

# The Burger Court Opinion Writing Database

*Nader v. Allegheny Airlines, Inc.*  
426 U.S. 290 (1976)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 2, 1976

Re: 75-455 - Nader v. Allegheny Airlines, Inc.

Dear Lewis:

I join your opinion dated June 2.

Regards,

WB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 13, 1976

RE: No. 75-455 Nader v. Allegheny Airlines

Dear Lewis:

I have distinct objections to inclusion of Part III in your circulated opinion in the above. As you say, no damages question was presented in Nader's petition or subsumed in the question presented. The Court of Appeals reversed the District Court punitive damage award on the federal statutory claim and vacated the award on the common law misrepresentation claim. Nader did not seek review of either and his brief nowhere makes any reference to damages. I would suppose that in these circumstances we would simply decide that the doctrine of primary jurisdiction is inapplicable and let the suit proceed accordingly.

I cannot agree therefore that it is appropriate to say that we approve of the Court of Appeals' treatment of the punitive damages question. That strikes me as in essence a state law issue, certainly so if this were a diversity action brought in New Jersey, equally so whether Virginia or District of Columbia or whatever local law applies in this case. If I were still a judge of the New Jersey Superior Court, I would feel completely free, politely but firmly, to tell this Court that Part III of your opinion could not be binding on me in the trial of an action for common law misrepresentation under New Jersey law. Indeed, I have some problems with your Part II(c) because I don't see how the doctrine of primary jurisdiction (as distinguished from preemption) can ever apply to a question of pure state law.

I do most earnestly suggest that we decide only the question submitted and omit Part III.

Sincerely,

Mr. Justice Powell

cc: The Conference

*Bil*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 15, 1976

RE: No. 75-455 Nader v. Allegheny Airlines

Dear Lewis:

Thanks for your response in the above. I am persuaded that my objections to your Part IIc are not well taken.

But I still suggest that you omit Part III. In your circulation in Stone v. Powell, page 13, n. 15, you state, and I fully agree, "only in the most exceptional cases will we consider issues not raised in the petition." This case not only does not qualify as a "most exceptional case" but the issue discussed in Part III is one purely of local law and as I see it therefore not appropriate for our comment in any event. Could not the purpose you have in mind be fully served by simply stating in a footnote that the issue is not presented in the petition for certiorari and is a question of local law upon which we express no view? Since Nader makes no objection to the Court of Appeals' treatment of the local law, I assume the remand must be governed by what the Court of Appeals says; if it's wrong the local courts can straighten it out in some other case.

Sincerely,

*Wm. J. Brennan, Jr.*

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

✓  
CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 2, 1976

RE: No. 75-455 Nader v. Allegheny Airlines, Inc.

Dear Lewis:

I agree.

Sincerely,

*W. J. Brennan Jr.*

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 14, 1976

No. 75-455, Nader v. Allegheny Airlines

Dear Lewis,

I am glad to join your opinion for the Court in this case. While I do not share Bill Brennan's strong objection to Part III of your opinion, I would have no objection whatever to its elimination.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 17, 1976

Re: No. 75-455 - Nader v. Allegheny Airlines Inc.

Dear Lewis:

I may file a brief concurrence, but I join your May 13 circulation and would prefer that you retain Part III. I shall, however, accept your judgment in that respect.

Sincerely,



Mr. Justice Powell

Copies to Conference

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice White

Circulated: 5-19-76

1st DRAFT

Recirculated: \_\_\_\_\_

**SUPREME COURT OF THE UNITED STATES**

**No. 75-455**

Ralph Nader, Petitioner, } On Writ of Certiorari to the  
 v. } United States Court of Ap-  
 Allegheny Airlines, Inc. } peals for the District of  
 Columbia Circuit.

[May —, 1976]

**MR. JUSTICE WHITE, concurring.**

I join the Court's opinion with these additional words. It may be that under its rulemaking authority the Board would have power to order airline overbooking and to pre-empt recoveries under state law for undisclosed overbooking or for overselling. But it has not done so, at least as yet. It is also unnecessary to stay proceedings on the present state law claim pending Board action under § 411. Neither an order denying nor one granting relief under that section would foreclose claims based on state law; and there is not present here the additional consideration that a § 411 proceeding would be helpful in resolving, or affecting in some manner, the state law claim for compensatory and punitive damages. Cf. *Ricci v. Chicago Mercantile Exchange*, 409 U. S. 289 (1973); *Chicago Mercantile Exchange v. Deak-  
tor*, 414 U. S. 113 (1973). I seriously doubt that any pending or future § 411 case would reveal anything relevant to this case about the Board's view of the propriety of overbooking and of overselling that is not already apparent from prior proceedings concerning those subjects.

