UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. NORTHWEST AIRLINES, CORP., and CONTINENTAL AIRLINES, INC. Defendants.	Civil Action No. 98-74611 Judge Denise Page Hood Magistrate Scheer

OPPOSITION OF THE UNITED STATES TO DEFENDANT NORTHWEST'S MOTION FOR RECONSIDERATION OF DENIAL OF MOTION EXCLUDING REPUTATION EVIDENCE FROM CARRIER COMPETITOR WITNESSES

For the reasons set forth below, the United States opposes Northwest's motion for reconsideration of the Court's order of October 16, 2000, in which the Court denied its motion to exclude the testimony of six airline executives on the United States' witness list.

Northwest's Latest Argument

Northwest initially argued that the Court should bar the testimony of the six airline executives because they might accuse it of illegal predatory conduct. Northwest Motion to Exclude at 2. After losing that motion, Northwest now turns 180 degrees, and asks the Court to bar the executives' testimony about Northwest's response to new entrants because they will not make that accusation. Northwest Motion for Reconsideration at 1, 3. For good measure, Northwest attached a proposed order with a blanket exclusion of "the testimony of the carrier competition witnesses" -- apparently including their testimony on the "economic and structural factors" that it concedes are relevant to an analysis of barriers to entry.[1] *Id.* at 4.

The Motion for Reconsideration Fails to Satisfy

[1]In a different motion, Northwest sought to exclude testimony from the United States' expert witnesses on economic and structural barriers to entry in the airline industry.

the Requirements of Local Rule 7.1(g)(3)

The Court should reject Northwest's motion for reconsideration out of hand. Under the Local Rules for the Eastern District, motions for reconsideration are granted only if the movant demonstrates "a palpable defect by which the Court and the parties have been misled" and that "a different disposition of the case must result from a correction thereof." L.R. 7.1(g)(3).

In its attempt to meet the first requirement of this rule, Northwest says that it "surmised that the government intended to elicit, from at least some of the witnesses, testimony that Northwest's competitive responses to competition amounted to unlawful price predation." It now claims to have been misled on this point, because: "The government has now revealed, however, that it has *no* intention of proving that Northwest engaged in unlawful conduct." Northwest Motion for Reconsideration at 1.

Northwest has no basis whatsoever for claiming that it was misled. Even if Northwest's surmise caused it to mislead itself, it knew that its surmise was incorrect before the Court denied its motion to exclude. In its Consolidated Opposition to Northwest's Motions in Limine, submitted three days before oral argument on those motions, the United States stated: "It is not the Government's intention to argue that any of its evidence proves that Northwest's response to new entrants meet the standard for unlawful monopolization conduct." *Id*. at 20. If Northwest initially misled itself, it should have addressed the issue of non-predatory behavior that deters new entry during oral argument -- before the Court ruled on its motion to exclude -- instead of waiting to see how the Court would respond to its original grounds for excluding the airline executives' testimony.

Northwest has not even attempted to satisfy the second requirement for granting motions

for reconsideration -- that a different disposition of the case must result from a correction of a palpable defect that misled the Court and the parties. As noted below, Northwest has not demonstrated that there is any defect that would result in a different disposition of its motion to exclude the airline executives' testimony -- much less the disposition of this case.

The Airline Executives' Testimony is Relevant under Rule 401

In its latest motion, Northwest apparently concedes that evidence on barriers to entry is relevant in Section 7, Clayton Act cases. It continues to insist, however, that executives from other airlines that have attempted to enter its routes, or who must consider whether or not to enter those routes in the future, have nothing relevant to say about the factors that tend to deter them from entering those routes (in antitrust terminology, barriers to entry).

In arguing that the Court should exclude evidence of its reputation for aggressively responding to airlines that enter its routes, unless that conduct is alleged to be unlawful, Northwest appears to argue that lawful conduct cannot constitute relevant evidence on barriers to entry. If this is Northwest's argument, it is mistaken. Most barriers to entry that effectively deter new entry are lawful. In fact, the precise barriers to entry that Northwest concedes are sufficient to deter new entry -- heavy regulation, large start-up costs, or dependence on a scarce commodity[2] -- are all lawful. The legality of these and other effective barriers to entry is not the issue. The relevant issue is whether barriers to entry in this case tend to deter other airlines from entering Northwest's routes in question.

Northwest also cites a number of cases in which the defendants ultimately prevailed on the

[2]Northwest Motion for Reconsideration at 3.

entry issue.[3] In the process, it confuses the issues of admissibility and sufficiency.

None of those cases stand for the proposition that evidence of barriers to entry other than heavy regulation, large start-up costs or dependence on a scare commodity should be excluded. In fact, the trial court judges admitted evidence about other types of alleged barriers to entry in all of those cases. Although properly admitted, the evidence just was not sufficient to convince those courts that the barriers to entry in those cases were high enough to make new entry unlikely to solve competitive problems.[4]

As noted by the Supreme Court, Rule 401 adopts a liberal standard of relevance. *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 587 (1993). More to the point, the Sixth Circuit has noted that:

> [I]n determining whether evidence is relevant, the district court must not consider the weight or sufficiency of the evidence. . . Even if a district court believes the evidence is insufficient to prove the ultimate point for which it is offered, it may not exclude the evidence if it has even the slightest probative worth."

Douglass v. Eaton Corp., 956 F.2d 1339, 1343-44 (6th Cir. 1992).

Although excluding any relevant evidence that has the slightest probative worth can constitute reversible error in this circuit, it would be particularly inappropriate to exclude the testimony of the six airline executives on the United States' witness list:

- Since neither the Court nor Northwest has heard any of their testimony (Northwest

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[3]Northwest relies primarily on *United States v. Syufy***,** 903 F.2d 659 (9th Cir. 1990) and *Marathon Oil Co. V. Mobil Corp.*, 669 F.2d 378 (6th Cir. 1981). Other cases are cited at pages 3-5 of its motion for reconsideration.

[4]At the appropriate time, the United States will argue the sufficiency of the evidence on the entry issue. After all of the relevant and admissible evidence is admitted, we believe that none of the cases cited by Northwest will provide any more support for its position on the merits than they do on the relevance issue.

declined to exercise its right to depose these witnesses), any order excluding that evidence can only be based on speculation that some portion of their testimony might not be sufficient to prove the ultimate point for which it is offered.

- Northwest seeks to exclude testimony about economic and structural barriers to entry in this industry that it concedes should be admitted into evidence at this trial -- even though it comes from the witnesses who have the most knowledge about the issue, *i.e.*, airline executives who make decisions to enter some routes, but who are deterred from entering others.

- Northwest proposes to exclude reputation evidence even though its behavior in the marketplace affects real world decisions to enter or avoid entering Northwest's routes.

The Airline Executives' Testimony is Admissible under Rules 402 and 403

Moreover, the exceptions to the admission of relevant evidence in Rules 402 and 403 have minimal relevance in bench trials.[5] When the Court hears the relevant evidence from the airline executives on the United States' witness list, it can insure that the United States does not waste its time on the direct examination of these witnesses, and that Northwest does not waste its time on their cross examination.

Respectfully submitted,

"/s/"

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[5]Moore's Federal Practice, 1990 Rules Pamphlet § 403.4 at 89 (1990); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 270 (3rd Cir. 1983)*; Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517 (5th Cir. 1981).