Court of Appeals for the District of Columbia on the ground that the proceeding was not in the public interest.² On certiorari to the Supreme Court, *held*, reversed. The complaint was in the public interest as there was confusion in the minds of the public as to the source of the transport systems. *American Airlines v. North American Airlines*, 351 U.S. 79 (1956).

The Supreme Court has construed section 411 of the Civil Aeronautics Act as requiring that a proceeding must be in the interest of the public before the CAB has jurisdiction to investigate charges of unfair methods of competition and of unfair or deceptive practices. This view is in accord with the Court's construction of section 5 of the Federal Trade Commission Act which uses the same language.³ In dealing with the Federal Trade Commission Act, the courts at the outset had great difficulty in defining what proceedings are in the interest of the public. It is clear that investigation is in the public interest if the method of competition hinders competition unreasonably or tends to create a monopoly,⁴ or if the practice violates the national policy against gambling and lotteries.⁵ But the courts have not been uniform in their interpretation of section 5 in determining cases involving misrepresentation of the quality of a product or involving trade name infringement. In *Federal Trade Commission v. Klesner*⁶ the Court ruled that a mere showing of confusion of source, created by the use of a similar trade name would not satisfy the public interest requirement. The interest of a competitor in the good will attached to his trade name was considered a private interest which should be protected in a court of equity.⁷ Since that decision the courts have generally measured public interest under the Federal Trade Commission Act by

¹ 55 Stat. 1003 (1938), as amended 66 Stat. 628 (1952), 49 U.S.C. (1952) §491.

² *North American Airlines v. Civil Aeronautics Board*, (D.C. Cir. 1955) 228 F. (2d) 432.

³ 38 Stat. 719 (1914), as amended 52 Stat. 1028 (1938), 15 U.S.C. (1952) §45. The wording of both acts would suggest that the commission's preliminary decision on the public interest question was not to be reviewed by appellate courts. See HENDERSON, *THE FEDERAL TRADE COMMISSION* 53 (1924); Hankin, "The Jurisdiction of the Federal Trade Commission," 12 CALIF. L. REV. 179 (1924); Mechem, "Procedure and Practice before the Federal Trade Commission," 21 MICH. L. REV. 125 (1922). The courts have probably imposed this restriction upon the commission because of a general distrust of the administrative process. See 40 YALE L. J. 617 (1931).

⁴ *Toledo Pipe Threading Mach. Co. v. FTC*, (6th Cir. 1926) 11 F. (2d) 337; *FTC v. Motion Picture Advertising Corp.*, 344 U.S. 392 (1953).

⁵ *Federal Trade Commission v. Keppel & Bros.*, 291 U.S. 304 (1934).

⁶ 280 U.S. 19 (1929).

⁷ After the *Klesner* decision there was some question as to whether the commission had jurisdiction to hear cases of misrepresentation involving simulation of trade marks.

determining whether an unfair practice would mislead an appreciable number of consumers into buying goods which they did not intend to buy.⁸ The principal case apparently departs from this test in interpreting section 411 of the Civil Aeronautics Act since the Court does not seem to be concerned with whether the confusion of trade names is great enough to deceive consumers into actually purchasing services which they do not intend to purchase.⁹ The Court seems to feel that a proceeding is in the public interest when a traveler may be inconvenienced in finding the transportation service which he has chosen. It is probable that the same test will not be used to measure public interest in cases arising under section 5 of the Federal Trade Commission Act, as the Court bases its decision on the significant differences in the two acts. Section 411, unlike section 5, deals with an industry that is of vital importance to the public, and which is subject to extensive federal regulation. The Civil Aeronautics Act grants the board wide powers for the purpose of assuring the public of efficient air transportation.¹⁰ In light of this fact it is clear that

Some authorities felt that the commission had jurisdiction only of cases involving misrepresentation of quality where, at that time, the private remedies were clearly inadequate. See Handler, "Unfair Competition and the Federal Trade Commission," 8 *Geo. Wash. L. Rev.* 399 (1940). However, federal courts recognized the jurisdiction of the commission over trade mark cases both before and after the Klesner decision. See *Juvenile Shoe Co. v. FTC*, (9th Cir. 1923) 289 F. 57; *Lighthouse Rug Co. v. FTC*, (7th Cir. 1929) 35 F. (2d) 163; *FTC v. Real Products Corp.*, (2d Cir. 1937) 90 F. (2d) 617.