Supreme Court of the United States  
Washington, D. C. 20543

MEMBERS OF  
THE CIRCUIT  
HAROLD F. BURGESS MARSHALL

June 2, 1976

Re: No. 75-455 -- Ralph Nader v. Allegheny Airlines, Inc.

Dear Lewis:

Please join me.

Sincerely,

*J. M.*

T. M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 2, 1976

Re: No. 75-455 - Nader v. Allegheny Airlines, Inc.

Dear Lewis:

Please join me in your recirculation of June 2.

Sincerely,



Mr. Justice Powell

cc: The Conference

[note to Justice Powell only]

Dear Lewis:

I trust my clerk has cleared with yours what seems to be an error in the second line of the new footnote 19 on page 17.

H. A. B.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 2, 1976

Re: No. 75-455 - Nader v. Allegheny Airlines, Inc.

Dear Lewis:

Please join me in your recirculation of June 2.

Sincerely,



Mr. Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 2, 1976

Re: No. 75-455 - Nader v. Allegheny Airlines, Inc.

Dear Lewis:

Please join me in your recirculation of June 2.

Sincerely,



Mr. Justice Powell

cc: The Conference

[ note to Justice Powell only]

Dear Lewis:

I trust my clerk has cleared with yours what seems to be an error in the second line of the new footnote 19 on page 17.

H. A. B.

*W*  
*we*  
*W*  
*we*

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 - Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: MAY 13 1976

Recirculated: \_\_\_\_\_

**1st DRAFT**

**SUPREME COURT OF THE UNITED STATES**

**No. 75-455**

Ralph Nader, Petitioner, } On Writ of Certiorari to the  
 v. } United States Court of Ap-  
 Allegheny Airlines, Inc. } peals for the District of  
 Columbia Circuit.

[May —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

In this case we address the question whether a common-law tort action based on alleged fraudulent misrepresentation by an air carrier subject to regulation by the Civil Aeronautics Board (Board) must be stayed pending reference to the Board for determination whether the practice is "deceptive" within the meaning of § 411 of the Federal Aviation Act of 1958, 49 U. S. C. § 1381 (1970). We hold that under the circumstances of this case a stay pending reference is inappropriate.

**I**

The facts are not contested. Petitioner agreed to make several appearances in Connecticut on April 28, 1972, in support of the fundraising efforts of the Connecticut Citizen Action Group (CCAG), a nonprofit public interest organization. His two principal appearances were to be at a noon rally in Hartford and a later address at the Storrs campus of the University of Connecticut. On April 25, petitioner reserved a seat on respondent's flight 864 for April 28. The flight was scheduled to leave Washington, D. C., at 10:15 a. m. and to arrive in Hartford at 11:15 a. m. Petitioner's

May 14, 1976

No. 75-455 Nader v. Allegheny Airlines

Dear John:

The sentence you refer to on page 7 describes the Court of Appeals' decision which, as you correctly point out, we disapprove in Part II(B). To make that more clear, I propose to introduce the sentence as follows: "The court held that if the Board were to find that there had been no violation of § 411, respondent would be immunized from common-law liability," and to add, "We disagree."

Although I believe that the paragraph on page 13 accurately characterizes our cases, I have no objection to the substitution you suggest and include it in the next circulation.

I hope that my response to Bill Brennan on the discussion of punitive damages will clarify my reason for including Part III.

I do appreciate your writing.

Sincerely,

Mr. Justice Stevens

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20542

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 14, 1976

No. 75-455 NADER v. ALLEGHENY AIRLINES

Dear Bill:

I appreciate your prompt response to my circulation in the above case.

