# DOJ Suffers Rare Acquittal From the Bench in Fourth Criminal No-Poach Loss

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In the latest setback in the Department Justice Antitrust Division's (DOJ) attempts to prosecute "no-poach" agreements criminally, a federal judge acquitted from the bench all six defendant employees of aerospace engineering companies alleged to have allocated a labor market by agreeing not to hire from each other.

In *United States v. Patel*, Judge Victor A. Bolden of the District of Connecticut granted defendants' motion for a judgment of acquittal at the close of the DOJ's case in chief. In its Ruling and Order,[1] the court held that the government had failed to show there was a "cessation of meaningful competition" in the purportedly allocated labor market, because there were numerous "exceptions" to the alleged agreement that ultimately permitted the hiring of employees.

The acquittal marks the DOJ's fourth failure in four jury trials to obtain a conviction in a criminal no-poach trial. Judgments of acquittal are rare, and they reflect the court's determination that, after viewing the evidence in the light most favorable to the government, no jury could have found defendants guilty.

The case posed many knotty legal issues for the DOJ, as reflected in pretrial motions and the briefing on the motion for judgment of acquittal. But the court's ruling is narrowly tailored to the evidence and leaves many of those legal issues open for future prosecutions. As a result, the DOJ is likely to remain undeterred and continue to bring similar criminal indictments in the future.

## Pretrial Proceedings

The indictment alleged that an employee of aircraft engine maker Pratt & Whitney conspired with employees of suppliers of outsourced engineering services not to hire or solicit each other's employees working on projects for Pratt & Whitney. The indictment described the Pratt & Whitney employee as the "primary enforcer" of the alleged no-poach agreement, who coordinated communications among the suppliers. Coordinating relationships with suppliers of outsourced engineers was the employee's role at Pratt & Whitney.

Defendants moved to dismiss the indictment, arguing that the purported agreement fell outside of the limited categories of conduct that are treated as *per se* unlawful under the Sherman Act and which can be prosecuted criminally, such as price-fixing, bid-rigging and market allocation, including naked no-poach agreements. The defendants argued that the alleged conduct reflected a vertical restraint between Pratt & Whitney and each supplier that was ancillary to the companies' legitimate business collaborations, and should be addressed civilly through a rule of reason analysis.

The court denied the motion to dismiss. Limiting the analysis to the four corners of the indictment, the court found that the DOJ had adequately pleaded a no-poach agreement in the market in which the defendants competed horizontally, the labor market. The court also analogized the arrangement to hub-and-spoke conspiracies, with vertical and horizontal elements that had previously been found *per se* unlawful. Before trial, the DOJ objected to defendants offering evidence that any agreement was ancillary to the vertical collaborations between Pratt & Whitney and the suppliers (rather than a naked agreement to allocate the labor market), but the court overruled the objection. The court also proposed to instruct the jury that the government bears the burden of proving the alleged agreement was not ancillary.

[1] United States v. Patel, No. 3:21-cr-220 (VAB), 2023 WL 3143911 (D. Conn. Apr. 28, 2023)

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## Trial and Acquittal

The trial began on March 29, 2023, and DOJ presented 17 witnesses over the course of 14 trial days. After DOJ rested its case in chief on April 24, the defendants moved for judgment of acquittal, making several arguments.

First, they argued that the government had failed to prove a *per se* agreement to allocate a market. Instead, the evidence merely showed a series of "isolated and episodic restrictions on hiring and recruitment" among Pratt & Whitney's outsourcing suppliers for the purposes of "managing attrition, minimizing disruption, and working collaboratively to build aircraft engines for a common customer."

They also argued that DOJ failed to prove a horizontal agreement among the suppliers — the required "rim" around a hub-and-spoke conspiracy. And defendants argued there was no market allocation, because the labor market at issue is broader than outsourced engineering labor for Pratt & Whitney projects and, as a result, there were many other alternative employers that remained free to compete for engineers.

The court heard oral argument the day after defendants filed their motion, and DOJ's written opposition followed a day later. The DOJ opposition summarized the evidence, including an email from the Pratt & Whitney employee who allegedly coordinated the conduct that said, "[D]o not hire any partners employee, whether they approached or you approached. That is the only way we can pre[v]ent poaching and price war." The DOJ argued that, because it alleged a *per se* violation, the DOJ need only prove the offense occurred; it need not prove a properly defined relevant market or anticompetitive effects.

The DOJ also argued that defendants bear the burden of showing some evidence that supports their defense that the agreement was ancillary to a legitimate collaboration before being entitled to a jury instruction on the defense. It is not the DOJ's burden, it argued, to prove the agreement was naked, and, therefore, a *per se* offense.

The court addressed a single issue in its decision: whether the evidence "provide[d] a sufficient 'basis for a reasonable jury to find that defendants entered into the charged market allocation agreement.'" The court found the evidence insufficient and, citing Second Circuit precedent in *Bogan v. Hodgkins*,[2] held that a *per se* market allocation claim required proof of a "conspiracy to actually allocate" and "cessation of meaningful competition" in the allocated market. The court noted that this standard had been adopted in *United States v. DaVita*,[3] a recent no poach prosecution in Colorado. The court pointed to evidence of numerous exceptions to the purported agreement, that many workers did get hired by alleged co-conspirators, and that the restrictions shifted constantly during the alleged conspiracy period, suggesting that "often hiring was permitted, sometimes on a broad scale." As a result, the court held that "the alleged agreement itself had so many exceptions that it could not be said to meaningfully allocate the labor market."

The *Patel* court addressed none of the other open legal issues presented by the parties, including whether the DOJ must define a market in a *per se* no-poach case, and, if so, whether the market described in the indictment was properly defined. Nor did the court resolve whether the DOJ has the burden of proving the alleged agreement was naked, rather than ancillary to a legitimate business collaboration. Judge Bolden found it was unnecessary to decide these issues, because the question of the insufficiency of the evidence was dispositive. Because of the prohibition on double jeopardy, the DOJ may not seek an appeal or a retrial.

## Conclusion

This loss is not likely to cause the DOJ to shy away from bringing criminal cases with similar facts. The DOJ viewed the evidence as establishing a no-poach agreement among horizontal competitors to allocate a labor market for anticompetitive reasons, like preventing a "price war." The court's narrow decision merely found that evidence of "exceptions" and employees moving between employers prevented a trier of fact from finding an agreement to allocate the market.

The court's ruling may, however, help companies and individuals in future investigations and trials. By reaffirming that a *per se* employment market allocation theory requires a meaningful cessation of competition, the court's ruling brings competitive effects to the forefront and would allow companies and individuals to show that, even if there is evidence of "agreement," meaningful competition in the purportedly allocated market did not end.

[2] 166 F.3d 509, 514 (2d Cir. 1999)

[3] No. 1:21-cr-00229-RBJ, 2022 WL 1288585 (D. Colo. Mar. 25, 2022)