⁸ Some courts have ruled that the true test of public interest is whether the consumers would be deceived into buying goods which were inferior in quality. See *L. B. Silver Co. v. FTC*, (6th Cir. 1923) 289 F. 985; *Berkey and Gay Furniture Co. v. FTC*, (6th Cir. 1930) 42 F. (2d) 427. But a majority of decisions support the view that the public interest requirement is met when the public is likely to be deceived into purchasing goods which they do not want, even if the goods are not inferior in quality. See *FTC v. Winstead Hosiery Co.*, 258 U.S. 483 (1922); *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933); *FTC v. Balme*, (2d Cir. 1928) 23 F. (2d) 615; *Moretrench Corp. v. FTC*, (2d Cir. 1942) 127 F. (2d) 792. These decisions indicate that courts generally use the same test to determine whether a proceeding is in the public interest as they use to determine whether the practice in question is unfair, within the meaning of §5. *Accord*, *Silverman v. FTC*, (9th Cir. 1944) 145 F. (2d) 751.

⁹ In most proceedings which are found to be in the public interest the commission finds that purchasers have been deceived into buying goods which they did not intend to buy, or that they are likely to be deceived into buying such goods. See *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934); *Pep Boys—Manny, Moe, and Jack, Inc. v. FTC*, (3d Cir. 1941) 122 F. (2d) 158. In the principal case, the record before the court leaves doubt as to whether the CAB made any such finding. The Court seems to treat the record as if there is no showing of any deception of customers in the past, as they state that there has been no diversion of trade from one competitor to another. Principal case at 86. Justices Douglas and Reed dissented in the principal case because they felt that the board had made no such finding. Principal case at 89. However, the findings of the CAB state that there are significant differences in the type of services offered by the two airlines, which may indicate that the CAB thought that there was a probability that travelers would be deceived into traveling on one airline when they had meant to travel on another. CAB Docket No. 5774, 5928 (1953), CCH Aviation L. Rep. §16,826 (Transfer Binder 1951-54).

¹⁰ See generally THOMAS, *ECONOMIC REGULATION OF SCHEDULED AIR TRANSPORT* (1951); Willebrandt, "Federal Control of Air Commerce," 11 *J. AIR L.* 204 (1940).

competitive practices which have a possibility of inconveniencing the traveler should be subject to the jurisdiction of the board, even though the practices are not deceptive enough to cause consumers to travel on a different airline than they had planned. However, the efficiency of businesses regulated by the Federal Trade Commission is generally not as important to the public as the efficiency of the airlines. Thus it would seem that in proceedings under section 5 the Federal Trade Commission should find that the degree of confusion is great enough to deceive customers into purchasing services which they do not want before deciding that a proceeding is in the public interest. In the absence of such a finding it is difficult to see what interest of the public is involved in the investigation.¹¹ A competitor's interest in the reputation of his name and in preventing the dilution of the effectiveness of that name are clearly private interests which do not affect the general public and which can be protected effectively in a court of equity. In a regulated industry such as transportation the public interest extends to the traveler's convenience, and the principal case is fully justified in interpreting the Civil Aeronautics Act so as to protect that interest.

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¹¹ A proceeding is not in the public interest when the record is barren of evidence showing that consumers have been induced to purchase goods by the practice in question. *Ostermoor v. FTC*, (2d Cir. 1927) 16 F. (2d) 962.