You are quite correct in saying that the propriety of the punitive damages award was not presented to us in Nader's petition for certiorari. But it seemed necessary to refer to that issue briefly to clarify the scope of our reversal of the Court of Appeals' holding that the misrepresentation action must be stayed pending Board consideration. We conclude that the court should not defer to the Board on the merits of the claim. This could well be interpreted, in the absence of clarification, as an indication that the district court may not properly consider any cooperation or understandings between respondent and the Board in evaluating the propriety of punitive damages. In order to prevent this possible misinterpretation - and to indicate that we are not sub silentio overruling the Court of Appeals' disposition of the punitive damages question - I think it desirable to make clear that our opinion does not go that far.

You also raise a question as to the relevance of Part II(c). The doctrine of primary jurisdiction often has been applied in cases involving state law claims.

2.

It is true that many "primary jurisdiction" cases involve deferral to agencies in the course of suits brought under the federal antitrust laws, e.g., United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932), or suits brought to vindicate rights under tariffs filed with federal agencies. E.g., United States v. Western Pacific R. Co., 352 U.S. 59 (1956).

But Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907), the case that Professor Davis has called "[t]he fountainhead from which the entire primary jurisdiction doctrine flows," came to this Court from the Texas state courts and involved a common law suit for damages caused by the imposition of an allegedly unjust and unreasonable rate. See also, e.g., General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940) (Court required stay pending reference to agency in action in "assumpsit" where the lease contract sued upon referred to tariff filed with ICC); Thompson v. Texas Mexican R. Co., 328 U.S. 134 (1946) (stay pending reference to ICC required in state court suit for injunction and damages caused by one railroad's use of another's facilities after termination of contract); Lichten v. Eastern Airlines, 189 F. 2d 939 (CA 2 1951) (court applied doctrine of "primary jurisdiction" in deferring to exculpatory clause in tariff approved by agency).

Of course, for the reasons stated in Part II(c) of the opinion, this case, unlike those cited above, does not present a situation in which the doctrine of primary jurisdiction should be applied. But the mere fact that Nader's claim is based on state law does not in itself dispose of that question.

I hope these observations will meet your concerns. I'll be glad to discuss any aspect of my draft opinion.

Sincerely,

*Lewis*

Mr. Justice Brennan

LFP/gg

CC: The Conference

✓ 16, 17

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

Recirculated ~~JUN 2 1976~~  
**2nd DRAFT**

## SUPREME COURT OF THE UNITED STATES

No. 75-455

Ralph Nader, Petitioner, v. Allegheny Airlines, Inc. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

In this case we address the question whether a common-law tort action based on alleged fraudulent misrepresentation by an air carrier subject to regulation by the Civil Aeronautics Board (Board) must be stayed pending reference to the Board for determination whether the practice is "deceptive" within the meaning of § 411 of the Federal Aviation Act of 1958, 49 U. S. C. § 1381 (1970). We hold that under the circumstances of this case a stay pending reference is inappropriate.

### I

The facts are not contested. Petitioner agreed to make several appearances in Connecticut on April 28, 1972, in support of the fundraising efforts of the Connecticut Citizen Action Group (CCAG), a nonprofit public interest organization. His two principal appearances were to be at a noon rally in Hartford and a later address at the Storrs campus of the University of Connecticut. On April 25, petitioner reserved a seat on respondent's flight 864 for April 28. The flight was scheduled to leave Washington, D. C., at 10:15 a. m. and to arrive in Hartford at 11:15 a. m. Petitioner's

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 21, 1976

Re: No. 75-455 - Nader v. Allegheny Airlines

Dear Lewis:

I agree with all of your opinion in this case with the possible exception of your treatment of punitive damages in Part III. Because my difficulties are not the same as those expressed by Bill Brennan, I take the liberty of setting them forth to see if they may be accommodated or perhaps shown to be chimerical.

The following portion of III is the part that troubles me:

"The imposition of punitive damages is a drastic remedy, to be imposed sparingly. This is especially the case where the party against whom damages are sought is subject to detailed agency regulation and has complied with all requirements imposed by the agency. Under the Act, mere compliance with agency regulations is not sufficient in itself to exempt a carrier from all common-law liability but, in determining whether punitive damages are appropriate, special weight must be given to evidence -- where it exists -- that the Board

- 2 -

was fully advised of the practice complained of, and that the carrier had cooperated with the Board in its ongoing effort to find a resolution of the problem consistent with the efficient operation of the airlines and the best interest of the passenger-public." (Page 17.)

