

## **Have you shipped goods by air? You may be in line for a substantial recovery of airline charges!**

By: Gerald B. Horn and Kenneth N. Wolf

In *The Devil's Dictionary*, Ambrose Bierce (1842-1914), an American satirist and cynic, included in his Decalogue the following wry commandment: "Don't steal; thou'lt never thus compete successfully in business. Cheat."

More than 90 litigants in the United States believe that numerous air cargo carriers have adhered to this mandate too faithfully and they have taken steps to recover excessive fuel and security surcharges from the airlines.

As will be explained below, they are not the only ones affected by the actions of the airlines. Anyone who has shipped goods via air may also be entitled to recover these overcharges, plus damages.

### **Background**

In February 2006, the European Commission and the United States Department of Justice, along with national authorities regulating competition in the European Union, conducted a series of coordinated raids on the corporate offices of 22 target airlines suspected of wrongdoing in connection with alleged criminal conspiracies to fix fuel and security surcharges. Civil antitrust litigation in the United States under the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914 followed almost immediately on the heels of the governments' investigations.

Many of the world's largest air cargo carriers have been named as defendants. These include: Air Canada, Air France, KLM, British Airways, Cargolux, Cathay Pacific, Lufthansa, Japan Airlines, Korean Airlines, LAN Airlines, Atlas, Air, Nippon Cargo, SAS, Singapore Airlines, Swiss Air, United Airlines and Virgin Airlines.

Plaintiffs in the civil litigations contend that at least from January 2000, and continuing through the present, defendants and their co-conspirators contracted, combined, or conspired in restraint of trade or commerce in violation of the federal antitrust statutes. In particular, the litigants assert that the defendants and their co-conspirators: 1) agreed to charge prices at certain levels and otherwise to fix, increase, maintain, or stabilize prices of air cargo services sold in the United States; 2) communicated with co-conspirators regarding prices to be charged for air cargo services; 3) met with co-conspirators in order to keep the existence of the conspiracy unknown so as to foster the illegal anti-competitive conduct described herein; 4) refrained from competition by refusing to offer air cargo services at prices below the agree-upon fixed price; and 5) sold air cargo services at agreed upon prices.

Dr. Andrew Traill, head of the Freight Transport Association in the UK, observed: "Shippers have long since identified and been concerned by the application of very similar levels of surcharges applied by different airlines in respect of fuel

price increases, new security measures and other factors.” (*Air Cargo Week*, Feb. 20, 2006).

For example, in June 2005, Lufthansa announced increases in its fuel surcharge from US\$.40 per kg, to US\$.45 cents per kg. (reported June 23, 2005 at <http://www.kweusa.com/newsroom/release.asp?id=377>), with other carriers announcing increases in lockstep immediately thereafter (reported June 27, 2005 at <http://www.kweusa.com/newsroom/release.asp?id=379>).

Similar patterns of conspiratorial conduct are suspected for security surcharges arising after September 11, 2001 and for war risk surcharges following the commencement of the present conflict in Iraq in 2003.

### What’s at stake?

By some accounts, the global market for air cargo services is US\$50 billion. Boeing Co., the aircraft manufacturer, estimates that the market for such services will grow in excess of 6 percent annually over the next two decades. Because the surcharges are designed to compensate airlines for increased external cost, such charges should bear a reasonable relationship to the air carriers’ external costs and fluctuate correspondingly to the rise or fall in the cost of jet fuel, security costs or insurance premiums.

Actual pricing experience suggests otherwise.

In March 2002, when the price of jet fuel plummeted by US\$.30 a gallon, the fuel surcharges assessed by the airlines remained disproportionately high. In 2005, despite record fuel prices, some airlines reported significant profits (*Bloomberg New, February 15, 2006, at 1*).

Under United States law, a defendant that has violated the antitrust laws is liable for *treble* damages, which may also include attorneys’ fees, as well as pre- and post-judgment interest. Plainly, some portion of the surcharges assessed by the airlines is lawful, and the law suits – pending and anticipated – look to recover for only the illegal component.

However, a successful plaintiff may recover damages incurred during the four-year period prior to the filing of the suit. The advantage that litigants in the United States enjoy is that the jurisdictional scope of the statutes is worldwide. As all of the air carrier defendants transact business in the United States, they are within reach of United States law. Thus a prospective plaintiff need not reside in the United States in order to avail itself of a right to recovery.

### What should I look for?

The reason you should consider participating in a surcharge recovery program is that any such funds recovered are bottom line dollars.

Presumably, these costs have already been expensed and factored into resale prices or the cost of acquiring the goods. Recovering such costs, or merely reducing a portion, would go to profit, and as cash. As most law firms tend to handle these cases on a contingency of modified contingency basis, the costs to you of participating are relatively nominal.

In order to participate in a recovery program, you will need to establish that you paid air freight surcharges, such as fuel or security. The amount that you paid should be either on your statements from the airlines (if you paid directly) or from your forwarders. If, as most shippers, you paid your forwarder, which in turn paid the air carrier, you will need to request your forwarder to provide you with proof that the forwarder paid the surcharges.

Depending on the volume of air shipments, the amount of any recovery will vary from shipper to shipper. However, because of the existence of the treble damages provisions in the U.S., even an otherwise modest recovery can become quite substantial. Clearly it is something worth looking into.

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