It seems to me there can be two, and only two, sources of authority for this Court to make that sort of pronouncement. The first is that some kind of federal emanation from the Federal Aviation Act limits the authority of a state court trying a common law cause of action in which an airline is a defendant to impose punitive damages. I would not readily subscribe to such a doctrine, and certainly would not subscribe to it unless the reasoning behind it were made explicit.

The second basis for such a pronouncement could be that it is applicable not to state courts, or to federal courts trying such a state law claim under their diversity jurisdiction, but only to the courts in the District of Columbia. There is no doubt, I gather, that prior to the Reorganization Act of 1970, see Palmore v. United States, 411 U.S. 389, 394-397, this Court was the final arbiter of statutory and common law in the District of Columbia, although great deference was paid to the decisions of the District's courts in those matters. See Fisher v. United States, 328 U.S. 463, 476 (1946). But I am not sure, and I am not sure that we have ever definitively decided, whether that situation still obtains after the enactment of the Reorganization Act. If it does, and the above language is simply spoken in our capacity as the court of last resort in a common law jurisdiction, I could certainly go along with it. I believe it to be a very sound statement of the law which should apply with respect to punitive damages. But if that is the

- 3 -

case, I would like to see some reference to the fact that this doctrine is limited to the District of Columbia, and is not binding upon the states.

Sincerely,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 2, 1976

Re: No. 75-455 - Nader v. Allegheny Airlines

Dear Lewis:

Please join me.

Sincerely,

*WR*

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 14, 1976

Re: No. 75-455 - Nader v. Allegheny Airlines, Inc.

Dear Lewis:

Although I agree with your disposition and with most of your opinion, there are three points that give me some difficulty:

1. On page 7 you state: "If the Board were to find that there had been no violation of § 411, respondent would be immunized from common-law liability." It seems to me that this sentence is inconsistent with the analysis in Part II B of the opinion. I should think it entirely possible that the Board would find that an overbooking practice is not in and of itself deceptive within the meaning of § 411 without necessarily reaching the question whether the practice, together with various oral statements made by airline personnel in administering the practice, would constitute a common law fraud. I would hope the quoted sentence could be deleted.
2. The full paragraph on page 13 strikes me as describing the typical application of the doctrine of primary jurisdiction a little more broadly than is appropriate. I wonder if you would consider revising the paragraph to read something like this:

"The doctrine has been applied, for example, when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included in a tariff filed with an agency, e.g., Danna v. Air France, 463 F.2d 407 (CA2 1972); Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411, 417-418 (1959), particularly

when the issue involves technical questions of fact uniquely within the expertise and experience of an agency--such as matters turning on an assessment of industry conditions, e.g., United States v. Western Pacific R. Co., supra, at 66-67. In this case, however, considerations of uniformity in regulation and of technical expertise do not call for prior reference to the Board."

3. I am also persuaded that Part III should be omitted but for a different reason than Bill Brennan's. I am afraid that the discussion of the damage issue at this point in the opinion creates the impression that we are assuming that fraud liability has been, or probably will be, established. In Part IV you correctly point out that the Court of Appeals has yet to decide the fraud issue. I personally have serious doubt that a *prima facie* case of fraud was proved.

Respectfully,



Mr. Justice Powell

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 17, 1976

No. 75-455 - Nader v. Allegheny Airlines

Dear Lewis:

Thank you for your response to my suggestion. I have restudied the punitive damage discussion in Part III of your opinion in the light of your letter and Bill Brennan's response thereto.

I think your concern is a legitimate one but I tend to agree with Bill that you may have stated a little more than is appropriate or necessary. Also, I am still a little bit concerned that reference to the Board in connection with the punitive damage issue without any mention of the liability issue might raise an unfortunate inference. In all events, I wonder if you might consider adding as a substitute for Part III either a footnote or a paragraph in the text saying something like this:

"Our conclusion that the decision of the Court of Appeals must be reversed does not, of course, mean that evidence relating to the disclosure of respondent's practices to the Board, or the Board's response to such disclosure in evaluating the challenged practice, is not relevant to other issues in the litigation. Consistently with our regular practice, we merely answer the question presented by the petition for certiorari."

Respectfully,



Mr. Justice Powell

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 2, 1976

Re: 75-455 - Nader v. Allegheny Airlines, Inc.

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference