TABLE OF CONTENTS

ARTICLES

Lease Capitalization and the Effect on the Debt Ratios of the Major U.S. Airlines  
   Richard D. Gritta  
   Ellen Lippman  
   Garland Chow  

Unemployment Compensation and Independent Contractors: The Motor Carrier Industry as a Case Study  
   James C. Hardman

The Transportation of Hazardous Materials by Rail: A Recommendation for Reform  
   John Levin

European Community Cabotage  
   Jeffrey Platt

NOTES

   Laynie Giles

Flying the Unfriendly Skies: The Effect of Airline Deregulation on Labor Relations  
   Laurie Schoder

The Transportation Law Education Study  
   Martin Steinmetz  
   John Roscoe  
   Marelynn Schneider  
   Barry M. Greenberg

BOOK NOTE

   Bernard Woessner

TABLE OF CONTENTS

ARTICLES

Consolidated Rail Corp. v. Gottshall: Does the "Zone of Danger" Test Put FELA on a New Track?

Steven L. Vollins ............... 183

Search and Seizure of Air Passengers and Pilots: The Fourth Amendment Takes Flight

Jonathan Lewis Miller............ 199

The Law of Intergovernmental Relations: IVHS Opportunities and Constraints

Michael E. Libonati ............... 225

Allocation of Air Space As a Scarce National Resource

J. Scott Hamilton ................. 251

CASE COMMENT

Northwest Airlines v. County of Kent, Michigan: More Than You Ever Wanted to Know About Airport Rate Setting, Part I (Pricing in the Courts)

Rise J. Peters ................... 291

NOTES

1994 HAROLD A. SHERTZ AWARD WINNER

High Speed Ground Transportation Systems: A Future Component of America's Intermodal Network?

Brian Kingsley Krumm ............ 309

Expanding International Air Service Opportunities to More U.S. Cities

David R. Fiore ................... 327
TRANSPORTATION LAWYERS ASSOCIATION

EXECUTIVE COMMITTEE MEMBERS

OFFICERS
President .................................. Alex M. Lewandowski
President-Elect ................................. William D. Taylor
First Vice President ........................... David B. Schneider
Second Vice President ....................... James F. Flint
Secretary-Treasurer ......................... Ann M. Pougiales
Immediate Past President ................. Edward J. Kiley

Representatives-at-Large
David F. Blair
Fritz R. Damm
Carla T. Novak
Roy D. Pinsky
Mary Kay Reynolds
Greg E. Summy
Donald J. Vogel

Past Presidents
Mark J. Andrews
Franklin Van Osdel
August W. Heckman
Carll V. Kretsinger
Truman A. Stockton, Jr.
Harold G. Hernly
Jack B. Josselson
Ewell H. Muse, Jr.
Phineas Stevens
John L. Bruemmer
John E. Jandera
Leroy Hallman
Walter N. Bieneman
Alvin J. Meiklejohn, Jr.
James W. Hagar
William J. Lippman
Thomas E. James
John A. Vuono
Charles Ephraim
James C. Hardman
Robert D. Schuler
James M. Doherty
Harold D. Miller, Jr.
Wilmer B. Hill
A. Charles Tell
Frank W. Taylor, Jr.
Richard H. Champlin
Michael J. Ogborn
Kim D. Mann
Richard P. Kissinger
David R. Parker
TABLE OF CONTENTS

ARTICLES

The Failure of the Teamsters' Union to Win Railroad-Type Labor Protection for Mergers or Deregulation
   Herbert R. Northrup ............. 365

The Practical Effects on Labor of Repealing American Cabotage Laws
   C. Todd Jones .................... 403

The Effects of Unlawful Interference with Civil Aviation on World Peace and the Social Order
   R.I.R. Abeyranne .............. 449

NOTES

Who Pays Detention Costs When Aliens Seek Asylum at the Borders of the U.S.? Relief May Be in Sight for the Transportation Industry
   Kathleen T. Beesing ........ 495

Stopping the Tailspin: Use of Oligopolistic and Oligopsonistic Power to Produce Profits in the Airline Industry
   James C. Lanik ................. 509

BOOK NOTES

The Law of Commercial Trucking: Damages to Persons and Property:
   David N. Nissenberg
   Wendy Katherine von Wald .... 533

Transportation Safety Law Practice Manual:
   William E. Kenworthy
   Christopher R. Eng ............ 537

NB: Airport Ratesetting: The Journal anticipates publishing Part II of “More Than You Ever Wanted to Know About Airport Rate Setting” in Volume 23, Number 1. You will recall that Part I, published in Volume 22, Number 2, addressed “Pricing in the Courts.” Part II will analyze the legislation following Northwest Airlines v. County of Kent Michigan. Legislation is currently pending the 90-day comment period. Rise J. Peters, an attorney with Spiegel & McDiarmid, Washington, D.C., practices in aviation/airport law. Ms. Peters is kindly sharing her expertise by writing these two scholarly articles.
TRANSPORTATION LAWYERS
ASSOCIATION

Executive Committee Members

OFFICERS

President ................................. Alex M. Lewandowski
President-Elect ......................... William D. Taylor
First Vice President .................... David B. Schneider
Second Vice President ................... James F. Flint
Secretary-Treasurer ..................... Ann M. Pougiales
Immediate Past President .............. Edward J. Kiley

Representatives-at-Large

David F. Blair
Fritz R. Damm
Carla T. Novak
Roy D. Pinsky
Mary Kay Reynolds
Greg E. Summy
Donald J. Vogel

Past Presidents

Mark J. Andrews
Franklin Van Osdel
August W. Heckman
Carll V. Kretsinger
Truman A. Stockton, Jr.
Harold G. Hernly
Jack B. Josselson
Ewell H. Muse, Jr.
Phineas Stevens
John L. Bruemmer
John E. Jandera
Leroy Hallman
Walter N. Bieneman
Alvin J. Meiklejohn, Jr.
James W. Hagar
William J. Lippman
Thomas E. James
John A. Vuono
Charles Ephraim
James C. Hardman
Robert D. Schuler
James M. Doherty
Harold D. Miller, Jr.
Wilmer B. Hill
A. Charles Tell
Frank W. Taylor, Jr.
Richard H. Champlin
Michael J. Ogborn
Kim D. Mann
Richard P. Kissinger
David R. Parker
Lease Capitalization and the Effect on the Debt Ratios of the Major U.S. Airlines

Richard D. Gritta*  
Ellen Lippman**  
Garland Chow***

Table of Contents

I. Introduction .............................................. 1  
II. Aircraft Leasing in the 1960s ............................. 3  
III. Aircraft Leasing in the 1990s .............................. 6  
IV. Conclusion............................................... 12

I. INTRODUCTION

Leasing has been an important and growing source of financing to the U.S. airline industry over the past several decades, and it continues to be in 1992. In 1969, the Air Transport Association (ATA) reported that thirty-seven airlines (with a combined fleet of 2403 aircraft) leased 324 planes, or 13.5% of their total.¹ By 1991, United alone was leasing 221 aircraft (or 45.5% of its fleet).² Leasing, however, is not a magical

¹ Robert Parrish, Aircraft Leasing, AIRLINE MANAGEMENT AND MARKETING, June 1970, at 50.  
² Computed from data contained in UNITED AIR LINES' ANNUAL REPORT, 14 (1991).

* Richard D. Gritta is Professor of Finance, University of Portland, Portland, Oregon. BBA, University of Notre Dame; MBA, Indiana University; Ph.D., University of Maryland.  
** Ellen Lippman is Assistant Professor of Accounting, University of Portland, Portland, Oregon. BA, Colorado College; MA, University of Wisconsin; Ph.D., University of Oregon. CPA, State of Oregon.  
*** Garland Chow is Associate Professor of Transportation and Logistics, University of British Columbia, Vancouver, B.C. BBA and MBA, University of Maryland; DBA, Indiana University.
source of funds. It is simply debt financing. Leasing thus increases financial leverage and the risk that it entails.

Research by one of the authors in 1973 and 1974 examined both the extent of airline lease finance and its effects on the financial structure of the airline industry in the 1960s. That research argued that certain types of leases (then called financial leases) should be capitalized and reflected in the calculation of carrier debt ratios. The purpose of this paper is to update that research and to compare and contrast the situation in the early 1990s with that of the late 1960s and early 1970s. It will be argued that data important for understanding the financial condition of the industry are still not disclosed. This is a highly significant finding in an industry already plagued by severe financial distress.

The discussion will be broken down into three sections. In Part II of the paper, conditions in the 1960s and early 1970s will be outlined. In the process, a critical distinction will be made between operating and financial lease contracts. In Part III, the current situation will be documented and compared to the early 1970s. A switch by carriers to the use of non-cancelable operating leases and a subtle change in the definition of the capital leases will be shown to cause difficulties in the analysis of carrier financial structures. Finally, Part IV, the Conclusion, will argue for changes in data reporting requirements.


6. By capitalized it is meant that the "present value" or discounted value of the lease payments should be computed for such lease agreements and those values should then be included in the total long-term debt burden of the carrier (and in any debt ratio computed from the airline's balance sheet). This paper will follow this approach.

7. For a complete treatment of the current financial state of the airline industry, see New Approach, supra note 4, at 371.
II. AIRCRAFT LEASING IN THE 1960s

Table I presents data on major airline fleets and total leased (both short-term and long-term) aircraft for the year 1969, the key year in a prior study. Included on the table are the carriers classed as the major carriers or “trunklines” in that year, the so-called “Big Four” and “Other Seven” as they were referred to by the Civil Aeronautics Board (CAB) at that time. Two interesting points are evident from the table. First, the vast majority of the leases were long-term. Of the total 317 leased aircraft, 87.1% (276/317) were financed using long-term lease agreements. It is the type of lease that is most important, as will become evident. Second, there was a tendency for the more profitable carriers to lease few, if any, aircraft. While carriers on average leased 19.2% of their planes (317 of the total fleet of 1651), Delta and Northwest, the two most profitable carriers of the 1960s, did not lease a single aircraft. Additionally, other than financially strong carriers, such as Western and Continental, had low rates of leasing (8% and 2%, respectively). In contrast, Eastern, Northeast, and TWA, three of the most financially troubled carriers of that era, leased significant portions of their fleets. Eastern leased 33% of its fleet, while Northeast leased 83% of its planes. While the correlation is not perfect (American, for example, leased 22% of its aircraft), it is still significant.

<table>
<thead>
<tr>
<th>Fleet</th>
<th>S-Term</th>
<th>L-Term</th>
<th>Total Leased</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern</td>
<td>250</td>
<td>21</td>
<td>61</td>
<td>82</td>
</tr>
<tr>
<td>American</td>
<td>247</td>
<td>0</td>
<td>54</td>
<td>54</td>
</tr>
<tr>
<td>TWA</td>
<td>226</td>
<td>5</td>
<td>38</td>
<td>43</td>
</tr>
<tr>
<td>UAL</td>
<td>388</td>
<td>0</td>
<td>75</td>
<td>75</td>
</tr>
<tr>
<td>Northwest</td>
<td>117</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Delta</td>
<td>130</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Braniff</td>
<td>72</td>
<td>12</td>
<td>8</td>
<td>20</td>
</tr>
<tr>
<td>Northeast</td>
<td>35</td>
<td>0</td>
<td>29</td>
<td>29</td>
</tr>
<tr>
<td>Continental</td>
<td>55</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Western</td>
<td>78</td>
<td>0</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>National</td>
<td>53</td>
<td>3</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1651</td>
<td>41</td>
<td>276</td>
<td>317</td>
</tr>
</tbody>
</table>

Source: CAB Form 41, Schedule B-14.

Leases are often classified as operating or finance leases. A financial lease has been defined as: “A noncancelable agreement that obli-

8. *Impact*, *supra* note 5.
9. Equivalent to the “majors” now.
gates the lessee to make payments to the lessor for a predetermined period of time. These payments usually are sufficient to amortize the full cost of the asset plus provide the lessor a reasonable rate of return on the investment in the asset.”\textsuperscript{10} It has been argued by most financial analysts and accountants that non-cancelable, long-term financial leases are really long-term debt finance and should be presented as such on a firm's balance sheet.\textsuperscript{11} Cancelable operating leases, being short-term, do not have the same impact, and disclosure in the footnotes to the financial statements may be sufficient for these leases. However, during the time of this study, nearly all lease agreements were relegated to footnotes in the carriers' financial statements.\textsuperscript{12} Thus, as “off-balance sheet” financing, their impact on debt ratios was not directly visible. Fortunately, data summarizing key terms of these agreements were available from the CAB Form 41 Schedule B14.\textsuperscript{13} From financial statements, users could, with some difficulty, construct the debt equivalents of these lease agreements.\textsuperscript{14}

The debt equivalents of the finance leases were computed for those air carriers listed in Table 1.\textsuperscript{15} For the purposes of the author's 1973 study, leases were categorized as financial leases if the following conditions existed: if the lease term was approximately equal to the depreciable life of the airframe; if there were options to purchase and or renew at the end of the initial term; if the aggregate rentals under the lease's initial term exceeded the then new purchase price of the aircraft; and if the leases were net leases.\textsuperscript{16} In fact, the vast majority of the 1969 agreements, (all of those identified as long-term), were clearly financial in nature. The few short term leases met none of the criteria. There was thus little ambiguity in the classification of the leases. For instance, American (AAL) leased twenty-two B727 jets and sixty-six engines from Banker's Trust Company of New York. The initial term of the lease was eighteen years, the rental per aircraft was $430,034 per year, and the aggregate

\textsuperscript{10} Moyer, supra note 3, at 623.

\textsuperscript{11} Id.

\textsuperscript{12} The then relevant accounting pronouncement, APB No. 5, required lease capitalization of financial type leases according to specific criteria. Reporting for Leases in Financial Statements of the Lessee, APB Opinion No. 5, § 14-14 (Am. Inst. of Certified Pub. Accountants). However, the criteria were ambiguous and, in practice, little capitalization of leases occurred.

\textsuperscript{13} Schedule B14 (for balance sheet form 14) was a part of the CAB Form 41, which all carriers were required to file with the CAB. In fact, actual lease covenants were available at the CAB. The same was not true for other non-regulated industries at that time and is not true today for the airlines.

\textsuperscript{14} This will be contrasted to the present situation shortly.

\textsuperscript{15} See Impact, supra note 5, for a detailed analysis of the methodology.

\textsuperscript{16} That is, the lessee paid the taxes, maintenance, and insurance, etc. These were the criteria suggested by Vancil and Anthony as those that readily identified the financial lease. See Richard F. Vancil & Robert N. Anthony, Leasing of Industrial Equipment, 1963.
total rental for each jet was $7,740,610. The latter exceeded the new purchase price of the B727 of $5.6 million in that year. Finally, there was a purchase option, the lease was a net lease, and the lease was non-cancellable by either party during the initial term.17

The debt equivalents of these leases were computed using a standard present value approach.18 Table II shows a summary of the approach for one carrier, American. The remaining payments on the lease (except for the current year's obligation—a short-term liability) were discounted at a appropriate interest rate (10% in the study).19 The resulting debt equivalent was then added to total long-term debt. As a consequence, American's "perceived" debt increased by $205.1 million, an addition of over 30% to its reported debt burden of $681.2 million. The impact on the airline's financial structure is, therefore, quite significant. The overall impact on several generally used financial ratios can also be calculated. AAL's debt/equity ratio (defined as long-term debt divided by net worth) increases significantly from 2.73 to 3.31, and the carrier's

Table II. American Airlines-Capitalization of Aircraft Leases

<table>
<thead>
<tr>
<th>Leased Aircraft</th>
<th>Date of Lease</th>
<th>Years Remaining (End of 1969)</th>
<th>Total Yearly Rental (All Aircraft)-1969</th>
<th>Present Value at 10%</th>
</tr>
</thead>
<tbody>
<tr>
<td>22-B727</td>
<td>12/68</td>
<td>17</td>
<td>$9.46 million</td>
<td>$67.29 million</td>
</tr>
<tr>
<td>5-B727</td>
<td>1/69</td>
<td>17</td>
<td>$2.15</td>
<td>$15.29</td>
</tr>
<tr>
<td>4-B727</td>
<td>9/69</td>
<td>15</td>
<td>$2.34</td>
<td>$15.67</td>
</tr>
<tr>
<td>3-B707</td>
<td>3/69</td>
<td>9</td>
<td>$2.55</td>
<td>$13.35</td>
</tr>
<tr>
<td>10-B707</td>
<td>6/68</td>
<td>14</td>
<td>$6.79</td>
<td>$43.85</td>
</tr>
<tr>
<td>10-B707</td>
<td>6/69</td>
<td>15</td>
<td>$7.41</td>
<td>$49.62</td>
</tr>
</tbody>
</table>

54 on long-term leases Total $30.70 million Total $205.07 million

Total Capital:
- Long-Term Debt $681.2 million
- Capital. Leases Aircraft $205.1
- Common Equity $403.3

1. Years Remaining rounded to the nearest year.
2. The present value of the annual rentals each year for the term of the lease, excluding the current year's rental (a current liability).

Source: Basic data from American's Form 41, Schedule B-14.

17. See Impact, supra note 5.
18. Any standard financial management textbook covers the basic methodology. See Moyer, supra note 3.
19. For a justification of the discount rate used, see Impact, supra note 5. In fact, the exact specification of the discount rate is not all that critical. The author tried to err on the high side, which would, of course, decrease the significance of the lease agreements. If a lower rate were used, the net effect of the capitalized leases would be much greater. Since the purpose of the paper was to show the importance of lease capitalization, the use of a higher rate made the estimates more conservative (and therefore more easily defensible).
long-term debt-to-total capital ratio\textsuperscript{20} increases to 60.3\% from 53.9\%\textsuperscript{21}. Tables III and IV summarize the results of the same approach applied to all the carriers on Table I. The ratios for some carriers, such as Eastern and Braniff, increase significantly, in stark contrast to the ratios of Delta, Northwest, and Braniff, which remain unchanged\textsuperscript{22}.

Two important observations can be made based on Tables III and IV. First, the impact of leasing on debt ratios is significant enough to merit the attention of any financial user, especially when making comparisons between carriers. Second, although difficult to obtain and process, the data were available (and in great detail). The discussion now turns to the situation in the 1990s, as a contrast to the conditions just described.

\section{AIRCRAFT LEASING IN THE 1990s}

Currently, much of the information about the true nature of aircraft leases is unavailable. This is a result of several events. First, accounting regulations were changed in 1976 when the Financial Accounting Standards Board (FASB) issued SFAS No. 13\textsuperscript{23}. This pronouncement established new criteria for the capitalization (and therefore the inclusion on the balance sheet) of all new financial type leases\textsuperscript{24}. While on the surface this change is positive, as it required capitalization of lease obligations, in reality many firms structured their lease agreements to strategically violate the requirements for capitalization of many noncancelable

\textsuperscript{20} Total capital here is computed as the sum of long term debt, including deferred taxes, and preferred and common equity.

\textsuperscript{21} The calculation of these ratios requires some information not disclosed on the tables, including deferred tax credits (which are part of total debt), long-term debt, and total capital and the current portion of the obligations (a current liability) which affects the debt/equity ratio. Data concerning these items are found in the original article by GRITTA, \textit{supra} note 4, at n.17. As they are not critical to the arguments made herein, the interested reader is referred to the source.

\textsuperscript{22} The results would be affected by the capitalization of ground leases. However, at the time of the original studies, data on ground leases were very sketchy at best. To quantify the effect of these leases, the author resorted to a primitive "discounting into perpetuity" technique. The inclusion of ground leases increases capitalization of aircraft leases (see Table IV) to 63.4\%, Eastern's from 77.2\% to 79.2\%, TWA's from 66.8\% to 69.4\%, United's from 58.0\% to 59.5\%, Braniff's from 69.1\% to 73.1\%, Delta's from 38.7\% to 41.4\%, National's from 27.4\% to 35.3\%, Northwest's from 17.2\% to 20.6\%, and Western's from 65.5\% to 67.0\%. Data on Continental were not available. The ratios of debt/equity were also affected. For American, that ratio increased from 3.31 (after aircraft leases were considered) to 3.62. Because of the limitations of the "discounting into perpetuity" technique, these results are somewhat subjective and are therefore reported only in this footnote. \textit{See} GRITTA, \textit{supra} note 4, at n.5, 19.


\textsuperscript{24} \textit{Id}. Unfortunately, all leases prior to 1977 were not covered until 1981, when the requirements were then to apply retroactively to all financing leases.
TABLE III. TOTAL CAPITAL, INCLUDING AIRCRAFT LEASES
U.S. DOMESTIC AIRLINES
(as of Dec. 31, 1969)

<table>
<thead>
<tr>
<th>Airline</th>
<th>Long-Term Debt</th>
<th>Capital Aircraft Leases</th>
<th>Common Equity</th>
</tr>
</thead>
<tbody>
<tr>
<td>EASTERN:</td>
<td>$626.2 million</td>
<td>150.1</td>
<td>224.9</td>
</tr>
<tr>
<td>CONTINENTAL:</td>
<td>$199.8 million</td>
<td>1.8</td>
<td>96.3</td>
</tr>
<tr>
<td>TWA:</td>
<td>$757.2 million</td>
<td>142.9</td>
<td>362.7</td>
</tr>
<tr>
<td>NATIONAL:</td>
<td>$66.2 million</td>
<td>6.2</td>
<td>130.5</td>
</tr>
<tr>
<td>UNITED:</td>
<td>$872.2 million</td>
<td>208.9</td>
<td>587.3</td>
</tr>
<tr>
<td>NORTHWEST:</td>
<td>$112.0 million</td>
<td>0</td>
<td>420</td>
</tr>
<tr>
<td>BRANIFF:</td>
<td>$200.8 million</td>
<td>33.2</td>
<td>587.3</td>
</tr>
<tr>
<td>NORTHEAST:</td>
<td>$4.4 million</td>
<td>102.2</td>
<td>-22</td>
</tr>
<tr>
<td>DELTA:</td>
<td>$233.8 million</td>
<td>0</td>
<td>241.4</td>
</tr>
<tr>
<td>WESTERN:</td>
<td>$197.2 million</td>
<td>20.1</td>
<td>79.3</td>
</tr>
</tbody>
</table>

Source: Basic data from CAB Form 41, Schedule B-14.

Leases. 25 Secondly, several years later, in October of 1980, the CAB dropped Schedule B14 from its Form 41 requirements. 26 These events make determining the true nature of lease agreements more difficult, as sufficient lease information is not included in either the balance sheet 27 or CAB filings. 28

Table V presents data on the major carriers for the year end 1991 (except where noted). The striking differences between this table and


27. The minimum future cash payments for all leases are disclosed in aggregate in the footnotes to the financial statements.

28. A third event should also be mentioned at this point. Data reported on Schedule B43 (The Inventory of Airframes and Aircraft Engines), which did at least list the number and type of equipment held under both “capitalized” and “operating” leases, was made confidential for those carriers requesting it. As will be noted shortly, this further adds to the problem of trying to derive the impact of operating leases on the financial structure of a carrier.
Table IV. Capitalization and Ratio Analysis  
(Dec. 31, 1969)

<table>
<thead>
<tr>
<th></th>
<th>Long-Term Debt /Total Capital</th>
<th>Total Debt/Net Worth</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Before</td>
<td>After</td>
</tr>
<tr>
<td>American</td>
<td>53.9%</td>
<td>60.3%</td>
</tr>
<tr>
<td>Eastern</td>
<td>73.2%</td>
<td>77.2%</td>
</tr>
<tr>
<td>TWA</td>
<td>63.0%</td>
<td>66.8%</td>
</tr>
<tr>
<td>United</td>
<td>52.7%</td>
<td>58.0%</td>
</tr>
<tr>
<td>Braniff</td>
<td>65.8%</td>
<td>unchanged</td>
</tr>
<tr>
<td>Continental</td>
<td>62.0%</td>
<td>unchanged</td>
</tr>
<tr>
<td>Delta</td>
<td>38.7%</td>
<td>unchanged</td>
</tr>
<tr>
<td>National</td>
<td>25.7%</td>
<td>27.4%</td>
</tr>
<tr>
<td>Northwest</td>
<td>17.2%</td>
<td>unchanged</td>
</tr>
<tr>
<td>Western</td>
<td>63.2%</td>
<td>65.5%</td>
</tr>
</tbody>
</table>

Source: Calculated from data in Table III and Moody’s Transportation Manual, 1971 edition.

Table I are immediately apparent. Eastern and Braniff, as well as Continental, have failed. Several former major carriers (Western, Northeast, and National), have disappeared, the result of mergers stemming from the severe financial distress in the industry. Several new carriers have appeared to take their places. More important, however, is the tremendous increase in leasing. The group of major carriers now are leasing on average 56.6% of their fleets. This contrasts sharply with the overall figure of only 19.2% in 1969. American, for example, was leasing 61.4% of its fleet by the end of 1991 (up from only 22% in 1969). And no longer is leasing used primarily by the weak carriers, as was the case in 1969. Delta and United, relatively strong carriers, leased 44.2% and 45.8%, respectively, of their planes in 1991.

While the original study separated leases into short-term and long-term classes (which approximated operating and finance type leases), the classification of leases is not as clear cut today. Presently, accounting regulations govern whether leases are classed as operating or capital leases. SFAS No. 13 provides for capitalization of leases when one of the following conditions is met: the lease transfers ownership of the property to the lessee by the end of the lease term, the lease contains a bargain purchase option, the lease term is equal to 75% or more of the estimated economic life of the leased asset, or the present value at the beginning of the lease term of the minimum lease payments equals or exceeds 90% of the excess of the fair value of the lease property. When these conditions are not met, the leases are classed as operating.

TABLE V. LEASED AIRCRAFT BY CARRIER

<table>
<thead>
<tr>
<th>Carrier</th>
<th>Total Planes Owned or Leased</th>
<th>Planes Leased</th>
<th>Percentage Leased</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern</td>
<td>ceased operations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>American</td>
<td>849</td>
<td>521</td>
<td>61.4%</td>
</tr>
<tr>
<td>TWA</td>
<td>207</td>
<td>135</td>
<td>65.2%</td>
</tr>
<tr>
<td>UAL</td>
<td>486</td>
<td>221</td>
<td>45.5%</td>
</tr>
<tr>
<td>Braniff</td>
<td>ceased operations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Continental</td>
<td>417</td>
<td>286</td>
<td>68.6%</td>
</tr>
<tr>
<td>Delta</td>
<td>475</td>
<td>210</td>
<td>44.2%</td>
</tr>
<tr>
<td>National</td>
<td>merged with PanAm</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northwest</td>
<td>not available-privately held</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Western</td>
<td>merged with Delta</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alaska</td>
<td>119</td>
<td>94</td>
<td>79.0%</td>
</tr>
<tr>
<td>USAir</td>
<td>550</td>
<td>260</td>
<td>47.3%</td>
</tr>
<tr>
<td>America West</td>
<td>101</td>
<td>82</td>
<td>81.2%</td>
</tr>
<tr>
<td>Southwestern</td>
<td>124</td>
<td>unavailable</td>
<td></td>
</tr>
</tbody>
</table>

Note: All figures are as of December 31, 1991, except for Delta which is June 30, 1991 and TWA which is December 31, 1990.

Table VI classifies leases as operating or capital leases.\(^{31}\) In comparison to Table I, it is immediately evident that while firms lease more, the type of lease used has also changed. There has been a massive increase in the use of the operating lease. In 1969, for example, all of American's leases were classic financing leases (none had a term less than 10 years and none were cancelable). By 1991, however, American

---

\(^{31}\) Determination of this schedule was hampered by the availability of data, which has not been uniformly available since 1989. In July of 1991, UAL filed a motion with DOT to make the filings under Schedules B7 (Airframe and Engine Acquisition and Retirements) and B43 confidential, as of October 1989. The Director of the Research and Special Programs Administration's (RSPA) Office of Airline Statistics at first denied the request. United then indicated that it would submit a petition for rulemaking requesting confidential treatments of both of these schedules. Pending action on that request, the Director reversed his earlier ruling and permitted any other major carrier to submit its schedules in confidence. See Confidential Treatment of Form 41 - Schedules B7 and B43. Some firms (Southwestern, United, American), chose to disclose this information in their annual reports; others did not. The reports of the latter three are now listed as confidential and available only to the Congressional and DOT staff. They are not available to the general public. Therefore, the latest available figures, either from the 1991 annual report or the 1989 DOT filing, were used to estimate the number of planes leased under operating and capital agreements. If anything, use of 1989 percentages results in a conservative estimate of the number of operating leases, as the percentage of operating leases to total leases has increased over time. For example, the carriers which disclosed 1991 percentages have increased their usage of operating leases since 1989. The authors wish to express their thanks to Mr. Clay Moritz, Systems Accountant, Office of Airline Statistics, and to Mrs. Doris Corbett, Research Assistant, Public Reference Room, for their assistance in ascertaining the status of airline filings under Schedule B43-Form 41 and for providing certain data on the table.
TABLE VI. CLASSIFICATION OF LEASES AS OPERATING OR CAPITAL LEASES

<table>
<thead>
<tr>
<th>Name</th>
<th>Total Leased</th>
<th>Capital</th>
<th>Operating</th>
<th>% Operating</th>
</tr>
</thead>
<tbody>
<tr>
<td>American</td>
<td>521</td>
<td>111</td>
<td>412</td>
<td>79.1%</td>
</tr>
<tr>
<td>TWA</td>
<td>135</td>
<td>53</td>
<td>82</td>
<td>60.9%</td>
</tr>
<tr>
<td>UAL</td>
<td>221</td>
<td>33</td>
<td>188</td>
<td>85.1%</td>
</tr>
<tr>
<td>Southwestern</td>
<td>N/A</td>
<td>N/A</td>
<td>46</td>
<td>N/A</td>
</tr>
<tr>
<td>Continental</td>
<td>286</td>
<td>45</td>
<td>241</td>
<td>84.3%</td>
</tr>
<tr>
<td>Delta</td>
<td>210</td>
<td>21</td>
<td>189</td>
<td>90.1%</td>
</tr>
<tr>
<td>Alaska</td>
<td>94</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>USAir</td>
<td>260</td>
<td>52</td>
<td>208</td>
<td>80.1%</td>
</tr>
<tr>
<td>America West</td>
<td>82</td>
<td>0</td>
<td>82</td>
<td>100%</td>
</tr>
</tbody>
</table>

Note: All figures are as of December 31, 1991, except for Delta which is June 30, 1991 and TWA which is December 31, 1990.

 leased 412 of its 521 planes (79.1%) under operating lease agreements.32

In general, firms have intentionally reduced the use of capital leases. With the increase in competition in the industry, in part fostered by deregulation of the airlines, airlines are concerned about the appearance of their balance sheet. Many carriers, already burdened with high debt, simply could not take on the appearance of more long-term debt. Also, there is a willingness and ability of the lessors to provide “custom-made” lease agreements. Therefore, many finance leases are structured to be classed as operating leases.33 This avoids capitalization of these leases on the balance sheet. Because of the increased usage of operating leases, non-capitalization of operating data distorts the financial condition of the firms, particularly their debt burden, since the vast majority of leases classified as operating leases are really long term debt.34

Determining the net effect of these operating leases on the “perceived” debt burden of the airlines is made more difficult now than in the early 1970s since the comprehensive data that was available on Schedule B14 is no longer required. However, as in the original study, an estimate of the debt equivalent of the leases can be made. The amount of

32. It should be remembered that in 1969, the classification of leases was governed by the classic definition of finance leases, while today, accounting regulations govern lease classification.

33. For example, when the lease term is equal to 74% of the economic life of the property, capitalization of the lease is not required, provided, of course, that none of the other lease criteria is met.

34. Under the set of criteria used by Gritta in both the 1973 and 1974 studies, these leases would now be capitalized.
the off-balance sheet debt from noncancelable operating leases is estimated by discounting the carrier's future minimum operating lease payments (disclosed in the footnotes to its financial statements) using estimates of the discount rate and the remaining life of the lease.\textsuperscript{35} Table VII shows a summary of the approach for American. As required by the FASB, American disclosed the minimum operating lease payments for each of the next five years, and then as a lump sum for all future years. For the lease payments made beyond five years, an estimate about the remaining life of the leases must be made. For the purposes of this illustration, the remaining lease term is assumed to be 15 years. The future lease payments are then discounted back to the present using an 8% discount rate.\textsuperscript{36} The discounted value of the leases was calculated as $9,049,814,000. This figure represents an estimate of the off-balance sheet debt represented by American's non-cancelable, operating leases.\textsuperscript{37} Capitalization of this debt increases the perceived long term debt burden by more than 100% from the previously recorded debt of $7,672,000,000. Using this capitalization approach, capital lease amounts are calculated for other carriers (Table VIII), and the key ratios utilized earlier in this study are also determined. Table IX summarizes these ratios.

Increases in the debt burden ratios are dramatic, even greater than the increases noted in the first study. American's long-term debt/total capital ratio increases from 67% to 82%, while its ratio of debt/equity jumps sharply from 3.27 to 5.66.\textsuperscript{38} United's ratios jump even more

\textsuperscript{35} The lease payments disclosed on the financial statements include leases for aircraft as well as ground leases and other equipment leases. The majority of air carriers do not separate out the leases payments by type of asset.

\textsuperscript{36} An analysis was performed to determine the sensitivity of the assumptions on the calculation of lease debt. While changes in assumptions changed the computed lease obligation, the capitalized lease liability remained a significant amount in relation to the recorded debt of the company. Regardless of assumptions used, capitalization of lease payments would have a material effect upon the financial statements.

\textsuperscript{37} Imhoff, Lipe, and Wright suggest a more theoretically correct method to determine the effect of leases on the balance sheet. Besides determining the lease obligation, they also compute the corresponding leased asset. Eugene A. Imhoff et al., \textit{Operating Leases: Impact of Constructive Capitalization}, \textit{Accounting Horizons}, Mar. 1991, at 51. This was ignored here so that the data would be comparable to the 1973 study. However, such computations were performed by these authors and are available from them.

\textsuperscript{38} These ratios can be directly compared to those in n.22. Remember, however, that the ratios in that footnote were somewhat subjective because of the lack of detailed data on ground leases. The original Gritta studies capitalized aircraft leases only, and, therefore, debt ratios listed on Table IV of this paper only include this type of lease. The reader is referred to n.22 for the impact of capitalizing all leases, including ground leases, on the long-term debt/total capital ratio. It is also important to remember that the additional debt burden from capitalizing leases includes capitalization of operating leases. Those aircraft leased under financing leases are already capitalized on the balance sheet and, therefore, contained in the long-term debt burden of the carrier.
TABLE VII. CAPITALIZATION OF FUTURE MINIMUM LEASE PAYMENTS FOR AMERICAN AIRLINES AS OF DECEMBER 31, 1991

<table>
<thead>
<tr>
<th>Year</th>
<th>Minimum Lease Payments</th>
<th>Present Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>$797,000,000</td>
<td>$737,963,000</td>
</tr>
<tr>
<td>1993</td>
<td>824,000,000</td>
<td>706,448,000</td>
</tr>
<tr>
<td>1994</td>
<td>813,000,000</td>
<td>645,386,000</td>
</tr>
<tr>
<td>1995</td>
<td>784,000,000</td>
<td>576,263,000</td>
</tr>
<tr>
<td>1996</td>
<td>765,000,000</td>
<td>520,646,000</td>
</tr>
<tr>
<td>Thereafter</td>
<td>15,097,000,000</td>
<td>5,863,108,000</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$9,049,814,000</strong></td>
<td></td>
</tr>
</tbody>
</table>

Note: A discount rate of 8% was used to determine present value.

TABLE VIII. TOTAL CAPITAL, INCLUDING AIRCRAFT LEASES (IN THOUSANDS)

<table>
<thead>
<tr>
<th>Carrier</th>
<th>Long-Term Debt</th>
<th>Capitalized Leases</th>
<th>Equity</th>
</tr>
</thead>
<tbody>
<tr>
<td>American</td>
<td>7,672,000</td>
<td>9,049,814</td>
<td>3,794,000</td>
</tr>
<tr>
<td>TWA</td>
<td>2,32,287</td>
<td>8,569,463</td>
<td>1,596,788</td>
</tr>
<tr>
<td>UAL</td>
<td>3,805,451</td>
<td>3,616,052</td>
<td>-2,066,068</td>
</tr>
<tr>
<td>Continental</td>
<td>3,749,082</td>
<td>6,929,541</td>
<td>2,506,116</td>
</tr>
<tr>
<td>Delta</td>
<td>676,912</td>
<td>504,042</td>
<td>284,447</td>
</tr>
<tr>
<td>Alaska</td>
<td>1,018,067</td>
<td>985,238</td>
<td>-166,510</td>
</tr>
<tr>
<td>America West</td>
<td>3,192,634</td>
<td>5,928,253</td>
<td>1,318,162</td>
</tr>
<tr>
<td>USAir</td>
<td>948,876</td>
<td>649,562</td>
<td>628,521</td>
</tr>
</tbody>
</table>

Note: Amounts are as of December 31, 1991, except for Delta which is June 30, 1992.

sharply. That carrier's long-term debt/total capital ratio increases from 61% to 87%, while its ratio of debt/equity doubles (from 5.19 to 10.55). The ratios of troubled Continental and America West are also very revealing, especially the negative debt/equity ratios for both. Clearly, capitalization of operating lease obligations would materially affect the financial statements.

IV. CONCLUSION

The purpose of this paper is twofold. First, it updates prior research on the topic of aircraft leasing. Second, it contrasts the findings of that earlier research to the present situation in the airline industry. The following are the major conclusions and observations from this study.

First, in 1970, it was the weaker carriers that, by and large, tended to lease the higher percentage of their fleets, and the average carrier leased only 19.2% of its aircraft. By 1991, however, all the major carriers
leased a significant percentage of their aircraft and average rate of leasing rose sharply to 56.5%. Second, in 1970, leases were clear and unambiguous in nature. The vast majority of aircraft leases were long-term, classic financial leases (according to the textbook definition of the term). In contrast, by 1991, most aircraft leases were operating leases, perhaps structured strategically to violate the lease capitalization requirements of SFAS No. 13. Third, in 1970, detailed data on aircraft leases were available from Schedule B14, which provided significant information on each leased aircraft. The motivated analyst could, therefore, derive the debt equivalent of these leases with a high degree of accuracy. Today the situation is more confused. Schedule B14 is no longer a required filing. Data availability is sporadic, and data which exist are often difficult for users to process. Estimates of debt equivalents are therefore far more subjective. Finally, the effect on carrier balance sheets, and on debt ratios, resulting from the capitalizing of leases was significant in 1970. The net effect is even more dramatic in 1992.

This research demonstrates the need for disclosure of additional air carrier lease data. As demonstrated, the data necessary to fully understand the financial situation of the U.S. airline industry are not currently available. In the 1973 paper, it was argued that the capitalization of the financial type lease could significantly alter the perceived level of financial risk facing a carrier. That argument is truer today than it was then. When operating leases are, in substance, “off-balance sheet” financing, the leases should be capitalized and included in the airline’s debt burden. Shareholders and creditors should join together in demanding sufficient information to determine this off-balance sheet risk. In the interest

---

39. This was in spite of the fact that some of these so-called operating leases had initial terms of up to 26 years, in some cases. All that is necessary is that one of the provisions necessary for capitalization be violated.

40. Impact, supra note 5.
of monitoring the airline industry, and in assessing its ongoing financial status, the DOT must act to restore crucial information, no matter how uncomfortable this might be to the carriers themselves.41

41. The authors favor a return to the requirement that the carriers file a Schedule B14 (Summary of Property Obtained under Long-Term Leases).
Unemployment Compensation and Independent Contractors: The Motor Carrier Industry as a Case Study

James C. Hardman*

TABLE OF CONTENTS

I. Introduction .............................................. 16
II. The Common Law ....................................... 17
III. Compliance With Instructions ......................... 18
IV. Service to the Public .................................... 20
V. Other Factors ............................................. 22
VI. Legislation ............................................... 22
    A. Employment, Special Exclusion ....................... 24
VII. The ABC Test ........................................... 24
    A. Application of the ABC Test ......................... 25
    B. The Usual Course of Business ....................... 26
    C. Place of Performance ................................ 28
    D. Independent Business ................................ 29
VIII. Special Situations .................................... 31
    A. Michigan ............................................. 31
    B. Illinois ............................................. 32
IX. Applicability of Statute ................................ 34
X. Possible solutions to the Route to Uniformity; Federal Action 34

* B.S. Quincy College, M.B.A., J.D. Northwestern University, Mr. Hardman is Vice President of Administration and General Counsel, Dart Transit Company, Eagan, Minnesota.
I. INTRODUCTION

Unemployment compensation is one of a series of measures under the Social Security Act\(^1\) designed for the protection of society and enacted to alleviate the burdens of citizens resulting from unemployment.\(^2\)

All states have enacted unemployment compensation statutes and, while seeking a common objective, they are diverse in their provisions.\(^3\) This diversity creates a problem for businesses which operate in more than one state.

In the transportation industry, motor carriers utilizing owner/operators are faced with a particularly vexing problem of determining whether such operators\(^4\) are within the coverage of the statutes.

Motor carriers have essentially taken the position that an owner/operator is an independent contractor and not covered by unemployment compensation statutes.\(^5\) State agencies administering such statutes, however, in the absence of a specific exclusion,\(^6\) have frequently construed the statutes liberally in favor of coverage.\(^7\)

2. The SSA itself is not an unemployment compensation law. Gardner v. Smith, 368 F.2d 77 (5th Cir. 1966). See also Richard v. Celebrizze, 247 F. Supp. 183 (D. Minn. 1965). Under the SSA and related taxing statutes, administrative costs and benefits under state unemployment compensation laws are financed by federal and state taxes imposed primarily on employers. Money accumulated in a federal unemployment trust fund consisting of federal and state contributions is invested and ultimately turned over to state authorities for the payment of unemployment benefits. Id.
4. Owner/Operators as the term is used in this paper, are individuals who own their own equipment or hold it under a bona fide lease and; under contract with licensed motor carriers, provide a subhauling service.
6. Missouri, Nebraska, New Jersey, Oklahoma, Oregon, and Virginia have specifically excluded owner/operators by statutory provisions. Arizona, Minnesota, Utah, North Carolina, Montana, Oregon, and North Dakota specifically exclude independent contractors in their statutes. ATA Survey, supra note 5, at 2-3.
7. It is generally held that the benefit provision would be liberally or broadly construed. See, e.g., Watson, 161 S.E.2d 1 (N.C. 1968); Sinclair Refining Co. v. Unemployment Compensation Commission, 29 S.E.2d 388 (Va. 1944); Davis v. Hix, 84 S.E.2d 404 (W. Va. 1954).
This clash of positions has generated extensive legislative and judicial activity. Diversity and uncertainty still exist. Motor carriers are being subjected to substantial back taxes, penalties, and interest if a misclassification occurs.8

II. THE COMMON LAW

Unlike other areas of law where the issue of employment classification arises,9 a majority of states have specific statutory definitions, and the determination of the employment classification issue involves statutory interpretation rather than application of the common law.

The issue of unemployment compensation, however, involves tax collection, as well as benefit payment. Thus, the common law is important. The Internal Revenue Service relies upon the common law to determine whether a person or entity should be making deductions and contributions under the Federal Insurance Contribution Act10 and the Federal Unemployment Tax Act.11

Twenty common law factors have been developed for determining whether a worker is an employee. The factors are not given even weight, nor are they applicable in all instances. These factors form the basis of Form SS-8 which is used by the Internal Revenue Service in their analysis of the employee-independent contractor question.12

The twenty questions asked on Form SS-8 are:

1. Are instructions provided by the employer?
2. Is training provided by the employer?
3. Are the worker's services integrated into the general operations of the employer?
4. Are the services rendered personally?
5. Does the worker hire, supervise, and pay others who work with him in the performance of services on behalf of the employer?

8. A misclassification of a driver who was paid $100,000 in 1989 and who is subsequently reclassified as an employee would result in the carrier being liable for $5,920.00 in back taxes, the majority dealing with employers social security tax, employee social security tax, and federal unemployment tax. American Trucking Association, How to Survive an IRS Employment Tax Audit, at 17 (1989). Additional taxes would be due on the state level. Id.

9. The employment classification issue arises in the context of numerous areas including Title VII, the Age Discrimination Employment Act, the National Labor Relations Act, the Internal Revenue Code, the Fair Labor Standards Act, the Employment Retirement Security Act, and in state statues such as workers' compensation and drug testing. See Clark, Independent Contractor-Employee, What are they - Why?, (paper delivered at the 1989 Conference Professional Program, Transportation Lawyers Association).

12. I.R.S. Form SS-8. Information for use in determining whether a worker is an employee for federal employment taxes and income withholding (Rev. 10-90).
6. Is there a continuing relationship between the worker and the employer?
7. Does the worker have set hours or work?
8. Does the worker work full time for the employer?
9. Does the worker work at the employer's premises or his own?
10. Does the employer specify the sequence of services to be performed?
11. Is the worker required to regularly furnish oral or written reports to the employer?
12. Is the worker paid on an hourly or weekly basis, or by the project?
13. Is the worker reimbursed for business expenses, or must he bear these expenses himself?
14. Does the employer provide materials needed to do the work, or does the worker provide these materials?
15. Does the worker have an investment in the enterprise?
16. Is it possible for the worker to either profit or lose money from his endeavors?
17. Does the worker work for a multitude of clients or just one?
18. Does the worker hold himself out to the public as being self-employed?
19. Does the worker have the right to terminate his services at any time without risking breach of contract?
20. Does the employer have the right to terminate the worker's services at any time?

While these questions appear to be easily answered, the interpretation of the answers involves subjectiveness on the part of the auditor; and industry members complain that the test has been applied unevenly and erroneously.

Some of the problems undoubtedly lie in the knowledge of the answering party, their ability to articulate clearly the facts on which the answer is predicated, and the auditor's understanding or knowledge of the industry involved.

III. COMPLIANCE WITH INSTRUCTIONS

The first question, "Are instructions provided by the employer?" is a prime example of the problems faced. If a simple answer of "yes" is provided, it is clear that an auditor would hold this as a factor against a finding of an independent contractor relationship.

However, a qualified "yes" with a reasonable explanation could have a contrary result. The key is to distinguish the type of instructions and/or the source of instructions.

Instructions can emanate from the carrier, a shipper, or a governmental entity. Instructions may also involve matters which do not bear on the critical issue of control and supervision of those matters which bear on the individual's ability to make a profit or loss and, thus, may not be a significant issue in the classification equation.
A carrier, for example, may require a contractor to telephone his location from time to time. The carrier has legitimate needs for such information because of the nature of the industry.

The location of the vehicle is necessary to advise a customer of the progress of the movement and when delivery can be anticipated to help the carrier seek or accept in advance other loads to tender to the contractor when the movement in progress ends; to assure that the load was not hijacked or delayed because of an accident; to advise if there is a reconsignment of goods in transit; and a host of other reasons.

Shippers may designate certain pickup and/or delivery times because of the need to coordinate dock personnel or to meet production requirements; may designate certain routes to follow to allow for partial loading or unloading in transit; and may require other of their special needs to be met.

Governmental directives also bear on the instructions given by carriers who frequently are duty bound to comply with and enforce statutes and/or administrative regulations. For example, logs\textsuperscript{13} must be completed by drivers but maintained by the carrier.\textsuperscript{14} Carriers may have to instruct the contractor to follow a particular route on occasion because the size or weight laws of a particular state may not accommodate the vehicle or load involved.

Essentially, no independent contractor, whether in the trucking industry or other industry, works without some direction or instructions. The real issue, as stated, is whether such directions emanate from, as opposed to through, the carrier engaging the contractor; and whether the contractor, as between the parties, shall exercise a substantial degree of control over both the broad outlines and the manner and means of how the contract work is performed.

Significantly, some courts and agencies do not distinguish between who exercises the control and the nature and degree of the control.\textsuperscript{15}

There are courts and administrative agencies, however, which recognize that control resulting from a government dictate and even a cus-

\textsuperscript{13} A log is a prescribed form on which drivers must record their action during the time they are carrying a load for a carrier. When completed, it will reflect the time the driver was sleeping or resting, loading or unloading lading, actually driving, etc. See Hours of Service of Drivers, 49 C.F.R. Part 395 (1992).

\textsuperscript{14} 49 C.F.R. § 395.8(a), (k) (1992).

\textsuperscript{15} Hudson v. Industrial Comm'n and Pfeiffer, 529 P.2d 1340 (Colo. Ct. App. 1974) (statutory license provisions requiring "exclusive control" over an enterprise may be considered in the employment classification issue).
tomer requirement does not constitute the type of control which would otherwise indicate an employment situation. 16

In Virginia a special exclusion exists for owner/operators if, substantially, all of seven factors are present. 17 The factor dealing with the control issue reads: 18

The individual generally determines the details and means of performing the services, in conformance with regulatory requirements, operating procedures of the carrier, and the specification of the shipper.

A similar exclusion evidencing the same control provisions exists in administrative rules in the state of Minnesota. 19

This split in approach is critical in a business so highly regulated and multi-state in nature.

IV. SERVICE TO THE PUBLIC

Another example of the difficulty truckers face is that administrators frequently place significant weight on the fact that owner/operators may frequently contract with a single carrier for a long period of time.

R. L. Moore, an acknowledged government expert on the issue, 20 has stated: 21

The fact that a person makes his service available to the general public usually indicates an independent contractor relationship.

Continuing, he pointed out various ways in which such a "holding out" could be made: 22

... he may have his own office and assistants; he may hang out a "shingle" in front of his home or office; he may hold business licenses; he may be listed in business directories or maintain business listings in telephone di-


17. VA. CODE ANN. § 60.2-212.1(A) (Michie 1992). The statutory wording of the seven factors is exactly the same as the specific exclusion provided by administrative rule in Minn. See MINN. R. 5224.0290 (1993).

18. VA. CODE ANN. § 60.2-212.1(A)(b) (Michie 1992). See ARIZ. REV. STAT. ANN. § 23-613.01(A) (1983) (example of a statutory provision which excludes legal requirements from being considered).

19. MINN. R. 5224.0292 (1993). The Ill. Dept. of Employment Sec. in May, 1992 also amended its reg. so that "direction and/or control" in a regulatory or licensing requirement shall not "... by operation of law or "per se," constitute a showing of "direction or control" for purposes of "the Act or Regulations." 92 ILL. ADM. CODE, Sec. 2732.203.

20. Mr. Moore is Technical Assistant to the Assistant Chief Counsel of Employee Benefits and Exempt Organizations, Internal Revenue Service.


22. Id.
State officials have expressed similar views. In the trucking industry, there are factors which question the reasonableness of such ideological concepts. Initially, owner/operators basically operate as single person businesses. The tractor is their place of business; the kitchen table is their home office. They have one tractor which, normally, they drive themselves. If they are kept busy by the carrier to whom they contract and are content with the contractual relationship and remuneration, why would they or should they have to contract with another merely to retain their independent status?

The real criterion should be whether the owner/operator has the option to serve other carriers or to contract with one carrier. Economic and other personal reasons may dictate one method of operation over the other. If the owner/operator chooses to contract with a carrier for a specific, continuing period of time, why would he or she want to maintain a special business telephone listing or advertise in directories? Clearly, to do so would involve poor business practices. Finally, government regulations and/or business realities preclude an owner/operator from switching carriers on a frequent basis.

Under the leasing regulations of the Interstate Commerce Commission, a carrier and owner/operator must enter into a written agreement in which the owner/operator gives the carrier exclusive possession and control of the vehicle during the term of the agreement. Thus, for the owner/operator to serve another carrier utilizing the same vehicle, it would be necessary for the agreement to be cancelled and a new agreement entered into with the second carrier.

Although this might appear to be an easy paper transaction, there is considerably more involved. Carriers are required to identify themselves on the vehicle as operator of the leased vehicle. Thus, the identification would have to be removed and the new carrier’s identification attached.

23. There are numerous publications which exist only to carry advertisements of carriers for independent contractors and driver employees. See, e.g., ProTrucker a monthly magazine published by Ramp Enterprises, P.O. Box 549, Roswell, GA 30077-0549. Independent contractors have no need to advertise their business.


25. If the carrier is a household goods carrier, the owner/operator and the motor carrier may agree that the contract applies only during the time the equipment is operated by or for the authorized carrier. See Lease and Interchange of Vehicles, 49 C.F.R. §1057.12(C)(1988).

Drivers of the vehicle would have to fill out a new application form; references would have to be checked; written examinations and driver’s tests given; medical data checked; and, in some instances, a drug test required.\textsuperscript{27}

Other problems may occur in the area of licenses and permits as carriers and owner/operators frequently register the vehicle with state officials jointly as a means of simplifying tax and mileage reporting. However, if an owner/operator leaves for another carrier, these arrangements can no longer exist and the owner/operator must normally be relicensed with attendant delays.

In recent years more carriers have also been transporting more cargo as contract carriers rather than common carriers.\textsuperscript{28} The former service may, and usually does, involve making a commitment to transport a specific number of loads or meeting set pick-up and delivery times. Therefore, as a practical matter, a carrier needs to have a commitment for a set number of vehicles and to have them available for its use at a required time. To lease on a trip basis is not consistent with this objective, as the carrier would never be assured an owner/operator would be available to haul its freight because the owner/operator could be hauling for another carrier. Despite the legitimate business reasons for long-term leases, a carrier runs the risk of the owner/operator lessors in such situation being found as not engaging in service to the public.

V. OTHER FACTORS

While other factors under the common law test may give a particular carrier or carriers problems, industry members as a whole can usually establish that owner/operators are independent contractors under the common law.

Carriers would be satisfied with the common law test, except for the fact that problems are encountered when an administrator with little knowledge of the industry is considering the issue. Many of the factors are subjective in nature; and thus, varied results are possible.

VI. LEGISLATION

Carriers have attempted to eliminate some of the shortcomings of the common law test by seeking legislative and administrative relief. Legislators in some states have given specific exclusions to owner/operators. For example, a Missouri statute reads:\textsuperscript{29}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{27} See Qualifications of Drivers, 49 C.F.R. Part 391 (1989).
\item \textsuperscript{29} MO. REV. STAT. § 288.035 (Supp. 1992). See also, NEB. REV. STAT. § 48-604(q)(1988).
\end{itemize}
\end{footnotesize}
Notwithstanding the provisions of Section 288.034. In the case of an individual who is the owner and operator of a motor vehicle which is leased or contracted with driver to a for-hire common or contract motor vehicle carrier operating within a commercial zone as defined in section 390.020 or 390.041, RSMo or operating under a certificate issued by the transportation division of the Department of Economic Development under the provisions of this chapter or by the Interstate Commerce Commission, such owner/operator shall not be deemed to be an employee, provided, however, such individual owner and operator shall be deemed to be in employment if the for-hire common or contract vehicle carrier is an organization described in Section 501(c)(3) of the Internal Revenue Code or any governmental entity.

In other instances, the statute will specifically set forth criteria, similar to the common law test, which must be met to constitute an individual as an owner/operator. This type of legislation is relatively new and stems from the industry’s concern over the application of common law concepts or other attempts to broaden coverage of the statutes.

In North Carolina and North Dakota, for example, independent contractors are specifically excluded from the definitions of “employee” and each refers to the common law rules as being applicable in the determination of who constitutes an independent contractor.

In Minnesota the statute specifically excludes independent contractors from the term “employment.” The Minnesota Department of Jobs and Training has promulgated rules which analyze specific jobs and also set forth criteria for general situations.

A. EMPLOYMENT, SPECIAL EXCLUSION

In the trucking industry, a specific exclusion exists for owner/operators. It reads:

In the trucking industry, an owner/operator of a vehicle which is licensed and registered as a truck, tractor, or truck-tractor by a governmental motor vehicle regulatory agency is an independent contractor, not an employee, while performing services in the operation of his or her truck if each of the following factors is substantially present:

a. The individual owns the equipment or holds it under a bona fide lease arrangement;

b. the individual is responsible for the maintenance of the equipment;

c. the individual bears the principal burdens of the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road;

d. the individual is responsible for supplying the necessary personal services to operate the equipment;

e. the individual's compensation is based on factors related to the work performed, including a percentage of any schedule of rates or lawfully published tariff, and not on the basis of the hours or time expended;

f. the individual generally determines the details and means of performing the services, in accordance with regulatory requirements, operating procedures of the carrier, and specifications of the shipper; and

g. the individual enters into a contract that specifies the relationship to be that of an independent contractor and not that of an employee.34

The rule has been a useful guide to the industry, and litigation on the issue has virtually ceased in the state. The approach used in Minnesota is a sage one. The administrative agency has recognized that general criteria based on the common law does not give sufficient direction to agency personnel or the public. Criteria become more useful and clear if they are developed in terms of the particular industry involved.

VII. THE ABC TEST

While many states apply the common law test and define it in a manner such as Minnesota, the majority of the states35 follow the ABC test basically stated as follows:36.


36. ATA Survey, supra note 5, at 2.
Service performed by an individual for remuneration (or wages) shall be employment irrespective of the common law unless and until it is proven that (a) the individuals are free from control as to the means and methods with which they accomplish tasks; (b) the services are performed outside the usual course of business of the employer or the employee performs such services outside of all the places of business of the party engaging the service; and (c) the individuals are engaged in an independently established trade, occupation, profession or business.

The use of this test is contrary to what federal legislatures envisioned within the Social Security system. In United States v. Silk, the Supreme Court established the "economic reality" test as being applicable to Social Security legislation. It held that two groups of owner/operators were small, independent businessmen as a matter of economic reality, chiefly because of their investment in equipment, hiring of helpers, and their opportunity for profit depended upon their own efforts. The Court considered the facts that owner/operators are integral to the carrier's business and that, in one instance, the owner/operator was under an exclusive contract, that was important, but not controlling.

In essence, the consideration of these latter facts was the foundation of the ABC test. However, when the Treasury Department attempted to issue regulations embracing the ABC test developed in the decision, Congress passed a joint resolution emphasizing that only common law factors should be considered for purposes of the legislation. It was felt that the economic reality test would mislead the public and that it was not consistent with legislative intent. Despite the fact that courts, since the Resolution, have acknowledged that strict application of the common law control test should be applied, the majority of states have continued to apply the economic reality test or, more appropriate, the ABC test.

A. Application of the ABC Test

In applying this test, the service engager has the burden of proof; and all three prongs of the test must be met. The ABC test is very

40. See, e.g., New Deal Cab Co. v. Fahi, 174 F.2d 318 (5th Cir. 1949), cert. denied 338 U.S. 818 (1949); Paity Cab Co. v. United States, 172 F.2d 87 (7th Cir. 1949).
42. See, e.g., Tachick Freight Lines, Inc. v. State Dep't of Labor, 773 P.2d 451 (Alas. 1989); State Dep't of Lab. v. Medical Placement Serv., Inc., 457 A.2d 382 (Del. 1982). In Trinity
difficult to pass in motor carriage because of the problems administrators have had in adapting the criteria to industry practices.

Initially, it should be noted that most courts and agencies hold that if a party were determined under the common law test to be an independent contractor, the party must still meet the ABC test to avoid coverage.43 The criteria of the ABC test actually are part of the common law test; and thus, it appears that the legislators adopting the ABC test attempted to emphasize the three specific criteria which must be met in all instances.

While under the common law test, the issue of control is the dominant factor; and the lack of control may be an overwhelming consideration in the classification determination.44 This is not the case if the ABC test is involved. It carries no more weight than any of the other factors which are to be considered.45

Prong A frequently causes problems since some courts have indicated the control test under the ABC test is not equivalent to the common law control test and have held that less control need be shown to establish an individual as an employee.46

B. The Usual Course of Business

Prong B of the ABC test actually involves two separate tests; and if the party satisfies either part of the test, the prong will be met.47 The first part of the test is whether the services are performed outside the usual course of business of the employer.

---


44. Meridith Publishing Co. v. Iowa Employment Sec. Comm'n, 6 N.W. 2d 6 (Iowa 1942); Erspamer Advertising Co. v. Dep't of Lab., 333 N.W.2d 646 (Neb. 1983).


The Courts have interpreted this test very narrowly. In *Times-Argus Ass'n v. Department of Employment,*\(^4\) for example, rural route drivers delivering newspapers were found to be performing a service in the usual course of a newspaper's business because the business of the newspaper included the *distribution* of the newspaper.

In *Bluto v. Department of Employment Security,*\(^4\) a carpenter contracted with a corporation to build an addition owned by the company which it intended to lease. The court found the carpenter was working on a project which was part of the corporation's real estate endeavors and within its usual course of business.\(^5\)

The practical effect of rulings such as above is to eliminate subcontracting or any type of joint venture. A particular company may desire to have a third party do part of the work it initially performed or held itself out to do. The ability to do so should not be conditioned on the company accepting the subcontractor as an employee.

It is difficult to conceive that legislators had this in mind when adopting the test. A company's use of subcontractors may be based on many legitimate purposes, none of which is the avoidance of unemployment compensation responsibility. Similarly, persons may desire to work as an independent contractor for legitimate business reasons.

In motor carriage, carriers may desire to utilize owner/operators because they do not have sufficient capital to purchase or lease tractors; they may believe owner/operators as entrepreneurs will perform the actual transportation function more effectively; or the employment market may not provide sufficient numbers of driver-employees to meet their needs.

What real difference is there if an individual performs the transportation aspects of a carrier's business or if the carrier engages a lawn service to cut and maintain its lawn? This distinction is really one without substance. In other industries subcontractors are freely used and held to be independent contractors.

In the construction area, for example, the general contractor assumes responsibility for constructing a building. Essential to the construction of that building is the laying of a foundation, steelwork, masonry, plumbing, and electrical work. Subcontractors are engaged for specific parts of the projects. The relationship with such subcontractors is normally one of an independent contractor.

\(^{4}\) *Times-Argus Ass'n, Inc. v. Department of Employment and Training, 503 A.2d 129 (Vt. 1985).*

\(^{4}\) *Bluto v. Department of Employment Security, 373 A.2d 518 (Vt. 1977).*

\(^{5}\) *Id. at 521.*
There does not appear to be anything unique about the "usual course of business" which should determine whether an individual is an employee and entitled to coverage. If a motor carrier chooses to subcontract a portion of its obligation, the furnishing of a vehicle and driver and the physical movement of the goods, this should not preclude the subcontractor from being classified an independent contractor.

C. Place of Performance

The second part of Prong B examines if the service is performed outside of all the places of business of the engager. Courts have gone in different directions in interpreting this test. In *In re Bargain Busters, Inc.*, salesmen selling ad space for a weekly newspaper were found to be working within the company's place of business because the calls it made were within the area in which the newspaper was sold to the public. In *Murphy v. Daumit*, the fact that salespersons occasionally appeared at the company's office was found to defeat compliance with the test. In *Solar Age Mfg., Inc. v. Employment Sec. Dep't*, however, the Court took a narrow view. It found that salespersons who sold products in people's home, at fairs, or any point where a display could be made, performed work outside the seller's place of business.

While one would agree that the test does not mean simply the home office or headquarters of a company, it is difficult to conceive that the test would be as broad as applied above. If a company did a nationwide business, presumably work could never be performed outside the company's place of business.

A motor carrier could never meet the test as the vehicles of the owner/operator would be moving from the carrier's terminal or a shipper or customer's site to another customer's site all within the state or states in which the carrier operates.

Similarly, picking up a semi-trailer at a carrier's terminal should not constitute doing business at the place of the engager any more than if a manufacturer contracts with an independent businessperson to repair parts utilized in the production process and that person picks up the broken parts at the factory and, after repairs, returns them to the factory.

---

52. In *Bluto v. Dep't of Econ. Sec.*, 373 A.2d 518, 521 (Vt. 1977), the Court, in dicta, indicated any activities in the business area in which a company operated constituted its place of business.
55. *Id.* at 587.
Business operations are not conducted in a vacuum. Businesspersons meet at one or the other's facilities to discuss problems, to exchange documents, to train, etc. To ignore such realities as a means of advancing the social objectives underlying the legislation is not only absurd, but unwarranted.

D. INDEPENDENT BUSINESS

The absurdities which arise under Prong B of the ABC test also exist under the third prong. This test essentially attempts to determine if the individual is an entrepreneur and service is performed by him or her in that capacity.

In Solar Age Mfg, Inc. v. Employment Sec. Dep't, the court noted that the adverb "independent" modified the word "established" and meant that the trade, occupation, profession, or business was established independently of the employer. This view would not hinder a motor carrier, as in most instances owner/operators are already in business when they contract with a carrier. They normally have their own equipment and make independent decisions to become an owner/operator. It is merely the choice of which carrier to contract with that occurs when the contract is executed.

However, some courts take a much more literal view. In Stafford Trucking, Inc. v. State Dep't of Indus., Lab. and Human Rel., a dependent business was found because the owner/operator was dependent on the carrier for customers, trailers, insurance, and operating authority.

56. Id.
57. Id. at 587.
58. In Graebel Moving & Storage of Wis. v. Labor and Indus. Rev. Comm'n, 389 N.W.2d 37 (Wis. 1986) rev'd den. 130 Wis.2d 544, 391 N.W.2d 210 (1986) the owner-operator was found not to be conducting an independent business because the contract, which included the tractor, was cancellable at will. The contractor has no proprietary interest or value that he alone controlled or was able to sell or give away. When the operating contractor terminated, the lease of equipment terminated. Id. Carrier with lease purchase plans may find it difficult to meet the test in light of this decision unless the equipment lease is distinct form the operating lease and the contractor acquires some interest or ability to purchase the equipment if he or she is no longer under contract to the carrier. For a brief discussion of lease-purchase plans see James C. Hardman, Motor Carriers and Independent Contractors and the Search for the Elusive Formula of Independent Financial Stability and Profitability in the Motor Carrier Industry (Paper delivered at the Independent Contractor Division of the Interstate Carrier Conference 1990 Annual Conference, March 27, 1990, Las Vegas, NV). See also North American Van Lines, Inc., 288 Nat'l. Lab. Rel. Bd. (1988), rev'd 669 F.2d 596 (D.C. Cir. 1989).
60. By statute and administrative regulations, the carrier-lessee is obligated to provide public liability insurance. 49 U.S.C. § 10927 (1979 & Supp.); Minimal level of financial responsibility for motor carriers, 49 C.F.R. § 387 (1992).
In some instances, the test is set forth by statute. In Oregon a business or service is considered to be independently established when four or more of the following circumstances exist:62

(a) The labor or services are primarily carried out at a separate location from their residence or they have set-asides a specific portion of their residence for the business;
(b) commercial advertising or business cards as is customary in operating similar businesses are purchased for the business or the individual or business entity has a trade association membership;
(c) telephone listing and service are used for the business that is separate from the personal resident listing;
(d) labor or services are performed only pursuant to written contracts.
(e) labor or services are performed for two or more different persons within a period of one year; or
(f) the individual or business entity assumes financial responsibility for defective workmanship or for services not provided as evidenced by the ownership of performance bonds, warranties, errors and omissions insurance, or liability insurance relating to the labor or services provided.

In Utah some of the elements which are considered when applying the test are holding oneself out to the public generally as engaged in a specific business, advertising one's services, having an established clientele, having a place of business, having a contractor's or business license, having special skills as a result of an apprenticeship training, and having a substantial investment in the tools necessary to do the work.63

These latter versions of the third prong of the ABC test create problems for the motor carrier. Owner/operators are essentially engaged in a one-person operation. The business is one in which he or she purchases products or services from others, whether it be tractor repairs, fuel, or bookkeeping services.

There is no need to maintain a business office apart from the individual's residence. There is no need to have a business phone or listing since he or she cannot lawfully or practically offer a service to another party if under contract to a carrier regulated by the Interstate Commerce Commission. The contractor normally has one tractor and he or she drives it. The test, as applied by administrators and by the courts, ig-

61. To haul regulated commodities in interstate commerce an entity must receive a Certificate of Public Convenience and Necessity or Permit from the Interstate Commerce Commission. In some instances, similar certificates or permits are required from state agencies for intrastate freight hauling. See 49 U.S.C. § 10921 (1979 & Supp.).
nores the realities of the industry and consequently hurts both carriers and owner/operators.

VIII. SPECIAL SITUATIONS

A. MICHIGAN

Special situations exist in some states. In Michigan a separate statutory provision exists for motor carriers. The statute reads:

... Service performed by an individual who by lease, contract, or arrangement places at the disposal of a person, firm, or corporation a piece of motor vehicle equipment and under a contract of hire, which provides for the individual's control and direction, is engaged by the person, firm, or corporation to operate the motor vehicle equipment shall be deemed to be employment subject to this act.64

Normally, service performed by an individual for remuneration in Michigan will not be deemed as employment, subject to unemployment compensation, unless the individual is under the employer's control or direction as to the performance of the service under both a contract for hire or in fact.65

While on the surface the test appears to be the same, for example, subject to control and direction, the fact of the matter is that the statutory provision by specifically referencing motor carriage seemingly is intended to override the decision in Pazan v. Mich. Unep. Comp. Comm'n,66 and to bring the position of the agency into consistency with the provision of the State Motor Carrier Act, which dictates that all persons driving vehicles for motor carriers must be employees.67 Further, the Motor Carrier Act provides that the operation of equipment held under lease must be conducted under the exclusive supervision, direction, and control of the holder of the operating authority.68 Thus, a motor carrier engaged in intrastate Michigan operations cannot avoid being subject to the unemployment compensation statute.

66. Pazan v. Michigan Unep. Comp. Comm'n, 73 N.W. 327 (Mich. 1955) cert. den. 350 U.S. 1014 (1956). In this case, owner-operators were found to be independent contractors because of the risk undertaken, the lack of control exercised over their operation, and the opportunity for profit from sound management. Id. at 329, quoting U.S. v. Silk, 331 U.S. 704 (1947).
67. Mich. Stat. Ann. § 479.10 a(6). The section dictates what provisions are to be included in leases, contracts, or arrangements under which a holder of operating authority augments equipment.
B. ILLINOIS

The Illinois Unemployment Insurance Act\(^69\) provides that an individual or entity must be an employing unit to be liable under the Act.\(^70\)

An employing unit is defined as "any individual or type of organization . . . which has one or more individuals performing service for it within the state."\(^71\)

The Illinois Department of Employment Security has taken the position that the foregoing provision is not relevant to the issue of classification and that the issue should be solely determined under the ABC test.\(^72\) The agency argues that if an entity is an employer of any employee, it becomes an employing unit and it is not proper to make the determination in respect to each individual.\(^73\)

However, in Wallace v. Annunzi,\(^74\) the Illinois Supreme Court decided that a party was not liable for unemployment contributions because the party was not an "employing unit" with respect to the alleged employee. It was specifically stated:

\[\text{[I]t has been held that the individuals are performing services essentially for themselves rather than for an employing unit, and are, therefore, not in employment under the terms of Section 2(f)(1)[now Section 206], even without reference to the three-fold tests of Section 2(f)(1) [now Section 212] of the Act.}\(^75\)

In Hart v. Johnson\(^76\) the court also made a two-step analysis. The court first determined the alleged employee performed services for an employing unit and then it proceeded to determine that the independent contractor status did not apply.\(^77\) This was also true in Parks Cab Co. v. Annunzio\(^78\) which involved cab drivers who leased their vehicles from the holder of the license authorizing such operations. The lessee cab drivers were responsible for property damage, but the cab company carried liability insurance coverage.

The court stated that unless the drivers were performing service for the cab company, coverage did not exist under the statute.\(^79\) The court

\(^{70}\) Id.
\(^{71}\) Id.
\(^{72}\) Id.
\(^{73}\) See Post Hearing Brief of Director of Employment Security, Director of Employment Security v. Pre-Fab Transit, Case No. H-10463. (Ill. Dep't of Employment Sec.).
\(^{74}\) Wallace v. Annunzi 103 N.E. 2d at 467 (Ill. 1952).
\(^{75}\) Id. at 470. See also Park Cab Co. v. Annunzio, 107 N.E.2d 853 (Ill. 1952); Hart v. Johnson, 386 N.E.2d 623 (Ill. App. Ct. 1979).
\(^{77}\) Id. at 627-628.
\(^{78}\) Parks Cab Co. v. Annunzio, 107 N.E.2d 853 (Ill. 1952).
\(^{79}\) Id. at 854.
noted that the cab company was not really in business of cab operations, but was a lessor of the license authorizing cab operations; and thus, service was not performed for it.\textsuperscript{80}

In Minnesota a similar statutory provision exists. An employing unit is defined as ". . . any individual or type of organization . . . which has . . . had in its employ one or more individuals performing service for it."\textsuperscript{81} However, it does not appear that Minnesota courts have ever addressed the issue considered in the Illinois cases.

In North Dakota, however, the issue arose in \textit{State By Job Service North Dakota v. Dionne}.\textsuperscript{82} In this case a motel operator used individuals to perform cleaning services at her motel. She refused agency personnel access to her records on the basis that the workers were independent contractors and not employees and, thus, did not "perform service for it [the motel company] within the state."\textsuperscript{83} The court held that the individuals were performing service for the motel and whether it was being done in an employment or independent contractor relationship was not relevant. The section of the statute involved\textsuperscript{84} was not concerned with the issue of whether the workers were covered or not but whether the company was required to keep records, etc., so that the agency could determine whether the workers were within the statute.\textsuperscript{85}

In Virginia the term "employment" has been defined as " . . . any service performed for remuneration or under a contract for hire, written or oral."\textsuperscript{86} This statutory provision has been interpreted to accord a broader and more inclusive meaning that in the common law context of the master-servant employment relationship.\textsuperscript{87}

In all probability, the Illinois position is an abnormality and that most courts would find that the concept of an "employing unit" is not relevant to the classification issue.\textsuperscript{88}

\textsuperscript{80} \textit{Id.} at 855. The Court rejected the argument that the city ordinance make the cab company the operator of the business and that for it merely to lease the license violates the ordinance. The Court stated compliance or non-compliance was not its concern and that "economic facts as they actually exist are determinative here.

\textsuperscript{81} \textsc{Minn. Stat. Ann.} 268.04 Subd. 9 (Supp. 1992).

\textsuperscript{82} \textit{State By Job Serv. N.D. v. Dionne}, 334 N.W.2d 842 (N.D. 1983).

\textsuperscript{83} \textsc{N.D. Cent. Code} § 52-01-01-16 (Supp. 1991).

\textsuperscript{84} \textit{Id.}

\textsuperscript{85} A separate subsection of the statute dealt with independent contractors and provided that they would be considered employed in service unless the contractors were employers themselves. 10(a) \textsc{N.D. Cent. Code} § 52-01-01016(a) (Supp. 1991).

\textsuperscript{86} \textsc{Va Code Ann.} § 60.1-14(1)(a)(1992 Rep. Vol.).

\textsuperscript{87} \textit{Virginia Employment Comm'n v. A.I.M. Corp.}, 302 S.E.2d 534 (Va. 1938).

\textsuperscript{88} This would be particularly true where the ABC test is applicable or if there is a specific exemption for owner-operators. One must question whether the legislators, in such a situation, would want a dual test to be applied.
IX. APPLICABILITY OF STATUTE

Compounding the problems which a motor carrier faces is the issue of which state law will apply. Generally, it is not the contract which will determine which state has jurisdiction, but the place where the service is performed, directed, and controlled. However, in some instances, the situs of the individual's residence will control. Owner/operators frequently contract with a carrier at the carrier's headquarters or branch locations. They generally do not report to a carrier location on a regular basis, and they go from shipper site to shipper site. The owner/operator may be receiving dispatch information from a central location or from multiple locations depending where he or she is operating at the time or the operating procedures of the carrier.

Contract payments may be sent by mail or at multiple locations one of which is chosen by the owner/operator. No taxes are withheld or remitted to the federal government or a state government. Operations could occur in all the states or be concentrated in one or more states, frequently at the choice of the owner/operator, and without conscious knowledge of the motor carrier. Thus, a carrier must anticipate that claims might arise in any state and that it would be forced to defend under any one of the various tests discussed. There is no feasible way to avoid the problem under the existing statutory scheme.

X. POSSIBLE SOLUTIONS TO THE ROUTE TO UNIFORMITY; FEDERAL ACTION

The ideal solution would be the enactment of a federal statute which would provide uniformity. However, there is no assurance that the States would have to adopt or accept the federal view. In Salem College & Academy, Inc. v. Employment Div.,90 for example, it was held that the federal act91 did not prevent the state from extending coverage beyond the federal requirement.92 The court noted that Congress did not undertake to create a nationally administered unemployment compensation system, but was a tax statute inducing incentive to the states to provide a system of unemployment compensation.93

If a state does not comply with the federal act; however, it can result in a forfeiture of federal benefits.94 While a state might attempt to extend coverage beyond that under the federal statute, the loss of funding would

92. Salem College, 695 P.2d at 29.
93. Id.
undoubtedly be a significant barrier to a state taking contrary action. Further, the federal government and state governments have had a history of cooperation.\footnote{95. The federal government, under a federal employees' unemployment program, may and has entered into agreements with states to pay compensation to federal employees who have lost their jobs under the same conditions as state law. See 5 U.S.C. § 8502 (1988).}

The law is clear that in determining whether an individual is an employee for federal employment tax purposes, federal, rather than state, law is applicable.\footnote{96. M.F.A. Mut. Ins. Co. v. United States, 314 F. Supp. 590 (W.D. Mo. 1970); Loeb v. United States, 209 F. Supp. 22 (E. D. La. 1962).} Thus, the real issue is to extend the federal definition of employment coverage to state unemployment compensation statutes. Congress should enact a specific provision which would exempt owner/operators from the coverage of federal law. This could be done by amending 26 U.S.C. § 3305 by adding the following sentence to subsection (a):

The foregoing provision shall not be applicable if, under any act of Congress, a person is not an employee under Section 3121.

Section 3121 (b)\footnote{97. 26 U.S.C. 3121 (1988).} could then be amended to add a subsection concerning owner/operators to read:

. . . service performed by an individual in the trucking industry who as an owner/operator of a vehicle which is licensed and registered as a truck, tractor, or truck tractor by a governmental motor vehicle regulatory agency while performing service in the operation of the truck, if each of the following factors is substantially present:

a. The individual owns the equipment or holds it under a bona fide lease arrangement;

b. the individual is responsible for the maintenance of the equipment;

c. the individual bears the principal burdens of the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road;

d. the individual is responsible for supplying the necessary personal services to operate the equipment;

e. the individual's compensation is based on factors related to the work performed including a percentage of any schedule of rates or lawfully published tariff and not on the basis of the hours or time expended;

f. the individual generally determines the details and means of performing the services, in accordance with regulatory requirements, operating procedures of the carrier, and specifications of the shipper; and

g. the individual enters into a contract that specifies the relationship to be that of an independent contractor and not that of an employee.
The combination of these statutory amendments would exempt owner/operators, as well as other persons already exempted under 26 U.S.C § 312 (b), from the term "employment" when engaged in interstate or foreign commerce from the federal tax. However, owner/operators engaged solely in intrastate commerce operations could still be subject to the employment classification issue.

XI. STATE SOLUTION

In such instances it would be necessary to seek a model or uniform statutory approach.

A uniform state statutory definition of "employment" and "independent contractor" would alleviate many of the problems facing motor carriers. The following is the type language which could be used.

A. COVERAGE

*Employment* involves service performed for remuneration by an individual who is not an independent contractor.

*Independent Contractor* is an individual who controls to a significant degree the nature, manner, and details of work performed under contract except to the extent affected by governmental laws or regulations or general requirements of the customers or clients of the contracting party.

The statute should also include an exception which addressed the owner/operator specifically. This exception should read as follows.

B. EXCEPTIONS

Employment; Special exclusion—In the trucking industry, an owner-operator or lessee of a vehicle which is licensed and registered as a truck, tractor, or truck-tractor by a governmental motor vehicle regulatory agency is an independent contractor, not an employee, while performing services in the operation of the truck, if each of the following factors is substantially present.

1. The individual owns the equipment or holds it under a bona fide lease arrangement;
2. the individual is responsible for the maintenance of the equipment;
3. the individual bears the principal burdens of the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road;
4. the individual is responsible for supplying the necessary personal services to operate the equipment;
5. the individual's compensation is based on factors related to the work performed including a percentage of any schedule of rates or lawfully published tariff and not on the basis of the hours or time expended;
6. the individual generally determines the details and means of performing the services, in conformance with regulatory requirements, operating procedures of the carrier and specifications of the shipper, and
7. the individual enters into a contract that specifies the relationship to be that of an independent contractor and not that of an employee.

The model state statutory approach involves three objectives: (1) advance the concept of an independent contractor relationship as being without the term “employment”; (2) define the term “independent contractor” in common law terms and assure that “control” imposed by third parties is not considered in the classification issue; and (3) includes a special exception to cover the trucking industry because of its history and uniqueness.

The difficulties attendant to legislative reform may make it more feasible to seek administrative rules and regulations which would have the special exclusion proposed above.

If the statute of a particular state or states also require that the independent contractor have an independently established business and that it be conducted outside the usual course and location of the contracting enterprise, the following provisions should be included within proposed administrative rules:

C. INDEPENDENTLY ESTABLISHED BUSINESS

If the owner/operator is found to be an independent contractor, his or her business shall be considered to be independently established if one or more of the following factors are present:

1. The individual’s business may provide a means of livelihood that is separate and apart from the livelihood gained from services performed for a particular carrier;
2. the business could continue if the relationship with the carrier was terminated;
3. the individual has an ownership interest in a business that the individual may sell or give away without restriction from the carrier;
4. the individual assumes financial responsibility for defective services attributable to his or her negligence or omissions;
5. the individual holds himself or herself out as a separate and distinct business from the party with whom the contract is executed; or
6. the individual determines the type and kind of equipment or tools furnished to perform the contract service.

D. INTEGRATION OF BUSINESS

If the owner/operator is found to be an independent contractor and his or her business is independently established, said business shall be considered to be performed outside the usual course of the enterprise for which service is performed or performed outside of all the places of busi-
ness of the enterprise for which service is performed if the contracting parties engage in independent operations which are integral to their individual businesses such as, but not limited to, one or more of the following factors:

1. The individual performs contract work of any nature other than that directly involved in the movement of freight for the carrier;
2. the individual performs subhauling for any other entity or hauls in his or her own name or for an entity in which an ownership equity exists;
3. the individual maintains business records at a place other than the carrier's premises; or
4. the individual uses contract or employed labor at his or her own discretion and costs to meet his or her service obligations at any facility or point other than the enterprise's facility.

These criteria address realistically the relationship existing in the motor carrier industry.

XII. CONCLUSION

Federal and State officials must recognize that industries have their own peculiarities and that general principles of law must be interpreted in light of such peculiarities. While the objectives of unemployment compensation statutes and the attempt to cover as many persons as possible are enviable, it is important that these objectives be weighed against the equally important goal of promoting small businesses.

If motor carriers cannot have reasonable direction in respect to the employment classification issue, it will handicap their use of owner/operators because of the monetary penalties which could be involved if a misclassification occurred.98

The demise of owner/operators in the motor carrier industry would foreclose significant opportunities for individuals to become small businesspersons and would require a substantial segment of the industry to change their modus operandi99 and perhaps lead to a substantial

98. See discussion supra note 8.
99. A substantial number of carriers who haul specific commodities in truckload quantities utilize owner-operators exclusively and they constitute a majority of the driver force. In Lockridge, The Overdrive 100, Overdrive magazine, at 51 (Sept. 1992), it is reported that the 100 largest users of owner/operators engaged more than 44,000 independent contractors and that 77% of respondents to a recent survey by the National Accounting and Finance Counsel of the American Trucking Association used independent contractors.
decrease in available for-hire carriage. Sensible classification criteria, whether statutory or administrative, are clearly necessary.

100. The reclassification of owner-operators as employees would require carriers to adjust their tariffs to reflect the new employment costs, modify or eliminate employee benefit plans, and make capital expenditures to secure equipment which would be taken from service by owner-operators who, as a general rule, do not want to operate as an employee and would not do so. Owner-Operators would generally sell their equipment or attempt to operate as a truck-line. Turmoil, at least in the short term, would prevail.
The Transportation of Hazardous Materials by Rail: A Recommendation for Reform

John Levin*

TABLE OF CONTENTS

I. Introduction .............................................. 42
II. Accidents and Investigations ................................ 42
III. Regulation ............................................... 44
    A. Hazardous Materials Transportation Act and Regulations 44
    B. Railroad Regulation .................................. 48
    C. AAR Rules .......................................... 49
    D. Environmental Laws .................................. 49
    E. Public Nuisance - Criminal Sanctions ..................... 52
IV. Private Actions ........................................... 53
    A. Negligence ......................................... 53
    B. Strict Liability ...................................... 54
    C. Failure to Warn ...................................... 55
    D. Punitive Damages ..................................... 56
    E. Compliance with Custom, Law or Regulation ................. 56
V. Failure of the Current System ................................ 57
VI. Reform .................................................. 59
VII. Conclusion ............................................... 60

* Mr. Levin is Assistant General Counsel to the GATX Corporation. The opinions expressed in this article are solely those of the author and may not reflect the opinions of the GATX Corporation.
I. INTRODUCTION

The United States Department of Transportation estimated that Americans transport over four billion tons of regulated hazardous materials each year. In 1989, over 1.5 million carloads of hazardous materials originated for transportation by rail. Between 1985 and 1989, the Federal Railroad Administration recorded 2121 accidents involving railcars carrying hazardous products, 254 of which resulted in a release of product. These 254 accidents represent a small fraction of the number of carloads of hazardous materials moved by rail. However, since these incidents often result in evacuations, property damage, or injuries to people and the environment, they have a high public profile. In response, federal, state, and local governments have imposed a system of regulation on the transportation of hazardous materials.

In order to rationally and efficiently reduce the number and severity of hazardous materials spills, a regulatory scheme should clearly delineate the duties of the various parties participating in a hazardous material movement and benefit those parties who fulfill their duties. In the event of an accident, the scheme should rationally compensate those injured at the expense of the parties at fault.

The current regulatory structure and the procedures for recovery of damages do none of the above well. The purpose of this article is to review the current regulatory and legal structure, propose reforms to promote the safer transportation of hazardous materials, promote rational compensation for those injured by releases of hazardous products, and encourage safer behavior by the transportation industry.

II. ACCIDENTS AND INVESTIGATIONS

There are several different interests involved in a movement of hazardous materials by rail. Those with interests include:

1. The manufacturer of the car. Railroads and shippers acquire their cars from railcar manufacturers. The manufacturers fabricate the cars, often purchasing components from other suppliers.

2. The owner/lessor of the car. The railroad or the shipper may own railcars directly or may lease the cars from a car leasing company. The lease may be a finance lease, under which the lessee is responsible for the maintenance of the car, or an operating lease, under which the leasing company maintains the car.

3. Id. at p.1 & table 1.
3. **The manufacturer of the lading.** The manufacturer of the product carried in the car may or may not be directly involved in the shipment of that product.

4. **The shipper.** The shipper selects the appropriate car for the product, performs the necessary paperwork for shipment of the product, loads the car, and delivers the car to the carrier.

5. **The carrier.** The railroad moves the car from the loading site to the destination.

6. **Other parties to the transaction.** Any number of other parties may be involved in handling the lading, manufacturing, maintaining or repairing equipment, or other aspects in the transportation of the hazardous material.

While there is no such thing as a typical hazardous materials railroad accident, a common instance involves a derailment, the puncture of the tank shell or shearing off of a fitting, the release of product, and damages caused by that release. The damages include expenses of evacuation, damages to property, personal injuries, cleanup, and remediation of the environment.

When a railroad accident occurs, several regulatory agencies may become involved. On the federal level, the Federal Railroad Administration (FRA) and the National Transportation Safety Board (NTSB), both within the U.S. Department of Transportation, may investigate the accident. The FRA determines if there have been any violations of the regulations promulgated under the Accidents Reports Act, the Hazardous Materials Transportation Act, or the Federal Railroad Safety Act of 1970, and may levy civil or recommend criminal sanctions for violation of the regulations. The NTSB may hold hearings and issue non-binding recommendations. The Environmental Protection Agency (EPA) will become involved if a release of product has entered the environment, and OSHA will become involved if an employee is injured. Different state agencies, as well as private agencies, such as the Association of American Railroads (AAR), may become involved in an investigation, depending upon the laws of the state in which the accident occurred. The result is the application of differing interpretations of laws and regulations, and often conflicting interests between the investigating bodies.

---

4. Transportation of Hazardous Materials by Rail, supra note 2, at app. D.
III. REGULATION

An unfortunate result of the current regulatory and enforcement scheme is the failure to maximize the very behavior which would reduce the likelihood of accidents. In order to motivate the parties involved in the transportation of hazardous products to maximize safe behavior, these parties need to know what their specific responsibilities are and that they will be rewarded for fulfilling these responsibilities. The current structure does neither. Rather, responsibilities are vague, and the prime motivating factor, in addition to the desire to prevent injury, is fear of massive and unpredictable verdicts and environmental remediation costs.

A. HAZARDOUS MATERIALS TRANSPORTATION ACT AND REGULATIONS

Congress has adopted a number of laws regulating the transportation of hazardous materials.12 The primary vehicle is the Hazardous Materials Transportation Act (HMTA),13 which was significantly amended in 1990 by the Hazardous Materials Transportation Uniform Safety Act of 1990.14 HMTA gives the Secretary of Transportation broad authority to "issue regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce . . . govern[ing] any aspect of hazardous materials transportation safety which the Secretary deems necessary or appropriate."15 While HMTA contains a number of specific provisions, especially with respect to training of personnel,16 the transportation of hazardous materials by motor vehicle,17 and the transportation of radioactive materials,18 the emphasis in the Act is on the promulgation of regulations. HMTA specifically authorizes the Secretary of Transportation to establish criteria for hazardous materials handling, including:

- a minimum number of personnel; a minimum level of training and qualification for such personnel; type and frequency of inspection; equipment to be used for detection, warning, and control of risks posed by such materials; specifications regarding the use of equipment and facilities used in the handling and transportation of such materials; and a system of monitoring safety assurance procedures for the transportation of such materials.19

---

16. Id. at § 1805.
17. 49 U.S.C., supra note 14, at § 1804(b)(c), § 1815.
18. Id. at § 1807, 1813.
The Regulations under HMTA are located in 49 C.F.R. parts 170-179. The overriding principle is that no person may transport or offer or accept for transportation a hazardous material or hazardous waste, except as in accordance with the appropriate regulations. Further, no person may represent, mark, certify, sell or offer a container as meeting the requirements of the regulations unless the container is manufactured, marked, maintained and repaired in accordance with the regulations.

While the general concept may appear simple, its implementation is complex. The determination of exactly what constitutes a hazardous material results in a patchwork of coverage. For example, 49 C.F.R. part 172 lists and classifies those materials which the Department of Transportation (DOT) has designated as hazardous materials, and prescribes the requirements for shipping papers, labeling, and placarding. In addition, the appendix lists materials which are listed or designated as hazardous substances under section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CRECLA). Hazardous wastes under the Resource Conservation and Recovery Act (RCRA), while not specifically listed in part 172, are nevertheless covered under the regulations. In addition, the Clean Air Act and the Clean Water Act have lists of hazardous or toxic substances, though these are not necessarily cross-referenced to HMTA, CERCLA or RCRA.

The regulations also address the activities of those persons who may in some way be involved with the transportation of hazardous materials. Part 173 sets forth the requirements for preparing and packaging hazardous materials for shipment and the responsibilities for persons who test or repair containers used for the transportation of hazardous materials. Section 173.22 sets forth the shipper's responsibilities, providing that:

21. Defined as "a substance or material, including a hazardous substance, which has been determined by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and which has been so designated." The term "hazardous substance" is defined by reference to the appendix to 49 C.F.R. §§ 171.8, 172.101 (1992).
22. Defined as any material which is subject to the Hazardous Waste Manifest Requirements of the U.S. EPA under RCRA. 49 C.F.R. § 171.8 (1992).
23. 49 C.F.R. § 171.2 (a) - (c) (1992).
a person may offer a hazardous material for transportation in a packaging or container required by this part only in accordance with the following:

(1) The person shall class and describe the hazardous material in accordance with Parts 172 and 173 of this Subchapter, and

(2) The person shall determine that the packaging or container is an authorized packaging ... and that it has been manufactured, assembled, and marked in accordance with [the appropriate DOT regulations].

The section then requires that in making the determination that a container has been authorized and appropriately manufactured, assembled and marked, a person may accept the “manufacturer's certification, specification, or exemption or marking.” Section 173.31(b) requires that when tanks are loaded and prior to shipping, “the shipper must determine to the extent practicable, that the tank, safety appurtenances, and fittings are in proper condition for the safe transportation of the lading.” The section also contains further details on the qualification and use of tank cars.

One element of potential confusion in the regulations is their failure to define the term “shipper.” A dictionary definition of the word is “one that sends goods by any form of conveyance.” Under this definition, the responsible person is the one who has the economic interest in the goods and the shipment. The regulations, however, also use the phrase “person who offers hazardous materials for transportation” when identifying the person subject to regulation. Using this definition, the responsible person is the one that performs the physical function of loading the car and presenting the car to the carrier. The Research and Special Programs Administration of the DOT addressed this ambiguity in a Formal Interpretation of Regulations, acknowledging that the word “shipper” was not defined in the regulations and is used as a layman’s term rather than as a term of art. The interpretation further stated that the responsibility of parties under the Hazardous Materials Regulations is to be determined on a case by case basis.

Part 174 specifically addresses the transportation of hazardous materials by rail and states that, unless otherwise specified, “each carrier, including a connecting carrier, shall perform the duties specified and comply with each applicable requirement of this part, and shall instruct its employees in relation thereto.” The carrier is to inspect each loaded

---

30. Id. at § 173.22.
31. Id. at § 173.22(a), (e) (1992).
32. 49 C.F.R. § 173.31(b) (1992).
and placarded railcar before acceptance at the originating point and when received in interchange, to see that it is not leaking and that the brakes and running gear are in proper condition. Each car immediately adjacent to the loaded and placarded car must also be inspected. All carriers and shippers must have the shipping papers on file. Part 174 contains detailed operational rules for loading, unloading, and moving railcars containing hazardous materials.

Part 179 prescribes the specifications for tanks that are part of tank cars. The car builder, and any other person who modifies or repairs the car, must perform his function in accordance with this part. In marking a tank with a DOT classification, the builder certifies that it complies with the provisions of Part 179. The builder is required to notify any person to whom the tank is transferred of any requirements which have not been met at the time of transfer. The authority for the approval of tank car design is granted under the regulations to the Mechanical Division of the AAR, which also approves welding procedures, welders, fabricators, and establishes procedures to be followed in making repairs and alterations.

As a general rule, HMTA, and any regulation thereunder, preempt any state or local law or rule. The Act provides, however, for specific procedures under which any person may apply to the Secretary of Transportation for a determination of whether a particular law or rule is preempted by the Act. Recourse to a court of competent jurisdiction for a determination of preemption is specifically allowed.

The fundamental conceptual flaw in the regulatory scheme under HMTA is that while everyone has responsibility for the safe transportation of hazardous materials, that responsibility is fragmented and not clearly delineated. For example, the shipper may rely on the car builder or the carrier to adequately inspect the car and the lading, while the carrier may be relying on the shipper or the car builder. The general lan-

---

38. 49 C.F.R. § 174.8(b) (1992).
42. 49 C.F.R. § 179.1(e) (1992).
44. 49 C.F.R. § 179.3 - 179.5 (1992).
47. 49 U.S.C. app. § 1811(c) (1976 & Supp. II 1993). The regulations governing preemption are found in 49 C.F.R. Part 107 Subpart C.
guage of the regulations, and the absence of a specification of duties, lead to confusion.

B. RAILROAD REGULATION

A number of federal laws apply directly to the regulation of railroad operational safety. Among these laws are: the Safety Appliances Act, which addresses safety appliances on railroad equipment and braking systems; the Locomotive Inspection Act, which addresses the inspection and condition of locomotives and their appurtenances; and the Accidents Reports Act which requires railroads to report accidents and authorizes the FRA to investigate accidents.

The major legislation, however, addressing railroad safety is the Railroad Safety Act of 1970, which has been revised several times since its adoption, most recently by the Rail Safety Improvement Act of 1988. The stated intent of the Railroad Safety Act is "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials."

As with HMTA, the emphasis under the Railroad Safety Act is for the issuance of regulations. The Act requires the Secretary of Transportation to promulgate regulations covering a number of specific items relating to railroad operations and safety, such as: licensing and certification of engineers, certification of automatic train control systems, and providing for use of event recorders. The Railroad Safety Act and its regulations preempt any state or local law, other than those to "eliminate or reduce an essentially local safety hazard . . . when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce." The Federal Railroad Administration regulations covering railroad safety and operations are located at 49 C.F.R., Chapter II.

C. AAR Rules

A significant element in the regulation of the rail transportation of hazardous material is performed by private industry. The predominant organization is the AAR, a trade association made up of the major and minor American railroads. The AAR has been delegated significant regulatory responsibility under the hazardous materials regulations. The rules of the AAR also govern major areas of responsibility, other than those reflected in the DOT regulations such as the required condition of cars moving in interchange and the method of reimbursing a car owner for a car destroyed on a carrier's line. The DOT regulations also incorporate by reference the procedures and policies of numerous trade and professional groups in addition to the AAR. Reliance on the expertise of private industry is probably the only way the DOT can create and maintain a comprehensive regulatory policy. The various industrial groups have an extensive knowledge of the business and technology as it applies to rail transportation of hazardous materials. It would be impossible for a governmental agency to hire the necessary trained staff to review and issue regulations. This reliance, however, adds to some of the regulatory confusion, as each industry group positions itself for some advantage in the morass of regulation and liability.

D. Environmental Laws

The basic federal statute governing liability for releases of hazardous materials into the environment is the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Authorization and Recovery Act of 1986. CERCLA authorizes the Environmental Protection Agency ("EPA") to act whenever there is a release or threatened release of "hazardous substances" or any other "pollutants or contaminants" into the environment, and authorizes civil actions to recover cleanup costs for releases of "hazardous substances." In addition, the EPA is authorized to engage in a number of investigative, evaluative, and cleanup activities.

57. 49 C.F.R. § 171.7 (1992).
60. Id.
CERCLA liability is imposed on "covered persons," which includes the "owner and operator" of a facility,62 generators of hazardous substances, transporters of hazardous substances, and persons who owned the facility at the time of the release.63 For the purposes of CERCLA, rolling stock is a "facility," and a "release" is broadly defined to cover any discharge into the environment.64 The term "hazardous substance" is defined both by reference to definitions in other federal environmental statutes and designation pursuant to section 102 of CERCLA.65

Liability under CERCLA is strict,66 and joint and several.67 The only defenses available are those set forth specifically in CERCLA, which require that the potentially responsible party establish by a preponderance of the evidence that the release was:

caused solely by

(1) an act of God;
(2) an act of war;
(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes . . . that . . . (a) he exercised due care with respect to the hazardous substance concerned, . . . and (b) he took precautions against foreseeable acts or omissions of any such third party . . . .68

---

62. The term "owner and operator" has been consistently construed in the disjunctive. See United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986).
65. In addition to being designated as such under CERCLA, a material is a "hazardous substance" covered by CERCLA if it is:
1. listed as a hazardous air pollutant under Section 112 of the Clean Air Act, 42 U.S.C. § 7412 (1983 & Supp. II 1993);
2. a "hazardous waste" listed or having characteristics identified under the Solid Waste Disposal Act, 42 U.S.C. § 6921 (1983 & Supp. II 1993);
3. a toxic pollutant as otherwise designated under the Federal Water Pollution Control Act, 33 U.S.C. § 1317 (1986 & Supp. II 1993); or
The defenses under CERCLA have been narrowly construed and are difficult to prove. Thus, the intent and operation of CERCLA puts the shipper, the carrier, and the car owner all at risk of strict joint and several liability for cleanup costs in the event of a release.

The involved parties may sue each other or third parties for contribution for the costs of cleanup. In resolving these actions, "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." Thus, assuming that the involved parties are solvent, they may litigate with each other to resolve the issue of contribution. Many states have statutes similar to CERCLA, allowing the state to recover its cleanup costs and damages for injury to natural resources.

CERCLA does not regulate petroleum, natural gas, or their fractions. Prior to 1990, oil spills into the navigable waters of the United States were covered by section 311 of the Clean Water Act, which had proven to provide an inadequate remedy. Oil spills into or upon "the navigable waters or adjoining shorelines or the exclusive economic zone" of the United States are now primarily covered by the Oil Pollution Act of 1990, which, in part, amended section 311 of the Clean Water Act. The Oil Pollution Act, which also covers discharges from rolling stock, is in many respects similar to CERCLA, though limited to discharges into water.

Section 7003 of the Resource Conservation and Recovery Act authorizes the Administrator of the EPA to file suit to prevent or remediate "an imminent and substantial endangerment to health or the environment." This provision is very similar to section 106 of CERCLA, though it covers certain substances regulated under RCRA, such as petroleum products, which are not regulated under CERCLA. While the Toxic Substances Control Act (TOSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) do not specifically address the transportation of hazardous materials, they do regulate the introduction of chemicals into commerce. The manufacturer of the regulated product is responsible for compliance with the requirements of TOSCA or FIFRA before shipping the material.

69. See United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373 (8th Cir.1989).
74. Id.
CERCLA specifically provides for private cost recovery suits in which a party may recover its response costs from other responsible parties.\(^{78}\) In addition, most federal environmental laws passed since 1970 authorize private parties to file actions to compel compliance with environmental laws, though the procedural prerequisites differ from statute to statute.\(^{79}\)

### E. Public Nuisance - Criminal Sanctions

In addition to civil enforcement actions under environmental laws, the federal government (and state governments under state environmental statutes) may bring criminal actions. CERCLA\(^n\), RCRA\(^n\) and the Clean Water Act\(^n\) (which includes criminal penalties for violation of the Oil Pollution Act of 1990) each provide for criminal sanctions in the event of violations. Criminal liability may be imposed on a corporate entity and on individuals who were directly involved in the criminal violation or were responsible for the corporation's compliance with environmental laws. Outside of the environmental laws, the state may be able to impose sanctions for environmental contamination under other criminal laws. These laws may run from public nuisance\(^n\) to murder.

The problem with the regulatory scheme imposed by environmental and criminal laws in the context of transportation of hazardous materials is that the laws are not primarily directed towards the regulation of transportation and the prevention of releases. These laws rarely state how to protect the environment. Rather, they tend to focus on punishing polluters or cleaning up the environment at a minimal cost to the government and a maximum cost to private parties. The application of strict and joint and several liability for cleanup costs, while perhaps effective in recovering the cost of remediation, may result in a party with a relatively minor amount of fault being responsible for a large share of the damages if other financially viable parties are not available. Again, the regulatory scheme does not clearly delineate responsibility in a multiparty transportation transaction, and does not benefit a party who complies, or attempts to comply, with the law.


\(^{83}\) A public nuisance "is a species of catch-all criminal offense consisting of an interference with the rights of the community at large, which may include anything from the construction of a highway to a public gaming house of indecent exposure." W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS § 86, at 618 (5th ed. 1984).
IV. PRIVATE ACTIONS

The civil courts decide the amount of damages caused by a hazardous materials accident and allocate those damages among the parties involved. This use of the courts is costly and inefficient. The injured parties sue one or more of the potential defendants, and the parties initially sued generally bring in the others through third party actions. The plaintiffs often request punitive damages. Spilled product must be cleaned up under the auspices of the appropriate regulatory agency, and the parties to actions filed by the regulatory agencies sue each other for contribution or indemnity. Generally the defendants are jointly and severally liable for the damages regardless of how the judge or jury allocates fault. Discovery can be lengthy, and, at the conclusion of years of litigation, cases are often settled on a basis which has little relationship to the causation of the accident or the damages actually incurred.

Since the elements of private claims are governed by state law and differ in detail from jurisdiction to jurisdiction, the following analysis is only an outline of the primary theories on which private tort claims may be brought as a result of a release of hazardous materials.

A. NEGLIGENCE

The classic requirements to establish a cause of action for negligence are:

(a) the interest invaded is protected against unintentional invasion, and
(b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
(c) the actor's conduct is a legal cause of the invasion, and
(d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.84

The requirements have also been described as follows:

1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure to conform to the standard required.
3. A reasonably close causal connection between the conduct and the resulting injury.
4. Actual loss or damage resulting to the interests of another.85

Success in a negligence action requires that the plaintiff prove each of the requisite elements. Experience has shown that such proof is often difficult and plaintiffs generally rely on other theories requiring less stringent proof in order to prevail.

84. RESTATEMENT (SECOND) OF TORTS § 281 (1965).
B. STRICT LIABILITY

There are several theories on which strict liability may rest. The most common is the application of strict liability to the manufacturer, vendor, or owner of a product, based on Section 402A of the Restatement (Second) of Torts which states:

1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   a. the seller is engaged in the business of selling such a product, and
   b. it is expected to and does reach the user or consumer without substantial change in condition in which it is sold.

2. The rule stated in Subsection (1) applies although
   a. the seller has exercised all possible care in the preparation and sale of his product, and
   b. the user or consumer has not bought the product from or entered into any contractual relation with the seller.86

The defect can be in fabrication or in design.87 Once the prerequisites have been proven, liability is found notwithstanding the care taken by the defendant.

A second application of strict liability in hazardous materials cases occurs when a court determines that an activity performed is so inherently dangerous that the party should be held responsible for the consequences of that activity regardless of the care taken. One line of cases follows the holding in Rylands v. Fletcher88 as set forth in the Restatement of Torts § 519:

[O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.89

An activity is ultrahazardous if it:

a. necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and
b. is not a matter of common usage.90

Another, more recent, line of cases follows the Restatement (Second) of Torts which provides:

86. Restatement (Second) of Torts § 402A (1965).
89. Restatement (Second) of Torts § 519 (1965).
90. Id.
(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.91

The Restatement (Second) continues to list a series of factors to consider in determining whether a given activity is abnormally dangerous. These are the:

(a) existence of a high degree of risk of some harm to the person, land, or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.92

Individual courts have substantial discretion in deciding whether and to the extent these factors apply to a given situation.

While ultrahazardous activity results in strict liability, the Restatement (Second) provides that the doctrine of ultrahazardous activity should not be applied to a common carrier acting in pursuance of its public duty.93 This position is premised on the theory that it would be unjust to hold a common carrier strictly liable for performing its legal obligations. The contrary position is premised on the theory that the carrier is in the best position to prevent accidents and spread the cost of any losses. The Restatement (Second) rule has been applied in some jurisdictions but rejected in others.94

C. FAILURE TO WARN

Another theory used to apply liability in a hazardous material release is the failure of a party to warn the users of a product of the hazards of that product. This principle is set forth in the Restatement (Second) of Torts as follows:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier would expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

91. Id.
92. RESTATEMENT (SECOND) OF TORTS § 519 (1965).
93. Id. at § 521.
(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.\(^95\)

The duty to warn may apply to all parties involved in the transportation of hazardous materials, depending on their sophistication and their relevant contractual and regulatory obligations.

In addition, when a hazardous material release occurs, neighboring landowners may have a right to sue for nuisance\(^96\) or trespass\(^97\) for the damages to their property.

D. PUNITIVE DAMAGES

The conduct prerequisite to establishing liability may also result in a finding of behavior so egregious that a jury would impose punitive damages on a defendant.\(^98\) The threat of punitive damages complicates any case by adding a threat of irrationality to the result of a trial. Any behavior, however reasonable it may seem at the time performed, may be cast as reprehensible conduct in the aftermath of a chemical release.

E. COMPLIANCE WITH CUSTOM, LAW OR REGULATION

While compliance with law or regulation may be evidence toward proving reasonable and proper conduct, such compliance is not a complete defense in a civil action.\(^99\) Even if all the parties to the transportation of the hazardous material did all that was required of them under the regulations, the parties could still be held liable. For example, the fact that a label or warning conforms to state or federal requirements is not a defense, but merely a factor to be considered by the jury along with all other facts.\(^100\) Mandated warnings are regulatory in nature while the purpose of a tort action is to compensate the injured party.\(^101\) Even the attempt to prove that the product conformed to industry custom or standards or complied with standards set forth in governmental regulations is not admissible in certain jurisdictions.\(^102\) Some courts, however, have

---

95. RESTATEMENT (SECOND) OF TORTS § 388 (1965).
96. See Cooke, supra note 79 at 17.01(2).
97. See Cooke, supra note 79 at 17.01 (3).
held that federal safety regulations preempt state tort law if there is a clear intention to establish uniform regulation.  

V. FAILURE OF THE CURRENT SYSTEM

There are generally two forms of formal regulation of conduct: "standard-setting," in which acceptable levels of risk are defined and standards set accordingly, and "screening," in which the introduction of products is screened to assure that the products are not harmful. The regulation of hazardous materials transportation has primarily concentrated on standard-setting. It has been criticized in three ways. First, DOT is dependent on the transportation industry for its information and therefore does not write efficient safety standards. Second, its standards are not implemented effectively. Third, the standards cannot be enforced.

Strict enforcement is unlikely because budget restrictions will always limit the personnel and other resources available to the DOT. The causes of ineffective implementation are more complex. First, the selection of what to regulate and how it is to be regulated is as much a matter of politics as of safety. Legislatures often act in a piecemeal fashion after a publicized disaster to regulate the causes of that disaster rather than address the problems of an industry as a whole. Second, the promulgation and implementation of standards is a slow process. Third, safety standards are complex and often difficult for the regulated community to understand. Fourth, standard-setting discourages innovation. A transporter of hazardous materials is more likely to follow the rules than attempt to adopt an improved system. Fifth, high compliance costs may make it more economical for the regulated community not to comply. Finally, standard-setting fails to take into account the effect of liability laws on the behavior of the regulated community.

In addition to the issues raised in this general critique, the current system imposed by federal legislation on the transportation of hazardous materials has other deficiencies. Regulations are incomplete and imprecise. While in some instances, for example, a shipper or a carrier may have specific responsibilities, in many others it is unclear which party is

105. Note, however, that certain legislation such as TOSCA and FIFRA emphasize regulation through screening.
primarily responsible to perform a particular function, or the matter is not regulated at all. Federal environmental laws rarely attempt to assign specific roles concerning the transportation of hazardous materials (other than for transporters under RCRA). Rather, they concentrate on remediation of the environment and cost recovery after a release. Turf struggles among regulatory agencies further complicate matters, and it is almost impossible to get consensus among the regulated community.

Similarly, the current system for determination and allocation of liability is flawed. Judges and juries often appear to act irrationally. Joint and several liability and the imposition of punitive damages, which make trials risky even for defendants with limited exposure, add to the pressure to settle on terms favorable to plaintiffs. Also troublesome is that even if the parties involved in the transportation of hazardous materials comply with the regulations intended to govern that activity, plaintiffs are entitled to argue that these parties should have maintained a higher standard of care, and each judge and jury is free to impose its own concept of the appropriate standard.

Academic critics have emphasized the efficiency of regulation through the imposition of tort liability on the parties to a given transaction. Such imposition delegates the decision-making to the parties with the knowledge, opportunity, and motivation to optimize safety. Failure to operate safely would result in payment of damages to the injured parties. Risk distribution analysis maintains that by holding the parties to an activity strictly liable, the societal costs of the activity are distributed through higher prices charged by the parties benefiting from the activity. These theories may make sense in instances in which only one party benefits from the activity or where the law allocates liability on the basis of fault and the price of the transaction as a whole covers the risks. However, where several parties are involved in a transaction, and any one of them may be held strictly, jointly and severally liable for an accident, the risk allocationcosted to the transaction will be a multiple of the costs allocated if only one party were involved. Also, no one party will likely be able to raise its prices sufficiently to cover its potential risks.

Another argument in support of the current system is that the parties engaging in a hazardous activity are in a better position to evaluate and safeguard against injury than are the injured parties. Again, this argument may be valid when only one party is involved. However, in a multiparty activity, no one party is able to direct all aspects of the transaction. Without specific rules and regulations setting forth each party's obligations, no one party can individually determine its own duties. Requiring each party to be responsible for providing safety for the

108. See Hahn, supra note 104, and Marten, supra note 106.
entire activity is inefficient and confusing. It multiplies the cost of regula-
tion, and is, in general, impractical.

In general, tort and environmental laws do not directly regulate the
hazardous activity, but rather, stress the compensation of parties for any
harm they may have incurred by reason of that activity. The system at-
ttempts to motivate safe behavior through the threat of punitive damages,
strict and joint and several liability, and massive cleanup costs and
verdicts.

VI. REFORM

The primary goals of regulation of hazardous materials, as stated
earlier, are to prevent accidents and releases of hazardous materials
while rationally compensating any party injured by a release at the cost
of the parties causing the release. In order to accomplish these goals, the
regulatory system should:

a. set forth the duties of each of the parties involved in the trans-
portation of hazardous materials with the greatest degree of speci-
ficity possible;
b. provide certainty that compliance with the regulatory system will
result in a benefit to the party so complying;
c. maximize the efficiency and economy of regulation;
d. spread the cost of regulation throughout the regulated commu-
nity; and

e. compensate injured parties fairly and rationally.

The current system of regulation of the transportation of hazardous
materials needs to be revised to accomplish these goals. Notwithstand-
ing the difficulties inherent in the regulatory process, governmental regu-
lation of the transportation of hazardous materials is necessary. Such
regulation should be specific, realistic, and directed to safe operation
and the prevention of releases. Regulation should recognize that haz-
ardous materials spills are random events which, however, may result in
extraordinary damages.109 The regulations should specifically delineate
the duties of each party and these duties should not overlap. New regu-
lations, adopted with the advice of industry, can be implemented over
time so as not to be disruptive to the transportation industry.

Amendments to standard-setting regulations are only part of the
needed reforms. The tort system must also be reformed in order to com-
plement standard-setting regulations as well as compensate injured par-

---

109. Gary M. Bowman, Judicial Ordering of Intergovernmental Roles in Hazardous Materi-
ties. While reform of the tort system is complex and controversial, there are changes which would significantly add to the effectiveness of the regulatory scheme.

The first is to reform the allocation of liability. One method is to impose strict liability on the carrier and eliminate liability for the other parties. The carrier would thereby pass the costs of compliance on to the users of the hazardous materials, and impose and enforce stringent standards on other parties such as shippers, railcar manufacturers and lessors. An alternative is to allocate liability on the basis of fault, and do away with joint and several liability. It is irrational and inequitable to regulate an industry by making one actor, who may have done little wrong, financially responsible for everyone.

Another reform is to prohibit punitive damages if a party uses due diligence to comply with applicable laws and regulations. The purpose of punitive damages is to punish a party for egregious activity. If a party uses due diligence to comply with the law, that party should, by definition, not have engaged in egregious conduct.

VII. CONCLUSION

Rail accidents involving releases of hazardous materials are of low frequency but may cause widespread harm. As a result, this activity has been subjected to intense scrutiny and regulation. Current law applicable to the transportation of hazardous materials by rail, however, has generally failed. Neither formal regulation nor tort law, independently or in concert, provide a fair, efficient system to both minimize accidents and equitably compensate injured parties. Only by working toward a comprehensive reform of existing law will the transportation industry create a system that works.

112. Certain of these suggested reforms are contained in the proposed Product Liability Fairness Act, S. 640, 102d Congress, 1st Sess. (1991), though not applicable directly to rail transportation of hazardous materials.
European Community Cabotage†

Jeffrey Platt*

TABLE OF CONTENTS

I. Introduction .............................................. 61
II. EC Rules Concerning Air Transport ...................... 62
III. Chicago Convention ...................................... 65
IV. Possible U.S. Remedies.................................. 72
V. Possible Solutions........................................ 74

I. INTRODUCTION

According to the Single European Act of 1986,† the internal market in the European Community was to be completed by January 1, 1993. Article 8A of this Act states that the "internal market shall comprise a market without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty."‡ The development of a common transport policy is listed in the Treaty as among the measures necessary to create the in-


* Mr. Platt is an Associate at Hinshaw & Culbertson, P.C., Chicago, Illinois. He received his J.D. from Chicago-Kent School of Law in 1991 and received his L.L.M. in International Law at Georgetown University in 1992.

2. Id. at Art. 8A.
ternal market. As part of this common transport policy the Commission has sought to create a Community cabotage area in the field of aviation. A Community cabotage area would mean that all the traffic within and between member states would be considered the equivalent of cabotage and therefore reserved to Community carriers.

There are two legal problems with this plan. First, it raises issues under Article 7 of the Chicago Convention, and second the creation of a Community cabotage area means that existing Fifth Freedom rights of third countries, which are currently handled by bilateral agreements, would be extinguished and would have to be renegotiated. In Part I of this paper, I will look at the rules in the European Community concerning air transport. In Part II, I will assess the legality of the cabotage area under the Chicago Convention, including possible counter-arguments of the European Community. In Part III, I will look at the U.S. remedies to the violation of the Chicago Convention, as well as remedies under bilateral agreements with various member states. Finally, in Part IV, I will look at the merits of the various ways this problem can be resolved.

II. EC RULES CONCERNING AIR TRANSPORT

Only one provision in the Treaty of Rome explicitly deals with the air transport field. Article 84(2) of the EEC Treaty provides that the “Council may, acting by a qualified majority, decide whether, to what extent, and

3. Treaty Establishing the European Economic Community [EEC Treaty] art. 3(e) (stating that the activities of the Community shall include “the adoption of a common policy in the sphere of transport”).
4. The term “cabotage” is generally defined as the “carriage of passengers, cargo and mail between two points within the territory of the same nation for compensation or hire.” W.M. Sheenan, Comment, Air Cabotage and the Chicago Convention, 63 Harv. L. Rev. 1157, 1157 (1950).
6. Id. In the maritime field similar cabotage provisions generally reserve coastal commerce within a state to vessels operated under that state’s flag. Similar liberalization measures are currently being undertaken in the maritime field, where EC-flag vessels will eventually be allowed to compete for domestic coastal trade anywhere in the Community. See Barnard, EC Nears Accord to Liberalize Coastal Shipping, JOURNAL OF COMMERCE, April 8, 1992. It will be interesting, however, to see whether the EC treats maritime cabotage differently than aviation cabotage with respect to non-EC carriers. In maritime, there are no international agreements, like the scheme of bilateral agreements in aviation, to constrain the EC from excluding all non-EC carriers. Unfortunately, the maritime field is outside the scope of this paper.
8. Fifth Freedom rights concern the right to transport passengers, mail, or cargo between another contracting state and a third country (for example, the right of a U.S. carrier to fly passengers between Paris and Rome). See also infra note 47 (concerning the extent of U.S. Fifth Freedom rights in Europe).
by what procedure appropriate provisions may be laid down for sea and air transport."9 Because individual member states of the European Community had differing views on the role of a common transport policy, the proposals of the EC Commission concerning the establishment of a competitive air transport system amounted to nothing, or were constantly postponed by the Council, until 1983.10 In 1983, the European Parliament brought an Article 17511 action against the Council for its failure to act in the area of transport policy. In 1985, the European Court of Justice found that Article 75(1)(a) and (b) of the Treaty were sufficiently clear to require the Council of Ministers to take appropriate actions to implement a policy of intra-community transportation and to regulate cabotage rights.12 The Court granted the Council a "reasonable period of time" to take appropriate action.13

While this case was being decided, the European Commission published its Second Memorandum on Civil Aviation.14 This memorandum laid out the major features of a common transport policy in the European Community. It dealt mainly with the regulation and creation of conditions for a competitive market for scheduled air transport, and was aimed at the liberalization of the existing bilateral air transport agreements, but only between member states and not third countries.15 This memorandum, combined with the Transport Policy case,16 led to the adoption of the First Phase of the process of liberalizing air transport within the European Community.17

9. See EEC Treaty supra note 3, art. 84(2). Note, however, that Article 75 also deals with transportation in general, stating in part that "the Council shall, acting by qualified majority, lay down, on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly, (a) common rules applicable to international transport ... [and] (b) the conditions under which non-resident carriers may operate transport services within a Member State."


11. See EEC Treaty supra note 3, art. 175, which states, in relevant part, that "[S]hould the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established."


13. Id. at 1600.


15. Id. at 28-40.

16. See supra Note 12.

17. For a full description of this phase see Ebke & Wenglorz supra note 10, at 418, n. 8.
The First Phase of liberalization\textsuperscript{18} consisted of: a Council Directive on tariffs, a Council Decision on capacity sharing and market access, a Council Regulation on the application of the EC antitrust laws to the air transport sector, and a Council Regulation concerning exemptions from EC antitrust laws.\textsuperscript{19} However, as with the EC Commission’s Second Memorandum, the First Phase dealt only with flights between member states by member state aircraft and did not apply to domestic flights within member states (i.e., cabotage), nor did it apply to non-EC carrier flights between member states. Nothing major was accomplished by the First Phase of liberalization, probably due to the fact that the changes it provided were accompanied by significant antitrust exemptions for EC carriers.

Due to the lack of serious change contained in the First Phase in September 1989, the Commission published proposals for the Second Phase of liberalization of EC scheduled air transport.\textsuperscript{20} The proposal dealt with relaxation of tariffs, capacity sharing, and market access. Based on this proposal, the Council of EC Transport Ministers agreed upon the Second Phase of liberalization in June of 1990. Notably, the Council did not adopt the Commission’s cabotage rights proposal. If adopted, this proposal would have required the member states to introduce, starting in 1990, cabotage rights for Community airlines to a limited extent. Still, the Council stated that it would include the introduction of cabotage rights in further liberalization measures by June 30, 1992. The third and most far-reaching package of liberalization measures has yet to get off the ground.\textsuperscript{21} EC transport commissioner Karel Van Miert, has stated that “I think there will be a decision by transport ministers in June [of 1992] that we will make a start, and have a transitional period in which ‘consecutive cabotage’\textsuperscript{22} is allowed.”\textsuperscript{23} Nonetheless, it is clear that whether or not cabotage liberalization between the EC states is adopted all at once or progressively, it will eventually be adopted, if not

\textsuperscript{18} It has been commented that “[L]iberalization means the reduction of constraints imposed upon the existing actors in the marketplace . . . whereas deregulation refers to the abolition of all restrictions dominating the air traffic marketplace, thus providing free access to international air transport.” Weinberg, \textit{Liberalization of Air Transport: Time For The EEC to Fasten Its Seatbelt}, 12 U. Pa. J. Int’l Bus. L. 433, 435, n. 9 (1991).
\textsuperscript{19} See Ebke & Wenglorz, supra note 10, at 418 n.8.
\textsuperscript{20} See COM(89) 373 final and COM(89) 417 final.
\textsuperscript{21} Goldsmith, \textit{The Sky is Falling in Europe: EC Plan to Loosen Air Travel Gains Speed}, \textit{International Herald Tribune}, March 26, 1992.
\textsuperscript{22} An example of “consecutive cabotage” would be Air France flying from Paris to London to Manchester.
\textsuperscript{23} See Goldsmith, supra note 21.
by January 1, 1993, then some time in the relatively near future. Because the creation of a Community cabotage area may well violate Article 7 of the Chicago Convention, it is useful to look at this article and the background of the Chicago Convention.

III. CHICAGO CONVENTION

As the close of World War II approached, it became evident that a new legal framework would have to be developed to deal with world air transport. The United States invited a number of countries to a conference in Chicago to discuss what this framework would look like. Unfortunately, a comprehensive agreement could not be reached due to the differing views of mainly two parties. The United States took a very liberal view, while the United Kingdom was protectionist. Therefore, agreement was reached only on the first two, of the then five, “ Freedoms of the Air.” Still, two important organizations were created as a result of the Chicago Convention. First, an intergovernmental agency was set up, known as the International Civil Aviation Organization, or ICAO, to provide a forum for the contracting States to continue the discussion of any matters relating to international civil aviation. As was the intention, ICAO has mainly dealt with technical, legal, and operational matters, e.g., standardization of equipment, liability of air carriers, and air traffic control procedures. Second, following the adoption of the Chicago Convention in 1944, it was decided that an inter-airline organization should be set up to establish international air rates or tariffs. So in 1945, airline executives met in Havana and created the International Air

24. It is interesting to note that the EC governments are divided over how much time is needed to introduce cabotage. While Britain and the Netherlands felt it could be accomplished by 1995, France wanted to wait. Reuters; December 16, 1991.
26. Id. at 48.
27. Id. The U.S. wanted unrestricted international operating rights with market forces determining frequencies and fares, while the U.K. proposed the organization of a world regulatory body which would distribute routes and determine frequencies and fares.
28. The First Freedom is “ the right to fly across the territory of a foreign country without landing.” The Second Freedom is “ the right to land for non-commercial purposes (technical operations relating to the aircraft, the crew, refueling, etc.) in the territory of a foreign country.” The Third Freedom is the right of an air carrier licensed in one state to put down, in the territory of another state, passengers, freight and mail taken up in the state in which it is licensed. The Fourth Freedom is the right of an air carrier licensed in one state to take on, in the territory of another state, passengers, freight and mail for off-loading in the state in which it is licensed. The Fifth Freedom is the right of an air carrier to undertake the air transport of passengers, freight and mail between two states other than the state in which it is licensed. See GIDWITZ, supra note 25, at 50.
29. Id. at 50.
30. Id.
31. Id. at 51.
Transport Association, or IATA, with a membership of 60 airlines. The main objective of IATA was twofold — first, to coordinate (i.e. set) international air fares and, second, to establish a clearinghouse to balance interairline accountings.

Unfortunately, the failure to agree on a multilateral agreement concerning air transport rights resulted in the creation of a system of bilateral agreements which remains the basis of the current air transport system today. The form of bilateral agreements has been greatly influenced by the standard Form of Agreement for provisional air routes adopted in 1944 at the Chicago Convention and, more importantly, as to economic provisions, by the bilateral air transport agreement signed between the United States and the United Kingdom in Bermuda in 1946, known today as “Bermuda I.” Bermuda I authorized airlines to utilize IATA for the coordination of rates subject to the final approval of both governments. Also, besides legitimizing IATA, Bermuda I dealt with the granting of commercial privileges of entry and departure to discharge and pick up traffic (i.e., Third, Fourth, and Fifth Freedoms). However, these privileges were only valid at designated airports, routes, in accordance with certain other traffic principles and limitations.

The parties to the Chicago Convention did, however, agree to a provision concerning cabotage. Article 7 states:

Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or airline of any other State, and not to obtain any such exclusive privilege from any other State.

This broad definition of cabotage is partly attributable to the circumstances surrounding the Chicago Convention. Probably because World War II was still going on, nationalistic concern prevailed over international goals. The argument was made that air transportation must remain totally under domestic control to guarantee adequate protection of national interests. Moreover, because the commercial aviation indus-

32. Id.
36. Id.
37. See Chicago Convention, supra note 7, art. 7.
try was virtually in its infancy, it was felt that extensive cabotage rights were necessary to insulate carriers from competition and thereby assure their continuing financial viability.39

While the first sentence of Article 7 is fairly straightforward, the second sentence has been open to interpretation.40 The meaning of the restriction contained in the second sentence has been clouded due to the ambiguous terms "specifically" and "on an exclusive basis." Two interpretations of this language have been posited by legal scholars.41 The first approach, referred to as the strict approach, places the emphasis on the phrase "on an exclusive basis." Under this approach, cabotage privileges can only be granted on a non-exclusive basis, creating an absolute prohibition against discriminatory grants. This means that cabotage rights may either be granted to no other State, or to all States who request such rights. The second approach, deemed the flexible approach, places the emphasis on the phrase "specifically." Under this approach, cabotage rights can be granted on an exclusive basis where it is not stipulated that they are exclusive, without third states having the right to demand similar privileges. The agreement would have to leave open the possibility that other states could receive similar cabotage rights. Under this approach, therefore, states may make agreements granting cabotage rights to other states so long as the agreement does not explicitly state that the rights are exclusive. This latter approach has been criticized as reducing the cabotage provision to a "paper tiger, [as] the burden placed on the plaintiff State of proving that certain cabotage rights were granted on the basis of exclusivity, would be insuperable in most, if not all, instances.42

The European Community could attempt to make an argument along the lines of the flexible approach. A number of bilateral grants of cabotage privileges have occurred in the past, and have been viewed as compatible with the second sentence of Article 7. For instance, in 1951, Sweden, Norway, and Denmark created Scandinavian Airlines System (SAS) and granted each other cabotage rights.43 As part of the cabotage arrangement, they included a safeguard clause to the effect that the arrangement would lapse if third states also claimed cabotage rights. After the ICAO debated this arrangement, it was regarded by ICAO

39. Id.
40. Id.
41. Id. at 1062-65.
44. Id.
member states as compatible with Article 7.\textsuperscript{45} Also, although a number of other similar cabotage arrangements have since been reached,\textsuperscript{46} in practice there has been no intervention by a third state demanding similar privileges. It is arguable, however, that third state intervention did not occur in these cases because the routes at issue were not deemed commercially attractive by third states, or possibly because no Fifth Freedom rights were affected. In the European Community, on the other hand, a substantial number of commercially attractive cabotage routes already exist,\textsuperscript{47} currently taking the form of Fifth Freedom rights for third countries. For this reason, it is entirely possible that the other non-EC members of ICAO will not be willing to accept the establishment of a Community cabotage area under the flexible approach just outlined. Furthermore, the argument that lack of protest to usage of the flexible approach has amounted to a customary international rule,\textsuperscript{48} or that it has become accepted international practice would likely also fail. As one author points out, "[t]he absence of protests is due to a lack of interest in the issue rather than a tacit acceptance of the discarding of the second sentence of Article 7."\textsuperscript{49}

It has also been argued, under the flexible approach, that even though Article 7 of the Chicago Convention seems to allow third countries to demand similar cabotage privileges, this in no way means that

\textsuperscript{45} Id.

\textsuperscript{46} For example, cabotage policies have been adopted by the Arab region, the South American countries — minus Chile, and the ten African states that constitute Air Afrique. See Jan Ernst C. de Groot, \textit{Cabotage Liberalization in the European Economic Community and Article 7 of the Chicago Convention}, 14 ANNALS AIR & SPACE L. 139, 179 (1989).

\textsuperscript{47} See, e.g., U.S. bilateral agreement with France which grants the U.S. routes via intermediate points over the North Atlantic and Spain to Marseille and Nice and beyond via Rome, Budapest, etc. The routes from Spain to Marseille and Nice and the beyond route from France to Rome are all Fifth Freedom rights available to U.S. carriers. It is important to note, however, that these Fifth Freedom rights involving Spain and Italy must also be provided for in their respective bilateral agreements. An example of a more liberal bilateral agreement is the U.S. bilateral with Germany. The German bilateral allows for U.S. routes from the United States via intermediate points to points in Germany, and beyond to any points outside Germany, without any directional limitation. Although the German bilateral provides for seemingly unlimited routes, Fifth Freedom rights involving other countries must allow for these rights. For instance, because Germany allows unlimited beyond rights, a route could be flown through Germany to France, because the French bilateral provides for routes via intermediate points over the North Atlantic. An excellent summary of U.S. bilateral agreements can be found in \textit{Air Service Rights in U.S. International Air Transport Agreements — A Compilation of Scheduled and Charter Service Rights Contained in U.S. Bilateral Aviation}, Office of the General Counsel of the Air Transport Association of America (1990).

\textsuperscript{48} Customary international law has been defined as law which "results from a general and consistent practice of states followed by them from a sense of legal obligation." THOMAS BROUGENTHAL & HAROLD G. MAIER, \textit{PUBLIC INTERNATIONAL LAW IN A NUTSHELL} 22 (1990).

\textsuperscript{49} See de Groot, supra note 46, at 162.
they will be given. In other words, requests by third countries for similar cabotage privileges will only be granted when, for example, comparable benefits are offered in exchange. Besides being based on the questionable flexible approach, this idea ignores the fact that in the Community cabotage scenario, substantial Fifth Freedom rights are already being granted by third countries. To ask countries to give up cabotage rights within their own countries for rights they already have under existing bilateral agreements is absurd. Moreover, a number of U.S. organizations are diametrically opposed to the idea of opening U.S. cabotage traffic to foreign countries.

Therefore, it seems clear that the creation of a Community cabotage area would cause problems under the second sentence of Article 7. However, there may be a way for the Community to justify its cabotage area under the Chicago Convention. The argument is based on Article 1 of the Convention, which states, "[t]he Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." This argument is essentially that the Community should be considered a "State" for purposes of Article 1. As one author has argued:

If States . . . wish to pool their sovereign rights as to internal domestic aviation interests, and let the dictation of those interests rest with a mutually established international organization, it could hardly derogate that justifying facet of Article 7 which was intended to protect those States from attempted outside domination.

Under this argument, the Community would have a legitimate right under Article 7 to reserve cabotage traffic to "Community" carriers. The question then becomes whether the gradual transfer of sovereign rights, responsibilities, tasks, and powers in the air transport sector from the member states who are subject to Article 1, to the Community (an institution not bound by the Chicago Convention) is compatible with Article 1. It is interesting to note that the United States has, at least in theory, agreed to the concept that a group of States could exchange cabotage if

50. Id. at 158.
51. Id.
52. See Robinson, supra note 42. Moreover, we noted the ICAO would be unlikely to adopt this approach.
53. For instance, Capt. Randy Babbitt, President of the Air Line Pilots Association has stated that he is vehemently opposed to the argument and feels that "if Fifth Freedom rights suddenly became cabotage, we somehow would have to come up with 29 routes to give to European airlines operating in the U.S. to match what U.S. carriers fly in Europe." Babbitt also reaffirmed his belief that if you "are talking about open-skies cabotage, then I would have no trouble gathering support for a strike." Robert W. Moorman, Capt. Randy Babbitt, ALPA President (Air Line Pilots Association), 28 AIR TRANSPORT WORLD 62 (1991).
54. See Chicago Convention, supra note 7, art. 1.
55. See Robinson, supra note 42, at 563.
significant integration has taken place between them. In a 1967 ICAO Conference concerning nationality and registration of aircraft, the Chairman of the United States delegation to that Conference stated that "there could be no objection to the creation of a cabotage area between the States participating in an international or joint system of registration, if those States took the far more significant step of establishing a federal union similar to that of the United States." 56

It is arguable that this transfer of authority from the member states to the Community would not be incompatible with Article 1, so long as the Community is considered legally bound to the Convention, and so long as the other ICAO signatories recognize the transfer. Regarding the first requirement, the Community has never formally signed or acceded to the Convention. Still, there is authority for the proposition that where the Community gradually involves itself in a matter formerly handled by the member states, the Community becomes legally bound to the Agreement to the extent that it actually exercises tasks and powers previously exercised by member states. 58

However, the Community does not yet have exclusive powers to deal with the external aviation relations of any of its member states. 59 It could be argued that this is a critical element in the transfer of sovereignty. Still, the Commission has adopted a new policy objective to have negotiations with third countries in matters of commercial air policy treated as part of the common commercial policy. 60 Whether the Commission can claim the right under the common commercial policy or must get a specific delegation from the Council of Ministers is an issue.

56. It is interesting to note that the Chicago Convention, in Article 77, provides for the creation of Joint Operating Organizations and states in relevant part that "[n]othing in this Convention shall prevent two or more contracting States from constituting joint air transport operating organizations or international operating agencies and from pooling their air services on any routes or in any regions, but such organizations or agencies and such pooled services shall be subject to all the provisions of this Convention . . . ." Besides the fact that EC Member States do not appear to be designing any sort of joint operating organizations, they will still all operate different airlines, and even if they did form a joint operating organization they would still be subject "to all the provisions of this Convention," including Article 7 dealing with cabotage.

57. See de Groot, supra note 46, at 172, n.123.

58. See Cases 21-24/72, International Fruit Co. v. Produkttschap voor Groenten en Fruit, 2 E.C.R. 1219 (1972), where the Community gradually involved itself in trade matters and was held legally bound to the GATT to the extent it exercised tasks and powers previously exercised by the Member States.

59. See infra note 60.

60. See Community Relations with Third Countries in Aviation Matters, COM(90) 17 final.

61. The Commission believes that it has the competence to negotiate all commercial aspects of air transport (e.g. access to the market, capacity, and fares) under Article 113 of the EEC Treaty, while social matters, environment, and safety should be dealt with by Article 84(2), which gives the Council authority to lay down provisions in the transportation field. See Greaves, supra note 5 at 171.
one author finds unnecessary to resolve. According to this author, that issue will either be resolved by the completion of the single transport market or by specific legislation conferring power on the Commission. This author believes the real issue to be "not whether but when the Commission will be in a position to exercise this competence in practice." Another author points out that even assuming the Commission does have the legal authority to deal in this area, it may lack the expertise to handle this field; and even assuming it gains this expertise, it will still need to establish an appropriate policy framework for its actions. This author notes that a policy framework is lacking and "there appears to be no consensus among member states as to what it should be."

As to the second requirement, whether the ICAO signatories would recognize the transfer, any such transfer would necessarily require recognition and acceptance to the extent that the relations of third countries with Member States are affected, (i.e., Fifth Freedom rights). Article 234 of the Treaty of Rome recognizes generally the need for acceptance by third countries of the transfer of tasks and powers, where such transfers affect existing international agreements, and states:

The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member States or States concerned shall take appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

---

63. Id.
64. Id.
65. See also Arthur Reed, Liberalization on Pace: Single Market Now, Cabotage Later — EC Transport Commissioner Karl Van Miert Pleased With Progress, 29 AIR TRANSPORT WORLD 62 (1992). (Van Miert, in response to the question of what expertise in the civil aviation field his department, has responded, "[w]e have people in our service, but it is a very limited service ... But once such responsibility is given us, we will have the involvement of national administrations who are used to this kind of negotiation. This will be not only on behalf of the 12 individual member states, but on behalf of the Community as a whole.")
67. Id.
68. See EEC TREATY, supra note 3, art. 234. As one author has stated, "[a]s far as non-member states are concerned, it seems also clear that the provisions of the Chicago Convention would prevail in the case of any conflict with the provisions of the Treaty: while member states are obliged to take the appropriate steps to eliminate incompatibilities, the effectiveness of any such steps would of course depend on the concurrence of one or more non-member states, which are under no obligation to concur." SHAWCROSS & BEAUMONT, supra note 35, at IX/22-23.
Therefore, so far as concerns the transfer of relations to the Community, recognition and acceptance by non-EC ICAO members, in the context of Article 1 of the Chicago Convention, would be a requirement for the compatibility of the new arrangement with Article 1. Because the external effect of cabotage is significant, it is likely that the matter of a possible Article 1 argument might be put to the ICAO Assembly for discussion and clarification.

From all this, it is clear the argument that the Community should be considered a "State" for purposes of Article 1 of the Chicago Convention is far from perfect. Until the Community exercises effective competence and authority in the external aviation relations of its member states, it can hardly be seen to constitute a "State" for purposes of the Chicago Convention.

The Council may well be putting off introduction of a Community cabotage area for the very reason that the Commission is awaiting the authority to act on behalf of the member states. Still, it seems apparent from Article 234 that third countries would have to agree to the change in legal status accompanied by the transfer of authority to the Community. As stated before, this would likely become a question dealt with by an ICAO panel of government representatives. Since third countries have substantial Fifth Freedom rights69 in the Community — which would be destroyed by the creation of a Community cabotage area — it is likely that they would not be readily amenable to allowing the Community an Article 1 exception. Also, since the creation of the Community cabotage area will likely be challenged under Article 7, even under the flexible approach, it is likely that the issue will have to be debated in some or several international fora.

IV. POSSIBLE U.S. REMEDIES

As noted at the outset, there are basically two legal problems with the creation of a Community cabotage area. First, the area would more than likely violate Article 7 of the Chicago Convention. Second, the area destroys existing Fifth Freedom rights in the Community held by non-EC members, especially the United States. Since there are two legal problems, the United States may attempt to pursue a legal remedy in two separate ways. So far as concerns the alleged violation of the Chicago Convention, Article 84 of the Convention70 provides that any disagreement relating to its interpretation or application, which cannot be settled.

69. See supra note 47.
70. See Chicago Convention, supra note 7, art. 84.
by negotiation, is to be decided by the ICAO Council upon the application of any state concerned. To aid it in the resolution of disputes, the Council has adopted rules of procedure. Counterclaims are permitted and the jurisdiction of the Council can be attacked by preliminary objections. Moreover, there are provisions for inviting or directing negotiations to settle the dispute. Furthermore, a committee of five members may be appointed to make an investigation and report to the entire Council. The proceedings are written, but on special application the Council may agree to receive oral testimony. Decisions of the Council must be made by a majority of its members and are binding. Of course, no member may vote on a dispute to which it is a party. The decision of the Council must contain its conclusions and reasons for reaching them, and there may be appeals from it to the ICJ or an ad hoc tribunal.

As for enforcement procedures, assuming the Community cabotage area is found to violate Article 7, there are different penalties for non-conformity with the decision by airlines and states. With respect to airlines, each contracting state undertakes not to allow the operation of an airline of a contracting state through the airspace of its territory if the Council decides that the airline is not conforming to the decision. As regards states, the Assembly of the ICAO shall suspend the voting power in the Assembly and Council of any contracting state found in default. So the remedies under the Chicago Convention are quite severe, and since they elicit the assistance of the other contracting parties to provide leverage to force the nonconforming party to change his practice, these remedies would likely be very effective. Compare this with the other possible way the United States might pursue a remedy against the Community cabotage area. For example, the Bermuda agreement between the United Kingdom and the United States provides that disagreements which cannot be settled by negotiation be referred to an arbitral tribunal, whose members are appointed by the President of the ICJ, where either contracting party fails to name an arbitrator. However, there have only been two international aviation disputes submitted to arbitral tribunals: between the United States and France concerning routes flown by United States carriers from Paris to the Near East, and between the United States and Italy over the allowance of all-cargo ser-

71. The amount of negotiation required is not that extensive; the discussion can be very short, to the point where one of the parties is unable to agree or refuses to give way. See Shawcross & Beaumont, supra note 35 at l(67), n. 2.
72. Id.
73. See Chicago Convention, supra note 7, art. 87.
74. See Chicago Convention, supra note 7, art. 88.
75. See Shawcross & Beaumont, supra note 35, at l(70).
76. Id.
vice. The United States-Italy tribunal points out one of the major problems with arbitral proceedings — the enforcement of the award. Italy failed to comply with the decision and eventually renounced the agreement. So while the Chicago Convention may provide a remedy that has the support of a number of members of the ICAO, the enforcement of an arbitral award depends on the losing party alone, and leaves the party with an unsatisfied judgment with only unilateral retaliation. Therefore, the best course for the United States would likely be to bring the violation of Article 7 before the ICAO Council and argue that the Community cabotage area violates the Chicago Convention. In order to avoid such an outcome, a number of solutions to this problem have been proposed.

V. POSSIBLE SOLUTIONS

One proposed solution is for the European Community to grandfather the existing Fifth Freedom rights of third countries. A grandfather clause is defined as “[a]n exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction.” The main purpose of such clauses is to preserve "existing" rights. In our case, the European Community could grant "grandfather rights" to Fifth Freedom rights existing in bilateral agreements between the member states and third countries. In this way, existing Fifth Freedom rights would not be destroyed by the creation of a Community cabotage area.

One very important consideration with respect to grandfathering rights is the problem of timing. It is normal for the cutoff date for the creation of grandfather rights to be the date of the treaty. This raises issues in the Community cabotage situation. First, it is not clear when the European Community will actually create the Community cabotage area. Second, if the Community grants cabotage privileges on a gradual basis, the question arises at what date the cutoff for grandfather rights should be set, at the start or finish of the transition. It would make sense for the European Community to establish an earlier rather than a later date, due to the commotion a later date might cause. If third countries are told, for instance, that in three years their existing Fifth Freedom rights will be grandfathered, there might be a deluge of countries coming to the Community seeking to renegotiate their bilateral agreements to obtain Fifth Freedom rights. In order to avoid this problem the Commu-

77. Id.
A second issue that arises with respect to grandfather rights is what constitutes an "existing" right. For example, if a country is authorized under a bilateral agreement to operate five Fifth Freedom rights through a EC member state, but is only actually operating two of those five, the question arises whether the unused rights would also be grandfathered; or, what if a country once used all five, subsequently reduced this to two, but then wished to retain or resume all five? As one author has noted in the context of the General Agreement on Trade and Tariffs, "[i]f one were to assume that the purpose of the grandfather clause was not to create a permanent preference, but rather to avoid the need for immediate amendment of inconsistent legislation, it could be argued that amending or recasting the offending legislation at a later date removes the justification for the exception." Although it is not clear that changing utilization of Fifth Freedom rights is an amendment or recasting of existing legislation, it is obviously uncertain how these politically significant commercial changes would be handled in a grandfather cabotage context. In order to avoid the problems the GATT Contracting Parties have had in determining what constitutes "existing" legislation, therefore, the European Community should make it clear whether changes in utilization would eliminate any grandfather protection afforded under and by a bilateral agreement.

Aside from the problems in implementing a system of grandfather rights, there is the question whether this system would solve the cabotage problem or just provide a temporary solution. It is likely that the latter is true. To the extent that airlines wish to change the scope and extent of their rights existing under current bilateral agreements, grandfather rights could be a very short term solution. Moreover, this solution still leaves the problem of the Community cabotage areas' violation of Article 7 of the Chicago Convention unresolved. Also, it leaves the bilateral system for the most part intact. Therefore, it does not seem to give the European Community much leverage to exert their newly united bargaining power, which could be better exerted in the context of multilateral solution. For all these reasons, it is unlikely that the Community would adopt the grandfathering approach.

Another proposed solution is for the European Community to try and get a qualified majority in ICAO to amend or delete the second sentence of Article 7. Such a proposal has been attempted in the past. In

80. Id. at 277.
81. Id. at 266-67.
82. See Chicago Convention, supra note 7, art. 94(a), which requires a two-thirds majority for an amendment to the Convention.
1966, Sweden asked the ICAO Council to adopt its interpretation that a contracting state may legitimately grant cabotage privileges to another contracting state provided that the applicable air transport agreement or operating permit did not stipulate that the privileges were granted on an exclusive basis. Then in 1967, Sweden asked the assembly to delete the second sentence of Article 7 because it restricted sovereignty and was ambiguous. At its 1968 and 1971 sessions, the ICAO Assembly considered the Swedish proposals concerning Article 7. At both sessions the proposals failed because they did not obtain the necessary two-thirds majority, as required by Article 94(a) of the Convention.

It has been argued that the main reason for the failure of the proposals was "that there was little, if any, evidence to prove that the alleged ambiguity of Article 7 had caused difficulties to any contracting state except Sweden and no specific difficulties had been brought to the Council's attention in the two years it had the matter under consideration." Because the proposals did not meet the criteria of having been "proved necessary by experience" or of being "demonstrably desirable or useful," the Council decided that it was unnecessary to engage in the "long and complicated process involved in the adoption and ratification of an amendment."

This same indifference to a proposal would likely not exist today, considering the possible effects of the removal of the second sentence of Article 7 on third countries with significant Fifth Freedom rights in jeopardy in the Community. It seems likely, therefore, that a proposal to amend Article 7 would probably fail to meet the required two-thirds majority vote only because of the substantial rights endangered by the legitimization of a Community cabotage area.

Moreover, this does not seem to be the path the Community intends to take. Instead, as one author notes, "it is clear that the Community hopes to persuade the parties to the Chicago Convention to adopt a multilateral approach . . . gradually replacing the traditional bilateral framework with a multilateral approach on traffic rights." Scholars seem to agree with this view and have commented: "[t]he cabotage issue is only one symptom of the obsolescence of bilateralism . . . [and] this political
discussion should be seized upon not only to rethink the traditional concept of cabotage, but to adapt the entire regulatory framework to modern-day needs and conditions, i.e., rethinking the bilateral system. If correct, the eventual legal problems of a Community cabotage area could well force the adoption of a multilateral solution.

One proposal to adopt a multilateral solution is to convene another Chicago Convention. United States Representative James Oberstar (D-Minn.), chairman of the House Public Works and Transportation’s Subcommittee on Aviation, has called for a new Chicago Convention to replace the current system of bilateral agreements with a multilateral regime. Oberstar proposed that each country “designate special negotiators, high-level in their own governments, and different from those who currently negotiate bilateral agreements to avoid having liberalization become a side line to traditional bilateral matters.”

One of the possible benefits of convening another Chicago Convention is that it could work to avoid some of the problems inherent in the proposal to include trade in services, the so-called “GATS” (General Agreement on Trade in Services) system. It would avoid the protracted negotiations that are taking place within the GATT framework (i.e., the current Uruguay Round has been on the table since 1986). It could also work to avoid mixing aviation issues with other trade issues so that aviation rights are not “traded off for soybeans or something else.”

This approach seems like an even better idea when we consider some of the drawbacks of the GATS approach later on. Moreover, one commentator has proposed a very simple way to amend the Chicago Convention, beyond just Article 7, to make it a multilateral solution. Former KLM Senior Vice President H.A. Wassenbergh has recommended converting the Chicago Convention into a multilateral document. He believes all that is necessary is the elimination of Articles 6 and 7 and amendment of

89. See de Groot, supra note 46, at 188.
90. It might even be possible for this to be handled under the auspices of the ICAO since, as one author notes, “the Organization represents a suitable forum for the contracting States to discuss any matters relating to international civil aviation and in the recent period more and more economic issues are being discussed at various Panels, Air Transport Conferences and Assembly Sessions to reconcile conflicting economic and political views and the differing national interests at stake.” See Milde, supra note 83, at 122.
92. Id. at 565.
93. See infra note 103.
94. Id.
95. Joan M. Feldman, On Getting from Here to There; International Aviation Structure is Becoming Obsolete, AIR TRANSPORT WORLD, July 1990, at 23.
96. See Chicago Convention, supra note 7, art. 6, which states, “[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with
Article 5\textsuperscript{98} to make it applicable to scheduled air service.\textsuperscript{99} Still, Wassenbergh feels that, similar to the problems we noted with amending Article 7, “[o]btaining a majority vote for open skies would be no easier today [because] [d]eveloping nations, which would have to support it in order to achieve a majority vote, probably would be opposed.”\textsuperscript{100} Variations on this sort of multilateral approach, which may be easier to implement, are discussed below.\textsuperscript{101}

Another significant proposal for a multilateral solution is the discussion of the creation of a General Agreement on Trade in Services (GATS) — the basic idea being to introduce free trade principles from the General Agreement on Trade and Tariffs (GATT) into the aviation sector. In September 1986, the United States convinced the Contracting Parties to the GATT to include in the Declaration of the Eighth Round in Uruguay, the so-called “Uruguay Round,” the possibility of creating a trade agreement dealing with services.\textsuperscript{102} In an attempt to bring the Uruguay Round to a close, on December 20, 1991, Arthur Dunkel, the director general of the GATT, published a “Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.”\textsuperscript{103} This draft is Mr. Dunkel’s proposal on how the current Uruguay Round should be completed and was submitted on a “take it or leave it” basis, meaning no single provision of the Draft can be considered effective until the entire package is acted upon. Annex II of this proposal deals with a General Agreement on Trade in Services, including a specific Annex on Air Transport Services.\textsuperscript{104}

The European Community favors this approach because as one author observes, “[i]ts great commercial weight will enable it more easily to
obtain concessions from third countries on traffic rights." 105 This argument also seems to validate the Commission's position that it should have competence to deal with member states' aviation matters. There has also been support in the United States for a GATS system, due to the fact that a large proportion of the United States GNP now comes from the provision of services as opposed to the production of goods. 106 As one author notes: "[s]o important has this issue become to the U.S., that even though the U.S. is the primary beneficiary of the present bilateral air transport regime, its negotiators have let it be known that they were prepared to include even air transport in order to obtain a GATT service provision." 107 Thus, the U.S. has had to include aviation in the GATS discussion in order to achieve its goals in other areas. There has been heavy criticism of the proposed inclusion of aviation in the GATS system by a number of U.S. organizations.

In order to understand how this proposed system works, it is useful to look at the actual structure of the GATS system, because it differs considerably from the GATT system. The GATS, with respect to aviation, is composed of basically three main sections. 108 The first section describes the Articles of Agreement. It is broken down into two general categories: general obligations and specific obligations. Included in the general obligations, which are applicable to all parties to the agreement, is Article II, an unconditional Most Favoured-Nation Treatment provision (MFN). However, while MFN is a general obligation, there is the possibility to exempt non-conforming measures from this obligation prior to the entry into force of the agreement. As far as specific obligations, these are to be applied only if specific commitments are negotiated bilaterally between countries, and set out in schedules attached to the Agreement. Included in the section on specific commitments are provisions concerning market access and national treatment. Still, liberalization undertakings with respect to market access and national treatment are to be extended to other parties to the GATS through the application of the MFN provision. 109 Aside from general and specific obligations, the first section also contains institutional and final provisions, of which the dispute settlement and the relationship with other international organizations 110 are noteworthy in the air transport field.

106. See Mifsud, supra note 101, at 165.
107. Id.
110. See Article XXVII, which states that "[t]he parties shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as
The second main section of the GATS deals with the negotiation and scheduling of commitments to liberalize trade in services. Without this section the specific provisions of the first section and the sectoral annex in the third section would have little meaning. Parties to the agreement have been negotiating offers and requests to liberalize trade in services on a bilateral trade since the latter part of 1990. These liberalization commitments are to be placed in national schedules and entered into force as part of the GATS. Thereafter, subsequent negotiations between parties would be undertaken to reduce or eliminate measures that restrict trade in service by the progressive abolition of unequal market access and inequitable operating conditions. Heavy service-oriented countries have already come forward with offers to liberalize trade in all major sectors of the services trade, including civil aviation, and other countries are preparing such offers.

The third main section of the GATS contains the sectoral Annex on Air Transport Services. This Annex is important as it limits the scope of the agreement. It states the Agreement shall not apply to measures affecting traffic rights covered by the Chicago Convention, bilateral air service agreements, or directly related activities. The third paragraph states that only measures affecting aircraft repair and maintenance, selling and marketing, and computer reservation services are subject to the general obligations under the GATS. Therefore, market access and national treatment commitments have to be negotiated by governments. Moreover, paragraph 5 states that dispute settlement procedures under the GATS are not applied to traffic rights and directly related activities, but are only applied to air transport service disputes after procedures specified in bilateral and other multilateral regimes have been exhausted. So, procedures under bilateral agreements and the Chicago Convention would have to be exhausted before the dispute settlement procedure of the GATS kicks in.

Unfortunately, there have been a number of valid criticisms of the structure of the proposed GATS system. First, the value of introducing a Most Favored Nation concept (i.e., the obligation to provide treatment no less favorable than that accorded to like services of any other country)

---

111. See ICAO document, supra note 109, sec. 3.13, at 3.
112. Id.
113. See Dunkel, supra note 103, at 45.
114. Id. at ¶ 2.
115. Id. at ¶ 3.
into the aviation field has been criticized. The problem with MFN in the aviation field is that MFN does not force better trade to occur. It simply mandates that everyone must be treated the same, whether this treatment is good or bad. A MFN clause alone, without a national treatment provision, means that nothing prevents domestic products from being treated more favorably than foreign goods. As one commentator puts it: "[a] most-favored-nation obligation is simply insufficient."116 He goes on to note that, "[w]orse, a multilateral agreement predicated on MFN would engender excessive caution on the part of governments otherwise inclined to be generous in extending market access opportunities to like-minded trading partners."117 He adds "[w]orse still, much of the existing and potential discrimination against foreign carrier services in some countries would be unaffected by the need to provide MFN treatment."118 Presumably, this existing and potential discrimination would be taken care of by market access and national treatment provisions. Unfortunately, as we have seen, these provisions are only to be granted on a specific basis after bilateral negotiations. This would be fine except that the MFN clause kicks in and forces countries to grant negotiated commitments to the rest of the parties to the agreement. Also, the Annex exempts traffic rights from the Agreement, so MFN would not apply to them, and the current bilateral system would be untouched unless specific commitments were made.

A second criticism of the GATS occurs in the area concerning market access and national treatment just mentioned. According to the GATS market access and national treatment provisions, commitments by countries are not mandatory unless undertaken by a country. One author has stated: "[m]arket access involves the development of a market equally open to foreign as well as domestic suppliers, except in cases of national security or exceptional balance of payments problems."119 The problem with leaving market access to separate negotiations is that governmental imposition of restrictions to market access is highly pervasive. Market access also involves sensitive areas of foreign ownership and investment.120 It has been noted that due to the

---

116. Comments of Jeffrey Shane, see ICAO document, supra note 109, sec. 1.15, at 3.
117. Id. An alternative to unconditional MFN is conditional MFN under which countries that mutually agree to accept higher levels of obligation should not be required to extend the same treatment to countries which were unwilling to do so. However, it has been argued that a conditional approach would ignore the needs of smaller, poorer, and less interesting countries, and degenerate into limited arrangements among "like-minded" countries. Jeffrey Shane seems to indirectly support conditional MFN in his criticism of the unconditional MFN provision. Id.
118. Id.
120. Id.
entrenched monopoly position of the service sector\textsuperscript{121} in many countries, \textit{"[g]iven the almost universal opposition to any discussion of market access in the aviation talks in Geneva, it was clear from the outset that the GATS would not be a market opening instrument."}\textsuperscript{122} Similar problems exist in the area of national treatment,\textsuperscript{123} as the internal regulation of services in most countries exceeds regulations on goods.\textsuperscript{124} Moreover, national treatment and market access go hand in hand, and national treatment is the \textit{sine qua non} of market access. MFN is therefore worthless without both market access provisions and national treatment provisions.

Furthermore, it has been noted that the concept of national treatment really has no place in the service sector. This is because in the goods sector the national treatment concept is applied in a subsidiary manner as relating to internal protective measures rather than tariffs, which are a legitimate instrument of protection under the GATT.\textsuperscript{125} Without the basic level of protection afforded by tariffs, national treatment changes from a subsidiary principle to a provision entailing the elimination of any protection.\textsuperscript{126} Since most developing countries have not reached the stage where they are able to utilize this reciprocity in national treatment, this requirement would have a negative impact on the infant and growing enterprises of developing countries.\textsuperscript{127} As the immediate introduction of national treatment would mean the elimination of all protection, it is likely that the introduction of this principle would occur over a long time period.\textsuperscript{128}

From these provisions, it is easy to see that the GATS system would not be a great liberalizer of trade in aviation services. The proposals under the GATS system have been criticized by United States industry as well. These criticisms probably arise from the fact that the United States is the primary beneficiary of the bilateral system. As Jeffrey Shane stated: \textit{"[i]n focusing on the weaknesses of the bilateral system, I}

\begin{itemize}
\item \textsuperscript{121} One author points out that \textit{"[e]verywhere, there are major national vested interests in services, including those of the entrenched regulators; often nationalized or monopolistic or oligopolistic businesses and those who perceive services as too important or too special to be subjected to the rigors of competition."} \textit{See Mifsud, supra note 101, at 166.}
\item \textsuperscript{122} \textit{See Comments of Jeffrey Shane, supra note 116, at 3.}
\item \textsuperscript{123} National treatment ensures the equality of treatment between foreigners and nationals and between products and services of foreign and indigenous origin. \textit{See Murray Gibbs and Mina Mashayekhi, Elements of a Multilateral Framework for Trade in Services, 14 N.C.J. INT'L L. \& COM. REG. 1, 29 (1989).}
\item \textsuperscript{124} \textit{Id. at 30.}
\item \textsuperscript{125} \textit{Id. at 33.}
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.}
\end{itemize}
hasten to point out the U.S. probably has extracted more benefit from it than most other countries.\textsuperscript{129}

It has been argued by United States industry that the GATS system would conflict with the ability of the United States to negotiate bilateral agreements and its ability to generally negotiate service liberalizing agreements.\textsuperscript{130} However, in the Annex of Air Transport Services to the GATT, a number of interesting exceptions are made affecting this argument. The Annex specifically addresses the problem of conflict with negotiating ability.\textsuperscript{131} It states that no provision of the Agreement shall apply to "traffic rights covered by the Chicago Convention, including the five freedoms of the air, and by bilateral air services agreements; (b) directly related activities which would limit or affect the ability of parties to negotiate, to grant or to receive traffic rights, or which would have the effect of limiting their exercise."\textsuperscript{132} So, it appears the concern of United States industry with respect to negotiating ability is unfounded. The real concern of United States industry is that they will likely lose the dominant negotiating position it now enjoys under the bilateral system, if a new multilateral system is employed. Still, we are left with the problem that the GATS system is not likely to be a trade liberalizer for the reasons we have noted. Also, as previously stated, placing trade in services under the GATT regime subjects services to the vagaries of trade disputes in the area of goods. Moreover, it is not clear when, or if, the Uruguay Round of the GATT will be completed, so services may be jumping aboard a sinking ship.\textsuperscript{133}

It is apparent from the dispute over cabotage rights, however, that some sort of new agreement will have to be reached in order to accommodate the growing demands of the European Community as a single entity. For this reason, it is useful to look at some of the multilateral approaches proposed outside the GATT framework. Professor John Jackson believes that the GATT should not be shouldered with the burden of taking on a services agreement because it lacks the proper institutional support (i.e., supervisory body, voting structure, rule making procedures, secretariat, institutional dispute settlement, and membership provisions).\textsuperscript{134} Professor Jackson believes that because unanimity

\textsuperscript{129} See Comments of Jeffrey Shane, \textit{supra} note 116, at 3.
\textsuperscript{130} See, \textit{e.g.}, Letter from Donald C. Comlish, Vice President, International Affairs, Air Transport Association, to the Honorable Julius L. Katz, Deputy United States Trade Representative (Oct. 24, 1990).
\textsuperscript{131} See Annex on Air Transport Services, \textit{supra} note 108, at 45.
\textsuperscript{132} Id.
\textsuperscript{134} See Mifsud, \textit{supra} note 101, at 166-67.
is unattainable an "Umbrella Agreement" should be pursued that establishes a basic organization which seeks the broadest possible consensus. 135 According to Jackson, different layers of agreement could be subscribed to by parties on an optional basis so that "like-minded nations forge ahead with sets of obligations which not all 'members' are yet prepared to accept." 136 The idea of forming a "core" group of like-minded countries has been advocated by a number of groups. 137

One scholar, for example, proposes taking the text of the Transport Agreement 138 as a starting point for a new effort. 139 A new agreement would then be based on two components. First, the core would represent the minimum, which would have to be accepted by all participants. Second, the periphery would, in each segment, consist of graduated steps, down from the maximum and open to reservations by which the participants would define the scope of application according to their individual needs. For example, in the area of market access the minimum would be First and Second Freedom rights, the maximum would be unlimited First through Fifth Freedom rights, and the intermediate would contain First through Fourth Freedom rights. Inherent in this idea is the principle that no participating government could request from any other government more than what it would grant itself under its terms.

Although an independent multilateral approach would have to be adopted slowly over time, it might be more acceptable than the GATS solution, which, as we have seen, provides little incentive to liberalize trade, is subject to the vagaries of trade disputes under the GATT framework, and may be forestalled by the failure of the Uruguay Round. Still, this approach is similar to a conditional MFN approach, which, as noted earlier, ignores the needs of smaller, poorer, and less interesting countries. For this reason, the idea of convening another Chicago Convention sounds more appealing, for it avoids the problems of the GATS system and allows the lesser developed countries to have a voice in the shaping of a new multilateral system. How a solution is eventually found to the narrow problem of a Community cabotage area, and to the broader problem of what a workable multilateral regime might look like, will ultimately be left to the whims of the political process. However, with

135. Id. at 167.
136. Id.
137. For example, Singapore Airlines' Deputy Managing Director Michael Tan has stated that "[y]ou can't get 100 countries together and sign a multilateral agreement. We find that the practical approach could be a number of countries getting together to conclude a multilateral agreement, which acts like a catalyst." John Bailey, Toward Open Skies, FLIGHT INT'L, Feb. 19, 1992, at 36.
138. The Transport Agreement was a proposal by the United States for "open skies" and contained the first five freedoms of the air. See Gidwitz, supra note 25, at 50.
the arrival of the European Community as a substantial economic power, it is likely that the United States will have to give up the favorable position it has enjoyed through the outdated system of bilateral agreements, and open up its domestic air traffic in order to keep air routes abroad.
Notes


Laynie Giles

TABLE OF CONTENTS

I. Introduction .............................................. 88
II. Background .............................................. 88
   A. Statutory Framework .................................. 89
   B. Case History ........................................ 90
      1. Pre-Deregulation ................................... 90
      2. Post-Deregulation .................................. 92
III. Morales v. Trans World Airlines, Inc. ...................... 95
   A. Facts ................................................ 95
   B. Majority Opinion .................................. 96
   C. Dissenting Opinion ................................... 98
IV. Analysis ................................................. 99
V. Conclusion ............................................... 103

Ms. Giles has worked in the Denver legal community for the last two years and has focused her work on aviation related legal issues. J.D., University of Denver School of Law 1994; MBA, University of Denver, 1981; B.S. Aeronautical Technology, Arizona State University, 1990. Ms. Giles is a private pilot and was previously a staff member of the Transportation Law Journal.
I. INTRODUCTION

The visionaries who instituted the Airline Deregulation Act of 1978 had a definite goal in mind: to make air transportation affordable to the general public. Indeed, this has been the case. It is estimated that consumers have saved approximately six billion dollars per year as a result of deregulation. While deregulation has generally benefitted the traveling public, it has created enormous trouble for the United States airline industry. Many once very stable airlines are now struggling to keep their heads above water. As a result, the air carriers have had to resort to some extremely creative tactics in order to generate revenue. Chief among these tactics is ticket pricing strategies. While airlines have developed intricate methods of pricing, it is questionable how deceptive or unfair these pricing schemes actually are.

The Supreme Court recently addressed this issue in Morales v. Trans World Airlines, Inc., where the Court interpreted section 105 of the Airline Deregulation Act of 1978 as essentially permitting airlines to engage in fare advertisement practices of their choice. Specifically, the Airline Deregulation Act preempts individual states from prohibiting allegedly deceptive airline fare advertisements through enforcement of their consumer protection statutes. This Comment will focus on the rationale behind the Court's interpretation of section 105 of the Airline Deregulation Act (ADA) and the impact Morales will have on future airline advertising practices.

II. BACKGROUND

Prior to Deregulation, airlines were not permitted to set their own fare levels. In the heavily regulated industry, the Civil Aeronautics Board (CAB) exercised exclusive control over pricing in the industry. Air carriers were required to file with the CAB detailed tariffs setting forth their classifications, rules, regulations, practices and services. The CAB had the power to require certain information be included in tariffs

5. See generally Morales, 112 S. Ct. at 2040.
and to reject tariffs not in conformity with such requirements.\textsuperscript{10} Subsequent to the passage of Deregulation in 1978, the CAB was gradually phased out, and the airlines were given near complete discretion over the rates, routes or services offered.

Most courts have interpreted section 105 of the deregulation act in the fashion opposite the recent \textit{Morales} decision. The underlying rationale of \textit{Morales} is that airlines cannot be expected to follow the different advertising laws of all fifty states. Imposing such a large burden would undermine the goal of deregulation: relying upon the competitive forces to best further the variety and quality of air transportation services.

\section{Statutory Framework}

The foundation of air carrier regulation is provided for in Title IV of the Federal Aviation Act of 1958 ("the Act").\textsuperscript{11} The Act, along with its predecessor, the Civil Aeronautics Act of 1938,\textsuperscript{12} established and granted authority to the CAB.\textsuperscript{13} The CAB was established as an independent agency having special competence to deal exclusively with problems in the air transportation industry.\textsuperscript{14} The CAB was provided with broad discretion to govern the daily economic affairs of the air carriers.\textsuperscript{15} Basically, the CAB had the authority to protect consumers and ensure fair competition.\textsuperscript{16}

Under section 411\textsuperscript{17} of the Act, the CAB was empowered to order air carriers to cease and desist from "unfair or deceptive practices or unfair methods of competition in air transportation."\textsuperscript{18} From its inception, section 411 served to supplement, not displace, state common law and statutory causes of action challenging deceptive practices in the airline

\begin{thebibliography}{9}
\bibitem{10} Id.
\bibitem{13} The Civil Aeronautics Authority was established by the Civil Aeronautics Act of 1938 and was subsequently renamed the Civil Aeronautics Board and granted regulatory authority under the Federal Aviation Act of 1958. \textit{See supra} notes 11 & 12 and accompanying text.
\bibitem{14} Robert M. Kane & Allan D. Vose, \textit{Air Transportation} 9-1 (1987)(noting that the CAB was comprised of five members appointed for five year terms by the President with the advise and consent of the Senate).
\bibitem{15} Id. at 9-2.
\bibitem{16} Daniel Petroski, \textit{Airlines' Response to the DPTA Section 1305 Preemption}, 56 J. \textit{Air L. & Com.} 125, 130 (1990).
\bibitem{17} 49 U.S.C. § 1381 (1988).
\bibitem{18} John W. Freeman, \textit{State Regulation of Airlines and the Airline Deregulation Act of 1978}, 44 J. \textit{Air L. & Com.} 747, 748 (1979)(noting that the CAB had broad jurisdiction over the airline industry).
\end{thebibliography}
industry.\textsuperscript{19} Incorporated within the Act was a savings clause that stated "Nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."\textsuperscript{20} The Supreme Court has interpreted the savings clause as preserving state actions within section 411’s purview, stating: "§ 411 confers upon the Board [CAB] a new and powerful weapon against unfair and deceptive practices that injure the public."\textsuperscript{21}

The advent of the ADA in 1978 significantly altered the regulatory atmosphere of the airline industry. The ADA established "a thorough program of economic deregulation of the airline industry, following a transition period culminating in the dissolution of the CAB."\textsuperscript{22} The CAB’s authority to regulate rates was significantly reduced and eventually phased out under the Sunset Provision\textsuperscript{23} of the ADA in 1984. Congress then transferred all of its remaining functions, including responsibility for section 411, to the Department of Transportation (DOT).\textsuperscript{24}

Incorporated in the ADA was section 105\textsuperscript{25}, which was enacted to ensure that the states would not undo the anticipated benefits of federal deregulation of the airline industry.\textsuperscript{26} The relevant portion of section 105 contains a preemptive provision prohibiting any state from enforcing any law "relating to [an air carrier’s] rates, routes, or services."\textsuperscript{27} In essence, the ADA gave the carriers unbridled discretion to carry out practices of their choice relating to rates, routes, and services. It is section 105 that has been a source of conflict in case law addressing deceptive advertising practices.

\section*{B. Case History}

\subsection*{1. Pre-Deregulation}

The structure of the airline industry in the years preceding 1978 was completely different from the modern industry. During the pre-deregulation era, the courts relied on the CAB’s interpretation of what constituted unfair methods of competition and deceptive advertising practices. In two significant Supreme Court cases, the CAB’s exercise of power was affirmed.

\begin{itemize}
  \item \textsuperscript{20} 49 U.S.C. § 1506 (1988).
  \item \textsuperscript{21} Nader v. Allegheny Airlines, 426 U.S. 290, 303 (1976).
  \item \textsuperscript{22} Freeman, \textit{supra} note 18, at 754.
  \item \textsuperscript{24} \textit{id}.
  \item \textsuperscript{25} 49 U.S.C. § 1305 (1988).
  \item \textsuperscript{26} Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2034 (1992).
  \item \textsuperscript{27} 49 U.S.C. § 1305.
\end{itemize}
In *American Airlines v. North American Airlines*, the Court held the CAB had the jurisdiction to inquire into the disputed methods of competition. Essentially, North American had requested permission from the CAB to use the name "North American Airlines". American Airlines requested the CAB deny North American's application because the use of the name "North American" would infringe upon its long-established trade name "American," and was a violation of section 411 of the Act. Since this was a case of first impression for the Court under section 411, the Court relied on section 5 of the Federal Trade Commission Act.

Section 411 of the ADA was modeled closely after section 5 of the Federal Trade Commission Act, which also prohibits "unfair methods of competition in commerce, and unfair or deceptive acts or practices." In *American* the Court stated that the air carrier business is of special and essential concern to the public. Section 5 and section 411 both were concerned with protecting the public interest. The CAB wanted to prevent further public confusion between the two airlines due to the similarity of names, and therefore granted American's request. The Court interpreted section 411 as not concerning the punishment of wrongdoing or protecting injured competitors, but rather with protection of the public interest. Furthermore, it was not necessary for the CAB to find the practice as intentionally deceptive or fraudulent.

Similarly, the Supreme Court in *Nader v. Allegheny Airlines, Inc.* also followed the notion of protecting the public interest. In this case, Mr. Nader was denied boarding on a flight upon which he had a confirmed seat. Subsequently, he brought an action against Allegheny Airlines seeking damages for the airline's failure to disclose its overbooking practices.

*Nader* affirmed the CAB's authority to investigate and determine whether an air carrier is engaging in unfair or deceptive practices and if so, to issue a cease and desist order. It is section 411 which conferred upon the CAB this powerful weapon against unfair and deceptive practices that injure the public. However, section 411 does not provide for private challenges or wrongs. In its analysis, the Court, through the savings clause, found that the Act preserved the remedies existing at

29. *id.*
30. *id.*
31. *id.*
32. *id.*
33. *id.*
34. *id.*
35. *id.*
36. *id.*
37. *id.*
common law or by statute. Therefore, the Court ruled that even if the CAB were to find no violation of Section 411, the airline would not be immunized from any common law liability. In effect, consumers had two possible sources of protection, section 411 and common law rights.

2. Post-Deregulation

In 1978, Congress enacted the Airline Deregulation Act. Congress' intent was to allow for maximum reliance on the competitive market forces, which would further efficiency and innovation in the airline industry. In fostering this notion, the focus shifted from protecting the consumer to protecting the marketplace. To ensure that the states did not undo the benefits of deregulation by enacting regulations of their own, the ADA was equipped with a preemption provision. Essentially, this provision prohibits the individual states from enforcing any law "relating to rates, routes or services."

Since deregulation, the preemption provision has been inconsistently applied by the courts. The majority of decisions rendered prior to Morales held that the practices in question were not pre-empted by section 105. In Brunwasser v. Trans World Airlines, Inc., the court determined that Pennsylvania's Unfair Trade Practices and Consumer Protection Law was not preempted by the federal ADA. In Brunwasser, Trans World Airlines, Inc. (TWA) began a promotional campaign in the Pittsburgh market advertising non-stop, economical air service from Pittsburgh to London. TWA subjected this service to several limitations and restrictions. Following the plaintiff's purchase of her tickets, TWA suspended this special service and subsequently notified passengers, including the plaintiff, offering alternatives to the daily non-stop flights previously provided. When none of these alternatives were acceptable to the plaintiff, she filed a complaint against TWA claiming fraudulent misrepresentation of the terms of the special offer. The court held that the Pennsylvania statute was not preempted by the federal statute. The court based its decision on the language of section 1506 of the Federal Aviation Act. Section 1506 states, "[N]othing contained in

38. Id.
42. Id.
43. Id.
45. PA. STAT. ANN. tit. 73, §§ 201-1 to -6 (1978).
47. Id.
this Chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies.\textsuperscript{49} Thus, federal law preserves legal remedies for air travelers beyond those set forth in the Federal Aviation Act and the ADA.\textsuperscript{50}

Similarly in \textit{People v. Western Airlines, Inc.}\textsuperscript{51}, the court held that the state and federal laws would remain in co-existence given that there was no inconsistency between California's false advertising statute and the federal ADA.\textsuperscript{52} In this action, Western Airlines was sued for making false and misleading statements implying a fare savings in its advertising promotions. The court held, as the court did in \textit{Brunwasser}, that the ADA generally preserves existing common law and statutory remedies while providing additional remedies.\textsuperscript{53} Section 105 did not insulate Western Airlines from liability for violating California false advertising statutes.

In \textit{In Re: Air Crash at Stapleton International Airport}\textsuperscript{54}, the plaintiffs claimed that Continental Airlines 1987 advertising campaign focusing on pilot training and safety amounted to a deceptive trade practice. The court concluded that this campaign was deceptive under the Texas Deceptive Practices Act. Additionally, the court concluded that "regulation of the conduct of commercial air carriers throughout the Federal Aviation Act and regulations promulgated thereunder do not pre-empt traditional tort remedies which have the same effect of regulating the same conduct."\textsuperscript{55} Thus, as in \textit{Brunwasser} and \textit{Western}, the court upheld the principle that common law and statutory remedies are preserved by the ADA.

When the plaintiff, West, was denied a seat on an overbooked flight in \textit{West v. Northwest Airlines, Inc.}\textsuperscript{56}, he sued Northwest Airlines for breach of covenant of good faith and fair dealing under Montana law. West had purchased a non-refundable, non-changeable ticket on Northwest. Before his scheduled departure, West had confirmed his scheduled departure with his travel agent. Some time after West purchased his ticket, Northwest downsized the aircraft from a Boeing 727 to a DC-9\textsuperscript{57} without informing West or any of her passengers. Northwest argued that the federal ADA pre-empted Montana's common law duty to deal

\begin{itemize}
\item \textsuperscript{49} Brunwasser, 541 F. Supp. at 1345.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} People v. Western Airlines, Inc., 202 Cal.Rptr. 237 (Cal. App. 4d 1984).
\item \textsuperscript{52} Id. at 239.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} In Re: Air Crash at Stapleton International Airport, 721 F. Supp. 1185 (D. Colo. 1988).
\item \textsuperscript{55} Id. at 1187.
\item \textsuperscript{56} West v. Northwest Airlines, Inc., 923 F.2d 657 (9th Cir. 1990).
\item \textsuperscript{57} Id. at 658 (a Boeing 727 holds 146 passengers, whereas a DC-9 holds 89 passengers).
\end{itemize}
fairly and in good faith.\textsuperscript{58} Examining this issue, the court noted that there is a presumption against finding preemption of state law where Congress has legislated in a field traditionally occupied by the states, such as common law tort and contract remedies in business relationships.\textsuperscript{59} Additionally, there are three ways in which preemption may occur:\textsuperscript{60} 1) Congress may preempt state law expressly in a statute; 2) Congress may intend that federal law occupy a certain field; and 3) even if Congress does not occupy the field, state law will be preempted where it conflicts with federal law. In this case, the district court found that West's state claims were expressly preempted by Congress. The court of appeals disagreed. When Northwest contended that "relating to ... services"\textsuperscript{61} include boarding policies, the court of appeals agreed. However, the court of appeals disagreed with Northwest and the district court that "law[s] relating to airline services" encompass all state laws that affect airline services.\textsuperscript{62} The court felt that preemption would be over-expanded if this interpretation were adopted.\textsuperscript{63} In this case, the state law simply imposes a duty on all who enter into contractual relations to act with good faith and fair dealing. Federal preemption is not invoked just because this duty is applicable to airlines.\textsuperscript{64} Moreover, the court found no inconsistency between the Montana law and the federal ADA. There was no reason to believe that requiring the airline to conform to Montana's duty of good faith and fair dealing would prevent it from following federal regulations.\textsuperscript{65}

Finally, in \textit{Kansas ex. rel. Stephan v. Trans World Airlines, Inc.}\textsuperscript{66}, the attorney general of Kansas brought an action against TWA under the Kansas Consumer Protection Act, asserting violations of the Act in connection with newspaper advertisements published in March of 1989.\textsuperscript{67} The court found the language of the preemption section precluding state regulation "relating to rates, routes or services" does not by its terms include advertising.\textsuperscript{68} This holding is consistent with the holding in \textit{Western Airlines},\textsuperscript{69} where it was determined that section 105 did not insulate

\begin{itemize}
\item\textsuperscript{58} \textit{Id.} at 659.
\item\textsuperscript{59} \textit{Id.}
\item\textsuperscript{60} \textit{Id.}
\item\textsuperscript{61} 49 U.S.C. § 1305(a)(1).
\item\textsuperscript{62} \textit{West v. Northwest Airlines, Inc.}, 923 F.2d 657, 660 (9th Cir. 1990).
\item\textsuperscript{63} \textit{Id.}
\item\textsuperscript{64} \textit{Id.}
\item\textsuperscript{65} \textit{Id.} at 661.
\item\textsuperscript{67} \textit{Id.} at 367.
\item\textsuperscript{68} \textit{Id.} at 368.
\item\textsuperscript{69} \textit{People v. Western Airlines, Inc.}, 202 Cal. Rptr. 237 (Cal. App. 4d 1984).
\end{itemize}
Western Airlines from liability for violating California statutes prohibiting false advertising.\textsuperscript{70}

III. *MORALES v. TRANS WORLD AIRLINES, INC.*

A. FACTS

The facts leading up to the Supreme Court decision in Morales began when the National Association of Attorneys General (NAAG)\textsuperscript{71} adopted Air Travel Industry Enforcement Guidelines.\textsuperscript{72} These guidelines contain provisions and standards governing the content and format of airline advertising, frequent flyer programs, and compensatory practices for overbooking flights. They were not implemented to establish new laws or regulations, but rather to explain how existing state laws would apply to airfare advertising and frequent flyer programs.\textsuperscript{73} The Attorneys General of seven states\textsuperscript{74} sent out an advisory memorandum to the major airlines stating that airlines needed to bring their advertisements into compliance with the standards delineated in the guidelines. The memorandum threatened immediate enforcement action if certain practices were not discontinued immediately.

Subsequently, the NAAG sent letters to several major airlines as formal notices of intent to sue. The air carriers then filed suit in federal district court\textsuperscript{75} claiming the state regulation of fair advertisements is preempted by section 105. The airlines, including Trans World Airlines, Inc. (TWA), sought a declaratory judgment that the NAAG guidelines were preempted, and requested an injunction restraining Texas from taking any action under its laws in conjunction with the NAAG guidelines that would regulate the airlines' rates, routes, or services, or their advertising and marketing of the same.\textsuperscript{76}

The federal district court entered a preliminary injunction against the NAAG.\textsuperscript{77} The court reasoned that the airlines were likely to prevail on their preemption claim. The court of appeals affirmed the decision to issue an injunction.\textsuperscript{78} Subsequently, the district court permanently enjoined the states from enforcing any action restricting the airlines fare

\textsuperscript{70} Id. at 238.
\textsuperscript{71} Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2034 (1992). NAAG is an organization including Attorneys General from all 50 states.
\textsuperscript{72} See generally id. app. at 2041-54.
\textsuperscript{73} Id. at 2034.
\textsuperscript{74} Id. The group included Attorneys General from Colorado, Kansas, Massachusetts, Missouri, New York and Wisconsin, and including petitioner's predecessor Mattox as Attorney General of Texas.
\textsuperscript{77} Mattox, 712 F. Supp. at 101-102.
\textsuperscript{78} Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 775 (5th Cir. 1990).
advertising, or operations “relating to rates, routes or services.”79 Once again, the court of appeals affirmed the lower court decision.80 The Supreme Court granted Certiorari81 to determine whether the guidelines regarding airline fare advertising were expressly preempted by the Airline Deregulation Act.

B. MAJORITY OPINION

The United States Supreme Court made a determination of two specific issues presented in this case.82 The first issue decided was whether the district court could properly award the air carrier with injunctive relief.83 Analyzing this question, the Court assumed section 105 did in fact pre-empt state enforcement of the NAAG guidelines.84 The basic principle the Court relied upon in its decision was of equity jurisprudence.85 In applying this doctrine, the air carriers were awarded injunctive relief because they did not have an adequate remedy at law and would, in fact, suffer irreparable harm86 if not granted an injunction.87

The Court specifically relied on Ex Parte Young88 in reaching its conclusion with respect to injunctive relief. In Young, the Attorney General of Minnesota was restrained from taking any action against various railroads in enforcing a Minnesota state act requiring railroads not to charge in excess of the passenger rates proscribed.89 The day after the injunction was issued, Young ordered the Northern Pacific Railway Company to publish its rates. The carriers in Morales, as the plaintiff in Young, faced a Hobson's choice: either the air carrier could continue to violate Texas law, exposing themselves to enormous liability, or violate the law one time and suffer the economic injury of obeying the law during the duration of the proceedings and subsequent review.90 Thus, the district court decision91 preceding the Morales Supreme Court decision enjoined the petitioner from threatening any enforcement action over any aspect of the airlines' rates, routes and services. However, the Supreme

79. Morales, 112 S. Ct. at 2035.
81. Morales, 112 S. Ct. at 2035.
82. Id. at 2035.
83. Id.
84. Id. at 2037.
85. Id. at 2035.
86. Id.
87. Historically federal courts have enjoined state officers in situations where parties will suffer irreparable harm because no remedy at law exists. E.g., O'Shea v. Littleton, 414 U.S. 488, 489 (1974); Ex Parte Young, 209 U.S. 123, 156 (1908).
89. Id. at 125-126.
Court held that the district court had overstepped the limits of its power with respect to injunctive relief in instituting such a broad declaration. Therefore, the Supreme Court vacated the injunction insofar as it restrained the operation of state laws with respect to other matters.

The second issue, the one most relevant to this Comment, centers around whether "enforcement of the NAAG guidelines on fare advertising through a state’s general consumer protection laws is preempted by the ADA." In rendering its affirmative answer, the Court based its decision on statutory intent, and began its analysis by applying the ordinary meaning of the language of the federal statute. Section 105 expressly preempts the states from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provisions having the force and effect of law relating to rates, routes, or services of an air carrier..."

The Court then wrestled with the meaning of the words "relating to" as written in the statute. The Court interpreted the statutory language "relating to" as it did in case law surrounding the Employee Retirement Income Security Act of 1974 (ERISA). This case law supports a broad interpretation of the phrase "in so far as they... relate to any employee benefit plan." Thus, the Court adopted the same broad standard in Morales because the relevant language of the ADA is identical to that of ERISA.

In response to the Court’s interpretation of statutory intent, the petitioner based his objection of the Court’s interpretation of the phrase "relating to" on the Federal Aviation Act savings clause. The

92. Morales, 112 S. Ct. at 2031.
93. Id. at 2036.
94. Id. at 2035. Petitioner only threatened to enforce the obligations described in the guidelines regarding fare advertising.
95. Id. at 2036.
96. Id.
97. Id. The Court also noted "[p]re-emption may be express or implied and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Id. (citing FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990)).
101. Morales, 112 S. Ct. at 2037.
103. Morales, 112 S. Ct. at 2037.
104. Id. Petitioner stated that the interpretation could not be based on using the identical language in ERISA as a guide. Id. Petitioner also asserted that ERISA has a wide and inclusive, comprehensive scheme, that the ADA does not have. Id.
105. Id. The savings clause was included within the Federal Aviation Act of 1958 and preserved "the remedies now existing at common law or by statute”. 49 U.S.C. § 1506 (1988).
Supreme Court rejected this view because it did not believe that Congress intended to undermine this carefully written statute through a general face saving clause. 106

The petitioner also read section 105 as completely excluding the phrase "relating to" 107 thereby giving the statute a very narrow interpretation. The Court refuted this assertion, stating that if the drafters had intended such a narrow reading they would have instead written into the statute a phrase forbidding the states to regulate rates, routes, and services. 108 The Supreme Court next determined that state and federal laws were inconsistent in this case. 109 The Court found that nothing in the language of section 105 suggests that the "relating to" preemption is limited to inconsistent state regulation. 110

C. DISSENTING OPINION

Justice Stevens attacked a number of analytical lines in the majority opinion. First, he did not agree with the analogy drawn between the language of ERISA 111 and the ADA 112. The Justice felt that the majority quickly lumped the language with that of ERISA instead of giving it a careful examination for statutory intent. 113 Thus, Justice Stevens would "approach preemption question with a presum[ption] that Congress did not intend to preempt areas of traditional state regulation." 114

Justice Stevens also disagreed with the manner in which the phrase "relating to" was interpreted. Justice Stevens stated, "[b]y definition, a state law prohibiting deceptive or misleading advertising of a product 'relates', 'pertains' or 'refers'. . .to the advertising, (particularly any deceptive or misleading aspects), rather than to the product itself." 115 Justice Stevens continued stating that the prohibition was designed to affect the nature of the advertising, not the nature of the product. 116 Justice Ste-

---

106. The savings clause is a relic of pre-ADA where there was no preemption. The Court felt a general savings clause cannot "be allowed to supersede the specific substantive pre-emption provision." Morales, 112 S. Ct. at 2037.
107. Id.
108. Id. at 2038.
109. Id.
110. Id. The Court relied on its previous interpretation of the "relating to" language as in ERISA cases. Id.
114. Id. (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985)).
115. Id.
116. In a similar New York case the distinction was explained:
"[A]ny relationship between New York's enforcement of its laws against deceptive advertising and Pan Am's rates, routes, and services is remote and indirect. In challenging Pan Am's advertising, New York does not care about how much Pan Am charges,
vens agreed with the plain language of section 105, which pre-empts any state law that relates directly to rates, routes or services. However, he felt that section 105 could not be interpreted to pre-empt every traditional state regulation that had some indirect relationship to rates, routes, or services, unless there was an indication that Congress had intended to do so.\textsuperscript{117}

The ADA was enacted to encourage and develop an air transportation system which relies on the market forces to determine quality, variety and price of air service. At the same time, Congress retained section \textsuperscript{118}411, giving CAB power to prohibit unfair or deceptive practices or methods of competition. Although the CAB is no longer in existence, Justice Stevens concluded that by not eliminating federal regulation of unfair or deceptive practices, and because state and federal regulations regarding deceptive practices co-existed prior to deregulation, there is no reason to believe Congress intended section 105 to immunize the airlines from state liability for engaging in deceptive advertising practices.

Finally, Justice Stevens stated that even if he were to concede that state regulation of deceptive advertising could relate to rates within meaning of section 105, he would still dissent if such a regulation had a significant impact on rates. Thus, Justice Stevens was not persuaded by the airlines' argument that NAAG guidelines will have a significant impact on the price of airline tickets.\textsuperscript{119} In fact, Justice Stevens believed that the airlines' argument is not supported by any legislative or judicial findings.\textsuperscript{120}

IV. ANALYSIS

The notion that federal law preempts state law has its origin in the United States Constitution.\textsuperscript{121} The Supreme Court has held that the fed-

\begin{itemize}
\item \textsuperscript{117} Morales, 112 S. Ct. at 2055, 2056.
\item \textsuperscript{118} 49 U.S.C. § 1381 (1988).
\item \textsuperscript{119} Justice Stevens summarized the airlines' argument as: \\
[Es]sentially that (1) airlines must engage in price discrimination in order to compete and operate efficiently; (2) a modest amount of misleading price advertising may facilitate that practice; (3) thus compliance with the NAAG guidelines might increase the cost of price advertising or reduce the sales generated by the advertisements; (4) as the costs increase and revenues decrease, the airlines might purchase less price advertising; and (5) reduction in price advertising might cause a reduction in price competition, which, in turn, might result in higher airline rates.
\item \textsuperscript{120} Id. at 2059.
\item \textsuperscript{121} U.S. Const. art. IV, § 2.
\end{itemize}
eral law may preempt state law by explicitly prohibiting state regulation in the area or, absent express statutory language, by occupying the entire field, leaving no room for state regulation.\textsuperscript{122} Even where federal law has not completely preempted state regulation in one of these ways, state law is invalid to the extent it actually conflicts with federal law.\textsuperscript{123} With this in mind, the Supreme Court in \textit{Morales} correctly upheld the lower court decisions that the federal ADA will preempt any state laws "relating to rates, routes or services."\textsuperscript{124} Applying the constitutional implications of federal preemption, it is particularly disturbing that air carriers have been given such discretion over regulate rates, routes, or services.\textsuperscript{125} In fact, the initial federal district court decision, \textit{Trans World Airlines, Inc. v. Mattox}\textsuperscript{126}, was the first instance where the marketers - the airlines - have prevailed in a suit to preempt state regulation of deceptive low ball fare advertising.\textsuperscript{127}

Even with the historical case law stating that state deceptive advertising laws are not preempted, it is amazing how the \textit{Morales} Court made its decision. The Court seemingly ignored this line of precedent and instead based its holding on \textit{Shaw v. Delta Air Lines, Inc.}\textsuperscript{128} Although \textit{Shaw} is a statutory interpretation case, it is not a deceptive advertising case. In effect, the majority based its whole preemption argument on its interpretation of the ERISA "relating to" phrase as it did in \textit{Shaw}.

Deceptive trade practice laws are designed with the primary purpose of protecting the trusting as well as the suspicious.\textsuperscript{129} This concept is deeply ingrained in American society. In fact, in 1962 President Kennedy set forth four basic rights to consumers: the right to safety, the right to be informed, the right to choose among a variety of products and services at competitive prices, and the right to be heard.\textsuperscript{130} It is the second basic right, the right to be informed, that is violated in light of the Court's recent \textit{Morales}\textsuperscript{131} decision. The right to be informed includes "the right to be protected against fraudulent, deceitful or misleading information, advertising, labeling and other such practices, and the right to be given the facts necessary to make informed choices."\textsuperscript{132} This concept is con-

\begin{itemize}
  \item \textsuperscript{123} See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152-53 (1982).
  \item \textsuperscript{124} 49 U.S.C. § 1305.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Trans World Airlines, Inc. v. Mattox, 712 F. Supp. 99 (W.D. Tex. 1989).
  \item \textsuperscript{129} Gardner & Sheldon, \textit{supra} note 127, at 253.
  \item \textsuperscript{130} \textit{Id.} at 254.
  \item \textsuperscript{131} Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992).
  \item \textsuperscript{132} Gardner & Sheldon, \textit{supra} note 127, at 254.
\end{itemize}
firmed repeatedly in the deceptive trade practice laws enacted or adopted in various states.133 Morales prohibits the consumer's right to full information by permitting the airlines unfettered discretion in pricing practices.

It is well understood that the protection of consumers from unfair and unlawful advertising practices is an area traditionally regulated by the states under their police powers.134 For an advertiser to be subject to a given jurisdiction's law, the advertisement must have appeared within that jurisdiction. Once this occurs, the advertiser is subject to the local jurisdiction's laws.135 Clearly, airlines meet this criteria given that most airlines advertise in the city markets in which they serve.

The majority completely ignores the individual states' focus on curtailing deceptive practices and instead bases its decision on the federal preemption doctrine.136 The rationale is if the states were allowed to initiate laws that were in conflict with and could override federal statutes, federal laws would be virtually meaningless. Constitutionally, this analysis is correct. However, the federal ADA was formulated with the intention of prohibiting states from enforcing any law "relating to rates, routes, or services", but does not address this area itself. Thereby, the airlines are virtually free to advertise as they choose.

The majority erroneously bases its position on a safeguard which may work in theory, but not in practical application. The majority firmly believes that the DOT will use its vested power under section 411137 to police deceptive advertising practices. However, the DOT has traditionally been quite lethargic in carrying out its duties. In fact, there are numerous documented instances to demonstrate the DOT's hands-off approach. For instance, the DOT has maintained an inactive enforcement policy against rebating practices138 and has been reluctant to investigate continued computer reservation system (CRS) vendor abuses.139

In opposition to the majority, the dissent140 discusses what in its opinion were errors made by the majority. First, Justice Stevens correctly identified the ADA preemption language as differing from that of

134. See, e.g., California v. ARC America Corp., 489 U.S. 93, 100 (1989).
138. Bert W. Rein, DOT's Continuing Regulatory Oversight of the Airline Industry, 425 PRAC. L. INST. ORDER No. A4-4193 1 (1987) (noting that rebating is the charging or collecting of a fare or rate less than the carrier's published price for services).
139. Id. at 4.
the ERISA.141 The majority incorrectly disposed of this issue in relying on the "similarity of the language to give ADA's preemption provision a similarly broad reading."142 This error in interpretation was nevertheless harmless, because the actual language of the ADA does state relating to rates, routes or services. Thus, it is this "relating to" phrase which does in fact broadens the statute143 to include advertising practices.144

In a related area, the rationale behind allowing the airlines to initiate advertising of their choice is rooted in their pricing strategy. The airlines typically divide the passenger market into price sensitive and price insensitive consumers.145 The airlines attempt to sell as many seats as possible to insensitive travelers and then fill up the remainder of the seats by selling discounted tickets to the price sensitive consumers.146 In order to keep costs at a minimum, the airlines must be able to place significant restrictions on deeply discounted tickets.147 Restrictions typically include specific dates of travel, non-refundability and advance purchase requirements. Airlines target sensitive buyers generally through radio, television, or print media advertising. In these advertisements the discounted fare is readily apparent with the restrictions either printed so small or not mentioned at all. Thus, the unseasoned traveler may be unpleasantly surprised when it comes time to pay for the perceived great vacation deal.

The Court in Morales argued that if the air carriers are required to place any and all material restrictions on fares148 in their advertisements, this burden would "serve to increase the difficulty of discovering the lowest cost seller...and [reduce] the incentive to price competitively."149 Additionally, the Court stated that where consumers have the benefit of price advertising, prices are often much lower than they would be without advertising.150 Even if this rationale holds true, it is important to weigh

141. Morales, 112 S.Ct at 2054-55 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983)). The Morales majority gives the "relating to" language a broad reading just as in ERISA. Id. at 2037. Although ERISA contains similar, but not identical language, see Shaw, 463 U.S. at 96, the Morales majority easily ignores the language, structure and history of ADA.

142. Morales, 112 S. Ct. at 2055 (Stevens, J., dissenting).

143. Id. at 2037-8; see generally Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).

144. Morales, 112 S. Ct. at 2058 (Stevens, J., dissenting). If the drafters had wanted a narrow reading the statute would have been written as forbidding states to regulate rates, routes or services. See Id. at 2055-2058 (Stevens, J., dissenting).

145. TRANSPORTATION RESEARCH BOARD NATIONAL RESEARCH COUNCIL, SPECIAL REPORT 230, WINDS OF CHANGE: DOMESTIC AIR TRANSPORTATION SINCE DEREGULATION 89 (1991) [hereinafter WINDS].

146. Morales, 112 S. Ct. at 2040.

147. WINDS, supra note 145, at 95.


149. Id.

150. Id.
this aspect against the consumers' right to make an intelligent and in­
formed decision.151 The small burden of having air carriers include a
phrase such as "restrictions may apply" in advertisements and then pro­
viding the public with easy viewing access to these restrictions would be
a substantial improvement. Additionally, travel and reservation agents
should inform consumers that restrictions may apply, and offer an expla­
nation or the opportunity to view the applicable restrictions.

V. CONCLUSION

Since the federal ADA will preempt any state laws "relating to rates,
routes, or services"152 simply because it is a federal statute, it is crucial
that steps then be taken at the federal level to tackle deceptive advertis­ing
problems in the airline industry. Admittedly, it would place an undue
burden on airlines engaged in interstate commerce to require them to
follow deceptive advertising laws of all fifty states. Thus, one possibility
would be to amend the federal ADA to include stricter standards for de­
ceptive advertising practices thereby uniformly decreasing the prevalent
practice. Another possibility would be to narrow the scope of the ADA
somewhat as to exclude advertising practices from its reach; then air­
lines could be subjected to general federal deceptive advertising stat­
utes. Regardless of the method employed, public policy dictates that
consumers be able to make fully informed choices and decisions relating
to rates, routes, or services of the United States airlines.

Flying the Unfriendly Skies: The Effect of Airline Deregulation on Labor Relations

Laurie Schoder*

Table of Contents

I. Introduction .............................................. 106
   A. Air Traffic Control Staffing ............................ 107
   B. Current State of the Airline Industry ............... 108
   C. Significance of the Railway Labor Act ............... 113

II. Mergers ................................................. 114
   A. Application of Labor Protective Provisions .......... 114
   B. Status of Collective Bargaining Agreements .......... 117

III. Bankruptcy .............................................. 119
   A. Rejection of Collective Bargaining Agreements ...... 119
   B. Section 43 of the Airline Deregulation Act .......... 121
   C. Employee Protection in Route Transfers ............... 122
   D. The Importance of Seniority ........................... 123
   E. Age Discrimination Claims ............................. 124

IV. Cabotage ................................................ 125
   A. Anti-Labor Atmosphere .................................. 125
   B. Foreign Ownership and U.S. Military Operations ...... 126

---

* Ms. Schoder is a Juris Doctorate candidate at the University of Denver College of Law. She serves on the staff of the TRANSPORTATION LAW JOURNAL.
I. INTRODUCTION

In the years immediately preceding deregulation of commercial aviation, airline employees enjoyed steadily rising salaries, good working conditions, and job security. Such benefits were due in part to a stable industry, the increasing popularity of air travel, and government regulation.

Rather than simply fostering healthy competition, deregulation has resulted in a lack of profitability and declining customer satisfaction. Deregulation has injured employees and the public interest in a number of ways. Carriers have stumbled into bankruptcy, disavowed labor contracts, hired cheap labor in a market already glutted by layoffs, and slashed fares to generate short-term profits used to buy out and cannibalize other carriers. Such activities, which have an obvious destabilizing effect on the industry and the employees of target carriers, cannot be viewed as consistent with public interest.

George Kourpias, President of the International Association of Machinists (IAM), blames deregulation and bad transportation policy for the loss of 400,000 aviation jobs.1 Kourpias has joined other industry leaders in urging emergency governmental action to address the unemployment problem.

In the last few years, the face of the U.S. airline industry changed remarkably. As 1991 ended, domestic carriers registered some $2 billion in losses,2 and the unemployment rate for pilots stood at 10 percent.3 Pan American Airways and Eastern Airlines, both founded in 1927, were recently liquidated in bankruptcy proceedings.4 Braniff, founded in 1934, was liquidated for the third time.5 Trans World Airlines (TWA), founded in 1928, recently emerged from bankruptcy, as did Continental Airlines, for the second time. Midway Airlines, founded in 1978, and heralded as a triumph of deregulation, was also liquidated due to bankruptcy, and America West is still floundering. The remaining U.S. airlines...

5. Id.
airlines lost a record $4 billion in 1992. Their current debt load is staggering, and stock of the major carriers has been downgraded to junk-bond status.

Since deregulation, many airline employees face stagnant or falling wages, increased work hours, declining benefits, and tenuous job security. Similar complaints are being voiced in the overall American workforce due to a weak economy. Yet many of the problems in the airline industry have been due to cut-throat competition among carriers, which has resulted in mergers, bankruptcies, and increased foreign investment. This section will explore some of the problems in airline labor relations which have arisen since deregulation.

A. AIR TRAFFIC CONTROL STAFFING

In 1981, the Professional Air Traffic Controllers (PATCO) went on strike to protest working conditions. President Reagan’s subsequent termination of 11,500 of the federal employees had a lasting impact on the entire aviation industry. To cope with the loss of the experienced controllers, the Federal Aviation Administration (FAA) imposed scheduling restrictions, which continue today in the form of slot and gate allocation. Unfortunately, the restrictions occurred at a time when carriers were past the point of no return in implementing costly expansion plans. The PATCO strike exacerbated the decline in the industry’s revenue and the downward trend in its collective bargaining agreements.

Although the government has hired and trained 10,000 senior controllers to replace the ones fired as a result of the PATCO strike, the overall experience level of the workforce is less than it was in 1980. Before the strike, 75% of controllers were rated at “full performance level” and were capable of carrying out all required controller functions. Today, only 63% have the requisite skill to perform at that level. Additionally, the traffic handled by controllers has increased from 30 million flights in 1980, to 38.5 million in 1991. Current controllers have complained of worsening work conditions since the labor force was rebuilt following the PATCO strike.

10. Id.
11. Id.
A congressional investigation into aircraft cabin safety and crash survivability, prompted by the USAir-Skywest accident of February 1, 1991, found many problems with the nation's air traffic control system. The House report found inadequacies in controller workforce staffing levels, absence of staffing standards, and an unrealistic expectation of continuous error-free human performance under stressful working conditions. The National Transportation Safety Board (NTSB) blamed the USAir-Skywest accident on improper air traffic control procedures, the FAA's failure to provide adequate policy direction and oversight of its air traffic control facility managers.

Workers hired to replace the striking controllers opted for union representation in 1987. The National Air Traffic Controllers Association (NATCA) has expressed concerns about the impact the DOT's proposed "open skies" agreements with foreign nations will have on an already overburdened air traffic control workforce. Specifically, the controllers' association opposes the wording "open entry on all routes" and "unrestricted capacity and frequency." NATCA contends that trans-oceanic airspace traffic has risen significantly faster than air traffic control oceanic staffing. The FAA planned to hire only 128 controllers in fiscal 1993, and NATCA says it is doubtful any new controllers will be assigned strictly to oceanic control spots.

B. Current State of the Airline Industry

Critics have consistently blamed rising labor costs for U.S. airlines' failure to prosper. In 1991, Transportation Secretary Samuel K. Skinner criticized unions for the rise in labor costs. However, a report prepared by Ernst & Young showed that while airline salaries and benefits doubled between 1980 and 1990, employee compensation actually declined as a percentage of both total operating revenues and expenses. The areas commanding a larger bite of revenues were equipment rental costs, landing fees, advertising, and promotional costs, as well as travel agency commissions. In 1980, labor costs accounted for 37.3% of total operating expenses. By the second quarter of 1992, employee salaries and benefits had fallen to 29.89% of total operating expenses for

---

14. Id.
17. Id.
18. Id.
the major carriers, and only 21.97% for national carriers.\textsuperscript{19} Despite this decline, many carriers, in their struggle to survive, are requesting further wage and benefit concessions from labor.

In October 1992, ailing TWA reached agreement with its three unions for wage and benefits concessions, and announced that $24 million would be cut from non-union and management compensation.\textsuperscript{20} Under the agreement, workers receive a 45% ownership stake in the airline in exchange for employee concessions worth $660 million.\textsuperscript{21} Pilots have been promised a 5% pay raise on the second anniversary of their contract, but only if verifiable cost savings result from specified work rule changes.\textsuperscript{22} TWA emerged from bankruptcy reorganization in November of 1993, but it is still too early to tell if the employee ownership and concessions will make a substantial difference in stemming the carrier’s financial hemorrhaging.

TWA’s pension plan is estimated by the Pension Benefit Guaranty Corporation (PBGC) to be underfunded by $1.2 billion. PBGC is a federal agency created by the Employee Retirement Income Security Act of 1974 to guarantee payment of basic pension benefits earned by American workers and retirees participating in private pension plans. In November 1992, PBGC threatened to go after TWA’s CEO, Carl Icahn’s personal assets outside of TWA if the deficit continued. In response, Icahn tentatively agreed to lend TWA $200 million and guarantee payments to TWA’s pension plan.\textsuperscript{23} Pension underfunding that is not guaranteed exposes workers and retirees to losses if their plans terminate. These potential losses may be reduced since any recoveries made by PBGC for the underfunding are shared with the participants. The PBGC publishes an annual list of the 50 most underfunded plans in order to assist workers, retirees, and creditors in putting more pressure on the companies to better fund their pension plans. Between 1991 and 1992, 11 of the companies that had been on the PBGC list improved their funding levels by higher contributions, investment performance, or mergers with well-funded plans.\textsuperscript{24} TWA is not the only airline that showed up in the PBGC’s top 50 list. While TWA’s actual deposits amount to 85% of

\begin{itemize}
\item \textsuperscript{20} Bankruptcy Court, Machinists Approve New TWA Worker Contracts, Av. Daily, Sept. 11, 1992, at 439.
\item \textsuperscript{21} Adam Bryant, Can Unions Run United Airlines?, N.Y. Times, Dec. 9, 1993, at D1.
\item \textsuperscript{22} PBGC Tries to Prod Icahn on Pension Underfunding, Av. Daily, Sept. 10, 1992, at 433.
\item \textsuperscript{23} Icahn Agrees to Lend TWA $200 Million, Reuters Fin. Report, Nov. 18, 1992, available in LEXIS, Nexis Library, FinRpt File.
\item \textsuperscript{24} Christopher P. Fotos, PBGC, TWA Creditors Reach Pension Fund Agreement, Av. Wk. & Space Tech., Nov. 2, 1992, at 35.
\end{itemize}
its total pension obligation, Northwest has funded 82% of its obligation and United only 79%.\textsuperscript{25}

Last year, Northwest Airlines narrowly avoided bankruptcy when its unions agreed to wage concessions in return for an ownership stake. The troubled carrier lost more than one billion dollars in 1992.\textsuperscript{26} Burdened by an enormous debt load as a result of its $3.65 billion buyout in 1989, Northwest has been pruning its workforce in an attempt to return to profitability. The wage cuts proposed by management were 30% for pilots, 20% for flight attendants, and 18% for mechanics.\textsuperscript{27} Management and union representatives finally agreed to $886 million in employee concessions over the next three years, in return for three seats on Northwest's 15-member board of directors and 37.5% equity interest in the company.\textsuperscript{28}

USAir announced plans to lay off another 2500 workers by mid-1994, in addition to the 7000 employees terminated since 1990.\textsuperscript{29} The airline indicated that further cost-cutting measures were necessary despite previous worker concessions slated to save the carrier $60 million in 1993. The prior wage cuts and work-rule concessions were negotiated with the International Association of Machinists and Aerospace Workers following a five-day walkout by union members.\textsuperscript{30}

Delta Airlines, reversing a no-furlough policy in existence for 36 years, began furloughing an estimated 600 of its 9400 pilots.\textsuperscript{31} Senior Vice President Thomas J. Roeck blamed "uneconomic fare programs" for damaging revenue. Roeck stated that the additional traffic generated by the fares had fallen "significantly short" of making up for lower fares.\textsuperscript{32} The pilots, Delta's only unionized labor force, agreed in 1991 to a 16-month extension of their current contract and a two percent raise, well below former Secretary Skinner's critical prediction of ten percent annual raises for flight crews.\textsuperscript{33}

United Airlines, American Airlines, and Northwest Airlines previously instituted two-tier wage scales for flight personnel in hopes of reducing overall labor costs. The plan has new hires starting at the lower B scale,

\textsuperscript{25} Id.
\textsuperscript{26} David Craig, Critical Week for Northwest, USA Today, June 28, 1993, at 1B.
\textsuperscript{27} James Ott, Northwest To Union: Bankruptcy Possible, Av. Wk. & Space Tech., June 21, 1993, at 31.
\textsuperscript{29} Id.
\textsuperscript{31} Delta Lays Off 136 Pilots in First Wave of Furloughs, Av. Daily, June 2, 1993, at 342.
\textsuperscript{32} Christopher P. Fotos, Delta Plans Layoff, Other Cuts Following $506 Million Loss, Av. Wk. & Space Tech., Aug. 3, 1992, at 33.
\textsuperscript{33} Id.
then merging to the higher A scale after five years. Management apparently hopes for a high turnover rate in those first five years in order to garner some savings.

In 1993, American Airlines slashed approximately 1700 jobs in order to cut costs.\textsuperscript{34} Despite such measures, American’s Chairman Robert Crandall announced that an additional 5000 workers would be terminated by the end of 1994.\textsuperscript{35} American’s 21,000 flight attendants, in response to Crandall’s call for further work-rule and wage concessions, walked off their jobs during the busy Thanksgiving holiday. The five-day dispute, the shortest U.S. airline strike since deregulation, was brought to an end by President Clinton’s recommendation that both sides agree to binding arbitration.\textsuperscript{36}

Meanwhile, United Airlines has implemented a sweeping cost reduction program designed to save $400 million a year by eliminating 2800 jobs and grounding 40 aircraft.\textsuperscript{37} United lost $1.5 billion between 1990 and 1992.\textsuperscript{38} As a result, shareholders began putting pressure on Chairman Stephen Wolf to make some changes. His response was a proposal to dismantle the airline into several regional carriers staffed with non-union labor, or to give employees an ownership stake in return for sweeping concessions.\textsuperscript{39} Pilots and mechanics reacted by offering to take significant pay and benefit cuts in order to gain some corporate leverage. The workers agreed to take a 15.7% pay cut and lose 8% of their pension benefits for the next five years. In exchange, the company agreed to invest 53% to 63% of its stock in a special employee pension fund and give workers three seats on the 12-member board of directors.\textsuperscript{40} The good news for the employee/owners was that they would be given “supermajority” voting rights on key issues such as acquisitions, mergers, and the sale of assets.\textsuperscript{41} The bad news was that employee ownership would be allowed to decline over five years as retiring workers are issued pension stock.\textsuperscript{42} Once the employee ownership stake falls below 50%, workers may find themselves right back where they started.

\textsuperscript{34} Dan Reed, American Speeds Up Cutbacks, DENVER POST, Sept. 15, 1993, at C1.
\textsuperscript{35} Id.
\textsuperscript{36} Airline Strikes, USA TODAY, Dec. 2, 1993, at 1B.
\textsuperscript{39} Id.
\textsuperscript{40} Del Jones and Julie Schmit, Airline Employees Taking Over, USA TODAY, Dec. 20, 1993, at 1B.
\textsuperscript{41} Acohido, supra note 38, at D1.
\textsuperscript{42} Id.
Many carriers have adopted profit sharing and/or employee ownership options as a means of enticing workers into granting wage or benefit concessions. Previously, such plans were generally initiated by financially unstable carriers, and few workers actually benefitted. At America West, employees were induced to work for less than their industry counterparts based on the assurance that their short-term sacrifices would reap long-term profits. New hires earning only $12,600 a year were required to purchase company stock with 20% of their salary. America West employees owned about 30% of the company. Now the airline is in bankruptcy and employee-owned stock is worthless. However, the use of employee stock ownership plans (ESOP) appear to be gaining momentum. Some type of employee ownership is now in place at TWA, Northwest, and Southwest Airlines. If approved by shareholders, United Airlines will boast the largest ESOP in the United States.

The profit-sharing plan at Southwest Airlines is one of the employees' most lucrative benefits. Southwest has managed to consistently show a profit since 1973. This is due in no small measure to its unique approach under which it shuns the use of hub and spoke routes, operates no computer reservations system, serves no meals, and treats its employees like an extended family. The employee profit sharing plan presently contains about $121 million which employees cannot collect until they leave Southwest. Even more unique is the fact that despite its low-cost operation, Southwest is 84% unionized. Southwest's exemplary labor-management relations are demonstrated by the fact that the carrier's employee turnover rate in 1990 was only 7.8%. The carrier describes its pay structure as "somewhere in the middle of the pack," with B-737 pilot salaries starting around $35,000 a year and topping out at above $100,000. At $43,150, the maximum pay afforded Southwest flight attendants is between $6000 and $24,000 more than any other major U.S. carrier. Labor costs at Southwest are approximately 31% of its total operating expenses, compared with a mere 20% at Continental Air-

43. McKelvey, supra note 7, at 77-78.
44. Former America West Flight Attendant Glad to be Represented by AFA at Hawaiian, FLIGHTLOG, Oct./Nov. 1992, at 5.
45. Jones & Schmit, supra note 40, at 1B.
46. Id.
47. Henderson, Southwest Airlines Company Profile, AIR TRANSPORT WORLD, July 1991, at 32.
49. Henderson, supra note 47, at 33.
Southwest would appear to be a perfect example of how an airline can be profitable without demanding concessions from labor.

Deregulation initially spurred a flurry of activity among low-cost, no-frills airlines. The new carriers lowered their operating costs, in part, by flying used aircraft and hiring predominantly non-union employees. In response, major carriers reduced fares to the point of unprofitability. Unrealistically low fares, combined with new management challenges brought on by deregulation, eventually forced many carriers to bankruptcy or merger with a financially stronger carrier.

C. SIGNIFICANCE OF THE RAILWAY LABOR ACT

Before examining the current effects of mergers and bankruptcies on labor, one needs to understand the relationship between management and labor prior to deregulation.

Historically, airlines have been heavily unionized. Since Congress extended the provisions of the Railway Labor Act (RLA) in 1936 to cover employees of airlines engaged in interstate commerce, many of the same unions active in the railroad industry sought to organize airline employees. Airlines have a decentralized structure unlike any other major U.S. labor force, and seniority governs virtually every facet of the employees' wages and working conditions. 52

The RLA embraced the belief that both parties should try to come to agreement without resorting to economic warfare and without the threat of binding arbitration. 53 Congress was interested in maintaining an undisrupted transportation system. It hoped to achieve this through the peaceful settlement of labor disputes. 54 The RLA was basically intended to aid in settling "disputes concerning rates of pay, rules, or working conditions," as well as "disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." 55 The RLA imposes a duty "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes whether arising out of the application of agreements or otherwise." 56

Under the RLA, only one form of representation is allowed, and that is by "craft" or occupational group. Individual crafts are then recognized as bargaining units for which the representation election is to be held.

54. Id.
55. Id. § 151(a)(4), (5).
56. Id. § 152.
The union that prevails is then known as the exclusive "bargaining representative."57 A new wrinkle that has surfaced since deregulation is the emergence of non-union airlines which cross-utilize their employees. In essence, employees in this situation do not belong to only one class. For example, airlines such as America West originally cross-trained their employees to act as reservationists, gate agents, ramp assistants, and flight attendants.

This novel approach would appear on the surface to be a useful way of managing the fluctuating demands on an airline's workforce; but where do these employees fit in under the RLA? If they desire representation, must they choose a single craft with which to affiliate? Under U.S. labor law, workers must choose between an independent union or no workplace representation at all.58 Therefore, any kind of employee association which attempts to represent its unique cross-utilization abilities is not going to be recognized as a bargaining representative under the RLA. America West recently removed that obstacle when it abandoned the practice of cross-utilization, and required each employee to choose one craft in which to specialize.

II. MERGERS

Since the RLA demands exclusivity or one craft - one representative, what happens when two airlines merge? Before deregulation, the Civil Aeronautics Board was charged with approving mergers while at the same time assuring fair and equitable treatment of all employees affected by the merger.59

A. APPLICATION OF LABOR PROTECTIVE PROVISIONS

The Civil Aeronautics Board (CAB) adopted the Labor Protection Provisions (LPPs) that had been established for the railroad industry. These provisions provided guidance regarding the duty of both carriers and employees to settle disputes; the employees' right to organize and bargain collectively through representatives of their own choosing; prohibition against changes in pay, rules, or working conditions contrary to agreements; and a prohibition against coercing an employee to join or not join a labor union.60 Emphasizing the unique nature of the airline industry, the CAB went beyond the railroad standards. The LPPs expanded coverage to include seniority integration, supplemental pay to

57. THOMS & DOOLEY, supra note 52, at 24.
58. Id. at 25.
employees forced into lower paying jobs, dismissal allowances, retention of fringe benefits for dismissed employees, payment of moving expenses, and binding arbitration of disputes between the airline and the employees about these provisions.61

The Board's policy allowed workers affected by a merger to avail themselves of the benefits provided by the CAB in the form of LPPs or severance benefits as provided by a collective bargaining agreement.62 Under no circumstances were the employees to receive less than the amount they were entitled to under their respective labor contracts.

Before the enactment of the Airline Deregulation Act of 1978, the CAB routinely imposed LPPs as a condition of its approval of mergers and acquisitions under section 408 of the Federal Aviation Act, but less routinely as a condition to its approval of route transfers. When the Civil Aeronautics Board Sunset Act was passed in 1984, the CAB's authority to rule on airline mergers was transferred to the U.S. Department of Transportation (DOT). DOT took the position that LPPs would never be imposed as a condition of merger approval.63 After deregulation, the DOT stated that it would only impose LPPs if: (1) they are necessary to prevent labor strife that would disrupt the national air transportation system, or (2) special circumstances of an acquisition or merger show that LPPs are necessary to encourage fair wages and equitable conditions.64

DOT intervention for either of these conditions has never occurred. Even the labor strike at Eastern, at the time one of the nation's major carriers, was not determined by the Department to constitute a threat to the U.S. transportation system.65 With regard to the second condition, the DOT required labor to demonstrate that inequity in working conditions and wages exist, but, at the same time, allowed the airline to argue that compliance would seriously jeopardize financial and operational concerns.66 Thus, the DOT would refuse to implement LPPs even upon a showing of labor inequity if the carrier could prove that it would be unprofitable to rectify the situation. Rather than become involved in such disputes, the DOT instead urged the affected parties to engage in collective bargaining.

On January 1, 1989, Section 408 of the FAA, which gave the Department of Transportation authority to rule on airline mergers and com-

62. Walls, supra note 59, at 851.
63. McKELVEY, supra note 7, at 144-50.
65. Id. at 420.
66. Id.
petition issues, was deleted. Such authority was subsequently transferred to the Department of Justice (DOJ). In keeping with the DOT's policy that the public interest is best served by relying upon market forces without unnecessary government regulation, the DOJ's primary focus now is on antitrust implications of airline mergers. 67 Unlike the DOT, which could block a merger with an administrative fiat, the DOJ can only challenge the transaction by seeking an injunction in federal court. 68

When DOJ analyzes a merger between two competing companies, one factor it looks at is the Herfindahl-Hirschman Index (HHI), which is used to measure market concentration before and after a merger. This is done by measuring an airline's share of enplanements against total industry enplanements, regardless of where it operates and who its competitors are. It is immaterial that an airline dominates a particular hub, as long as there are other airlines which could theoretically compete with it. 69 If the HHI comes up too high, indicating a heavy market concentration, DOJ will not recommend the merger be approved without mitigating circumstances. However, according to Margaret Guerin-Calvert, a former Justice Department economist, "unless there is a case of clearcut, overlapping hubs and there are major barriers to entry for a replacement of the merged carrier, [the] DOJ won't intervene." 70

In February 1991, the DOJ did exercise its authority by threatening to enjoin United Airlines' proposed acquisition of bankrupt Eastern Airlines assets at Washington's National Airport. 71 The DOJ said the sale to United would violate antitrust law by lessening competition between Washington and other cities. At the time of the proposed acquisition, United operated 3000 of the 4400 monthly domestic flights at Washington's Dulles International Airport. 72 At the very least, this action demonstrates that the DOJ is willing to oppose some mergers where the DOT was not. The DOJ, however, has no authority to examine the interests of affected employees or invoke labor protection provisions.

67. Walls, supra note 59, at 857.
69. Perry Flint, Too Many Mergers, Too Little Competition; Airline Industry May be Over-concentrated, AIR TRANSPORT WORLD, Jan. 1988, at 81.
72. Id.
B. STATUS OF COLLECTIVE BARGAINING AGREEMENTS

When airlines merge, if disputes arise as to the identity and certification of a collective bargaining representative, such disputes fall within the exclusive jurisdiction of the National Mediation Board (NMB).\textsuperscript{73} NMB policy specifies that any union representing employees of the acquired carrier is decertified as of the merger date.\textsuperscript{74} Deregulation has spawned fierce competition not only among airlines, but among employee groups as well. The ensuing struggle for employee representation and determination of seniority between the merging groups has frequently led to animosity and strained employee relations. Some examples of mergers with significant labor relations difficulties include Northwest-Republic, Texas Air-Eastern, Delta-Western, and People Express-Frontier.

In the Delta-Western merger, Delta assured the DOT that it would offer Western's employees labor protection no less favorable than what they would receive if the DOT had imposed LPPs.\textsuperscript{75} At the time of merger, Western's flight attendants were represented by the Association of Flight Attendants (AFA) while Delta's were non-union. In return for prior bargaining concessions by AFA, Western had agreed to a successorship clause whereby any successor or parent company was to be bound by the terms of the earlier contract.\textsuperscript{76} However, Western's merger agreement with Delta did not claim to bind Delta to Western's existing collective bargaining agreement.\textsuperscript{77} Delta's management was understandably reluctant to recognize the existence of a valid Western contract for fear of agitating Delta's non-union flight attendants or giving them ideas about organizing. Delta finally imposed its own "fair and equitable" solution which was unacceptable to the Western flight attendants.\textsuperscript{78} The matter eventually resulted in litigation, which will be discussed below.

Seniority integration and wage scales among Western and Delta pilots should have been simpler to reconcile, since both groups were represented by the Air Line Pilots Association (ALPA). Even so, the ensuing disputes dragged on for so long that Delta sought to impose deadlines on the groups in an attempt to resolve the matter. Ultimately, this too ended up in litigation.\textsuperscript{79}

The industry is replete with employee horror stories regarding mergers. The usual posture of the dominant carrier is to characterize its role

\begin{thebibliography}{9}
\bibitem{note74} 4 Walls, \textit{supra} note 59, at 861.
\bibitem{note75} McKELVEY, \textit{supra} note 7, at 151-60.
\bibitem{note76} Association of Flight Attendants v. Delta Air lines, 879 F.2d 906 (D.C. Cir. 1989).
\bibitem{note77} McKELVEY, \textit{supra} note 7, at 151-54.
\bibitem{note78} \textit{Id.}
\bibitem{note79} \textit{Id.}
\end{thebibliography}
akin to that of a white knight, rescuing a failing airline, and in the process providing jobs for workers who would otherwise eventually find themselves standing in unemployment lines. The acquiring carrier is generally stronger and more likely to impose its present labor relations style on the weaker carrier. With regard to integration of seniority lists, management of the acquiring carrier contends that it must protect the interests of its present workforce. In fact, the acquiring carrier is obligated to honor its premerger contracts, if any, with its own employees.

So who protects the interests of the acquired employees? The authority to impose labor protection provisions was removed from the DOT and never conferred on the DOJ. Even if the acquiring airline agrees to some type of seniority integration, what happens when a single-wage scale carrier merges with a two-tier wage scale carrier? The government believes that all of these problems can be adequately resolved through the collective bargaining process and can even be addressed premerger through the use of successorship clauses.

Generally, successorship clauses fail with respect to representation protection. This is because of the NMB’s position that mergers eliminate the acquired carrier’s status as a separate operating entity, resulting in decertification of that union since it no longer represent a majority of their craft in the merged carrier.

Although the courts have refused to find that an existing collective bargaining agreement survives a merger, a recent decision holds that an independent union may be entitled to damages if the acquiring carrier breaches a successorship clause. In Association of Flight Attendants v. Delta Air Lines, the union conceded that the NMB’s decertification order precluded its right to represent Delta employees after the merger date. The union claimed, however, and the D.C. Circuit Court agreed, that Delta should be ordered to arbitration regarding Western’s alleged breach of its successorship clause.

The question remains as to whether Delta is now “answerable in damages” for Western’s failure to honor its contract. The court declined to hold that a bargained-for successorship clause creates no legal rights or duties whatsoever. “Whether the successorship clause in this case creates any legal obligations is, of course, a matter within the province of the arbitrator.” The matter was remanded to the district court for an order to arbitrate.

81. Id. at 909.
82. Id.
83. Id. at 917.
84. Id.
The federal court's ruling signals a small victory for employee groups whose representation is lost due to merger. The final outcome still depends upon the result of arbitration. The union could eventually receive a damage award, or the carrier may prevail in its assertion that the successorship clause was not intended to operate as a merger. Whatever the result, it will be a long time in coming. The Western-Delta merger was initiated in 1986. It has taken five years just to get that dispute to arbitration. Surely there is a better way. The approach taken by the DOT forced airlines contemplating mergers, and their respective employee groups, to engage in what routinely became protracted, hostile negotiations, typically ending in litigation.

Competition and consolidation have been shown to be the major factors responsible for the increase in legal expenses in the labor field. Former Republic employees filed a class action suit against Northwest claiming they were denied their benefits under Republic's ESOP. As discussed previously, Western's pilots were dissatisfied with their integration into the Delta pilot group and brought suit against both Delta and ALPA. Pilots from TWA and Ozark sued TWA and ALPA. Merging seniority lists rarely satisfies anyone, thus — in the absence of government imposed integration or binding arbitration — lengthy, expensive lawsuits will undoubtedly continue.

III. BANKRUPTCY

When a carrier files for bankruptcy, it often cuts fares and improves service in an attempt to draw more passengers. At the same time, management usually reduces the crew compliment to the minimum and requests employee wage and benefit concessions which workers feel compelled to concede in a frequently futile attempt to save their careers.

A. REJECTION OF COLLECTIVE BARGAINING AGREEMENTS

In the past, collective bargaining agreements were treated like any other executory contract, and were subject to rejection by an employer who filed for reorganization under Chapter 11 of the Bankruptcy Code. Contracts under the RLA, however, were exempted from automatic rejection by Section 1167 of the Bankruptcy Code which provides: "Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor.

86. Id.
established by a collective bargaining agreement that is subject to the Railway Labor Act except in accordance with section 6 of such Act.88

Section 6 of the RLA sets forth the procedural rules for changing employee pay rates or working conditions. Carriers must give at least thirty day's written notice of any intended changes, and arrange a conference with employee representatives to discuss such changes.89 The RLA expressly provides that changes in pay rates, rules, and working conditions agreed upon between airlines and their employees will be implemented only in the manner prescribed in the agreements themselves or pursuant to procedures specifically set forth in the RLA.90

In 1983, Continental Airlines filed for Chapter 11 protection. It announced the termination of two-thirds of its unionized employees (unilaterally abrogating its union contracts), implemented wage and benefit cuts of 50%, and dissolved seniority.91 In response, Congress enacted section 1113 of the Bankruptcy Code on July 10, 1984.92 Section 1113 provides an expedited form of collective bargaining specifically designed to insure that employers cannot use Chapter 11 solely to rid themselves of a union, but to allow modifications that are necessary for the company's survival.93

Section 1113 imposes an affirmative duty on the employer to bargain with the union prior to modification or rejection of its contract. The bankruptcy court in In Re American Provision Co. delineated nine requirements to be met by an employer seeking to reject a labor contract.94 The nine tests are:
1) the debtor in possession must make a proposal to the union to modify the collective bargaining agreement;
2) the proposal must be based on the most complete and reliable information available at the time of the proposal;
3) the proposed modifications must be necessary to permit the reorganization of the debtor;
4) the proposed modifications must assure that all the creditors, the debtor and all of the affected parties are treated fairly and equitably;
5) the debtor must provide to the union such relevant information as is necessary to evaluate the proposal;
6) between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the union;

---

90. Id. § 152.
91. Walls, supra note 59, at 883.
93. Walls, supra note 59, at 883.
7) at the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement;
8) the union must have refused to accept the proposal without good cause;
9) the balance of the equities must clearly favor rejection of the collective bargaining agreement.\textsuperscript{95}

The language of Section 1113(b)(1)(A) requires the employer to submit a proposal "which provides for those necessary modifications in the employees' benefits and protection that are necessary to permit the reorganization of the debtor."\textsuperscript{96}

Section 1113 appears to demonstrate a sincere congressional effort to provide some protection for airline unions whose companies reorganize through bankruptcy. At least wages and benefits can no longer be abolished arbitrarily and instantaneously upon the filing of a petition. However, the extensive bargaining which ordinarily precedes modification of an airline labor contract under the RLA may result in the airline asserting that continued maintenance of its union agreements is overly burdensome. Under the fourth provision of section 1113, an employer might benefit if it can convince the bankruptcy court that its financial plight is genuine.\textsuperscript{97}

B. \textbf{SECTION 43 OF THE AIRLINE DEREGULATION ACT}

Aside from collective bargaining agreements, there are many other labor issues raised when an airline is forced to file a petition for bankruptcy. When a company goes out of business due to bankruptcy, the only government assistance available to its workers is unemployment compensation. When airline deregulation began in 1978, the federal government apparently anticipated that deregulation would inevitably have a detrimental effect on the industry's vast labor force. Congress enacted section 43 of the Airline Deregulation Act (ADA) based, in part, on such concerns. Section 43 was designed to provide certain benefits to dislocated airline employees for a period of up to ten years. Those benefits included monthly assistance payments to employees deprived of employment or adversely affected with respect to their compensation, assistance for relocation, and the duty of other carriers to hire qualified employees dislocated due to bankruptcy, merger, or other staff reduction.

In retrospect, section 43 was probably added to the ADA only to make it more politically palatable and to make its passage more likely. In reality, the assistance payments to be disbursed by the Secretary of La-

\textsuperscript{95} Id. at 909.
\textsuperscript{97} Walls, \textit{supra} note 59, at 888-90.
bor were never funded, and qualifying employees dislocated as a result of deregulation have yet to receive any monetary benefit required under section 43. The only portion of section 43 that employees were able to take advantage of, if they were aware of its existence, was the duty imposed on other carriers to give preferential hiring treatment to dislocated employees. Since the provisions of this section expired in 1988, any employees currently dislocated due to bankruptcy must fend for themselves.

C. Employee Protection in Route Transfers

On July 29, 1991, Senator Bob Graham (D-Fla.) introduced Senate Bill 1565 which proposed partially to revive section 43. Senate Bill 1565 was designed to amend the FAA Act of 1958 to ensure fair treatment of employees in route transfers. The bill proposed that the ten year limit on the duty to hire provision be extended to seventeen years. It also proposed that if a certificate transfer was approved, the carrier to which the authority transfer was granted was required to hire in each class or craft no less than the number of employees found by the Secretary as necessary to operate the route at the time of the transfer's approval. Such employees were to be hired from the carrier transferring the certificate in order of seniority.

The proposed legislation was assailed by major airlines and the DOT as likely to impose unnecessary costs on airlines seeking to acquire international routes. According to James Callison, Vice President of Corporate Affairs for Delta Air Lines, the DOT would be required to engage in an “extensive, time-consuming, and complicated regulatory proceeding to determine the number of employees by class and craft that must be transferred as part of a final decision.” Callison said that if the proposed legislation had been law before Delta concluded its agreement with Pan Am, it would have most likely prevented the carriers from reaching agreement in a timely manner. As a result, employee prospects of being hired by an acquiring airline would be reduced.

In light of such opposition, the odds that the original bill would pass were extremely remote. Therefore, in an attempt to salvage some of the bill, it was modified by Senator John Danforth (R-Mo.) and proposed as an amendment to the fiscal 1993 DOT Appropriations Bill H.R. 5518.

The amendment required that DOT may approve the transfer of foreign route certification only after finding that: (1) the employment plan required to be submitted by the acquiring carrier does not discriminate,

99. Id.
100. Id.
(2) reasonable attempts have been made by the acquiring carriers to provided employment opportunities for workers of the transferring carrier, and (3) the employment plan would not adversely affect the viability of the transaction. The provision was dropped from the appropriations bill in an attempt to bring the spending levels within President Bush's $37 billion budget for transportation and avoid a veto.

D. The Importance of Seniority

The airline industry is peculiar with regard to its employee wages and benefits. Dislocated employees generally cannot take advantage of their experience and tenure when hiring on with another airline. Wages, hours, benefits are all based on seniority; but the only seniority that counts is seniority with that particular carrier. If crew members or mechanics want to relocate voluntarily to another airline, they will usually start at the lowest entry level no matter how much expertise they have, and work their way up the corporate ladder the same as someone with no previous experience.

When a carrier is forced to shut down due to bankruptcy, employees not only lose a steady paycheck, they lose all the seniority they have worked years to achieve. Veteran employees lose more than a job, they lose a career. This is poignantly illustrated by the final demise of once great Pan American Airways. Many of Pan Am's pilots and flight attendants were long-time veterans with fifteen, twenty, and sometimes forty years of experience. The impact on them is overwhelming. They cannot find jobs to replace their salary, their pensions are in jeopardy, and they cannot afford health insurance.

Pan Am's pilot union has asked the DOT to impose LPPs on United in connection with its purchase of Pan Am's Latin American route system. The union, a branch of ALPA, successfully negotiated an agreement with United's pilots that would allow 763 former Pan Am flight deck personnel to transfer to United. The highly senior Pan Am pilots would be placed at the bottom of United's seniority list. Further, they would receive only 50% of what they were earning before Pan Am went under.

Pilots may fare better as a result of their specialized skills and a projected shortage of pilots due to military cutbacks. In particular, pilots of wide body jets with significant over-water experience should have little trouble finding employment if they are willing to relocate to foreign-based

101. Id.
104. Id.
carriers. But they must start over at the bottom of the seniority ladder with respect to wages and working conditions. While they fare better than other airline employees in some respects, pilots still may encounter significant adversity as a result of dislocation from their jobs. One major problem experienced by many pilots in relocate is age discrimination.

E. AGE DISCRIMINATION CLAIMS

In 1967, Congress enacted the Age Discrimination Employment Act (ADEA) “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment.”105 To achieve these goals, the ADEA, among other things, makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s age.”106 However, the ADEA provides an exception “where age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business.”107 Pilots have become accustomed to being forced into retirement at age sixty in compliance with Federal Aviation Administration (FAA) requirements.

But what of the experienced forty-five-year-old pilot who finds himself unemployed due to bankruptcy and attempts to relocate to another airline? According to a decision by the federal court, he or she is not likely to be hired by American. In Murname v. American Airlines, the District of Columbia Court of Appeals upheld American’s employment policy of not hiring pilots over the age of forty.108 American had an “up or out” policy whereby the pilot must demonstrate the ability to move up to a captain’s chair or be fired. The average time required to progress from flight engineer to pilot was sixteen years. American argued that persons over the age of forty would not get the experience necessary to operate its equipment safely. The court accepted this argument, finding the maximum age restriction to be a BFOQ “reasonably necessary to the normal operation” of the airline.109

The pilot in question might have a chance of being hired at United, however. In Smallwood v. United Airlines, also decided in 1981, the Fourth Circuit held that United did not show that its age restriction was a

106. Id. § 623(a)(1).
107. Id. § 623(f)(1).
109. Id.
BFOQ.\textsuperscript{110} Smallwood was forty years old and had ten years of experience in commercial jet operation when he applied for a flight officer position with United. United rejected his application on the grounds that it only considered pilots thirty-five years or younger. The court ruled that United’s age restriction was not a BFOQ.\textsuperscript{111} The issue of valid maximum age requirements appears to remain an open question.

IV. CABOTAGE

A new worry for U.S. airline employees is their status with respect to foreign ownership of their company. Foreign investment is already present in a number of U.S. carriers and is bound to increase as the world moves toward a more global economy. Workers concerned about the impact of an aggressive “open skies” policy with other countries have asked the DOT to take certain steps, before formal open skies negotiations begin, to prevent U.S. jobs from being lost to foreign workers.\textsuperscript{112} Specifically, workers have pointed out that U.S. flag carriers are required to adhere to more stringent rules than most European flag carriers. Therefore, the employees argue, the U.S. should insist that any negotiations include identical requirements for all U.S. and foreign employees. Labor has also suggested that all agreements should be conditioned on some form of legal reciprocity for the employment of non-resident foreign nationals by each carrier whose country is a party to the negotiations. This suggestion is based on the fact that it is often legally impossible for U.S. citizens to obtain employment as flight attendants on foreign flag carriers even though foreign nationals residing outside the U.S. routinely obtain employment as flight attendants on U.S. flag carriers.\textsuperscript{113}

With increased globalization of airlines, labor unions face a daunting task in merely maintaining the status quo for its rank and file. Increasingly, troubled carriers must choose between bankruptcy or acquisition by an international rival. The USAir-British Airways (BA) merger is but one example.

A. ANTI-LABOR ATMOSPHERE

Sir Colin Marshall, BA’s chief executive, has made clear his intention of operating the two carriers as one entity under British ownership. If he has his way, USAir employees should prepare for uneasy labor relations. U.K. airline employees currently endure an anti-labor corporate

\textsuperscript{110} Smallwood v. United Airlines, 661 F.2d 303 (4th Cir. 1981).
\textsuperscript{111} Id.
\textsuperscript{112} Airline Job Safeguards Wanted In ‘Open Skies’ Negotiations, Av. DAILY, May 20, 1992, at 313.
\textsuperscript{113} Id.
and government environment. Even if a union has the support of 100% of the employees in a particular class or craft, there is no obligation for any U.K. employer to recognize that union for purposes of collective bargaining.  

Additionally, British Airways has developed a union-busting technique which would make Frank Lorenzo proud. BA creates subsidiary companies to directly compete with its own mainline operation. In Germany, BA created a "new airline" called Deutsche BA. Deutsche BA was created without any input from British Airways U.K. unions, and BA employees in Berlin lost their jobs as a result. The new airline was established as a non-union, low-cost carrier which will compete with the British Airways mainline operation in the rest of Europe, according to George Ryde, a spokesman for the Transport and General Workers Union. BA has set up similar non-union regional carriers within the U.K., in a move that has helped make it the world's most profitable carrier, arguably at the expense of its workers.

In October 1992, BA acquired financially troubled Dan-Air. BA plans to restructure its acquisition into a new low-cost, short-haul subsidiary based out of London's Gatwick Airport. As a result, 1600 of the nearly 2000 Dan-Air employees will lose their jobs. The remaining staff will be offered jobs with the new carrier, but at substantially lower salaries than they had at Dan-Air.

In addition to union-busting tactics by foreign owners, labor must also face the threat of foreign investment by airlines in countries that can provide cheaper labor such as Korean or Singapore Airlines.

B. FOREIGN OWNERSHIP AND U.S. MILITARY OPERATIONS

Of even greater concern is how foreign investment will affect the Civil Reserve Air Fleet (CRAF). The Pentagon relied on twenty-two U.S. flag carriers to fly troops and equipment during the Persian Gulf war. Six foreign carriers were utilized for cargo transport only. For purposes of national security, only crew members who were U.S. citizens were allowed to fly these missions. If the military is concerned about the citizenship of crew members flying its troops, what about the citizenship of the carrier itself? With the rising proliferation of foreign investment, will there

115. Id.
117. Id.
be a sufficient number of domestically owned airlines to shoulder the burden?

Although the efforts of the civilian fleet were most obvious during the war, domestic commercial carriers routinely carry U.S. troops under the auspices of the Military Airlift Command (MAC). Not only must all crew members be U.S. citizens, some military contracts with the civilian carriers even require that all airline personnel involved with the operation of such flights receive secret military clearance. Cutbacks in military spending are expected to create increased rather than diminished demand for the reserve fleet in certain areas, particularly with regard to smaller aircraft.

V. SAFETY

While the number of accidents and fatalities has decreased in the last two years, everyone involved in the industry needs to be increasingly vigilant with regard to safety. It is estimated that by the year 2000, almost half the planes in the U.S. fleet will be over twenty years old.

A. SUBSTANCE AND ALCOHOL TESTING OF AIRLINE EMPLOYEES

In 1988, the FAA instituted mandatory random drug testing. The regulations adopted by the FAA require employee drug testing to be performed by both scheduled and unscheduled commercial air carriers. Employees required to be tested include pilots, flight attendants, dispatchers, maintenance personal, security or screening personnel, and air traffic controllers. The regulations require pre-employment testing, post-accident testing, testing based on reasonable cause, and testing after return to duty following a leave of absence. Substances to be tested for are marijuana, cocaine, opiates, PCP, and amphetamines. Random drug testing is also required and must be performed on a minimum of 50% of the workforce per year.

Employees challenged the regulations on the ground that the random testing constitutes an unreasonable search in violation of the Fourth Amendment.

119. A MAC contract granted to American Trans Air to operate flights between Nellis and Tonopah Air Force bases required all civilian flight personnel to pass background checks and receive secret clearance.


123. Id.

124. Id.
Amendment. The regulations were found to be reasonable by the Ninth Circuit in 1990.125

By October 28, 1992, DOT was to have established a mandatory alcohol-testing program for transportation employees.126 Random alcohol testing was mandated by the Omnibus Transportation Employment Act of 1991. The DOT has decided that the best method of detection would be breath testing. Because of the lengthy implementation process, DOT was granted an extension.

Although labor challenged the constitutionality of drug testing, the impending implementation of alcohol testing has annoyed those in management as well. With many carriers fighting to control costs, the last thing management wants to see is additional labor related operational costs such as those associated with drug and alcohol testing. Random testing of flight crews at the 50% level currently costs carriers $1 million a week.127

Airline executives have asked the FAA to reduce the random drug testing from a 50% sampling to 10%, which they estimate would save $90 million a year.128 This would appear to be more than adequate since less than 1% of all randomly tested airline employees in 1992 showed a positive result.129 Thus far, the 50% sampling remains the standard, despite the fact that the FAA has decreased the random drug testing of its own employees to 25%. The upcoming alcohol testing program is also expected to involve a 50% annual sampling.

Labor relations expert Jerrold Glass said the random alcohol program is going to be extremely costly.130 Glass estimated that random alcohol testing for flight crews will most likely be pre-performance testing while testing for drug abuse is usually post-performance. That means that a flight crew member normally scheduled to report one hour before flight time will be required to arrive at least thirty minutes earlier in order to undergo the alcohol test. If flight crews demand this additional time be considered duty time, the economic impact is obvious. Glass said "the

costs of alcohol testing could dwarf that of drug testing." The Air Transport Association (ATA), which conducted a cost analysis, said that random alcohol testing could cost airlines $3.6 billion over the next five years.

Flight attendants are considered by the FAA to be safety employees for purposes of alcohol consumption prohibitions, and are therefore subject to drug testing, which DOT requires only of safety-related employees. Although Congress has not hesitated to adopt regulations concerning drug and alcohol use which it feels directly affect the safety of the traveling public, it has consistently failed to enact duty time limits for flight attendants.

B. Flight Attendant Duty Time Limits

Fatigue among airline employees is a serious safety problem. To prevent accidents due to fatigue, the FAA has established maximum duty times and minimum rest periods for pilots, flight engineers, air traffic controllers, mechanics, and dispatchers. Since the 1970s, flight attendants have urged the FAA to include them in this protection. Flight attendants who are fortunate enough to have union representation can seek duty time limits through their collective bargaining agreements. However, with the proliferation of non-union carriers, the lack of federal guidelines poses a significant safety issue.

Flight attendants' safety responsibilities range from providing routine pre-flight briefings to emergency evacuations. In the event of an evacuation, they must rapidly determine which exits to use after assessing dangerous external conditions. They must use their physical as well as cognitive skills in deploying slides which may be damaged or malfunctioning, and assist passengers safely out of the exits. Flight attendants must cope with rapid depressurization, cabin fires, passenger illness or injury, attempted skyjackings, bomb threats, and other unusual situations. Since the U.S. commercial air fleet is the oldest in the developed world, cabin crews need to be even more vigilant throughout the flight for any signs of an impending emergency in the cabin. This necessity is clearly illustrated by two recent incidents. In the first incident, an Aloha Airlines' 737 lost much of its outer fuselage. In the other, a United Airlines' 747 lost a cargo door. Each aircraft had been in use for 19 years

131. Id. at 91.
134. Id. at 4.
and both incidents prompted a rapid depressurization and emergency evacuation.¹³⁵

In the past 10 years, 94% of all major accidents involving U.S. carriers had survivors.¹³⁶ The fact that so many airline crashes are now survivable brings cabin safety in sharp focus. A flight attendant's ultimate responsibility is to ensure that all passengers who initially survive a crash are assisted to safety away from the aircraft. It is tragic to think that passengers who lived through a crash might die in the wreckage because the cabin crew was too fatigued to perform an emergency evacuation adequately.

The NTSB has urged the FAA to impose mandatory flight attendant duty times. Studies by the NTSB have identified fatigue as a contributing factor in rail, highway and marine accidents including the Exxon Valdez grounding in Alaska.¹³⁷ The Board recommended that DOT expedite a research program on the effects of fatigue and upgrade regulations governing hours of service for all transportation modes.¹³⁸

The matter of excessive duty time is not hypothetical. Longer range aircraft, more international flights, and increased work rule concessions from labor have all contributed to longer duty days. Jet lag, rotating shifts, and changing time zones exacerbate the fatigue created by a series of work days that can last 12 or 14 hours or more, broken only by shortened rest periods. A rest period begins when the aircraft blocks in at the gate and ends when the flight attendant returns to the airport. It includes time in transit between airport and hotel, meals, attending to personal needs, and sleep. An eight hour rest period usually yields no more than four to five hours of sleep. Witnesses at subcommittee hearings in 1989 and 1991, testified to duty periods of up to fifty-three hours with little, if any, rest.¹³⁹ The NTSB report on the 1985 Galaxy Airlines accident in Reno, Nevada, disclosed that at the time of the accident the flight attendants had been on duty for over eighteen hours and were scheduled to continue for an additional seven hours.¹⁴⁰

In 1989, the FAA conducted a study in which it reviewed flight attendant work records at five major, four national, seven regional, and five supplemental carriers. The study found industry-wide duty time and rest problems, including seventy-four cases in one month of domestic duty hours exceeding fourteen hours in the major carriers alone. With respect to regional carriers, the FAA identified 140 cases in one month where

¹³⁸. Id.
¹³⁹. Id.
¹⁴⁰. Id.
duty times exceeded fourteen hours. Despite these findings, and the fact that twenty-three countries have established duty time limitations for flight attendants, the FAA has yet to promulgate such a rule.

In an attempt to fill the void, Congress proposed legislation establishing duty time limits for flight attendants as part of the 1993 Transportation Appropriations Bill. The legislation suggested limiting duty time on domestic and some international flights to fourteen hours with a minimum rest period of ten hours. On September 24, 1992, the duty-time provision was removed from the appropriations bill due to a threatened veto by President Bush.

U.S. carriers have consistently opposed flight attendant duty times based on cost considerations. Anthony Broderick, Federal Aviation Administrator for Regulation and Certification, estimated that record keeping alone would cost the airline industry $1 million a year. The Air Transport Association estimated that the total monthly cost of flight attendant duty time limits would be approximately $2.5 million for an international carrier with 10,000 flight attendants. This figure includes wage and benefit costs incurred by hiring additional flight attendants, as well as increased lodging and per diem expenses.

An FAA summary of evacuation and evacuation-related occurrences between 1975 and 1990 revealed over 40,000 occurrences in which flight attendant response was a factor in passenger survival. Although it may seem unconscionable to put a value on human life, monetary figures are used to provide government officials with a benchmark comparison of the expected safety benefits of rulemaking actions. Accordingly, the value of every statistical fatality avoided in an airline accident is estimated at $1.5 million, while every serious injury avoided is estimated at $640,000.

The Federal Aviation Act of 1958 demands the highest degree of safety from the airline industry and the FAA. It does not allow only that safety which the airlines are willing to pay for. Executive Order

---

141. Id.
143. Id.
146. Id. at 119.
147. Id. at 120.
12,291, signed by President Reagan, requires that new regulations show a positive economic benefit before being issued. Because of the expense that fleet-wide safety improvements can entail, some safety measures may no longer be justified on a traditional cost-benefit basis. The order directs federal agencies to promulgate new regulations or modify existing ones only if potential benefits to society outweigh potential costs. However, unfavorable cost finding should not automatically exempt the airlines from providing the flying public with the highest possible level of safety.

There appears to be no logical difference between the risks posed by a flight attendant under the influence and an entire cabin crew too exhausted to respond to an emergency effectively. Both are intolerable safety hazards.

VI. CONCLUSION

In conclusion, labor disputes have soared since deregulation, and morale, along with benefits, has plummeted. Although the Airline Deregulation Act was intended to restrict government intervention in airline management and promote a laissez faire approach, it is obvious that the government is still actively exercising its regulatory functions by promulgating rules on everything from the color of airline crew uniforms (navy blue), to employee background checks, to drug and alcohol testing. Presumably such regulations are being enacted to protect the public interest and further safety.

Beginning with its response to the air traffic controllers strike in 1981, the government has leaned heavily toward management in the resolution of aviation-related labor disputes. This is its prerogative. But in the airline industry, where the well-being of the public is involved, the emphasis should be on putting passenger safety and comfort above politics bias. Moderate government intervention designed to establish a harmonious and stable work environment for aviation employees will be a step toward reaching this goal.
The Transportation Law Education Study

Martin Steinmetz*
John Roscoe**
Mareleyn Schneider***
Barry M. Greenberg****

TABLE OF CONTENTS

I. Introduction .............................................. 134
II. Purpose ................................................. 135
III. Scope and Goal of the Project ....................... 135
    A. Law Schools ......................................... 136
    B. Attorneys Active in the Field .................... 138
    C. Public and Private Companies Active in the Field .. 138
    D. Government Officials ............................... 139
IV. Study goal .............................................. 139
V. Survey Design and Advisory Board .................... 139

* Mr. Steinmetz is a graduate of Benjamin N. Cardozo School of Law and has a Masters in Public Administration from Baruch College. He is the founder of the Cardozo Transportation Law Society and has worked extensively as a Transportation Planner.

** Mr. Roscoe is a graduate of Benjamin N. Cardozo School of Law and holds an undergraduate degree from Victoria University of Wellington, New Zealand. While at law school, he was on the staff of New Europe Law Review, and Editor-in-Chief of the Cardozo Law Forum and Cardozo Omnibus Journal.

*** Dr. Mareleyn Schneider is an associate professor of sociology at Yeshiva University, and also teaches courses in statistics and computers.

**** Mr. Greenberg holds a Bachelor of Science in Business Administration from California State University and is a CPA in California. He is currently a third year student at Benjamin N. Cardozo School of Law and works for a New York law firm.
I. INTRODUCTION

Transportation is a cornerstone of life in the United States. It is the basis for the historical and future development of the country. Everything is affected by the movement of goods and individuals, whether through air, rail, trucking, maritime, or public transportation services. All goods manufactured or sold in the United States as well as the movement of individuals are subject to a myriad of rules and regulations regarding transportation at the international, federal, state, and local levels or some combination thereof.

Consequently, there are few areas of legal practice that are not affected by transportation-related activities. And yet, there are virtually no courses specifically designed for the study of Transportation Law in any of the 176 ABA-approved law schools. There are scattered courses in Admiralty and Maritime Law, and a few that deal with aviation and airports; however, transportation tends only to be dealt with as a part of other subjects, if at all.

Owing to this lacuna in legal education, a group of students from Benjamin N. Cardozo School of Law decided to investigate the reasons for this omission from law school curricula. This report is a summary of how they approached this task and the initial findings they have produced.

The project was sponsored through the Transportation Law Journal (TLJ) of the University of Denver and the Center for Transportation Studies at the University of Denver College of Law. Key support was provided by the Transportation Law Society of Benjamin N. Cardozo School of Law of Yeshiva University. These institutions recognized that no research had been done evaluating the training of attorneys for this important field and that this lack of information needed to be addressed.
II. PURPOSE

This study was undertaken as a step towards evaluating and improving the training of attorneys in the legal fields related to Transportation Law.

The survey format selected was not intended to determine whether transportation is a specific field of legal study, nor was it meant to suggest that schools, practitioners, or professional associations are at fault. The results however, do provide a wealth of information that can be used to understand the dynamics of the various areas of practice.

The survey provides empirical proof for the proposition that there exists a disjunction between what is practiced and taught regarding transportation-related law. This conclusion is so apparent that it virtually leaps off the pages of raw data. There is a growing chasm between what private and public practice requires of graduates entering the field and what law schools perceive those requirements to be — if they perceive them at all. District Court Judge Harry T. Edwards, in the Michigan Law Review, has recently expressed his concern over the growing disjunction between the teaching and the practice of law. In doing so, Judge Edwards notes that, “[w]hile the schools are moving toward pure theory, the firms are moving toward pure commerce, and the middle ground — ethical practice — has been deserted by both...”1 The initial findings of this study tend to support his assertion regarding the teaching and practice of transportation and transportation-related law.

Informed opinion leads to change. As more is done to investigate the disjunction between teaching and practice, more can be done to search for solutions.2 The legal academic community must recognize that the practice of transportation and transportation-related law is a significant and growing field of legal expertise. In realizing this, it becomes incumbent upon the academic branch to realign itself with the realities of practice and reflect them in course curricula. Only by making this effort can the legal profession maintain a degree of uniformity within its ranks that will ensure the highest standards of ethical practice.

III. SCOPE AND GOAL OF THE PROJECT

Transportation law encompasses many different legal elements and interests. These elements are as diverse as torts, undercharges and the

---


2. See generally 91 Mich. L. Rev. 2191 (1993) (this entire issue was dedicated to the discussion concerning the growing disjunction between the teaching and practice of law.)
regulations proposed under the North American Free Trade Agreement (NAFTA). Therefore, the project was organized to account for as many interests as possible. Many of these interests overlap, thereby providing a wealth of correlative data that can be used to gain a greater appreciation of the overall dynamics associated with the practice and teaching of Transportation Law and its related subject areas.

Four distinct groups are highlighted as having basic knowledge and interest in the field:

1. Law schools.
2. Attorneys active in transportation law.
3. Public and private companies active in the field.

A. Law Schools

This group is responsible for the training of new attorneys. Historically, reactions and revisions happen slowly at this level. The Socratic method teaches students how to think as lawyers and prepares them for survival in the courts and justice system. In terms of practicality, the implementation of new curriculum is slow and rarely keeps pace with the changes in practice. Indeed, the nearly exclusive focus on decided (usually appellate) cases suggests that, unless and until legal developments have worked their way into the jurisprudence of the courts, they are virtually banned from the classroom. The recent growth, however, of clinical programs and the greater use of adjunct faculty by law schools, indicates that there is an attempt being made to bridge this delay. The accelerated demands of changes in practice require this. The ABA, in its recent report on legal education,3 emphasized the urgency of this shift.

The survey used by this study was designed to reflect the changing academic nature of the schools surveyed. A group of legal academicians was asked separately to pigeonhole each of the respondent law schools into one of three categories depending upon the reputation of the school's curriculum as being focused primarily on either (A) academic study; (B) a mixture of academic study and practical training; or (C) practical training. Where appropriate, the differences in the respondent law schools' curriculum focus are emphasized throughout this article.

Transportation law appears to be almost entirely left out of the processes that are bridging the delay in translating changes in practice with law school instruction. Indeed, transportation law, as a field, ap-

---

pears to be, for the most part, neglected as an area of legitimate academic concern. This was not always the case. The survey results offer empirical proof that this is indeed the case today. What may come as a surprise to readers is how pronounced transportation law's exclusion really is.

The key issue that ultimately arises from this paper is the question of why transportation law is being left out of legal education when it is an area of such considerable concern to practitioners. Judge Edwards notes that the last two decades have seen the focus of law school curriculum shift from the teaching of doctrinal material to a more cross-disciplinary and theoretical nature. This indeed is the case at many of the nation’s law schools, and is the most likely candidate upon which to pin the blame for the disjunction between the teaching and practice of transportation law. It need not be argued, but can be asserted from our findings, that this disjunction is growing and is already resulting in adverse consequences for the legal profession.

Such a situation needs to be rectified. It sounds a siren bell that raises subsequent issues. The most obvious issue raised by the survey findings is whether the omission of transportation law from law school curricula is due to a lack of communication between educators and practitioners. Are schools ignoring information coming their way, or are they altogether out of touch with what is happening in practice? Another issue that needs to be addressed is whether this disjunction is solely the fault of the law schools, or are practitioners and legal associations also responsible? This paper does not attempt to answer those questions,

---

4. See Frank N. Wilner, Comes Now the Interstate Commerce Practitioner, 23 ICC Prac. J. 1131 (1993). “Almost twenty percent of the Supreme Court's docket affected railroads during the 1930s. . .” (this reflects the pervasive nature of transportation law in the 1930s. The law affecting carriage by railroad was a commonly referred to area by law schools at that time).


6. With the emphasis now on introducing cross-disciplinary courses, niche courses, and clinical programs into the law school curriculum that effectively account for areas of legal practice that have not been dealt with at the doctrinal level, the inertia to adapt doctrinal courses (i.e. Contracts, Torts, Real Property, Constitutional Law, Civil Procedure, and Criminal Law) to account for shifts in practice, has waned. This has meant that where Contracts or Torts could readily be adapted to incorporate a significant transportation-related component that would reflect the realities of practice, the impetus to do so is no longer there.

Furthermore, recently established niche courses (i.e. Environmental Law, Hazardous Materials Law, Regulatory and Administrative Law, etc.) that are arguably entering the mainstream of law school curricula, some of which may yet become quasi-doctrinal, and which relate directly to the field of transportation practice, are not being fully adapted to reflect the growing importance and pervasiveness of transportation.

The net result is that transportation law is being left out of this shift in instructional emphasis. It is neither covered by doctrinal, cross-disciplinary, niche, or clinical programs of study.
rather it provides empirical data to support the assertion that a major disjunction does exist.

B. ATTORNEYS ACTIVE IN THE FIELD

Attorneys know what it takes to succeed in a transportation-related practice. Some take it as a given, that they have to learn the field while on the job. Other attorneys have an interest in furthering the field through the traditional training ground provided by the schools so as the practice of transportation law can be developed in future attorneys as quickly and fully as possible. Persons in this group, however, may not be fully aware of the difficulties in creating change at the law school level. Few have the time to attempt to make what they see as needed changes. The survey points out the attorneys' needs and relates them directly to the attitudes prevalent among educators. The differences are glaring.

C. PUBLIC AND PRIVATE COMPANIES ACTIVE IN THE FIELD

This group encompasses the companies or businesses in the field of transportation that use attorneys' services. It can be divided into two subgroups: public and private.

Public agencies are primarily concerned with the carriage of passengers. They do have freight concerns, but their main goal is to carry persons from point "A" to point "B". Many of the problems of this group fall into two areas of legal activity: labor law and tort law. The amount of legal work undertaken in these areas is enormous, yet schools appear oblivious to the specific needs of these transport-related agencies.

Private companies have much more diverse transport related interests. These involve national, local, international, and extraterrestrial concerns. The companies may transport passengers, but are more likely to transfer freight. They may involve one type of carriage or be intermodal in orientation. The crossing of state and national lines is common, and the level of bureaucratic and regulatory matters increases daily — except when deregulation occurs, which also leads to greater use of lawyers in the long run. There is great interest in Interstate Commerce Commission (I.C.C.) rulings as well as claims involving increased areas of litigation such as environmental concerns.

As a result of this increasingly multi-faceted legal activity many questions are being raised. For example, in this day of controlling costs for survival, are more legal services being contracted out or being kept in-house? If the former, are all services being contracted out or just some? If some legal services, which ones and why? These are questions and issues the survey posed. Consequently, some profound shifts
in the market place were pin-pointed. This presents further questions for the schools. Are they acknowledging these market force realities of doing business? The survey's results suggest some unsettling initial conclusions.

D. GOVERNMENT OFFICIALS

The Federal Government has deregulated many functions of the transportation industry. With this deregulation comes additional functions at the state and local level as well as increased legal activity in dealing with the consequences of deregulation. Over-charging was the prime example. The transition from one political philosophy to another that occurs with the changing of administrations further complicates the especially dynamic nature of governmental activity.

The function of government attorneys is now more important than ever. Whether in the drafting of administrative proposals and legislation, the advising of the executive branch, or the litigation of complaints arising under the current purview of governmental activity, the challenges facing legal officials in transportation are vast and increasingly complex. This raises the question as to whether the training of future legal government officials reflects the dynamic changes occurring within the governmental sphere, and of concern to us, the sphere of transportation law.

In order to begin to answer this question, the survey asked respondents to list the major transportation-related areas of law that government officials are involved with, which areas are handled in-house and which are contracted out, and what officials would like to see emphasized in the future training of legal personnel.

IV. STUDY GOAL

These four core groups make up the legal minds and interests that should be accessed in order to gain an overall appreciation of transportation-related legal activity. Having surveyed these groups, the goal of the study is to assess what each group perceives its function to be, what areas of law it sees as areas for potential growth, and what skills it requires of its members to meet the challenges of today and the future. By asking law schools for their assessment of the value and importance of transportation law and transportation-related law, the study is able to identify areas of disjunction between what is emphasized in the practice of transportation law and what is taught at the law school level.

V. SURVEY DESIGN AND ADVISORY BOARD

Four prototypical survey instruments were put together by the Executive Committee of the Transportation Law Society of Benjamin N. Car-
dozo School of Law. The surveys were then reviewed and edited by a
group of knowledgeable persons from different areas of transportation
law.

This editing process was carried out on three generations of the
questionnaires before the final survey instruments were readied for dis­
tribution in May, 1993.

The Advisory Board for the study includes bus company officials,
consultants, government officials, law professors, practicing attorneys,
and statistical experts. The members are:

VI. TRANSPORTATION LAW EDUCATION AND SURVEY
ADVISORY BOARD

<table>
<thead>
<tr>
<th>NAME</th>
<th>AFFILIATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robert Alderson, Esq.</td>
<td>Transportation Law Association</td>
</tr>
<tr>
<td>Paul Stephen Dempsey</td>
<td>University of Denver</td>
</tr>
<tr>
<td>John Farrell</td>
<td>ATE Management</td>
</tr>
<tr>
<td>Jalal Haidar</td>
<td>Center Transportation Studies</td>
</tr>
<tr>
<td>J. Scott Hamilton, Esq.</td>
<td>Denver Attorney</td>
</tr>
<tr>
<td>Cornelius Henry</td>
<td>Applied Transportation Systems</td>
</tr>
<tr>
<td>Michael Herz</td>
<td>Benjamin N. Cardozo School of Law</td>
</tr>
<tr>
<td>Richard Lam</td>
<td>Center for Urban Studies</td>
</tr>
<tr>
<td>James McDaniel</td>
<td>Transportation Research Board</td>
</tr>
<tr>
<td>Ann Pougalis, Esq.</td>
<td>San Francisco Attorney</td>
</tr>
<tr>
<td>Dr. Mareleyn Schneider</td>
<td>Yeshiva University — Statistician</td>
</tr>
<tr>
<td>Ronald Shapss, Esq.</td>
<td>Ass'n Transportation Practitioners</td>
</tr>
<tr>
<td>Jay Smith</td>
<td>AASHTO</td>
</tr>
<tr>
<td>Richard Stocking, Esq.</td>
<td>Counsel to Kitsap Transit</td>
</tr>
<tr>
<td>Joseph Vameke</td>
<td>General Manager Wichita Transit</td>
</tr>
</tbody>
</table>

All 176 ABA approved law schools received a questionnaire. The
original survey was distributed in May 1993, with a follow-up mailing in
August 1993. This group is referred to in the following data as
"SCHOOL".

In all, 186 attorneys were chosen at random from a list provided by
the Transportation Law Association. There were two mailings, one in
May and one in July. This group is referred to in the following data as
"ATTORNEY" or "ATT’Y".

The third mailing was aimed at private companies and corporations
with major interests in the transportation legal field. One-hundred and
forty non-attorney members of the Association of Transportation Practi­
tioners received questionnaires. There were two mailings, one in May
and one in July. This group is referred to in the following data as "PRI­
VATE" or "PRACTITIONER".

The American Public Transit Association (APTA) is the organization
that organizes activities and lobbying efforts on the behalf of public
transit. Upon request from the study group at Cardozo, APTA agreed to distribute the survey instrument to the its Law Committee. There was one mailing to this group in May. This group is referred to in the following data as “PUBLIC”.

The last survey instrument was distributed to government officials. The American Association of State and Highway Transit Officials (AASHTO) was selected as the most appropriate group to suggest a mailing list in this category. After some discussion, AASHTO provided a mailing list of their Law Committee members. Eighty-one officials received the questionnaire in one mailing that occurred in May. This group is referred to in the following data as “GOVERNMENT” or “GOV’T”.

VII. RETURN RATES

The return rates for the five samples were:

<table>
<thead>
<tr>
<th>Group</th>
<th>Responses</th>
<th>Total</th>
<th>Return Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>PUBLIC</td>
<td>63</td>
<td>173</td>
<td>35%</td>
</tr>
<tr>
<td>GOVERNMENT</td>
<td>42</td>
<td>81</td>
<td>53%</td>
</tr>
<tr>
<td>ATTORNEY</td>
<td>126</td>
<td>186</td>
<td>67%</td>
</tr>
<tr>
<td>PRIVATE</td>
<td>59</td>
<td>140</td>
<td>42%</td>
</tr>
<tr>
<td>SCHOOL</td>
<td>98</td>
<td>176</td>
<td>56%</td>
</tr>
</tbody>
</table>

VIII. ANALYSIS

The raw findings of the study are listed below. All of the questions asked on the four surveys are included. The questions are listed, for ease of assimilation, in an order starting with those related to respondents’ experience in the field and what their law school experience provided, current law school offerings, and finally, the needs of those engaged in practice and what they believe will be the areas of growth in the field.

A. Respondents’ Experience in the Field

Years of Experience

1. How many years have you been in practice? (Attorney)

   Of the attorneys who responded, there was a range in level of experience from 0 - 43 years. The mean was 21.37 years and the median level of experience was 20.0 years.

Years in Transportation Law

2. How many of those years have been directly related to transportation? (Attorney)

   As with the previous question, the amount of time spent in the area of transportation law varied from 0 - 43 years. The mean recorded was 19.03 years and the median was 20.00 years. The difference of 2 years
in both the mean and median recorded here as compared with those recorded in the "years of experience" question suggests that not all attorneys practicing transportation law started out in the field.

Attorneys generally spend the first year or two after graduation finding their place in the legal profession. Once that niche is found, the attorneys develop their expertise through practice. The results from the transportation attorneys who returned the questionnaire compare very closely to other evaluations and other studies.\(^7\)

**Percentage of Practice Related to Transportation**

3. **Approximately how much of your practice is related to transportation?**

<table>
<thead>
<tr>
<th>ATTORNEY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 33%</td>
</tr>
<tr>
<td>Somewhere between 33% and 66%</td>
</tr>
<tr>
<td>Somewhere between 66% and 90%</td>
</tr>
<tr>
<td>More than 90%</td>
</tr>
<tr>
<td>DK/NA (Don't Know/No Answer)</td>
</tr>
</tbody>
</table>

   Distribution was a very even here. A follow-up survey that delves further into the makeup of the practices may ascertain a more in-depth analysis of the types of legal activity and the amount of time they consume. Almost half of the attorneys who are active in the field of transportation law spend more than two-thirds of their time working strictly in the field. The results seem to indicate that transportation law is a separate and definable area of practice. This issue can be analyzed in greater detail by comparing the activities and interests of those who spend more time in the field with those who spend less.

**B. Respondents' Interest While in Law School**

**Student Interest**

4. a. **In school, how interested were you in transportation law?**

   (Attorney)

   b. **If a program or courses in transportation were offered at your law school, how interested do you think your students would be?** (School)

---

Twenty-five percent of attorneys working in the field of transportation today had some interest while in school. However, 68% related that they had little or no real interest in the field at that time. The law school responses may indicate unfamiliarity with the issue more than an actual appreciation for this concern. The 14% DK/NA response tends to indicate a great deal of uncertainty here. Predominantly mid-range/non-committal responses are also typical for respondents on surveys when asked to give subjective assessments. This is often because they simply might not have an informed opinion but do not wish to appear unknowledgeable by giving a DK/NA response. The fact that only 1% said "not at all" also tends to reveal unfamiliarity as opposed to a definite affirmative or negative response.

C. Law School Courses

Course Availability

5. During the last five years, has your law school offered courses specifically in transportation law? (School)

<table>
<thead>
<tr>
<th></th>
<th>SCHOOL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>9%</td>
</tr>
<tr>
<td>No</td>
<td>89%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>2%</td>
</tr>
</tbody>
</table>

6. During the last five years, has your law school offered a program or concentration in transportation law? (School)

<table>
<thead>
<tr>
<th></th>
<th>SCHOOL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>2%</td>
</tr>
<tr>
<td>No</td>
<td>96%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>2%</td>
</tr>
</tbody>
</table>

7. If no, has your law school discussed transportation law as a viable separate area of study? (School)

<table>
<thead>
<tr>
<th></th>
<th>SCHOOL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>4%</td>
</tr>
<tr>
<td>No</td>
<td>78%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>18%</td>
</tr>
</tbody>
</table>

Virtually no ABA-approved law school offered specific transportation programs in the last five years. Only a few others have ever offered a
course. At most schools the topic has not even come up for discussion. Transportation law is a dynamic area of legal activity that is not being recognized by the law schools. The few schools that had offered courses are in the midwest or west. There seems to be no acknowledgment of transportation law as an independent area of legal study by the schools in the east.

**COURSE OFFERINGS**

8. Which of the following courses in your law school, directly address transportation issues? (School)

<table>
<thead>
<tr>
<th>Course</th>
<th>SCHOOL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative</td>
<td>34%</td>
</tr>
<tr>
<td>Trial Practice (Litigation)</td>
<td>6%</td>
</tr>
<tr>
<td>Legislation</td>
<td>6%</td>
</tr>
<tr>
<td>Contracts</td>
<td>4%</td>
</tr>
<tr>
<td>Government Contracts</td>
<td>8%</td>
</tr>
<tr>
<td>Labor</td>
<td>10%</td>
</tr>
<tr>
<td>Tax</td>
<td>6%</td>
</tr>
<tr>
<td>Torts</td>
<td>18%</td>
</tr>
<tr>
<td>Regulatory</td>
<td>20%</td>
</tr>
<tr>
<td>Environmental</td>
<td>30%</td>
</tr>
<tr>
<td>Real Estate</td>
<td>4%</td>
</tr>
<tr>
<td>Criminal</td>
<td>1%</td>
</tr>
<tr>
<td>Other</td>
<td>9%</td>
</tr>
</tbody>
</table>

Law schools consider transportation law to be an area that is mainly administrative and regulatory. The results indicate a growing recognition of transportation-related issues in environmental law and tort liability, but such recognition does not carry over into commercial areas.

9. a. What areas of your law school education have you found relevant to transportation? (Attorney)

b. What areas of a law school education do you think are relevant to the practice of transportation law? (School)
In terms of relevance to actual practice, there is little agreement between private companies and law school deans as to the importance of subject areas that deal heavily with transportation-related legal work. While there is a fairly close relationship in the areas of administration and torts law, there is a meaningful gap in every other area. It must be taken into account that the attorneys were commenting on their personal law school education that occurred, on average, some 23 years ago. For example, environmental law was not taught in the late 1960s or early 1970s, while today it is a viable subject. Any meaningful comparison should take into account differences between current curricula and courses taught in 1970.

10. What areas of a law school education do you think could be readily adapted or more fully developed in areas of transportation? (Attorney) (School)

<table>
<thead>
<tr>
<th>Subject</th>
<th>ATTY</th>
<th>SCHOOL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative</td>
<td>71%</td>
<td>55%</td>
</tr>
<tr>
<td>Trial Practice</td>
<td>37%</td>
<td>15%</td>
</tr>
<tr>
<td>Legislation</td>
<td>22%</td>
<td>35%</td>
</tr>
<tr>
<td>Contracts</td>
<td>49%</td>
<td>25%</td>
</tr>
<tr>
<td>Environmental</td>
<td>50%</td>
<td>38%</td>
</tr>
<tr>
<td>Real Estate</td>
<td>6%</td>
<td>22%</td>
</tr>
<tr>
<td>Criminal</td>
<td>3%</td>
<td>8%</td>
</tr>
<tr>
<td>Labor</td>
<td>33%</td>
<td>27%</td>
</tr>
<tr>
<td>Tax</td>
<td>18%</td>
<td>16%</td>
</tr>
<tr>
<td>Torts</td>
<td>25%</td>
<td>26%</td>
</tr>
<tr>
<td>Regulatory</td>
<td>62%</td>
<td>62%</td>
</tr>
<tr>
<td>Gov't</td>
<td>14%</td>
<td>30%</td>
</tr>
<tr>
<td>Other</td>
<td>10%</td>
<td>5%</td>
</tr>
</tbody>
</table>

This question shows a much closer relationship between schools and attorneys than is seen in the question about course relevance. Consistent with what was indicated in the earlier question, law schools feel
that there could be growth in the areas of administrative and regulatory law. No other category gathered more than 40% recognition. As discussed earlier, the growth in environmental law came in next, tying-in nicely with later questions about legislation. Attorneys agree that administrative, regulatory, environmental and contracts law rank high as areas that can readily be adapted to transportation law.

11. a. What areas of a law school education do you think should be more specifically related to transportation? (Public) (Government) (Private)

b. What areas of a law school education do you think should be adapted or more fully developed in areas of transportation? (School)

<table>
<thead>
<tr>
<th></th>
<th>PUBLIC</th>
<th>GOV'T</th>
<th>PRIVATE</th>
<th>SCHOOL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative</td>
<td>36%</td>
<td>28%</td>
<td>37%</td>
<td>28%</td>
</tr>
<tr>
<td>Trial Practice</td>
<td>16%</td>
<td>23%</td>
<td>20%</td>
<td>3%</td>
</tr>
<tr>
<td>Legislation</td>
<td>26%</td>
<td>48%</td>
<td>14%</td>
<td>8%</td>
</tr>
<tr>
<td>Contracts</td>
<td>45%</td>
<td>44%</td>
<td>75%</td>
<td>5%</td>
</tr>
<tr>
<td>Environmental</td>
<td>48%</td>
<td>67%</td>
<td>45%</td>
<td>17%</td>
</tr>
<tr>
<td>Real Estate</td>
<td>21%</td>
<td>2%</td>
<td>49%</td>
<td>2%</td>
</tr>
<tr>
<td>Criminal</td>
<td>2%</td>
<td>2%</td>
<td>7%</td>
<td>2%</td>
</tr>
<tr>
<td>Labor</td>
<td>58%</td>
<td>9%</td>
<td>25%</td>
<td>6%</td>
</tr>
<tr>
<td>Tax</td>
<td>7%</td>
<td>5%</td>
<td>15%</td>
<td>3%</td>
</tr>
<tr>
<td>Torts</td>
<td>23%</td>
<td>42%</td>
<td>5%</td>
<td>5%</td>
</tr>
<tr>
<td>Regulatory</td>
<td>53%</td>
<td>73%</td>
<td>23%</td>
<td>25%</td>
</tr>
<tr>
<td>Govt Contracts</td>
<td>71%</td>
<td>54%</td>
<td>18%</td>
<td>7%</td>
</tr>
<tr>
<td>Other</td>
<td>3%</td>
<td>5%</td>
<td>7%</td>
<td>4%</td>
</tr>
</tbody>
</table>

Each group studied has its own priorities and interests. Intrinsic in these findings is an indication how each group feels its interests could be best served in the preparation of attorneys entering their respective fields. For public transportation agencies (Public), an increased preparedness in government contracting, labor, regulatory, environmental and contracts law is considered critical. For government officials (Government), there is considerable interest in improving educational coursework related to environmental, government contracts, real estate and contracts law. Private companies (Private) highlighted contracts and regulatory law as areas needing increased educational attention. There is relatively no interest on the part of the schools in further relating specific courses towards transportation except in regulatory and environmental law.

Importance of Legal Education

12. a. How valuable would it be for law schools to focus greater attention on transportation law? (Public) (Government) (Attorney) (Private)
b. How valuable would it be for law schools to focus more attention on transportation law? (School)

<table>
<thead>
<tr>
<th></th>
<th>PUBLIC</th>
<th>GOVT</th>
<th>ATT'Y</th>
<th>PRIVATE</th>
<th>SCHOOL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extremely</td>
<td>7%</td>
<td>7%</td>
<td>7%</td>
<td>20%</td>
<td>1%</td>
</tr>
<tr>
<td>Moderately</td>
<td>34%</td>
<td>42%</td>
<td>7%</td>
<td>30%</td>
<td>9%</td>
</tr>
<tr>
<td>Fairly</td>
<td>31%</td>
<td>28%</td>
<td>32%</td>
<td>33%</td>
<td>27%</td>
</tr>
<tr>
<td>Not Much</td>
<td>23%</td>
<td>19%</td>
<td>26%</td>
<td>12%</td>
<td>48%</td>
</tr>
<tr>
<td>Not At All</td>
<td>3%</td>
<td>5%</td>
<td>1%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>3%</td>
<td>0%</td>
<td>3%</td>
<td>5%</td>
<td>15%</td>
</tr>
</tbody>
</table>

Half of the government officials and half of the private companies feel that there is something to be gained by focusing greater attention on transportation law at the law school level. By comparison, only 10% of the law schools feel that way. In fact, over 60% of the schools believe there is no value in focusing on transportation law.

13. a. Classroom study of transportation law is important preparation for a successful practice. (Attorney)

b. Classroom study is important preparation for a successful practice in the field. (School)

<table>
<thead>
<tr>
<th></th>
<th>ATTORNEY</th>
<th>SCHOOL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly Agree</td>
<td>7%</td>
<td>1%</td>
</tr>
<tr>
<td>Agree</td>
<td>28%</td>
<td>17%</td>
</tr>
<tr>
<td>Neutral</td>
<td>44%</td>
<td>43%</td>
</tr>
<tr>
<td>Disagree</td>
<td>15%</td>
<td>23%</td>
</tr>
<tr>
<td>Strongly Disagree</td>
<td>4%</td>
<td>3%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>2%</td>
<td>14%</td>
</tr>
</tbody>
</table>

Only 35% of the attorneys feel that classroom study is important for the development of a successful practice. This is lower than the percentage of attorneys who feel very strongly that law schools should increase their offerings in transportation law. In comparison, the number of law schools that feel greater attention to transportation is needed is slightly more than half of those who believe classroom study is important preparation for transportation-oriented practice.

D. Further Education

Potential Growth in Law Schools

14. a. A Master's program in transportation law would be helpful preparation for a successful practice. (Government)

b. A Master's degree program in transportation law would be helpful preparation for a successful practice. (Attorney)

c. Do you think there would be value to a Master's program in transportation law? (School)
A quarter of the law schools feel that there is room for a Master's program in transportation law. This percentage is higher than the number of schools who believe strongly that either classroom study is important or that greater focus should be given to transportation law in regular courses. There was a strong feeling among transportation attorneys that a masters program will be useful as exemplified by the fact that over two-thirds either strongly agreed, agreed, or were neutral, and less than 20% disagreed. This indicates an across-the-board recognition for specialization in transportation law at the post-graduate level of legal education.

**Continuing Legal Education (CLE)**

15. How would you rate existing Continuing Legal Education programs in transportation law, using two sets of adjectives? (Attorney)

<table>
<thead>
<tr>
<th>ATTORNEY</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Worthwhile</td>
<td>71%</td>
</tr>
<tr>
<td>Neutral/Uncertain</td>
<td>21%</td>
</tr>
<tr>
<td>Worthless</td>
<td>3%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>5%</td>
</tr>
</tbody>
</table>

16. If neutral or worthless, the reasons are: (Attorney)

<table>
<thead>
<tr>
<th>ATTORNEY</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Courses poorly designed</td>
<td>70%</td>
</tr>
<tr>
<td>Courses improperly taught</td>
<td>5%</td>
</tr>
<tr>
<td>Subject is difficult to teach</td>
<td>25%</td>
</tr>
</tbody>
</table>

There is fairly solid support for current programs. Whatever dissatisfaction there is comes from the way the courses are designed.

**E. Current Legal Practice in Transportation Law**

**Areas of Greatest Concern**

17. a. What are the legal areas of greatest concern to your company or agency? (Public) (Government) (Practitioner)

   b. What are the primary areas of your practice? (Attorney)
Areas of Greatest Concern
Administrative

Attorney
- Little (8.73%)
- Moderate (12.70%)
- Important (7.14%)
- Very Important (17.46%)
- Critical (24.60%)
- DK/NA (29.37%)

Government
- Little (14.52%)
- Moderate (8.06%)
- Important (9.66%)
- Very Important (4.84%)
- Critical (3.23%)
- DK/NA (59.68%)

Public
- Little (13.16%)
- Moderate (7.89%)
- Important (21.05%)
- Very Important (5.26%)
- Critical (10.53%)
- DK/NA (42.11%)

Practitioners
- Little (13.16%)
- Moderate (7.89%)
- Important (21.05%)
- Very Important (5.26%)
- Critical (10.53%)
- DK/NA (42.11%)
18. When services are needed in the fields listed below, indicate whether you use primarily in-house or contracted legal services. (Public) (Government) (Attorney) (Private)

<table>
<thead>
<tr>
<th>Administration</th>
<th>PUBLIC</th>
<th>GOVT</th>
<th>ATT'Y</th>
<th>PRIVATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>In-House</td>
<td>66%</td>
<td>98%</td>
<td></td>
<td>58%</td>
</tr>
<tr>
<td>Contract</td>
<td>31%</td>
<td>0%</td>
<td></td>
<td>22%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>3%</td>
<td>2%</td>
<td></td>
<td>20%</td>
</tr>
</tbody>
</table>

The results indicate that providing administrative services is an important part of the activities of transportation attorneys. Forty-two percent rank it as either first or second in importance. It also ranks high with government officials. Most administrative services are handled in-house, although representatives of the private firms use contracted services almost a third of the time.
Areas of Greatest Concern
Trial Practice

Attorney

Little (8.00%)
Moderate (4.80%)
Important (10.40%)
Very Important (12.00%)
Critical (29.60%)
DK/NA (35.20%)

Government

Little (9.30%)
Moderate (4.65%)
Important (9.30%)
Very Important (11.63%)
Critical (29.93%)
DK/NA (44.19%)

Public

Little (8.06%)
Moderate (6.45%)
Important (9.66%)
Very Important (9.66%)
Critical (12.90%)
DK/NA (53.23%)

Practitioners

Little (5.41%)
Moderate (8.11%)
Important (2.70%)
Very Important (5.41%)
Critical (2.70%)
DK/NA (75.68%)
More than half of the public agencies, and more than 80% of the private companies do not feel that this was one of their five major concerns. When the need does arise, the public agencies usually call in outside counsel, whereas the private companies use in-house counsel.
Areas of Greatest Concern
Legislation

Attorney
- Little (5.60%)
- Moderate (5.60%)
- Important (3.20%)
- Very Important (0.00%)
- Critical (2.40%)
- DK/NA (83.20%)

Government
- Little (9.30%)
- Moderate (6.98%)
- Important (6.98%)
- Very Important (2.33%)
- Critical (9.30%)
- DK/NA (85.12%)

Public
- Little (12.90%)
- Moderate (4.84%)
- Important (8.06%)
- Very Important (6.45%)
- Critical (8.06%)
- DK/NA (59.68%)

Practitioners
- Little (5.26%)
- Moderate (7.89%)
- Important (18.42%)
- Very Important (26.32%)
- Critical (5.26%)
- DK/NA (36.84%)
Only one group surveyed considers legislation to be an important part of their needs. The private companies cite legislation as a concern 64% of the time. No other group lists this area of study higher than 40%. Despite their high concern, however, less than half of the private companies dealt with legislation in-house.

<table>
<thead>
<tr>
<th>Legislation</th>
<th>PUBLIC</th>
<th>GOVT</th>
<th>ATT'Y</th>
<th>PRIVATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>In-House</td>
<td>57%</td>
<td>98%</td>
<td></td>
<td>45%</td>
</tr>
<tr>
<td>Contract</td>
<td>39%</td>
<td>0%</td>
<td></td>
<td>30%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>4%</td>
<td>2%</td>
<td></td>
<td>25%</td>
</tr>
</tbody>
</table>
Areas of Greatest Concern

Contract

Attorney

Government

Public

Practitioners

Little (8.00%)

Moderate (16.00%)

Important (30.40%)

Very Important (21.60%)

Critical (7.20%)

Little (5.98%)

Moderate (6.98%)

Important (11.93%)

Very Important (13.95%)

Critical (5.98%)

Little (9.68%)

Moderate (8.06%)

Important (17.74%)

Very Important (3.23%)

Critical (14.52%)

Little (15.79%)

Moderate (18.42%)

Important (5.98%)

Very Important (7.85%)

Critical (28.95%)

DK/NA (16.80%)

DK/NA (53.49%)

DK/NA (45.77%)

DK/NA (23.68%)
Every group includes contracts as an important concern. Most contractual activity is handled in-house with only the public agencies contracting out as much as a third of their needs. Private firms list contracts as their leading concern. This is twice as often as public agencies.
Areas of Greatest Concern
Environmental

Attorney
- Little (6.35%)
- Moderate (6.35%)
- Important (4.76%)
- Very Important (2.38%)
- Critical (3.97%)
- DK/NA (76.19%)

Government
- Little (9.30%)
- Moderate (25.56%)
- Important (30.23%)
- Very Important (11.63%)
- Critical (5.98%)
- DK/NA (16.28%)

Public
- Little (15.13%)
- Moderate (16.13%)
- Important (9.68%)
- Very Important (9.68%)
- Critical (3.23%)
- DK/NA (45.16%)

Practitioners
- Little (13.16%)
- Moderate (13.16%)
- Important (23.68%)
- Critical (5.26%)
- Very Important (7.89%)
- DK/NA (36.84%)
There is an increasing interest in environmental matters, especially among government officials. The number of attorneys knowledgeable in this area is not as large as in other fields. Therefore, when services are needed they are often contracted out. The government in comparison almost always uses in-house attorneys.
Areas of Greatest Concern

Real Estate

The Transportation Law Education Study
Real Estate

<table>
<thead>
<tr>
<th></th>
<th>PUBLIC</th>
<th>GOVT</th>
<th>ATT'Y</th>
<th>PRIVATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>In-House</td>
<td>47%</td>
<td>84%</td>
<td>35%</td>
<td></td>
</tr>
<tr>
<td>Contract</td>
<td>48%</td>
<td>14%</td>
<td>33%</td>
<td></td>
</tr>
<tr>
<td>DK/NA</td>
<td>5%</td>
<td>4%</td>
<td>32%</td>
<td></td>
</tr>
</tbody>
</table>

There is a much higher level of involvement in real estate by government officials than any other group because they're concerned with progress of government projects. In fact, one-fifth of them list it as their first priority. Attorneys had the next highest level of involvement, but just 6% of them list real estate as their first priority.
There is almost no overlap of criminal law with transportation. None of the surveyed groups indicate any interest with criminal law in the field of transportation.
Areas of Greatest Concern

Labor Law

Attorney

Little (7.20%)
Moderate (4.80%)
Important (2.40%)
Very Important (5.60%)
Critical (4.80%)

DK/NA (75.20%)

Government

Little (2.33%)
Moderate (0.00%)
Important (4.65%)
Very Important (0.00%)
Critical (0.00%)

DK/NA (93.02%)

Public

Little (2.33%)
Moderate (0.00%)
Important (4.65%)
Very Important (0.00%)
Critical (0.00%)

DK/NA (93.02%)

Practitioners

Little (10.53%)
Moderate (2.63%)
Important (7.89%)
Very Important (7.89%)
Critical (5.26%)

DK/NA (65.79%)
Public transportation agencies have serious concerns and interests in labor law, but they are almost twice as likely to contract the work out as are other groups. It would appear that they have not developed the in-house ability to handle their needs. Private companies and the government have fewer concerns and are more likely to handle the problem internally.

<table>
<thead>
<tr>
<th>Labor</th>
<th>PUBLIC</th>
<th>GOVT</th>
<th>ATT’Y</th>
<th>PRIVATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>In-House</td>
<td>37%</td>
<td>72%</td>
<td>37%</td>
<td></td>
</tr>
<tr>
<td>Contract</td>
<td>60%</td>
<td>9%</td>
<td></td>
<td>28%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>3%</td>
<td>19%</td>
<td></td>
<td>35%</td>
</tr>
</tbody>
</table>
Areas of Greatest Concern

Tax

- Practitioners
  - Little (2.33%)
  - Moderate (0.00%)
  - Important (0.00%)
  - Very Important (0.00%)
  - Critical (0.00%)
  - DK/NA (58.42%)

- Public
  - Little (2.33%)
  - Moderate (0.00%)
  - Important (0.00%)
  - Very Important (0.00%)
  - Critical (0.00%)
  - DK/NA (97.67%)

- Attorney
  - Little (0.00%)
  - Moderate (3.20%)
  - Important (0.80%)
  - Very Important (0.80%)
  - Critical (91.20%)
  - DK/NA (97.67%)
### Tax

<table>
<thead>
<tr>
<th></th>
<th>PUBLIC</th>
<th>GOVT</th>
<th>ATT'Y</th>
<th>PRIVATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>In-House</td>
<td>18%</td>
<td>51%</td>
<td></td>
<td>43%</td>
</tr>
<tr>
<td>Contract</td>
<td>63%</td>
<td>9%</td>
<td></td>
<td>30%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>19%</td>
<td>40%</td>
<td></td>
<td>27%</td>
</tr>
</tbody>
</table>

Only private companies indicate an interest in this area of law. Thirty-one percent of them place this area among their top five concerns.
Areas of Greatest Concern

Torts

**Attorney**
- Little (8.80%)
- Moderate (16.03%)
- Important (11.20%)
- Very Important (10.40%)
- Critical (4.00%)
- DK/NA (64.00%)

**Government**
- Little (11.83%)
- Moderate (16.28%)
- Important (16.28%)
- Critical (6.98%)
- Very Important (11.63%)
- DK/NA (37.21%)

**Public**
- Little (11.83%)
- Moderate (16.28%)
- Important (16.28%)
- Critical (6.98%)
- Very Important (11.63%)
- DK/NA (37.21%)

**Practitioners**
- Little (2.63%)
- Moderate (0.00%)
- Important (2.63%)
- Very Important (0.00%)
- Critical (0.00%)
- DK/NA (94.74%)
Public agencies and government officials indicate a great concern with torts. The main difference is in how these problems are handled. This area constitutes the largest percentage of contracted legal services by the government.

<table>
<thead>
<tr>
<th>Torts</th>
<th>PUBLIC</th>
<th>GOVT</th>
<th>ATT'Y</th>
<th>PRIVATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>In-House</td>
<td>34%</td>
<td>72%</td>
<td></td>
<td>12%</td>
</tr>
<tr>
<td>Contract</td>
<td>61%</td>
<td>26%</td>
<td></td>
<td>47%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>5%</td>
<td>2%</td>
<td></td>
<td>42%</td>
</tr>
</tbody>
</table>
Areas of Greatest Concern
Regulatory

Attorney

Moderate (13.60%)
Important (12.80%)
Very Important (16.00%)

Critical (20.80%)
DK/NA (30.40%)

Government

Little (4.65%)
Moderate (4.65%)
Important (4.65%)
Very Important (6.98%)
Critical (4.65%)

DK/NA (74.42%)

Public

Little (4.65%)
Moderate (4.65%)
Important (4.65%)
Very Important (6.98%)
Critical (4.65%)

DK/NA (74.42%)

Practitioners

Little (18.42%)
Moderate (13.16%)
Important (15.79%)
Very Important (15.79%)
Critical (26.32%)

DK/NA (10.53%)
Regulatory

<table>
<thead>
<tr>
<th></th>
<th>PUBLIC</th>
<th>GOVT</th>
<th>ATT'Y</th>
<th>PRIVATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>In-House</td>
<td>57%</td>
<td>91%</td>
<td>50%</td>
<td>50%</td>
</tr>
<tr>
<td>Contract</td>
<td>39%</td>
<td>2%</td>
<td>38%</td>
<td>38%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>5%</td>
<td>7%</td>
<td>12%</td>
<td>12%</td>
</tr>
</tbody>
</table>

There is an across-the-board concern regarding regulatory matters. A full one-third of private companies list it as their primary concern. In fact, only 12% of them do not include it among their highest ranked legal concerns. Attorneys also identified it as an area of high concern. This statistic may reflect the legal prism through which government practitioners view the law. By way of illustration, an issue dealing with real estate law would be considered more a regulatory problem by a real estate attorney than by her equivalent government official, who would likely view the regulatory component as a matter of fact and consider the overall issue to be of a purely real estate nature.
Areas of Greatest Concern

Government Contracting

![Pie Chart: Government](Image)

- Little (2.33%)
- Moderate (2.33%)
- Important (25.58%)
- Very Important (13.95%)
- Critical (16.28%)
- DK/NA (39.53%)

![Pie Chart: Practitioners](Image)

- Little (5.26%)
- Moderate (0.00%)
- Important (2.53%)
- Very Important (5.00%)
- Critical (9.47%)
- DK/NA (89.47%)

![Pie Chart: Public](Image)

- Little (1.61%)
- Moderate (8.06%)
- Important (19.35%)
- Very Important (11.29%)
- Critical (27.42%)
- DK/NA (32.26%)

![Pie Chart: Attorney](Image)

- Little (2.40%)
- Moderate (0.80%)
- Important (0.60%)
- Very Important (0.00%)
- Critical (0.00%)
- DK/NA (96.00%)
The attention paid by public agencies and government officials to government contracting is — one might think — relatively low. An interesting statistic here is the percentage of this type of work that is contracted out by public agencies. Government contracting is almost 60% of the public agency’s critical concern, yet nearly one-third of the work is contracted out. This indicates that perhaps resources are not used as effectively as possible.

<table>
<thead>
<tr>
<th>Govt. Contracting</th>
<th>PUBLIC</th>
<th>GOVT</th>
<th>ATT'Y</th>
<th>PRIVATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>In-House</td>
<td>69%</td>
<td>95%</td>
<td></td>
<td>32%</td>
</tr>
<tr>
<td>Contract</td>
<td>31%</td>
<td>0%</td>
<td>0%</td>
<td>25%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>0%</td>
<td>5%</td>
<td>43%</td>
<td></td>
</tr>
</tbody>
</table>
Areas of Greatest Concern

Other

- Attorney
  - Critical (7.20%)
  - Very Important (5.60%)
  - Important (4.40%)
  - Moderate (2.20%)
  - Little (4.80%)
  - DK/NA (73.60%)

- Government
  - DK/NA (98.39%)

- Public
  - DK/NA (98.39%)

- Practitioners
  - DK/NA (92.11%)

- Little (0.00%)
- Moderate (0.00%)
- Important (0.00%)
- Very Important (0.00%)
- Critical (2.33%)
Topics included under “Others” span the full spectrum of legal activities not dealt with by the specific categories given. The public agencies mention civil rights law as an area of particular concern. Government officials report eminent domain and risk management. Private companies refer to admiralty, hazardous materials, international, logistics, product liability and undercharges law. The largest group represented in this category are attorneys. They mention admiralty, antitrust, affordable housing, cargo insurance, constitutional, corporate, customs, estates, financing, freight loss, labor, and undercharges law as other transport-related concerns.

**Profile of Employers’ Legal Staff**

The results for questions 19 and 20 are recorded together on the table below.

19. How many attorneys do you have on staff (in-house)?  
   (Public)(Government)(Private)

   20. Please indicate the level of legal experience recently (in the last five years) hired attorneys have had?  (Public)(Government)(Private)

<table>
<thead>
<tr>
<th>Attorneys</th>
<th>PUBLIC</th>
<th>GOVT</th>
<th>PRIVATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-5 Attorneys</td>
<td>37%</td>
<td>28%</td>
<td>45%</td>
</tr>
<tr>
<td>6-10 Attorneys</td>
<td>16%</td>
<td>37%</td>
<td>5%</td>
</tr>
<tr>
<td>10+ Attorneys</td>
<td>18%</td>
<td>26%</td>
<td>18%</td>
</tr>
<tr>
<td>DK/NA (Includes 0)</td>
<td>27%</td>
<td>9%</td>
<td>32%</td>
</tr>
<tr>
<td>None</td>
<td>5%</td>
<td>7%</td>
<td>3%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Experience</th>
<th>PUBLIC</th>
<th>GOVT</th>
<th>PRIVATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-2 Years</td>
<td>7%</td>
<td>19%</td>
<td>5%</td>
</tr>
<tr>
<td>3-5 Years</td>
<td>31%</td>
<td>44%</td>
<td>20%</td>
</tr>
<tr>
<td>6-10 Years</td>
<td>19%</td>
<td>14%</td>
<td>20%</td>
</tr>
<tr>
<td>Over 10 Years</td>
<td>19%</td>
<td>9%</td>
<td>27%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>19%</td>
<td>7%</td>
<td>25%</td>
</tr>
</tbody>
</table>

On average, the government has more attorneys on staff than the other groups. The mean for private firms is 5.9, for public agencies 10.5, and for government 15.7.

In terms of experience, the numbers show the government as having the least experienced staff; public agencies are in the middle, while private companies have the most experienced people. This could be because graduating students generally start out working in this area for the government before moving on to public agencies and the private sector.
The largest percentage of private company respondents answer in the “Over 10 years” category.

TRUST IN LEGAL EXPERTISE


<table>
<thead>
<tr>
<th></th>
<th>Public</th>
<th>Gov't</th>
<th>Private</th>
</tr>
</thead>
<tbody>
<tr>
<td>All of the time</td>
<td>15%</td>
<td>14%</td>
<td>23%</td>
</tr>
<tr>
<td>Most of the time</td>
<td>58%</td>
<td>33%</td>
<td>52%</td>
</tr>
<tr>
<td>Some of the time</td>
<td>11%</td>
<td>9%</td>
<td>13%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>16%</td>
<td>44%</td>
<td>16%</td>
</tr>
</tbody>
</table>

Government officials indicate a greater propensity not to follow the legal advise tendered them than do private companies and public agencies. The level of faith and trust displayed by government officials in their legal staff is shockingly low. The high DK/NA response indicates the indifference shown the law and its advocates by our elected representatives and their staffs. These findings also pose important questions about the perceived competence and reliability of attorneys.

PROFILE OF EMPLOYERS

22. Are you self-insured? (Public)(Private)

<table>
<thead>
<tr>
<th></th>
<th>Public</th>
<th>Private</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>86%</td>
<td>65%</td>
</tr>
<tr>
<td>No</td>
<td>11%</td>
<td>22%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>3%</td>
<td>13%</td>
</tr>
</tbody>
</table>

Most public agencies are self-insured while a considerable number of private companies are not. This correlates to the concerns about tort claims expressed by each group.

23. How large is your fleet? (Public)(Private)

The range for the public agencies is from 28-9500. The range for private companies is from 4-10,000+

24. Type of Vehicles? (Public)(Private)

<table>
<thead>
<tr>
<th></th>
<th>Public</th>
<th>Private</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bus</td>
<td>61%</td>
<td>2%</td>
</tr>
<tr>
<td>Truck</td>
<td>0%</td>
<td>27%</td>
</tr>
<tr>
<td>Freight Car</td>
<td>0%</td>
<td>10%</td>
</tr>
<tr>
<td>Airplane</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Ship</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Pass Rail</td>
<td>3%</td>
<td>0%</td>
</tr>
<tr>
<td>Bus and Rail</td>
<td>19%</td>
<td>0%</td>
</tr>
<tr>
<td>Passenger and Freight</td>
<td>5%</td>
<td>2%</td>
</tr>
<tr>
<td>Two or more types of Freight</td>
<td>0%</td>
<td>13%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>11%</td>
<td>47%</td>
</tr>
</tbody>
</table>
This question worked partially for one group surveyed (Public) but not at all for the other (Private). For private companies, such as the airline industry, were not adequately covered. This defect created inaccurate distortions in the "Private" response. Furthermore, the intermodal nature of many private transportation concerns creates combinations that make it difficult to properly evaluate these results.

**GEOGRAPHIC COVERAGE**

25. a. *What type of practice do you primarily have? (Attorney)*  
b. *What is the geographic domain for your agency? (Government)*

<table>
<thead>
<tr>
<th>GOVERNMENT</th>
<th>ATTORNEY</th>
</tr>
</thead>
<tbody>
<tr>
<td>National</td>
<td>5%</td>
</tr>
<tr>
<td>State</td>
<td>91%</td>
</tr>
<tr>
<td>Regional</td>
<td>0%</td>
</tr>
<tr>
<td>Metropolitan</td>
<td>0%</td>
</tr>
<tr>
<td>Local</td>
<td>0%</td>
</tr>
<tr>
<td>International</td>
<td>2%</td>
</tr>
<tr>
<td>National and State</td>
<td>0%</td>
</tr>
<tr>
<td>State and Metropolitan</td>
<td>0%</td>
</tr>
<tr>
<td>All</td>
<td>2%</td>
</tr>
<tr>
<td>DK/NA</td>
<td>0%</td>
</tr>
</tbody>
</table>

The list used for government officials was weighted towards state employees. This is evident in the results. However, the percentages are fairly close to numbers that are accurate nationally. There is a straight split among attorneys who have a national practice and those who have a statewide area of operation.

**F. POTENTIAL GROWTH AREAS**

26. *Which areas of transportation do you envision as growth areas for attorneys? (all)*
Each group surveyed places a different emphasis on where they feel growth will occur. The five most prominent areas for each group are listed below.

<table>
<thead>
<tr>
<th></th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>PUBLIC</td>
<td>Public</td>
<td>Rail</td>
<td>Tort</td>
<td>Intermodal</td>
<td>Regulatory</td>
</tr>
<tr>
<td>GOVT</td>
<td>Intermodal</td>
<td>Tort</td>
<td>Bus</td>
<td>Rail</td>
<td>Public</td>
</tr>
<tr>
<td>LAWYER</td>
<td>Safety</td>
<td>Intermodal</td>
<td>Bus</td>
<td>Claims</td>
<td>Tort</td>
</tr>
<tr>
<td>PRIVATE</td>
<td>Regulatory</td>
<td>Intermodal</td>
<td>Safety</td>
<td>Bus</td>
<td>Claims</td>
</tr>
<tr>
<td>SCHOOL</td>
<td>Regulatory</td>
<td>Aviation</td>
<td>Safety</td>
<td>Airport</td>
<td>Public</td>
</tr>
</tbody>
</table>

Overall, the law school responses predict far less growth potential than any of the other groups. Their choices of Airport and Aviation as growth areas are not reflected by those who practice.

Private companies forecast very large growth potential in Regulatory, Intermodal, and Safety Law areas. These three areas rank prominently with all of the respondent groups. (Safety averaging 42%, Regulatory 42%, and Intermodal 48%) It is interesting that the group that has the most direct interaction with trucking (private) sees almost no potential for growth in this area.

Attorneys see Safety as the area with the largest potential for growth. As with all the groups, with the exception of law schools, Intermodal is ranked in the top four potential growth areas. The high ranking of bus-related growth is somewhat surprising.

Government officials are extremely concerned with tort-related litigation and claims. It is mentioned by 58% of the respondents as a potential growth area. Only one area is listed more often — Intermodal — at 65%. There is also more interest in Aviation shown here than by any other sample group except the schools. Six subjects are listed by more than 40% of the respondents.
Public agencies generally have answers that are consistent with those of the government officials and the private companies. As with government officials, public agencies list six areas as having growth potential. None of the other groups have more than three areas listed above 40%. Four of the areas are the same as those listed by the government officials, the additional two are Regulatory and Safety, which are also ranked high by private companies. The results indicate that both public agencies and government officials are the least concerned with paying taxes and tariffs.

Other Fields

Respondents list in addition to the given areas a number of other legal specialties: (frequency indicated by the number of responses).

<table>
<thead>
<tr>
<th>PUBLIC</th>
<th>GOV’T</th>
<th>ATTORNEY</th>
<th>PRIVATE</th>
<th>SCHOOL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environ. 4</td>
<td>Environ. 11</td>
<td>Environ. 12</td>
<td>Environ. 2</td>
<td>Environ. 5</td>
</tr>
<tr>
<td>Labor 3</td>
<td>Em. Domain 2</td>
<td>Labor 5</td>
<td>Hazard. Mats. 1</td>
<td></td>
</tr>
<tr>
<td>Civil Rts. 1</td>
<td>Contracts 1</td>
<td>Contracts 3</td>
<td>Logistics 1</td>
<td></td>
</tr>
<tr>
<td>Computer 1</td>
<td></td>
<td>Haz. Mats. 3</td>
<td>NAFTA 1</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Commercial 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Bankruptcy 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>NAFTA 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Freight 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Brokers 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>International 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Civil Rts. 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Customs 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Solid Waste 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Warehousing 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Environ. 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Environ. 5</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The only area mentioned by every test group is Environmental — which was listed by 12% of the total number of respondents and is the only area listed by more than two groups. The second largest listing is Labor.

IX. CONCLUSION

The results of this survey provide empirical proof that there exists a significant disjunction between the practice and law school instruction of transportation and transportation-related law. This disjunction needs to be addressed.

The data provided in this article presents a wealth of information that was hitherto unknown. As the students who implemented the project are finding, there is much that needs to be done to close the gap between the actualities of practice and how transportation and transportation-related areas are taught in American law schools.
In addressing this problem, many questions will need to be answered. It was not the purpose of this study to address those issues or to propose a solution for the disjunction. The survey does, however, provide the necessary empirical basis from which to move forward. Indeed, the results themselves raise in the analysis many of the questions that will need to be addressed as the transportation industry and legal profession move into the twenty-first century.
Aviation law and regulation touches upon concerns important to national economic, social, political, and security interests. Born from this marriage of competing interests is a legal field that, perhaps more than any other area of the law, requires of its practitioners an almost encyclopedic knowledge. AVIATION LAW AND REGULATION, a new treatise published by Butterworth Legal Publishers, addresses, in one source, every major issue an aviation lawyer might confront. The authors, Paul Dempsey, Hughes Professor of Law and Director of the Transportation Law Program at the University of Denver, Robert Hardaway, Professor of Law at the University of Denver, and William E. Thoms, Professor of Law and Director of the Aviation Law Program at the University of North Dakota, have combined their considerable experience and expertise to create a unique reference source for the neophyte or the experienced practitioner.

Beginning with the first chapter, History of the Aviation Industry and Its Regulation, the authors weave into the text an historical perspective which complements the substantive content. This approach gives to the reader a grasp of the subject being addressed which is atypical of books attempting a complete treatment of a subject. When dealing with the aviation industry, which has been highly regulated from its infancy, having an understanding of the history and politics influencing the development of the law is invaluable. This point is illustrated by the authors' treatment of antitrust regulation and airport regulation dealt with in Chapters Five and Seven respectively. After deregulation, the emergence of hub and spoke systems and subsequent increased saturation of hub airports by major carriers, the regulation of airport resource allocation, and antitrust concerns have become pivotal issues in the aviation industry.

* Mr. Woessner is a May 1994 graduate of the University of Denver College of Law and a former staff member of the Transportation Law Journal. He is currently studying for the bar in Colorado.
AVIATION LAW AND REGULATION includes a complete study of these phenomena and their impact on the industry, including chapters on Environmental Regulation, Consumer Protection, and Airline Service to Small Communities.

The authors also give extensive treatment to aspects of international aviation law. In an increasingly shrinking world, being able to understand the correlation between domestic regulations and international law has become integral to almost every field of law. This is especially true of aviation law. As the authors point out, "[a]viation is among the most profound of man's technological accomplishments . . . Aviation shrinks the planet, intermingling the world's cultures and economies." AVIATION LAW AND REGULATION includes three chapters devoted solely to international aviation: Regulation of International Aviation, Regulation of European Community Aviation, and International Liability for Passengers and Cargo. International aspects are also considered in chapters on Environmental Regulation, Aviation Security, Safety Regulation, and Labor Relations and Labor Law.

AVIATION LAW AND REGULATION also includes treatment of fundamental facets of aviation law practice in separate chapters addressing procedural issues, aircraft ownership, leasing, and finance and bankruptcy.
Consolidated Rail Corp. v. Gottshall: Does the "Zone of Danger" Test Put FELA on a New Track?

Steven L. Vollins*

TABLE OF CONTENTS

I. The Gottshall Opinion ......................................... 184
II. The Law Prior to Gottshall ........................................ 187
III. What Types of Emotional Injuries are Within the "Zone of Danger"? .................................. 190
IV. Gottshall's Ramifications for Physical Injury FELA Cases ........................................ 191
V. Gottshall's Ramifications for Asbestos Cases ................................. 195
VI. Conclusion ......................................................... 197

In Consolidated Rail Corp. v. Gottshall, the U.S. Supreme Court (Thomas, J.) resolved that a claim for negligent infliction of emotional distress may be brought against railroads under the Federal Employers'

* Steven L. Vollins is an associate with New York's Chadbourne & Parke. He is a graduate of Brown University (B.A., magna cum laude, 1986) and Harvard Law School (J.D., cum laude, 1989).

Liability Act ("FELA"). This aspect of the Court’s decision is not remarkable. Prior to 
Gottshall, courts around the country allowed FELA plaintiffs to recover for emotional distress in a variety of circumstances.

What is noteworthy about the Court’s decision, however, is the requirement that FELA plaintiffs must fall within the “zone of danger” before they can recover for emotional distress. Before Gottshall, federal circuit courts were split as to when plaintiffs could recover for emotional damages under FELA. Some circuits required plaintiffs to show they had sustained physical as well as emotional injuries, while other courts permitted recovery for emotional injury only.

By requiring that a plaintiff be in the zone of danger in order to recover for emotional injury, the Court’s ruling in Gottshall may lead to markedly different results as to who can recover under FELA. Judges will often face complex issues about whether a plaintiff sustained an emotional injury due to being in the zone of danger. The Gottshall decision is also important because it may significantly restrict the extent of recovery by railroad employees for physical as well as emotional injuries.

This article examines the potential effect of the Gottshall opinion on a variety of FELA claims, including claims based on workplace exposure to asbestos. It suggests the approach courts may take given Gottshall’s rationale that the zone of danger test best achieves FELA’s goal of “alleviating the physical dangers of railroading.”

I. THE GOTTSHALL OPINION

Two separate cases were at issue in Gottshall. The first involved James Gottshall, a Conrail crew member assigned to replace defective track on an extremely hot and humid day. The crew had been under time pressure to complete the job, and was discouraged from taking scheduled breaks. Two and one-half hours into the job, a worker named Richard Johns (a longtime friend of Gottshall) collapsed. Several coworkers rushed to help Johns. They revived him, but five minutes later he col-

7. The Supreme Court granted certiorari on two Third Circuit opinions: Consolidated Rail v. Gottshall, 988 F.2d 355 (3rd Cir. 1993) and Consolidated Rail v. Carlisle, 990 F.2d 90 (3rd Cir. 1993).
lapsed again. By the time the paramedics arrived, Johns was dead. The coroner’s report indicated that Johns had died from a heart attack brought on by the heat, humidity, and heavy exertion.\textsuperscript{8}

Gottshall became extremely agitated and upset as a result of this experience. Over the next several days, Gottshall felt sick while he continued working under the hot and humid weather conditions. He became preoccupied with Johns’s death and feared he would die under similar circumstances. Shortly after Johns’s funeral, Gottshall entered a psychiatric institution and was diagnosed with depression and post-traumatic stress disorder.\textsuperscript{9}

The second case before the Supreme Court in \textit{Gottshall} involved a claim by Alan Carlisle for negligent infliction of emotional distress. Carlisle’s responsibility as a Conrail train dispatcher was to ensure the safe and timely movement of passengers and cargo. Due to a reduction in personnel, Carlisle was required to assume additional duties and work long hours. He began to experience headaches, insomnia, depression and weight loss. After an extended period of working mandatory twelve to fifteen-hour shifts, Carlisle suffered a nervous breakdown.\textsuperscript{10}

There were anomalous results in these two cases at the district court level. Carlisle was awarded $386,500 in damages. He had maintained that his injuries were the result of Conrail’s failure to ensure workplace safety. Carlisle’s medical experts testified that his nervous breakdown was due, at least in part, to job strain.\textsuperscript{11} Conversely, the district court dismissed Gottshall’s action and held that FELA did not provide a remedy for Gottshall’s emotional injuries.\textsuperscript{12}

The Third Circuit affirmed the jury award for Carlisle,\textsuperscript{13} and reversed the dismissal of Gottshall’s claim.\textsuperscript{14} It recognized that claims for negligent infliction of emotional distress were cognizable under FELA, even if there was no proof of physical impact or physical harm.\textsuperscript{15} To safeguard against frivolous claims for emotional harm, the Third Circuit advised that courts should “engage in an initial review of the factual indicia of the genuineness of a claim.”\textsuperscript{16} This would require courts to consider

\begin{itemize}
  \item \textsuperscript{8} Consolidated Rail Corp. v. Gottshall, 114 S.Ct. at 2401.
  \item \textit{Id.}
  \item \textsuperscript{9} \textit{Id.}
  \item \textsuperscript{10} \textit{Id.} at 2402.
  \item \textsuperscript{11} \textit{Id.}
  \item \textsuperscript{12} \textit{Id.} at 2401.
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Id.} at 2402.
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} \textit{Id.} (quoting Carlisle, 990 F.2d at 97-98).
\end{itemize}
"broadly used common law standards" and then "apply the traditional negligence elements of duty, foreseeability, breach, and causation in weighing the merits of that claim."17

The Supreme Court (Thomas, J.) agreed with the Third Circuit that a claim for negligent infliction of emotional distress is cognizable under FELA. The Court rejected as too broad, however, the Third Circuit's approach for detecting which claims were viable under the statute. Specifically, the Court ruled that the Third Circuit's approach would "dramatically expand employers' FELA liability to cover the stresses and strains of everyday employment", and would "tend to make railroads the insurers of the emotional well-being and mental health of their employees."18 The Court therefore analyzed three approaches that would best limit an employer's liability under FELA: the physical impact test; zone of danger test; and relative bystander test.19

The Court rejected the physical impact test as too restrictive. It reasoned that an employer should not escape liability where it put an employee in danger, but did not hurt the employee physically. "We see no reason . . . to allow an employer to escape liability for emotional injury caused by the apprehension of physical impact simply because of the fortuity that the impact did not occur."20

The Court also rejected the relative bystander test as too limiting, since at common law the test only permitted recovery for persons who witnessed the severe injury or death of a close family member. The Court explained that "[o]nly railroad employees (and their estates) may bring FELA claims . . . and presumably it would be a rare occurrence for a worker to witness during the course of his employment the injury or death of a close family member."21

In contrast, the Court ruled that the zone of danger test was consistent with FELA's "central focus", i.e., the protection of railroad workers from physical perils.22 It explained that FELA was designed to provide compensation for the "dangers of railroad work", and that these dangers could lead to both physical and emotional injuries.23 Under the Court's

17. Id. (quoting Carlisle, 990 F.2d at 98).
18. Id. at 2409.
19. Id. at 2406-07. In several instances, Justice Thomas expressed concern that permitting claims for emotional distress under FELA would impose "infinite" liability on railroads. Id. at 2405-09. In her dissent, Justice Ginsberg took issue with this concern. She pointed out that the "universe of potential FELA plaintiffs . . . is hardly 'infinite,'" and that FELA only permits plaintiffs to recover where they are able to show that their injury was caused by the negligence of a railroad. Id. at 2418.
20. Id. at 2411.
21. Id.
22. Id. at 2410.
23. Id. (citing Urie v. Thompson, 337 U.S.163, 181 (1949)).
logic, a railroad should be held liable if it exposes an employee to an unreasonable hazard, which in turn causes the employee to have some sort of injury, whether it be partly physical or entirely emotional in nature.

Unfortunately, the Court spent little time actually articulating the boundaries of the zone of danger. It merely stated that “a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside this zone will not.”\textsuperscript{24} As a result, railroad employees who are “threaten[ed] . . . imminently with physical impact” will be able to recover for any emotional damages they may have sustained.\textsuperscript{25}

Applying the zone of danger standard, the Court remanded Carlisle’s case with instructions to enter judgment for Conrail. It explained that Carlisle’s “work-stress-related claim” plainly did not fall within the common law’s conception of the zone of danger because it merely arose from “stress arising in the ordinary course of employment.”\textsuperscript{26} Conversely, the Court directed the Third Circuit to reconsider Gottshall’s claim under the zone of danger test. That issue had not been adequately briefed before the Supreme Court. Gottshall’s only assertion was that he met the requirements of the zone of danger test, a conclusion with which Conrail disagreed.\textsuperscript{27}

II. The Law Prior to Gottshall

Seven years ago, in \textit{Atchison, Topeka & Santa Fe Railroad Co. v. Buell},\textsuperscript{28} the Supreme Court left unresolved the issue as to what extent plaintiffs could recover under FELA for emotional injuries. The Court merely stated in obiter dicta that whether emotional injuries were cognizable under FELA was “not necessarily an abstract point of law or a pure question of statutory construction that might be answered without exacting scrutiny of the facts of the case.”\textsuperscript{29} It further explained that whether FELA permits recovery for purely emotional damages rested on a “vari-

\begin{itemize}
\item \textsuperscript{24} \textit{Id.} at 2410-11.
\item \textsuperscript{25} \textit{Id.} at 2411.
\item \textsuperscript{26} \textit{Id.} at 2411.
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Atchison, T. \& S. Fe R.R. v. Buell}, 480 U.S. 557 (1987).
\item \textsuperscript{29} \textit{Id.} at 568. With respect to the facts of the Buell case, the Court had found that the record was “insufficiently developed to express an opinion on [plaintiff’s] ultimate chances of recovery.” \textit{Id.} at 564. Instead, it held that the only issue before it was whether the plaintiff’s sole remedy was pursuant to the Railway Labor Act (“RLA”). On this issue, the Court determined that the plaintiff could maintain his FELA action, even though he could have arbitrated his claim subject to the RLA. The Court stated: “The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages.” \textit{Id.}
\end{itemize}
of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity."\(^30\) Thus, the Court clearly indicated that purely emotional injuries were cognizable to some extent under FELA. It deferred to the circuit courts, however, to define when such recovery would be allowed.\(^31\)

Prior to and following the Supreme Court's dicta in *Buell*, circuit courts had articulated several different standards for determining when a FELA plaintiff could recover for purely emotional injuries. The Ninth Circuit crafted the most liberal standard. In *Buell*, it held that an employee who suffers any injury attributable to a railroad's negligence is eligible for recovery under FELA "regardless of its characterization as mental or physical."\(^32\)

The First Circuit was more circumspect. Before the Supreme Court's dicta in *Buell*, it had not allowed plaintiffs to recover for emotional distress unless associated with a physical injury.\(^33\) After *Buell*, the First Circuit admitted that "the door to recovery for wholly emotional injury" under FELA was "somewhat ajar," but it cautioned that it was "by no means wide open."\(^34\)

Like the First Circuit, other federal courts also required that some physical injury accompany a claim for emotional damages. For example, in *Hammond v. Terminal Railroad Ass'n of St. Louis*,\(^35\) a post-*Buell* opinion, the Seventh Circuit affirmed the dismissal of a FELA complaint that merely alleged that the defendant-railroad unfairly criticized the plain-

\(^{30}\) Id. at 568.

\(^{31}\) Although silent on the issue of negligent infliction of emotional distress, the language of the FELA statute does not appear to place any limit on the type of recovery railroad employees may seek. FELA states that "every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." Gottshall, 114 S.Ct. 2396, ? (quoting 45 U.S.C. § 51) (emphasis added).

\(^{32}\) Atchison, T. & S. F. R.R. v. Buell, 771 F.2d 1320, 1324 (9th Cir. 1985), aff'd in part and vacated in part, 480 U.S. 557 (1986). *Buell* involved a carman's claim that his emotional breakdown was caused by the "harassment, threats, and intimidation" he suffered while employed by a railroad. He had maintained that the railroad "negligently failed to stop this harassment and abuse even after [he] and other workers complained" about these actions to the appropriate railroad officials. *Id.* at 1321. *See also* Taylor v. Burlington N. R.R., 787 F.2d 1309, 1313 (9th Cir. 1986) ("The law of this circuit is that railroad employees may assert claims under [FELA] wholly for mental injury."); Toscano v. Burlington N. R.R., 678 F. Supp. 1477, 1478 (D. Montana 1987) (the Supreme Court's opinion in *Buell* left "unassailed" Ninth Circuit precedent recognizing the right of railroad employees to assert claims for wholly mental injuries).

\(^{33}\) *See*, e.g., Bullard v. Central Valley Ry., 565 F.2d 193 (1st Cir. 1977) (refusing to permit recovery for emotional injury as a result of other railroad employees' deaths); Finn v. Consolidated Rail, 622 F. Supp. 41 (D. Mass. 1985), aff'd, 782 F.2d 13 (1st Cir. 1986) (rejecting damage claim for emotional injury brought about by employer's record-keeping error).

\(^{34}\) Moody v. Maine Cent. R.R., 823 F.2d 693, 694 (1st Cir. 1987).

tiff's work and unfairly conducted disciplinary proceedings against him. The court stated that it knew of no case where such allegations were "thought even remotely sufficient to state a claim under the FELA."36 Likewise, in Adkins v. Seaboard System Railroad Co.,37 the Sixth Circuit ruled that an alleged intentional tort resulting in purely emotional injury was not cognizable under FELA.

In Amendola v. Kansas City Southern Railway Co.,38 the court dismissed a complaint alleging "mental anguish resulting from fear of contracting asbestos-related diseases in the future." It held that a plaintiff suing under FELA for negligent infliction of emotional distress must introduce either: (1) evidence that he or she has suffered harm as a result of the conduct that caused the distress, or (2) physical harm caused by the alleged distress. The plaintiffs in Amendola failed to plead either type of physical harm; therefore, their complaint was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

In contrast, federal courts had largely permitted emotional injury claims under FELA where there was some physical injury. One example is Giammona v. Metro-North Commuter Railroad Co.,39 another asbestos lawsuit. In Giammona, the plaintiff satisfied the standard set forth in Amendola by pleading emotional harm as a result of asbestos fibers causing the initiation of a "scarring process in his lung."40 The court explained that although the asserted harm to plaintiff's lungs may not rise to the level of a clinically diagnosed disease, it did "suffice to differentiate this case from Amendola where the court held only that the mere inhalation of asbestos fibers, alone, does not represent an actionable physical injury."41 In other words, the court found that "a detrimental physical change" in body tissue "would, if substantiated, be sufficient to support recovery for emotional harm under FELA."42 Likewise, in Lancaster v. Norfolk & Western Railway Co.,43 the Seventh Circuit affirmed a judgment in favor of the plaintiff where the alleged emotional injury was

36. Id. at 98. See also Ray v. Consolidated Rail, 721 F. Supp. 1017 (N.D. Ill. 1989), aff'd, 938 F.2d 704 (7th Cir. 1991) (dismissed complaint where plaintiff made no allegation that the conduct which harmed him was physical in nature).
40. Id. at 663.
41. Id. at 664.
42. Id.
caused by a series of relatively minor physical violations. Specifically, the plaintiff alleged that on separate occasions he was “goosed,” had a sledgehammer thrown at him, and was threatened with a pickax handle.

Thus, prior to Gottshall, the circuit courts had attempted to find some ground on which to limit recovery for purely emotional damages under FELA. These varying standards will now be replaced by the zone of danger test articulated by Justice Thomas in Gottshall.

III. WHAT TYPES OF EMOTIONAL INJURIES ARE WITHIN THE “ZONE OF DANGER?”

As explained above, in Gottshall the Court ruled that the issue of whether Gottshall was in the “zone of danger” at the time of the events that caused his emotional injury had not been sufficiently briefed. For this reason, it remanded the case to the Third Circuit for further analysis pursuant to relevant common-law precedent. One can only wonder, however, what factors would be significant in the railroad setting to determine whether Gottshall was in the “zone of danger.” The Supreme Court’s opinion in Gottshall provides only a few hints as to what criteria will be useful in making this determination.

Justice Thomas’s use of the word “imminently” is perhaps the best indication of what the “zone of danger” standard may entail. As explained above, the Gottshall Court held that the “zone of danger” would include those railroad employees who are threatened “imminently with physical impact.” Webster’s New Collegiate Dictionary defines “imminent” as “ready to take place,” especially with reference to “hanging threateningly over someone’s head.” Clearly, Carlisle was not in “imminent” danger of any “physical impact” because he merely alleged that Conrail had required him to work long, difficult hours. There was no allegation that he was about to be struck physically.

For the same reason, it could be argued that Gottshall was also not in “imminent” danger of “physical impact.” Like Carlisle, he was merely required to work long, arduous hours. The only differences are perhaps that Gottshall was required to do heavy physical labor in difficult weather conditions, and actually claimed that he feared that, like his friend Johns, he too would suffer a heart attack while working under these conditions. One might ask whether Carlisle would also be in “imminent” danger of

44. Id. at 813.
45. Id. at 811.
46. Gottshall, 114 S.Ct. 2396, 2411.
47. Id.
"physical impact" if a fellow dispatcher had died of a heart attack while on the job, and he feared, like Gottshall, that he too would have a heart attack while working long, stressful hours.

The spirit of Justice Thomas's opinion would suggest that even under these circumstances, Carlisle would not be able to recover for purely emotional injuries pursuant to FELA. Justice Thomas placed great weight on the historic underpinnings of FELA. Indeed, he explained that the "zone of danger" test was consistent with FELA's "central focus" of compensating railroad employees for "physical perils," and that when FELA was enacted in 1908, Congress's "attention was focused primarily upon injuries and death resulting from accidents on interstate railroads." He further explained that a desired effect of FELA was to have railroads "improve safety measures in order to avoid those claims." Perhaps most telling, however, is his statement that the "zone of danger" standard was the most appropriate way to limit FELA claims for emotional injuries because it will further Congress's "goal" of "alleviating the physical dangers of railroading."

In other words, pursuant to the logic of the Gottshall opinion, only individuals who are actually injured as a result of a hazard that is unique to railroading could raise a claim for emotional distress under FELA. Gottshall's fear of danger satisfies this test because working long, physically-arduous hours laying tracks is a hazard that is unique to railroading. Carlisle would not be covered by this standard since he was merely a dispatcher who worked in an office. He could have just as easily been a bus dispatcher or a taxi dispatcher. Indeed, the Court even stated that Carlisle's complaint was "not our idea of a FELA claim" insofar as he merely alleged that he suffered his injury as a result of "too much — not too dangerous — work." Thus, the success of future FELA claims for emotional distress will likely hinge on whether the plaintiff was injured while performing a dangerous task, unique to railroading.

IV. GOTTSHALL's Ramifications for Physical Injury FELA Cases

The Court's attempt to differentiate between perilous "railroad-type" injuries and non-perilous "non-railroad-type" injuries is curious in light of the previous FELA case law, which had permitted even the most

49. Gottshall, 114 S.Ct. 2396, 2404 (quoting Urie, 337 U.S. at 181). See also Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) (FELA "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations").
50. Gottshall, 114 S.Ct. 2396, 2411.
51. Id.
52. Id. at 2412 (quoting Lancaster, 773 F.2d at 813).
minor of on-the-job physical injuries to fall within the statute. These cases, including opinions by the Supreme Court, held that FELA covered any injury incurred by a railroad employee as long as that injury was caused by the railroad in the scope of employment. This line of FELA decisions was premised on the notion that, under FELA all railroad employees are entitled to a “safe place to work.”

Indeed, this “safe place to work” standard has been applied quite liberally. In *Moore v. Chesapeake & Ohio Railroad Co.*, for example, the Fourth Circuit permitted the plaintiff, a mail clerk, to maintain her FELA claim based on the injuries she sustained in the railroad’s cafeteria when she slipped on a pat of butter while carrying a tray from the serving line to the condiment table. The railroad had argued that FELA recovery was inappropriate because its employees were not required to eat lunch in the cafeteria, and were free to eat their lunch at the place of their choice. The railroad had also argued that although the injury occurred on its premises it could not be held liable because the cafeteria was operated by a separate company that was in the catering business. The Fourth Circuit rejected these arguments. It ruled that FELA recovery was appropriate because representatives of the railroad had acknowledged in their testimony that there was some benefit to having employees eat their lunch in the cafeteria, specifically because it “improved employee morale and enabled employees with short lunch periods to return to work on time.” As a result, it ruled that the plaintiff’s injury occurred within the “scope of employment,” and FELA was therefore applicable.

Likewise, in *Gallose v. Long Island Railroad Co.*, the Second Circuit broadly defined what constitutes the “scope of employment” under FELA. The trial court held that the plaintiff could not maintain his FELA claim because his injury was caused by another railroad employee acting outside the scope of her employment. Specifically, the plaintiff was injured by a dog brought to work by the other railroad employee. This other employee claimed that she needed to bring the dog to work with her because she feared for her safety while on the job. The Second Circuit found that there was sufficient evidence in the record to create a jury question as to whether this employee was acting within the scope of her employment by bringing the dog to work. It explained:

54. Buell, 480 U.S. at 558.
56. Moore, 649 F.2d at 1010.
57. See Moore, 649 F.2d at 1011.
Arguably, at least as far as [the dog owner] was concerned, the bringing of the dog to work served a legitimate employment purpose: It afforded her physical protection from what she believed to be a real hazard in the workplace and allowed her to concentrate fully on her duties, thus making her more efficient and better able to perform high quality work.59

*Moore, Gallose* and the other cases like them have permitted railroad employees to raise FELA claims for numerous types of injuries that are not necessarily unique to railroading.60 These cases represent quite a departure from the original intent of FELA, which — as Justice Thomas reiterated in *Gottshall* — was enacted in the early part of this century in response to “the special needs of railroad workers who are daily exposed to risks inherent in railroad work and are helpless to provide adequately for their own safety.”61 As such, the Act was designed to provide railroad workers with a federal remedy that would eliminate several of the traditional tort defenses that the railroad could raise if sued at common law.62 For example, under FELA railroads cannot assert the defense of assumption of risk.63 FELA is also more liberal with respect to a plaintiff’s burden of proving causation. A FELA plaintiff can get to a jury if he or she can show that “the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.”64

In the past, courts have, for the most part, rejected defense arguments that plaintiffs should not be afforded these special FELA advantages where they have not sustained an injury that is attendant to the dangers of working for railroads. In *Moore* and *Gallose*, the railroads’ arguments that FELA was inapplicable were rejected because the plaintiffs were injured at their place of work, albeit while they were in the process of doing something that was not dangerous and not specific to railroading. The plaintiff in *Moore* could have injured herself by slipping on a pat of butter in any cafeteria. There are no unique facts which tie

---

59. *Gallose*, 878 F.2d at 84.
her injury to railroading, or even railroad cafeterias. Likewise, the Gallose plaintiff's injury could have occurred in any workplace setting where someone brought a dog to work. Again, there is nothing that links this injury to the dangers attendant to railroading.

Thus, the Gottshall Court's emphatic rejection of claims for negligent infliction of emotional distress that are not based on the dangerous nature of railroad work may be seen as a divergence from prior precedent which broadly defined the type of workplace injuries that FELA covered. Of course, it will likely be argued that the Court's holding in Gottshall should only apply in cases where the plaintiff alleges a purely emotional injury. But this distinction would leave one to wonder why the Court chose the "zone of danger" standard over the "physical impact test." If it truly wanted to draw a clear line between FELA claims for emotional injury and FELA claims for physical injury, no matter how small the physical injury, it could have required plaintiffs to have been physically hurt or physically touched in some way before being able to recover for emotional harm. Instead, the Court focused on the hazardous nature of railroad work, and opted to have FELA govern the claims of employees who had the "apprehension of physical impact" because they were doing dangerous work.65

One might also wonder why physical injuries should be treated any differently from emotional injuries under FELA. After all, the Gottshall Court recognized that on its face FELA makes no distinction between physical and emotional injury.66 As such, why should purely emotional injuries be subject to greater scrutiny with regard to whether they were caused by a hazard specific to railroading?

A plausible answer may be the Court's desire to place some limitation on claims for emotional injury under FELA. Justice Thomas was concerned that permitting FELA claims for negligent infliction of emotional distress would lead to "infinite" liability for the railroads. As Justice Ginsburg noted, however, there are other ways of verifying the validity of claims for emotional distress. For example, the "physical manifestation" test endorsed by the Restatement of Torts would limit recovery for emotional injuries to claimants who have sustained some physical distress as a result of their emotional harm. On this ground, Justice Ginsberg would have affirmed the Third Circuit's ruling which permitted Carlisle to recover under FELA because there was a mechanism by which

66. Id.
the "genuineness" of his claim could be verified. The Court's rejection of this alternative, as well as its repeated concern that FELA was intended to compensate railroad employees for the dangers attendant to railroading, lead one to believe that it was interested in not just limiting liability for emotional injuries under FELA, but also in limiting the type of FELA claims that can be raised for physical injuries.

V. **Gottshall's Ramifications for Asbestos Cases**

Many of the issues Gottshall raises about the parameters of the "zone of danger" test in the railroad setting may be answered if courts have to resolve to what extent railroad workers exposed to asbestos can recover under FELA. Since diseases caused by asbestos take years to manifest themselves, courts may likely rule that railroad employees who were exposed to asbestos decades ago cannot recover today for claims of emotional distress because they have not been in "imminent danger." As discussed above, the word "imminent" connotes a threat of immediate danger, one that is simply not present in the asbestos context. Therefore, plaintiffs raising claims for infliction of emotional distress because of their exposure to asbestos would at first blush flunk the "zone of danger" test.

But it should be remembered that the Giammona court had based its decision on the fact that the plaintiff there alleged that although he had no clinically diagnosed disease, the asbestos fibers he was exposed to initiated a "scarring process," which had already done damage to his lung tissue. Would this physical harm, albeit without a clinically diagnosed illness, take an asbestos plaintiff outside the reach of Gottshall, and relieve him from having to show that he was in the "zone of danger?" If so, the scope of the Court's opinion in Gottshall would indeed be limited to situations where there is not even the least serious physical harm. If not, then a court would likely rule that the reasoning of Gottshall applies to FELA claims for at least some physical injuries, as well as to FELA claims for emotional harm.

A court could easily dodge this complex issue requiring an interpretation of Gottshall by rejecting the reasoning of Giammona, and ruling that an asbestos plaintiff who has simply sustained scarring to the lungs — with no clinically diagnosed disease — is merely suing for an emotional

---

67. Specifically, she pointed out that the "genuineness" of Carlisle's emotional injuries could be established because he experienced such verifiable physical symptoms as "insomnia, fatigue, headaches,...sleepwalking and substantial weight loss." Gottshall, 114 S.Ct. 2396, 2416 (quoting Carlisle, 990 F.2d at 92, 97 n.11).
injury, i.e., the fear of coming down with a disease.\(^69\) Such an approach would require a court to look beyond the pleadings to discover whether the true nature of a plaintiff's injury was physical or emotional.

This was what the Eastern District of Louisiana did in *Gaston v. Flowers Transportation Co.*,\(^70\) a case filed pursuant to the Jones Act.\(^71\) In *Gaston*, the plaintiff and his half-brother were both working as deckhands on a barge at the time of a collision. Because of the accident, plaintiff fell to the deck and injured his elbow. His half-brother slipped off the barge, and was crushed to death. The court rejected the plaintiff's Jones Act claim, ruling that his injury was essentially emotional in nature, even though he had also suffered a trivial injury, a bruised elbow.\(^72\)

Could an analogous argument be made for someone who was exposed to asbestos while working for a railroad and many years later has sustained scarring to the lungs as a result, but has come down with no clinically diagnosed illness? The Fifth Circuit’s *Gaston* opinion, affirming the district court’s ruling, may shed some light on this issue. In that opinion, the Fifth Circuit distinguished the *Gaston* plaintiff's injury from the injury sustained by the plaintiff in another case, *Hagerty v. L & L Marine Services*.\(^73\) The plaintiff *Hagerty* was accidentally drenched in cancer-causing chemicals and feared contracting cancer based on this exposure. The Fifth Circuit explained that unlike the plaintiff in *Gaston*, “Mr. Hagerty's recovery was one for his own expenses and for his own fear of contracting cancer — one based upon an event directly affecting him.”\(^74\)

Based on the same reasoning, the Fifth Circuit also ruled that the *Gaston* plaintiff failed to meet the “zone of danger” test. It pointed out that at neither his deposition nor in his answers to interrogatories did the plaintiff indicate that he was concerned that he himself would be harmed at the time of the barge accident.\(^75\) In this sense, *Gaston* was unlike *Gottshall*, where the plaintiff was able to allege that he continually feared that he, like his friend Johns, would have a heart attack while working long,
arduous hours in the sun. Gaston was also unlike Hagerty, who feared for his own health from the moment he was accidentally drenched in the cancer-causing chemicals.

As such, it appears that a key inquiry under the "zone of danger" test is whether the employee actually feared danger at the time of the exposure, and not at some later time when he learned that an exposure may have caused him harm. In this sense, asbestos plaintiffs would not be able to recover for what are essentially emotional injuries under the "zone of danger" test, unless they knew at the time of their exposure that they were inhaling asbestos fibers and feared the risks attendant to this exposure at the time. Since asbestos fibers are too small to be seen and since it takes prolonged exposure to asbestos to impose any risk of physical harm, such a factual scenario appears highly unlikely. Moreover, any asbestos plaintiff making such allegations about his fears at the time of exposure would likely have significant problems under the statute of limitations, which starts to run at the time that the plaintiff discovered or reasonably should have discovered the cause of his alleged injury.76

VI. CONCLUSION

The Supreme Court's holding in Gottshall may not just limit the extent to which railroad employees can recover for purely emotional injuries under FELA, but may limit the extent to which they can recover for physical injuries as well. Justice Thomas's adoption of the "zone of danger" standard appears to signal a significant departure from the holdings of lower federal courts, which had broadly interpreted the statute to permit FELA recovery for any physical injuries sustained by railroad employees while they were on duty. Following Gottshall, courts may require that plaintiffs seeking recovery under FELA be engaged in the type of work that the statute was originally aimed to protect, i.e., work that is dangerous but essential to railroading.

Search and Seizure of Air Passengers and Pilots: The Fourth Amendment Takes Flight

Jonathan Lewis Miller*

TABLE OF CONTENTS

I. Introduction ............................................... 200
II. The Scope of Fourth Amendment Protection .................. 201
III. Consensual Searches of Passengers ......................... 203
    A. The Standard of Consent .................................. 204
    B. Administrative Searches .................................. 206
IV. Search of Passenger’s Luggage and Effects ................. 207
V. Seizure of Passengers — The Drug Courier Profile ......... 209
VI. Passengers from Abroad ..................................... 211
    A. Border Search ............................................. 211
    B. Detention at the Border .................................. 212
VII. Drug Testing of Pilots ..................................... 213
VIII. Police Aerial Investigation ................................ 218
IX. Conclusion .................................................. 220

* Mr. Miller received his A.B. from Colby College, 1973, his B.S. in physics from University of Washington, 1980, his J.D. from the University of Denver College of Law, 1994, and he formerly served on the board of the Transportation Law Journal.
Air travel, now considered to be the safest and most timely manner of traversing global distances, has proven to be an effective way to transport illicit drugs, and at times to be the unwitting tool of terrorists. "[A]n aircraft flying many passengers in splendid and detached isolation thousands of feet in the air is especially vulnerable; in flight it operates in a delicate balance, subject to catastrophe and destruction if that balance is in any way disrupted." Police officials in each country have developed strategies to combat terrorism and the movement of illicit substances.

In the United States, the Fourth Amendment of the Constitution, the heart of the Bill Rights, and perhaps the cornerstone of freedom, has been interpreted to define and redefine the limits of intrusion the police may legally take in their search for drugs and criminals. The right to be free from unreasonable searches and seizures precedes the Revolution. An oft quoted passage by William Pitt, Lord Chatham, cited since the time of our founding fathers, defends this protection:

The poorest man in his cottage may bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter it; but the King of England can not. . . . All his power dares not cross the threshold of that ruined tenement!

Justice Story has said that "[t]his provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property." Justice Brandeis, in his prophetic dissent in Olm-
stead,7 declared, about the “sanctities” of the home and “privacies” of life, “the offense . . . is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .”8

With respect to air travel, the Fourth Amendment directly impacts the legality of searches at immigration, the permissibility of drug testing of air carrier personnel and pilots in particular, and the use of aircraft for domestic criminal surveillance.

Law and order demand that the airways be free of criminals endangering the lives of innocent passengers in hijackings and other terrorist activities. Yet, most of the criminals apprehended in weapons searches at airports are unarmed. Most of the weapons searches uncover illicit drugs rather than weapons.

It would technically be possible to implant felons with microchips via hypodermic injections, which would announce their status as felons as they passed through airport arrival and departure gates.9 This possibility demonstrates the tension between the needs of society in preventing terrorism and illicit drug traffic and the needs to preserve for the common citizen the liberties and freedoms guaranteed by the Constitution and the Bill of Rights.10 This paper will explore the pronouncements of the United States Supreme Court and federal courts in relation to these issues.

II. The Scope of Fourth Amendment Protection

The Fourth Amendment to the Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.11

---

8. Id. at 474-475 (Brandeis, J. dissenting).
9. Based on a telephone interview with John Howard, D.V.M., Gallup, New Mexico on April 10, 1994. Pets are implanted with microchips which transmit a 10 digit code when scanned. Cost - $350. For humans, it could be a felony to remove an implanted chip.
11. U.S. Const. amend. IV.
American Constitutional criminal procedure is federal common law. Since *Marbury v. Madison*, the U.S. Supreme Court has held, under the Supremacy Clause, the Court to be the final arbiter of the United States Constitution. Thus, with the elegant yet open-ended language of the Constitution and particularly, the Bill of Rights, the Supreme Court has increasingly molded and delimited the rights of the American people.

Each state may afford a citizen greater rights than those guaranteed under federal law, but not less. Since each federal and state court may apply the rulings of the Supreme Court differently, the applicable cases of the Supreme Court are the settled law of the land and must be the main focus of any investigation into the application of the Bill of Rights.

Two cases, *Katz v. United States* and *Soldal v. Cook County*, define the current envelope of the Fourth Amendment's application to cases as of this writing. Although not specifically concerned with aviation, these cases underly all present cases. If, for heuristic purposes, you think of the Fourth Amendment as the point of an inverted pyramid, then these two cases rest directly upon the Fourth Amendment.

In 1967, the U.S. Supreme Court confronted the problems of the development of modern technology in *Katz v. United States*. FBI agents had attached electronic recording devices to the outside of a telephone booth in which the subject, Katz, had made incriminating statements with regard to his bookmaking activities. Justice Stewart, speaking for the Court, declared, "the protection of a person's general right to privacy — his right to be let alone by other people — is like the protection of his property and of his very life..." The Court held that "[t]he activities of electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."
Prior to *Katz*, searches had been defined in terms of a physical trespass. The Court thus redefined the scope of the protection of the Fourth Amendment from freedom from the invasion of trespass to freedom from unwarranted invasion of one's right to privacy. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." 20

In *Katz*, something was gained: the extension of the Fourth Amendment into the reasonable expectation of privacy. However, perhaps something was lost as well: the right to demand a particularized warrant whenever the government contemplated a trespass. Justice Harlan, in his concurrence to *Katz*, equated "electronic" to "physical intrusion" as potentially violative of the Fourth Amendment. 21 Implicit in this interpretation is the warning to not abandon the concept of trespass. This warning has gone unheeded.

In *Soldal v. Cook County*, 22 the Court considered whether a seizure was protected by the Fourth Amendment even when no privacy interest was implicated. The Soldal family resided in a mobile trailer. Rather than pursue a conservative and legal course of court-ordered eviction, the owner of the trailer park, enlisting the aid of the local sheriff, simply hooked the Soldal's home to a tractor and wrenched it off the premises, tearing the canopy, and the electrical, water, sewage and telephonic hookups. 23 The Court quipped that this gave new meaning to the term "mobile home." 24 Here, the sheriff was not taking the property *per se*, but rather exercising control and domain over the mobile home for purposes of eviction.

The Court reversed the court of appeals, holding that this, in fact, was a seizure under the Fourth Amendment, even though there was no search. 25 Thus, while *Katz* modified the concept of an unreasonable search to include those areas where the suspect had a reasonable expectation of privacy, *Soldal* held onto the idea that seizure is the taking into possession of a person or property that had been under the control of another.

### III. Consensual Searches of Passengers

In the War on Drugs, airport lobbies have become one of the major battlefields between the drug enforcement agencies and the drug couriers. Police often confront those who they feel may be carrying illicit

20. *Id.* at 359.
21. *Id.* at 360-61.
23. *Id.* at 541.
24. *Id.* at 543.
25. *Id.* at 547.
drugs. The officer may ask the suspect to allow a search of his or her luggage. Generally, when the suspect truly ‘consents’ to the search, the officer need not obtain a warrant nor show probable cause to justify the search.

A. THE STANDARD OF CONSENT

The Court has provided some guidelines as to what constitutes consent. In Schneckloth v. Bustamonte,26 the Court rejected a traditional waiver approach to consent; a knowing and intelligent relinquishment of one’s rights does not necessarily constitute consent. Justice Stewart, speaking for the Court, held that consent to a search must be demonstrably voluntary, and not the result of “duress or coercion, express or implied.”27

Florida v. Bostick28 also provides some guidance as to what constitutes consent. In this case, armed police in special uniforms would ‘work the buses’ by entering a bus, and asking passengers to submit to a search of their luggage. The Court held that the test of whether a passenger consents to a search is whether, taking into account the totality of the circumstances, a reasonable passenger would feel free to “decline the request and terminate the encounter.”29 The Court specifically held that this rule applied to an “airport lobby” as well as city streets or buses.30

Various police and drug enforcement agencies have utilized the ‘consensual search’ as an effective means of intercepting drugs. The agents will scan passengers at airports for those matching various factors of a “drug courier profile”, and approach candidates.

In United States v. Mendenhall,31 DEA agents in an airport approached a woman, Mrs. Mendenhall, whose behavior fit the “so-called ‘drug courier profile.’”32 She was asked to accompany the agents to the airport DEA office, and was asked to submit to a strip search. She stated she had a plane to catch, and was told that if no drugs were found, she could leave. During the course of the search she handed over two pack-

27. Id. at 248. The court warned that “voluntariness is a question of fact to be determined from all the circumstances.” Id. at 248-49.
29. Id. at 433.
30. Id. at 436. Justice Marshall, dissenting, stated: “[i]n my view, the Fourth Amendment clearly condemns the suspicionless, dragnet-style sweep of intrastate or interstate buses.” Id. at 450.
32. Id. at 548, n. 1. Mrs. Mendenhall was the last person off the flight from Los Angeles, was enroute to Detroit on a different airline, appeared nervous, scanned the area, and had no baggage. Id.
ets of heroin. Justice Stewart, speaking for a divided Court, held that Mrs. Mendenhall's consent, in light of the totality of the circumstances, and despite testimony by one of the agents that Mrs. Mendenhall was in fact not free to leave, gave her consent "freely and voluntarily."

In *Florida v. Royer*, two detectives approached a traveler, Royer, and requested his airline ticket and driver's license. In the course of questioning him, they invited him to accompany them to a small room. There, he gave the detectives keys to open one of his suitcases, which had been retrieved by the detectives, and allowed the detectives to force open the other. Drugs were discovered. The Court found that the procedure used was coercive, and that the holding of the driver's license, tickets and luggage precluded Royer from terminating the encounter. The Court suggested that with the use of less coercive means and the utilization of a "dog-sniffing" procedure to establish probable cause, the encounter would have passed muster.

As the above cases illustrate, many drug carriers appear to submit to searches, like lambs led to the slaughterhouse. In *United States v. Berry*, the Fifth Circuit court noted: "We think it strikingly unusual that so many individuals stopped at airports consent to search while carrying drugs and even show where they have hidden drugs...."

Judge Becton of the North Carolina Court of Appeals addressed this issue in a law review article:

> [T]he agent was always careful to give the suspect the impression that he was never under arrest or in custody during the contact and was always free to go. Regardless of whether this was true, it was certain that the agent would testify to this sequence of events at trial.

Judge Becton concludes, "to instill any meaning into the second tier of police-citizen encounters — brief seizures — 'reasonable suspicion' must mean more than a subjective judgment based on an amorphous statistical data so obviously susceptible to bias, misuse, and arbitrary enforcement."

33. Id. at 548-49.
34. Id. at 575 (Justice White, joined by Justices Brennan, Marshall, and Stevens, dissenting).
35. Id. at 559-60.
37. Id. at 507. To the suggestion of an alternate approach, (then) Justice Rehnquist responded: "If my aunt were a man, she would be my uncle." Id. at 528.
38. United States v. Berry, 670 F.2d 583 (5th Cir. 1982).
39. Id. n.16 at 598.
41. Id. at 473.
B. ADMINISTRATIVE SEARCHES

The government has defined administrative searches as an exception to the Fourth Amendment requirements, since searches in this context may proceed without probable cause, with or without a search warrant. Rather, the search proceeds on the basis of the government’s need to oversee a highly regulated activity.

In 1972, the President ordered the screening of all airline passengers, and accordingly, the FAA ordered that all passengers and carry-on baggage be screened by January 5, 1973. The Ninth Circuit, considered the screening of airline passengers in United States v. Davis. The Davis Court stated:

[S]earches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence for a crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched.

The Davis Court recalled that “screening searches of airline passengers” were in fact regulatory searches in furtherance of an “administrative purpose, namely, to prevent the carrying of weapons or explosives aboard . . . .” However, if contraband was discovered in this course of action, the search would not necessarily be rendered unconstitutional.

The searching authorities often discover contraband in these ‘administrative’ screening searches of airline passengers. The Ninth Circuit cited statistics from newspapers which revealed that less than 20% of the arrests have been for offenses relating to aircraft security. The court quoted the Director for Security for Pan American World Airways as follows: “We’ve shaken down any number of people we have found to be thoroughly undesirable to have aboard an airplane . . . . Narcotics! — we’re knocking off people day after day . . . .” The federal court worried about the passenger’s right to travel and his right to privacy, suggesting that passengers be allowed to retreat from the search by refusing to board.

42. 14 C.F.R. § 121.538 (1972).
43. United States v. Davis, 482 F.2d 893 (9th Cir. 1973).
44. Id. at 908.
45. Id.
46. Id.
47. Id. at 909 (citing NEW YORK TIMES, Nov. 26, 1992 at 1).
48. Id. (quoting JAMES A. AREY, THE SKY PIRATES 242 (1972)).
49. Id. at 913.
50. Id. at 911.
IV. SEARCH OF PASSENGER'S LUGGAGE AND EFFECTS

Although the Supreme Court has never directly addressed warrantless searches of aircraft, numerous cases exist with regard to warrantless searches of automobiles, boats, mobile homes, and airport lobbies. In *Coolidge v. New Hampshire*, the Court held that "exigent circumstances" justify the warrantless search of 'an automobile stopped on the highway,' where there is probable cause. The opportunity to search is fleeting." The *exigent circumstance* exception has often been invoked to justify searching the luggage of passengers in transit, who may be transporting illicit drugs.

In *United States v. Place*, a passenger, Place, refused to consent to a search of his luggage upon his arrival at La Guardia airport in New York. A Drug Enforcement Administration (DEA) agent seized his luggage and transported it to Kennedy Airport where 90 minutes later a narcotics detection dog reacted positively to a sniff of the luggage. The Court held that the initial seizure was justified, but that a 90 minute seizure of Place's luggage, without probable cause, rendered the seizure unreasonable under the Fourth Amendment. Justice O'Connor, writing for the Court, applied a balancing approach derived from *Terry v. Ohio*, balancing the government's exigent interest in fighting the war on drugs against the intrusion of the individual's rights protected under the Fourth Amendment.

In another case, the Fifth Circuit allowed for the validity of airport preboarding security searches based on the need to "thwart air piracy and protect passengers and crew." The court warned this should not "turn into a vehicle for warrantless searches for evidence of other crimes."
In 1971, in United States v. Lopez, a federal trial court explored the hijacker profile and the use of the flux-gate magnetometer. District Judge Weinstein distinguished the magnetometer from a Katz wiretap, since no communication of the subject - "internal or external" - was involved. The Lopez court did not adequately address whether an expectation of privacy had been abridged, but explained that the courts were there to prevent abuse. However, said the court, "[e]ven the use of the magnetometer might be an objectionable intrusion were it not accompanied by an antecedent warning from the profile . . . ."

Subsequently, the Fourth Circuit, in United States v. Epperson, found that the use of the magnetometer was justified: "The danger is so well known, the governmental interest so overwhelming, and the invasion of privacy so minimal, that the warrant requirement is excused by exigent national circumstances." The Epperson court admonished that "reasonableness is still the ultimate standard" and that reasonableness was determined by balancing governmental interests versus the rights to privacy.

At first, only carry on luggage was x-rayed, however, eventually all luggage became suspect. In the 1984 case of United States v. Herzbrun, the court held that "airport security checkpoints . . . have long [been] held . . . like international borders, [to be] 'critical zones' in which

62. See Drug Courier profile, infra. The Lopez court stated:
Employing a combination of psychological, sociological, and physical sciences to screen, inspect and categorize unsuspecting citizens raises visions of abuse in our increasingly technological society. Proposals based upon statistical research designed to predict who might commit crimes and giving them the special attention of law enforcement agencies is particularly disturbing.
Id. at 1100.
63. A magnetometer is a device which detects the presence of magnetic materials by their influence on the local magnetic field. It is often used to screen for weapons at airports. The court took judicial notice of the magnetometer. Id. at 1085. "We need not fear that approving use of the magnetometer to search by means of unseen electromagnetic lines of force foretells approval of more frightening systems; for example, one searching the brain waves [magnetoencephalography] . . . to determine if they are tense or frightened . . . ." Id. at 1100.
64. Id. at 1101.
65. Id.
66. Id. at 1100.
68. Id. at 771.
69. Id. (quoting Camara v. Municipal Court, 387 U.S. 523 (1966)).
70. Id.
special [F]ourth [A]mendment considerations apply." That case involved a traveler, Herzbrun, who was stopped and had his shoulder bag seized after he retreated from a security checkpoint, exclaiming, "I don’t want to fly." The court held that Herzbrun had no constitutional right to revoke his consent to a search. The court cited United States v. Skipwith, which "stands for the proposition that travelers who enter an airport security area may be searched on mere suspicion."77

In 1984, the Sixth Circuit applied the automobile exception to a four-engine DC-6, to allow the evidence of smuggled drugs. The court noted that although the Supreme Court had not decided this issue, the Eleventh Circuit upheld a warrantless search perceiving "no difference between the exigent circumstances of a car and an airplane." Many other cases had similar findings including United States v. Brennan, which found that "the mobility of a plane is sufficient to justify a warrantless search."81

V. SEIZURE OF PASSENGERS — THE DRUG COURIER PROFILE

The court in United States v. Lopez linked the use of the magnetometer to suspicions aroused by a hijacker profile. The use of magnetometer screening became mandatory and the use of profiles expanded. Lopez explored the escalating steps of a stop: establishing severe legal penalties, placing warnings and notice, developing a profile, magnetometer readings, interview by airline personnel, interview by Marshal, and full frisk.

In the 1972 landmark Second Circuit opinion of United States v. Bell Judge Friendly explained:

73. Id. at 775.
74. Id. at 775.
75. Id. at 778.
76. United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973).
78. United States v. Nigro, 727 F.2d 100 (6th Cir. 1984).
79. Id. at 106 (quoting United States v. Rollins, 699 F.2d 530, 534 (11th Cir. 1983)).
80. Id. (citing United States v. Brennan, 538 F.2d 711, 721-22 (5th Cir. 1976)).
83. Supra, note 63.
84. See generally, Cogan, supra note 10. In 1989, one pair of agents was reported to have detained 600 suspects using the drug courier profile. This resulted in 10 arrests and 590 warrantless, unnecessary and unreasonable searches. Id. at 975-976 (citing United States v. Hooper, 935 F.2d 484, 499-500 (2d. Cir. 1991) (Pratt, J., dissenting), cert. denied, 112 S.Ct. 663 (1991)).
85. Lopez, 328 F. Supp. at 1082.
When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness.

Since all air passengers and their baggage can thus be constitutionally searched, there is no legal objection to searching only some. . . 87

Henceforth, the utilization of the hijacker, and then the drug courier profiles has seldom been questioned except in law review articles and dissents. In United States v. Moreno,88 the Fifth Circuit, citing the possibility that a hijacker is "a deeply disturbed and highly unpredictable individual - a paranoid, suicidal [violent] schizophrenic,"89 admonished that airport security was not alone sufficient to justify a warrantless airport search.90

The Fifth Circuit applied Moreno in United States v. Legato.91 In 1971, in Miami, the FBI received an anonymous telephone tip that a bomb would be smuggled on board a 4:00 P.M. Chicago airline departure. The suspects in Legato were carrying an orange shopping bag at the airport. They were stopped, searched, and found to be carrying heroin, and subsequently convicted. The Fifth Circuit court applied a 'critical zone' and exigent circumstances argument justifying the detention,92 and a 'consent' theory justifying the search.93

Concurring only in the result, Judge Goldberg stated:

The exigencies of skyjacking and bombing, however real and dire, should not leave an airport and its environs an enclave where the Fourth Amendment has taken its leave. It is passing strange that most of these airport searches find narcotics and not bombs, which might cause us to pause in our rush toward malleating the Fourth Amendment in order to keep the bombs from exploding. Seeking to prevent or detect crime, standing alone, has never justified eroding right to privacy, and I continue to hope that we will soon return to the hallowed and halcyon days of the Fourth Amendment.94

The reasonableness of searches continued to be tested as it was in United States v. Kroll.95 The problem with drug courier profiles is that the parameters fluidly vary from case to case. In United States v. Soko-

87. Id. at 675 (Friendly, C. J., concurring).
88. United States v. Moreno, 475 F.2d 44 (5th Cir. 1973).
89. Id. at 48.
90. Id.
91. United States v. Legato, 480 F.2d 408 (5th Cir. 1973).
92. Id. at 410-12.
93. Id. at 413.
94. Id. at 414 (Goldberg, Circuit Judge, specially concurring).
95. United States v. Kroll, 481 F.2d 884 (8th Cir. 1973) (where a United States marshall found drugs while performing a warrantless search of a briefcase for weapons after the suspect was determined to fit the hijacker profile and his briefcase hinges set off the magnetometer).
low, another drug courier profile case, Justice Marshall, dissenting, explained that “a suspicion is not reasonable unless officers have based it on ‘specific and articulable facts.’”

Justice Marshall then enumerated a series of profile cases and the articulable facts that they were based upon. Profiles included the following factors: first to deplane, last to deplane, deplaned in middle; one-way ticket, round-trip ticket, non-stop flight, changed planes; no luggage, gym bag, new suitcases; traveling alone, traveling with companion; acted nervously, acted too calmly. Some have suggested that the drug courier profile has met mixed acceptance by the appellate courts in that it fails to limit the discretion of the officers.

VI. PASSENGERS FROM ABROAD

A. BORDER SEARCH

Aviation is unique in that of all the means to travel, only the airport provides an international gateway at landlocked, inner continental locations. Thus, Atlanta, Chicago, Denver, Moscow and Paris are as much international ports of entry as are New York and San Francisco. The international border crossing may take place deep in the heartland of a nation. In the United States, courts and government agencies, such as Customs, have traditionally taken greater liberties in protecting their borders than in protecting individuals once admitted to the country.

Recognizing that the First Congress noted the difference between searches of a dwelling and those of a movable vessel, the Supreme Court in United States v. Carroll stated the impracticability of obtaining a warrant when the subject was in transit. In 1961 the Ninth Circuit applied this doctrine in Witt v. United States: “No question of whether

98. Id. at 13-14.
101. Id. at 153. Note the familiar dissent by Justice McReynolds, concurred in by Justice Sutherland: “The damnable character of the ‘bootlegger’s’ business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods.” Id. at 163.
there is probable cause exists when the search is incidental to the crossing of an international border, for there is reason and probable cause to search every person. . . ."103

B. DETENTION AT THE BORDER

The extent of the police power is broadened at the border even under less than articulable suspicion. In *United States v. Montoya de Hernandez*,104 Mrs. Montoya de Hernandez was suspected by customs officials of being a "'balloon swallower', one who attempts to smuggle narcotics hidden in her alimentary canal."105 The suspect was detained for over 16 hours, while female officers observed her and waited for her to move her bowels. She refused all food and drink and complained of the indignity. The customs officials chose not to seek a warrant to x-ray her distended stomach.106

Justice Rehnquist, delivering the opinion of the Court, explained: "Since the founding of our Republic, Congress has granted the executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."107 The Court held that the detention at the border, beyond the scope of a routine customs search and inspection, was justified if the agents, considering all the facts, reasonably suspected the traveler was "smuggling contraband in her alimentary canal."108 Justice Rehnquist concluded:

[T]he detention was not unreasonably long. . . . At the border, customs officials have more than merely an investigative law enforcement role. They are also charged . . . with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives.109

Mrs. Montoya de Hernandez did not agree. Justice Brennan, joined by Justice Marshall, dissenting, quoted Mrs. Montoya de Hernandez, during her detention: "I will not submit to your degradation and I'd rather die."110 He reported that she was kept in a small uncarpeted room with no bed for nearly 24 hours. She spent most of her time crying and looking at pictures of her children. Her requests to call home, to speak to her

103. Id. at 391.
105. Id. at 534.
106. Id. at 536.
107. Id. at 537.
108. Id. at 541.
109. Id. at 544.
110. Id. at 546 (Brennan, J., dissenting).
children, to contact an attorney, were all denied. She was strip searched twice. After 27 hours in detention, a warrant was obtained for a body cavity search and two balloons of cocaine were located. Eighty-six more appeared over the next four days.\textsuperscript{111}

Justice Brennan was most concerned that this episode had taken place "based on nothing more than the 'reasonable suspicion' of a low ranking investigative officer . . . unmonitored. . . ."\textsuperscript{112} without warrant or probable cause.\textsuperscript{113} Those who conduct border searches should not be the sole judges.\textsuperscript{114} Most disturbing, Justice Brennan recounts that one physician who had "conducted many 'internal searches' — rectal, vaginal and stomach pumping — estimated that he had found contraband in only 15 to 20 percent of the persons he had examined."\textsuperscript{115}

VII. DRUG TESTING OF PILOTS

In 1989, the Federal Aviation Administration (FAA) issued a final rule mandating urinalysis drug testing of airline and aircharter personnel who perform security-related or safety-sensitive tasks.\textsuperscript{116} In 1988, the Department of Transportation (DOT) predicted a positive test rate of 7.5% of all aviation employees tested for illegal substances.\textsuperscript{117} This proved to be far from true: "[A]n analysis of 120,642 drug tests conducted over a six-month period in 1990, showed positive findings in only 0.47% of the tests completed."\textsuperscript{118}

The constitutionality of drug-testing has been tested in the 1989 cases \textit{Skinner v. Railway Labor Executives' Association}\textsuperscript{119} and \textit{National Treasury Employees Union v. Von Raab}.\textsuperscript{120} In \textit{Skinner},\textsuperscript{121} the Federal Railroad Administration promulgated rules requiring drug and alcohol testing of any employee involved in a train accident or incident or who, by dint of some infraction, is suspected by a supervisor of drug or alcohol use. Railroad employees challenged the regulation. The U.S. Supreme Court held that 'covered' employees in regulated industries have a diminished expec-

\begin{flushright}
\begin{tabular}{l}
111. \textit{Id.} at 548 (Brennan, J., dissenting).
112. \textit{Id.} at 549 (Brennan, Marshall, JJ., dissenting).
113. \textit{Id.} at 550 (Brennan, Marshall, JJ., dissenting).
114. \textit{Id.} at 556 (Stevens, J., dissenting).
115. \textit{Id.} at 557 (Stevens, J., dissenting).
118. \textit{Id.} (citing \textit{Washington Roundup, supra note 117}).
\end{tabular}
\end{flushright}
tation of privacy,\textsuperscript{122} and that the likelihood of testing of those in 'safety-sensitive' positions would deter them from drug use.\textsuperscript{123} Thus the "[g]overnment's compelling interests outweigh privacy concerns"\textsuperscript{124} and testing is not "an undue infringement on the justifiable expectations of privacy of covered employees."\textsuperscript{125}

Joined by Justice Brennan, Justice Marshall dissented, noting that notwithstanding the importance of ridding society of drugs, the "[g]overnment's deployment . . . of a particularly Draconian weapon . . . the compulsory collection and chemical testing of railroad worker's blood and urine [may not] comport with the Fourth Amendment."\textsuperscript{126} Justice Marshall suggested that perhaps the Department of Transportation could collect the specimens subsequent to an accident (upon reasonable suspicion) but not analyze them unless a warrant was issued upon probable cause,\textsuperscript{127} which would be corroborated either by a witness or a coworker's report of malfeasance.\textsuperscript{128}

In \textit{Von Raab},\textsuperscript{129} Justice Kennedy, speaking for the majority of the Supreme Court, upheld drug testing of U.S. Customs officials. Unlike \textit{Skinner},\textsuperscript{130} where the testing was predicated upon either an accident or suspicion of drug or alcohol use, the drug testing in \textit{Von Raab} was triggered by a Custom employee's request for transfer to a sensitive position. A sensitive position was one where the agent would be either (1) armed, (2) in contact with drugs, or (3) privy to secret information. Within the Customs Service, almost every post involves at least one of these three, thus any Customs employee seeking advancement or transfer would be tested.

The U.S. Supreme Court held that in this circumstance a warrantless search with no probable cause was acceptable.\textsuperscript{131} Here, the employee was already on notice that drug testing would be required, so "a warrant would provide little or nothing in the way of additional protection of personal privacy."\textsuperscript{132} Further, a probable cause analysis is related to a criminal investigation,\textsuperscript{133} whereas when the Government acts in a routine

\begin{itemize}
\item \textsuperscript{122} \textit{Id.} at 627-28.
\item \textsuperscript{123} \textit{Id.} at 630.
\item \textsuperscript{124} \textit{Id.} at 633.
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Id.} at 635 (Marshall, Brennan, JJ., dissenting). "Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great." \textit{Id.}
\item \textsuperscript{127} \textit{Id.} at 642-43 (Marshall, Brennan, JJ., dissenting).
\item \textsuperscript{128} \textit{Id.} at 654 (Marshall, Brennan, JJ., dissenting).
\item \textsuperscript{129} \textit{National Treasury Employees Union v. Von Raab}, 489 U.S. 656 (1989).
\item \textsuperscript{130} \textit{Skinner}, 489 U.S. 602.
\item \textsuperscript{131} \textit{Id.} at 666-69.
\item \textsuperscript{132} \textit{Id.} at 667.
\item \textsuperscript{133} \textit{Id.}
\end{itemize}
administrative fashion such as in this situation, it "seeks to prevent the
development of hazardous conditions." "It is readily apparent that the
Government has a compelling interest in ensuring that front-line interdic­
tion personnel are physically fit, and have unimpeachable integrity and
judgment." Justice Scalia, dissenting, found this practice an affront to
both the Fourth Amendment and to personal privacy and dignity.  
The doctrine of warrantless searches lacking in probable cause has
been expanded to random sobriety checkpoint programs. The constitu­
tionality of these programs was attacked in Michigan Dep't of State v.
Sitz.  
Despite admissions that the sobriety checkpoints resulted in approx­i­mately a 1% arrest rate of the drivers that were stopped, the
Court found that the brief stops did not violate the Fourth Amendment.
The Court held that the worthy goal of preventing drunken driving out­
weighed the impositions of the brief stops.  
Justice Stevens, dissenting, was deeply concerned that this decision
gave no freedom from "suspicionless unannounced investigatory
seizures." Additionally, he expressed that the "sobriety checkpoints
are elaborate, and disquieting publicity stunts." Finally, Justice Ste­
vens warned that the Court was "transfixed by the wrong symbol — the
illusory prospect of punishing countless intoxicated motorists — when it
should keep its eyes on the road plainly marked by the Constitution."  
The FAA-mandated random drug testing of airline and aircharter
personnel has been vigorously refuted by the Air Line Pilots Association
(ALPA). When first proposed, ALPA submitted a brief to the FAA urging
that widespread mandatory drug testing was not only an affront to
the dignities and liberties of the pilots and airline personnel, but would be

---

134. Id. at 668.
135. Id. at 670.
136. Id. at 680 (Scalia, J., joined by Stevens, J., dissenting). Justice Scalia stated:
Experience teaches us to be most on our guard to protect liberty when the Govern­
tment's purposes are beneficent. Men born to freedom are naturally alert to repel inva­
sion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in
insidious encroachment by men of zeal, well meaning but without understanding.
Id. at 687 (quoting Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J.,
dissenting).
138. Id. at 455.
139. Id.
140. Id. at 473 (Stevens, J., dissenting).
141. Id. at 475.
142. Id. at 477.
143. Before the Department of Transportation, Federal Aviation Administration, In the Mat­
ter of: Notice of Proposed Rulemaking — Antidrug Program for Personnel Engaged in Specific
Aviation Activities, Docket No. 25148, Notice No. 86-41, Comments of the Air Line Pilots, As­
sociation. [Hereinafter "ALPA-1986".]
ineffective and a poor investment. ALPA explained that the profession of piloting tends to self-select a “proud” body of men and women who are “concerned about health and safety.”\footnote{ALPA-1986, \textit{supra} note 143, at 9.}

The brief cited statistics showing that over a ten year period of “4376 deceased pilots, . . . only 28 — or approximately 6/10 of 1 percent — had evidence of illegal drugs in their bodies.”\footnote{\textit{Id.} at 9-11 and Appendix A.} The ALPA brief mathematically posited that in a statistical operation such as drug testing, with a systematic error relatively high with respect to the number of true positives, the number of false positives will greatly exceed the true positives found.\footnote{\textit{Id.} at 9-11 and Appendix A.} Considering the consequences of a false positive test result — legally, financially, and with respect to the employer, a patently unjust situation occurs. Considering the enormous cost of the drug-testing program,\footnote{ALPA estimated the total cost to be $280 million or more per year. \textit{Id.} at 17.} the action is unreasonable.

ALPA, in turn, presented its own alcohol and drug program, which had had a 93% long term success rate of rehabilitating 800 (primarily) alcohol-dependent pilots.\footnote{\textit{Id.} at 19.} The program (Human Intervention and Motivation Study Program - “HIMS”) teaches co-workers to identify the signs of alcoholism and drug-abuse. It then orchestrates an intervention by co-workers, family, an airline representative, and a physician to urge the pilot to seek and accept treatment.\footnote{\textit{Id.} at 18.}

As ALPA described, “[t]he HIMS program works because it is compassionate and nonpunitive, because it is implemented by the pilots themselves, because it puts management, government, and labor into a cooperative relationship, and because it emphasizes education and rehabilitation rather than testing and enforcement.”\footnote{\textit{Id.} at 19.} ALPA admonishes the FAA by asserting that a drug-testing program which may simply identify the abuser is problematic: “[s]ooner or later he will end up in some other job or situation where he can cause harm to himself or to others . . . . Thus, some form of rehabilitation is essential — not only for the sake of the employee, but also for the sake of society.”\footnote{\textit{Id.} at 21.}

In \textit{Bluestein v. Skinner},\footnote{Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990).} the Ninth Circuit upheld the FAA order for random drug testing. The \textit{Bluestein} court reasoned that in light of the fact that drugs had been found in the bodies of pilots involved in two airplane crashes, and since “the harm that can be caused by an airplane crash is surely no less than the harm that might be caused by drug impair-
ment in the course of Custom Service employment," then the drug testing program was at least as valid as the one in Von Raab. The Ninth Circuit concluded this even though the Custom Service's testing followed five days notice and the testing mandated by the FAA was random.

ALPA has recently argued in a brief to the Department of Transportation that the implementation of the drug testing program produces manifestly unfair results. The brief recommends the following: split testing to provide fewer false positives and viable defenses in the occurrence of an alleged false positive; a 0.04% minimum level for reporting and sanctions due to test inaccuracies; and a medical review to validate the test and explore possibilities of inadvertent ingestion and explainable false-positives.

Additionally, ALPA urges the FAA to modify the rule which holds a superior liable for the substance abuse of a subordinate, even if the subordinate was never observed by the superior. Another standard that ALPA contests involves the sanctioning of employees based on "an appearance of alcohol misuse." ALPA points out that this practice can lead to obvious abuse by a disgruntled co-worker, supervisor, or even contractor. ALPA asserts that random drug testing should be abolished, but if it is not, that the maximum random testing should not exceed 10% of employees for all substances combined.

The war on drugs may be the direct cause of the erosion of Fourth Amendment rights. The expansion of the 'special needs' exception, from possessions to people in Skinner, "completely eliminates the prob-

153. Id. at 456.
156. Before the Department of Transportation, In the Matter of: Proposed Rulemaking Limitation on Alcohol Use by Transportation Workers; Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities; Procedure for Transportation Workplace Drug and Alcohol Testing Programs, Comments of the Airline Pilots Association, Docket No. 48513 and Docket No. 25148 and Notice No. 92-19.
157. Such as due to alcohol in pastries or the consequence of metabolic changes effected by sanctioned medication. Id. at 16-22.
158. Id. at 25-27.
159. Id. at 21.
160. Id. at 22. In this instance, a pilot must rush to have a blood sample taken to clear his/her name - if there is an opportunity. Id.
161. Id. at 35.
able cause requirement for civil searches."163 Testing individuals without probable cause or a search warrant can have dire consequences. The results of such testing can result in revelations to others, including employers, insurance companies, or police, or even to the individual about sensitive matters such as the existence of prescription drugs in their body, pregnancy, diabetes, or even that that individual has contracted the AIDS virus.164 Any of these revelations can have dire consequences on one's insurance, employment or peace of mind.

Four possible types of testing exist: preemployment, post-accident, random, and with probable cause.165 Certainly, random testing is the most invasive of an individual's rights.166 Random drug testing involves enormous and "exorbitant" costs, yet results in minimal results.167 The DOT estimates costs to be $1.34 billion over 10 years with a detection rate of less than one half of one percent of those tested.168 ALPA recommends that if there were a rash of drug-induced pilot-caused casualties, Congress mandate post-accident testing rather than permit the FAA's random drug testing program.169

VIII. POLICE AERIAL INVESTIGATION

In Dow Chemical Co. v. United States (Dow Chemical),170 the EPA inspected a 2000 acre chemical plant owned by DOW Chemical Co. (Dow Chemical). When Dow Chemical denied a request for a second inspection by Environmental Protection Agency (EPA) enforcement personnel, rather than seek an administrative search warrant, the EPA employed "a commercial aerial photographer, using a standard, floor-mounted, precision aerial mapping camera, to take photographs of the facility from 12,000, 3,000, and 1,200 feet."171

---


164. Id., n.115 at 1037. Lewis points out that during 1985-1987, in addition to the drug screening tests of all applicants to the Washington D.C. police department, the department was secretly testing all female applicants for pregnancy. Id. (citing McNulty, Bush Urges Spot Drug Tests, Chicago Tribune, Apr. 9, 1989, at 1).

165. Lewis, supra note 162, at 1040. Lewis refers to "reasonable" cause rather than "probable" cause.

166. Id. at 1041.


168. Id.

169. Id. at 83-90.


171. Id. at 229.
Chief Justice Burger delivered the opinion of the Supreme Court, holding that the warrantless EPA investigation of Dow Chemical was allowed under the Fourth Amendment. Burger explained that since environmental standards can not be enforced in a library, and since the area observed did not fall under the protection of a person's curtilage (it was an "industrial curtilage", something rather closer to an "open field"), this investigation was more like one conducted by the naked eye from an airplane or a neighboring hill. Dow also argued that this invasion of its privacy would be precluded by trade secret law. The Court held that the needs of a government agency are not comparable to unfair competition under state trade secret laws which would preclude such a search. The Court appeared to distinguish the enhanced sense of sight utilized by aerial surveillance from the extended sense of hearing formed in wiretapping as precluded by Katz. Nevertheless, the search did not fall under Fourth Amendment protections. "We hold that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment."

In California v. Ciraolo, the companion case to Dow Chemical, the Supreme Court found that a warrantless aerial search of the curtilage of a home surrounded by two fences was not an invasion of the owner's expectation of privacy. After an anonymous tip that Ciraolo was growing marijuana plants in his backyard, and after the police could not see them over two fences, six feet and ten feet high, the Santa Clara police secured a private plane and photographed ten-foot tall plants from an altitude of 1,000 feet above ground level using a 35 millimeter camera. The Court held that there was no Fourth Amendment violation, in part because the police officers had violated no FAA rules in their flight, and thus were legally permitted to be in the airspace where the observations and photographs were made.

In dissent, Justice Powell, joined by Justices Brennan, Marshall, and Blackmun, questioned whether aerial surveillance could be justified by the mere fact that it took place in legally navigable airspace. "A home is a place in which a subjective expectation of privacy virtually always will

172. Id. at 227.
173. Id. at 235-239.
174. Id. at 231.
175. Id. at 231-32.
176. Id. at 239.
178. Id. at 209.
179. Id. at 213.
180. Id. at 216-17.
be legitimate.\textsuperscript{181} Furthermore, "[w]arrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this rule."\textsuperscript{182}

In \textit{Florida v. Riley},\textsuperscript{183} the Court extended its permissive rulings on aerial searches. It determined that a helicopter surveillance at an altitude of 400 feet above a greenhouse, within the curtilage of a mobile home, was not unreasonable under the Fourth Amendment. Justice White explained that such flights at 400 feet were legal, not sufficiently rare as to raise questions about the reasonable expectations of privacy, nor low enough to reveal intimate details of the subject's life.\textsuperscript{184} Justice O'Connor suggested a possibility that the Court may limit surveillance flights to no lower than 400 feet, below which reasonable expectations of privacy may be invaded.\textsuperscript{185} But Justice Brennan, dissenting, quoted George Orwell's \textit{1984}:

\begin{quote}
In the far distance a helicopter skimed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.\textsuperscript{186}
\end{quote}

IX. Conclusion

In conclusion, the Fourth Amendment impacts nearly all aspects of flight. Flight impacts the entire fabric of life in modern society. The aviation industry is a viable laboratory to test the reaches of our extant freedom and a paradigm for the pervasive advances of technology that could not have been envisioned by the framers.

A direct consequence of the growth of technology is the increasing sophistication and insidiousness of criminal activity. Dissenting in \textit{Terry v. Ohio},\textsuperscript{187} Justice Douglas proclaimed:

\begin{quote}
To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.
\end{quote}

\begin{center}
\textsuperscript{* * * *}
\end{center}

\begin{flushleft}
\textsuperscript{181.} \textit{Id.} at 220 (citing United States v. Karo, 468 U.S. 705, 713-15 (1984)).
\textsuperscript{182.} \textit{Id.} at 225 (quoting United States v. Karo, 468 U.S. 705, 717 (1984)).
\textsuperscript{184.} \textit{Id.}
\textsuperscript{185.} \textit{Id.} at 451.
\textsuperscript{186.} \textit{Id.} at 466 (Brennan, J., dissenting, quoting \textit{GEORGE ORWELL, NINETEEN EIGHTY-FOUR} 4 (1949)).
\end{flushleft}
Search and Seizure

There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.\textsuperscript{188}

Thus, aviation can be seen to be directly affected by the Fourth Amendment. The Fourth Amendment is defined and delimited by the exigencies and technologies of the modern world, particularly as characterized by aviation. Aviation, by providing fast, safe transportation to the citizens of the world, by providing a platform to view the earth and its inhabitants as never before envisioned by our ancestors, and by providing a means to shrink the globe such that international borders are only hours away, can be seen to directly impact the interpretation of the Bill of Rights of the United States Constitution and thus define the reaches of liberty.

Justice Brandeis has explained: "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."\textsuperscript{189}

With regard to the Fourth Amendment, the United States government, at times, I submit, appears to be divided, if not confused. "We must never forget . . . that it is a constitution we are expounding."\textsuperscript{190}

Exceptions to the Fourth Amendment abound. For example, "[t]he three exceptions to the warrant requirement applicable to sniff searches are the consent exception, the search incident to a valid arrest exception, and the exigent circumstances exception."\textsuperscript{191} A 1992 law review essay stated, regarding the Bill of Rights, "I felt certain that the promise of these decisions (cases in the 1960s) could only be embellished upon and never seriously eroded. Boy was I wrong!"\textsuperscript{192}

Perhaps to save the Fourth Amendment, the Supreme Court must interpret it in a binary analysis. One commentator, Professor Craig Bradley, posits two models of the Fourth Amendment:\textsuperscript{193} either (1) abandon

\begin{itemize}
\item \textsuperscript{188} Id. at 38-9 (Douglas, J., dissenting).
\item \textsuperscript{189} Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
\item \textsuperscript{190} Id. at 471 (quoting McCulloch v. Maryland, 17 U.S. 316, 407 (1819)).
\item \textsuperscript{191} William F. Timmons, Comment, "Re-examining the Use of Drug-Detecting Dogs Without Probable Cause", 71 Geo. L.J. 1233, 1249 (1983).
\item \textsuperscript{193} Craig M. Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468 (1985).
\end{itemize}
all particularized guidelines for the application of the Fourth Amendment and simply require the police to be "reasonable" at all times, using a tort law form of reasonableness, or (2) require that a warrant always be required for every search and seizure "when[ever] it is practicable to obtain one."194 Professor Bradley notes that, as the Fourth Amendment stands, the law is confusing, replete with exceptions, and hard to apply.195

Current Fourth Amendment theology is replete with balancings of public and private interests. This is nowhere more apparent then in aviation, where the public interest of the safety of the masses of people relying on air travel is balanced against the interests of the privacy of the individual. Professor T. Alexander Aleinikoff, in a law review articles, states that law, whether it is formed by Congress or judge-made, reflects the values of society. "A judge is to give effect in general not to his own scale of values, but to the scale of values revealed to him in his readings of the social mind."196 The professor concludes that "balancing is not inevitable. To balance the interests is not simply to be candid about how our minds — and legal analysis — must work."197 Balancing is too simplistic to deal with the rich textures of constitutional imperatives, and has become "rigid and formulaic. It gives answers but fails to persuade. . . . Constitutional law is suffering in the age of balancing."198

In recent times, the decision was made to wage a war on drugs.199 The opinions of the Supreme Court have pendulum swung from the liberalism of the Warren Court to the reformation of the Rehnquist Court.200 Whereas the Warren Court placed a premium on individual rights, the Rehnquist Court has reversed priorities, placing the Fourth Amendment ban on unreasonable searches and seizures at the bottom of the hierarchy, and the "belief that the ultimate mission of the criminal justice system is to convict the guilty and let the innocent go free" at the apex.201 Both extremes reflect the needs defined by our society - to be free and to be free from debilitating crime. It may be that a 'war on drugs' is incompatible with a Fourth Amendment as envisioned by our forefathers. Pro-

194. Id. at 1471. This second model allows for telephone and voice recorded warrants where necessary. Id. Were this adopted, mobile fax warrants would be feasible!
195. Id. at 1472-75.
197. Id. at 1001.
198. Id. at 1005.
201. Id.
Professor Charles Whitebread points out that of all the Constitutional rights, only a Fourth Amendment right can be voluntarily waived (e.g. a 'consensual' search at the airport) without knowing that one possessed that right.\textsuperscript{202}

It is at this time, before the millennium, that we must evaluate the direction that our country is targeted to follow: whether we as a people find the erosion of Fourth Amendment rights to be reasonable and necessary for our evolution, or whether we as a nation are capable of living healthy lives with the heightened responsibility that obtains, without 'big brother' always looking over our shoulders.

Nowhere is there found a better stage to define the limits and parameters of the Fourth Amendment than in those areas of life touched upon by aviation, flying, the natural and inevitable paradigm of freedom itself. Two thirds of a century ago Justice Brandeis declared:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.\textsuperscript{203}

Perhaps our society is too immature, too weak-willed, to prone to the violence of terrorism and the decadence of drug abuse to enjoy the visions of liberty promised by the Framers. Or perhaps, more enlightened prevention and rehabilitation programs, as those of ALPA\textsuperscript{204} are not only less likely to infringe on the civil liberties of the Constitution and the Bill of Rights, but also are more pragmatic and effective than the war on drugs. We, the people, must decide.

\textsuperscript{202} Id.
\textsuperscript{203} Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
\textsuperscript{204} See discussions relating to ALPA, supra, at 29-30.
The Law of Intergovernmental Relations:
IVHS Opportunities and Constraints

Michael E. Libonati*

* Mr. Libonati is a graduate of Yale Law School (LL.B 1967, LL.M 1969). He is the co-author of both Local Government Law, a four volume treatise, and a Legislative Law and Process (20 ed. 1993). He is a principal author of State Law and Local Autonomy which was published by the Advisory Commission on Intergovernmental Relations in October, 1993. He serves as Laura H. Carnell Professor of Law at Temple University. Although his primary expertise is in the area of local government law, he has served since 1988 on the Advisory Board of the Highway Law Project of the National Transportation Research Board/National Academy of Sciences.
II. State, Regional, and Local Government Provisions of IVHS Technologies ................................................................. 238
A. State Constitutional Questions .................................................. 238
   1. Home Rule ........................................................................ 239
   2. The Public Purpose Doctrine .............................................. 239
   3. Fiscal Limits ................................................................... 239
B. State Statutory Questions ............................................................ 240
   1. The Interpretation of Enabling Legislation ....................... 240
   2. Interlocal Conflict in IVHS Service Production and Provision ................................................................. 241
C. The Authority to Engage in Intergovernmental Collaboration to Provide IVHS Services ................................................. 241
   1. State Constitutional Provisions Bearing on Intergovernmental Collaboration .................................................. 242
   2. State Statutory Provisions Bearing on Intergovernmental Collaboration ......................................................... 243
III. Models of Intergovernmental Relations and IVHS ................ 244
   A. The Centralization Model ..................................................... 245
   B. The Federalism Model ......................................................... 246
   C. The Consultative Model ....................................................... 247
   D. The Coordination Without Hierarchy Model .................... 248
IV. Conclusion ........................................................................ 248

EXECUTIVE SUMMARY

According to the most recent census figures, there are more than 22,000 cities and counties in the United States. Each of these general purpose units of government may, under a variety of state constitutional, statutory, and home rule charter provisions, be empowered to exercise regulatory powers over Intelligent Vehicle Highway Systems (IVHS) technologies. The transaction costs associated with regulating IVHS technologies would include: 1) "search and information costs" to discover the extent to which local governments are currently empowered to or preempted from exercising regulatory authority; 2) "bargaining and decision costs" in creating a regulatory scheme; and 3) "policing and enforcement costs" associated with implementing the regulatory scheme. Similar transactions costs would be incurred should local governments decide to provide or produce IVHS services.

A model state statute clarifying: 1) the appropriate role for local governments as regulators of IVHS services; and 2) the rules of the game for local governments which choose to provide or produce IVHS services could significantly reduce the substantial transaction costs which will predictably occur under existing laws. In addition to the objective of minimizing search and information, bargaining and decision, and policing and
enforcement costs, that model statute should address the question of whether there is any reason to make government other than neutral toward the form which IVHS technologies should assume. That is, consideration should be given to a statutory regime which would create a level playing field on which different emerging IVHS technologies and their providers can compete.

**ABSTRACT**

State, regional, and local government units perform two roles in the transportation sector: 1) regulator and 2) service-provider. Both are impacted by the emergence of the cluster of IVHS technologies.

With respect to the regulatory function, the first question that must be addressed is that of empowerment — does the entity have the authority to regulate? The second question is that of preemption — has the entity’s regulatory authority been modified or taken away?

With respect to the service-provision function, the basic question that must be addressed is that of empowerment — does the entity have the authority to provide the service either on its own or in collaboration with other units of government?

To answer these questions, this paper will survey the current statutory and constitutional provisions as well as pertinent court decisions.

The final part of the paper will discuss four different legal frameworks for dealing with the problems of intergovernmental conflict and coordination generated by IVHS technologies.

**I. STATE, REGIONAL AND LOCAL GOVERNMENT REGULATION OF IVHS TECHNOLOGIES: THE AUTHORITY TO REGULATE AND TO PREEMPT**

Intelligent Vehicle Highway Systems (IVHS) refers to a bundle of emerging technologies which affect the use and management of highways and streets.1

The relationship between any new technology and state and local government can take many forms. The cable television industry furnishes a good illustration of the mix of state and local government responses to an emerging technology. In some jurisdictions, cable transmission is treated as a public utility, a monopoly service provider subject to relatively stringent local franchising requirements including rate regulation. In New York, local regulatory powers are subject to a degree of supervision and control by a state agency. In some places, the public sector itself

---

provides cable television services. In others, local or state regulators prescribe minimum standards for competing private sector cable service providers.

State, regional, and local governments have the potential to perform two significant roles in relation to emerging IVHS technologies: 1) as regulator; and 2) as service provider.

For example, a state government might exercise its regulatory authority to require that all private sector emergency vehicles be equipped with a device which can change traffic signals to green. A local government might create a licensing scheme which requires that all private sector providers of traveler information services be adequately insured and operated by persons of "good moral character." With respect to service provision, a county might decide to install road sensors at major intersections to facilitate traffic management. Or a state agency, like the New Jersey Turnpike Authority, might broadcast periodic bulletins concerning weather and traffic conditions over a radio frequency.

This paper will provide an analytic overview of key state law issues that are likely to arise in the implementation of IVHS technologies. Legal specialists in the field of intergovernmental relations share a common set of tacit understandings about the key legal questions which arise when new technologies are created. Highway program specialists have had little professional incentive to familiarize themselves with these concepts. That lack of familiarity is due to the fact that states responded to federal spending incentives for highway construction by "providing broad legislative or constitutional authorization for actions taken by state highway departments to meet federal-aid highway program incentives." The purpose of this paper is to bridge that knowledge gap by presenting an overview of basic legal concepts in the field of intergovernmental relations such as Home Rule; Dillon's rule of interpretation; Express and Implied Preemption; the Public Purpose Doctrine; and Intergovernmental Collaboration.

A distinction must first be made between the authority of the several states and their political subdivisions. States are "sovereign" and possess "plenary powers simply by virtue of their original sovereignty; they retain


all the powers it is possible for government to have except insofar as these powers have either been delegated to the federal government, or have been limited by the state constitution.\textsuperscript{6}

The principle of state sovereignty means that the states have "supreme" authority to shape their relationship with their political subdivisions "unrestrained by any provision of the Constitution of the United States."\textsuperscript{7} By contrast, the nature and extent of policy-making authority conferred on political subdivisions rests in the absolute discretion of each State. For example, a state legislature would be free, as far as the Federal constitution is concerned, to forbid local government from playing either a regulatory or a service provision role with respect to IVHS technologies.

Accordingly, any constraints on the sovereign power of the state legislature to determine the regulatory and service provision activities of its political subdivisions derive from the state constitution. The next section of this paper focuses on the extent to which state constitutional provisions have modified the general principle of state dominance and local government subordination.

**A. State Constitutional Questions**

State constitutional provisions speak directly to the allocation of authority between a state and its political subdivision.\textsuperscript{8} Political subdivisions may possess autonomy from the state legislature in two different ways.\textsuperscript{9} First, the state constitution may afford political subdivisions the power of initiative, that is, the power to initiate legislative action in the absence of statutory authorization from the state legislature. For example, in jurisdictions affording local governments the power of initiative, a local government would be authorized to regulate private sector providers of IVHS services even in the absence of state enabling legislation. Second, the state constitution may afford political subdivisions the power of immunity, that is, freedom from state legislative control. For example, in jurisdictions affording local governments the power of immunity, a state statute authorizing private sector IVHS providers to install road sensors on local streets and ways without the consent of the affected local

---


\textsuperscript{7} Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907); Local Government Law, supra note 2 at § 3.01.

\textsuperscript{8} See generally U.S. Advisory Comm'n on Intergovernmental Relations; Local Government Autonomy (1993).

government might be unconstitutional. With the distinction between the *power of initiative* and the *power of immunity* in mind, we can now turn to an examination of those categories of state constitutional provisions which are most salient to the issue of which level of government is authorized to regulate IVHS technologies.

1. **Home Rule**

   From a legal standpoint, home rule is an imprecise term. For example, the Advisory Commission Intergovernmental Relations (A.C.I.R.) reports that cities are granted "home rule authority" in 37 state constitutions and counties are granted such authority in 23 states.\(^{10}\) The label "home rule" does not tell us whether the pertinent state constitutional provision conveys the *power of initiative*, the *power of immunity*, or both. Indeed, a state constitutional provision labeled by the A.C.I.R. as granting "home rule authority" may convey neither the *power of initiative* nor the *power of immunity*. For example, the Connecticut Constitution's Home Rule Article provides:

   The general assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities, and boroughs relative to the powers, organization and form of government of such political subdivisions.\(^{11}\)

   It is clear that political subdivisions in Connecticut both require statutory authorization from the legislature before exercising any regulatory junction and have no immunity from the reach of general laws.

   Further, the term "home rule" does not unambiguously indicate the scope of *initiative* or *immunity* granted by the pertinent state constitutional provision.

   The A.C.I.R. defines local discretionary authority as:

   the power of a local government to conduct its own affairs — including specifically the power to determine its own organization, the functions it performs, its taxing and borrowing authority, and the numbers and employment conditions of its personnel.\(^{12}\)

   Of the four dimensions of local government discretionary authority — 1) structural; 2) functional; 3) fiscal; and 4) personnel — we will concern ourselves primarily with functional autonomy for reasons which will be discussed in the next section of the paper.

---

Our discussion will focus on the extent to which state constitutional provisions furnish political subdivisions with powers of functional initiative over IVHS technologies and whether such provisions yield them functional immunity from state control in the exercise of their regulatory jurisdiction.

a. Power of Initiative

Home rule provisions in state constitutions do not usually give clean answers even to seemingly easy questions about the scope of home rule authority. The discussion in this section of the paper may be heavy going for the non-specialist. Bringing out the details of the power of home rule is useful for several reasons: 1) to illustrate the diversity of state responses to the question of how authority should be allocated between the state and its political subdivisions; 2) to indicate the search and information costs which must be incurred on a state by state basis in answering questions about the scope of local government autonomy; 3) to provide the non-specialist with an analytic yardstick for evaluating the quality and thoroughness of the work product of legal staff and consultants; and 4) to indicate the complexity of legal problems encountered when state rather than federal law controls emerging technologies.

The contemporary constitutions of sixteen states contain terms like “municipal affairs”, “municipal matters” and “powers of local self-government” to convey the scope of discretion afforded home rule cities or counties. Qualifying adjectives like “local” or “municipal” do not unambiguously indicate whether a home rule entity can exercise regulatory jurisdiction over a private sector provider of IVHS technologies. Illustratively, a home rule city’s power to enact a rent control ordinance was struck down in Florida but sustained in California. Nonetheless, the clear trend of decision is toward judicial recognition of the expansive scope of regulatory powers of home rule entities. For example, “powers of local self-government” in Ohio authorized a home rule city to barricade and close

13. CAL. CONST. art. XI, § 5; COLO. CONST. art. XX, § 6; FLA. CONST. art. VIII, § 1(g) (counties have all powers of local self-government), art. VIII, § 2(b) (cities); ILL. CONST. art. VII, § 6(a); IOWA CONST. art. III, § 38A (cities) and § 39A (counties); KAN. CONST. art. 12, § 5(b); LA. CONST. art. VI, § 5(E); ME. CONST. art. VIII, Part Second § 1; MICH. CONST. art. VII, § 2; OHIO CONST. art. XVIII, § 3; OR. CONST. art. VI, § 10; R.I. CONST. art. XIII, § 1; W. VA. CONST. art. VI, § 39(a); WIS. CONST. art. XI, § 3(i); and WYO. CONST. art. 13, § 1(b).
16. LOCAL GOVERNMENT LAW, supra note 2, at § 4.10.
streets to control the volume and burden of traffic.\textsuperscript{17} This case has obvious implications with respect to whether a technology which impacts on traffic usage patterns on city streets can be regulated or even prohibited.

On the other hand, a limited construction may be placed on terms like “local” and “municipal” such that home rule regulatory jurisdiction might not extend to state or interstate highways located within its boundaries.\textsuperscript{18}

The constitutions of four states have language that convey power over matters concerning “property, affairs or government.”\textsuperscript{19} Six states have constitutions that employ the term “its own government” to delineate the scope of local initiative.\textsuperscript{20} As in the case of texts using arguably broader terms such as “municipal affairs” or “local self government”, the scope of regulatory autonomy afforded will be subject to the vagaries of judicial interpretation in these states.

The Oregon and Texas Constitutions grant eligible cities comprehensive power to formulate the contents of their home rule charters, limited only by the preemptive powers of the legislature.\textsuperscript{21} This highlights the general point that regulation of IVHS technologies may be permissible under state law but barred because a particular provision of the home rule charter disables the home rule entity from such regulation. That is, in entities having a charter, the scope of regulatory authority is defined by each charter and may vary considerably from city to city within a state.

In nine states, the local government unit is broadly empowered to “exercise any power or perform any function” not denied by the charter, state law, or the state constitution.\textsuperscript{22} In these states, home rule entities unambiguously have regulatory power.

Nonspecialists may be surprised to learn that it is rare for home-rule provisions of state constitutions to be interpreted to give home-rule units additional power either to tax or to borrow.\textsuperscript{23} That is why the bulk of the discussion in this section of the paper has emphasized functional autonomy. The fiscal powers of both home-rule and non-home rule entities are generally subject to the strictures of Dillon’s rule of interpretation (see section I.B.1. for further discussion).

\begin{itemize}
\item \textsuperscript{17} City of Cleveland v. City of Shaker Heights, 507 N.E.2d 323, 325 (Ohio 1987).
\item \textsuperscript{19} GA. CONST. art. IX, § II, para. I(a); MICH. CONST. art. VII, § 22; N.Y. CONST. art. IX, § 2(c)(i); R.I. CONST. art. XIII, § 2.
\item \textsuperscript{20} MD. CONST. art. XI-A, § 1; NEB. CONST. art. XI, § 2; NEV. CONST. art. VIII, § 8; OKLA. CONST. art. XVIII, § (3)(a); UTAH CONST. art. XI, § 5; WASH. CONST. art. XI, § 10.
\item \textsuperscript{21} OR. CONST. art. XI, § 2; TEX. CONST. art. 11, § 5.
\item \textsuperscript{22} ALASKA CONST. art. X, § 11; CONN. CONST. art. X, § 1; MASS. CONST. art. II, § 6 (amended 1990); MO. CONST. art. VI, § 19(a); MONT. CONST. art. XI, § 6; N.H. CONST. pt. I, art. 39; N.M. CONST. art. X, § 6; PA. CONST. art. IX, § 2; S.D. CONST. art. IX, § 2.
\item \textsuperscript{23} LOCAL GOVERNMENT LAW, supra note 2, at § 4.10; § 23.02; § 25.01.
\end{itemize}
b. Power of Immunity

In states that confer home rule over "municipal affairs,"24 a correlative immunity from state legislative interference may attach to matters which fall within the home rule entity's exclusive legislative jurisdiction.

For example, the California Constitution provides that "city charters adopted pursuant to this Constitution . . . with respect to municipal affairs shall supersede all laws inconsistent therewith."25

Thus, in California, charter cities are sovereign over "municipal affairs."26 In jurisdictions like California, a state law limiting the regulatory power of home rule cities raises a state constitutional law issue.

The test that has emerged in the case law is that the home rule entity is sovereign only with respect to "municipal" as distinguished from "statewide" matters.27 At first blush, this constitutional division of powers between home rule units and the state would seem to present a significant barrier to any state law interfering with the exercise of local regulatory jurisdiction. However, the trend of modern case law is almost uniformly deferential toward the state legislature's statutory determination that a regulatory matter is of statewide concern.28

The general rule that, in a conflict between the state and a home rule unit's regulatory jurisdiction, the state wins, must be qualified. That rule generally applies when the statute in question expressly preempts a home rule unit's regulatory jurisdiction. That is because, even in states which do not, like California, purport to immunize a home rule unit from state legislation trenching on "municipal" or "local" matters, many state constitutional grants of home rule authority are consciously phrased to exclude the application of implied preemption to home rule entities.

The Montana Constitution says that "a local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter."29 The Illinois Constitution states that:

Home rule units may exercise and perform concurrently with the state any power or function of a home rule unit to the extent that the General Assembly does not by law specifically limit the concurrent exercise or specifically declare the States' exercise to be exclusive.30

25. CAL. CONST. art. XI, § 5(a).
27. LOCAL GOVERNMENT LAW, supra note 2, at § 4.08.
28. Id.
29. MONT. CONST. art. XI, § 6 (emphasis supplied).
30. ILL. CONST. art. VII, § 6(i) (emphasis supplied).
In other states, pertinent constitutional language invites the judiciary to establish a doctrine of preemption along the lines indicated by the language employed. Thus, in Iowa, “municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government.”31 Washington's constitution states, “any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”32 In assessing the degree of the asserted conflict between a state and a local regulatory regime, a home rule unit may benefit from the presumption that state and local regulatory jurisdictions are concurrent.33

2. Control Over Streets and Ways

Some forms of IVHS technologies may require the installation of transmission or control devices on local streets and ways. In several states, state legislative power over streets and ways is limited by a state constitutional provision.34 In Michigan, local government units exercise both powers of regulatory initiative and of immunity from state control over their streets and ways.35 In other states, local authorities must consent before streets can be used by the private sector.36 Localities enjoy immunity but not the power of regulatory initiative under this type of constitutional provision.

31. IOWA CONST. art. 3, § 38A (emphasis supplied).
32. WASH. CONST. art. XI, § 11 (emphasis supplied).
33. Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 777 P. 2d 157 (Cal. 1989).
34. LOCAL GOVERNMENT LAW, supra note 2, at § 3.18.
35. MICH. CONST. art. VII, § 29. The Michigan Constitution provides: [N]o person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.
36. ALA. CONST. art. XII, § 220; S.C. CONST. art VIII, § 15; VA. CONST. art. VII, § 8. Thus, South Carolina Constitution provides: [C]onsent of local governing body to certain laws required. No law shall be Passed by the General Assembly granting the right to construct and operate in a public street or on public property or other railway, telegraph, telephone or electric plant, or to erect water, sewer or gas works for public use, or to lay mains for any purpose, or to use the streets for any other such facility, without first obtaining the consent of the governing body of the municipality in control of the street or public places proposed to be occupied for any such or like purpose; nor shall any law be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway, or to erect waterworks for public use, or to lay water or sewer mains for any purpose, or to use the
B. STATE STATUTORY QUESTIONS

In most states, political subdivisions are empowered to regulate and to perform regulatory functions by statutory grants of power. Statute law is the basis for local regulatory authority even for home rule units in the majority of states. How to interpret grants of power from the state legislature to its political subdivisions is therefore a significant legal issue.

1. The Interpretation of Enabling Legislation

The standard for interpreting grants of powers to political subdivisions is known as Dillon's rule. The rule was formulated by Judge Dillon in a leading case as follows:

In determining the question now made, it must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation — against the existence of the power.

Dillon's rule has been cited in thousands of cases in every jurisdiction over the past 125 years as calling for a relatively strict construction of grants of power to political subdivisions. And, where Dillon's rule is followed, it represents a constraint on a political subdivision's capacity to regulate.

Dillon's rule has, however, been eroded in many states by 1) broad constitutional grants of functional authority to home rule units; 2) broad statutory grants of functional authority to other political subdivisions; 3) constitutional and statutory rules of construction requiring courts to liberally interpret grants of powers to political subdivisions; and 4) judicial repudiation of the rule. Even so, Dillon's rule injects a degree of uncertainty when local regulatory authority is asserted over new technologies.

streets for any facility other than telephone, telegraph, gas and electric, without first obtaining the consent of the governing body of the county or the consolidated political subdivision in control of the streets or public places proposed to be occupied for any such or like purpose.

37. LOCAL GOVERNMENT LAW, supra note 2, at §§ 14.01, 14.02.
38. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, supra note 8.
2. **Express and Implied Regulatory Preemption**

The law of preemption comes into play after it has been determined that a political subdivision is empowered to exercise regulatory authority. The preemption question is this: to what extent are a political subdivision's regulatory powers "limited, in dealing with a particular subject, by the existence of state statutes relating to the same subject?" 42

The answer to this question is significantly affected in many states by whether or not the political subdivision has home rule status.

With respect to home rule entities, we can simply summarize the previous discussion in section I.A.1.b. In states which confer powers of immunity on home rule entities, express preemption issues are of constitutional magnitude turning on whether the matter to be regulated is of statewide or merely municipal concern. In other states, the legislature is free to preempt local regulatory schemes but the text of the constitution may provide a decision rule concerning the extent of the conflict necessary to preempt, e.g. "not inconsistent with" or "not prohibited by" state law. 43

With respect to non-home rule entities, the legislature is sovereign and thus free to preempt a political subdivision's regulatory authority either expressly or by implication.

Express preemption is not problematic where no state constitutional provision confers a power of immunity on political subdivisions.

Implied preemption, by contrast, has developed through case by case adjudications in the several states. 44 Only the broadest outlines of implied preemption doctrine can be sketched here. 45

Professor Briffault has concisely identified the two "basic strands in contemporary preemption doctrine":

> The first focuses on whether the state and local governments have issued conflicting commands. The second . . . focuses not on conflict per se but on whether, given the fact of state regulation, any local enactment on the same subject — even one substantively consistent with the terms of the state law — would be inconsistent with the fact of state lawmaking in the area. 46

The most frequently cited formulation of the conflict strand is as follows:

---

42. SATO AND ALSTYNE, supra note 9.
43. MONT. CONST. art. XI, § 6 (emphasis supplied); ILL. CONST. art. VII, § 6(i) (emphasis supplied); IOWA CONST. art. III, § 40 (emphasis supplied).
44. LOCAL GOVERNMENT LAW, supra note 2, at §14.04.
in determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test is whether the ordinance prohibits an act which the statute permits or permits an act which the statute prohibits.  

The difficulty with this test is that it fails to give any weight to the fact that two valid statutory schemes are in conflict: one empowering political subdivisions, the other empowering the state. Further, it is merely a verbal test giving no weight to whether the political subdivision's regulations conflict with the policies or operations of the state regulator.

The second strand, known as preemption by occupation of the field, looks to: 1) whether the subject matter of the regulation reflects a "need for uniformity"; 2) whether the comprehensiveness or pervasiveness of the state regulatory scheme "precludes coexistence" with local regulations; and 3) whether the local regulatory scheme represents an "obstacle to the accomplishment and execution of the full purposes and objectives" of the state scheme.

Another dimension of complexity is added when the asserted conflict occurs between various political subdivisions. For example, both a city and county might seek to impose different regulatory standards on a private-sector provider of IVHS services. The legal standards for resolving these horizontal implied preemption problems are even more fluid and uncertain than those governing vertical implied preemption questions. One authoritative source has identified seven different approaches in the case law for answering the question: to what extent are a political subdivision's regulatory powers limited, in dealing with a particular subject, by the existence of enactments of other political subdivisions relating to the same subject? The lack of judicial consistency in providing predictable answers to this question is well illustrated by two Pennsylvania cases. In a case involving a conflict between a special district created by a cooperative agreement and one of the general purpose units which it served, the Pennsylvania Supreme Court held that the special purpose district was required to comply with the general purpose unit's zoning regulations because "the objectives of zoning regulation are more comprehensive than..."
the objectives" of the special purpose district.51 In a later case involving a conflict between a special purpose unit and a general purpose unit, the same court held that a school district was not bound by the zoning code of the general purpose unit because the zoning authority was general whereas the power to locate a school was specific.52

The vagary and variety of state court decisions under either vertical or horizontal implied preemption doctrine means that considerable transaction costs will be incurred in determining the scope of political subdivision regulatory authority over IVHS technologies unless the issue is expressly addressed and resolved by state legislatures.

II. STATE, REGIONAL, AND LOCAL GOVERNMENT PROVISION OF IVHS TECHNOLOGIES

The key concept in this section of the study is the distinction between the "provision" and the "production" of public goods and services.

Provision "refers to decisions that determine what public goods and services will be made available to a community."53 For example, a county might decide that IVHS technologies should be used to facilitate traffic management at congested intersections.

Production "refers to how those goods and services will be made available."54 For example, once a county has decided that IVHS technologies should be provided to alleviate traffic congestion problems, the county is faced with the decision as to how that service should be produced.

A political subdivision can arrange for the production of IVHS services in two ways: 1) it can operate its own IVHS service; or 2) it can make arrangements for another governmental unit or private sector entity to deliver the service. The legal question canvassed in this section is the extent of authority afforded political subdivisions to either provide or produce IVHS services.

A. STATE CONSTITUTIONAL QUESTIONS

The capacity of political subdivisions to expand the scope of public services to include IVHS raises two questions: 1) are they empowered to do so; and 2) if so, are they otherwise restrained from doing so by the state constitution? The bulk of reported decisions challenging a political

54. Id.
subdivision's capacity to expand the scope of public services it provides have to do with the latter "public purpose" issue rather with the former "empowerment" issue.

1. **Home Rule**

As discussed in section I.A.1., home rule provisions can be roughly divided into those which contain a limiting qualifier, e.g., "local" or "municipal," and those which are more broadly phrased, e.g., "exercise any power or perform any function."

California and Ohio are two states in which the state constitution contains the "local" or "municipal" language. Home rule cities in those states are equity partners in a shopping center and have owned a minor league baseball franchise. In addition to this anecdotal information, Professor Ellickson summarized such scanty case law as exists as follows: "[c]ities now rarely lose lawsuits that challenge their power to engage in business activities that deviate from the public utility paradigm."

In Oklahoma and Arizona, municipal corporations are constitutionally empowered to "engage in any business or enterprise" that may be engaged in by the private sector.

2. **The Public Purpose Doctrine**

The public purpose doctrine sprawls across several areas of public law including the power to borrow, the power to spend, the power to tax, and the power to take by eminent domain. The doctrine commits state courts to reviewing the actions of state and local government units to appraise whether the challenged undertaking primarily benefits the public rather than the private sector. However, the public purpose doctrine "is generally construed so as not to forbid a wide range of trading and entrepreneurial pursuits by localities."

3. **Fiscal Limits**

Even if a local government is empowered to provide IVHS services, its power to borrow and finance the capital construction costs necessary to do so may be subject to constitutionally mandated debt limits. Debt

---

58. Local Government Law, supra note 2, at § 21.03; § 23.05; § 25.06; § 26.03.
59. Id. at § 25.06.
60. Id. at § 18.06. See generally McQuillin, supra note 40, Ch. 36 (3d rev. ed 1979).
limits can greatly affect the authority of local government units either to self-finance or to enter into interlocal cooperative agreements. For example, an agreement by Fairfax County and Falls Church, Virginia to fund operating deficits incurred by the Washington Metropolitan Area Transit Authority was held to incur debt within the meaning of the Virginia constitution. 62 That decision compelled a significant restructuring of the language of the agreement. 63

Similarly, in some states, constitutional limitations on taxing and spending may constrain state and local expenditures. 64 The California expenditure limit provision was amended by voters to exempt transportation-related projects. 65

### B. State Statutory Questions

Five different forms of statutory authorization to engage in IVHS service production and provision activities can be distinguished: 1) the power to supply a IVHS services for a political subdivision’s own use; 2) the power to supply IVHS services to the residents of the political subdivision; 3) the power to supply IVHS services extraterritorially; 4) the power to sell IVHS services exclusively by creating a monopoly; and 5) the power to own the means of producing IVHS services. 66

#### 1. The Interpretation of Enabling Legislation

As was indicated in section I.B.1., a crucial distinction exists between those states which follow Dillon’s rule and those which do not. It is difficult to generalize because within a particular state some political subdivisions will benefit from a rule of liberal interpretation, such as home rule units, while others are subject to Dillon’s rule. Illustratively, the Illinois constitution provides as follows: “counties and municipalities which are not home rule units shall have only the powers granted to them by law . . .” 67

Where Dillon’s rule obtains, it is possible that a political subdivision might have the authority to provide IVHS services for its own use, but not for the use of non-residents. The reader is referred to the previous section for the possible range of differentiation concerning service provision and production activities.

64. E.g., CAL. CONST. art XIII, B; MO. CONST. art X, § 22.
66. Id.
2. Interlocal Conflict in IVHS Service Production and Provision

This section builds upon the discussion of preemption in section I.B.2. Vertical and horizontal implied preemption problems will predictably occur should local government exercise their authority to engage in IVHS service production and provision. For example, a county might attempt to establish a monopoly over the provision of IVHS services over the objection of municipalities located within the county. Or the county might assert a general regulatory authority over municipal service providers. Absent an overriding statutory scheme which addresses these preemption questions, the same blooming, buzzing confusion of case by case decisions sketched in section I.B.2. can be anticipated.

C. The Authority to Engage in Intergovernmental Collaboration to Provide IVHS Services

Intergovernmental cooperation can assume several forms:

1) A contractual agreement — that is one locality hires another local government to provide the service to its citizens, similar to the local government contracting with a private firm;

2) Two or more local governments jointly perform the service, provide support facilities or operate a public faculty; or

3) A service is run by a jointly created separate organization which aids all jurisdictions party to the agreement.

Forty-two states have enabling legislation or a constitutional provision authorizing cooperative intergovernmental service agreements. Two categories of enabling legislation are recognized in the literature: 1) a “mutuality of powers” provision limiting collaborative arrangements to the exercise of powers possessed by each contracting entity; and 2) a “power of one unit” provision which permits all contracting entities to exercise a power as long as one party to the agreement possesses that power.

68. Local Government Law, supra note 2, at §§ 5.10-5.11.
70. See Advisory Commission on Intergovernmental Relations supra note 61, at 26-27.
1. State Constitutional Provisions Bearing on Intergovernmental Collaboration

The New York Constitution contains a "mutuality of powers" type provision. In that jurisdiction all local governments have the power, as authorized by the legislature, "to provide cooperatively, jointly or by contract any facility, service, activity or undertaking which each local government has the power to provide separately."\(^{72}\)

That text may be contrasted with Pennsylvania's "power of one unit" type which authorizes all local government units to "contract or otherwise associate among themselves . . . to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or ordinance."\(^{73}\) The Illinois provision broadens the gambit of potential collaborators to include the state, other states and their political subdivisions, the Federal government, and the private sector.\(^{74}\) The provision further authorizes participating units to "use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities."\(^{75}\)

The implications of these constitutional provisions for intergovernmental collaboration concerning the production and provision of IVHS services are as follows. In New York, each government unit must show that it is empowered to enter into every detail of the agreement. For example, a home rule unit with a broad grant of functional autonomy could create its own IVHS system. But, if a non-home rule unit wanted to participate in that system, the non-home rule unit would have to show express statutory authority to do so. In Pennsylvania, any unit of government could collaborate with a home rule unit for the provision of IVHS services unless prohibited from so doing by law or ordinance. Thus, any collaborating unit would have as much functional autonomy as the most broadly empowered unit in the deal. However, the Pennsylvania provision does not confer any additional fiscal authority on the collaborating entities. Each collaborating entity in Pennsylvania would continue to be constrained by existing limitations on its power to tax or to borrow. Only the Illinois provision speaks to the practical issue of fiscal as well as functional autonomy.

In some states, a constitutional provision authorizing interlocal agreements may be necessary. Some states adhere to the delegation doctrine, according to which the state legislature is prohibited from delegat-

---

\(^{72}\) N.Y. CONST. art. IX, § 1 (c).

\(^{73}\) ILL. CONST. art. VII, § 10 (a).

\(^{74}\) Id.

\(^{75}\) Id.
ing its sovereign legislative powers to political subdivisions. In Kansas, for example, general purpose units of government may only exercise legislative powers as to "matters of local concern.

2. State Statutory Provisions Bearing on Intergovernmental Collaboration

As indicated in the previous section, state enabling legislation can be categorized as following either the "mutuality of powers" or the "power of one unit" models. The "power of one unit" approach has the effect of eroding Dillon's rule. Where the "mutuality of powers" approach prevails, the overriding legal problem is to find a statutory basis for each aspect of the collaborative arrangement.

From the legal point of view, there are four significant risks within interlocal collaboration. The first has to do with lack of judicial familiarity with the significance of the distinction between the "mutuality of powers" and the "powers of one unit" approaches. In a leading case, the Iowa Supreme Court interpreted a model statute incorporating the "powers of one unit" approach as permitting a metropolitan agency created by several local governments to do only what each "cooperating unit" already had the power to do.

The second risk has to do with Dillon's rule of strict construction of grants of power in the context of interlocal collaboration agreements. The Washington Public Power Supply System (W.P.P.S.S.) entered into an interlocal and interstate agreement with municipalities and public utility districts in three states for the construction of nuclear generating plants to supply power to the collaborating local government entities. The Supreme Courts of two of the three states involved in the transaction held a 2.25 billion dollar bond issue invalid because the collaborating local entities did not have the express power to assent to one clause in the revenue bond indenture. The implications of the W.P.P.S.S. case for IVHS project financing are obvious.

78. See generally Local Government Law, supra note 2, at § 6.04; § 18.11.
The third risk has to do with the effect of debt limitations on the fiscal capacity of each governmental unit seeking to collaborate. Under the law of a particular state, counties, cities, and regional authorities may have different debt limits imposed by constitution or statute. Further, certain provisions in an intergovernmental cooperative agreement may incur debt within the meaning of controlling constitutional or statutory law, thus creating a significant obstacle to interlocal or interstate agreements (See section II.A.3.).

The fourth risk stems from federal rather than the state law. An agreement which involves collaboration across state boundaries may be subject to the requirements of the Compact Clause of the U.S. Constitution. The Compact Clause provides that:

No state shall, without the consent of Congress . . . enter into any agreement or compact with another state . . . 82

The Compact Clause is not interpreted literally such that congressional consent is required for every interstate agreement.83 The Compact Clause only reaches interstate agreements which tend to "increase the political powers of the contractant States or to encroach upon the just supremacy of the United States."84 Whether or not interstate agreements affecting transportation facilities are exempt from congressional scrutiny under this test, it is common to submit them for congressional approval in order to avoid potential problems as well as to immunize the deal from an attack based on the Commerce Clause.85

A state statute authorizing intergovernmental agreements has been held to be a matter of "statewide concern" in California so as to override the effect of a home rule city charter.86

III. MODELS OF INTERGOVERNMENTAL RELATIONS AND IVHS

Little has been written about federalism in the specific context of highway systems. Most of the articles dealing with intergovernmental relations issues in the leading research treatise on highway law are devoted to compliance with federally mandated standards and procedures so as to qualify for federal funds.87

82. U.S. Const. art. I, § 10 cl. 3.
86. City of Oakland v. Williams, 103 P.2d 168 (Cal. 1940).
87. See generally L. Thomas and J. Vance, eds., FOUR SELECTED STUDIES IN HIGHWAY LAW ch. 9.
As a result, legal analysis has tended to focus on top-down models which may be less appropriate and effective in the context of IVHS technologies than they have been in the content of highway construction.\textsuperscript{88}

A. THE CENTRALIZATION MODEL — FEDERAL PREEMPTION AND REGULATION OF STATE, REGIONAL, AND LOCAL GOVERNMENT REGULATORY AND SERVICE PROVISION ACTIVITY

In a recent comprehensive survey of Federal statutes preempting state and local authority, there is no mention of The Federal Aid Road Act of 1916 or its successor legislation.\textsuperscript{89} Yet a 1967 summary of intergovernmental relations under those programs speaks of increased “federal controls which sharply circumscribe state authority” and of “federal dominance in the cooperative relationship.”\textsuperscript{90} This discrepancy can be explained by the fact that a high degree of uniformity in the highway program was achieved not with the stick of preemption, but with the carrot of federal spending. The state response is measured by a panoply of state statutes and even constitutional provisions\textsuperscript{91} which have the effect of “providing broad legislative or constitutional authorization for actions taken by state highway departments to meet federal-aid highway program requirements.”\textsuperscript{92} Congress’ broad power to use the spending power to induce states to adhere to federally formulated policies was sustained by the Supreme Court in a case challenging a statute directing the Secretary of Transportation to withhold a percentage of federal highway funds from states which permit persons under 21 to purchase or possess alcoholic beverages in public.\textsuperscript{93}

Congress is free under the Commerce Clause to regulate highway policy directly. However, the Tenth Amendment prohibits it from interfering with a state government’s regulation of commerce.\textsuperscript{94}


\textsuperscript{89} See Advisory Commission on Intergovernmental Relations, supra note 44 at 54-56.

\textsuperscript{90} See Wells, et al., supra note 4, at 1996.

\textsuperscript{91} Id. at 1998-2005 (collecting state laws).

\textsuperscript{92} Id. at 2005.


Although comprehensive authority exists under the United States Constitution to achieve a high degree of centralization and uniformity with respect to highway policy, the recent Intermodal Surface Transportation Act of 1991 reflects some concern that centralizing tendencies in highway programs have gone too far.95

States have asserted a similar degree of control over the regulatory and service-provision activities of local government in the highway field through a mixture of preemptive statutes and state spending policies.96 For example, the regulatory preemption of the Uniform Motor Vehicle Code precludes local governments from enforcing any ordinance on a matter covered by the Code “unless expressly authorized.”97 Under the Code, local governments are confined to “reasonable exercise of their police powers” over “streets or highways within their physical boundaries.”98 Fiscal dependence of local government on state spending produces a high level of de jure centralization in Maryland and Iowa.99 In Florida, local initiatives in the provision of highway services must conform to state-wide and regional growth management planning norms.100 California requires centralized approval over engineering work on all projects on the state highway system even when funded by a local option sales tax.101

B. THE FEDERALISM MODEL — STATE PREEMPTION OF REGIONAL AND LOCAL GOVERNMENT REGULATORY AND SERVICE PROVISION ACTIVITY

The federalism model refers to the attempt in some state constitutions to constitutionalize division of power by reserving “powers of local-government” or over “municipal affairs” to political subdivisions.

As the discussion of this subject in section I.A.1.b. indicated, resolution of the state constitutional law question turns on whether IVHS technologies are viewed by courts as matters of “statewide” concern.

97. E.g., PA. CODE § 6101.
98. E.g., PA. CODE § 6109(a). The Pennsylvania Code includes an enumeration of twenty categories of motor vehicle regulation which are presumed to be reasonable exercises of a local government's police powers.
101. DEVOLUTION, supra note 96, at 16.
Another constitutional barrier, discussed in section I.A.2., occurs in states which grant local government a right to veto any proposed interference with local streets and ways.

Legal restraints on the ability of states to centralize decision-making in the highway field are not as important as those which have emerged as a matter of state policy. Kansas has created a road system which "appears to proceed along two autonomous tracks: the [state] highway system is developed almost exclusively by the state, and the [local] highway system is developed almost exclusively by county and city officials."\(^{102}\) Whether this dual sovereignty scheme would prove workable in the context of IVHS technologies is an open question since project selection in that state is based on neutral criteria of need and the state highway policy is focused on preservation of the existing system rather than new projects.\(^ {103}\) In Illinois, local governments are afforded the right "to select and program projects without state interference."\(^ {104}\) In California and Florida, political subdivisions may finance new road projects through local taxes on the sale of motor vehicle fuels.\(^ {105}\)

C. The Consultative Model

Transportation specialists are familiar with formal requirements for consultation and cooperation between state and local officials which are part of the federal-aid highway program.\(^ {106}\)

State highway departments have employed a range of formal and informal consultative strategies with local officials concerning state highway programs.\(^ {107}\) These strategies range from notification and consultation to active involvement in the planning process.\(^ {108}\) The body of experience gathered from formal and informal consultative mechanisms can be drawn on in the context of IVHS technologies. However, the administrative model for making investment decisions has been criticized because of a tendency to ignore market-based solutions to transportation policy problems.\(^ {109}\)

\(^{102}\) Devolution, supra note 96 at 32.

\(^{103}\) Id.

\(^{104}\) Id at 27.

\(^{105}\) Id. at 14, 19.


\(^{107}\) Devolution, supra note 96, at 21.


\(^{109}\) Mashaw, supra note 88, at 70-71.
Consequently, a market-based model for the production and provision of IVHS services may be preferable to ISTEA's beefed-up requirements for local government involvement in the surface transportation decision-making process.

D. THE COORDINATION WITHOUT HIERARCHY MODEL — PROVIDING A LEGAL FRAMEWORK FOR BARGAINING AND NEGOTIATION AMONG NATIONAL, STATE, REGIONAL, AND LOCAL GOVERNMENTS

Recent research indicates the prevalence of both formal and informal modes for collaboration between and among public sector service providers. A recent influential study of regional transportation systems calls this the "coordination without hierarchy" approach. From a legal point of view, the formal rules which would facilitate the provision and production of IVHS services through collaborative activity by a variety of public sector entities are already largely in place. However, a model state statutory scheme which directly focused upon IVHS technologies as well as other aspects of system wide and project planning, funding, design, operations, and management for highways could considerably reduce the transaction costs and uncertainties attending a transition from the centralization and federalism models toward one more congruent with the policy objectives sought in the Intermodal and Surface Transportation Efficiency Act of 1991. Although legal issues arising out of private sector involvement are beyond the scope of this paper, private sector involvement in the production of IVHS services reinforces the desirability of providing a clear and perspicuous legal infrastructure specifically adapted to public-private sector collaboration.

IV. CONCLUSION

According to the most recent census figures, there are more than 22,000 cities and counties in the United States. Each of these general purpose units of government may, under a variety of state constitutional, statutory, and home rule charter provisions, be empowered to exercise

112. See supra text accompanying notes 69-71.
regulatory power over IVHS technologies. The transaction costs associated with regulating IVHS technologies would include: 1) "search and information costs" to discover the extent to which local governments are currently empowered to or preempted from exercising regulatory authority; 2) "bargaining and decision costs" in creating a regulatory scheme; and 3) "policing and enforcement costs" associated with implementing the regulatory scheme.\footnote{115} Similar transaction costs would be incurred should local governments decide to provide or produce IVHS services. The long-standing intergovernmental muddle over cable television should serve as a warning to all those involved with emerging technologies.

A model state statute clarifying: 1) the appropriate role for local governments as regulators of IVHS services; and 2) the rules of the game for local governments which choose to provide or produce IVHS services could significantly reduce the substantial transaction costs which predictably occur under existing laws. In addition to the objective of minimizing search and information, bargaining and decision, and policing and enforcement costs, that model statute should address the question of whether there is any reason to make government anything other than neutral toward the form which IVHS technologies should assume. That is, consideration should be given to a statutory regime which would create a level playing field on which different emerging IVHS technologies and their providers can compete.\footnote{116}


\footnote{116. This paper was prepared under FHWA Contract DTFH61-93-C-00087. The views expressed in this paper do not necessarily reflect the views of the U.S. Department of Transportation.}
Allocation of Airspace as a Scarce National Resource

J. Scott Hamilton*

TABLE OF CONTENTS

I. Introduction ............................................... 253

II. Landmarks in Litigation .................................... 254
A. Eminent Domain ............................................. 254
   1. Federal Airports ........................................ 254
   2. Public Airports Operated by State and Local Governments ........................................ 257
B. The Police Power ........................................... 258

* J. Scott Hamilton is an attorney from Louisville, Colorado, who limits his practice to aviation law. He also serves as an Adjunct Professor of Law at the University of Denver College of Law, and as an Adjunct Professor both at Embry-Riddle Aeronautical University and in the Aerospace Science Department at Metropolitan State College of Denver. He holds the following degrees: B.A. (Economics & Business, 1967), Hendrix College, J.D. (1971) (Order of St. Ives), University of Denver; LL.M. (Institute of Aerospace Law, 1972), Southern Methodist University.

An experienced pilot, he has served on the FAA's Stapleton International Airport Capacity Improvement Committee, the Colorado Airspace Initiative Working Committee and as spokesman for the New Denver International Airport Terminal Control Airspace User Committee.

He is the author of more than a dozen law review articles, over a hundred magazine articles, the PRACTICAL AVIATION LAW treatise, workbook and teacher's manual (Iowa State University Press, 1991), and a portion of the Airport Planning chapter in Hardaway, AIRPORT REGULATION, LAW & PUBLIC POLICY (Quorum Books, 1991). He is admitted to practice in Colorado and the District of Columbia.
1. Generally ......................................... 258
2. Height Zoning .................................... 258
3. Land Use Zoning .................................. 259
4. State and Local Ordinances ...................... 260
5. Injunctions Against Airports .................. 262
6. Public Opinion ................................... 263
C. Proprietary Restrictions on Airport Use .......... 264

III. Airport Planning ................................ 265

IV. Airspace Allocation and Air Traffic Control ........ 271
A. Airspace Allocation .............................. 272
  1. Class A Airspace .............................. 272
  2. Class B Airspace .............................. 273
  3. Class C Airspace .............................. 274
  4. Class D Airspace .............................. 274
  5. Class E Airspace .............................. 274
  6. Special Use Airspace ......................... 275
     a. Restricted Areas ............................ 276
     b. Prohibited Areas ........................... 276
     c. Warning Areas ............................. 276
     d. Military Operations Areas .................. 277
     e. Alert Areas ................................. 277
     f. Controlled Firing Areas .................... 277
  7. Military Training Routes ....................... 278
  8. Temporary Flight Restrictions .................. 278
  9. Class G Airspace .............................. 279
10. Air Defense Identification Zones .................. 279
B. Air Traffic Control ................................ 279
  1. Towers ........................................ 280
  2. Air Route Traffic Centers ..................... 280
  3. Flight Service Stations ....................... 281
  4. Central Flow Control ........................... 281

V. Current Issues in Controversy ..................... 281
A. Reinventing ATC ................................ 281
B. Challenges to Federal Preemption ............... 282
   1. Alaska Airlines v. City of Long Beach .... 283
   2. Country Aviation v. Tinicum Township .... 284
   3. Gustarson v. City of Lake Angelus ...... 285
   4. A Aerial Advertising Banners v. City of Boulder 285
C. Airspace Over National Parks .................... 287

VI. Conclusion ..................................... 289
I. INTRODUCTION

Following deregulation of airline economics by the Airline Deregulation Act of 1978, almost all airlines sought to achieve operating economies through a shift to exclusively hub and spoke route systems with jet service to small communities being largely replaced by more numerous but smaller turboprop commuter aircraft.\(^1\) Air carrier airports, selected by one or more airlines to serve as regional hubs, experienced an exponential increase in flight operations. This phenomenon has imposed an increased noise burden on residential communities in the vicinity of these airports and (especially during periods of inclement weather) increased flight delays. This not only inconveniences and frustrates travellers on the specific flights delayed, but also creates ripple effects throughout the air transportation system, disrupting nationwide air travel for days.\(^2\)

This strain on air transportation system capacity has resulted in incentives to expand and improve existing airports and to build new airports, both air carrier and general aviation reliever airports to entice non-airline traffic away from these busy airline hubs.\(^3\) Due to this strain on system capacity, the FAA and airport operators are under increased pressure to utilize existing airports more efficiently and to manage the navigable airspace so as to maximize its capacity.\(^4\)

---


3. For example, the new Denver International Airport will be the first major air carrier airport to open in the nation in over two decades, since the Dallas-Ft. Worth International Airport ("DFW") opened in 1974. Leslie Cowling & Suzanne Weiss, Denver Gets $60 Million Check, ROCKY MTN. NEWS, Sept. 28, 1989, at 6.

4. U.S. Congress, Office of Technology Assessment, Safe Skies for Tomorrow: Aviation Safety in a Competitive Environment, OTA-SET-381 (Washington, D.C.: U.S. Government Printing Office, 36-38 (July 1988) (hereinafter referred to as “OTA Study”), Lehrer, Air Transportation Challenges of the 1990's, 3 J. AVIATION/AEROSPACE ED. & RESEARCH (1993). FAA Administrator David R. Hinson states that U.S. commercial air travel is estimated to exceed 680 million passenger enplanements by the year 2000 and states that unless more efficient use can be made of the airspace, constraints may be necessary. AOPA PILOT, July 1994 at 22. Concerned by the growing congestion of world airspace, the International Air Transport Association, an organization of international airlines, set up an “infrastructure action group” to lobby governments — particularly in Europe, North America and Asia (which it called the worst case) — to give higher priority and, if necessary more money, to solve the problem. IATA warned that the airports of these three affected regions face virtual saturation by the end of the century unless something is done to relieve congestion of the air traffic control system. The action group supplements IATA's existing Task Force on Airport and Airspace Congestion, which was previously organized to identify technical air traffic problems (such as lack of radar coverage in certain countries, congestion around certain airports, and safety problems) and to suggest ways to combat them. AIR SAFETY WEEK, June 4, 1990 at 3. There is already considerable international
Efforts to expand airport and airspace system capacity are sometimes hampered by: divided federal and local authority to regulate airport and other land uses, especially where the exercise of local jurisdiction operates in a manner incompatible with the exclusive federal jurisdiction to regulate airspace use;\(^5\) fear of liability for aircraft noise,\(^6\) and anti-airports sentiments in local communities (which are usually largely noise-related, but may have a component of safety concerns, as well).\(^7\)

Most litigation over airport and airspace use in the United States has been noise-related, although issues relating to capacity and access are arising now with greater frequency.\(^8\)

At this writing, all public airports in the United States, receiving scheduled airline passenger service, are owned and operated by state or local governments or quasi-governmental regional airport authorities. These state and local governments may call upon their inherent power of eminent domain, police power, and proprietary powers as operators of airports to deal with these problems.

II. LANDMARKS IN LITIGATION

A. EMINENT DOMAIN

1. Federal Airports

The first aviation case decided by the Supreme Court of the United States focused on airport and airspace issues.\(^9\) The plaintiffs raised chickens adjacent to a little-used rural airport in North Carolina. When World War II began, the federal government took over the airport and put it to use as a heavy bomber base, operating around the clock with a very high level of flight activity. A continuous stream of transports and heavy bombers, as well as formations of fighters, roared over the plaintiffs’ property day and night. Their landing approach brought them as low as cooperation in air traffic control (see, e.g., 14 C.F.R. Part 91, Appendix C — Operations in the North Atlantic (NAT) Minimum Navigation Performance Specifications (MNPS) Airspace (1993), but there is vast room for improvement.


7. OTA Study, supra note 4, at 63-64. Safety concerns of residents living in close proximity to an airport are not frivolous, as statistics show that most aircraft accidents occur in near proximity to the airport where the accident aircraft either took off or was intending to land.


sixty-seven feet over the rooftop of the house. The roar of the bombers’ four 1200 horsepower piston engines was deafening and at night their landing lights repeatedly illuminated the plaintiffs’ bedroom.10

The brain of a chicken is apparently programmed to associate anything flying overhead with threat of attack by a chickenhawk, the perceived threat drove the chickens into a frenzy of activity. Thus, some 150 of the plaintiffs’ chickens died from injuries sustained while crashing about their coops in panic caused by the low-flying bombers. The plaintiffs themselves found it impossible to get a night’s sleep under the circumstances and hired an attorney who sued the federal government in the United States Court of Claims.11

From this humble setting came the foundation of the law of airports and airspace in this country, as the case found its way to the Supreme Court of the United States as a case of first impression.12 Indeed, counsel and the Court, in a thorough and exhaustive quest for precedent on the issue of property rights in airspace, searched all the way back to the writings of the Roman Glossators who, around the time of Jesus Christ, wrote extensive legal treatises. There, they found the ad coelum doctrine which, when translated from the original Latin (cujus est solum, ejus est usque ad coelum), held that a person who owned a parcel of land owned not only the surface of that land but also the airspace vertically above it, literally “to the stars” (ad coelum).13

This ancient legal doctrine had been relied upon from time to time to resolve the kinds of rights-in-airspace disputes that arose prior to the advent of flying machines, such as determining the ownership of fruit growing on branches of one landowner’s tree overhanging another’s property,14 or determining whether a landowner might legally construct a building that, although its foundation occupied only its owner’s land, has balconies or roof eaves extending over a neighbor’s land.15

The Supreme Court quickly realized that application of this ancient legal doctrine to the aviation context would make flight virtually impossible, as each property owner whose land was overflown could demand that aircraft keep out of that landowner’s airspace or pay a toll for crossing that vertically limitless property. Relying on the Commerce Clause to the Constitution of the United States16 and Congress’ pronouncements in the

10. Id. at 258-59.
13. United States v. Causby, supra note 9, at 260-61 n.5.
15. Id.
Civil Aeronautics Act of 1938\textsuperscript{17} (precursor to the present Federal Aviation Act of 1958\textsuperscript{18}), the Court held that navigable airspace is a federal public highway within the federal public domain and that, at least as it would otherwise affect the passage of aircraft, the \textit{ad coelum} doctrine has no place in the modern world.\textsuperscript{19}

However, the Court did afford the plaintiffs relief for the damages they suffered. By analogizing to the law of eminent domain, the Court found that these flights by aircraft owned and operated by the federal government, at an airfield operated by the federal government, were “so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land” as to diminish the value of the land. This, the Court held, amounted to a taking of private property for a public use under the Just Compensation Clause of the United States Constitution, Amendment V,\textsuperscript{20} requiring the federal government to pay the landowner for the taking. The Court characterized the property interest taken as an “aviation easement”,\textsuperscript{21} and held that the actual dollar amount constituting “just compensation” was the difference between the appraised value of the plaintiffs’ land before the commencement of the oppressive over flights and its appraised value after the flights had begun.\textsuperscript{22}

Ordinarily, when a government sets out to take private property for a public use under the power of eminent domain, it proceeds by way of a condemnation action, filing suit seeking a judicial determination of the fair market value of the property and a requesting a court order transferring title of that property to the government upon payment of the price thus determined.\textsuperscript{23} Since, however, in this case it was the landowners who had filed the suit seeking a judicial determination that the federal government had already taken a property interest from them for public use (without prior resort to judicial proceedings), and seeking just compensation for that taking, the Court characterized this lawsuit as one in “inverse condemnation.”\textsuperscript{24}

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{17} United States v. Causby, \textit{supra} note 9, at 263-64; Civil Aeronautics Act of 1938, 49 U.S.C. §§ 1301-1542 (1976).
\item \textsuperscript{19} United States v. Causby, \textit{supra} note 9, at 261.
\item \textsuperscript{20} “[n]or shall private property be taken for public use without just compensation.” U.S. CONST amend. V.
\item \textsuperscript{21} United States v. Causby, \textit{supra} note 9, at 261-62.
\item \textsuperscript{22} \textit{Id.} at 266-67.
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.}
\end{itemize}
\end{flushleft}
2. Public Airports Operated by State and Local Governments

In the next landmark case in this area, the Supreme Court of the United States addressed the issue of who should be liable to landowners near public civil airports for the impact of noise generated by civil aircraft using those airports. In this case, the plaintiff's home was adjacent to the Greater Pittsburgh Airport, an airport owned and operated by Allegheny County and served by several commercial airlines. The county built a runway so close to the plaintiff's property that airliners following the federally-prescribed approach to landing sometimes passed as low as eleven feet over the top of the chimney of the plaintiff's home. The noise and vibration cracked the plaster walls and ceilings, and toppled the plaintiff's precious belongings from shelves and china cabinets. The plaintiff's attorney filed suit against both the county and the airlines whose aircraft actually generated the noise. The Court dismissed the action against the airlines, reasoning that since as private enterprises, they lacked the power of eminent domain. Thus, they could not be found to have taken a property interest from the plaintiff for a public use.

The Court held that Causby was controlling authority in this case, and held that the county, as operator of this public airport, had taken an aviation easement over the plaintiff's property through inverse condemnation. The Court thus required the county, as the airport's owner/operator, to pay the plaintiffs just compensation for the taking (again, to be measured by the difference between the appraised fair market value of the property immediately before and after the runway extension which led to the radical increase in noise burdening the plaintiffs' property).

This decision apparently alarmed many state and local governments that owned and operated (or were in the process of planning or constructing) public civil airports. Such governments recognized the potential for a flood of similar claims by local landowners. The nature of the cases that followed suggests that many attorneys for state and local governments were tasked by their employers to find a way to avoid or minimize such potential liability. The following cases suggest that these attorneys enthusiastically approached this challenge, attempting and vigorously defending a variety of approaches to evading such potential liability.

26. Id. at 86-87.
27. Id. at 89.
28. Supra note 9.
B. THE POLICE POWER

1. Generally

Generally, when the Griggs decision was announced, operations had already commenced at a new regional air carrier airport in the Seattle-Tacoma, Washington area (SEATAC). In an apparent effort to circumvent potential Griggs style liability for inverse condemnation suits brought by landowners provoked by aircraft noise at the new airport, the airport’s proponents included in enabling legislation an elaborate recital that the airport was created under the police power, in the interest of the public welfare.

When the airport opened for operation, an adjacent landowner filed suit. The Washington Supreme Court held that although building and operating a public airport was certainly a proper exercise of the police power, if that exercise of police power resulted in a taking of private property rights for public use, then such an exercise of police power is also, in effect, an exercise of the power of eminent domain, obligating the government that owned and operated the airport to pay just compensation to affected property owners.

2. Height Zoning

Shortly thereafter, in Riverside, California, a county government, while constructing a new general aviation airport (Ryan Field), was concerned that the safety and capacity of this public airport might be jeopardized if nearby landowners were allowed to erect structures blocking approach paths to the runway. Therefore, in the exercise of its police power, the county adopted zoning restrictions, prescribing maximum structure heights permitted beneath the line of approach to the runway, proceeding outward and upward from the airport in stairstep fashion, permitting only very low structures close to the airport and progressively higher structures farther away.

Mr. Sneed owned a parcel of some 234.5 acres immediately adjacent to the runway threshold. Under the new county height zoning ordinance, the tallest structure permitted to be built on that portion of his property farthest from the end of the runway was twenty-four feet, and on that portion closest to the runway, a mere three inches. The landowner filed suit and the California Court of Appeals held that, while building and operating the airport and adopting this height zoning regulation to pro-

31. Id. at 668-70.
32. Id. at 671-72.
34. Id.
tect the airport's approaches from obstruction were valid exercises of the county's police power, the restriction resulted in a taking of the plaintiff's property. The court reasoned that because the height zoning regulation was plainly intended to keep open a right-of-way (aviation easement) for the passage of aircraft using this public airport and the restriction of the use of the airspace over this particular parcel of land was so drastic, the effect on the plaintiff landowner was a taking. Thus, the Court required the county to pay the landowner just compensation for the aviation easement taken (as measured by the difference in the value of the land immediately before and after imposition of the height zoning ordinance).35

3. Land Use Zoning

About this same time in Santa Barbara, California the county decided to build a public air carrier airport. Nearby and in line with planned runways, a private developer owned a large parcel of land which had already been zoned, platted, and approved by the county for development as a residential subdivision, although construction had not yet begun.36 The county government was appropriately concerned that if this residential subdivision was constructed, its residents would soon be annoyed by noise generated by aircraft using the new airport and might successfully sue the county in inverse condemnation for the taking of an aviation easement. Therefore, the county revised its land use zoning in the vicinity of the new airport to permit only land uses insensitive to noise in those areas expected to receive the brunt of the noise generated by aircraft using the new airport.37 Under this new land use zoning ordinance, the developer's property was rezoned from residential to industrial use.38

The developer filed suit, claiming that this rezoning constituted a taking of his property for a public use, requiring the payment of just compensation by the county.39 The California Court of Appeals held that the ordinance was a valid exercise of the county's police power, adopted for the purpose of protecting the public health and welfare by preventing residential exposure to the adverse effects of aircraft noise.40 The court noted that, unlike the zoning ordinance in Sneed,41 the Santa Barbara County use zoning regulations did not impose any height limits or otherwise demonstrate any intent to keep open a public right-of-way through

35. Id. at 320-22.
37. Id. at 293.
38. Id.
39. Id.
40. Id. at 294-95.
41. Supra note 34.
the airspace for aircraft coming and going (an aviation easement), so that this land use zoning ordinance did not have the effect of also taking private property rights for a public use. Thus, the court found that the county had no liability to the landowner. 42

As a result of this decision, land use zoning is now a very popular tool, used nationwide in new airport planning and in protecting existing airports, not already surrounded by residential developments. 43 Industrial, commercial and agricultural land uses are favored in the near proximity of airports, especially in areas falling within the airport's projected 65 Ldn noise contour, as it is generally accepted that noise levels of 65 Ldn or greater are incompatible with the reasonably quiet enjoyment of residential property. 44 Land use zoning is, however, a two-edged sword which local governments may use not only to protect airports from the encroachment of noise-sensitive residential developments, but also to protect residential communities from the encroachment of noise-generating airports. 45

4. State and Local Ordinances

The arrival of the first generation of jets 46 in airline service triggered a nationwide epidemic of aircraft noise-related litigation. These aircraft emitted far more noise and smoke than their propeller-driven predecessors (and later generations of jet airliners which followed) and their safe operation required longer, flatter approaches and departures which carried the noise burden further from the airports, to communities not previ-
ously bothered by aircraft noise.47 This new noise burden spurred many communities, which had long been neighbors of airports, to legal action to protect their citizens.

One such community was the Village of Cedarhurst on New York's Long Island, about a mile southeast of John F. Kennedy International Airport ("JFK", formerly known as Idlewild). Several of JFK's runways point toward Cedarhurst. Citizen outrage over the new jet noise level motivated the local government to adopt a municipal ordinance which specifically prohibited aircraft from flying over the village at less than 1000 feet above ground level (AGL).48 Enforcement of the ordinance was immediately challenged in court.49 In the litigation process, it was demonstrated that the FAA air traffic control procedures then in use required aircraft landing on certain runways at JFK to overfly the village at altitudes below 1000 feet AGL.50

The United States Court of Appeals for the Second Circuit found a pervasive federal regulatory scheme in the FAA's establishment of JFK arrival and departure routes as part of a nationwide regulatory scheme governing interstate and foreign commerce.51 Since the ordinance prohibiting aircraft from flying over the village at altitudes below 1000 feet AGL conflicted with the federal regulatory scheme requiring that aircraft fly over the village at lower altitudes, the ordinance was held unenforceable52 under the Supremacy Clause of the United States Constitution.53

Nearby, citizens of the Town of Hempstead were also irate over this new burden of jet noise from JFK. The town adopted a municipal noise ordinance setting decibel limits on the maximum amount of noise anyone (not just aircraft) was permitted to generate in the town. The town promptly attempted to enforce its ordinance against aircraft flying overhead to and from JFK. Enforcement of this ordinance, too, was soon challenged in court, where it was demonstrated that the jets could not comply with the town's noise ordinance without flying over the town at altitudes higher than those prescribed by the same existing FAA air traffic control procedures which had been the basis for the court's decision in

49. Id. An action in which the airlines using the airport joined with the airport operator and the Air Line Pilots Association International as plaintiffs and the court also permitted the Civil Aeronautics Board (precursor to the FAA) and the Administrator of Civil Aeronautics to intervene as parties plaintiff against the municipality.
50. Id. at 814-15.
51. Id. at 815-17.
52. Allegheny Airlines, supra note 48 at 816-19.
Cedarhurst.\textsuperscript{54} Thus, the United States Court of Appeals for the Second Circuit found that the town's noise ordinance, as applied against aircraft, was in direct conflict with the federal regulatory scheme so that the Supremacy Clause precluded the town from enforcing the ordinance against aircraft (although the town remained free to enforce the ordinance against terrestrial noise sources such as motorcycles, lawn mowers, chain saws and the like).\textsuperscript{55} It is now firmly established that the federal government has preempted control of airspace allocation and use so that state and local governments are precluded from attempting to regulate aircraft in flight.\textsuperscript{56}

5. Injunctions Against Airports

Where irate citizens have sought to enjoin the operation of a publicly-owned airport as a nuisance, the courts have uniformly refused to grant injunctive relief, holding that such landowners have an adequate remedy at law, through suits in inverse condemnation, to obtain payment of just compensation for any diminished property value they may have suffered from the noise of aircraft using the airport. No court has ever enjoined the operation of a publicly owned and operated airport in the United States, although damages have been awarded where the public airport has been found to constitute a nuisance.\textsuperscript{57}

Privately owned and operated airports, however, have generally not fared so well in defending against suits for injunctive relief. Some private airports have been found to be nuisances and either enjoined from continuing operation or subjected to such daily damages for continuing operation that they have elected to cease operation rather than pay the damages to the surrounding residents.\textsuperscript{58}

Because an injunction is equitable relief, considerations of fairness come into play in these cases, so the court may take into account such factors as who came first, the airport or the complaining residents. If it

\textsuperscript{54} Id.

\textsuperscript{55} American Airlines, Inc. v. Town of Hempstead, 398 F.2d 369 (2nd Cir. 1968).


appears that the airport was established first and the complaining resi-
dents “came to the nuisance” the court may consider it unfair to enjoin
operation of the airport.59 In these cases, courts typically balance the
interests involved, and may consider not only the rights and interests of
the airport operator and complaining residents, but also any public bene-
fits which may accrue by keeping the airport operational.60 For example,
if a privately-owned airport is open to the public and the airport’s attor-
neys can demonstrate to the satisfaction of the court that if the airport is
closed, the local government will need to expend considerable taxpayer
funds to build a publicly-owned and operated airport to replace the facil-
ity, the court might well find a public interest in allowing private enter-
prise to continue to satisfy that need, and thus deny injunctive relief.
Some private airports have successfully fought litigation seeking to enjoin
their operation, while others have failed. Some of the private airports
that lost have ceased operations rather than pay damages for a continuing
nuisance.61

6. Public Opinion

Not all solutions to the twin problems of aircraft noise and unob-
structed airport approaches have been found in litigation or preventive
lawyering. Public opinion is also sometimes effective when directly
applied.

In Dallas, Texas, the Love Field airport is very convenient to down-
town businesses. In the early 1970s, the Dallas banks were engaged in
one-upmanship, building office towers each taller than that of the competi-
tion’s. The FAA’s obstruction analysis62 determined that a particular
proposed “skyscraper” bank would constitute an obstruction to air navi-
gation requiring decommissioning of instrument approaches to the air-
port from the southeast. The FAA did not prohibit the construction, but
merely announced its findings and plan, which were well publicized in the
local media. Loss of these instrument approaches would have greatly re-
duced the utility of this popular airport in periods of foul weather. Appar-
ently, the local business community was so upset by that prospect that
they let the bank’s directors know that they would not look kindly upon

59. For a wide-ranging, if somewhat dated, review of application of the common law of
nuisance to the complaints of airport neighbors, see Wright, supra note 12, at Ch. V.
60. Hamilton, supra note 58, at 158-59.
61. Of 17,581 aircraft landing facilities operating in the United States in 1991, the most
recent year for which statistics are available, there were 12,904 airports, 4,199 heliports, 70 STOL
ports and 408 seaplane bases. 5,090 of these facilities were publicly owned while the other 12,491
(the vast majority) were privately owned. Only 666 of these facilities are served by airlines, the
rest only by general aviation. Continuing a trend, 387 aircraft landing facilities were abandoned
62. See infra, notes 82-86, and accompanying text.
such a consequence and would feel compelled to take their business elsewhere if it were to come to pass. The bank quickly yielded to this expression of public opinion, announcing with great magnanimity that of course everyone already knew that they were really the biggest and best bank in town and they didn't have to go build some silly skyscraper to prove it. The airport’s approaches remain unobstructed to this day.

Washington, D.C.’s National Airport has long been a noisy annoyance to its neighbors. In an effort to reduce the airport’s noise impact on the surrounding communities without resort to overt restrictions, the FAA (then the airport’s owner and operator) announced a “voluntary jet curfew”, requesting that corporate operators voluntarily refrain from conducting jet operations at the airport between the hours of 11:00 p.m. and 7:00 a.m. Not surprisingly, when this voluntary program took effect not all corporate jet operators volunteered. Local newspapers then published the names of major corporations which had flown in or out of the airport with their jets during curfew hours. The airport’s neighbors, angered by this intrusion into their night’s quiet sleep, wrote letters to the management of those corporations, expressing their outrage. Corporate jet operators swiftly responded to this public reaction and within only a few months, voluntary participation in the curfew had reached 100%.

C. PROPRIETARY RESTRICTIONS ON AIRPORT USE

A state or local government or regional airport authority which owns and operates a public airport may, as proprietor, regulate the use of that airport. Such proprietary regulations or restrictions, however, must not substantially burden interstate or foreign commerce, must not discriminate against interstate or foreign commerce, and must be reasonable.

The courts have struck down as unreasonable an airport ban on all jets, adopted for noise abatement purposes, where the evidence showed that louder piston-engine aircraft were still allowed to use the airport. Likewise, an airport authority’s refusal to allow the Anglo-French Concorde supersonic transport to use an airport operated by the authority

63. And despite efforts to restrict its use and direct traffic (especially airline traffic) to the Dallas-Ft. Worth Regional Airport (“DFW”), Love Field is busier than ever.
64. The FAA has since turned both National Airport and Dulles International Airport over to the Washington Metropolitan Airport Authority.
67. Santa Monica Airport Ass’n v. City of Santa Monica, 659 F.2d (9th Cir.1981).
68. Id.; Santa Monica Airport Ass’n v. City of Santa Monica, 647 F.2d 3 (9th Cir. 1981) (the second of three landmark noise cases at this airport, referred to as “Santa Monica II”).
was also struck down where the evidence showed that the aircraft could operate within the authority's general noise limit applicable to all other aircraft.69

Proprietary restrictions which have been upheld by the courts include: a night curfew on all aircraft takeoffs and landings, a prohibition against low approaches and “touch and go” landings on weekends, a prohibition against helicopter training flights, and the establishment and enforcement of maximum single event noise exposure levels against aircraft using the airport.70 Such restrictions may be imposed only where the governmental entity is the proprietor of the airport. Where the state or local government is not the airport’s proprietor, the police power is unavailable to impose such restrictions against the airport.71

III. AIRPORT PLANNING

Appropriate planning, fully and properly implemented and continuously updated in light of changing circumstances, can benefit the public by assuring that valuable airport facilities are available to serve the public’s demands free of artificial restraints on capacity.72 In practice, however, that is often more easily said than done. Typically, airport authorities must rely on local governments having zoning authority to implement zoning for compatible uses and limiting the height of structures. Even where the airport is being developed by a local government possessing zoning power, the airport’s projected noise footprint may extend over neighboring cities and counties. Effective zoning would then require the cooperation of the neighboring cities and counties in implementing and maintaining appropriate land use and height zoning ordinances to protect the airport from the encroachment of developments that are incompati-

71. However, it is not unusual for adjacent local governments to enter into intergovernmental agreements to harmonize the airport’s needs with those of non-proprietor communities. Typically, in such agreement, the adjacent government agrees to use its police power to impose height zoning to protect the airport’s approaches and use zoning to assure that only land uses which are not particularly noise sensitive (such as industrial) are permitted under the airport’s approach and departure paths, while the airport proprietor government agrees in exchange to enforce noise limits on aircraft using the airport and perhaps a nighttime curfew against flight operations, as well.
72. Where residential communities have been permitted in proximity to an airport, public outcry for aircraft noise limits, nighttime curfews and other noise-abatement restraints is common. While such a reaction is understandable, these restraints markedly diminish the airport’s usefulness as an element of the national transportation system. On the subject of restricted airport access by slot allocation, see 14 C.F.R. §§ 93,211-93,227 (1993).
ble with the airport either by virtue of their noise sensitivity or height. Unfortunately, there are virtually no examples of wholly successful long term intergovernmental cooperation in the United States to accomplish these goals.

Land use zoning can be the most cost effective method for assuring that the noise generated by aircraft using the airport does not provoke litigation in inverse condemnation against the airport operator or citizen animosity which may be effectively felt as political pressure to restrain the airport's future operations. Airport developers, in creating a master plan, must accurately predict the "noise footprint" of the airport and its traffic, as it will fall on surrounding land. Noise sensitive uses such as homes, schools, hospitals, and churches should not be permitted within the projected 65 Ldn noise contour. Where this 65 Ldn noise contour extends beyond the jurisdiction of the government constructing the airport or where the airport is being developed by an airport authority not possessing zoning power, the airport sponsor must obtain an intergovernmental agreement with local governments having zoning jurisdiction over all potentially affected areas to cooperate in zoning out potentially noise sensitive uses from these areas and to keep the airport's approaches clear of dangerous obstructions through height zoning or application of their power of eminent domain to condemn and take necessary land and aviation easements. Even if such a cooperative intergovernmental working

73. For example, planning for DFW involved extensive rezoning of at least two counties and several cities and towns.
74. Both Dulles International Airport, which serves the Washington, D.C. metropolitan area and the Dallas-Fort Worth Regional Airport (DFW) were considered models of planning at the time of their construction. Both, however, now face real potential constraints on future growth and development as a result of land uses that have been approved by surrounding governments in the years since these airports were first constructed. Helms, Noise Pollution and Airport Regulation, 47 J. AIR. L. and COM. 405 (1982); Newman, An Innovative Approach to Airport Planning, 39 J. AIR. L. and COM. 353 (1973).
76. 14 C.F.R. Pt. 150 (1992); Gesell, supra, note 76, at ch. V.
77. The "footprint" projects on contour maps aircraft noise expected to fall upon the surface of surrounding lands and waters.
78. Industrial parks have been particularly successful land uses in these noisier areas, since a worker operating a turret lathe or other noisy machinery may be totally oblivious to the passage of a jetliner overhead. Indeed, the proximity of the airport as a transportation hub may make such properties especially valuable in an industrial application. Herbert Conway, The Airport City: Development Concepts for the 21st Century 93-133 (1980); supra note 44.
relationship can be established and maintained, the best plans and projections are always subject to being rendered irrelevant by FAA changes in flight patterns and airspace use.  

Although Congress has delegated to the FAA broad plenary power to allocate the use of the navigable airspace, which includes airspace necessary for the takeoff and landing of aircraft, the FAA has made very limited use of that power to protect airport approaches from obstruction. Part 77 of the Federal Aviation Regulations requires that before constructing anything which could be an obstacle to aircraft, the sponsor of that construction must notify the FAA. Upon receipt of this notice, the FAA performs an obstruction analysis to determine whether the proposed structure would adversely affect air navigation. At the conclusion of its analysis, the FAA issues an official finding as to whether the proposed construction would constitute a hazard to air navigation. This concludes the FAA's involvement in the issue. The FAA neither permits nor prohibits the proposed construction, leaving that decision to the local government having jurisdiction over land use and height zoning and the issuance of construction permits.

The state or local government developing a public airport may use its power of eminent domain to condemn and purchase both land and aviation easements over land in the vicinity of the airport. Beyond that land needed for the airport's initial structures and facilities (including runways, approach lighting structures and radio navigational transmitter installations), there is no hard and fast rule by which to determine whether additional land should be purchased in fee for noise abatement purposes (or optioned for future acquisition), or whether acquisition of aviation easements over that land (generally a considerably less expensive proposition when dealing with undeveloped land) would suffice. It may, however, be stated as a general proposition that the closer the proximity of a

---

79. On the other hand, if the local governments maintain a close and cooperative working relationship with the FAA, at least where the airport is served by an FAA-operated control tower, the FAA can assist the airport proprietor in developing noise-abatement procedures appropriate to the airport, including runway use preferences that (winds permitting) route departures over the least noise-sensitive neighboring.


81. 14 C.F.R. §§ 77.1 to 77.75 (1992).

82. 14 C.F.R. § 77.13 (1992), which describes in considerable technical detail construction requiring notice.

83. 14 C.F.R. §§ 77.33 to 77.35 (1992).

84. 14 C.F.R. § 77.31(b) (1992).


particular parcel of property to a runway threshold, the greater consider-
ation should be given to purchasing that property in fee. Likewise, if the
property is farther from the airport (and the less its projected noise con-
tour), an aviation easement may suffice.

Federal matching funds are available from the Airport and Airway
Trust Fund to acquire land and aviation easements for noise abatement
purposes, but the federal government has been reluctant to provide
matching funds for the purchase of land for anticipated future airport
expansion.\(^87\) Thus, the development of surrounding properties (even if
such developments are noise compatible with the airport's original plan
by virtue of then seemingly prudent land use zoning) may constrain fu-
ture extension or multiplication of runways to allow the airport to keep
abreast of originally unforeseen increasing demands for capacity.\(^88\)

Airport development in the United States has not relied heavily on
general obligation ("full faith and credit") bonds for financing,\(^89\) which is
probably a good thing considering the increasing resistance of voters to
tax increases. Instead, airport revenue bonds, supplemented by grants
from the federal Airport and Airway Trust Fund, have been the primary
financial tools of choice to finance airport development.\(^90\) The federal
Airport and Airway Trust Fund, about $14 billion at this writing, consists
of the proceeds of airline passenger ticket taxes and general aviation fuel
taxes.\(^91\) Many states also earmark certain tax revenues to be expended
for airport development purposes, such as state registration fees and spe-
cific ownership taxes on aircraft and taxes on aviation fuels.\(^92\) These state
revenues may be used to match federal funds.

Air carrier airports may also impose a passenger facility charge
(PFC) on airline passengers using the airport.\(^93\) Unlike general obligation
bonds, airport revenue bond obligations are secured by the pledge of

\(^87\) Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 2204(c)(1)(b)

\(^88\) Helms and Newman, supra note 74. See also comment, Obstacles to Increasing Airspace:


\(^90\) Gesell, supra note 75, at VII-28 to 30.

\(^91\) The Airport and Airway Trust Fund was established by Section 9502 of the Internal
Responsibility Act of 1982 (TEFRA), 26 U.S.C. § 1. These revenue sources include an 8% do-
mestic air passenger ticket tax, a 5% tax on air freight weigh bills, a $3 per person international
departure tax, a 12% per gallon tax on aviation gasoline used for non-commercial purposes, a
14¢ per gallon tax on other aviation fuels used for non-commercial purposes and a tax on aircraft
tires and tubes. Congress has been notoriously slow to approve expenditures from the Trust
Fund for reluctance to increase the federal deficit.

\(^92\) See, e.g., Hamilton, Aircraft Registration and Taxation in Colorado, 5 COLO. LAW. 17
(1976).

\(^93\) Hardaway, supra note 1, at 104.
revenues earned by the airport and are not backed by the general taxing power of the issuing government. 94 The issuance of general obligation bonds may require approval by popular vote whereas the issuance of airport revenue bonds usually does not require such approval. 95

Where an airport development project is viewed by the financial community as justifiable in scope and feasible under the circumstances, and where the airport's revenue projections are viewed as realistic, airport revenue bonds have generally found a ready market. 96 This has proved to be so even where airlines that are prospective users of the new airport have not yet signed long term use agreements with the airport operator. 97 No doubt a major reason for this level of acceptance is the simple historical fact that no U.S. airport has ever failed to make a payment on a revenue bond and none has ever defaulted. 98

Upon recommendation of the FAA and specific authorization by Congress, as much as ninety percent of the allowable project costs may be paid from the Airport and Airway Trust Fund. 99 Acceptance of such federal grant-in-aid funds does, however, contractually obligate the airport's sponsor to keep the airport open for a long term (typically twenty years from the date of the last federal grant to the sponsor), and prohibits the airport operator from entering into exclusive use agreements and from discriminating against any kinds or classes of aeronautical users of the airport. 100 Funded projects must also comply with federally prescribed airport construction standards. 101

The type of bond relied upon to finance an airport project may be influenced by the airport's size. Thus, larger air carrier airports are less likely to use general obligation financing than smaller general aviation fields. Between 1978 and 1982, general obligation debt accounted for only two percent of total bond financing at the nation's largest commercial air carrier airports, fourteen percent at medium sized commercial air

---

96. Buschman & Gibbons, supra note 94, ch. 15.
97. Id. However, signed airline long-term use agreements do add a further measure of security which may be reflected in the bonds' rating and thus the interest the issuer pays. See also Blais, Airport Financing the Need for Long-Range Planning, in Speaker Syllabus, U.S. Dept. of Transportation, Federal Aviation Administration, The Law of Aviation Symposium, Washington, D.C. (Dec. 1-2, 1981).
98. Lewis, supra note 89, at 72-73.
99. 49 U.S.C. § 2209(a) (1992). Allowable project costs are itemized at 49 U.S.C. § 2212 (1992), and include planning costs. See also U.S. Dept. of Transportation, Federal Aviation Administration, Planning the State Airport System, Advisory Circular 150/5050-3A at 23 (1972).
carrier airports and thirty percent at small commercial air carrier airports. Among general aviation reliever airports, by contrast, about forty-nine percent of all tax exempt debt capital has general obligation backing. At non-reliever general aviation airports, more than eighty-three percent of debt financing is secured by general obligation backing.\textsuperscript{102}

Airport development and its funding is considered a major federal action which may significantly affect the quality of the environment, bringing into play the National Environmental Policy Act of 1969 (NEPA) requirement for preparation of an environmental impact statement (EIS).\textsuperscript{103} Some states have also adopted similar statutes requiring preparation of an environmental impact statement (EIS) for projects which could affect the environment.\textsuperscript{104} These requirements may apply to improvements to existing airports, as well as to the development of new airports. Opponents of airport development have achieved some success in enjoining federal funding of airport projects where an EIS fails to meet NEPA requirements.\textsuperscript{105} Further, where the EIS and the process of conducting that study come to be viewed by persons who stand to be adversely affected by the project as an "inside job" with little real consideration given to citizen concerns, the necessary intergovernmental cooperation becomes much more difficult to achieve. It is crucial that the study leading to the EIS be thorough and legitimate, and be completed as early as possible in the planning phase to avoid the risk of an injunction interrupting construction or financing of the project once ground has been broken.

Regardless of whether federal funds are being sought or have been used to develop the airport, the FAA must be notified of every proposal to construct, alter, activate or deactivate a civil or joint use (shared civil and military) airport.\textsuperscript{106} The FAA then conducts an airspace analysis to determine the effects of the project on existing or contemplated air traffic patterns of neighboring airports and the existing airspace structure, together with the effects of existing or proposed manmade objects known to the FAA and the area's terrain features on flight operations at the air-

\textsuperscript{102} Lewis, supra note 89, at 60.  
\textsuperscript{106} 14 C.F.R. § 157.3 (1993).
Following completion of the airspace analysis, the FAA will issue one of three determinations: No objection, no objection if certain conditions are met (such as the establishment of traffic patterns compatible with those of pre-existing adjacent airports), or that the proposal is objectionable and stating specific objections. The FAA neither permits nor prohibits execution of the proposal.

Airports receiving regularly scheduled commercial passenger service are also required to establish security programs that meet with the approval of the FAA’s Director of Civil Aviation Security. If the airport serves any commercial passenger operation conducted with aircraft having a seating capacity of more than thirty passengers (whether these operations are scheduled or unscheduled), the airport must also obtain FAA certification under FAR Part 139, which imposes additional requirements, including but not limited to: crash, fire, and rescue equipment; personnel; and training.

Airports projects will also need to provide for large capacity storage of aviation fuels. Therefore, planners must take into account federal underground storage tank (UST) regulations promulgated under the federal Resource Conservation and Recovery Act (RCRA). Local land use planners need to also consider adding soundproofing requirements to building codes applicable to areas within the airport’s potential noise footprint.

IV. AIRSPACE ALLOCATION AND AIR TRAFFIC CONTROL

Under the Federal Aviation Act of 1958, as amended, the Secretary of Transportation is authorized and directed to develop plans and formulate policy for the use of the navigable airspace and to assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure

109. Id.
The safety of aircraft and the efficient utilization of such airspace. The Secretary has delegated this authority to the Administrator of the Federal Aviation Administration.

A. AIRSPACE ALLOCATION

The FAA performs its delegated obligations primarily through the promulgation of rules. The substantive and procedural rules governing the allocation of airspace are adopted in accordance with the Administrative Procedure Act and appear in the Federal Aviation Regulations. These regulations establish the following categories of airspace.

1. Class A Airspace

Formerly known as the Positive Control Area, Class A Airspace includes all airspace above Flight Level 180 (approximately 18,000 feet above mean sea level (MSL), but varying somewhat with atmospheric pressure) and continuing upward to the presently undefined boundary between airspace and outer space. This is positively controlled airspace, within which all aircraft are required to: operate under instrument flight rules (IFR); maintain radio communication with, and subject to, the direction of FAA air traffic controllers; and be equipped with an operating mode-C transponder. This is the airspace used by most airline and corporate jets in cruise.

---

116. The principal exception is areas where flight is temporarily either totally prohibited or significantly restricted as a result of transitory phenomena not suited to the ponderous rule making process, such as disaster areas, space flight recovery areas, and areas to be visited or travelled by the President, Vice President or other designated security-sensitive public figures. In these cases, a Notice to Airmen (NOTAM) issues immediately without rulemaking. 14 C.F.R. § 91.137 - .143 (1993). See also note 55, infra, and accompanying text. Other exceptions are alert areas, controlled firing areas and military training routes (see notes 149 - 154, infra, and accompanying text) which are established by the FAA outside the APA rulemaking process. U.S. Dept. of Transportation, Federal Aviation Administration, Special Military Operations, Handbook 7610.4H at paragraph 11-51 (1990).
119. Rather than adjusting their altimeters to compensate for local barometric pressure as is done when operating below 18,000 feet MSL, pilots operating aircraft at or above 18,000 feet MSL utilize a nationwide standard barometric setting of 29.92 inches of mercury. 14 C.F.R. § 91.121 (1993).
121. Id. See also 14 C.F.R. § 91.123 (1993).
122. 14 C.F.R. §§ 91.135 and 91.215 (1993). When interrogated by ATC radar, the mode-C transponder allows the air traffic controller to display on his radar screen an alpha numeric data block showing the aircraft's identification, altitude and speed across the ground. The complete listing for all Class A, Class B, Class C, Class D, and Class E airspace areas and for all reporting points can be found in U.S. Dept. of Transportation, Federal Aviation Administration Airspace
2. **Class B Airspace**

Formerly referred to as Terminal Control Areas, Class B Airspace is designated at airports serving a high density of airline jet traffic, to more effectively protect and separate that traffic from other aircraft.\(^{123}\) The basic design of Class B Airspace begins with a circular configuration resembling an inverted three tier wedding cake, having a 10 nautical mile (NM) radius inner circle extending from ground level to 12,000 feet (MSL), a second tier having a radius of 20 NM with a floor altitude predicated on a 300 foot per NM climb rate from the distal end of each runway and also extending upward to 12,000 feet MSL, and a third tier having a radius of 30 NM with a floor again predicated on the 300 foot per NM climb rate and also a 12,000 foot MSL ceiling.\(^{124}\) Each Class B Airspace designation is, however, specifically designed to take into account local topography, airport configuration, airspace needs of other airports in the area and planned traffic flows and routings, with the result that all are considerably more complex than the simple “upside down wedding cake” model.\(^{125}\) This is also positively controlled airspace within which all air...
craft are required to be in radio communication with and subject to the
direction of FAA Air Traffic Controllers and equipped with an operating
mode-C transponder. An operating mode-C transponder is also required
for all aircraft operating within a 30 NM radius of the center of a Class B
Airspace, even if the aircraft is operating outside the boundaries of that
airspace.\textsuperscript{126}

3. \textit{Class C Airspace}

Formerly called an Airport Radar Service Area (ARSA), Class C
Airspace is designated at medium sized commercial airline airports. All
aircraft operating within Class C Airspace are required to be in radio
communication with FAA air traffic controllers and equipped with an op­
erating mode-C transponder.\textsuperscript{127}

4. \textit{Class D Airspace}

Formerly designated as a Control Zone (CZ) with Airport Traffic
Area (ATA), Class D Airspace is designated at airports having opera­
tional air traffic control towers. Class D Airspace is tubular in configura­
tion having a 5 NM radius from the airport and extending vertically to
2500 feet AGL. All aircraft operating in this airspace are required to be
in radio communication with, and subject to the direction of, FAA air
traffic controllers in the tower.\textsuperscript{128}

5. \textit{Class E Airspace}

Class E Airspace includes airspace formerly designated as: Airways,
Control Zones at airports not having air traffic control towers, and transi­
tion areas (TA).\textsuperscript{129} Class E Airspace is designated for en route air navi­
gation at altitudes below flight level 180,\textsuperscript{130} for operations in IMC\textsuperscript{131} at

\begin{itemize}
  \item \textsuperscript{126} 14 C.F.R. §§ 91.131, 91.215 (1993). The 30 NM radius is referred to as the “Mode-C
  veil”.
  \item \textsuperscript{127} 14 C.F.R. §§ 71.51, 91.130, and 91.215. \textit{See also} Bennenson, \textit{supra} note 123. Examples of
  Class C airspace are found at such locations as Santa Barbara, CA; Albuquerque, NM, Colorado
  Springs, CO; Little Rock, AR; and Fayetteville, NC, among others.
  \item \textsuperscript{128} 14 C.F.R. §§ 71.61, 91.129; Bennenson, \textit{supra} note 123. Examples of Class D airspace are
  found at Denver area general aviation relievers Jefferson County Airport and Centennial
  Airport.
  \item \textsuperscript{129} Bennenson, \textit{supra} note 123; 14 C.F.R. §§ 71.71-79 (1993).
  \item \textsuperscript{130} Along federal airways depicted on aeronautical charts and described in sub-part E of
  FAA Order 7400.9A, \textit{supra} note 122. An example of a federal airway is V-356 from Cheyenne,
  WY to Denver, CO.
\end{itemize}
certain airports not having an air traffic control tower and to permit operations in IMC at a lower altitude than would otherwise be permissible at other airports not having an air traffic control tower. Class E Airspace is also typically designated along travelled air routes where the need for IFR capability exists and where the ATC services and facilities required for navigation and separation of aircraft operating under IFR can be provided. Class E Airspace designed for en route navigation typically extends 4 NM either side of a center line extending between radio aids to navigation (usually very high frequency omnidirectional ranges (VOR)) and extending vertically from 1200 feet AGL up to the floor of Class A Airspace at flight level 180. At airports having no control tower, but where IFR operations are permitted, Class E Airspace extends down to the surface. At airports not having a control zone and where takeoffs and landings under IFR are not permitted, the Class E Airspace is 700 feet AGL.

6. Special Use Airspace

Special Use Airspace is airspace over which the FAA has ceded control to another agency. Special Use Airspace includes restricted areas, prohibited areas, warning areas, military operations areas, alert areas, and controlled firing areas. Instrument meteorological conditions (IMC) are said to exist when visibility is less than 3 statute miles or the ceiling is less than 1,000 feet above ground level (AGL). 14 C.F.R. § 91.155 (1993).

This airspace was formerly designated as a Control Zone at an airport not having an air traffic control tower. Examples are found at Garden City, Dodge City and Liberal, KS, among others.

This airspace was formerly known as a transition area. U.S. Dept. of Transportation, Federal Aviation Administration, Procedures for Handling Airspace Matters, Handbook 7400.2C, Ch. 24 (1984).


See notes 161-171, infra, and accompanying text.

Such as the former Continental Control Area, including all airspace between 14,500 MSL and the base of Class A airspace at FL 180.


Joel Hamm, Making Sense of it All, FLIGHT TRAINING, Sept. 1992, at 18.

14 C.F.R. §§ 73.1-73.85, 91.133 (1993); U.S. Dept. of Transportation, Federal Aviation Administration Procedures for Handling Airspace Matters, Handbook 7400.2D (1993) at Part 7; Peter Bedell, Stealth Airspace: What You Don't Know Can Hurt You, AOPA PILO, July 1994 at 65. Where the activities to be conducted in special use airspace and along military training routes may impose a noise burden on underlying lands, the NEPA requirement for an EIS applies. See note 104, infra. Where an EIS is to be prepared, there may be expanded opportunities for public participation. For example, when the Department of Defense's Air National Guard Readiness Center proposed to modify and add to MOAs and MTRs in Colorado via the Colorado Airspace Initiative, a citizens' committee representing civil aviation, residents of the potentially affected areas and regional economic interests was formed to review the proposal and advise the govern-
a. Restricted Areas

Restricted areas are designated in locations were activities incompatible with the flight of civil aircraft are conducted. Examples are areas of military artillery or missile firing, aerial gunnery and bombardment.140 During times when the area is not in use for such activities, ATC may have authority to permit civil use of this airspace.141

b. Prohibited Areas

Prohibited areas are established primarily for national security reasons and exclude all civil aircraft at all times.142 An example of a prohibited area is P-56, the area encompassing the White House and Capitol buildings in Washington, D.C.143

c. Warning Areas

A warning area is airspace of defined dimensions over international waters that contains activities which may be hazardous to nonparticipating aircraft. Because international agreements do not provide for prohibition of flight in international airspace, no restriction to flight is imposed. The designation and charting of such airspace, however, serves to alert pilots of nonparticipating aircraft to the potential danger. The term “warning area” is synonymous with the International Civil Aviation Organization (ICAO) term “danger area.”144

140. 14 C.F.R § 73.3(a) (1993). Restricted areas are not established only over federally-owned lands.
141. Handbook 7400.2D, supra note 139 at para. 7305. An example is R-2601 at Ft. Carson, CO.
142. 14 C.F.R. §§ 73.81-.85, 91.133 (1993) and Handbook 7400.2D, supra note 139, at Ch. 28.
143. Prohibited areas are identified on aeronautical charts by the prefix letter “P”, followed by a dash, a two digit number and a location (city, town or military reservation), e.g.: “P-66 Rancho de Cielo, Goleta, CA.” They are normally designated from the surface to a specified altitude and are continuously in effect.
144. Special Federal Aviation Regulation (SFAR) No. 53, Establishment of Warning Areas in the Airspace Overlying the Waters Between 3 and 12 Nautical Miles From the United States Coast (Dec. 29, 1993); Handbook 7400.2D, supra note 140, at Ch. 30. Warning areas are identified on aeronautical charts by the prefix letter “W”, followed by a dash, a two or three dash digit number and a location (city, town, area, military reservation and state); e.g.: “W-72 VACAPES VA.”
d. Military Operations Areas

A military operations area (MOA) is airspace established outside Class A airspace to separate/segregate certain non-hazardous military activities from IFR civil air traffic and to identify for VFR civil air traffic where these activities are conducted.145 MOAs are established where the U.S. military services have a continuing requirement to conduct training activities such as air combat maneuvers, air intercepts, acrobatics, and low altitude tactics.146 MOAs are, in effect, always joint use airspace in that civil aircraft operating under visual flight rules are not denied access, but are merely alerted by charting of this airspace to the nature of the activities conducted therein and civil IFR aircraft may be routed through the airspace by ATC when the required separation can be provided from MOA activity.147

e. Alert Areas

Alert areas are established to inform pilots of specific areas where a high volume of pilot training or an unusual type of aeronautical activity is conducted. The establishment of alert areas does not impose any flight restrictions or communication requirements.148

f. Controlled Firing Areas

Controlled firing areas are established to contain activities which, if not conducted in a controlled environment, would be hazardous to non-participating aircraft. Controlled firing areas are used instead of restricted areas only for activities which are either of a short duration or of such a nature that they could be immediately suspended on notice that the activity might endanger nonparticipating aircraft. Examples of such activities include the firing of missiles, rockets (both military and civilian, professional and amateur), anti-aircraft artillery and field artillery, static

145. Handbook 7400.2D, supra note 139, at para. 31-1.
146. Id. at para. 31-2.
147. Handbook 7400.2D, supra note 139 at para. 31.7. An example is the LaVeta MOA in southern Colorado, where jet fighters engage in simulated air combat. Air National Guard Readiness Center, Airspace Management Branch, Environmental Division, Final Description of Proposed Action and Alternatives (DOPAA) for the Colorado Airspace Initiative, July 1993, at 35. While the top of a MOA is no higher than 18,000 feet MSL, the FAA may establish Air Traffic Control Assigned Airspace (ATCAA), such as the Chama ATCAA which overlies the LaVeta MOA, to permit higher altitude dog-fighting if and when such activities do not conflict with other air traffic in the Class A airspace and if controller workload permits. Discussion with Paul McConnellogue, FAA Denver Air Route Traffic Control Center, at Pueblo, CO on Mar. 8, 1994.
148. Handbook 7400.2D, supra note 139 at Ch. 32. An example is A-260 at the U.S. Air Force Academy, which has an extraordinarily high level of flight training in powered airplanes, gliders and parachuting in a small area.
testing of large rocket motors, blasting, ordinance disposal, and chemical disposal. The user of a controlled firing area is required to maintain active surveillance of the airspace for at least 5 miles beyond the area and to cease hazardous activity if an aircraft approaches the area.

7. Military Training Routes

The FARs impose speed limits on aircraft operating below 10,000 feet MSL. By Letter of Authorization granted to the Department of Defense, the FAA allows certain military operations to be conducted in excess of the speed limit below 10,000 feet MSL in MOAs and while proceeding en route along established Military Training Routes (MTR). As with MOAs, MTRs are always joint use in that civil aircraft operating under VFR are not denied access, but merely alerted to the possibility of high speed military traffic along the charted route, and civil IFR aircraft may be routed through the airspace when required separation can be provided from military aircraft using the route.

8. Temporary Flight Restrictions

By issuance of a Notice to Airmen (NOTAM), the FAA also imposes temporary flight restrictions on areas to be visited by the president, vice president and other security sensitive public figures as well as space flight operational areas (such as Cape Canaveral, Vandenberg Air Force Base and Edwards Air Force Base), in areas where sightseeing or news gathering aircraft might interfere with disaster relief, law enforcement or fire fighting aircraft operations, and in other areas where an unsafe congestion of sightseeing and other aircraft above an event (such as the Super Bowl) might otherwise occur.

---

149. Handbook 7400.2D, supra note 139, at paras. 7700-01.
150. Handbook 7400.2D, supra note 139 at paras. 7730-33. Controlled firing areas are not depicted on civil aeronautical charts, since the firing area activity is required to cease upon radar or visual sighting of non-participating aircraft. Bedeil, supra note 139 at 69.
152. FAA Handbook 7610.4H, supra note 116, at para. 11-2 and Appendix 18. See also notes 141 and 105, supra, re: applicability of NGPA EIS requirements. The Department of Defense (DOD) also designates low-altitude tactical navigation areas (LATN) and slow-speed low-altitude training routes (SRs) for military use, but military aircraft operating along these routes must obey the same air traffic rules as a civil aircraft, including the speed limit. Bedeil, supra note 139, at 66-67.
153. See supra note 147, and accompanying text.
154. 14 C.F.R. § 91.137 (1994). Temporary flight restrictions may also be used as an interim measure pending rulemaking to establish or chart special use airspace. For example, when the U.S. Customs Service installed a tethered aerostat (balloon) bearing a radar system on a 15,000 foot unlighted cable near Glencoe, LA in August of 1993 to detect low flying drug smugglers, a temporary flight restriction area was announced at that location pending establishment and charting of restricted airspace.
9. **Class G Airspace**

Formerly called Uncontrolled Airspace, this is what remains (below FL 180, and outside other lettered classes of airspace, special use airspace and areas of temporary flight restrictions). While aircraft in uncontrolled airspace are not subject to any requirement to communicate with ATC (regardless of weather conditions), it is not an area where anything goes, since many FARs apply here, as well. Because this category of airspace defies the FAA’s obsession for direct control over everything that moves in the sky, there is not much of this airspace to be found outside of the State of Alaska, although there is more to be found in the western United States than in the east, where overlapping airways have laid down a virtually continuous blanket of Class E airspace.

10. **Air Defense Identification Zones (ADIZ)**

Additionally, Air Defense Identification Zones are established around U.S. borders. Aircraft operating in these areas are required to have filed flight plans notifying the FAA ahead of time of their intentions, to be in radio communication with the appropriate ATC facility, and to have an operating mode-C transponder. Aircraft operating in these areas are subject to interception by military aircraft for visual identification.

B. **Air Traffic Control**

The air traffic control (ATC) system is based upon radio control in a largely radar environment, meaning that aircraft are directed by voice radio instructions given to pilots by ground based air traffic controllers, who are usually observing the aircraft’s three dimensional position, track, and speed on a radar screen. In areas not covered by radar or where radar equipment is not available to the particular controller, such as a nonradar air traffic control tower, the controller's instructions are based on position reports radioed by pilots, supplemented in some instances by

---

155. Under ICAO nomenclature, international Class F airspace is designated where IFR traffic separation is provided “to the extent practicable”. There is no U.S. equivalent to the ICAO nomenclature for Class F airspace. *Supra* note 123.


160. Originally established during the Cold War era as a line of defense against the Soviet bomber threat, the ADIZ is now more frequently used in efforts to intercept drug-smuggling aircraft.
visual observation of the aircraft. The basic ATC facilities are air traffic control towers, air route traffic control centers (ARTCC or centers), flight service stations (FSS) and central flow control (CFC).

1. **Towers**

Air traffic control towers control air traffic in the terminal area, including arrivals, departures and aircraft movements on the airport and may include terminal radar approach control (TRACON or approach) facilities. Depending on the type and level of activity at the airport and the structure of the surrounding airspace, a tower's area of responsibility may extend over an area as small as the airport's Class D Airspace to as much as a 40 mile radius up to FL 200. Letters of Agreement between ATC facilities outline the areas of responsibility and coordination procedures for each.

2. **Air Route Traffic Centers (ARTCC)**

“Centers” control en route traffic operating under IFR over wide geographical areas of the country and provide radar traffic advisory to aircraft operating under VFR upon request, on a workload permitting basis.

---

161. See generally OTA Study, supra note 4, at Ch. 7; Gesell, supra note 76, at III-18; U.S. Dept. of Transportation, Federal Aviation Administration, *Air Traffic Control*, Handbook 7110.65 (1994).

162. Not all air traffic control towers are operated by the FAA. Some are “contract towers” operated by private enterprise, usually under contract to the state or local government which owns and operates the airport. Following decimation of the FAA’s air traffic control staff by the mass firing of controllers by President Reagan in response to the Professional Air Traffic Controllers (PATCO) strike and tightening federal budgets, all Level I towers (those control towers having the lowest level of annual activity) which remain operational are now operated under contract by private enterprise. Level II towers may follow suit as the FAA faces further budget cuts.

163. As matters of internal policy, letters of agreement are considered to fall outside the APA’s requirements. For example, a letter of agreement between the FAA air traffic control towers at Denver and Colorado Springs (both of which include TRACON facilities) and the Denver Center allow IFR traffic between the two airports (which are less than 60 miles apart) to be handled by the two towers without an intermediate phase of center control. Letters of agreement may also exist between ATC facilities and airspace users when such an agreement may improve safety and efficiency. For example, skydiving and soaring operators frequently enter into letters of agreement with ATC facilities in whose airspace they operate.

164. At this writing, all centers are operated by the FAA (*But see* notes 168-172, *infra*, and accompanying text). An example is the Denver Center, which serves air traffic over almost all of Colorado as well as portions of Utah, Arizona, New Mexico, Kansas, Nebraska, South Dakota, Montana and Wyoming.
3. *Flight Service Stations (FSS)*

Flight Service Stations observe, collect and disseminate weather and other aviation safety information, briefing pilots in person, by telephone, by radio and by computer terminal. They also receive and disseminate flight plans and pilot reports of weather conditions encountered in flight.\(^\text{165}\)

4. *Central Flow Control (CFC)*

Central Flow Control at the new Air Traffic Control System Control Center in Herndon, Virginia (near Dulles International Airport) monitors and manages the flow of more than 150,000 flight per day, adjusting for weather conditions and other factors affecting airport and airspace capacity nationwide. The center anticipates delays and accomplishes fuel savings by holding flights on the ground prior to departure, allowing delays to be taken on the ground rather than inflight and by providing fuel efficient routings.\(^\text{166}\) Air traffic control on a typical commercial flight is depicted in Figure 2.

V. *CURRENT ISSUES IN CONTROVERSY*

A. *REINVENTING ATC*

Citing intolerable restrictions of federal procurement and personnel policies on efforts to modernize the ATC system (a federal project which may have set a new record as behind schedule and over budget), the Clinton Administration is advocating creation of an independent government corporation to take over the air traffic control function from the FAA.\(^\text{167}\)

The proposal has proved itself quite controversial in the aviation industry. It is generally accepted that although imperfect, the U.S. ATC system is the safest and most efficient in the world. Opponents of the proposal point out the disappointing experiences of the U.S. Postal Ser-

\(^\text{165}\) In addition to the FAA’s Direct User Access Terminals (DUAT), a number of private enterprises also offer weather report and flight planning services via computer modem or fax. Both the FAA and private industry rely upon not only FAA observers at the flight service stations, but also on automated observation systems—Automated Weather Observation System (AWOS), Automated Surface Weather Observation System (ASOS), National Weather Service (NWS) observers, and certified weather observers in private industry.

\(^\text{166}\) *Global ATC Command Center Moves To Expanded Facility*, *GENERAL AVIATION USE & FLYER*, first June issue 1994, at 5.

vice and Amtrak, independent government corporations created to over­
come similar problems. Many in the aviation industry have expressed
fears that an independent government ATC corporation would, like the
Postal Service and Amtrak, cause rising costs to be passed along to con­
sumers, while efforts to contain costs would simultaneously lead to deteri­
orating service.

Another concern is the proposed management of the new ATC cor­
poration would give airlines virtual control over the system, potentially
prejudicing other airspace users (particularly general aviation).

Indeed, the administration’s own pronouncements of late have called
into question the validity of the justifications originally advanced for the
recommendation.

B. CHALLENGES TO FEDERAL PREEMPTION

It is generally accepted that the Supreme Court’s 1973 decision in
City of Burbank v. Lockheed Air Terminal, founded the principle that
the federal government has preempted the regulation of the use of the
navigable airspace and the regulation of airplanes in flight in the naviga­
able airspace. State and local governments are therefore prohibited from
regulating in this area.

While recent challenges to this premise have uniformly met with fail­
ure, it is interesting to note 20 years after the Court’s supposedly defini­
tive answer in Burbank, the holding has been questioned in a number of
recent cases.

---

169. Id.; U.S. Representative James L. Obestar, Chairman, Aviation Subcommittee of House
Public Works and Transportation Committee in AOPA PILOT, June, 1994 at 22; Experimental
Aircraft Association news release, EAA Voices Opposition to Corporate Air Traffic Control Sys­
tem (Feb. 24, 1994).
170. Id.; President of Aircraft Owners & Pilots Association, Phil Boyer, address at the
AOPA Town Meeting, Englewood, CO. (May 31, 1994).
171. In a recent press release announcing the opening of the new central flow control facility,
the FAA claims that by leasing the building, equipment and computer services from a private
company, the FAA gained the capability to adopt new technologies without making new
purchases, allowing the agency to exploit rapidly changing technology without having to go
through the cumbersome federal procurement process. Editorial, Clinton Administration Trying
To Fool Us on ATC, GENERAL AVIATION NEWS and FLYER, First June Issue 1994, at 20; Guest
Opinion by W. Hamilton, For Federico Pena, ATC Represents Larger Stage, Greater Folly, Id. at
21. (The lesser of Secretary of Transportation Pena’s follies, according to the latter writer, being
the new Denver International Airport (DIA)).
1. *Alaska Airlines, Inc. v. City of Long Beach*173

On October 24, 1991, the U.S. Court of Appeals for the Ninth Circuit affirmed a permanent injunction issued by the district court against the City of Long Beach, ending 10 years of litigation over efforts by the City to regulate noise emanating from aircraft using the Long Beach Municipal Airport. The airport opened in 1923 on city property surrounded by residential housing. Throughout its history, the airport had heavy military and general aviation usage. In 1981, the city council adopted its first noise control ordinance, the “Aircraft Noise Control Regulation” which limited airline flights to 15 per day and required airlines to use quieter aircraft.174 On June 28, 1983 Alaska Airlines filed suit seeking an injunction against enforcement of the ordinance; other commercial airlines subsequently intervened. During the ten year course of the litigation, the ordinance was amended. By the time the case was tried, the principal elements of the ordinance included a limit of 65 decibels on the Community Noise Equivalent (CNEL) scale, limited the number of air carrier jet flights to 15 per day, and set noise limits for individual aircraft. Relying on footnote 14 to *Burbank*,175 the Court of Appeals found that federal regulation of air commerce did not preempt the municipality, as proprietor of the airport, from adopting and enforcing noise regulations in the interest of avoiding liability for excessive noise generated by aircraft using the airport,176 stating: “the goal of reducing airport noise to control liability and improve the aesthetics of the environment is a legitimate and permissible one”.177 The Court of Appeals declined to find any of the

173. 951 F.2d 977 (9th Cir. 1991).
174. Later, an FAA-funded noise study was conducted at the airport under 14 C.F.R. §§ 150.1 - 150.35. Based on that study, the city submitted a noise compatibility program (NCP) to the FAA for review and approval in July of 1986. By the time the case came before the Court of Appeals 5 years later, it did not appear to the court that the FAA had yet acted on the city’s proposed NCP.
175. *Supra* note 172, at 635.
176. Footnote 14 to *Burbank*, has been problematic. At the time that decision was announced, the airport was the only privately-owned airport in the United States serving scheduled passenger-carrying airlines. This fact, along with the Court’s insertion of footnote 14, appeared to yield a result which applied only to that one airport. Indeed, the decision did not apply to that airport for long as the owner (Lockheed) soon sold the airport to a public entity: the Burbank-Glendale-Pasadena Airport Authority. This left no airports serving regularly scheduled passenger carrying airlines fitting within the footnote 14 exception. Some, including this author, thought that it would have been more appropriate for the Supreme Court to have dismissed certiori as improvidently granted, once the court found it necessary to insert footnote 14, under these facts. The decision has, however, proved to serve delimit the boundaries of federal, state and local authority.
177. 951 F.2d 977, 984 (9th Cir. 1991). Of course, only the proprietor of the airport may enforce these regulations and not, for example, a neighboring (non-owner) municipality upon which the airport’s noise falls.
substantive provisions of the ordinance completely arbitrary or unreasonable and concluded the ordinance did not violate the Commerce Clause.\textsuperscript{178}

The airlines also argued the ordinance violated their equal protection rights, since it imposes the entire burden of noise regulation on the airlines while leaving other users of the airport (general aviation and the military) unregulated. The court found the right to avoid reduction in the number of allocated flights is not a fundamental right and the airlines were not a suspect class. The court stated they could not find that the ordinance violated of equal protection unless it were found not rationally related to a legitimate interest of the city.\textsuperscript{179} Since the court found the city’s interest in reducing airport noise to control liability and improve the aesthetics of the environment legitimate, it found the ordinance not violative of the airlines equal protection rights.

Finally, the airlines argued the ordinance denied the airlines procedural due process by authorizing the airport manager, alone and without a hearing, to require airlines to reduce flights, further providing that the determination of the airport manager “shall be conclusive unless it is demonstrated to lack a rational basis.” The ordinance provided no procedures for notifying carriers of a contemplated change in quota, or to allow them to challenge the determination of the airport manager.\textsuperscript{180} The Court of Appeals agreed with the airlines that they have a property interest in the number of flights they have been allocated, which could be considered a license “essential in pursuit of a livelihood” so as “not to be taken away without that procedural due process required by the Fourteenth Amendment.”\textsuperscript{181} The ordinance included a non-severability clause, so the Court of Appeals found the denial of procedural due process a fatal flaw to the entire ordinance thereby affirming the district court’s permanent injunction of the ordinance’s enforcement.\textsuperscript{182}

2. \textit{Country Aviation, Inc. v. Tinicum Township}\textsuperscript{183}

In a case involving the Van Zant Airport, home to a glider club in Upper Bucks County, Pennsylvania, the local government attempted to use its police power to enforce an aviation noise control ordinance against aircraft operating at the privately owned airport.\textsuperscript{184} The airport owner and operators filed suit in the United States District Court for the
Eastern District of Pennsylvania seeking an injunction against enforcement of the ordinance. The FAA, at the court's invitation, participated as amicus curiae, supporting the position of the airport owner. The FAA and the plaintiffs argued it is long settled that except for reasonable noise control regulations adopted by airport proprietors, all state and local regulation of the noise of aircraft in flight is preempted by pervasive federal regulations governing airspace management and aviation noise control. The trial court agreed, stating that Burbank continues to govern the law of preemption in this case despite defendants' renewed contention that the case was wrongly decided.

The United States Court of Appeals for the Third Circuit affirmed the permanent injunction in a two sentence order citing Burbank.

3. Gustarson v. City of Lake Angelus

In this case, a waterfront homeowner and seaplane pilot challenged the southeast Michigan city’s ordinance prohibiting the operation of seaplanes on Lake Angelus, a one and one half mile long lake within the city. The ordinance also prohibited operation by any aircraft below 500 feet over the lake.

The United States District Court found that federal law preempts local ordinances in matters concerning aircraft operation, rendering the city’s ordinance unconstitutional.

The city has appealed the decision to the United States Court of Appeals for the Sixth Circuit.

4. A Aerial Advertising Banners, Inc. v. City of Boulder

In Colorado, the Boulder City Council, finding that commercial signs towed over the city by aircraft are a distraction impairing traffic safety, and a source of noise, enacted a city ordinance prohibiting com-

185. Memorandum of the United States as Amicus Curiae, County Aviation v. Tinicum Township, No. 92-3017.
186. 9 F.3d 1539 (3rd Cir. 1993).
188. Id.
189. Id. at 6.
190. LAWYER-PILOTS BAR ASSOCIATION JOURNAL, Winter 1994 at 38.
191. 868 P.2d 1077 (Colo. 1994).
192. Known locally as the "People's Republic of Boulder" for marching to the beat of a different drummer.
mmercial signs towed aloft by aircraft.\textsuperscript{194} (The ordinance did not apply to personal, political or other noncommercial messages.)\textsuperscript{195} A Aerial Advertising Banners, Inc., d/b/a Banner Advertising, Inc. (Banner), believed the ordinance unconstitutional by operation of federal preemption, declined to obey its prohibitions. Ignoring a strongly worded letter from the FAA's chief counsel expressing preemptive intent,\textsuperscript{196} each time the city identified one of Banner's aircraft violating the ordinance, charges were filed and increasing fines imposed. (Interestingly, during the four years of this litigation, while Banner's competitors were warned by the city and threatened with similar enforcement actions, they also continued to disregard the ordinance, however, none were charged.) In the last of several cases, the municipal court not only imposed the maximum $2,000 fine against Banner, it also issued a cease and desist order against Banner and the corporation's president, stating he would be jailed for contempt in the event of a future violation.\textsuperscript{197} A state district court affirmed the municipal court's convictions and the Colorado Supreme Court granted certiori to decide whether the city code prohibiting commercial signs towed by aircraft was preempted by federal law, by operation of the Supremacy Clause of the United States Constitution.\textsuperscript{198} The Aircraft Owners and Pilots Association, a 350,000 member national organization, participated on Banner's side as \textit{amicus curiae}.

The Supreme Court noted Banner did not use Boulder's Municipal Airport on the days it violated the ordinance, so the limited exception to overall federal preemption carved out for state or local governments who own airports set forth in footnote 14 to \textit{Burbank} did not apply.\textsuperscript{199} The court considered the three types of federal preemption (explicit preemp-

\textsuperscript{194} Boulder Rev. Code § 10-11-3(c) provides: Specific Signs Prohibited: No person shall erect, install, post, display, or maintain any of the following signs: (1) Airborne Advertising: a commercial sign towed aloft by aircraft.

\textsuperscript{195} "Commercial Sign" is defined in the Boulder Rev. Code § 10-11-2(a)(10) as "a sign which identifies, advertises, or directs attention to a business or is intended to induce a purchase of a good, property, or service, including without limitation, any sign naming a brand of good or service and any sign which is not a non commercial sign."

\textsuperscript{196} Letter of Mar. 6, 1991 from FAA Chief Counsel Kenneth P. Quinn to Jane W. Greenfield, Acting Boulder City Attorney.


\textsuperscript{198} The Colorado Supreme Court has denied certiori in the first of these case, which had received similar treatment in the municipal and state district courts. \textit{See Banner Advertising v. City of Boulder}, No. 91CR269, 1991 Lexis 894 (Colo. 1991), \textit{cert. denied} No. 91SC485 (Colo. Dec. 23, 1991).

\textsuperscript{199} Banner Advertising v. City of Boulder, 868 P.2d 1077, 1083 n.6 (Colo. 1994).
tion, exclusive domain, and obstacle to the accomplishment and execution of federal regulation) individually, and applied their tests to the Boulder ordinance.

On the first test, the Court found that the Federal Aviation Act contains no explicit provision by Congress manifesting an intent to preempt local regulation in the area of air traffic and airspace management, nor, specifically, banner towing by an aircraft. Thus, the Court found the ordinance not explicitly preempted by the Federal Aviation Act. 200

Turning to the second preemption test, however, the Court found the letter from the FAA’s Chief Counsel to be instructive in its interpretation of the FAA’s regulation governing towing of objects by civil aircraft, including banners. The Court found the regulation of towing of banners by aircraft within the exclusive domain of the federal government, preempting application of the city ordinance. 201

Turning to the third preemption test, whether the ordinance was preempted because it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” the Court found the city’s ordinance more stringent than the federal regulation and its purpose (the protection of the safety of persons and property on the ground) identical. Therefore, the court found the ordinance “stands as an obstacle to the accomplishment and execution of the federal regulation and is therefore preempted.” 202

C. AIRSPACE OVER NATIONAL PARKS

All aircraft are requested to maintain a minimum altitude of 2,000 feet above the surface of National Parks, National Monuments, National Seashores, National Lakeshores, National Recreational Areas and Scenic Riverways administered by the National Park Service. 203 National Wildlife Refuges, Big Game Refuges, Game Ranges and Wildlife Ranges administered by the U.S. Fish and Wildlife Service, and Wilderness and Primitive Areas administered by the U.S. Forest Service have identical

200. Id. at 1081.
201. Id. at 1081-83.
202. Id. at 1083-84.
altitude requests. Boundaries of these areas are depicted on VFR aeronautical charts. The majority of general aviation pilots honor this voluntary restriction. However, there have been citizen complaints from visitors on the ground in national parks (particularly Grand Canyon National Park) that aircraft noise was diminishing the quality of the national park experience and traumatizing wildlife.

These complaints led Congress in 1987 to mandate a study of the problem by the Department of the Interior and the FAA to impose Special Flight Rules in the vicinity of the Grand Canyon National Park, AZ. This SFAR, which expires on June 15, 1995, imposed "flight free zones" over certain large areas of the park where overflights below 10,500 feet MSL are prohibited except in emergencies, and confining park overflights to narrow corridors within which minimum flight altitudes ranging from 5,000 feet MSL to as high as 14,500 feet MSL (all above the canyon's rim) apply. Since implementation of this SFAR, there has been an eighty percent reduction in visitor complaints about aircraft noise at the Grand Canyon.

204. Id.
205. These charts are published in Washington, DC by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, and are typically updated on a 6-month cycle, unless substantial changes (such as the opening of the new Denver International Airport) necessitate revision in a shorter time frame.
207. Id. at 12743.
208. Study to Determine Appropriate Minimum Altitudes for Aircraft Flying Over National Parks, 16 U.S.C. § 1a-l (1988). The study took longer than anticipated as many of the issues involved are on the cutting edge of technical and scientific capability. As the FAA and NPS note in the ANPRM (infra note 206): "Measuring degrees of quiet and perception of quiet is very different from measuring amounts of noise." The Colorado Airspace Initiative Working Committee expressed similar concern that the Ldn methodology being used in the EIS for proposed military special use airspace changes "will not accurately reflect noise impact of the CAI on humans, livestock and wildlife in remote rural and mountainous areas ... such methodology will seriously underestimate or fail to take into account ... the startle effect of sudden onset noise generated by the ... high speed, low altitude flights." Letter to Governor Romer, supra note 139, at 8.
210. Id.
211. Facsimile message to the author from Melissa Bailey, Associate Director of Technical Services, AOPA, Frederick, MD (June 22, 1994).
Some complaints continue to be received, and the FAA and the National Park Service (NPS) have published an Advanced Notice of Rule Making (ANPRM) soliciting comments on proposed National Park Overflight Regulations. Such regulations are expected to apply to overflight of all national parks.

A total of 42 aviation companies from Arizona, California, Nevada, Utah and New Mexico provide aerial tours of Grand Canyon National Park to approximately 750,000 people annually, seventeen percent of the park's 4.5 million visitors. During peak summer months, the number of air tours exceeds 10,000 per month. The industry accounts for approximately 300 pilot jobs and generates $250 million in economic impact.

While Grand Canyon aerial tour operators supported the adoption of the SFAR, most (if not all) have voiced opposition to the ANPRM. Air tour operators note the SFAR has eliminated the impact of aircraft sound on more than ninety-nine percent of the park's ground visitors, air tours relieve congestion at the canyon's rim, contribute nothing to the erosion of trails, and provide equal access to those with disabilities. They also note some sixty percent of the aerial tourists are foreigners on vacation, and commercial air tours provide an opportunity to enjoy park vistas when time or physical constraints otherwise exclude them. Others have expressed concern that under hot conditions where the effects of density altitude reduce aircraft performance some aircraft (particularly helicopters) will be unable to attain the altitude required to comply with a mandatory 2,000 foot AGL overflight requirement, necessitating lengthy circumnavigations of meandering national park boundaries.

VI. Conclusion

Like real estate, airspace is a finite resource. Demands for use of a share of this resource come from all aspects of aviation. Earthbound interests, such as the broadcasting industry which has a need to erect tall signal transmission towers which rise into the navigable airspace, also compete for this resource.

Tall structures and activities on the surface such as military artillery firing may conflict with aviation activities. Various aviation activities may conflict with each other: military high altitude dogfight training, unless

212. See Advance Notice of Proposed Rulemaking, supra note 205.
213. Id. at 12745.
216. See supra note 213.
carefully controlled and coordinated, may conflict with airliners cruising to their destinations, while military low level training may pose a hazard to crop sprayers and aircraft patrolling pipelines and powerlines. Aviation activities in the navigable airspace may also conflict with terrestrial interests: Low flying aircraft may interfere with the solitude sought by hikers, campers, spiritualists and residents of rural areas and may disturb wildlife. As was witnessed during the recent O.J. Simpson chase, the noise of news gathering helicopters made more difficult the communications which ultimately led to Simpson's arrest. Where there are conflicts, the legal profession will be called upon to aid in resolution.

In the past the FAA leaned towards an autocratic approach to airspace allocation, that agency is becoming more open to input from users and others affected by airspace uses. A similar trend is noted in the EIS process for proposed military special use airspace, and at the international level with the IATA effort to lobby governments to deal with the problem of growing congestion in world airspace.

Effectiveness in such an arena frequently depends heavily upon not only advocacy, but diplomacy and consensus building skills. Opportunities abound for lawyers to serve a beneficial function in rationalizing the allocation of scarce airspace among competing needs and interests.
Case Comment

Northwest Airlines v. County of Kent, Michigan: More Than You Ever Wanted to Know About Airport Ratesetting, Part One (Pricing in the Courts)

Rise J. Peters*

TABLE OF CONTENTS

I. Introduction .................................................. 292
II. Development of the Federal Law of Airport Pricing ...... 292
   A. Evansville and the Federal Anti-Head Tax Act .......... 293
   B. Two Systems of Airport Ratesetting ..................... 295
   C. Indianapolis ......................................... 297
III. Northwest Airlines v. County of Kent (Grand Rapids) .... 298
IV. Analysis of Grand Rapids Decision .......................... 302
V. The LAX Decision and the Legislative Response to Grand Rapids ......................................................... 304
VI. Conclusion ................................................ 307

* Rise J. Peters holds a J.D. from the Harvard Law School and a Master of Public Policy degree from the Kennedy School of Government of Harvard University. She is an associate in the Transportation Practice Group at Spiegel & McDiarmid, Washington, D.C., and wishes to express all appropriate demonstrations of gratitude to all the proper people, primarily including Jack Corbett of Spiegel & McDiarmid.
I. INTRODUCTION

The recent Supreme Court case, in *Northwest Airlines v. County of Kent, Michigan,*1 (Grand Rapids) represents a shift in bargaining power between public airport proprietors and the airlines which are their primary commercial users. Moreover, the airlines' attempt to secure a legislative reversal of that decision have effectively backfired, resulting in legislation that provides additional procedural protection to airports and that sets the stage for a transition to a federally-regulated system of airport ratesetting.

In *Grand Rapids,* airlines serving the Kent County International Airport challenged the airport proprietor's right to impose rates designed to recover from airlines the full cost of their use of airfield facilities and terminal space, rather than offsetting those costs by sharing the profits from nonairline revenue sources. The airlines claimed that those rates were statutorily and constitutionally impermissible. The lower courts and the Supreme Court disagreed and upheld virtually every aspect of the airport's rates, and suggested that the courts are not an appropriate forum for initial review of airport ratemaking.

This Comment, Part One examines the Supreme Court decision as one movement in the evolving counterpoint of federal law on airport pricing. It briefly discusses the legislative response to that decision, and sets the stage for Part Two, which will analyze U.S. Department of Transportation/Federal Aviation Administration's (DOT/FAA) final policy on airport rates and charges and consider the likely results of a fully-developed system of airport rate regulation. Part Two will be published in the next volume of the *Transportation Law Journal.* In section II of Part One, the development of the federal law of airport pricing is explored. Section III discusses the history and decision in *Grand Rapids.* The Court's rationale for its decision is analyzed in section IV. Section V briefly sets out the legislative response to the decision, and the framework in which DOT/FAA's regulatory policy will take shape.

II. DEVELOPMENT OF THE FEDERAL LAW OF AIRPORT PRICING

The *Grand Rapids* decision foreclosed the possibility that federal courts would act as rate regulators overseeing airport pricing. Further, while the Supreme Court did not go so far as to direct the DOT/FAA to issue regulations on the subject, no one reading the decision could come away with any misunderstanding as to the Court's clear preference. This decision and the subsequent responsive legislation put an end to a period

---

of confusion in which airports and their users were uncertain, not only of
the standards governing airport ratesetting, but also of the proper forum
in which rate challenges should be brought.

A. EVANSVILLE AND THE FEDERAL ANTI-HEAD TAX ACT

Before 1972, airports’ charges to airlines and their passengers were
limited on the federal level, primarily by the constitutional prohibition
against unreasonable burdens on interstate commerce, Art. I, § 8 of the
U. S. Constitution. Change was precipitated when the Evansville-Van­
derburgh Airport Authority District, a political subdivision of the State of
Indiana, implemented a “use and service charge” of $1 on enplaning pas­
sengers at Dress Memorial Airport in Evansville, Indiana. The revenue
from this so-called “head tax” was to be used for improvement and main­
tenance of the airport. A similar charge was imposed by the State of New
Hampshire for passengers enplaning in the state, with fifty percent of the
funds allocated to the State’s aeronautical fund, and the remainder going
to the airport proprietor as unrestricted general funds.

In both cases, affected airlines challenged the constitutionality of
head taxes. The state courts split, with the Indiana Supreme Court find­
ing the Evansville head tax an unreasonable burden on interstate com­
merce, while the New Hampshire Supreme Court sustained the
constitutionality of that state’s charge. In Evansville-Vanderburgh Air­

2. In addition, the early 1970s saw enactment of the Airport and Airway Development Act
of 1970 (the “AADA,” which is a predecessor to a series of airport funding statutes, all of which
are commonly referred to as the Airport and Airway Improvement Act of 1982, as amended (the
“AAIA”), then at 49 U.S.C. app. § 1701 et seq., which provided for airport development grants
from the Aviation Trust Fund (in recent years, these grants have been issued under the Airport
Improvement Program (“AIP”)). A provision of the AADA (and, later, the AAIA) imposed
conditions on approval of AIP grants, requiring the Secretary of Transportation to determine,
inter alia, that fees charged by the airport operator will “make the airport as self-sustaining as
possible under the circumstances existing at that particular airport,” then 49 U.S.C. app.
§ 2210(9) (1990), and will make the airport “available for public use on fair and reasonable
terms,” then 49 U.S.C. app. § 2210(a)(1)(1990). As discussed below, DOT/FAA fulfilled this
statutory mandate by requiring airports receiving grants to enter into contracts containing “grant
assurances” in which the airport assured DOT/FAA of its compliance with the statutory require­
ments. See FAA Order 5100.38A, Airport Improvement Program (AIP) Handbook (October
24, 1989), Appendix 1. Those grant assurances became another source of limits on airport rates,
first as airlines and other users attempted to enforce them through the court system, and later as
a basis for administrative action. See, e.g., Interface Group v. Massachusetts Port Authority, 816
F.2d 9, 15 (1st Cir. 1987); Northwest Airlines v. County of Kent, 955 F.2d 1054, 1058 (6th Cir.

3. In Evansville infra, the Supreme Court noted, 405 U.S. at 711, n. 3 (1972), that state
courts in Montana and New Jersey had invalidated similar airport fees, while legislative propos­
als for such fees elsewhere had been abandoned based on opinions from state or local officials
arguing their invalidity.
port Authority District v. Delta Airlines,\textsuperscript{4} (the Evansville decision), the Supreme Court held that the head taxes imposed in those cases were constitutionally permissible.\textsuperscript{5}

The Evansville Court reasoned that a “facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense.”\textsuperscript{6} In language that became central to development of case law in this area, the court held that where that charge is “based on some fair approximation of use or privilege for use . . . [and is] neither . . . discriminatory against interstate commerce nor excessive in comparison with the benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users.”\textsuperscript{7} Both the Indiana and New Hampshire charges, the Court found, met those standards.

Congress responded to Evansville, and to the increased number of local head taxes passed in its wake, with enactment of the Anti-Head Tax Act (“AHTA”), since codified at 49 U.S.C. § 40116.\textsuperscript{8} As codified, AHTA prohibits any state or its political subdivisions from imposing “a tax, fee, head charge, or other charge on an individual traveling in air commerce; the transportation of an individual traveling in air commerce; the sale of air transportation; or the gross receipts from that air commerce or transportation.”\textsuperscript{9} However, AHTA further provides that States and their subdivisions are not prohibited from imposing “taxes [except for certain

\begin{footnotesize}
\begin{enumerate}
\item Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972).
\item Id. at 711-22.
\item Id. at 714.
\item Id. at 714-15.
\item The legislative history of AHTA demonstrates that Congress, having recently imposed an eight percent federal ticket to fund airport development through AIP grants from the Aviation Trust Fund, was concerned that travelers not be taxed again on the state level for the same purpose. In addition, Congress was concerned about inconvenience to travelers and about diversion of head tax revenues into general municipal coffers. See S.Rep. No. 12, 93d Cong., 1st Sess. 1, reprinted in 1973 U.S.C.C.A.N. 1434, 1446; H.R.Rep. No. 157, 93d Cong., 1st Sess. 4 (1973). The legislative history of the AHTA and Congressional intent are discussed in Aloha Airlines v. Director of Taxation of Hawaii, 464 U.S. 7, 9-10 (1983).
\item 49 U.S.C.A. § 40116(b) (1994). Note that the decisions cited in this comment refer to various provisions of law in a pre-codified form; for example, citations in published decisions to the federal Anti-Head Tax Act are to 49 U.S.C. app. § 1513 (1990 & Supp. 1994), while citations to the grant assurance requirements of the Airport and Airway Improvement Act of 1982, as amended, are to 49 U.S.C. app. § 2210 (1990). Those provisions were recently codified in Pub. L. No. 103-272 (July 5, 1994). While the description of the codifying law states that the intent of that law was to “revise, codify, and enact without substantive change certain general and permanent laws, related to transportation . . . ”, in fact the codifiers worked substantial changes in at least some provisions under discussion in this Comment; for this reason, statutory language quoted by the courts in the decisions cited herein may no longer be consistent with the statute as codified.
\end{enumerate}
\end{footnotesize}
taxes imposed specifically against airlines and their property including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision.\textsuperscript{10}

Over time, AHTA grew to encompass all airport pricing to airlines, as courts assumed that all charges to airlines and their passengers, except those exempted in subsection (e), were barred by statute.\textsuperscript{11}

B. TWO SYSTEMS OF AIRPORT RATESetting

Airport proprietors provide a wide range of services and facilities to many classes of users, each of whom may pay for their use of the airport under a different pricing system. For example, concessionaires (such as restaurants, gift shops, or rental car companies) commonly pay a market rate set by bid or negotiation.\textsuperscript{12} General aviation operators (non-airline aircraft operations, including operations by private pilots and by corporate aircraft) generally pay a fuel flowage fee, which is a per-gallon charge on the fuel they buy at the airport. Airlines generally pay two kinds of rates: a landing or takeoff fee, which pays for their use of the airfield facilities (runways, taxiways, and aircraft parking areas), and terminal rents, which pay for their use, exclusively or in common with others, of offices, ticket counters, baggage handling facilities, passenger waiting rooms (holdrooms), and boarding areas (gates). These rates can be set by ordinance passed by the airport proprietor (ordinance rates,) or can be negotiated between the airlines and airport as one element of a written airport-airline lease and use agreement.

Calculation of rates may be done using either a “compensatory” or a “residual” system.\textsuperscript{13} Under a compensatory system, an airline pays only the actual cost for the facilities and services it uses. The formulas are applied differently for airfield and terminal facilities, but as an example, an airline paying a compensatory terminal rent would pay a per square foot rate for the space it leases in the terminal. The cost for unleased areas, such as public circulation space or janitorial storage, would be paid for by the airport proprietor from nonairline revenues. Under a residual


\textsuperscript{11} See J. Thomas' dissent in \textit{Grand Rapids}, in which he criticizes the majority's view that § 40116(a) "prohibits virtually all airport user fees" while subsection (e) "'saves' those fees that are 'reasonable.'" \textit{Grand Rapids}, J. Thomas dissenting, slip op. at 2.

\textsuperscript{12} Rates to concessionaires, whether arrived at by bid or negotiation, generally include some factor calculated as a percentage of receipts. Thus, payments from the concessionaire to the airport will vary depending on the success of the concession business.

\textsuperscript{13} The \textit{Grand Rapids} district court decision includes a succinct discussion of the relevant distinctions between compensatory and residual ratesetting, 738 F. Supp. at 1114.
system, the airlines as a group pay rent equal to the costs of the entire terminal net of other operating revenues. Thus, each airline pays a proportional share of the net cost of the terminal.

In theory, the primary difference between these two methods should be a shifting of two types of risks: the risk of success or failure of the nonairline revenue sources and the risk of a mismatch between airport capacity and demand for that capacity.

With regard to the risks of nonairline revenue fluctuations, under the compensatory system, the airport bears the risk that concession revenues will fall short of the amount needed to pay the costs of the public area and other unleased terminal space. In the event of a shortfall, the airport must cover those costs from its reserves, from local tax revenue if it has taxing authority, or from other nonairline revenue sources. If concessionaires prosper, and concession revenues exceed the costs of the unleased space, the excess revenues are available to the airport proprietor to pay off airport debt, to fund capital projects or operating costs, or as a reserve against future contingencies. In contrast, under a residual system the risks of concessionaire performance lie on the airlines, which pay as terminal rent the net (of non-airline revenues) costs of the terminal. Thus high concession revenue lowers the net costs to the airlines, while low concession revenue increases the airlines' costs. Because a residual system shifts risks to the airlines, it cannot be imposed by ordinance, but is only a product of a negotiated agreement.

Regarding shifting the risks of overbuilding, under the compensatory system, the airport proprietor, when it chooses to build additional capacity, bears the risk that capacity will go unused. For example, if an airport with a compensatory terminal rate builds additional gates, and those gates go unleased, the airport must pay the cost of those unleased gates out of nonairline revenues. In contrast, under the residual system, those risks fall on the airlines. If an airport with a residual terminal rate builds additional gates and those gates go unleased, the costs of the gates go into the total terminal cost without any offsetting additional revenues, thus increasing the net cost to the airlines.

The airport proprietor may impose compensatory rates, or may negotiate rates based on either a compensatory system, a residual system, or some hybrid of the two. Airlines, exercising their rights under the Airline Deregulation Act to freely enter and exit domestic markets, use their market power for leverage in negotiations with airports; they typically

---

14. Under current law and the terms of grant agreements between the federal government and airports accepting federal funds, airport revenues at federally-funded airports may be legally used for a limited range of airport-related purposes and may not be spent for non-airport related expenses. 49 U.S.C.A. § 47107 (1994); FAAAA §§ 110, 111, and 112. The intricacies of law and policy on airport revenue use are outside the scope of this Comment.
seek to secure residual agreements where the risks look favorable to them, and also to limit their exposure to airport proprietors' capital development decisions by bargaining for the contractual right to control airport capital development.

C. INDIANAPOLIS

In 1984, airport proprietors suffered a significant loss when the Seventh Circuit Court of Appeals ruled on a challenge to ordinance rates at the Indianapolis International Airport. Airlines that had served the airport under a fifteen-year residual contract sued, rather than pay compensatory rates imposed by ordinance after the residual agreement expired. The appellate court accepted the airlines' argument that the airport had a "locational monopoly" and that, absent rate regulation by the court, the airport would use that monopoly to extract unreasonable rates from airport users. The court essentially accepted the airlines' argument that they were entitled to have rates set on a residual basis (actually, a risk-free residual basis, in that they would receive the benefit of concession surpluses without being responsible for any shortfall in overall airport revenues), and held that under the circumstances at Indianapolis, the AHTA entitled airlines to rates calculated to give them the benefits of concession revenues.

In reaching that decision, the court assumed that concessions are frequented "with rare exceptions" by airline passengers. The court then apparently made an unstated and unsupported assumption that charges by concessionaires for the wares they sell are unavoidable by passengers — a factually incorrect belief that forms an unvoiced premise of the court's conclusion that "when the airport charges a rental fee to concessionaires it is as if it were charging a landing fee to the airlines or imposing a head tax on the passenger... [w]hat matters to [the passenger] is the total cost that he must incur to make the flight, rather than the form in which the cost is distributed among the various items that he must buy." From the conclusion that concession rentals (as passed through in prices to consumers) are unavoidable costs of travel, the Indianapolis court proceeded further to conclude that the AHTA entitled the passenger (or the airline, as the passengers' proxy) to offset concession revenues against the operating costs of the airport as a whole, and that rates set without such offset were unreasonable. Since the Indianapolis decision

16. Id. at 1267.
17. Id.
18. Id. at 1267-68.
19. Id. at 1268.
was published, it has not found favor among other courts considering airport ratesetting issues, and has been cited favorably only by Judge Richard Posner, its author, and only in non-airport contexts involving traditionally regulated utilities. Still, it served the airlines well as a negotiating tool for a decade before being put to rest, first by the refusal of a district court to follow it,20 and finally by the decisions of the lower courts and Supreme Court in Grand Rapids.

III. NORTHWEST AIRLINES v. COUNTY OF KENT (GRAND RAPIDS)

The Grand Rapids case began with a success story: the Kent County International Airport ("KCIA") in Grand Rapids, Michigan, succeeded in finding sources of nonairline revenue sufficient to allow it to amass contingency reserves of approximately $9 million, following a strict compensatory methodology (the "Buckley method," named after airport cost accounting pioneer James Buckley).21 This "Buckley method," used at KCIA since 1968, resulted in rates that formed the basis of negotiated agreements with the airlines until issuance of the challenged rate study in 1986.22 The new rates (to take effect January 1, 1987), as compared to those established in 1984, raised the landing fee by $.20/thousand pounds, decreased the overnight aircraft parking fee by $.08/thousand pounds, and increased the terminal space rental rates.23 The airlines refused to

20. City and County of Denver v. Continental Air Lines and United Air Lines, 712 F.Supp. 834, 837-38 (D. Colo. 1989). The City and County of Denver sought a declaratory judgment that its financing plan for the New Denver Airport, which relied in part on charges to concessionaires and airlines using Stapleton Airport, did not violate the AHTA. The federal district court, ruling on cross-motions for summary judgment, upheld Denver's right to use Stapleton concession revenues for costs of the replacement airport. The airlines challenged the use of concession revenues based on a claim that all costs and revenues from Stapleton must be considered together (sometimes called "cross-crediting") in setting "reasonable" airline rates and charges.

Read literally, the court stated, the AHTA "has no application to concession revenues at Stapleton." That conclusion was reinforced by the legislative history of the Act, where the court found no sign Congress intended to regulate concession rates or to preclude airport operators generating surplus concession revenues to fund airport expansion and development. "On the contrary," the court stated, "Congress recognized concession revenues as an important source of airport capital funding since federal government grant money does not finance 100% of any airport development project."

The court declined to find that concession charges exploit passengers, stating that "no person traveling to, from or through Stapleton . . . is required to park in the parking lot, rent a car, eat at a restaurant or buy a magazine. These are all individual decisions driven by individual perceptions of need and economic values. That is not the case with respect to the use of the airport's runways, taxiways, and airline portions of the terminal building. . . . Denver's decision to operate concessions at a profit is not an exploitation of airline passengers who have the freedom of choice to use the amenities Denver has provided." The Denver court declined to follow Indianapolis, stating that it disagreed with the public utility analogy underlying that decision.


22. Id.

23. Id. at 1115.
agree to the new rates, arguing that the surplus revenue generated by the airport demonstrated that the rates were unreasonable under the rationale of *Indianapolis*. The airport responded by passing ordinance rates.

The airlines brought suit in federal court, claiming that the Buckley method violated the AHTA because of: the unreasonable level of rates resulting from the method; the resulting “exorbitant profits” (claimed to far exceed the costs the airlines impose on the Airport) extracted from the airlines, and indirectly from passengers; the failure of the Buckley method to cross-credit surplus nonairline concession revenues to the airlines in establishing rates and charges; and discrimination against airlines and in favor of general aviation. The district court, evaluating the airlines’ argument, stated that the “overriding theme to plaintiffs’ argument is that the rates and fees are inherently unreasonable since they generate a surplus in excess of $2,000,000 per year and have resulted in a cash surplus on hand in 1989 of over $9,000,000.”

In the initial district court decision, the court held that landing fees and terminal rentals charged the airlines did not violate the AHTA, except that charges for overnight parking of aircraft overrecovered the costs of apron space reserved for aircraft parking. The district court assumed, based on a line of cases starting with *Evansville*, that plaintiff airlines had the burden of proving that the rates and fees are unreasonable in the light of the benefit conferred on the airlines, and found that the airlines had failed to meet that burden.

After discussing the genesis of the AHTA in the *Evansville* decision, the court, citing *City and County of Denver v. Continental Air Lines, Inc.*, agreed with the Denver court that the AHTA on its face does not apply to nonairline concession revenues and does not require the Airport to cross credit non-airline concession revenues to airlines when setting rates and fees.

Like the Denver court, the court declined to follow *Indianapolis*. It distinguished that case as involving an airport with a regional monopoly on air travel, and found that the airport in Grand Rapids was not a monopoly. Further, the court agreed with the *Indianapolis* concurring judge and the Denver court that “the AHTA is inapplicable to fees charged to nonairline users of the Airport.” Airline passengers are not a

24. The airlines’ complaint included a claim that the challenged rates violated the AAIA, but the district court ruled, on cross motions for summary judgment, that there was no cause of action under the Commerce Clause and no private right of action under the AAIA. The case then went forward on the AHTA claims.
25. *Id.* at 1116.
28. *Id.* at 1118.
"captive audience" for concessionaires, so that high concession prices are an inescapable add-on to the cost of travel; rather, the court stated, the high percentage of origin and destination traffic at the airport meant that most passengers wishing to avoid high concession prices could easily do so.29

The court then considered whether the rates and fees charged the airlines were reasonable, and decided that "except for the aircraft parking fee, the plaintiffs were charged the break-even costs for the areas they use . . . the Airport is charging plaintiffs only for their share of the operating expenses and is not generating any of its surplus revenues from rates and fees charged plaintiffs."30 The court concluded that the charges were therefore reasonable as compared to the benefits conferred. The parking fee, which overrecovered the cost of providing the parking area, was found unreasonable.31

Considering the claimed cross-subsidy between the airlines and general aviation users, the court found that the shortfall from general aviation was covered by charges to concessionaires and other nonairline users, instead of being made up by higher rates for airlines.32

In conclusion, the court stated:

[T]he AHTA does not require defendants to cross credit nonairline revenues when establishing rates to be charged airlines. Although the Court is troubled by such large surpluses generated by the Airport, it must acknowledge the prudent management which allows the Airport to run efficiently and with foresight thereby avoiding the necessity of seeking extra tax or bond revenues from the citizens of Kent County for expansion or improvement.33

The case went up on appeal to the Sixth Circuit. In its brief to the appellate court, the airport focused on its compensatory ratesetting method, arguing that use of that method was a local governmental ratemaking decision entitled to "substantial deference" by the courts. The airport pointed out that the increases complained of were clearly related to increased CFR costs and airport improvements attributable to airline activity at the airport; that the cost per passenger for landing fees had gone down, even with the increases; and that airport management, including fee setting, has been prudent and had kept the airport from becoming a charge on local taxpayers. The airport has a legal right to

29. Id.
30. Id.
31. Id. at 1119-20.
32. Id. at 1120.
33. Id.
choose its own rate-setting method, it argued, and for the court to give the airlines the relief they seek would force the airport to adopt residual rate-setting.

The Airline's appellate reply brief focused on the degree to which the airport's total income exceeded the cost of its operations, stating that airport fees are so much in excess of revenue needed to make the airport self-sustaining that they are plainly unreasonable. The airlines argued that the Buckley methodology, which charges most of the airport's costs of the air operations area and the terminal to the airlines, and little to the concessions, is plainly unreasonable as well, because "concessions, like the Airlines, benefit substantially from and are dependent on the air operations and common areas of the terminal." The airlines argued that they are not seeking "cross-crediting".

The Airlines do not seek a "share" of concession "revenues." Indeed, our contention has nothing to do with assigning concession revenues to the Airlines; it has to do with fairly allocating Airport costs to the concessions . . . the real issue is the Airport's refusal to acknowledge in its cost-allocation methodology that the concessions as well as the Airlines receive substantial benefit from the air and passenger-terminal operations, and that, therefore, some fair share of the Airport's costs of those operations should be allocated to the concessions.

The question on which the court should focus, the Airlines said, is not whether the airport could operate without concessions, but whether the concessions could operate without the airport. On this point, they argued that without the substantial expenditures made by the airport on the air operations area and terminal, there would be no concessions and no concession revenues; thus, concessionaires should bear a portion of the costs that made the concession revenues possible.

In response to the airlines' argument that the charges were inherently unreasonable because they produced substantial reserves, the Sixth Circuit found that concession fees are not covered by AHTA, which limits only fees to commercial airlines and travellers. The court distinguished the Indianapolis case, as involving an airport where travellers could not easily drive to another facility. The Sixth Circuit also agreed with the Denver court that operating concessions at a profit does not exploit airline passengers, who are free to avoid those charges by not consuming the goods or services in question.

34. The Sixth Circuit Court upheld the district court decision that the airlines had a private right of action under the AHTA, but no right of action under the AAIA or the Commerce Clause.

The Sixth Circuit also held against the airlines on their claim that they were being discriminated against in favor of general aviation, in that the airport recovers from airlines 100% of their costs, while the fuel flowage fees imposed on general aviation recover only 20% of the costs attributed to those users. Because the shortfall was made up out of concession revenues, not additional airline charges, the court found it had no authority to require the airport to change its fee system. AHTA applies only to travellers in “air commerce”; thus the court is limited to oversight of charges to commercial airlines, not to general aviation or concessions.

In response to a certiorari petition filed by the airlines, the Supreme Court sought a brief from the U.S. Solicitor General stating the federal government’s position in the case. The Solicitor General responded, on behalf of the government, that Supreme Court review was unnecessary and that DOT, rather than the federal courts, should determine the reasonableness of airport rates and charges. The Solicitor General also said that the charges imposed by Kent County appear reasonable under federal aviation law. Despite the Solicitor General’s urging, the Court granted certiorari, and on January 24, 1994, the Court issued a 7-1 decision in favor of the airport proprietor, holding that the rates charged by the airport were reasonable under the AHTA.36

IV. ANALYSIS OF GRAND RAPIDS DECISION

In Supreme Court oral argument, the airlines argued that the airport’s fees were unreasonable primarily because concessionaires pay no share of the airfield costs, even though they benefit from the traffic flow created by operation of the airfield; all airfield costs are allocated to airlines and general aviation. The airlines also complained that the combination of break-even fees to airlines and market-based fees to concessionaires generates unreasonable surplus revenue for the airport.

To determine the reasonableness of the charges, the Court applied the three-part test set out in the Evansville decision, considering whether the charge is: based on some fair approximation of use of the facilities, not excessive in relation to the benefits conferred, and does not discrimi-

36. Justice Thomas did not join the majority, instead dissenting on the fundamental issue of whether the AHTA prohibition on head taxes encompasses all airport user fees. In his view, the prohibition in 49 U.S.C.A. § 40116(a) (1994) defines the bases on which taxes or charges may not be calculated, while the permissive language of subsection (e), with its reference to “reasonable” charges, “does not impose a requirement that all airport user fees be ‘reasonable.’” Instead, it simply makes clear that state and local governments remain free to impose charges other than those proscribed by [subsection (a)].” Grand Rapids, J. Thomas, dissenting, slip op. at 5. Thus, in Justice Thomas’ view, airport user fees not calculated on an impermissible basis are limited simply by the dormant Commerce Clause, and the case should have been remanded to give the lower court the opportunity to consider the airlines’ dormant Commerce Clause challenge.
nate against interstate commerce. The Court held that because airlines and general aviation are the only actual users of the airspace facilities, while concessionaires actually use only terminal facilities, the airport’s fees “reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed.”37 As for surpluses resulting from concession fees, the Court found that such surpluses are not regulated by AHTA.38

Finally, the airlines challenged the airport’s rates as violating the constitutional prohibition on discrimination against interstate commerce, arguing that airlines should not be charged full cost-recovery rates, while general aviation users paid only twenty percent of the costs allocated to them. However, that argument depended on the claim that general aviation is typically intrastate, and the Court held that the airlines had not established that claim on the record.39

For procedural reasons, the Court did not decide whether the airlines can challenge airport rates directly in federal court, rather than first seeking review by DOT/FAA. Specifically, the Court held against the airport concerning allocation of costs for crash/fire/rescue service, and the airport did not cross-petition on that issue. As a result, the Court declined to decide whether a private right of action exists under the AHTA (instead assuming that one does for the purposes of this case), because to find no private right of action under the AHTA would effectively reach and reverse the Sixth Circuit’s unchallenged decision on the CFR allocation issue.40

However, the Court telegraphed its preference that such complaints be brought first before the agency, stating that “[c]ourts . . . are scarcely equipped to oversee, without the initial superintendence of a regulatory agency, rate structures and practices.”41 The Court stated that DOT/FAA is better equipped to regulate than the court because the agency has an overall view of the field of airport charges, has established procedures, under 14 C.F.R. Part 13, for adjudicating such complaints, and has previously entertained such a challenge, (i.e, to the Massachusetts Port Authority’s charges under its Program for Airport Capacity Efficiency (PACE)).42 The Court rejected the approach taken by the Seventh Circuit in the Indianapolis case, which would have had the courts act as pub-

37. Grand Rapids, slip op. at 8-12.
38. Such surpluses arguably may be capped under the AAIA, but the airlines did not appeal the finding of the Sixth Circuit, 955 F.2d at 1058, that there is no private right of action under the pertinent provisions of that statute.
40. Id. at 7-8.
41. Id. at 9.
42. Id. at 9-11 and n. 11.
lic utility style regulatory bodies overseeing airport rates. According to the Court, the Seventh Circuit, in deciding to take on the role of public utility regulator, "overlooked a key factor" when it "reasoned explicitly from the incorrect premise that 'no agency has regulatory authority over the rate practices of the Indianapolis Airport Authority,'" and that the duty of regulation fell to the courts.\textsuperscript{43} The key factor overlooked by the Seventh Circuit, said the Court, is the fact that DOT/FAA regulates airport rates.\textsuperscript{44}

The decision in \textit{Grand Rapids} is significant on several levels. First, for those airports facing renegotiation of their agreements with airlines, or contemplating enacting ordinance rates, it buries the \textit{Indianapolis} decision, lifting the cloud created by the possibility that a court could undo an airport's efforts to set full cost-recovery rates. Second, the \textit{Grand Rapids} decision, by telegraphing the Court's preference that challenges to airport rates be heard first before DOT/FAA, set the stage for the district court ruling to that effect in \textit{Air Transport Association v. City of Los Angeles},\textsuperscript{45} and thus for a movement replacing court oversight of airport rates with administrative review. Finally and most importantly, however, it provided the impetus for legislative lobbying by the airlines, in an effort to secure a Congressional "reversal" of \textit{Grand Rapids}, that resulted in enactment of legislation that will govern DOT/FAA's future administrative decisions on airport rates, but with an effect arguably quite different from that intended by the airlines.

\section*{V. The LAX Decision and the Legislative Response to \textit{Grand Rapids}}

On February 15, 1994, a mere three weeks after the Supreme Court decision in \textit{Grand Rapids}, a federal district court in California dismissed a challenge brought by the Air Transport Association (the trade association of U.S. airlines) and numerous airlines to landing fee increases at the Los Angeles International Airport (LAX). The airlines had filed the suit when Los Angeles moved to impose full cost-recovery rates at LAX. Previously, rates were set under a fifteen-year-old residual methodology which used concession revenues to lower airlines' landing fees. The air-

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 15.
\item \textit{Id.}
\item \textit{Air Transport Association v. City of Los Angeles, No. CV 93-4539 AWT (C.D. Cal. Feb. 15, 1994)} (the "LAX" decision).
\end{enumerate}
\end{footnotesize}
lines argued that proposed new rates were unreasonable under the AHTA and raised state barriers to interstate commerce in violation of the Commerce Clause. 46

The airlines initially refused to pay the increased fees, and the City responded with threats of a "lock-out," denying them operating privileges at LAX. Rather than lose operating privileges, the airlines signed an interim agreement with the City that included a commitment to pay the increased fees under protest.

In its decision, the district court took a position that was suggested but not adopted by the Supreme Court in Grand Rapids. The district court ruled that AHTA gives the airlines no private right of action to bring federal court litigation. Instead, the airlines must first challenge the airport rates in an administrative action before DOT/FAA.

The district court also considered the airlines' Commerce Clause argument and noted that, once Congress regulates an area of commerce directly, the courts will no longer allow an argument based on the implicit prohibition in the Commerce Clause. The district court ruled that AHTA is an example of such direct Congressional regulation, thus rejecting the airlines' "dormant" Commerce Clause argument.

Finally, the airlines argued that federal law preempted a lock-out by Los Angeles. The district court declined to decide this issue, ruling that it was mooted when the interim agreement was signed.

The airlines' response to the Grand Rapids and LAX decisions was swift and predictable. Guided perhaps by the historical precedent in which Congress responded to Evansville by legislatively reversing its outcome, they went to Capitol Hill seeking legislation that would give them the victory denied by the Supreme Court. In addition, the airlines saw the writing on the wall: if, as the LAX court had held, the future of airport ratesetting lay with DOT/FAA, it behooved them to persuade Congress to require DOT/FAA to limit airport rates. They sought a prohibition on lock-outs, permission to withhold payment of challenged rate increases, and a statutory entitlement to have airline rates set after consideration of concession revenues — in effect, a statutorily-mandated residual agreement that would shift to the airlines positive, but not negative, risks. What they won, however, fell short of those goals.

46. In addition to filing litigation against the rate increase, the airlines also claimed publicly that the asserted "cost recovery" nature of the fee increases was a smoke screen for the City's desire to accumulate revenue surpluses that could later be spent on non-airport related purposes. They pointed to statements by the Mayor of Los Angeles indicating that the City would seek a change in federal law that would allow the City to divert surplus revenue to fund additional police protection downtown.
As finally enacted on August 23, 1994, the Federal Aviation Administration Authorization Act of 1994 (FAAAA) included four sections (§§ 110-113) touching on airport rates and revenues. Section 110, headed "Airport Fees Policy," amends the policy provisions of the former Airport and Airway Improvement Act of 1982, as amended47 to provide that it is the policy of the United States that airport fees, rates, and charges: must be reasonable, may only be used for purposes not prohibited by the Act, and should reinforce the requirement that airports should be as self-sustaining as possible.

Section 111 of FAAAA amends the grant assurance requirements codified at 49 U.S.C. § 47107(a) (1994) to require that airport owners submit annual reports listing intergovernmental payments and other transfers of assets, and to require that DOT/FAA prescribe a unified format for such reports. Section 112 of FAAAA further amends the requirements placed on the Secretary prior to approval of AIP grants by requiring, within ninety days of the enactment of the statute, the promulgation of policies and procedures to ensure enforcement of limitations on the use of airport revenue.

Section 113 of FAAAA grants airlines and airports the authority to ask DOT/FAA to determine whether an airport fee is reasonable, and requires DOT/FAA to establish procedures that will result in a final order within 120 days of a complaint. Regarding the substance of that determination, however, the new legislation provides explicitly that "[a] fee subject to a determination of reasonableness under this section may be calculated pursuant to either a compensatory or residual fee methodology or any combination thereof."

The regulations that will implement the Supreme Court's directive and the new legislation are not yet in place, but already have a tortuous history of their own. On June 9, 1994, after the decisions in Grand Rapids and LAX made clear the need for DOT/FAA policies and procedures governing airport rates, DOT/FAA published a Notice of Proposed Policy (NPP) Regarding Airport Rates and Charges,48 and later extended the public comment period on that NPP until September 15, 1994,49 and later to October 15, 1994.50 Since FAAAA was enacted subsequent to publi-

47. Codified at 49 U.S.C. Subtitle VII Part B.
50. At the same time, DOT/FAA also published a Notice of Proposed Rulemaking on a new 14 C.F.R. Part 16, Rules of Practice for Federally Assisted Airport Proceedings, to govern complaints against airports (the "NPRM"). 59 Fed. Reg. 29880. At this writing, proposed Part 16 Subpart J, which would have governed airport-airline rate disputes, has been withdrawn due to inconsistencies with the FAAAA, and DOT/FAA has announced that it will instead promulgate changes to 14 C.F.R. Part 302 in order to accommodate airline/airport rate disputes. 59 Fed. Reg. 47568 (September 16, 1994).
cation of the NPP, DOT/FAA have extended the comment period and delayed final promulgation in order to assure that commenters, and the agencies, have had ample opportunity to take the provisions of the legislation into account. Comments filed in the docket thus far take strong exception to several provisions of the NPP, and it is unclear to what degree the final rules will vary from those proposed.

VI. CONCLUSION

In 1972, airport proprietors won a clean victory before the Supreme Court, only to see that victory snatched away two years later by passage of AHTA. Indeed, they lost more than they knew at the time; not only head taxes, but every charge placed on airlines and their passengers became subject to an ill-defined review under a vague “reasonableness” standard. Although that standard led to few actual court decisions, and even fewer losses, the Indianapolis decision, coupled with airlines’ ability to avoid paying increased rates for years while federal litigation dragged on, led to a serious imbalance in negotiating power, and to airlines gaining increased control over airports’ capital planning.

With the airlines’ legislative response to the airports’ success in Grand Rapids, it appeared that once again airports were poised to snatch defeat from the jaws of victory. Instead, the new legislation imposes no additional substantive standards, grants airports the right to collect challenged fees, and limits the financial exposure of airports planning new ordinance rates at a full cost-recovery level. Since, under compensatory rates, airports will still bear the risk of building unused capacity, the result should be an increased flexibility on the part of local airport proprietors to set full cost-recovery rates, to use concession revenues to support construction of additional capacity where needed, and to free their airport from the need for subsidies from local taxpayers. Whether that potential will be met depends in large part on how DOT/FAA resolve fundamental issues of airport ratemaking in promulgating a final policy on airport rates and charges. That final policy and its implications for the future of airport development will be the subject of Part Two of this comment.
Notes

Harold A. Shertz Award Winner

High Speed Ground Transportation Systems:
A Future Component of America’s Intermodal Network?

Brian Kingsley Krumm*

TABLE OF CONTENTS

I. Introduction .................................................. 310
II. The Development of High Speed Ground Transportation . 310
III. Policy Developments ........................................ 313
IV. The High Speed Rail Development Act of 1993 ........... 316
V. Policy and Legislative Analysis .............................. 319
VI. Conclusion ................................................ 323

* Brian Kingsley Krumm was a third year law student at the University of Tennessee College of Law at the time he authored this article. He received a B.A. from the State University of New York at Oswego, and an MPA from the Maxwell School of Citizenship and Public Affairs at Syracuse University. Prior to law school Mr. Krumm was employed as a management consultant by Booz Allen & Hamilton in Washington D.C. and later by the Tennessee Valley Authority in Knoxville, Tennessee.
I. Introduction

This article provides an overview of what appears to be a major change in national transportation policy of the United States. It focuses on the legislative efforts to integrate high speed ground transportation¹ (HSGT) systems into the intermodal mix of methods of moving people throughout the country. In order to put this developing policy within its proper perspective, the status of high speed ground transportation in the United States will be compared to developments in Europe and Japan. This will be followed by a discussion of the policy objectives of the Intermodal Transportation Efficiency Act of 1991² (ISTEA), legislation which was designed to promote efficiency, cost effectiveness and environmental sensitivity in our nation's transportation planning process. The article will then analyze the Clinton Administration's High Speed Rail Development Act of 1993³ in an effort to identify the obstacles that HSGT must overcome to be implemented effectively into the nation's intermodal transportation network.

II. The Development of High Speed Ground Transportation

Great strides have been made in passenger rail service since the Baltimore & Ohio railroad began passenger service in 1830, when it ran a horse-drawn passenger car a few miles out of Baltimore.⁴ By 1835, Congress began to take an active interest in railways and with the national government's active participation, railroads became an important factor in the nation's transportation economy.⁵ In the 1850s, the federal government adopted the policy of granting lands to help the states develop the railroads.⁶ In the late 1800s, many American railroad companies began to experiment with increasing the speed of passenger rail service. Perhaps most notably, the New York Central broke all records when, on May 10, 1883, "steam locomotive No. 999 pulled the Empire State Express at the then breathtaking speed of 112 1/2 mph between Batavia and Buffalo."⁷

¹ The term high speed ground transportation (HSGT) systems includes both the traditional steel wheel on rail and the more technologically sophisticated magnetic levitation (maglev) passenger transportation systems capable of sustained speeds of 125 miles-per-hour or greater. This definition is consistent with that used in the legislation.
⁴ See DANIEL OVERBY, RAILROADS, THE FREE ENTERPRISE ALTERNATIVE 5-6 (1982).
⁵ See 1 LEWIS H. HANEY, CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES, 99 (rev. perm ed. 1968).
⁶ Id. at 13.
By the 1930s, a number of railroad companies conducted regularly scheduled passenger service at 100 miles-per-hour. Unfortunately, in the 1930s American interest in and development of passenger rail service began to wane. Railroads, effectively a collective of corporate monopolies at the time, found themselves in competition with highways and airports which were being built with public funds. With increased competition came a change in corporate strategy; the focus shifted from passenger to freight service. As a result, companies did not provide financing for technological development of equipment or improved customer service, leaving much of the passenger rail facilities in the state of disrepair. In an attempt to prevent passenger rail service from becoming extinct, Congress passed the Rail Passenger Service Act in October, 1970, creating Amtrak. Currently, the United States’ only operating HSGT project is Amtrak’s Metroliner, operating in the Northeast Corridor, which travels at an average speed of eighty-seven miles-per-hour with a top speed of 125 miles-per-hour achievable on certain stretches of track.

In contrast, when development of rail passenger service ended in the United States, its development and use within the European and Japanese communities flourished. Tremendous advances have been made in both technology and customer service. The French have developed the Train a Grande Vitess (TGV), providing regularly scheduled passenger service at speeds of over 180 miles-per-hour. On May 18, 1990 the TGV set the world’s current speed record, reaching 320.2 miles-per-hour in a special test run. The Japanese Shinkansen, or Bullet Train, has been in operation for over twenty-five years and has become an integral part of Japanese Culture. The Shinkansen operates approximately 260 trains each day, serving over 400,000 passengers, with an on-time record of ninety-nine percent. Traveling at speeds up to 125 miles-per-hour, the Bullet Train operation has not resulted in a single injury or fatality. The German Federal Railway operates the Intercity Express (ICE), which was developed by a government/private industry consortium. Since the opening of the Berlin Wall, more than 200 daily trains run be-

8. Id.
9. See id. at 227.
11. Although current signal restriction limit the Metroliner’s top speed to 125 miles-per-hour on this route, the more technologically advanced Swedish X-2000 tilt train was tested on the Northeast Corridor without passengers at a speed of 155 miles-per-hour. Machalaba, Amtrak Test Train That Goes Faster on Curves, WALL ST. J., Dec. 9, 1992, at B1.
13. Id. at 80.
14. Id. at 85. During this time the Shinkansen has carried approximately three billion passengers, “equal to more than half the world’s population. In the United States over half of the country’s accidental deaths occur in the transportation sector, and more than 90% of those are on the highways.” Id.
between the two halves of Germany. The ICE trains are among the fastest in the world, achieving 186 miles-per-hour service on new lines and up to 137 miles-per-hour on upgraded lines. Great Britain, Belgium, Portugal, Switzerland, Austria, Spain, and the Netherlands are also participating in the vigorous pursuit of electric powered HSGT system development.

In addition to the steel wheel HSGT systems described above, Germany and Japan have separately developed prototype magnetic levitation (maglev) systems. Maglev systems use forces of attraction or repulsion from magnets located in the vehicle to suspend it, while a linear motor located in the guideway propels the vehicle forward. Ironically, these maglev systems are based on technology pioneered in the United States in the 1960s and early 1970s. Currently the German Transrapid appears to be the maglev system most adapted to regular passenger service. It has demonstrated the capability to “climb grades as steep as 10 percent and negotiate curves at speeds as high as 250 mph.” In addition, the manufacturer assures complete safety due to the inability of the vehicle to come off of the guideway or collide with another vehicle “because the propulsion system prevents two trains from approaching head-on or overtaking the other from the rear.”

The companies involved in the development of the Transrapid technology look forward to introducing their products in paid passenger service in the not-too-distant future. A consortium of German, Japanese, and American companies have introduced a proposal to the state of Florida to build a maglev demonstration project from the Orlando, Florida airport to an area located near the Disney Complex. Recognizing the vast potential market that exists for HSGT development in the United States, a number of foreign corporations have pursued developmental opportunities in this country. The most notable inroad was made by GEC Alsthom, the French manufacturer of the TGV, who formed the Texas TGV consortium with the American company, Morrison Knudsen, win-

---

15. Id. at 61.
16. Id. at 60.
17. Id. at 16.
18. Id. at 90.
19. Maglev trains float on waves of electromagnetic energy. The Japanese system uses repulsion forces to suspend the vehicle over the guideway. The electrodynamic suspension system is unable to lift off at zero velocity and requires wheels until the vehicle reaches a speed of 60 miles-per-hour. By contrast, the German electromagnetic suspension system uses attractive forces to levitate the vehicle; this enables the vehicle to lift off at zero velocity. See id. at 95-96.
20. See id. at 115.
21. Id. at 101.
22. Id. at 101-102.
23. Id. at 142.
ning a franchise agreement to build and operate a high speed rail route linking Dallas, Fort Worth, Houston, San Antonio, Austin, and Waco.24 Texas TGV won the franchise in a competition with Fastrac Incorporated, a consortium of three prominent Texas companies and a similar number German multinational firms.25

Although promising, both of these efforts have been slowed by a number of factors, the most important of which is financing. A general consensus exists that if the public sector is unwilling to participate financially in the development of these and other HSGT projects, as have the public sectors in all other countries in the world pursuing HSGT implementation, the benefits of HSGT will likely not be realized in the United States.

III. POLICY DEVELOPMENTS

With a number of American travelers returning from Europe and Japan commenting on the pleasant experiences they had riding the high speed trains and the obvious interest by foreign corporations in the potential United States market for HSGT passenger service, Congress authorized research and development funds to assess the potential for HSGT in this country.26 In addition, several state legislatures formed commissions whose objectives was to develop new privately financed HSGT systems.27

As a result of this interest, a number of studies were conducted to assess the feasibility of implementing HSGT systems in the United States. At the request of the U.S. Department of Transportation (DOT), the National Research Council, operating through the Transportation Research Board, assembled a committee to assess the applicability of HSGT technologies to meet the demand for passenger transportation service in high-density travel markets and corridors.28 The study examined both technical and financial issues and concluded HSGT systems could be an effective alternative to auto and air travel in corridors where travel demands are increasing, but where increasing the capacities of highways and airports is difficult.29 Among a number of recommendations, the report urges that DOT to join its efforts with the states “to develop a capacity to

24. Id. at 168-71.
25. See id. at 169-71.
27. Id.
28. The committee was comprised of individuals with experience in transportation systems analysis, intercity travel demands, advanced transport technologies, environmental assessment, economics, finance and administration, and operation of passenger transportation systems.
29. Supra note 26.
evaluate HSGT systems in the context of alternative intercity travel mode investments and ultimately to make funding decisions (or resource allocations) reflecting the most cost-effective investment opportunities regardless of mode."30 If a HSGT system were justified based on such an evaluation, public subsidies could include contributions from the national airport and airways or highways trust funds.31 In addition, the committee notes that the states, special authorities, and the DOT should consider not only high speed rail and maglev systems but also incremental speed improvements to existing intercity rail services.32

Based in part by this and numerous other studies focusing on our national transportation needs, President Bush signed the Intermodal Surface Transportation Efficiency Act33 on December 18, 1991. This new law was viewed as a historic restructuring of surface transportation programs with an emphasis on intermodalism and efficiency. Several provisions in the bill also addressed high speed rail and maglev development over a funding period of six years.34 The legislation established a National Magnetic Levitation Prototype Development Program financed by $725 million in federal funds, of which $500 million came from the highway trust fund.35 It initiated a Technology Demonstration Program of $50 million, half of which comes from highway trust fund grants, to demonstrate any steel wheel or maglev technology that is under construction or operation at the time of application.36 It approved $30 million from highway trust funds for use in eliminating or improving rail-highway grade crossings in corridors considered eligible for high speed service.37 Also, under certain conditions, states could use "flexible" highway funds for grade crossing work.

The Act created a $25 million research and development effort for all forms of high speed steel wheel and maglev transport through agreements with industry.38 The purpose of this provision was to encourage investment by domestic firms in extending the limits of the state-of-the-art technologies. It permitted high speed maglev and steel wheel systems to use the rights-of-way of any highway in which federal funds have been invested, if it could be done without impairing auto safety. At state dis-
cretion, such rights-of-way may be used without charge. It also amended the Railroad Revitalization and Regulatory Reform Act of 1976 to authorize as much as $1 billion in government guaranteed loans to help finance construction of high speed steel wheel systems. However, a separate appropriations measure, necessary for this provision to take effect, has yet to be passed.

Although ISTEA appeared to hold great promise for HSGT systems, the reality has been somewhat disappointing for all modes of transportation. Even though the bill authorized large sums of money, the annual congressional appropriations process, constrained by the deficit, failed to fund most of the ISTEA programs in fiscal year 1993. In the case of the National Maglev Prototype Program, no money was provided. The National Maglev Initiative received only $4 million out of a requested $15 million in DOT funds and $2.8 million in Army Corps of Engineers funds. However, the Federal Railroad Administration (FRA) did receive $6 million for continued high speed rail research and development, $3 million for high speed rail safety programs, and $5 million for the ISTEA Technology Demonstration Program. The electrification of Amtrak’s Northeast Corridor to increase speeds was fully funded. An additional $6 million was made available from the Highway Trust Fund for rail/highway grade crossing grants in five high speed rail corridors.

High speed ground transportation advocates experienced some long-term gains, and a temporary setback, when Congress reached agreement on appropriations for the DOT in fiscal year 1994. The biggest victory was $225 million for Amtrak’s Northeast Corridor improvement project. In addition, $20 million in funding for magnetic levitation research was appropriated as authorized by ISTEA. This represents the largest federal government investment ever in such technology. Congress also “authorized $5 million in loan guarantees that may be used for high speed steel wheel facilities or equipment and $3.5 million to develop the Chicago-St. Louis and Washington D.C.-Charlotte rail corridors.” There was also an effort to appropriate $95.2 million for corridor implementa-

39. Id.
41. Connor, supra note 34, at 9.
42. Id.
43. Id.
44. Id.
46. Id.
47. Id.
tion under the Clinton Administration’s High Speed Rail Development Act.  

IV. THE HIGH SPEED RAIL DEVELOPMENT ACT OF 1993

During the 1992 presidential campaign, candidates Bill Clinton and Al Gore promised a high speed rail network linking major cities with trains running up to 300 miles-per-hour. The network would be financed partially from the “peace dividend” resulting from cutbacks in defense spending. It was hoped that greater focus on HSGT systems would add a new dimension to the nation’s transportation infrastructure, as well as providing a mechanism for the defense industry to make a transition from manufacturing weapons to developing HSGT system components. Only a few months after the inauguration, on April 28, 1993, Secretary of Transportation Federico Pena introduced the Clinton Administration’s proposal for a major new initiative in the advancement of high speed ground transportation. In announcing the Administration’s proposal, Secretary Pena outlined a strategy in which the federal government would work in partnership with state and local communities to build high speed rail corridors which would, creating jobs and spurring economic growth. Total proposed federal expenditures under the Clinton initiative during the ensuing five years would total $1.285 billion. In addi-

48. Id.
49. Id.
50. Don Phillips, Two Trains Running: President’s is on Slower Track, THE HOUSTON CHRONICLE, April 28, 1993, at A4 (2 Star ed.).
tion, the Clinton Administration hopes to leverage the federal funds invested in high speed rail to generate at least $2 billion in investment in high speed rail infrastructure from state, local, and private sources.52

The High Speed Rail Development Act of 1993 amended the Railroad Revitalization and Regulatory Reform Act of 197653 (the “4R Act”). The first section of the legislation identifies a number of benefits to high speed rail. It also places the leadership responsibility for the implementation of high speed rail service on state and local governments, and envisions private sector participation in the funding of meritorious projects.54 While it recognizes that federal financial assistance is essential to the success of such projects, it restricts continuing federal subsidies for operation and maintenance expenses.55 Section two of the Act amended the 4R Act by adding a new Title X creating a National High Speed Rail Assistance Program.56 Title X establishes a financial assistance program to facilitate the implementation of high speed rail corridors in the United States. The objective of the National High Speed Rail Assistance Program is to aid state, local, and private sector efforts to improve intercity mobility through development of high speed rail in appropriate intercity corridors. The 4R Act is the source of the Secretary’s additional authority to undertake capital investments in high speed rail infrastructure. Title V authorizes the Secretary to issue loan guarantees for rail capital improvements, including high speed rail.57 Title VII authorizes the Secretary to undertake the Northeast Corridor Improvement Project.58

Section 1001 in the new Title X authorizes the Secretary to designate as high speed rail corridors those that serve two or more major metropolitan areas where the Secretary determines high speed rail offers the potential for cost effective intercity public transportation.59 Eligibility for federal financial assistance is predicated on obtaining such designation by the Secretary. Such designation requires the submission of a petition by the state, or states, indicating that they meet certain objective criteria pertaining to effective planning, cost-effectiveness, environmental considera-

---

53. Railroad Revitalization and Regulatory Reform Act, supra note 35.
54. S. 839 and H.R. 1919, supra note 3, at § 1.
55. Id.
56. Supra note 3, at § 2.
57. Supra note 3, at § 3.
58. Id.
59. Supra note 3, at § 1001.
tions, and broad-based financial support. Six corridors, already officially designated by the DOT as high speed rail corridors, will be automatically re-designated upon request to the Secretary.

Section 1002 requires the public agency responsible for the development of a designated corridor to develop a master plan for the corridor. The plan must identify a coordinated program of improvements to permit the establishment of high speed rail service in the corridor. This corridor master plan program is similar to the program required for the Northeast Corridor Improvement Project. The master plan will be the basis for identifying the elements of the corridor project that will receive federal funding under the program. The Secretary is authorized to enter into an agreement with the public agency preparing a corridor master plan to fund up to eighty percent of the eligible costs, providing that state and local governments fund at least twenty percent of such costs.

Section 1003 of the Act outlines the objectives and framework for federal financial assistance to designated corridors. Funding is not available to those corridors in which the state prohibits the use of state or local funds for the construction or operation of such a corridor. Requiring the active participation of state and local governments in the program is intended to ensure projects receiving assistance under the program become integral parts of state and local transportation systems and that these projects have substantial public support. The bill encourages states and localities to obtain as large a portion of the funds as possible from private sources before seeking federal funding. Federal funds available under the program can provide for up to eighty percent of the cost of specific eligible improvements on a project and for up to fifty percent of the "public share" of the cost of an approved element of a high speed program. The "public share" is defined in the bill as the total cost of the infrastructure improvement, minus the maximum practicable private

60. These Corridors include: (1) Chicago to Milwaukee, St. Louis and Detroit; (2) Miami-Orlando-Tampa; (3) Washington, D.C.-Richmond-Raleigh-Charlotte; (4) San Diego-Los Angeles-Sacramento; (5) Eugene-Portland-Seattle-Vancouver; and (6) the Empire Corridor (New York-Albany-Buffalo). The Northeast Corridor is separately funded and will not be eligible for funding under this program (the bill includes a separate authorization of appropriations for continuation of the Northeast Corridor Improvement Project). The Administration is actively seeking additional regions wishing to be designated as corridors. REED, SMITH, SHAW, & MCCLAY, Analysis of the High-Speed Rail Development Act of 1993, ON TRACK: HIGH SPEED GROUND TRANSPORTATION UPDATE 3 (Spring 1993).

61. High Speed Rail Development Act, supra note 3, at § 1002.

62. Id. at § 1003.

63. Id. The term 'state or local funds' means funds generally available to states or local governments to fund transportation projects excluding any payments of contributions to state and/or local governments or authorities from holders of a franchise or other private parties with an interest in the development operation of the high speed rail system. High Speed Rail Development Act, supra note 3, at § 1005.
share of the infrastructure costs. As mentioned earlier, federal assistance requires matching state and local funds. This section recognizes because high speed rail projects are expensive and available funds are limited, it is impossible to fund all eligible projects in any given year. This section also grants the Secretary discretion to make decisions on how to allocate resources among the eligible corridors, and improvements to ensure that maximum benefit is derived from the federal investment.

Section 1004 authorizes the Secretary of Transportation to undertake research, development, and demonstration of steel wheel on rail technologies that may facilitate the introduction of high speed rail service in the United States.64 The Secretary is authorized under this section to enter into financial assistance agreements65 with any United States private business, educational institution, state or local government, public authority or agency of the federal government.

V. POLICY AND LEGISLATIVE ANALYSIS

The Clinton Administration envisions the development of HSGT as a component of an integrated intercity transportation system that includes aviation and HSGT systems in complementary roles, each technology serving its appropriate market niche.66 As part of this vision, HSGT systems would be fully integrated with intercity bus and intracity bus, rail, and transit systems. Diversions from short-haul air service would free scarce airport capacity, which could then be used for more profitable longer-haul service.67 HSGT would also address highway congestion by diverting a portion of highway trips.68 This would result in an improved environment and reduced dependence on fossil fuels.

Such policy objectives are widely supported by a large segment of the traveling public, as well as politicians who see HSGT as a mechanism for bringing jobs and economic development to their states. However, a number of forces shaping the high speed rail legislation today have little to do with the development of a coherent, long-term transportation pol-

64. High Speed Rail Development Act, supra note 3, at § 1004.
65. "The term 'financial assistance agreement' means various forms of arrangements to provide financial assistance, including grants, contracts or cooperative agreements." High Speed Rail Development Act, supra note 3, at § 1005.
67. Id. at 7.
68. Id. Surveys of passengers on Amtrak's existing service indicate that between 45 and 65 percent of intercity rail passengers would have used automobiles if the rail service had not been available.
icy. The primary force is the federal budget deficit, a major "stumbling block" to the implementation of HSGT systems in the United States.69 High speed ground transportation infrastructure is costly, and costs increase as the design speed increases.70 Funding for HSGT projects and programs has not met expectations; the 1993 and 1994 appropriations for HSGT system development under ISTEA were not funded as authorized. The Clinton Administration's "incremental approach" to HSGT, which builds on existing infrastructure and requires little or no acquisition of rights-of-way, is at least in part a recognition that levels of funding anticipated for HSGT infrastructure development during the campaign, are unlikely to be realized in this period of fiscal restraint.

Ultimately, the incremental approach may prove to be a politically desirable strategy for the Administration to pursue. In order to obtain the broad-based support needed in Congress to pass the High Speed Rail Development Act, the potential must exist for a broad spectrum of states to at least be eligible for funding. The incremental approach offers just such an allure. Although states may not be currently pursuing formal plans for HSGT systems, they do have existing railroads which could serve as the backbone for incremental upgrading. The legislation is written broadly enough to be attractive to legislators whose states lack such formal plans, yet provides the Secretary of Transportation with the necessary discretion to focus the funding once appropriated. This will allow the DOT to fund those projects that have the greatest potential for successful development and operation.

However, the same characteristics in the legislation that initially attracted strong bipartisan support in the House Energy and Commerce Committee have come under fire from the railroad unions and freight railroads which would provide most of the trackage under the incremental approach. The transportation unions, which believe the new routes could result in layoffs or wage cuts for workers on conventional rail and bus lines, want provisions included to protect them from such career-ending events.71 Although the version of the bill that the House Energy and Commerce Committee reported on July 27, 1993 includes several provi-

69. See Abelardo L. Valdez, Financing High Speed Rail: Meeting the Transportation Challenge of the '90s, 18 TRANSP. L.J. 173, 177 (1990).
70. See High Speed Ground Transportation, Financing Issues: Hearings on S. 839 Before the Subcomm. on Transportation of the Senate Comm. on Appropriations, 103d Cong., 1st Sess. (1993) (statement of Kenneth M. Mead, Director, Transportation Issues, Government Accounting Office). According to a recent estimate, the capital loss of achieving high speed operations for a hypothetical 200 mile-long system ranges from $500 million for incremental improvements of existing tracks that could bring speeds up to 110 miles-per-hour to more than $12 billion for maglev systems that might allow speeds of more than 200 miles-per-hour. Id. at 3.
sions to protect transportation workers, it does not go far enough to satisfy the unions, and goes too far for many Republicans who might otherwise support the bill. Additionally, the freight railroads want shielding from lawsuits that might result from high speed rail accidents occurring on their trackage. Discussions concerning this liability are being pursued within the House Judiciary Committee, but no solution has been found. A proposal which would place a cap on the liability of the freight railroads was recently submitted to Senator Ernest Hollings by the Association of American Railroads. Such liability concerns are likely to be amplified as a result of the recent wreck of Amtrak's Sunset Limited.

In addition to the concerns expressed by the transportation unions and the freight railroads, there is also fierce competition from other modes of transportation, both for the limited share of the federal funds and for the potential passengers or users of the particular mode of transportation. An example of this competition is the Partnership for Improved Air Travel, a lobbying effort supported by the large airline and aircraft companies to pursue additional public spending on airports and opposing proposed increases in airline ticket and fuel taxes. The Chairman of Southwest Airlines, Herb Kellehar, the chief spokesperson for this group, is also a major opponent of HSGT. Southwest Airlines bitterly opposes the construction of HSGT, especially the Texas high speed rail line that would provide service to a number of the cities that the airline currently serves. The lobby places subtle, yet effective, pressure

72. Id.
73. Id.
74. Thomas C. White, Railroads Propose Liability Limit for High-Speed Trains, RAIL NEWS, Sept. 16, 1993, at 1. The cap would supersede state laws that prohibit full immunity for railroads. Such a cap was enacted by Congress in 1990 to address liability concerning the Virginia Railway Express commuter service, linking Washington, D.C. with its northern Virginia suburbs.
76. See Vranich, supra note 7, at 293. HSGT proponents have also developed an industry group composed of such American technology titan s as Gruman Corp., Martin Marietta, General Motors, McDonnell Douglas, and Bechtel Corp., as well as many of Europe's largest technology companies, who are all interested in the development of U.S. high speed rail systems. These and a number of smaller companies and individuals have boosted membership of the High Speed Rail Association, an influential umbrella group based in Pittsburgh to well over 1200 members. O'Malley, Rapid Rails, POPULAR SCIENCE, June 1992, at 74.
77. See Vranich, supra note 7, at 293.
78. See Vranich, supra note 7, at 288.
on Congress not to subsidize HSGT at the expense of "self supporting" commercial aviation, conveniently overlooking the massive subsidies that the airlines enjoy.\(^7\)

Compounding the problem that other modes of transportation must also compete for federal transportation dollars is the fact that the Clinton Administration legislation and the DOT place the responsibility for making important transportation financial resource allocation decisions on the state and local governments. Although it appears to be sound fiscal policy to ensure that adequate public and financial commitment exists for HSGT projects at the state and local levels before the federal government participates financially, a number of practical concerns need to be considered.

The state executive primarily responsible for the transportation function is typically more knowledgeable about highways, waterways, and airport planning and operation than with HSGT systems. Furthermore, at the local level, the metropolitan planning organizations, while vested with the authority to identify and plan for a jurisdiction's long-term transportation needs, are often forced to allocate limited federal and state funding to more immediate road and local public transit issues in order to meet the demands of the local citizenry.\(^8\) Under such circumstances, it becomes increasingly difficult for these officials to make the long-term investment and take the risk to support HSGT development.

The legislation also contemplates that two or more states might cooperate in establishing a high speed rail corridor.\(^9\) From a national transportation planning perspective and in order to achieve the efficiency and effectiveness objectives of intermodalism, it would seem almost imperative that such joint ventures be pursued. However, from a very practical perspective, such collaboration, if not presenting an inherent conflict of interest, may prove difficult to manage. Federal transportation funds are not allocated to all states in a uniform fashion. In addition, individual states often must fund some projects over others based on such factors as technical merit, necessity, and political considerations. Unlike the state coordination necessary to implement the interstate highway system, the

---

\(^7\) The federal government provides the following subsidies for the airline and aircraft industry: funds the FAA air traffic control system and personnel, reduces infrastructure and borrowing costs through the aviation trust fund, funds the Essential Air Services Program to allow flights to small towns, pays for FAA and NASA research which helps in designing jetliners, and trains thousands of military pilots who later shift employment to the private sector.

\(^8\) The increasing propensity of Congress to pass legislation which requires local government funds to implement such projects is financially strangling many cities, counties, and towns. Confronted with funding federally mandated programs, local governments must shift their discretionary spending which might otherwise be used for transportation projects. Senator Paul Coverdell (R-Ga.), *Give Local Governments a Break*, USA Today, Nov. 16, 1993, at 15A.

\(^9\) High Speed Rail Development Act, *supra* note 3, at § 1001.
requirements to implement a high speed rail corridor would demand joint investment in such things as rolling stock and a long term partnership for operations and maintenance. Conflicts might arise, for example, if one state were forced to forgo the full investment and associated economic development benefits of the construction of an international airport in order to participate with an adjoining state on a HSGT project. Combining such a multi-state venture with private sector participation would, out of necessity, require some sort of coordinating and management organization. This would most certainly add complexities to the implementation process, since the management organization would most likely fall within the regulatory jurisdiction of the Interstate Commerce Commission.

The private investment legislation envisions may also prove to be problematic. The long delay between project startup and return on investment makes it difficult to attract investment capital.\(^{82}\) In addition, the United States lacks expertise and experience in the design, construction, and manufacturing of HSGT systems. This may make the "Buy America Requirements" of the Act\(^{83}\) difficult to meet, or may potentially foreclose certain possibilities for foreign investment in such projects. In the final analysis, "private investors need to be convinced that high speed rail has a viable future in this country"\(^{84}\) before they will aggressively participate in such a private-public partnership.

VI. CONCLUSION

Whether the Clinton Administration's high speed rail legislation is signed into law during the next session of Congress depends primarily on how successfully its proponents negotiate the interests of the transportation unions regarding job security. Also, consideration must be given to the concerns of the freight railroads regarding liability. However, how well this legislation will achieve the policy objectives it is designed to accomplish is quite another matter. While the High Speed Rail Development Act's $1.285 billion in funding would be the largest investment ever made in HSGT technology, there is no way to determine exactly how much federal funding is necessary for any given project to be successful.\(^{85}\) For example, if the $1 billion estimated for corridor development is

---

82. See Valdez, supra note 69, at 178.
83. High Speed Rail Development Act, supra note 3, at § 1005.
84. Valdez, supra note 69, at 187.
spread over as few as five projects, each would receive an average of only $40 million a year.\textsuperscript{86} Although allocating small amounts of federal funds to several projects could certainly facilitate limited incremental improvements in speed, it would be a long time before speeds of 125 miles-per-hour could be attained.\textsuperscript{87} Obtaining truly high speeds would be virtually impossible at such funding levels.\textsuperscript{88}

The funding obstacles which face HSGT confront all modes of transportation infrastructure in the United States. Since the early 1980s, the net public transportation investment by federal, state, and local governments has dropped considerably.\textsuperscript{89} This has resulted in increased urban traffic congestion and has left roads, bridges, and airports in desperate need of improvement.\textsuperscript{90} It is estimated that up to $3 trillion is needed for transportation investment in the next twenty years in order to bring our current transportation system up to par.\textsuperscript{91} However, in today's budgetary environment, prospects for such spending increases are unlikely. This is unfortunate as the country's transportation network can have a significant impact on the country's overall economic productivity.\textsuperscript{92}

\textsuperscript{86} Id. An incremental improvement program designed to increase speeds on a 200-mile corridor using existing right-of-way could cost over $2 billion. Electrification alone could cost $400 million and the elimination of grade crossing hazards, $200 million. \textit{Id.}

\textsuperscript{87} Id. The current status of the Northeast Corridor, where speeds of 125 miles-per-hour can be achieved in limited areas, is the result of 17 years of congressional appropriations averaging about $147 million every year. \textit{Id.}


\textsuperscript{89} Norman Y. Mineta, \textit{Getting from Here to There in the 1990s: Trains, Planes, and Automobiles}, \textit{Trial}, Feb 1991, at 44 (Congressman Mineta (D-Cal.) chairs the House Subcommittee on Surface Transportation of the Public Works and Transportation Committee). In the 1960s and 1970s, investment averaged 2.3 percent of gross national product. In the 1980s, that average dropped to 0.4 percent, leaving the United States 55th in the world in infrastructure development. \textit{Id.} at 46.

\textsuperscript{90} \textit{See id.} According to the Federal Highway Administration, traffic congestion has increased nationally by 50 percent, half of the nation's bridges are deficient or functionally obsolete, and 60 percent of the roads are considered substandard. \textit{Id.} at 46.

\textsuperscript{91} \textit{Id.} at 46.

\textsuperscript{92} Mead & William-Bridgers, \textit{The Intermodal Approach to Transportation}, \textit{G.A.O. JOURNAL}, Spring 1991, at 9. David Aschauer, a professor of economics at Bates College in Lewiston, Maine, contends that there are direct links between spending on infrastructure and overall economic growth. David Aschauer, \textit{The Third Deficit}, \textit{G.A.O. JOURNAL}, Spring 1991, at 5. "Up to 50 percent of the decline in our long-term economic growth can be attributed to the falloff in infrastructure investment which occurred in the 1970s and '80s relative to the '50s and '60s." David C. Walters, \textit{Repairing America: Investment in Roads, Bridges, and Ports Lays Foundation
Policymakers may avert this apparent impasse if they are willing to make some fundamental changes in the way they formulate the nation's transportation policy. Currently, when analyses are conducted to determine needs for highways, mass transit, and airways, the DOT prepares each separately. Such an approach precludes consideration of comprehensive strategies to meet the transportation needs of the states in the most cost-effective manner. To achieve this result would require interagency cooperation in planning, funding, and policymaking. This lack of coordination not only prevents the federal government from producing the necessary leadership to achieve comprehensive intermodal projects but also presents obstacles to state and local governments hoping to plan and fund such projects.

Another complicating factor is the distribution of transportation modes among the various congressional committees. National transportation policy is formulated by five different committees and an even greater number of subcommittees in Congress. Such jurisdictional fragmentation is further exacerbated by the variety of financing mechanisms currently used to fund transportation programs. In addition to Congress, the Executive Branch can also play a role in frustrating the transportation planning and funding process. As was evinced by the ISTEA legislation, the President's budget does not always contain sufficient appropriations to fund all projects and programs authorized.

---

93. Mead & Williams-Bridgers, supra note 92, at 9.
94. Id. at 10. The DOT must coordinate the policies and practices of the Federal Aviation Administration, Federal Highway Administration, Federal Transit Administration, and Federal Railroad Administration.
95. Id.
96. Id. at 12. In the House, the Public Works and Transportation Committee has jurisdiction over both mass transit and highways, whereas in the Senate, mass transit issues are handled by the Banking, Housing, and Urban Affairs Committee and oversight of highways is exercised by the Senate Environment and Public Works Committee. Similarly, jurisdiction over passenger rail in the House is split between the Public Works and Transportation Committee and the Committee on Energy and Commerce. Id.
97. Id. Congress funds each transportation mode in a different way — through trust funds, contract authority, borrowing authority, and loan guarantees, as well as through regular authorizations and appropriations from general revenue. Id.
98. Mineta, supra note 89, at 45. Currently there is a substantial surplus in the highway trust fund, which is funded from a combination of user fees and taxes on gasoline that can only be used for transportation projects chosen by Congress and the Office of Management and Budget. There has been a recent reluctance to not allocate these funds, as a surplus gives an appearance the national budget deficit is not as high as it otherwise would be. Id.
Once these impediments to intermodal decision-making at the federal level are removed, the federal government should adopt a greater leadership role, and in conjunction with the states, develop an integrated transportation plan.\textsuperscript{99} While state and local officials are in the best position to determine and implement effective solutions to their transportation needs, a national perspective and greater expertise are essential to make cost-effective planning decisions. Based on such a plan, in the near term, a single HSGT project should be chosen for implementation. The project should incorporate the latest in technology and not be constrained by the use of existing infrastructure. Under such conditions, the private sector is more likely to take the necessary financial risks to make the HSGT vision a reality in the United States. Only within this context is it likely that HSGT systems will become a future component of America's transportation network.

\textsuperscript{99} Mead & Williams-Bridgers, \textit{supra} note 92, at 14.
Expanding International Air Service
Opportunities to More U.S. Cities

David R. Fiore*

TABLE OF CONTENTS

I. Introduction .................................................. 329
II. Background — Bilateral Review .................................. 329
III. USA Airports For Better International Air Service
    Organization .................................................... 330
IV. The Cities Program ................................................. 332
    A. USA — BIAS Request ............................................. 332
    B. DOT Proposal .................................................... 340
       1. General ......................................................... 340
       2. Proponent Perspectives ......................................... 341
       3. Opponent Perspectives .......................................... 342
       4. DOT Conclusions — Original Cities Program/Final
          Order ......................................................... 343
    C. The 1991 Amendments ............................................ 346

* Mr. Fiore currently works for the law firm of Wittman & McCord in Colorado Springs
  and Denver, Colorado, and has worked as an airport administrator for the past ten years at
  various airports including San Francisco International Airport, Fort Wayne International Air
  port, and a major reliever airport to O'Hare International Airport. He has also worked as a
  consultant on several airport projects in England and San Francisco. Currently Mr. Fiore is the
  Editor-in-Chief of the TRANSPORTATION LAW JOURNAL and is a Juris Doctor candidate at the
  University of Denver College of Law (May 1995). B.S. Airport/Aviation Management, Southern
  Illinois University (1983); Commercial Pilot with Instrument and Multi-engine ratings.
PREFACE

The international community is changing in profound ways. Within the last several years, we have seen the Berlin Wall crumble and the end of the Cold War. As our international neighbors try to join the crusade for democracy and human rights, they are faced with great challenges. The world is connected by a web of economic, sociologic, political, and other critical strands that impact our relationships with one another.

As the international community remolds in new dimensions, the U.S. economy, too, is reshaped. America evolved as an industrial state and today is feeling the results of the high-tech revolution. The internal wheels of our nation, U.S. cities, must be able to respond to this rapidly changing economic environment.

Long before Columbus first set sail to the Americas, transportation was the link of trade amongst nations. Nations adjacent to waterways enjoyed greater access to trade. Today, aviation connects the world more quickly and with less limitations than those imposed by the sea. It is no wonder then, that economically thriving nations are linked to other economic centers by air transportation.

In order for the U.S. to capitalize on the full potential of the world economy, our civic leader, U.S. cities, must be allowed to secure better access to the international marketplace. In 1989, a program known as the Cities Program was created to open channels for economic success through community partnerships. For the first time in the history of international aviation, U.S. cities have indirect access to negotiate, or to secure, international air service for their citizens. The program provides a tool for economic development. The jury is out, but thus far the effects seem positive.

This paper evaluates the Cities Program in an effort to weigh the U.S. benefits. However, please keep an open eye as you read this paper; how will these newly formed alliances assist in the process of world unification — linking U.S. communities to new world trade centers?
I. Introduction

Early in 1989, both civic and business leaders joined hands to obtain improved international air service to their respective communities. This leadership coalition formed a nonprofit "caucus" organization known as U.S. Airports for Better International Air Service (USA-BIAS). USA-BIAS, together with state and local officials, sought support from the U.S. Department of Transportation (DOT) to achieve its objectives. The premise for its request was based on economic development grounds. USA-BIAS sought new international air service in an attempt to expand tourism, business, foreign investment, and jobs, among other economic benefits, to its respective communities. It acknowledged the importance of maintaining a healthy U.S. airline industry, but believed there must be a device that would allow communities to seek international air service regardless of the flag which the carrier providing it flew.

The DOT found USA-BIAS's proposition worthy of consideration. They elected to formulate a program with "certain well-defined condition[s]" which would enable a foreign carrier to provide additional U.S. service, even though a bilateral right supporting such authority is not granted. Today, after much public debate, this initiative culminated into a program known as the Cities Program.

This paper includes: (1) The background from which international routes are awarded; (2) the organization of USA-BIAS; (3) the development and evolution of the Cities Program; and (4) an applicant and city award analysis. Following this review, the author provides his own conclusions and recommendations.

II. Background — Bilateral Review

The use of the air has in common with the use of the sea; it is a highway given by nature to all men. It differs in this from the sea that it is subject to the sovereignty of the nations over which it moves. Nations ought therefore to arrange among themselves for its use in that manner which will be of the greatest benefit to all humanity, wherever situated.

—ADOLF A. BERLE, Chairman of U.S. Delegation to the Civil Aviation Conference, Chicago, 1944

1. Expanding International Air Service Opportunities, DOT Order 89-10-19 (1989)[hereinafter Proposed Cities Program].
Nearly fifty years ago the international community convened in Chicago and recognized the need for an open link between nations in the interest of world unification. Fifty-two nations attended the conference with “virtually all of the civil aviation powers of the postwar era represented.” Their goal was to reach a multilateral regime that would enable air transportation to flow freely amongst nations. Political and economic differences, however, lead to a slow evolving process. This was not unforeseen by the world aviation leaders of this time. Today most countries exchange aviation-related rights by agreement in a bilateral exchange process. One commentator noted that “[m]ass response, even to the best of new ideas, comes slowly.” The traditional method for negotiating bilateral agreements is between two governments. The U.S. government is often influenced solely by U.S. airlines. The Cities Program culminated a half of century after the Chicago Convention, but reflects Adolf Berle’s idealism that aviation should be used to benefit all humanity. The program breaks the boundaries of traditional bilateral negotiations by granting route authority to foreign airlines through an exemption process. It brings together the collective input from both foreign and domestic airlines, U.S. communities, and the federal government.

III. U.S. AIRPORTS FOR BETTER INTERNATIONAL AIR SERVICE ORGANIZATION

“... air service supports economic development, and as such, is critical to each member’s continued economic prosperity.”

—FOUNDING PREMISE OF USA-BIAS AIRPORTS

In March, 1989, eight cities formed the caucus known as U.S. Airports for Better International Air Service a/k/a USA-BIAS. The original eight members include:


4. The countries present at the Chicago Convention ultimately defined what is known today as the “five freedoms” and three new freedoms which act as the basis for bilateral negotiations between two countries. See Paul S. Dempsey, et al., 1 Aviation Law and Regulation 10-7, 8 (1993).


Expanding International Air Service

(1) City and County of Denver, Aviation Division;
(2) Dallas/Fort Worth International Airport;
(3) Baltimore/Washington International Airport;
(4) Orlando International Airport;
(5) Metropolitan Washington Airports Authority;
(6) Kansas City International Airport;
(7) Phoenix Sky Harbor International Airport; and
(8) The Port of Portland.

Today the list has grown to more than thirty members. Traditional international airline service negotiations are conducted bilaterally amongst nations and, essentially, are driven by the economic needs of the air carriers. USA-BIAS members collectively board one-third of all U.S. travelers, but are allowed little input to the bilateral negotiation process. This factor created a central concern for USA-BIAS, given the important role transportation plays in the development of great economic centers.

Today, air transportation plays a vital role in commerce since "[about] 30 million people will cross the Atlantic by air, and only a handful will go by sea for the sheer novelty of the experience." In 1957 Sir George Edwards, of the Royal Aeronautical Society, said:

We tend to trade as far as we can conveniently travel in a day, and if we look back through history, we find that as two population centers have come within the span of a 12-hour journey, trade and travel between them has increased, stimulating the economy and population at either end.

The effect of bilaterally negotiating international routes only to major U.S. cities is reflected by the concentration of international economic activity in cities such as New York, Chicago, and San Francisco. International entities are most likely to conduct business in gateway cities because of the ease of access.

7. Twenty six additional members include: Seattle-Tacoma International Airport; State of Connecticut, Bradley International Airport; Detroit Metropolitan Wayne County Airport; Metropolitan Nashville Airport Authority; Reno Cannon International Airport; Lambert-St. Louis International Airport; Indianapolis International Airport; Tampa International Airport; New Orleans International Airport; Charlotte-Douglas International Airport; Cleveland Hopkins International Airport; Las Vegas McCarran International Airport; Minneapolis/St. Paul International Airport; Memphis/Shelby County Airport; Huntsville-Madison County Airport Authority; City of San Jose, California; Norfolk Airport Authority; New York State Department of Transportation, Stewart International Airport; Sarasota-Bradenton Airport; General Mitchell International, Milwaukee, Wisconsin; Allentown-Bethlehem-Easton Airports; Richmond International Airport; Dayton International Airport; and the Washington Airports Task Force.


10. Id. at 3.
USA-BIAS sponsored a study which revealed that the inauguration of 767 service between a U.S. city and London can expect to generate $240 million in the first year.\(^\text{11}\) (See Tables 1-3d.) Further, linking a U.S. city to Tokyo with 747 service was found to pump approximately $720 million into the economy annually.\(^\text{12}\) Neither of these figures take into account the economies of our foreign counterparts.

Because of these inequities, USA-BIAS sought to strike a balance between the economic concerns of the airlines with the individual economic development needs of U.S. cities. It did not try to change the negotiating strategy of the United States. The original caucus of eight cities, in their original inquest to the U.S. Secretary of Transportation, stated that they were "seek[ing] equality" between the justifiable needs of both the airlines and U.S. cities respectively.\(^\text{13}\)

In November of 1989, twenty-two members of the Senate Tourism Caucus petitioned the Bush Administration in support of the USA-BIAS inquest.\(^\text{14}\) The following year, the National Governors Association, attended by then-Governor Bill Clinton, endorsed the requested policy.\(^\text{15}\)

The U.S. Department of Transportation (DOT), recognizing the validity of their claim, promulgated the Cities Program in January, 1990, and expanded it in November, 1991. Details of the program will be provided in the next section.

**IV. THE CITIES PROGRAM**

**A. USA-BIAS REQUEST**

On March 31, 1989, USA-BIAS sent a letter to Samuel Skinner, then-Secretary of Transportation. The letter opened as follows:

> The U.S. communities that we represent own and operate some of the largest public airports in this country. Our airports accounted in 1987 for almost 20 percent of total passenger enplanements in the U.S. While many serve as "gateways" for international airline flights to and from the United States,

---

\(^{11}\) Kurth & Co., Inc., *Economic Impact of Int'l Air Services Instituted At USA-BIAS Cities Since June 30, 1989*, October 14, 1992 [hereinafter the Kurth Study].

\(^{12}\) Id.

\(^{13}\) Letter to then Secretary of Transportation, Samuel K. Skinner, from USA-BIAS, March 31, 1989 [hereinafter Skinner Letter].

\(^{14}\) USA-BIAS, Background Brief, October, 1992, p.1.

\(^{15}\) Id.
### TABLE 1
TOTAL PASSENGER AND CARGO ECONOMIC IMPACT

<table>
<thead>
<tr>
<th>Entity</th>
<th>Passenger</th>
<th>Cargo</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transatlantic</td>
<td>2,123,354,743</td>
<td>$129,245,147</td>
<td>2,252,599,890</td>
</tr>
<tr>
<td>Transpacific</td>
<td>878,042,950</td>
<td>$43,641,218</td>
<td>921,684,168</td>
</tr>
<tr>
<td>South America</td>
<td>173,775,100</td>
<td>$6,714,034</td>
<td>180,489,134</td>
</tr>
<tr>
<td>Canada</td>
<td>308,328,219</td>
<td>–</td>
<td>308,328,219</td>
</tr>
<tr>
<td>Mexico</td>
<td>295,836,710</td>
<td>–</td>
<td>295,836,710</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$3,779,337,722</strong></td>
<td><strong>$179,600,399</strong></td>
<td><strong>$3,958,938,121</strong></td>
</tr>
</tbody>
</table>

**Total Estimated Job Impact** 85,418

---

I/ Based on the study "The Economic Impact of an Open Skies Agreement between the United States and the European Community", by Brinn Campbell, with assistance from KCInc. Exhibit 7, page 1.

Jobs generated is estimated by dividing total impact by $46,348, the U.S. GNP per job in 1989.

- This table was prepared by Kurth & Company, Inc., Washington, D.C.
### TABLE 2

#### SUMMARY OF ECONOMIC IMPACT OF INTERNATIONAL AIR SERVICES INSTITUTED AT USA-BIAS CITIES SINCE JUNE 30, 1989

(except cargo)

<table>
<thead>
<tr>
<th>Entity</th>
<th>Annual Passengers</th>
<th>65% Load Factor</th>
<th>Foreign Visitors</th>
<th>Foreign Per Foreign Visitor Expenditure</th>
<th>Airline Expenditures</th>
<th>Primary Economic Impact with 2.5 Multiplier</th>
<th>Total Primary &amp; Export Expansion Impact from Visitors and Airline Expenditures</th>
<th>Foreign Per Fgn. Visitor Service in U.S.</th>
<th>Time Saved from Nonstop Service</th>
<th>Total Economic Impact in U.S.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transatlantic</td>
<td>612,222</td>
<td>389,011</td>
<td>188,946</td>
<td>$239,338,833</td>
<td>$54,986,755</td>
<td>$294,325,588</td>
<td>$735,813,970</td>
<td>$1,030,139,559</td>
<td>$658,595,115</td>
<td>$2,123,354,743</td>
</tr>
<tr>
<td>South America</td>
<td>44,928</td>
<td>25,203</td>
<td>19,082</td>
<td>17,967,269</td>
<td>8,304,696</td>
<td>26,271,965</td>
<td>65,679,912</td>
<td>91,951,877</td>
<td>49,441,018</td>
<td>31,876,169</td>
</tr>
<tr>
<td>Canada</td>
<td>135,356</td>
<td>87,981</td>
<td>47,070</td>
<td>27,065,278</td>
<td>4,459,098</td>
<td>31,524,376</td>
<td>78,810,940</td>
<td>148,952,510</td>
<td>48,017,609</td>
<td>1,022,784</td>
</tr>
<tr>
<td>Mexico</td>
<td>138,320</td>
<td>89,908</td>
<td>26,523</td>
<td>15,250,645</td>
<td>11,311,855</td>
<td>26,562,500</td>
<td>66,496,249</td>
<td>152,214,244</td>
<td>49,069,089</td>
<td>3,584,629</td>
</tr>
<tr>
<td>Total</td>
<td>1,121,562</td>
<td>720,082</td>
<td>369,646</td>
<td>$438,524,944</td>
<td>$110,546,372</td>
<td>$549,071,316</td>
<td>$1,372,678,291</td>
<td>$1,921,749,608</td>
<td>$219,098,318</td>
<td>$3,779,337,722</td>
</tr>
</tbody>
</table>

- This table was prepared by Kurth & Company, Inc., Washington, D.C.
<table>
<thead>
<tr>
<th>Entity</th>
<th>Direct</th>
<th>Indirect</th>
<th>Total Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transatlantic</td>
<td>$8,003,900</td>
<td>$121,241,247</td>
<td>$129,245,147</td>
</tr>
<tr>
<td>Transpacific</td>
<td>$2,702,615</td>
<td>$40,938,603</td>
<td>$43,641,218</td>
</tr>
<tr>
<td>South America</td>
<td>$415,787</td>
<td>$6,298,247</td>
<td>$6,714,034</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$11,122,302</strong></td>
<td><strong>$168,478,097</strong></td>
<td><strong>$179,600,399</strong></td>
</tr>
</tbody>
</table>

*This table was prepared by Kurth & Company, Inc., Washington, D.C.*
### TABLE 3b
TRANSATLANTIC AVERAGE TOTAL CARGO IMPACT FOR 1992

<table>
<thead>
<tr>
<th>To</th>
<th>From</th>
<th>A/L</th>
<th>Aircraft Code</th>
<th>Average Annual Freq</th>
<th>Capacity @ 60%</th>
<th>Annual Tons</th>
<th>Direct Impact</th>
<th>Indirect Impact</th>
<th>Total Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>IAD</td>
<td>BRU</td>
<td>UA</td>
<td>767</td>
<td>364</td>
<td>6,552</td>
<td>3,931</td>
<td>727,627</td>
<td>11,021,932</td>
<td>11,749,559</td>
</tr>
<tr>
<td>IAD</td>
<td>MAD</td>
<td>UA</td>
<td>767</td>
<td>364</td>
<td>6,552</td>
<td>3,931</td>
<td>727,627</td>
<td>11,021,932</td>
<td>11,749,559</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Scheduled Transatlantic Cargo Impact</td>
<td>$7,518,815</td>
<td>$113,893,293</td>
<td>$121,412,108</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transatlantic Charter Cargo</td>
<td>HSV</td>
<td>LUX</td>
<td>CV</td>
<td>74F</td>
<td>52</td>
<td>84</td>
<td>4,368</td>
<td>2,621</td>
<td>485,085</td>
</tr>
<tr>
<td>Total Scheduled &amp; Charter Transatlantic Cargo Impact</td>
<td>$8,003,900</td>
<td>$121,241,247</td>
<td>$129,245,147</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2/ Average number of pallet positions by particular aircraft configuration according to the Official Airline Guide's "Air Cargo Guide" times 3 tons per pallet position. Only widebody aircraft were included.

3/ Based on an estimated direct impact of $166.54 per ton, increased to reflect the increase of the Consumer Price Index from 362.7 in January, 1989 to 403.1 in January, 1991. Source: Wilbur Smith Associates, "The Economic Impact of Los Angeles International Airport", 1988, pg. 5 of Section 2 and pg. 8 of Section 3.

4/ Based on an estimated indirect impact of $2,522.71 per ton, increased to reflect the increase of the Consumer Price Index from 362.7 in January, 1989 to 403.1 in January, 1991. Source: op. cit., pg. 8 of Section 3.

* This table was prepared by Kurth & Company, Inc., Washington, D.C.
### TABLE 3c

**TRANSPACIFIC AVERAGE TOTAL CARGO IMPACT FOR 1992**

<table>
<thead>
<tr>
<th>To</th>
<th>From</th>
<th>A/L.</th>
<th>Aircraft Code</th>
<th>Average Annual Freq</th>
<th>Capacity Per Freq (Tons) 2/</th>
<th>Total Annual Capacity (Tons)</th>
<th>Annual Tons @ 60% Load Factor</th>
<th>Direct Impact 3/</th>
<th>Indirect Impact 4/</th>
<th>Total Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>PDX</td>
<td>NGO</td>
<td>DL.</td>
<td>M11</td>
<td>364</td>
<td>36</td>
<td>13,104</td>
<td>7,862</td>
<td>$1,455,254</td>
<td>$22,043,863</td>
<td><strong>$23,499,111</strong></td>
</tr>
<tr>
<td>SJC</td>
<td>NRT</td>
<td>AA</td>
<td>M11</td>
<td>312</td>
<td>36</td>
<td>11,232</td>
<td>6,739</td>
<td>1,247,361</td>
<td>18,834,740</td>
<td><strong>20,142,101</strong></td>
</tr>
</tbody>
</table>

**Total Transpacific Cargo Impact**

|                | 2,702,615 | 40,938,603 | **43,641,218** |

---

2/ Average number of pallet positions by particular aircraft configuration according to the Official Airline Guide’s “Air Cargo Guide” times 3 tons per pallet position. Only widebody aircraft were included.

3/ Based on an estimated direct impact of $166.54 per ton, increased to reflect the increase of the Consumer Price Index from 362.7 in January, 1989 to 403.1 in January, 1991. Source: Wilbur Smith Associates, “The Economic Impact of Los Angeles International Airport”, 1988, pg. 5 of Section 2 and pg. 8 of Section 3.

4/ Based on an estimated indirect impact of $2,522.71 per ton, increased to reflect the increase of the Consumer Price Index from 362.7 in January, 1989 to 403.1 in January, 1991. Source: op. cit., pg. 8 of Section 3.

- This table was prepared by Kurth & Company, Inc., Washington, D.C.
### TABLE 3d

**SOUTH AMERICAN AVERAGE TOTAL CARGO IMPACT FOR 1992**

<table>
<thead>
<tr>
<th>To</th>
<th>From</th>
<th>A/L Code</th>
<th>Aircraft Capacity (Tons) 2/</th>
<th>Annual Per Freq Capacity (Tons)</th>
<th>Total Annual Capacity (Tons)</th>
<th>Annual @ 60% Load Factor</th>
<th>Direct Impact 3/$</th>
<th>Indirect Impact 4/$</th>
<th>Total Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>IAD</td>
<td>BSB</td>
<td>TR 763</td>
<td>3,744</td>
<td>2,246</td>
<td>$415,787</td>
<td>$6,298,247</td>
<td>$6,714,034</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total South American Cargo Impact

<table>
<thead>
<tr>
<th></th>
<th>Direct Impact 3/$</th>
<th>Indirect Impact 4/$</th>
<th>Total Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$415,787</td>
<td>$6,298,247</td>
<td>$6,714,034</td>
</tr>
</tbody>
</table>

---

2/ Average number of pallet positions by particular aircraft configuration according to the Official Airline Guide's "Air Cargo Guide" times 3 tons per pallet position. Only widebody aircraft were included.

3/ Based on an estimated direct impact of $166.54 per ton, increased to reflect the increase of the Consumer Price Index from 362.7 in January, 1989 to 403.1 in January, 1991. Source: Wilbur Smith Associates, "The Economic Impact of Los Angeles International Airport", 1988, pg. 5 of Section 2 and pg. 8 of Section 3.

4/ Based on an estimated indirect impact of $2,522.71 per ton, increased to reflect the increase of the Consumer Price Index from 362.7 in January, 1989 to 403.1 in January, 1991. Source: op. cit., pg. 8 of Section 3.

* This table was prepared by Kurth & Company, Inc., Washington, D.C.
existing U.S. international aviation policy in many cases has prevented our communities — representing the major growth centers in the United States today — from securing more "gateway" services and direct international flights to the major cities of Europe, the Orient, Canada, and South America.16

USA-BIAS predicated its argument on economic development grounds. It suggested that if bilateral negotiators continued to work under a "rubric of balanc[ing] [airline] benefits," that the economic interest of U.S. cities, and thus, the country as a whole, would be jeopardized.17

In an effort to block or delay competition, U.S. carriers often raise "doing-business" problems as a means to create entry-obstacles. This blocking tactic is evident in the responses to Cities Program applications illustrated below. The DOT, however, must evaluate the public interest when deciding matters of this nature. The public interest criteria, in part, is that the DOT must maintain a "comprehensive and convenient system of continuous scheduled interstate and overseas airline service for small communities and for isolated areas in the United States."18 The DOT must maintain a regulatory environment that is responsive to the needs of the public, particularly with respect to the air transportation system, so that it meets U.S. interests in domestic and foreign commerce.19 USA-BIAS noted that the "Federal Aviation Act (§1102(b)) require[d] U.S. negotiators to pursue an increase in the number of nonstop United States gateway cities and opportunities for carriers of foreign countries to increase their access to United States points."20

USA-BIAS made its strongest argument to Skinner in closing:

We favor a more balanced U.S. international aviation negotiation policy — one better balanced between the interest of U.S. airlines and U.S. communities. Our communities are willing to work with U.S. flag carriers and to support their introduction of new services. But when a U.S. carrier is unable or unwilling to serve an international route of economic benefit to an American City, then we would ask that the federal government set aside the objections of that airline to service by another carrier, whether foreign or U.S., in favor of the economic interests of the region to be served and the convenience of the traveling public. We cannot continue to keep our markets closed to new competitors just because certain U.S. airlines may lose business or because U.S. airlines seek nothing in return in the foreign market. .21

17. Id. at 2.
21. Id. at 3.
One of the greatest points to note, is that USA-BIAS favored the development of U.S. carrier service over foreign air carrier service, but it recognized the importance of aviation as a means to enhance international business for U.S. industries and communities. The proposal considered the greater interest of our country over that of a select segment of corporate America: the airline industry.

On October 5, 1989, Samuel Skinner, then-Secretary of Transportation, addressed the Transportation Symposium at Georgetown University on USA-BIAS's request. Secretary Skinner found merit in the request and told the audience that he would direct his staff to respond to our U.S. community's requests. Skinner challenged his audience to help him define the role of government in international aviation and to encourage a competitive world environment. Skinner stated that U.S. negotiators are doing "too good a job" in getting the best deal possible for the U.S. airline industry and that "our communities understand the importance of a healthy U.S. airline industry." He acknowledged the fact, however, that international air service is critical to economic development, regardless of flag.

Skinner suggested that the traditional bilateral negotiating process sometimes fails to work when a U.S. carrier has no immediate plans to expand their service; and thus, U.S. communities should be given a voice. Skinner characterized this unbalanced negotiating process in which only "one side is hungry" as a "prescription for frustration, if not confrontation." The proposed Cities Program was designed to respond to this problem so that more U.S. Cities could enjoy the economic benefits of having international air service.

B. DOT Proposal

I. General

On October 10, 1989, DOT submitted its version of the Cities Program for public comment. The DOT emphasized that it did not intend to replace the bilateral negotiating process with this proposal. It stated that "in the majority of cases, [the bilateral] negotiating process advances..."
the public interest, including the interest of communities and carriers.\textsuperscript{29} The definition of public interest is vague in this case. Bilateral negotiations are conducted between countries on behalf of the airlines from their respective nations. Routes, including destinations at U.S. cities that are traded between these parties, historically lack community input. Generally, large-hub gateway airports are at the center of these negotiations from which international route authority is granted. The Cities Program, however, gives communities and its airports the ability to attract international service based on its own economic development objectives. The DOT in its proposal recognized that communities lack the ability to secure international service when a U.S. carrier does not have immediate plans to expand its service to a particular destination or where they do not need additional bilateral authority.\textsuperscript{30}

2. Proponent Perspectives

USA-BIAS was joined by Members of Congress, other U.S. airport authorities and cities, foreign airlines, and private individuals in support of the proposed DOT order. Additionally, they received conditional support from several U.S. carriers; including ABX Air, America West, American, Emery, and United Parcel Service.

The airlines supporting the measure stated that "[they] support the proposal as a way to achieve a more open civil aviation environment."\textsuperscript{31} Numerous private individuals sent letters supporting the proposal stating that they "look[ed] forward to more international air service at their communities."\textsuperscript{32}

The major supporters of the measure, other than the airlines, raised concerns that the proposal may be too restrictive and may "prevent carriers from operating viable services."\textsuperscript{33} They suggested that the requirement to have a procompetitive agreement should not be a prerequisite for route approval under the program. The DOT awarded authority in several cases under the program absent a procompetitive bilateral agreement.\textsuperscript{34} A few of the proponents felt that all-cargo services should be included.

\textsuperscript{29} Id.

\textsuperscript{30} Id. The DOT gave 30 days for interested parties to address the proposal and an additional 15 days after that for reply comments to be submitted. In addition to publishing this order in the Federal Registrar, the DOT serviced a number of parties likely to be affected by the final decision.

\textsuperscript{31} Proposed Cities Program, supra note 1, at 2.

\textsuperscript{32} Id.

\textsuperscript{33} Id. at 1.

\textsuperscript{34} See Lufthansa, DOT Order 91-7-39 (1991); KLM, DOT Order 91-9-22 (1991); LTU, DOT Order 91-11-6 (1991). Each of these were approved in the spirit of negotiating a procompetitive bilateral agreement between the US and Germany.
3. Opponent Perspectives

The Airline Pilots Association International (APA), the National Air Carrier Association (NACA), and the Air Transport Association (ATA) all opposed the program. They felt that the Cities Program would adversely affect the U.S. airline industry by "eroding traffic at existing gateways." ATA also felt that "procompetitive agreements" should include the specific authority approved by the Cities Program.

However, the purpose of the Cities Program is to allow communities to secure international service when U.S. carriers decline. The program would not be necessary if the U.S. carriers reached an agreement with the respective cities in the first place. Additionally, route authority, as discussed below, is granted on a one-year basis. Therefore, if a U.S. carrier later decides to enter the same market, the foreign carrier's home country must reciprocate in granting route authority, or jeopardize the route granted to their carrier. The first condition of the Cities Program is that "a U.S. or foreign carrier does not provide . . . service to that community from the same country." It does not, however, address what happens if a U.S. carrier later decides to enter the market. The DOT responded to this question by discouraging anticompetitive practices by U.S. carriers. This will be discussed in more detail later in this note.

In addition to the general airline and pilot association responses, Pan American, Rosenbalm, and Trans World Airlines responded individually in opposition. These airlines stated that "they rely on the smaller U.S. communities to feed their hubs and that they do not see the added benefit if a passenger travels to a country by a foreign carrier over a foreign hub rather than by a U.S. carrier over a U.S. hub." The latter part of their argument is unfounded in that the service sought by U.S. communities is to provide service not otherwise provided by U.S. carriers. USA-BIAS notes that "the records show that the advent of service at the non-traditional gateways represented by USA-BIAS members stimulates overall industry growth rather than diversion from traditional gateway airports."

---

35. Proposed Cities Program, supra note 1, at 2.
36. Id.
37. Id.
40. USA-BIAS, Background Brief, supra note 8, at 3.
4. DOT Conclusions — Original Cities Program/Final Order

The DOT's proposal was adopted as proposed. It merely explained its position for establishing the respective requirements imposed. From the inception of the program in January of 1990 until nearly two years later, the DOT did not relent from its position on these requirements. Thus, it is important to distinguish between the original program and the 1991 amendments to reflect how the DOT's strict adherence to its proposal affected international operations approved under the program. Under the original program, a foreign flag carrier was required to meet the following six criteria to receive Cities Program authority:

1. A U.S. or foreign carrier does not provide nonstop or one-stop single-plane international air service to that community from the same foreign country.

The DOT decided to retain this condition without change, despite comments suggesting that the authority should be broadened. The DOT stated that the purpose of the program is to accommodate communities which lack access to convenient service to a particular foreign country. Proponents found the program too restrictive. They felt that one-stop service was not equal to nonstop service and that authority should be granted by city, applying a city-pair test, rather than by foreign country. This would allow cities to seek service to a particular international city not serviced, rather than to a country not serviced, by a U.S. carrier. Although U.S. cities may encourage foreign carriers to service their communities, it is the foreign carrier, and not the city, who may apply for Cities Program authority. Because of this, the DOT feared that if a city-pair test, rather than a foreign country test, is used, foreign carriers would attempt to use the Cities Program as a means to secure authority between major U.S. gateway cities and small unserved communities in their homelands. If this occurred, the premise of the Cities Program "to expand international air service to more U.S. cities" would be bastardized. To remedy this concern, the DOT should review the applications under the

---

41. The DOT amended its original program on November 20, 1991, after protest by the recipients of route authority under the program and from the respective U.S. cities that they served. The original proposal proved to be too restrictive. See DOT Order 91-11-26.

42. Original Cities Program, DOT Order 90-6-20 (1990) [hereinafter Original Cities Program].

43. This condition was modified by DOT Order 91-11-26 (1991). A U.S. carrier as of this writing may only block a foreign applicant if it provides nonstop service to the same city-pair. See Part V(C) below.

44. Original Cities Program, supra note 42, at 2.

program on a case-by-case basis. This would mitigate this problem and
would allow the respective U.S. communities to increase direct service to
more international destinations in the spirit of the program.46

(2) There is a pro-competitive agreement in place with the homeland coun-
try; and thus, a basis does not exist for a traditional aviation trade to obtain
benefits for U.S. airlines.

The DOT stated that the key elements that it will require under this
"procompetitive condition" include open entry, unrestricted capacity,
U.S. rights to operate service from any point in the U.S. to the foreign
country, and pricing freedom.47 The most significant issue raised by the
DOT — pricing — has not created a problem to date. In the event that
pricing becomes an issue, the DOT stated that "pricing environments
[will be reviewed] on a case-by-case basis."48 Other procompetitive con-
cerns raised include noninclusivity, computer reservation systems, airport
terminal facilities, ground-handling, and currency and remittances. Each
of these issues were raised as "doing business problems," with exception
to the latter, in some of the Cities Program applications submitted to
date. Part V below illustrates this point in more detail.

(3) The foreign carrier's proposal does not involve service to and from
third-world countries.

In response to comments from the foreign carriers, the DOT agreed
not to place an absolute prohibition on third-country traffic. Almost all
international flights carry third-country traffic. Thus, the foreign carriers
stated "an absolute prohibition on carrying third-country traffic would
render the program inoperable."49 The DOT imposed a three-tier test
stating that the carrier must not (1) place undue reliance on third-country
traffic; (2) operate or hold out single-plane service or any service with
single flight numbers to countries beyond their homelands; nor (3) adver-
tise any third-country services via intermediate points or connecting serv-
ces in the public media.50 If a foreign applicant meets this criteria, then
it will be permitted to carry third-country passengers, both intermediate
and beyond their homelands. Foreign carriers, to maintain the vitality of
the program, however, will not be precluded from listing such services in
computer reservation systems. This compromise seems fair and meets the
concerns of both the proponents and the opponents.

46. Note that this concern was addressed in the 1991 amendments.
47. Original Cities Program, supra note 42 at 3.
48. Id.
49. Id. at 4.
50. Id.
(4) Interested U.S. parties have not raised overriding public interest reasons for denying the requested authority.

In addition to the concerns raised in (2) above, if a U.S. carrier has firm plans to provide the requested service within a reasonable time frame, the DOT may decline to award Cities Program authority. As illustrated in subsequent applications, the DOT apparently reviews this condition on a case-by-case basis. When a U.S. carrier raises a "doing business problem" or other public interest issues, the DOT gives deference to the foreign applicant.\(^5\)

(5) The foreign carrier has firm plans to operate the proposed service.

The DOT adhered to the 90-day start-up period for foreign carriers under the program. This is the same period imposed on U.S. carriers. DOT indicated that it would be flexible on this item. Subsequent applications confirm DOT flexibility as reviewed in Part V below.

(6) The foreign carrier meets all other applicable licensing standards.

In addition to the licensing standards of fitness and ability, all applicants must meet the rules applicable to exemption proceedings and other public interest standards.\(^5\)

Based upon the modifications and qualifications in conditions (1) through (6), the DOT issued the order, only three months after it issued its proposal, and invited interested and eligible carriers to apply for authority under the Cities Program. Despite comments raised, the DOT did not feel that the limitation granting one-year authority would impede the program.\(^5\) In practice, once a carrier receives authority under the Cities Program, upon expiration they may invoke what the DOT calls the "auto extension provisions."\(^5\) It is not unusual for DOT Orders to be issued after Cities Program route authority has actually expired. The DOT explains that the "auto extension provisions" are more important than the DOT Order.

In sum, advocates of the program considered the proposal a "first step,"\(^5\) while opponents thought the proposal would "erode traffic at existing U.S. gateways."\(^5\) The negative feedback is not surprising, considering the only opponents to the measure were U.S. air carriers and their

---

54. Based on a telephone conversation with Alan Brown, DOT Licensing Division, February 12, 1994.
55. *Original Cities Program*, supra note 42, at 1.
56. Id. at 2.
respective associations. The carriers themselves, as noted, were not unified in their response. Conversely, advocates of the Cities Program represent a diverse cross-section of U.S. economic and sociopolitical constituencies. USA-BIAS would argue that this DOT Order is more restrictive than what it hoped for. However, it raised a valid public concern that received national attention; and the matter was acted upon in less than one year from the organization of the caucus.

C. THE 1991 AMENDMENTS

On May 7, 1991, more than one year after the inception of the Cities Program, USA-BIAS filed several requests to the DOT.57 It claimed that the program was not meeting the public or private sector expectations for improved international air service. To rectify what it claimed as “restrictive,” USA-BIAS suggested eight modifications to the Cities Program as follows:

1. Existing one-stop service by a U.S. carrier should not block a foreign carrier’s application for nonstop service;
2. To be eligible to block approval of a foreign carrier application, the U.S. carrier nonstop service must be in the same city-pair, not to or from another point in the same foreign country;
3. Third-country traffic may be carried on flights to or from the foreign carrier’s homeland up to daily service without restriction as to amount of third-country traffic, or ability to advertise connecting service;
4. Third-country traffic may be carried on Seventh Freedom58 basis provided the U.S. has a liberal agreement with the carrier’s homeland and U.S. carriers could provide the service in the city-pair market;
5. Eligible services under the Cities Program should include both scheduled combination and scheduled all-cargo international air services;
6. To be eligible to block approval of a foreign carrier’s application, U.S. carrier’s ‘firm plan’ to initiate service should be codified as one that is publicly announced with a specific start-up date prior to the date of a foreign carrier’s application under the Program;
7. A foreign carrier shall have up to nine months to inaugurate new service under the program; and

58. The Seventh Freedom right is “an airline, operating entirely outside one territory of its country of registry, has the right to fly into the territory of another country and there discharge, or take on, traffic coming from, or destined to a third country.” See supra note 4, at 10-8.
8. The DOT should act on a foreign carrier's application within 60 days, or else the application is approved automatically for one year.\textsuperscript{59}

To justify these proposed amendments, consider, correspondingly, the following:\textsuperscript{60} (1) There is no substitute for nonstop service which should take precedence over U.S. carrier one-stop service; (2) the program's country-destination test restricts service to a single route unnecessarily limiting service opportunities to U.S. communities; (3) the benefits of new international service with respect to reliance on third-country traffic outweighs the potential harm that U.S. carriers may experience; (4) since holders of Cities Program authority maintain liberal agreements with the U.S., Seventh Freedom rights should be allowed to generate experimental data on the feasibility of permitting these rights; (5) the market place should determine whether scheduled combination or all-cargo service under the program is warranted, not the DOT; (6) the definition of "firm plan" proposed by USA-BIAS should be incorporated into DOT guidelines for notice purposes and to mitigate anticompetitive practices; (7) the DOT should act within this [60-day] time frame, otherwise the request should be approved automatically for one year. The spirit of the program may be compromised if unduly delay tactics are used by U.S. carriers.

World Airways and the Airline Pilots Association are the only two respondents who entirely opposed the USA-BIAS proposed amendments. Five parties fully supported all aspects of the USA-BIAS request; however, only three are American citizens. These parties included: American West Airlines, the Department of Justice, the Pittsburgh Parties, Swissair, and Zambia Airways.\textsuperscript{61} Nine other parties responded with mixed reactions.\textsuperscript{62}

The DOT adopted two of USA-BIAS's recommendations. It agreed to Proposal No. 1, to eliminate the ability of one-stop, single-plane service to block proposed nonstop service. The DOT noted that only one U.S. combination carrier, of the five to file comments, opposed this element.\textsuperscript{63} The DOT also agreed to Proposal No. 2, to substitute the city-pair test for the current country designation test.\textsuperscript{64} With respect to No. 2, the DOT stated they "now believe that the benefits to be gained by the affected U.S. communities are likely to far outweigh any possible dilution

\textsuperscript{59} Supra note 57, at 1, 2.
\textsuperscript{60} USA-BIAS justifications provided to the DOT as expanded by the author.
\textsuperscript{61} DOT Order 91-11-26 at 9 (1993).
\textsuperscript{62} See Table 4 for details.
\textsuperscript{63} Id.
\textsuperscript{64} DOT Order 91-11-26 at 2, 3 (1990).
### TABLE 4
PETITIONER RESPONSES

<table>
<thead>
<tr>
<th>Petitioner</th>
<th>Proposal Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
</tr>
<tr>
<td>American Samoa</td>
<td>NC</td>
</tr>
<tr>
<td>Cargolux Airlines</td>
<td>NC</td>
</tr>
<tr>
<td>Hawaii, The State of</td>
<td>NC</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>NC</td>
</tr>
<tr>
<td>United Air Lines</td>
<td>NC</td>
</tr>
<tr>
<td>American Airlines</td>
<td>NC</td>
</tr>
<tr>
<td>Delta Air Lines</td>
<td>FN</td>
</tr>
<tr>
<td>Federal Express</td>
<td>NC</td>
</tr>
<tr>
<td>Pan American Airlines</td>
<td>N-OBJ</td>
</tr>
<tr>
<td>Trans World Airlines</td>
<td>OP</td>
</tr>
<tr>
<td>NACA</td>
<td>NC</td>
</tr>
</tbody>
</table>

NC = No Comment; SP = Supports; OP = Opposed; N-OBJ = No Objection; DEFER = Defer; FN = Footnote

---

1. Hawaii and ATA expressed concern about inspector levels of Federal Inspection Services. They support liberalization of the ban on third-country traffic. They urge extensions of the 90-day start up criterion.

2. Id.

3. No objection so long as nonstop/one-stop is a reciprocal right.

4. No objection so long as other third country bilateral rights are not affected.

5. Defer until intra-EC cargo service issues are resolved.
Expanding International Air Service

of the aims of [the] program." The DOT declined to ease the numerical limits on third-country traffic (No. 3) or to permit an applicant to carry Fifth-Freedom traffic on a Seventh-Freedom basis (No.4). It stated that the program was not designed to circumvent the bilateral negotiation process and instead decided to adhere to a case-by-case approval on these items. The DOT noted that combination service approved under the Cities Program afforded additional cargo capacity. However, it did not find a need to expand the Cities Program to include all-cargo operations (No. 5) as suggested by USA-BIAS. Its decision to decline on this item was based on a lack of showing by U.S. communities that this need exists. Thus, it is not unreasonable to expect that this item will ultimately be included under the program. Proposal 6 and 7 of USA-BIAS's request to adopt a "firm plan" concept and to provide for a "nine-month start-up period" were deemed not necessary. The DOT stated that these items are better handled on a case-by-case basis.

Although these items may seem trivial, the "firm plan" concept is worthy of consideration. When a U.S. carrier blocks a foreign applicant's ability to gain authority under the program on this basis and later declines to start service, it is not just the foreign carrier who is hurt by its inaction; but additionally, the respective U.S. communities. For every day that service is delayed, the U.S. economy is proportionately affected. The eighth item listed by USA-BIAS to provide for a sixty-day DOT action period is only critical for new applicants. The request is reasonable considering that U.S. communities lose when the DOT takes an unnecessarily long time to approve City Program applicants. The DOT, however, declined to adopt this item.

In summary, today a foreign applicant who wishes to obtain authority under the Cities Program must meet the original six conditions listed above. However, the proposed nonstop service can only be blocked by the same nonstop service, not by one-stop service. Additionally, a U.S. carrier may not block an applicant merely because it serves the applicant's home country. Instead, a U.S. carrier must service the same city-pair to block the foreign applicant's authority.

D. LIMITATIONS

A community must secure or have U.S. Customs Service and Immigration and Naturalization Service at their airport to take advantage of the Cities Program. The requirement for both services may be waived under a common agreement between the two agencies giving "cross-des-

---

65. Id. at 3.
66. Id.
67. Id. at 4.
Communities may secure these services by either qualifying as a "port-of-entry" or by obtaining a user-fee agreement with U.S. Customs. To obtain port-of-entry status, an airport must deplane 15,000 international passengers annually and process 2,500 commercial cargo shipments per year. To obtain user-fee status, U.S. Customs establishes various personnel cost and facility requirements. The approximate cost to bring in a Customs official (including salary, training, relocation, etc.) is $75,000 for the first year and about $50,000 for each year thereafter. Today, in addition to the port-of-entry airports, there are approximately twenty-one user-fee airports. Airports located near existing port-of-entry facilities may work out a cost of services agreement with Customs to send officials from these nearby facilities to their own.

V. Applicant & City Award Analysis

A. City by City Analysis

Since the inception of USA-BIAS, nine member cities have gained services to seventeen international destinations. These nine cities include Cincinnati; Baltimore; Minneapolis/St. Paul; Miami; Detroit; Philadelphia; Washington, D.C.; Charlotte; and Orlando. Estimates indicate 83,000 jobs and $3.8 billion a year in economic activity flows from these services approved under the Cities Program. Below is an analysis, city by city, of the U.S. communities who have received international service under the Cities Program.

Baltimore

On March 27, 1990, the DOT granted the first authority under the Cities Program. KLM, a foreign air carrier of the Netherlands, was granted the right to engage in scheduled air transportation of persons, property, and mail between Amsterdam, the Netherlands, and Baltimore.
Maryland. The DOT responded to KLM's request filed on February 23, 1990, one month later, only two months after the promulgation of the Cites Program.

KLM's application was supported by the State of Maryland. It stated "[that] there is a demonstrated need for the operations." However, Pan American World Airways, Inc. (Pan Am), and Trans World Airlines, Inc. (TWA) opposed KLM's request. They expressed a concern that KLM will rely on third-country traffic, in violation of the third condition of the Cities Program, and that KLM should have the burden to show otherwise. Further, TWA expressed a concern that it was experiencing "doing-business problem[s]." TWA's latter concern, if true, would violate the second condition of the Cities Program.

KLM responded, stating "with respect to the undue reliance issue raised . . . KLM understands that it is bound to observe [this condition]." KLM suggested that the other issue should be left for resolution between the airport authority and the respective airlines.

The DOT found the U.S.-Netherlands Air Transport Services Agreement to be procompetitive. It found that the agreement provides for open entry, unrestricted capacity, U.S. rights to operate service from any point in the U.S. to the Netherlands, and pricing freedom for U.S. carriers. The DOT recognized Pan Am and TWA's concern relative to third-country reliance; however, it stated that "[it] could rely on these commitments in light of the fact that [it was] awarding exemptions limited to one year." DOT's approval was in the spirit of the Cities Program allowing new service to communities not otherwise served. Since neither Pan Am nor TWA were willing to enter the market, the DOT acknowledged their concern but gave deference to the applicant. In response to TWA's "doing-business" concern, the DOT placed the burden on TWA to prove exactly what problems existed. Since TWA did not meet this burden, the DOT found that granting approval of KLM's request was in the public interest.

---

77. Id.
78. Id.
79. Id.
80. Id. at 2.
81. Id.
83. Supra note 74, at 2.
84. Id.
85. Id. at 3.
KLM’s authority to serve Baltimore was extended based on its original conditions set forth by the DOT in 1990. In 1991, Ladeco, S.A., requested that its authority, originally approved between Santiago and Washington Dulles, be transferred to Baltimore. Ladeco’s request was granted and it continues to service Baltimore with Boeing 767 service twice weekly.

Charlotte

Lufthansa German Airlines (Lufthansa) applied for Cities Program authority to service Charlotte, North Carolina. At the time of Lufthansa’s application, a procompetitive agreement did not exist. However, a bilateral agreement did exist between the U.S. and the Federal Republic of Germany (FRG). The bilateral agreement specifically addressed pricing freedom based upon a country-of-origin. The U.S. issued concerns earlier relative to FRG-originating fares; however, Lufthansa stated that “this issue will not be resolved, or affected, by whether [it] receives authority [as] request[ed] here.”

Pan Am, TWA, the Air Line Pilots Association (ALPA), and the Port of Seattle opposed the request. They stated that the U.S.-FRG bilateral agreement is not procompetitive and that there are overriding public interests at stake which would undercut the U.S.-FRG bilateral negotiation process. The carriers expressed a concern that they were experiencing doing-business problems. In this case they specifically illustrated the problems they were experiencing, unlike TWA and Pan Am’s earlier response to the KLM application to Baltimore. The problems they noted include: difficulty in gaining access to airports, liberalized charter rules, ground handling, intermodal transportation, and the ability to change the

---

86. DOT Order 91-7-33 (1991); DOT Order 93-2-29. KLM later requested that its authority be transferred to Washington Dulles Airport. This request was granted. Typical service provided by KLM includes Boeing 747 service five times a week during peak season (May to October). Some of its 747 service includes upper level cargo service. Based on a telephone conversation with Vincent Rivellese, Air Service Development Manger, Washington Airports Authority, April 21, 1994.


89. Application filed February 27, 1990.

90. Supra note 88, at 1.

91. Id.

92. Id.
gauge of service.\textsuperscript{93} Federal Express filed an answer but did not object. It merely wanted Lufthansa to address the impact of its operations on the cargo market.

The communities of Charlotte, Tampa Bay, and the Port of Portland; and USA-BIAS filed answers in support of Lufthansa's request. They predicated their support on the basis that the traveling public would benefit, and that local, regional, and national economic development would result.\textsuperscript{94} They further suggested that approval of the request would "enhance U.S.-FRG relations and [would] provide a positive climate in upcoming U.S.-FRG bilateral aviation negotiations."\textsuperscript{95} The DOT ultimately approved the route for a period of 179 days. It stated that authority "is contingent upon the achievement of satisfactory progress toward the establishment of a liberalized regime for the setting of fares for air transportation originating in FRG."\textsuperscript{96} The DOT used the Cities Program in this case as a lever for negotiating a more liberal bilateral agreement. Lufthansa's authority was extended for multiple six-month periods as bilateral negotiations continued, despite protest by Pan Am and TWA.\textsuperscript{97} In February of 1992, the DOT granted authority for a period of one-year.\textsuperscript{98} This authority allowed Lufthansa the ability to conduct this service, either separately or in combination with its terminal point, in Houston, Texas. Lufthansa's election to operate conterminously with Houston would result in its enjoyment of cabotage rights otherwise restricted by U.S. law.\textsuperscript{99} The DOT stated that its decision "[was] based on established public interest factors deriving from the context of continuing aviation negotiations with the FRG."\textsuperscript{100}

Today, Charlotte receives international service from USAIR. KLM no longer services this destination.\textsuperscript{101} A conversation with the airport administration did not reveal why KLM no longer serves its facility. The DOT, however, has not precluded the continuation of Cities Program authority just because a U.S. carrier later enters the market. KLM may have dropped the service for other market considerations. The traffic,

\textsuperscript{93} Id. "Gauge of Service" usually applies to downsizing aircraft for approved service point beyond the destination airport.

\textsuperscript{94} Id.

\textsuperscript{95} Id.

\textsuperscript{96} Id. at 1.

\textsuperscript{97} DOT Order 91-2-41 (1991); DOT Order 90-6-38 (1990).


\textsuperscript{99} Cabotage is transportation of passengers, cargo, or mail by a foreign airline between two points in the same nation and is prohibited by \$1108(b) of the Federal Aviation Act, See generally, supra note 3, at 10-68 (1992).

\textsuperscript{100} Id. at 2.

\textsuperscript{101} Based on a telephone conversation with the office of Haley Genre, public relations department of the airport, April 20, 1994.
most likely, could not support two airlines, particularly since a substantial portion of USAIR stock was recently purchased by British Airways. Thus, USAIR, through this investment scheme, now accesses more European destinations than before.

Philadelphia

Swissair, Swiss Air Transport Company, Ltd. (Swissair), was granted authority to engage in scheduled air service between Zurich, Switzerland, and Philadelphia, Pennsylvania, after a finding that it met all conditions of the Cities Program. The authority included the right to "coterminate" the Philadelphia operations with its existing U.S. service to Boston, Massachusetts. The DOT allowed cotermination in the spirit of the Cities Program based upon public interest grounds. Swissair's proposal was first met by a petition filed by American Airlines, which was ultimately withdrawn.

The DOT later extended Swissair's authority pursuant to the DOT's renew exemption clause. The authority was granted by telephone in recognition of the imminence of its operations and to guard against any interruption in service. The DOT emphasized the third condition of the Cities Program, that Swissair must not advertise or hold out single-plane service to countries beyond Switzerland, nor may it rely upon traffic from other countries. Swissair continues to enjoy Cities Program rights in Philadelphia pursuant to the autoextension provisions of the DOT. The authority, however, continues to be coterminous with Boston. Philadelphia enplanes a minimal 1,600 passengers annually to Zurich through Boston. By allowing coterminous operations, the DOT is allowing more U.S. cities to gain improved access to international air service.

Detroit

KLM was the first airline and country, respectively, to apply for Cities Program authority and the first to be denied. Until KLM's application to service Detroit, the DOT approved all other Cities Program applications. Its Detroit application, however, did not meet all program criteria. Pan American World Airways, Inc., operated one-stop,
change of gauge service in the Detroit-Amsterdam market. It planned to
expand that service to single-plane service within the same month in
which the application was filed.\textsuperscript{109}

The application received protest from Pan Am; Trans World Airlines, Inc.; and the Airline Pilots Association (ALPA). Pan Am and
TWA questioned Northwest's recent motivation for terminating its ser­
vice in the Detroit-Amsterdam market. Northwest dismissed their in­
quiry as "normal scheduling process."\textsuperscript{110} Northwest garnered support
from United Airlines, USA-BIAS, Governor Blanchard, the State of
Michigan, the Port of Seattle, and the Metropolitan Detroit AFL-CIO.
United said that "in markets that remain open to U.S. airlines, we should
not be opposed to service expansion and increased competition."\textsuperscript{111}
USA-BIAS suggested that if the DOT did not approve KLM's request, a
"dampening effect" on future foreign air carrier requests under the pro-
gram would result.\textsuperscript{112}

The DOT in evaluating the public interest looked at three factors: (1)
did the U.S. carrier plan to provide single-plane service to the same mar­
ket; if so (2) how soon did they plan to start serving the market; and (3)
what frequency of service would be provided.\textsuperscript{113} Based on these factors,
the DOT denied KLM's request since Pan Am had "firm plans" to ser­
vice the market.

Nearly one year later, KLM received a grant of authority under the
program.\textsuperscript{114} Pan Am no longer serviced the Detroit-Amsterdam market;
and therefore, the DOT, based on the procompetitive agreement be­
tween the Netherlands and the U.S. approved KLM's request. ALPA
filed the only answer opposing KLM's request, stating that "the [DOT]
should require KLM to provide detailed traffic analyses to demon­
strate that it will not rely excessively on third-country traffic."\textsuperscript{115} The DOT
noted that if all of the provisions of the Cities Program are not met, that
it may "amend, modify, or revoke . . . [its] authority at any time and
without hearing."\textsuperscript{116} KLM continues to service Detroit under the
program.\textsuperscript{117}

\begin{itemize}
  \item \textsuperscript{109} Supra note 106.
  \item \textsuperscript{110} Id. at 2.
  \item \textsuperscript{111} Id. at 5.
  \item \textsuperscript{112} Id. at 4.
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} DOT Order 91-9-22 (1991); DOT Order 92-8-54 (1992).
  \item \textsuperscript{115} DOT Order 91-9-22 (1991).
  \item \textsuperscript{116} Id. at 3.
  \item \textsuperscript{117} Confirmed with Tricia Godlewski with the Detroit Airport Commission on April 20,
  1994.
\end{itemize}
Washington

On August 10, 1990, the DOT granted Ladeco, S.A., permission to conduct air transportation services between Santiago, Chile, and Washington, D.C.\textsuperscript{118} When Ladeco was not able to meet its original commitment to start service, as provided in the fifth condition of the Cities Program, the DOT amended its authority to begin September 30, 1990. The delay was minimal and found to be in the public interest.\textsuperscript{119}

Washington, D.C., is the first and only city to receive multiple Cities Program service. The DOT granted Swissair Cities Program authority to provide combination service between Zurich, Switzerland, and Washington, D.C., either nonstop or one-stop over Boston. The DOT allowed the one-stop service conditionally on a promise made by Swissair that “when traffic warrants . . . it will provide nonstop service between Zurich-Washington.”\textsuperscript{120}

American Airlines (American) and United Airlines (United) filed answers opposing Swissair's request, and TWA filed an answer seeking deferral. American claimed that they incurred unnecessary expenses because of various problems, including ramp handling, catering, and security. United claimed they were required to pay excessive fees for use of its own check-in counters. TWA argued that they were unable to secure exclusive operating space.\textsuperscript{121}

Despite opposition, the DOT approved Swissair’s request based upon public interest grounds. It claimed, although it was sympathetic to the concerns raised by these [U.S.] carriers, “taken either separately or together they do not override the fact that Swissair continues to meet” Cities Program criteria and benefits the public interest.\textsuperscript{122} The DOT stated that “against this background, [it] clearly anticipate[s] that [it] will be able to work with the Swiss authorities to address the issues raised by [U.S.] carriers.”\textsuperscript{123}

\begin{itemize}
  \item \textsuperscript{118} DOT Order 90-6-20 (1990).
  \item \textsuperscript{119} DOT Order 91-1-25 (1991).
  \item \textsuperscript{120} \textit{Id.}
  \item \textsuperscript{121} \textit{Id.} at 2.
  \item \textsuperscript{122} \textit{Id.} at 3.
  \item \textsuperscript{123} \textit{Id.}
\end{itemize}
As of this writing, Washington, D.C., no longer is serviced by Ladeco, S.A., airline of Santiago, Chile. Instead, Ladeco now serves the city of Baltimore. However, it is serviced by Swissair to Zurich, Switzerland and now by KLM to Amsterdam, the Netherlands.

Miami

Finnair was granted authority to provide service between Helsinki, Finland, and Miami, Florida. Finnair's request was granted without opposition. The Dade County Aviation Department and Delta Airlines, Inc., filed answers in support of its request. Finnair filed for continued extensions pursuant to the autoextension provisions of the DOT.

Minneapolis - St. Paul

Minneapolis-St. Paul, Minnesota, enjoys service between its city and Amsterdam pursuant to the authority KLM received under the Cities Program. KLM's request was accepted without opposition. The Minneapolis-St. Paul Metropolitan Airports Commission and Northwest Airlines supported KLM's request based on regional economic development grounds from the substantial benefits incurred by the travelling and shipping public. KLM continues to enjoy Cities Program authority pursuant to the autoextension provisions of the DOT.

Cincinnati

Cincinnati, one of the smallest U.S. cities serviced under the Cities Program, put its merits to the test. Switzerland maintains various route authority with the U.S.; however, its authority does not include the right to fly to Cincinnati. Since Delta Airlines, Inc. (Delta), did not intend to provide single-plane service on its own between Zurich and Cincinnati, the Swiss Air Transport Company, Ltd. (Swissair) could have applied for Cities Program authority. Instead, Delta and Swissair teamed together to jointly market the relative small demographic areas of the two respective cities. Delta, in an unprecedented move, filed jointly with

---

125. Id. Swissair provides mostly Boeing 747-300 service five times a week. It provides MD-11 service once a week. KLM provides primarily Boeing 747 service five times a week during the peak season (May to October). KLM began service at Washington Dulles Airport in May of 1993.
Swissair to obtain Cities Program authority.\textsuperscript{131} The two airlines applied for joint authority pursuant to a code-sharing arrangement.\textsuperscript{132} Delta maintained that the market would only be viable if Swissair's code-share traffic is also carried on its flights.\textsuperscript{133} The two airlines recognized that Swissair's request to provide nonstop service in this market does not directly meet the Cities Program criteria since Delta will actually be providing the service; however, they emphasized that the application was in the spirit of the program by "improving international air service to an underserved U.S. community."\textsuperscript{134} The City of Cincinnati, the Greater Cincinnati Chamber of Commerce, and the Northern Kentucky Chamber of Commerce supported the application, stating that the new service would contribute to the economic growth of the area.\textsuperscript{135}

American, United, and Trans World Airlines all filed responses suggesting that the application should be denied on doing-business problem grounds. Only United gave specific details of its problems.\textsuperscript{136} The DOT previously discounted U.S. carrier complaints on this ground when they failed to give specific reasons for their complaint.\textsuperscript{137} United raised the cost of doing-business issues, particularly with respect to its inability to bring in its own cargo handling agent and for high ground-handling service fees.\textsuperscript{138} Pursuant to an agreement between the U.S. and Switzerland,\textsuperscript{139} the Swiss authorities are required to give an "adequate" accounting of the cost involved for ground-handling services. United's dispute was with the adequacy of the accounting.

The DOT approved the two carriers' application. It stated, "[w]hile it is true that Swissair's application does not meet the 'Cities Program' criterion requiring lack of nonstop U.S. carrier service in the relevant city-pair market, the nonstop U.S. carrier that would be affected in this case is Delta itself, which supports Swissair's application."\textsuperscript{140} The DOT continued to note that the public interest of the U.S. communities and the respective U.S. carrier (Delta) override the doing-business concerns

\textsuperscript{131} DOT Order 93-5-35 (1993).
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 2. The code-share arrangement sought between Zurich and Cincinnati is part of a broader code-sharing/blocked space arrangement between them which includes operations in New York-Zurich/Geneva and Atlanta-Zurich markets. Id. at 1.
\textsuperscript{134} Id. at 1.
\textsuperscript{135} Id. at 2.
\textsuperscript{136} Id. at 3.
\textsuperscript{137} See supra note 76 and note 88.
\textsuperscript{138} Id.
\textsuperscript{139} U.S.-Switzerland Memorandum of Consultations (MOC), September 30, 1988. Id. at 2
\textsuperscript{140} Id. at 4.
1994] Expanding International Air Service

raised. The authority was granted subject to U.S. code-sharing policy.\textsuperscript{141} The authority granted to Swiss Air is due to expire in May of 1994. However, it will most likely be renewed given the circumstances surrounding its application.\textsuperscript{142}

\textit{Orlando}

In 1991, LTU Lufttransport-Unternehmen (LTU), was granted temporary authority to provide service between Orlando, Florida, and the Federal Republic of Germany (FRG). The authority was considered on Cities Program terms but not applied under nor approved under the Cities Program itself.\textsuperscript{143} LTU’s authority was granted while the U.S. and the FRG pursued bilateral negotiations. The Greater Orlando Aviation Authority filed in support of LTU’s request. It stated that “FRG is the second-largest market in Europe for Orlando; that FRG-Orlando non-stop passenger traffic increased 33 percent from 1989 to 1990, etc.”\textsuperscript{144} Thus, although the Cities Program itself was not used, the basic premise of the program was used to guide LTU’s grant of temporary authority.

\textbf{B. SUMMARY ANALYSIS}

To date, eight countries, seven airlines, and ten U.S. cities have benefitted from the adoption of the Cities Program. Some of these cities are enjoying international service for the first time. The Cities Program, as illustrated below, allows new partnerships between U.S. cities and foreign countries to develop.

The following countries and their respective airlines enjoy authority under the Cities Program:

<table>
<thead>
<tr>
<th>Countries</th>
<th>Airlines</th>
</tr>
</thead>
<tbody>
<tr>
<td>Switzerland</td>
<td>Swiss Air</td>
</tr>
<tr>
<td>Netherlands</td>
<td>KLM</td>
</tr>
<tr>
<td>Finland</td>
<td>Finnair</td>
</tr>
<tr>
<td>Germany</td>
<td>Lufthansa &amp; LTU</td>
</tr>
<tr>
<td>Chile</td>
<td>Ladeco, S.A.</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>Aero Costa Rica &amp; LACSC</td>
</tr>
</tbody>
</table>

\textsuperscript{141} See DOT Order 92-8-14; The contract of carriage and ticket must reflect the carrier that is holding out the service in the computer reservations system and elsewhere, and the carrier must accept its responsibility to its passengers according to the terms of that contractual relationship.

\textsuperscript{142} Note that as of this writing, the author was unable to confirm whether Cincinnati still receives international service under the Cities Program.

\textsuperscript{143} DOT Order 91-11-6 (1991).

\textsuperscript{144} Id.
U.S. cities that have gained new international service include:

<table>
<thead>
<tr>
<th>Cities</th>
<th>Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cincinnati</td>
<td>Zurich, Switzerland</td>
</tr>
<tr>
<td>Baltimore/Washington</td>
<td>Amsterdam, the Netherlands</td>
</tr>
<tr>
<td>Minneapolis-St.Paul</td>
<td>Amsterdam, the Netherlands</td>
</tr>
<tr>
<td>Miami</td>
<td>Helsinki, Finland</td>
</tr>
<tr>
<td>Detroit</td>
<td>Amsterdam, the Netherlands</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>Zurich, Switzerland</td>
</tr>
<tr>
<td>Washington, D.C.</td>
<td>Zurich, Switzerland &amp; Santiago, Chile</td>
</tr>
<tr>
<td>Charlotte, N.C.</td>
<td>Frankfurt, Germany</td>
</tr>
<tr>
<td>Orlando</td>
<td>Dusseldorf, Germany</td>
</tr>
<tr>
<td>Tampa</td>
<td>San Jose, Costa Rica</td>
</tr>
</tbody>
</table>

VI. CONCLUSIONS AND RECOMMENDATIONS

More than four years have passed since the inception of the Cities Program. Despite early complaints from U.S. carriers that the program will “erode traffic” from their flights, the international traffic count continues to grow. Today, U.S. cities are enjoying expanded international air service. For the first time in the history of international aviation, U.S. cities have a voice. Generally, in practice the equation for bilateral negotiations are permeated with lop-sided input from a select group of corporate America: the airlines. When the economy is doing well, the airlines economically benefit from increased travel. Airlines plan for their own financial success. A community’s success, however, is dependent upon the collective planning of government and the respective business community. When an economic development plan calls for international air service, if a U.S. carrier declines, it makes sense to allow any carrier, regardless of flag, to service the market. Businesses and communities are better equipped to determine what their own air service needs are. De-regulation occurred more than fifteen years ago. At this point there is no turning back. Therefore, let the marketplace work to its fullest potential.

To maximize the benefits of the Cities Program, consider the following recommendations:

145. The following information was secured from a telephone conversation with Jim Johnson, Deputy Director, Tampa Aviation Commission, April 21, 1994: Aero Costa Rica was awarded the authority to provide service between Tampa and San Jose, Costa Rica. United Airlines filed “doing business problem” petitions which delayed LACSC’s original request. Because Costa Rica’s peak season was approaching, the Costa Rican governments chose Aero Costa Rica over LACSC for “scheduling purposes.” LACSC is contesting this decision. Aero Costa Rica is scheduled to begin service in July of 1994, providing service seven days a week.
(1) Formally liberalize the Seventh Freedom rights to countries that provide reciprocal rights. This right, however, should be limited to U.S. city-pairs in which neither U.S. city is served by a U.S. carrier to the international destination in which authority is sought;

(2) Extend the one-year authority period to reflect the service needs of the respective U.S. cities — allow for continuing agreements, unless public interest issues dictate otherwise;

(3) Expand the program to include all-cargo operations; and

(4) Incorporate USA-BIAS's definition of "firm plan" to ensure that unjust blocking tactics are not used by U.S. carriers.

Lastly, the National Airports System Plan should be reevaluated to take into account the use of airports otherwise not designated as international gateways. The use of more U.S. airports for international flights may shift the traffic flows away from the hub-spoke system of the 1980's. Further, the use of other U.S. airports, rather than the traditional gateways, may alleviate capacity constraints experienced by our national airport system. The Cities Program may just be the seed necessary to sprout a new international aviation policy for America.

VII. EPILOGUE

On September 25, 1994, Airports Council International (ACI-NA) held a Canada-U.S. Air Service Roundtable as part of their annual conference in Toronto, Canada. The meeting focused on prospects for resuming liberalization negotiations, particularly with respect to what steps airports and communities of each respective country should take next. After lengthy discussions between the delegates present at the roundtable, a general consensus evolved that airports and communities need to take an active position with their respective governments by advocating a more liberal agreement. ACI-NA suggested drafting a joint response to governmental leaders present at the conference.

A USA-BIAS representative discussed its most recent proposal to Secretary Federico Peña. USA-BIAS noted that one of the principal goals, since the inception of the 32 member coalition, was to secure open skies between Canada and the U.S. It recognized that this goal was unreachable in the short term. The greatest obstacle in the Canadian


147. Based on author's notes taken at the roundtable discussions.

148. This article was sent for publication before a copy of the response could be secured.

market is Toronto. One delegate referred to Toronto as the "big gorilla" of the Canadian passenger market.\textsuperscript{150} Like Chicago, New York, and other large markets in the U.S., Toronto represents a lucrative Canadian market which is protected from foreign carriers. USA-BIAS suggested that there are many other markets in Canada, "including Calgary, Edmonton, Halifax, Montreal, and Vancouver which would receive immediate service from either U.S. or Canadian carriers, or both, were the market liberalized."\textsuperscript{151} It concluded that "a potential way to break through the current impasse would be to move to immediate, unphased liberalization of all U.S.-Canadian markets except Toronto."\textsuperscript{152} Despite this desire to implement a more liberal agreement without the inclusion of Toronto, USA-BIAS is aware of the position taken by some carriers that without access to Toronto they will "block any agreement."\textsuperscript{153} However, in the spirit of the Cities Program, USA-BIAS suggested "[n]ow is the time to break through the impasse with a less than perfect solution, which will open many markets, both which bypass the greatest problem market."\textsuperscript{154}

The proposal submitted by USA-BIAS to Secretary Peña is as follows:\textsuperscript{155}

A. Elements of a New U.S./Canada Agreement:

1. The current 1978 bilateral is antiquated, very restrictive and should be replaced to spur travel and trade consistent with NAFTA.

2. The U.S. and Canada should agree to an open skies aviation market immediately between any U.S./Canada city-pair market except new services to/from Toronto. Eventually a liberal, totally open transborder regime should be put in place after a short transition period for new Toronto services. All existing rights, including existing services under the Regional Notes, should not be impaired during the transition period.

3. Because the phasing of new Toronto markets for both U.S. and Canadian carriers has been the most contentious aspect of a new open transborder aviation regime, we propose immediate implementation of an interim aviation regime while Toronto options

\textsuperscript{150.} See supra note 147.

\textsuperscript{151.} Supra note 149.

\textsuperscript{152.} Id.

\textsuperscript{153.} Id.

\textsuperscript{154.} Id.

\textsuperscript{155.} Id.
continue to be explored by the U.S. and Canadian governments. The interim regime we propose is described in the following paragraphs of this [proposal].

B. Interim Aviation Regime:

4. Open market-driven access should be provided immediately to the carriers of both nations in any U.S./Canada market except for new Toronto services: Nonstop service would be authorized at once between any United States city and the Canadian cities of Montreal, Vancouver, Ottawa, Calgary, Edmonton, Regina, Saskatoon, Winnipeg, London, Hamilton, Quebec, Halifax, St. John's, and similar or smaller communities.

5. While U.S./Canada transborder routes (other than new Toronto routes) should be open for services immediately, multiple carrier designations by either country may be restricted for a further period in the new Vancouver and Montreal markets, provided the total transition period does not exceed three years. While the cities favor solutions which do not involve a carrier selection process in either country, it is recognized that this may not be possible in the transition markets.

6. All-cargo services should be able to operate in an open market-driven regime immediately, in all U.S./Canada city-pairs including those involving Toronto.

7. At the few capacity restricted airports, airlines of both nations should have fair access to comparable numbers of slots at marketable times of the day for transborder service. Assuming reciprocity by Canadian authorities at relevant Canadian airports, the U.S. should be prepared to grant Canadian carriers slot exemptions at applicable High Density Rule Airport (ORD, JFK, LGA) under new provisions of the recently-enacted Federal Aviation Administration Authorization Act of 1994. However, DCA should remain as it is today under its existing statute.

8. Airport access should be assured for United States and Canadian airlines in each other's territory consistent with full protection of proprietary rights of airport operators in both countries.

Canadian airport and community representatives present at the ACI-NA roundtable advised the group that they drafted a similar position paper for submission to the Canadian government.¹⁵⁶

¹⁵⁶. Supra note 147.
The open skies issue may be at its ripest stage. Aviation officials will convene for the 50th anniversary of the Chicago Convention on October 30, 1994. USA-BIAS's proposal is fresh in the hands of our government officials; it should serve as the catalyst for open skies.

Consider: The international community should establish an open skies regime to all friendly nations. Rather than granting route authority, bilateral agreements should limit specific city-pairs. This would enable respective domestic and foreign city-pairs to secure international air service consistent with their economic development needs. The lucrative city-pair markets, likewise, could be protected by each nation.

Perhaps the visions of the Chicago Convention delegates of 1944 will come to fruition on the 50th anniversary. As stated by President F.D. Roosevelt:

As we begin to write a new chapter in the fundamental law of the air, let us all remember that we are engaged in a great attempt to build enduring institutions of peace. These peace settlements cannot be endangered by petty considerations or weakened by groundless fears. Rather, with full recognition of the sovereignty and juridical equality of all nations, let us work together so that the air may be used by humanity, to serve humanity.157

Each country should rightfully protect their most lucrative markets. However, this should not preclude the establishment of an open skies regime. Open skies, by linking nations together, will promote the world economy and help facilitate world unification as we join hands to promote democracy.

157. Supra note 2.
Articles

The Failure of the Teamsters' Union to Win Railroad-Type Labor Protection for Mergers or Deregulation

Herbert R. Northrup*

TABLE OF CONTENTS

I. Development of Railroad Protective Programs .......... 366
   A. The 1936 Washington Agreement and Its Progeny ..... 367
   B. Transfer of LPPs to Airlines and Urban Transit ...... 369

II. Situations in Which Trucking Workers Gained LPPs ....... 371
   A. Trucking Workers As Railroad Employees .......... 372
   B. Inclusion of Penn Truck in the 3R Act ............... 373
   C. The Frisco Trucking (Cosby) Decision ............... 374

III. Judicial and Administrative Decisions Contrary to Cosby ..... 376
   A. The Missouri Pacific Case ............................. 376

* Herbert R. Northrup is Professor Emeritus of Management at the Wharton School of the University of Pennsylvania. He has previously held the following positions: Professor of Industry; Director, Industrial Research Unit; Chairman, Labor Relations Council; and Chairman, Department of Industry, the Wharton School, University of Pennsylvania. Dr. Northrup holds the following degrees: A.B., Duke University, 1939; A.M., Harvard University, 1941; and Ph.D., Harvard University, 1942 (Economics). Dr. Northrup wishes to extend his appreciation to Richard J. Schreiber, Esq., and George Tanasijevich, Esq., for their helpful suggestions and comments. Ronald M. Johnson, Esq., Richard L. Wyatt, Esq., and Gary Green, Esq., provided helpful research.
Employees in three key transportation industries — railroads, airlines, and urban transit — have enjoyed legislative or administrative regulatory income and job protection in mergers, consolidations, or "abandonments" (closings) which greatly exceed that found in industry generally. Except in a few isolated instances, trucking industry employees and their union, the International Brotherhood of Teamsters ("Teamsters"), have failed to win such benefits even in situations where the trucking company involved was a subsidiary of a railroad.

How and why this has occurred constitute the principal subject of this article. Cases in which the trucking organization is a subsidiary or division of a railroad are first examined, followed by developments resulting from the deregulation of the trucking industry, and then collective bargaining agreements. In conclusion, the economic and political rationales for these developments are analyzed. To provide necessary background, an explanation is first provided of the nature of labor protective provisions ("LPPs"), as developed in the railroad industry and expanded to airlines and urban transit.

I. DEVELOPMENT OF RAILROAD PROTECTIVE PROGRAMS

The success of the railroad unions in establishing the concept of LPPs dates from the 1930s. From a high of two million during World War I, employment on the railroads had declined to about one-half that number as a result of the competition of trucks and automobiles and the
impact of the Great Depression. Meanwhile, the industry, which had been faced with overcapacity for many years, was in dire need of consolidation and merger, a fact that had been “recognized and addressed as early as the Transportation Act of 1920.”

With the severe downturn during the Great Depression, railroad unions feared that mergers and consolidations would result in substantial unemployment of their members. They, therefore, sought political protection against such action. Initially, the unions were successful in inducing Congress to provide in § 7(b) of the Emergency Railroad Transportation Act of 1933 that railroads must “freeze” into their jobs all railroad employees actively employed in May 1933, who might be affected by actions taken pursuant to authority contained in this Act, which was avowedly designed to promote financial reorganization. However, “for a variety of reasons, not the least of which was this ‘job freeze,’ no significant consolidations took place under this legislation.”

A. THE 1936 WASHINGTON AGREEMENT AND ITS PROGENY

The 1933 Act expired by its terms in 1936. At the behest of the railroad unions, legislation was introduced and strongly supported in Congress to continue protection almost as restrictive as that provided by Section 7(b). Anxious to avoid such limitations, and prodded by President Franklin D. Roosevelt, the carriers entered into negotiations with the unions. After protracted bargaining, the so-called “Washington Agreement” was signed on May 21, 1936, between the then twenty-one national railroad unions and carriers representing eighty-five percent of the country’s railroads. The agreement covered railway “coordination”, which was defined as “joint action by two or more carriers whereby they unify, consolidate, merge or pool” their facilities or operations in whole or in part.

The Washington Agreement “set the tone for railroad labor protec-


Dr. Kozak’s study, based in part on his doctoral dissertation (University of Maryland, 1981), and on information supplied by several railroads on their experience in major mergers, is the most thorough and recent study of railroad LPPs now extant.


4. Id. at 145. See also, Earl Latham, The Politics of Railroad Coordination 1933-1936 (1959).
tive arrangements for the next fifty years." Its principal provisions pro-
vided that employees deprived of employment as a result of coordination
receive either sixty percent of their prior earnings for as long as they had
worked, up to five years, or a lump sum severance. Those accepting the
former also continued to receive such fringe benefits as free transpor-
tation, pension credits, and medical benefits. In addition, employees who
were downgraded as a result of coordination received an allowance for up
to five years to make up for the difference in earnings; and employees
who were required to move in order to continue to work received trans-
portation and moving expenses, and compensation for losses on sale of
homes. The five-year extent of benefits, unique at the time of adoption
and rarely matched elsewhere since, was based upon a contemporary esti-
mate of the time when employees could expect to return to the railroad
active work force. 6

First by administrative action, which was upheld by the U.S.
Supreme Court, 7 and then pursuant to legislation beginning with the
Transportation Act of 1940, 8 the Interstate Commerce Commission
("I.C.C.") began awarding LPP benefits as a condition of all mergers,
consolidations, and abandonments. Standard six-year packages were de-
veloped: New York Dock 9 type for mergers, consolidations, and acquisi-
tions of control; Oregon Short Line 10 conditions for abandonments;
Mendocino Coast 11 conditions in lease transactions; and Norfolk and
Western Conditions 12 for lease and trackage rights transaction. These
provisions, detailed in Appendix I, provide for full incomes during the six

6. Rehmus, supra note 3, at 145.
7. United States v. Lowden, Trustees of the Chicago, Rock Island and Pacific Railroad
8. Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898 (codified as amended in
scattered sections of 31 U.S.C. and 49 U.S.C.). For other significant legislation affecting LPPs,
aff'd, New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).
11. Mendocino Coast Ry. — Lease and Operate — California Western R.R., 354 I.C.C. 7321
States, 675 F.2d 1248 (D.C. Cir. 1982).
modified, 360 I.C.C. 653 (1980), aff'd sub nom., Railway Labor Exec. Ass'n v. United States, 675
F.2d 1248 (D.C. Cir. 1982).
years. To be eligible for such statutory benefits, employees must show that their worsened position has been caused by a “transaction” directly related to a merger or other “coordination”. Ordinary layoffs, downgradings, or other such actions are not covered.

For an interim period, a much more liberal package became common in major rail mergers, including the merger of the Pennsylvania and New York Central railroads in 1968. Because of the political power of the railroad unions in blocking merger applications at the I.C.C., the Penn Central merger proponents agreed to “lifetime attrition protection” of the labor force as a means of gaining union support. This was both preceded and followed by a series of major mergers which provided the same extravagant protection that guaranteed lifetime protection even for employees who were in their twenties and thirties. Moreover, when the Penn Central merged operation went bankrupt, such benefits were incorporated into law. As discussed later, however, the costs of such benefits proved too great even for the United States Treasury, and were drastically modified in the early 1980s. Since then, the standard conditions listed above have been the rule.

B. TRANSFER OF LPPs TO AIRLINES AND URBAN TRANSIT

In 1936, Congress placed the fledgling airline industry under the Railway Labor Act. The airlines, having expanded employment in most years since 1936, were thereby confined to the rules, regulations, bargaining units, and other labor relations practices of the railroad industry, where employment has been declining for the last seventy-five years. In 1938, Congress established a comprehensive scheme for airline industry regulation and a special agency, the Civil Aeronautics Board (“CAB”), to administer it. Not surprisingly, the CAB emulated the I.C.C. in many of its administrative actions.

Like the I.C.C., the CAB, acting on broad grants of power from Con-

13. “Lifetime attrition protection” provides the individual worker with LPP coverage throughout work life except in cases of retirement, resignation, or discharge for cause.

14. These mergers were those of the Virginian and the Norfolk & Western (1959); the Norfolk & Western and the Nickel Plate, with the lease of the Wabash (1964); the Baltimore & Ohio, the Western Maryland, and the Chesapeake & Ohio (1967); the Great Northern, the Northern Pacific, the Chicago, Burlington, & Quincy, and the Spokane, Portland & Seattle into the Burlington Northern (1970); and the Illinois Central and the Gulf, Mobile, & Ohio into the Illinois Central Gulf System (1972).


gress rather than on specific authority, imposed LPPs almost as a condition of approving mergers, acquisitions, and certain other business transactions. It did not, however, extend protection beyond five years and did not impose LPPs in a few cases where the costs were deemed so high as to negate benefits, or where losses to employees were slight or temporary. Given the high wages paid in the industry, however, the costs could be very high where LPPs were ordered. Following the Airline Deregulation Act of 1978 ("ADA"), the CAB ceased ordering LPPs, and since its demise, the Department of Transportation ("DOT") has failed to order LPPs in any case, although it clearly has the power to do so.

The Airline Deregulation Act found Congress rejecting the standard railroad LPP, but § 43 did establish an Employee Protection Plan ("EPP") composed of two parts. Section 43(e)(2) required that the CAB (and the DOT as its successor) determine whether complaining employees had been harmed because of a "qualifying dislocation," and if so provided certain benefits. This section of the law, which expired in 1988, never resulted in the payment of benefits and is still in litigation. Additionally, § 43(d)(1) provided that employees displaced by deregulation were to be listed and given priority for industry employment until October 1988. This did result in some laid-off employees receiving jobs.

The urban mass transit industry in the United States suffered massive decline from World War II to the early 1970s. Following the passage of the Urban Mass Transportation Act of 1964, the industry was converted from an overwhelmingly privately owned series of enterprises to an industry in which public ownership was almost universally established. Despite huge injections of federal, state, and municipal funds for capital improvements, as well as substantial subsidy of operating costs, no major urban transit system since the passage of the 1964 Act has operated profitably. One reason for this has been the existence and administration

---

20. Id.
21. The ADA defined a "qualifying dislocation" to receive benefits as either a bankruptcy or a "major contraction in employment" for which a substantial cause was the new regulatory structure provided by the ADA.
22. Because the Teamsters attempted to secure benefits similar to the EPP when trucking was deregulated, as described later, a more complete account of § 43 benefits is set forth in Appendix II.
24. For an analysis of this situation, see (among many studies), Simon Rottenberg, Protection of Employees in the Public Acquisition and Operation of Urban Mass Transit, in NORTHUP
The labor protection requirements involving mergers and acquisitions written in § 13(c) were not deemed significant by transit industry representatives interviewed by the author in August 1991. Such mergers and acquisitions do not occur frequently, but usually only when a public authority takes over an area's facilities and acquires a number of formerly private and/or public concerns. In such situations, it has been customary to accept all employees involved as employees of the new public employer in order to conform with § 13(c).

Urban mass transportation management is inhibited by the knowledge that any employees downgraded or dismissed will remain on the payroll for up to six years or receive very handsome severance arrangements. This fact, coupled with the fear that the U.S. Department of Labor will delay or cancel grants, or that politician-friends of organized labor will threaten management's own job security, encourages management's acceptance of the status quo. In turn, this contributes to continued deficits despite the huge public financial subsidies which characterize the industry.

In urban mass transportation, therefore, LPPs based upon railroad developments serve only to maintain both employment and costly methods of operation, rather than to compensate employees being deprived of jobs.

II. SITUATIONS IN WHICH TRUCKING WORKERS GAINED LPPS

Trucking employees have been awarded railroad-type LPPs under

MISCIMARRA, supra note 1, at 601. Data for the industry are found in the AMERICAN PUBLIC TRANSIT ASSOCIATION'S TRANSIT FACT BOOK, which is published annually and includes statistics and other information about the industry. In 1992, for example 57.6% of the industry's operating revenues were received from federal, state, and local government sources. TRANSIT FACT BOOK 15 (1993).

Section 13(c) reads as follows:

It shall be a condition of any assistance under section 3 of this Act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights and benefits (including continuation of pension rights and benefits) under existing collective agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the [Interstate Commerce Act of February 3, 1887 (24 Stat. 379), as amended. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangement.
three conditions: when they were employed directly by a railroad and treated as railroad employees, when legislation required such payments, and when a court ordered such payments. These situations are rare, but examples of each exist.

A. Trucking Workers as Railroad Employees

The 1970 mergers that created the Burlington Northern system brought under one company the former Chicago, Burlington, & Quincy; the Great Northern; the Northern Pacific; and the Spokane, Portland, and Seattle railroads. At the time of the merger, the Great Northern; the Chicago, Burlington, & Quincy; and the Northern Pacific railroads all had trucking affiliates. The different handling of these motor carrier affiliates illustrates differences in LPP eligibility of trucking personnel who are employed directly by the railroads, in contrast with those who are employed by motor carrier subsidiaries operating separate trucking businesses.

The Great Northern motor carrier operation did not operate as a separate trucking company, but rather as part of the operating department of the railroad. Moreover, the Great Northern trucking operations were limited to providing substitute freight motor carrier service for rail service when the Great Northern abandoned some of its smaller branch lines, particularly in Montana. The employees of the Great Northern trucking operations were, therefore, considered railroad employees and were covered by the Railway Labor Act and the Railroad Retirement Act. The Great Northern trucking employees were included in the I.C.C. order approving the merger and were, like other railroad employees, granted the lifetime attrition benefits that were then becoming common for major railroad mergers. On May 15, 1971, and February 15, 1972, respectively, the Burlington Northern signed agreements with the Teamsters and the International Association of Machinists, the unions representing the employees of the former Great Northern's trucking operations, providing for the merger protection agreed to by the parties and prescribed by the I.C.C.27

The motor carrier affiliates of the Chicago, Burlington & Quincy and the Northern Pacific, Burlington Truck Lines and Northern Pacific Transport, respectively, in contrast to that of the Great Northern, were separately operated facilities and engaged in the general motor common carrier business serving many customers. Their employees were not considered railroad employees and were not covered either by the Railway


Labor Act or the Railroad Retirement Act, but rather by the National Labor Relations Act ("NLRA") and the Social Security Act. Burlington Truck Lines was actually a major less-than-truckload ("LTL") carrier with considerable unrestricted operating authority even prior to deregulation, and was a party to the National Master Freight Agreement with the Teamsters' union. Employees of these two subsidiaries were not perceived as being eligible for LPPs, and did not receive such protection either by order of the I.C.C. or by agreement when they were merged into a new entity, BN Transport ("BNT"), which by 1980 was number eighty-six on the list of the largest 100 motor carriers. The legal and historical bases for this distinction among trucking employees of railroad company motor carrier affiliates are discussed in connection with several cases reviewed below.

B. INCLUSION OF PENN TRUCK IN THE 3R ACT

The Regional Rail Reorganization Act of 1973 ("3R Act"), was designed to restructure the railroads of the Northeast following the bankruptcy of the Penn Central. The Act included extremely costly lifetime employment provisions. Penn Central, merged by law with other Northeast railroads under the Conrail name, at that time owned a motor carrier subsidiary, Penn Truck. Although the employees of Penn Truck were not railroad employees; were covered by the NLRA, not the Railway Labor Act, and the Social Security Act, not the Railroad Retirement Act; and were represented by the Teamsters; § 501(2) of the 3R Act artificially defined them as railroad employees and made them eligible for the lifetime attrition benefits written into the Act. As of January 31, 1981, Penn Truck employees had received $19.7 million in LPP payments, or 6.2 % of the total payout funded by the 3R Act.

Penn Truck employees allegedly profited substantially as a result. Apparently, a considerable number of these laid-off employees obtained jobs with other motor carriers. They then received not only the wages paid by their new employers, but additionally, their Conrail wages less fifty percent of their earnings from the non-Conrail employment. This, in addition to other abuses inherent in the 3R Act, led to that law's modifi-

28. The Top 100 Carriers in 1980 and Now, TRANSPORT TOPICS, August 5, 1991, at 28. For a shorter list of leading carriers, see Table 1 infra.
30. Kozak reported expenditures of $319.1 million from April, 1976 through August, 1978 as a result of this provision. See Kozak, supra note 1, at 519.
32. Kozak, supra note 1, at 52.
cation by the Staggers Rail Act of 1980. Among such amendments was "relaxation of the prohibition on offering employees jobs in other crafts for former marine service employees and Penn Truck Line employees whose positions were permanently abolished ..." When such modest changes failed to stem the cost of § 501(2), Congress abolished the section in the North East Rail Service Act ("NERSA"), which substituted severance pay for § 501(2)’s elaborate and costly LPP provisions. This terminated the only known LPP created by legislation that specifically included employees of a railroad-owned motor carrier which operated a general common carrier business.

C. THE FRISCO TRUCKING (COSBY) DECISION

In 1980, the I.C.C. approved the merger of the San Francisco-St. Louis Railway Company ("Frisco") into the Burlington Northern. The Frisco had a small trucking subsidiary, the Frisco Transportation Company ("FTC"). In 1981, FTC ceased operation. Three years later, upon appeal in Cosby v. I.C.C., the Eighth Circuit determined that the employees of FTC were "railroad employees," that FTC's motor operations were "auxiliary and supplemental" to Frisco's rail operations, and that Burlington Northern and Frisco executives' representations and assurances to "railroad employees" concerning LPP coverage included FTC employees. The Court, therefore, ruled that FTC employees were entitled to LPP protection as were railroad employees involved in the merger. To sum up, the Court based its decision upon the following considerations:

1. FTC's operations were generally restricted to service which was auxiliary or supplemental to the Frisco's rail service;
2. FTC was intimately tied to the railroad's main transportation function;
and
3. There was no evidence in the record that the skills of FTC's employees

34. Daniel J. Kozak, Employee Job and Income Protection in the Railroad Industry, (1981) (Ph.D. Dissertation, University of Maryland), at 223. The maritime employees were those employed by the railroad primarily to handle the transfer of rail cars to New York City from New Jersey.
35. Id.
38. Id. at 1084.
39. Id. at 1081.
40. Id.
were transferable to general motor carrier services.\footnote{Id.}

The \textit{Cosby} decision placed great emphasis on statements made by high-ranking Burlington Northern officials before the I.C.C. which the court assumed constituted representations or assurances that all employees would receive LPP protection in the merger.\footnote{See \textit{id.} at 1082-84.} The Court, therefore, ruled that, regardless of whether they could be considered railroad employees, FTC employees were entitled to rail LPP benefits on equitable grounds, and that “it was an abuse of discretion not to grant the FTC employees the same protective conditions granted to \textit{Frisco’s other railroad employees.”}\footnote{Id. (emphasis added).}

Other evidence, however, demonstrates that what Burlington Northern officials meant by their statements is that \textit{all railroad employees as traditionally and customarily defined} would receive such protection. In fact, the verified statements\footnote{“Verified statements” are notarized presentations which are submitted to the I.C.C. by the parties in lieu of direct testimony. At the hearings which follow, the authors of these statements are then subject to cross and redirect examination. Many government agencies use this procedure in order to reduce the time and expense of hearings.} of Louis W. Menk, Chairman of the Burlington Northern, Richard C. Grayson, Chairman of the Frisco, Michael M. Donahue, Burlington Co-Chairman of the merger unification study, and Clyde M. Illg, Assistant Vice-President and chief labor relations negotiator for the Burlington, whose responsibilities “included all of the various areas of negotiation and administration of labor agreements, including job protection,” never mentioned the FTC, the BNT, or motor carrier employees in their statements, either generally, or in the sections of the statements dealing with LPPs and the estimated costs thereof.\footnote{The verified statements of Louis M. Menk, Burlington Northern Chairman, R.C. Grayson, Frisco Chairman, M.M. Donahue, Burlington Northern Vice-President, and C.M. Illg, Burlington Northern Assistant Vice-President, were acquired for this study from the Burlington Northern in their original notarized form. They are dated on various days of December 1977.} In addition, Messrs. Menk, Grayson, Donahue, and Al Egbers, who was Vice-President-Labor Relations and Illg’s superior, and who was responsible for reviewing and editing Illg’s statement, testified during their depositions for a subsequent arbitration that the verified statements referenced above dealt exclusively with railroad employees, not motor carrier employees, and that the \textit{Cosby} court misinterpreted the scope and intent of these statements.\footnote{See \textit{Deposition of Egbers}, BNT Arbitration, New York Dock Protection, I.C.C. Fin. Docket No. 28583, St. Paul, Mn., (Oct. 27, 1992), Tr. at 10 and 149; \textit{Deposition of Donahue, idem.}, St. Paul, Mn., (Oct. 29, 1992), Tr. at 114 and 117; \textit{Deposition of Menk, idem}, Carefree, Az., (Jan. 11, 1994), Tr. at 10; and \textit{Deposition of Grayson, idem}, Carefree, Az., (Jan. 12, 1994), Tr. at 12.}
It is likewise clear, as discussed below in connection with cases which are at odds with the Cosby decision, that the Eighth Circuit’s analysis appears to run counter to the historical framework and legislative intent of the Interstate Commerce Act in including a railroad trucking operation’s employees as “railroad employees.” Nevertheless, the Cosby decision has had a profound and costly impact, as discussed infra, following a review of other judicial decisions.

III. JUDICIAL AND ADMINISTRATIVE DECISIONS CONTRARY TO COSBY

In contrast to Cosby, other cases have found that employees of railroad trucking subsidiaries are not “railroad employees”, and that Congress did not intend for such trucking employees to be covered by railroad labor and social legislation.

A. THE MISSOURI PACIFIC CASE

In 1977, Texas and Pacific Motor Transport (“TexTruck”), the trucking subsidiary of the Texas and Pacific Railway Company, was merged into Missouri Pacific Truck Lines (“MoTruck”), the trucking subsidiary of the Missouri Pacific Railroad Company, after the Missouri took over Texas and Pacific Railway. In 1978, the U.S. Internal Revenue Service (“IRS”) ruled that the merged motor carrier was covered by the Railroad Retirement Act, and sued to recover the difference in taxes between social security taxes and the higher railroad retirement taxes, plus interest and penalties. This was the test case involving the trucking subsidiaries of all major railroads that had such operations, including BNT. On appeal, the U.S. Court of Claims found for the railroad, and this decision was affirmed by the Court of Appeals, Federal Circuit. 47

This case is significant because the Court of Claims opinion reviewed the basic railroad labor and social laws, the Railway Labor Act as amended in 1934, the Railroad Retirement Tax Act, the Railroad Unemployment Insurance Act, the Federal Employers Liability Act, and the pertinent sections of the Interstate Commerce Act. 48 It noted that employees of the trucking subsidiaries were not subject to railroad legislation, for example, being covered instead by the NLRA, the Social Security Act, and state unemployment and workers’ compensation legislation, and were unionized on an industrial, not craft basis, by the Teamsters, a non-railroad union. 49 Both trucking subsidiaries serviced companies other than their rail owners.

48. Id. at 16.
49. Id. at 17.
Utilizing such information, and the legislative history of the Railroad Retirement Act, the claims and appellate courts determined that the trucking subsidiaries' employees were not railroad employees. Consequently, the IRS withdrew the deficiency assessments which it had levied against railroad-owned trucking carriers.

B. Kansas City Southern Case

A second and key case finding that employees of railroad subsidiary-owned motor carriers are not "railroad employees" arose from the sale of the Southern Pacific Railroad to the Rio Grande after the I.C.C. rejected the proposed merger of the Sante Fe and the Southern Pacific. The Kansas City Southern filed objections, but the I.C.C. approved the merger. The I.C.C. also rejected the request of the Teamsters' union to impose LPPs on Southern Pacific's motor carrier subsidiaries, Pacific Motor Carrier Trucking and Pacific Motor Transport Company.\(^{50}\) The Commission stated:

The statute, formerly section 5(2) of the Interstate Commerce Act, required only that the interests of railroad employees be protected. The 1978 recodification of the Act, while eliminating the specific reference to railroad employees . . . may not be read to change substantively the law it replaced.\(^{51}\)

The I.C.C. declined also to impose LPP conditions for the motor carrier employees by utilizing its discretionary powers pursuant to § 11344 of the Interstate Commerce Act, which permits the I.C.C. to order LPPs for "other" (non-railroad) employees. The I.C.C. decision noted that the Rio Grande did not contemplate any changes in the motor carrier's operations. The Teamsters' union then intervened in the appeal proceeding brought by the Kansas City Southern in the Fifth Circuit, requesting that LPPs be provided for the motor carrier employees.\(^{52}\)

The Fifth Circuit carefully reviewed the issue of LPPs for trucking subsidiaries. It supported the I.C.C.'s interpretation of § 11347 replacing § 5(2)(f) as a recodification rather than a substantive change, stating that § 11347 did "not mandate labor protective conditions for employees of motor carrier subsidiaries of a merging railroad."\(^{53}\) This was at odds with Cosby, wherein it was stated:

If Congress meant for section 11347 to apply only to employees who worked for rail carriers and not all the employees affected by the merger, the clear-

---


\(^{51}\) Id.

\(^{52}\) Kansas City Southern Industries, Inc. v. Interstate Commerce Commission, 902 F.2d 423 (5th Cir. 1990).

\(^{53}\) Id. at 438.
The Fifth Circuit, however, noted that this segment of the Cosby decision was dictum, as was the following statement of the Eighth Circuit in the Cosby case: “We need not resolve this question of interpretation because we believe, in the circumstances of this case, that the [motor carrier subsidiary’s] employees are ‘railroad employees’ within the meaning of the Act.” The Fifth Circuit, therefore, sustained the I.C.C.’s ruling as “sufficiently rational” to stand.

C. UNION PACIFIC-MISSOURI PACIFIC MERGER

A third set of cases affirming that trucking subsidiary employees are not railroad employees, and in this case are not covered by the I.C.C.’s requirement to grant LPP coverage, commenced in 1982 when the I.C.C. approved the Union Pacific’s takeover of the Missouri Pacific, and this decision was affirmed by the courts. Employees of the motor carrier subsidiaries of both railroads then persuaded the I.C.C. twice to reopen the case on the grounds that they did not receive the LPP protection mandated by the I.C.C.’s approval order, and cited the Cosby case in support of their position.

In the proceeding that followed, the Union Pacific declared that a lost contract, not a merger, had caused layoffs, and that in any case, the motor carrier employees were not covered by the LPP order. The railroad also emphasized that the statement of the court in the Cosby case to the effect that employees of trucking subsidiaries of railroads were automatically entitled to LPP coverage was only dictum and had been rejected by the I.C.C. and the Fifth Circuit.

The I.C.C. ruled that “the labor protective conditions imposed in... [its previous merger approval] were not for the benefit of... [trucking employees].” It also saw “no basis for imposing such protection now.” It found that employees of the motor carrier subsidiaries were not railroad employees, and that there was no mandatory protection in the Inter-

54. Cosby, 741 F.2d at 1080.
55. Kansas City S.R.R., 902 F.2d at 437 (quoting Cosby, 741 F.2d at 1080).
59. Id. at *8.
60. Id.
state Commerce Act for such non-rail employees.\textsuperscript{61} The I.C.C. did note that it had discretionary authority to impose LPPs in such cases pursuant to § 11344, but declined to do so in part because there had been no request therefor at the earlier merger hearings.\textsuperscript{62}

Eight of the affected trucking employees then appealed to the Tenth Circuit, which affirmed the I.C.C.'s ruling.\textsuperscript{63} The court noted that § 11347 of the Interstate Commerce Act, as amended, entitles "employees who are affected by" an approved merger or consolidation to LPPs, but does not define employees as did its predecessor clause, § 5(2)(f), which used the phrase "railroad employees."\textsuperscript{64} When § 5(2)(f) was repealed in 1978 and § 11347 substituted, however, the committee reports accompanying the amendments stated that the Act was being recodified for "clarity," and that changes in substance were not intended.\textsuperscript{65}

The Tenth Circuit agreed that the Eighth Circuit in \textit{Cosby} had ruled that motor carrier subsidiary employees were covered by § 11347, but also that the Fifth Circuit in \textit{Kansas City Southern} had ruled that Congress's intent was clearly to the contrary.\textsuperscript{66} Moreover, the Tenth Circuit seemingly identified what it perceived to be a flaw in the \textit{Cosby} analysis. In \textit{Chevron U.S.A. v. National Resources Defense Council},\textsuperscript{67} the U.S. Supreme Court ruled that when a court is reviewing an agency's construction of a statute that it administers, the court must conduct a specific two-step analysis, but that in \textit{Cosby} the \textit{Chevron} analysis was not done.\textsuperscript{68}

The Tenth Circuit, which in an earlier opinion had ruled that the

\begin{itemize}
\item \textsuperscript{61} Id. *9-10.
\item \textsuperscript{62} Id. at *11.
\item \textsuperscript{63} Rives v. I.C.C., 934 F.2d 1171 (10th Cir. 1991).
\item \textsuperscript{64} Id. at 1174.
\item \textsuperscript{65} Id. In its opinion, the Tenth Circuit quoted the following excerpt from the House of Representatives committee report accompanying the bill to recodify the Interstate Commerce Act:

\begin{quote}
\textit{Substantive change not intended} — Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantially unchanged.
\end{quote}

\item \textsuperscript{66} Id. at 1174.
\item \textsuperscript{68} Bound by the \textit{Chevron} approach, the Tenth Circuit found:
\begin{quote}
The language in former § 5(2)(f) mandated protection only for "railroad employees" and the legislative reports accompanying § 11347 state that the recodification intended no substantive changes in existing law. Restricting § 11437's mandatory projections to rail carrier employees provides certainty and a logical limit to the scope of employees protected by §11347. Also, a reading as expansive as that petitioners request would
\end{quote}
\end{itemize}
recodification did not change the meaning of the Act,\textsuperscript{69} therefore, came down squarely on the side of the Fifth Circuit, finding that the intent of Congress was not unambiguous, and that the I.C.C.’s interpretation had been a “permissible and rational construction of the statute.”\textsuperscript{70}

Claiming a conflict between the rulings of this case and that of the Eighth Circuit in the \textit{Cosby} one, the plaintiffs in the \textit{Rives} case petitioned the Supreme Court to grant certiorari, which was denied.\textsuperscript{71}

\section*{D. Union Pacific-Overnite Case}

The Overnite Transportation Company, headquartered in Richmond, Virginia, is one of the ten largest LTL trucking concerns, and has been for many years the largest nonunion LTL company.\textsuperscript{72} It was purchased by the Union Pacific, and the acquisition was approved by the I.C.C. in 1987.\textsuperscript{73} The I.C.C. imposed the standard LPP conditions for Union Pacific railroad employees but no other labor conditions. The United Transportation Union (“UTU”) intervened, and requested that LPPs be imposed for Overnite’s employees as a matter of public interest. The I.C.C. commented: “It is well settled that, absent special circumstances not present here, section 11347 prescribes labor protection only for employees of railroads participating in the involved transaction.”

\section*{IV. The Case for LPPs from BN Transport’s Sale and Bankruptcy}

Deregulation, recession, and a costly purchase of another carrier\textsuperscript{74} caused BNT, the Burlington Northern’s motor carrier, to suffer substan-

\begin{itemize}
  \item \textsuperscript{69} Atchison, Topeka & Santa Fe Ry. v. Lennen, 732 F.2d 1495 (10th Cir. 1981). Here the Court held that recodification of the Interstate Commerce Act in 1978 “was not intended to change the law,” and that any substantive conflicts between the original language and the new language must be resolved “in favor of the original language.” \textit{Id.} at 1497.
  \item \textsuperscript{70} \textit{Id.} at 1175.
  \item \textsuperscript{72} Recently, the nonunion status of Overnite has been dented as the Teamsters union (“IBT”) has won National Labor Relations Board elections at five Overnite service centers. \textit{See Overnite Workers Vote for IBT Representation}, Daily Lab. Rep. (BNA), No. 245, at A-13 (Dec. 23, 1994); and Overnight workers in Minneapolis and Sacramento Vote for IBT representation, \textit{id.}, No. 22, at A-8 (Feb. 2, 1995).
  \item \textsuperscript{73} Union Pacific Corp. and BTMC Control — Overnite Transportation Co., 4 I.C.C.2d 36 (1987).
  \item \textsuperscript{74} BNT purchased a regional carrier at an inflated price just before the Motor Carrier Deregulation Act of 1980 was passed, which would have permitted it to operate in these areas without the purchase.
\end{itemize}
tial operating losses beginning in 1982. In 1984, Burlington Northern officials concluded that BNT's return to profitability was unlikely because of poor market share and high fixed overhead costs. Moreover, the IRS was then attempting to assess BNT and all other railroad-owned motor carriers with Railroad Retirement Act taxes in place of the Social Security Act taxes which these motor carriers were paying. Since the former taxes were substantially higher, this proposed assessment would have subjected BNT to a further competitive disadvantage against non-railroad motor carriers if the IRS had been successful in subsequent litigation, and would have increased BNT's losses, then averaging close to $800,000 per month.

Also in 1984, BNT's management was approached by a representative of Avery Eliscu and Leonard Lewensohn — whose company had previously purchased Sante Fe Trails Transport (“SFTT”), the then largest railroad-owned motor carrier — expressing an interest in purchasing BNT and combining it with SFTT. In August 1984, this sale was consummated after BNT management assessed this purchase offer against two others and the costs of simply shutting down BNT.

Unfortunately, the combined SFTT-BNT operation continued to suffer losses. Within one year after the purchase, it was forced to file for bankruptcy and was permanently shut down. This, in turn, led to rulings by the I.C.C. in 1987 and 1988, which held, based upon the Cosby decision, that BNT employees were within a generic class potentially eligible for LPPs if it were found that the shutdown of BNT was caused by the merger of the Burlington Northern and the St. Louis-San Francisco (“Frisco”) railroad. The I.C.C. remanded the issues to arbitration for determination as to causation, if any, and for determination of factual issues, stating in its decision:

We have not found that any particular employee was adversely affected, or that any adverse effect that might be alleged was a result of a “transaction” directly related to the merger and control authorized in this proceeding. It is not necessary that an employee be adversely affected to be included in a class of protected employees. Inclusion in a class does not lead to entitle-

75. The author has reviewed the operating statements of BNT and can attest to the sizable losses which were being incurred during this period.
76. As described supra in relation to the Missouri Pacific Truck Lines case, the IRS was unsuccessful in this endeavor.
77. This loss of approximately $800,000 per month was at the time of the sale, in the summer of 1984. See the letter of R.F. Beagle to Withdrawal Liability Department, Central States, Southeast and Southwest Areas Pension Fund, May 26, 1988.
78. See id. for an explanation of the rationale for selling BNT to SFTT controlled by Eliscu and Lewensohn.
ment to protection until an employee has been adversely affected, and then only if the adverse effect is a result of a “transaction” directly related to the merger, control, or other authorization.80

Since the I.C.C. did not find that any particular employee was adversely affected, or that any adverse effect was the result of a “transaction” which was directly related to the Frisco-Burlington Northern merger, the arbitrator was requested to determine among other matters, first, whether any BNT employee-claimant was a railroad or a motor carrier employee, and second, whether said claimant was adversely affected by a covered transaction. The arbitrator was also to decide whether the claims were timely, and whether the claimants were in fact affected by other economic conditions, such as the business cycle or the dislocation of the industry as a result of deregulation, rather than by the Frisco-Burlington Northern merger. Thus, in order to receive benefits each claimant would be required to show “causation and other issues relating to the merits of individual claims.”81

Because the liability of Burlington Northern Railroad could have been as much as $250 million if the claims put forth had been sustained, the arbitration case was taken very seriously. Depositions were requested of more than 300 claimants over a two-year period. Those that declined to answer interrogatories were dropped from the case by the arbitrator, as were management employees above the rank of “subordinate officials” (foremen and lower managers), who have not ordinarily been considered eligible for LPPs,82 and others, such as those who were not employed at key eligibility dates.

The net effect was to reduce the maximum liability to approximately $80 million, still a sizable figure, and at the same time greatly discourage the plaintiffs, who were not supported by a union or other organization. Additionally, the carrier was able to provide substantial evidence that the failure of BNT was a consequence of deregulation and the severe recession of the early 1980s, as discussed infra. As a result, settlement was

80. Id. (June 10, 1988), at 3. The merger referenced in the above quotation refers to the Frisco-Burlington Northern merger, and particularly, the mergers of the trucking subsidiaries approved by the I.C.C. in 1980.
82. There are numerous arbitrations on this issue. A key one is by Arbitrator Jacob Seidenberg, Matter of Arbitration between B.J. Maeser, T.P. Murphy, E.M. Sengheiser, and K.W. Shupp and the Union Pacific Railroad Co., Missouri Pacific Railroad Co., Pursuant to New York Dock Conditions Imposed by the Interstate Commerce Commission in I.C.C. Fin. Docket No. 30,000 (Dec, 17, 1987). The only exceptions found were when the carrier covered management employees voluntarily, which was done in the merger that created the Burlington Northern Railroad, or when specific legislation covered them, as it did in the Milwaukee Railroad Restructuring Act of 1979, § 3(4).
achieved in the fall of 1994, on terms that were very favorable for the company. The I.C.C. approved the settlement and dismissed the case "with prejudice" on December 5, 1994. Whether this case closes the use of the Cosby case as precedent for other claims remains to be seen. Certainly, Cosby has found no following in other federal circuit courts.

V. Deregulation and LPP Attempts

The passage of the Motor Carrier Act of 1980, which deregulated the over-the-road trucking industry, drastically altered the industry structure and its unionization.

A. Industry Structure and Unionization

Common carriers of a general goods type are divided into two segments, less-than-truckload ("LTL") and truckload ("TL"), which underwent different structural changes.

LTL companies consolidate shipments from various sources into a truckload and carry them to the same or nearby destinations, or to several destinations where they are unloaded and re-loaded at terminals for their respective destinations. The LTL business requires substantial investment for terminals; local trucking facilities for delivery; computer facilities for scheduling, order taking, billing, etc.; telecommunications facilities; as well as for large trucking equipment. As a result, entry into this branch of trucking operations is limited by the requirement for extensive investment.

The number of LTL motor carriers has actually declined since the passage of the Motor Carrier Act of 1980, which deregulated the industry. Between 1980 and 1991, a study by an industry magazine found that forty-three of the 100 largest motor carriers closed, or are otherwise no longer in business. Another fourteen survived by merging, by being taken over, or by selling out to another carrier; and two remained in business but ceased LTL operations. All but ten of the carriers that closed, merged, or dropped LTL business were LTL operations.

The exact terms of the settlement have not been divulged, but conversations with various parties indicate that it involved payments to approximately 570 claimants by the carrier totaling about one million dollars, and an additional amount of about $700,000 for costs and attorneys' fees. Assuming that these figures are reasonably accurate, the settlement was, therefore, less than one cent on the dollar amount claimed.


Pub. L. No. 96-296.

These data are found in Transport Topics, Aug. 5, 1991, at 28.

Convenient summaries of the motor carrier industry's structure and the impact of deregulation thereon are found in Nicholas A. Glaskowsky, Jr., Effects of Deregulation on Motor Carriers (2d ed. 1990), a study that basically opposes deregulation, and in Clifford
A similar study issued in 1993 by Trucking Management, Inc., which represents several of the largest LTL unionized carriers, is partially summarized in Table 1. This study reported that:

In the 1970s, around 200 carriers a year closed their doors; from 1980-89, over 11,500 failed. There were 2000 closings in 1991 alone.

In 1979, 65 of the top 100 carriers were identified as primarily LTL. Of those 65, more than two-thirds had ceased operations by 1991. In fact . . . only eight LTL carriers of the top 50 trucking companies from 1965 have survived deregulation . . . All the companies that failed were unionized carriers . . .

These dramatic results have been caused by the elimination of barriers to entry; greater price competition; elimination of restrictions on where and in what service carriers may operate; mergers of motor carriers; bankruptcies of weaker ones; expansion of some of the larger, better managed concerns; and transfer of some former LTL business to TL carriers, or to United Parcel Service's expanded small package operation.

The TL sector of the motor carrier industry is quite different in terms of investment requirements. For the small entrepreneur, there is no need for terminals, local delivery equipment, or elaborate computer and telecommunications facilities. One can go into the TL business by leasing one or more rigs, taking business to deliver a truckload of goods from destination A to destination B, and hoping to have a load for the return trip. This easier entry in the TL sector compared to the LTL has resulted in a substantial increase in the number of carriers, while industry concentration has increased in the LTL sector. Meanwhile, as the percentage of trucking companies with annual revenues under one million dollars has risen, net load factors and profit margins have declined, and high rates of turnover for small companies, as well as numerous bankruptcies, have occurred.

Because of the large number of small carriers and the lack of terminals as focal points of operation, the TL sector, unlike the LTL one, is predominately nonunion. Deregulation's elimination of barriers to entry and other changes had a profound impact on unionization. As Figure 1 shows, "[by] 1991, union employment in trucking was 40 percent below its

---

88. Glaskowsky, supra note 86, at Chapter 6. It should be noted that the largest and most successful TL carriers also invest heavily in the latest computer, software, and telecommunications equipment in order to provide rapid, reliable service. For an account of how a leading TL carrier handles just-in-time pick-up and delivery for large TL customers, see Myron Magnet, Meet the New Revolutionaries, 125 FORTUNE, February 24, 1993, at 12.
Table 1

Motor Carriers That Remain From the Top 50 in 1965

<table>
<thead>
<tr>
<th>Rank</th>
<th>1965</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>United Parcel Service</td>
<td>United Parcel Service</td>
</tr>
<tr>
<td>2</td>
<td>Consolidated Freightways</td>
<td>Consolidated Freightways</td>
</tr>
<tr>
<td>3</td>
<td>Roadway Express</td>
<td>Roadway Express</td>
</tr>
<tr>
<td>4</td>
<td>Associated Transport</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Pacific Intermtn. Express</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>McLean Trucking Co.</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Interstate Motor Freight</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Spector Freight System</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Denver Chicago Trucking Co.</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Pacific Motor Trucking</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Harris Freight Lines</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>Transamerican Freight Lines</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>Yellow Transit Freight</td>
<td>Yellow Transit Freight</td>
</tr>
<tr>
<td>14</td>
<td>Gateway Transportation</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>T.I.M.E. Freight</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>Transcon Line</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>Eastern Express</td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>Anchor Motor Freight</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>Ryder Truck Lines</td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>Garrett Freightline (ANR)</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>Western Gillette, Inc.</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>Associated Truck Lines</td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>IML</td>
<td></td>
</tr>
<tr>
<td>24</td>
<td>Norwalk Truck Lines</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td>Red Ball Motor Freight</td>
<td></td>
</tr>
<tr>
<td>26</td>
<td>Navajo Freight Lines</td>
<td></td>
</tr>
<tr>
<td>27</td>
<td>Jones Motor Co.</td>
<td></td>
</tr>
<tr>
<td>28</td>
<td>Wilson Freight Lines</td>
<td></td>
</tr>
<tr>
<td>29</td>
<td>United Buckingham Freight</td>
<td></td>
</tr>
<tr>
<td>30</td>
<td>Brach Motor Express</td>
<td></td>
</tr>
<tr>
<td>31</td>
<td>Kramer-Consol. Frt.</td>
<td></td>
</tr>
<tr>
<td>32</td>
<td>Illinois Calif. Express (ICX)</td>
<td></td>
</tr>
<tr>
<td>34</td>
<td>Hemingway Transport</td>
<td></td>
</tr>
<tr>
<td>35</td>
<td>Overnite Transportation</td>
<td>Overnite Transportation</td>
</tr>
<tr>
<td>36</td>
<td>Strickland Transportation</td>
<td></td>
</tr>
<tr>
<td>37</td>
<td>Cooper-Jarrett</td>
<td></td>
</tr>
<tr>
<td>38</td>
<td>Carolina Freight Carriers</td>
<td>Carolina Freight Carriers</td>
</tr>
<tr>
<td>39</td>
<td>Gordon Transport</td>
<td></td>
</tr>
<tr>
<td>40</td>
<td>Midwest Emery Freight Sys.</td>
<td></td>
</tr>
<tr>
<td>41</td>
<td>Akers Motor Lines</td>
<td></td>
</tr>
<tr>
<td>42</td>
<td>Terminal Transport</td>
<td></td>
</tr>
<tr>
<td>43</td>
<td>All States Freight</td>
<td></td>
</tr>
<tr>
<td>44</td>
<td>Johnson Motor Lines</td>
<td></td>
</tr>
<tr>
<td>45</td>
<td>East Texas Motor Lines</td>
<td></td>
</tr>
<tr>
<td>46</td>
<td>Mason and Dixon Lines</td>
<td></td>
</tr>
<tr>
<td>47</td>
<td>Leeway Motor Freight</td>
<td></td>
</tr>
<tr>
<td>48</td>
<td>Ringsby Truck Lines</td>
<td></td>
</tr>
<tr>
<td>49</td>
<td>Arkansas Best Freight Sys.</td>
<td>SBF Freight System</td>
</tr>
<tr>
<td>50</td>
<td>Pilot Freight Carriers</td>
<td></td>
</tr>
</tbody>
</table>

* Auto Transport carrier, not an LTL carrier

Source: Traffic World

1978 level, while non-union employment grew over 80 percent.\textsuperscript{89} In round numbers, this meant a loss to the Teamsters of as many as 200,000 dues-paying members.

B. ATTEMPTS TO GAIN LPPs UNDER Deregulation

The Teamsters lobbied strenuously to have LPPs, or at least protection similar to what was afforded to airline employees in that industry's deregulation law, included in the Motor Carrier Act of 1980, but did not succeed. The 1980 Report of the House of Representatives Committee on Public Works and Transportation dealing with H.R. 6418, which became the 1980 Act,\textsuperscript{90} did examine the LPP issue. It stated that the Committee had considered that the legislation would cause loss of jobs, and that this contingency "was dealt with by the creation of a list of available job openings to be supplied by regulated carriers to the Department of Labor."\textsuperscript{91}

\textsuperscript{89} \textit{The State of the LTL Trucking Sector} 12 (1993).
\textsuperscript{91} \textit{Id.} at 4.
The Report also stated that it was the Committee's intent "to conduct oversight hearings to ascertain the true impact of this bill on industry employment and what action, if appropriate, should be taken." Further, the Committee stated that such oversight would be part of annual hearings.

In further reference to the question of LPPs, the Committee elaborated on § 35 of the proposed Act which directed the Secretary of Labor:

- to publish comprehensive lists of jobs available with regulated carriers and to assist persons previously employed by a regulated carrier to find other employment. It is not the intent of section 35 that any motor carrier be required to hire employees from such lists or that motor carriers be required to refrain from immediately filling any openings. Specifically, no motor carrier shall be required to refrain from filling any openings until such openings are published on the list.

The Committee was also requested to amend the bill to provide labor protection for employees of the trucking industry who might lose their jobs as a result of this legislation. Labor protection provisions have been included in the Airline Deregulation and other acts of Congress according to dislocated employees first hire rights and assistance payments. The Committee elected not to include such provisions at this time.

When H.R. 6418 was debated on the House floor, an amendment was introduced to provide monthly assistance payments to displaced or laid-off employees similar to those provided for (but not as yet ever paid) under the Employee Protection Plan set forth in the Airline Deregulation Act. The proposed amendment was defeated.

Attempts of the Teamsters' union officials to secure the passage of LPP legislation in subsequent years also failed despite testimony at oversight hearings of the unemployment of members of the union. The union's claims that LPPs were needed were offset by the then Undersecretary of Labor, who presented data showing that much of the unemployment was attributable to the severe recession of the early 1980s rather than the passage of the bill.
than to deregulation, and that the unemployment data presented by the Teamster officials pertained only to unionized employees, but that increased employment of nonunion employees offset some of the union members' unemployment.\textsuperscript{99}

It is thus clear that any type of LPP was, and continues to be, rejected as a means of mitigating the impact of motor carrier deregulation. Moreover, the Department of Labor experience, as testified to by the Undersecretary, also showed that the requirement to maintain a list of available unemployed trucking employees and available jobs in that industry was of little consequence. The Department kept such a register through the Employment Service, which listed the openings and applicants in its more than 2000 local offices. The actual volume of job orders and applicants both proved quite low. The Undersecretary attributed the slight utilization of this service to the fact that unemployed union members sought jobs at Teamster hiring halls.\textsuperscript{100}

It is also probable that laid-off employees of large unionized LTL firms would not be very interested in working either as owner operators or for small, usually nonunion TL concerns, which, as noted, were proliferating rapidly during this period, and which were probably equally uninterested in employing Teamster members.\textsuperscript{101}

\section*{VI. THE CONTENT OF COLLECTIVE AGREEMENTS}

A search of Teamster agreements in over-the-road trucking found no railroad-type LPPs. The contracts examined and listed below covered periods from 1985 to 1998.

- National Master Freight Agreement
- Carolina Freight Agreement
- Central States Council
- Diamond Transportation
- Distribution Trucking
- Food Employers of California
- Food Haulers of New Jersey
- Gateway Freightline (Kroger)
- Illinois Trucking


\textsuperscript{100} Id.

\textsuperscript{101} During the late 1980s when employment levels were high, there was some concern about a shortage of truck drivers, but this was not so much based upon a market lack of qualified personnel as a failure of the industry to attract personnel when in competition with other industries. See, e.g., Stephen A. Lemay & G. Stephen Taylor, Truck Driver Recruitment: Some Workable Strategies, \textit{28 Transp. J.} 15 (1988); and R. Neil Southern, James P. Rakowski & Lynn R. Gordon, Motor Carrier Road Driver Recruitment in a Time of Shortage, \textit{28 Transp. J.} 42 (1989).
The Failure of the Teamsters’ Union

Maryland—D.C. Over-the-Road
Schneider Transport
United Parcel Service
Southern Conference of Teamsters Rail-Truck Agreement

A. NATIONAL MASTER FREIGHT AGREEMENTS

The National Master Freight Agreement includes as participants several of the largest LTL carriers, as well as carriers in other trucking branches; other agreements mimic much of its content. The contract for the period April 1, 1991-March 31, 1994, provided that in case of a merger, consolidation, or similar transaction, seniority of the employees involved shall be negotiated by the employer and the affected local union. A general layoff section provides that laid-off employees be given job preference in their area for up to three years. Other provisions provide expanded seniority rights for employees laid off because of terminal closings, partial closings, or similar events. Where employees must move to hold a position, moving expenses are paid.

This National Freight Agreement did not provide for severance pay, but some Teamster agreements, for example, Gateway Freightline (Kroger), have included such provisions. As already emphasized, however, there were no provisions which provided for continuation of pay to laid-off persons, or to personnel demoted or downgraded as a result of mergers, consolidations, abandonments, or any similar cause for which LPPs are provided under the railroad system.

The 1994-98 agreement, signed after a strike, provided for an expansion of the right of motor carriers to use additional railroad intermodal service in place of motor carriers for long distance transport. To protect drivers who might be displaced, the contract provides that they shall be offered work at other domiciles, and may not be laid off during the term of the contract if they accept such assignment. All bid drivers (those with sufficient seniority to have regular runs) are protected during each dispatch day and all extra board drivers (those who fill in as needed until they acquire sufficient seniority to gain regular runs) during each dispatch week at all affected domiciles. As in other transfers, moving expenses are paid.

B. THE RAIL TRUCK AGREEMENT

Of special interest for this study are the “Southern Conference of Teamsters Master Rail-Truck Freight Agreement for the Southwest Area and Supplements & Riders Thereto Covering Road, City, Garage, and Clerical Employees for the Period of April 1, 1988 Through March 31, 1991,” and the renewal thereof, 1991-1994. Among the parties to these
agreements with the Teamsters' union for 1988-1991 were Southern Pacific Motor Trucking Company; Missouri Pacific Truck Lines; Kansas City Southern Transport Company, Inc.; Louisiana, Arkansas, and Texas Transportation Company; and Katy Transportation Company. In the period between 1991 and 1994, after a rail merger, Union Pacific Truck Lines replaced the latter two. All the trucking companies are railroad-owned motor transport concerns.

The agreements contain no severance pay provision except a requirement that full pay to date of termination be paid. They do provide that company successors and assigns be responsible for maintaining the agreement, and that employee and family transportation and moving expenses be paid in cases of transfers at the direction of the company or of employees "exercising seniority rights to new positions or vacancies necessitating changes of residence." There is, however, no other provision that could possibly be termed a labor protection provision as the term is utilized in railroad parlance.

VII. THE RATIONALE FOR LPPs

Although it was not expressed, it is likely that the Teamsters' union failed to win LPPs except in a few exceptional cases because it could not meet the rationale underlying them. It seems clear that trucking lacked the railroads' historic differentiation from other industries, which has been brought to airlines and urban mass transit. Thus, the arguments justifying these very rich benefits have been found inapplicable to trucking even though, as the discussion which follows demonstrates, such rationale is highly debatable for any of the transportation industries.

A. THE RATIONALE FOR RAILROAD LPPs

The rationale of LPPs for railroad workers is that they have a unique skill which is not utilized in other industries. It is further maintained that when a railroad ceases operations, such as when a merger between competing railroads occurs, no other avenues of employment are available for displaced railway personnel. Moreover, since the railroads have suffered declining employment for over seventy-five years, opportunities for railroad workers outside the workers' domiciles are very slim.¹⁰² Even if job opportunities existed, the displaced workers would be required to begin any new railroad employment at the lowest job in the craft because the rigid seniority system in the industry is senior-

¹⁰². Employment in the railroad industry peaked at approximately two million in 1920, then declined by one-half in the early 1930s. It rose to 1.4 million during World War II, and has since dropped to about 235,000. For data, see Transportation in America (ENO Transportation Foundation, Inc., 12th ed. 1994), at 24.
ity district specific. Thus, it is argued that when railroad workers are laid off permanently, or for long periods, ordinary unemployment compensation or severance pay arrangements are insufficient for workers' needs. It is further contended that since government regulates numerous phases of railroad industry behavior and operations, it should also regulate employee relations to ensure that employees are properly treated.

This rationale was developed during the 1920s and continues to permeate the arguments of railroad unions in their quests for LPPs. It is superimposed on the general theory of railway labor relations which have always been based upon a public policy different from that established for other industrial workers, except for airlines, which were cast into the railroad mold by legislation and administrative action during the 1930s and 1940s.

The reasons for the different treatment of railroad workers in nearly all aspects of labor and social legislation seem to have been, in addition to this alleged uniqueness of work: first, that the railroads by the latter part of the nineteenth century were the most significant means of transporting goods, materials, and people over long distances, and vital to the commerce of the country; second, that regulation of the railroads was found constitutional under the interstate commerce clause and, therefore, unlike manufacturing industry, subject to early congressional regulation; and third, that at the turn of the century, the railroad operating crafts had gained power and influence and were able to affect political decisions. When government takeover of the railroads during World War I encouraged the unionization of the non-operating crafts, union power and influence were greatly enhanced. During the 1930s, railroad employment, even though cut by one-half since 1920, stood at one million, and the unions had members in every congressional district.

If one examines the jobs of railroad workers, the alleged "uniqueness" appears to be confined largely to engineers and conductors. Signalmen have training in electrical and electronic applications, which surely could be used in other industries. All clerks and office personnel could undoubtedly qualify with minimum training for jobs in other industries. Skilled mechanics in the shops should have little difficulty obtaining positions in many metal industries. Railway carmen do less skilled, possibly unique work, but they could certainly qualify for work in other industries with minimum training. Most maintenance of way workers are laborers or equipment operators. The latter could easily be trained in road construction or other heavy equipment operation.

Insofar as the absence of jobs in the same industry and location is utilized as a rationale to support LPPS, the same thinking could be applied to numerous other industries, such as steel mills, which have experienced tremendous cutbacks; paper mills; and many plants located in one
industry towns. Moreover, given that the railroads emphasize careful selec­tion of operating employees, it is difficult to believe that these employ­ees, if laid off, would not qualify after some retraining for jobs in other industries, in many of which are also found unique jobs.

The arguments for LPPs in the railroad industry thus rest largely on grounds that are not defensible in terms of the “uniqueness” of the jobs or their location. The payment of generous benefits for five or six years, in some cases even for life, to railroad workers laid off because of merg­ers or consolidations, in fact, results in special privileges to these workers, significant costs to carriers, and a financial burden to the public.

B. RATIONALE FOR AIRLINE LPPs

In the airlines, the really unique jobs are those of the pilots. The remainder of the jobs may have some unique aspects, but the training, work, and experience are valuable for employment in other industries. For example, flight attendants’ experience in interacting and serving people, reservation clerks’ work with computers and data processing, and mechanics’ training on complicated equipment give them excellent credentials for other employment. Selection of pilots is very carefully done, and a college education is generally required. The compensation is among the most generous in industry. Special protective measures over and above those accorded employees generally under these circumstances seem questionable public policy.103

C. RATIONALE FOR URBAN MASS TRANSIT LPPs

The primary rationale to provide labor protective provisions to employees of urban mass transit systems was originally that the transfer of these systems to public ownership would threaten unionism and collective bargaining and, therefore, the employment terms and conditions of the employees involved. In 1964, collective bargaining in the public services was relatively rare and weak. Today, however, public employment is much more highly unionized than is the private sector. In 1994 only 10.9% of the private sector labor force was unionized, as compared with 37.8% of public employees. That is more than three times the comparable private employee ratio. That is more than three times the comparable private employee ratio. Clearly, union protection such as that provided by § 13(c) is difficult to justify as necessary for public employees today.104

103. See Northrup, supra note 18, for an analysis of the prodigious cost of paying LPPs to airline employees.

104. Data for union membership are published each year by the U.S. Department of Labor, Bureau of Labor Statistics, in the Bureau’s journal, Employment and Earnings, January or February issue.
A second rationale for the protective provisions of § 13(c) relates, as in airlines and railroads, to the alleged special characteristics of the jobs involved. In 1989, 173,029, or 60.6% of total transit employment, were motor bus operators. “Successful performance in that occupation requires motor vehicle operating skill, a calm and courteous demeanor, good moral character, and capacity to read and to tell time. These are skills commonly possessed by the country’s adult populations.”

Rail operating workers, office and clerical staff, and maintenance employees are the other major groups in urban transit, each a much smaller percentage of the total workforce than are motor bus operators. The first has a profile similar to railroad train operators. What has been already noted about railroad train operators is applicable to their urban mass transit counterparts. Maintenance employees include auto mechanics and lesser skilled personnel, all of whom are in demand by automobile, truck, industrial and construction equipment, farm equipment concerns and sales agencies, as well as by other businesses which utilize such skilled mechanics, helpers, and similar personnel. Office and clerical employees have wide opportunities for alternative employment. Thus, the arguments supporting such special legislation for urban mass transit employees are weak.

D. RATIONALE FOR TRUCKING INDUSTRY LPPs

Utilizing the criteria developed to support LPPs for railroad employees, one finds very few grounds for LPP application to trucking industry workers. The industry work force has four main groups: truck drivers, warehouse personnel, auto mechanics, and clerical employees. Truck drivers are, of course, key personnel. Applicants for these jobs must be reasonably strong physically, be able to drive vehicles, and be capable of learning how to maneuver large trucks on the highways, in crowded cities, and in and around company docks. They must be able to meet U.S. Department of Transportation minimum requirements as to age, visual acuity, and other physical requirements, and to pass government physical examinations and tests proving that they have these abilities, and have thereby obtained the appropriate driving licenses. They must also be willing to endure long periods away from home, be able to read and write, have the good character to avoid alcohol and substance abuse that might impair their ability to drive, and act promptly in an emergency. A large segment of the labor force obviously qualifies for such positions after some training.

Warehousemen (dockmen) need somewhat similar qualifications, but are in less critical positions, are not required to be absent from home,

105. Rottenberg, supra note 24, at 608.
and do not need to pass tests for government licenses. Again, these attributes are found in a substantial portion, probably a majority, of the labor force. Mechanics need training in their skills, which are, however, widely utilized in a number of industries involving automobiles and heavy equipment. These services are often in short supply, and are therefore in high demand. Clerical employees perform the same functions for trucking companies that they do for many other employers.

Unlike railroad employment, jobs are found in nearly all localities of any size and are not confined to one employer except in small communities. Since deregulation, entrance to the industry for TL shippers has been rather easy; therefore, opportunities exist for those who have lost jobs to gain employment with other carriers, or even to become self-employed as owner-operators. Claimants who are or have been truck divers testified in the recent BNT arbitration that the “driving skills” are readily transferable from one truck company to another.\(^\text{106}\) The former BNT Director of Human Resources also testified that “truck drivers, dockmen, and the clerical workers all had readily transferable skills . . . ”\(^\text{107}\) and that more than 90 percent of the BNT labor force possessed transferable skills.\(^\text{108}\) Testimony of claimants who formerly occupied these positions clearly affirmed this fact.\(^\text{109}\)

Of course, being unemployed results in severe problems. The issue here, however, is whether trucking employees should be granted terms and conditions in excess of those provided to employees in the general labor force who suffer this misfortune. Congress, except for the short-lived Penn Truck experience, the I.C.C. and the courts, except for the Eighth Circuit in Cosby, have determined that there is no basis for such special privilege treatment for trucking employees.

E. THE POLITICAL FACTOR AND THE TEAMSTERS

In addition to the factors already enunciated, there was probably a political factor which could have affected the failure of the Teamsters to win at least something akin to the EPP that was written into the Airline Deregulation Act of 1978. Since the difficulties of the late James Hoffa during the 1960s, and until the current union reform regime, the Teamsters union hierarchy supported Republican candidates. The Motor Carri...
rier Deregulation Act was enacted in 1980, a period in which the Democrats controlled both Congress and the Presidency, as they did in 1978. Yet unlike the situation in 1978 when the ADA was enacted, when motor carrier deregulation was being discussed in 1980, there was no significant surge of congressional friends of unions who came forward to address the Teamsters’ quite realistic fear that a key impact of deregulation would be a substantial loss of union membership. Moreover, Teamster election support of Republican candidates in the 1980 election resulted in no return support for the relief which they sought.

It may well be that the Teamsters’ belated search for special legislation providing relief in layoffs over and above that enjoyed by workers in non-transportation industries would have failed regardless of the political factor. Nevertheless, the disinterest of major union supporters in Congress to add political muscle to the Teamster proposals appears to have doomed whatever chance that they had of becoming law.
APPENDIX I
SYNOPSIS OF I.C.C. IMPOSED RAILROAD LABOR PROTECTION
BENEFITS*

The Interstate Commerce Commission imposes four sets of standard labor protection conditions for different transactions:
(1) New York Dock — applies to mergers, consolidations and acquisitions of control;
(2) Oregon Short Line — applies to abandonments;
(3) Mendocino Coast — applies to leases; and
(4) Norfolk and Western — applies to trackage rights.

Except for the notice and negotiation provisions for reaching an "implementing agreement," the substantive benefits of these four sets of conditions are identical. The following is a brief summary of the major provisions of these protective conditions.

I. ELIGIBILITY FOR PROTECTION CRITERIA

A transaction, i.e., an ICC authorized action such as a merger, abandonment, lease or trackage rights arrangement, triggers eligibility for protective benefits.

In order to claim protection benefits, an employee must identify a transaction that may have lead to a loss or diminution in earnings. The burden of proof is then on the railroad to show that causes other than a transaction affected an employee.

A displaced employee is an employee who is placed in a worse position with respect to his compensation and rules governing his working conditions as a result of a transaction. He still holds a job, albeit at a lower rate of pay, and is entitled to be made whole. A dismissed employee is an employee who is deprived of employment as a result of a transaction.

The protective period is the six-year period after an employee is adversely affected as the result of a transaction. Employees with less than six years of service are protected for a period equivalent to their actual years of service.

One area of almost constant dispute between the railroads and unions is over the issue of eligibility criteria. The unions typically attempt to link employee furloughs with ICC transactions and the carriers try to demonstrate the opposite. A large body of arbitral precedent has been

built up in recent years requiring the linkage between an adverse effect and an ICC transaction in order to make an employee eligible for protective benefits. Job reductions, per se, do not entitle employees to ICC imposed protection benefits. Collectively bargained labor protection agreements, on the other hand, typically have much looser eligibility criteria for qualifying for protection benefits.

II. PRESERVATION OF COLLECTIVE BARGAINING AGREEMENTS

Section 2 of each of the ICC protective conditions contains a provision preserving "rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits." The history of the language dates back to the Urban Mass Transportation Act of 1964. At the time, as private transit company operations were assumed by public transit authorities, the transit unions were concerned that their collective bargaining agreements would not be preserved through this transition. This preservation of agreement language subsequently was carried over into the Amtrak C-1 protective conditions as the C-1 conditions were based on the UMTA provisions. In turn, the "new" ICC protective provisions resulting from the Rail Revitalization and Regulatory Reform Act of 1976 amendments to the Interstate Commerce Act were based substantially on the 1971 Amtrak C-1 conditions. This preservation of agreement language then was carried over to the ICC protective conditions formulated in the late 1970s.

The rail unions have relied on this provision to argue that employees must carry along their collective bargaining agreements as they are transferred from one railroad to another in a merger, consolidation or lease transaction in lieu of working under the agreement of the railroad to which they are transferred. Although an initial group of arbitration awards in the early 1980s supported the unions' position, subsequent awards have ruled that agreements are not portable as work forces are consolidated.

III. PRESERVATION OF ON-PROPERTY PROTECTION AGREEMENTS

Many employees in the railroad industry come under the purview of collectively bargained protection agreements that are unrelated to an ICC authorized transaction. Often these agreements provide benefits for longer than a six-year period or contain looser eligibility criteria for qualifying for benefits (e.g., lifetime protection agreements guarantee income maintenance until an employee retires, resigns or is dismissed for cause). For employees covered by such protection agreements and who are also affected by an ICC authorized transaction, the ICC protection conditions
allow such employees to elect benefits under their on-property agreement in lieu of the ICC protection benefits.

IV. NOTICE, NEGOTIATIONS, AND IMPLEMENTING AGREEMENTS

Section 4 of each of the ICC protective conditions contains detailed procedures for serving notices, conducting negotiations, reaching implementing agreements, and submitting issues to arbitration if an implementing agreement is not reached. The New York Dock and Oregon Short Line Conditions require a thirty day negotiation period after notices are served. In an agreement is not reached within this period, either party may submit the dispute to arbitration. However, the transaction cannot be implemented without an agreement or arbitration decision. Although this process is designed to be completed in 90 days, New York Dock transactions usually take a minimum of 180 days and often longer to move to finality where arbitration is involved.

Mendocino Coast and Norfolk and Western transactions, on the other hand, provide for a twenty day negotiation period after service of a notice. At the end of twenty days, the railroad is free to consummate the lease or trackage rights transaction notwithstanding the absence of an implementing agreement. If an agreement is not reached subsequently, the matter can be referred to arbitration.

The scope of arbitration under Section 4 of the ICC protective conditions is limited to the selection of forces issues. The parties attempt to agree on how work forces are intermingled in a consolidated operation. If an agreement is not reached, then the arbitrator determines the appropriate selection of forces.

V. PROTECTIVE ALLOWANCES

There are three types of protective allowances under ICC protective conditions. They are: (1) displacement allowances; (2) dismissal allowances; and (3) separation allowances. Displacement allowances are designed for employees who are forced to accept a lower paying position as a result of an ICC transaction. It is a make whole provision that provides for difference in pay between the old an new positions. Dismissal allowances are designed for employees who are deprived of employment as a result of a transaction. If employees cannot exercise their seniority to hold another position or are not offered comparable positions, the railroad must provide full income maintenance for six years, or in the case of employees with less than six years service, for a period of time equivalent to their actual years of service. Finally, separation allowances are available for employees who are deprived of employment. In lieu of electing
protection for up to six years but being available for recall, employees can elect to resign and accept a lump sum severance allowance.

The displacement and dismissal allowances are based on a “test period” of the last twelve months in which the employee had railroad income immediately preceding the month in which an employee was adversely affected by an ICC transaction. This figure is divided by twelve to produce a monthly guarantee. Separation allowances are based on an employee’s daily rate of pay multiplied by 360 which produces a typical severance allowance of between sixteen and seventeen months of pay. Fringe benefits also are preserved for those employees collecting a dismissal or displacement allowance.

VI. MOVING BENEFITS

Employees who are required to change their point of employment as the result of an ICC authorized transaction are entitled to moving and relocation benefits. Such benefits include actual relocation costs, traveling expenses of himself and members of his family, living expenses for himself and members of his family, his own actual wage loss not to exceed three days, and any loss on sale of his home. Because of the administrative costs and burden of monitoring these benefits, many railroads in recent years have agreed to pay a one time lump-sum relocation benefit in lieu of the aforementioned moving and relocation benefits.
APPENDIX II

The Airline Deregulation Act of 1978 ("ADA") established two benefit programs: benefits for "dislocation," and employee preferences for employment if dislocated. Together these benefits comprised the Employee Protection Plan ("EPP").

ELIGIBILITY AND MONETARY BENEFITS UNDER THE EPP

The benefit schedule set forth in § 43 (e)(2) of the ADA defined a qualifying dislocation to receive benefits as either a bankruptcy or a "major contraction in employment" for which a major cause was the new regulatory structure provided by the ADA. "Major contraction" was further defined as "a reduction by at least 7.5 percent of the total number of full-time employees on an air carrier within a 12-month period." Furthermore, only those employees who had at least four years of seniority at the time of the passage of the ADA and worked then for an airline that was certificated by the Civil Aeronautics Board ("CAB") were eligible. This eliminated the eligibility of employees from airlines spawned after the ADA became effective, which merged or ceased operations, such as People Express, Muse, and Air Florida. Moreover, the EPP benefit provisions were effective under the law only for a ten-year period and, therefore, expired in October 1988. Employees of Eastern Air, Pan American, and Midway, which ceased operations, or Trans World, which sold major portions of its operations, all in 1991-1992, were thus not eligible for any EPP benefits except for those employees who suffered "major layoffs" prior to October 1988.

Benefits under the EPP could have provided the payment of the displaced employees' prior wages for up to six years. The Secretary of Labor, however, was required to determine what percent of prior wages would be paid as benefits. Actually, no employee protection benefits whatsoever have been paid as a result of the law. Any implementation of the law was delayed till 1987 because of litigation questioning its constitutionality.

110 The Secretary of Transportation, who took over the CAB's function, determined originally in the test case involving Braniff Airlines that deregulation was not the "major cause" of the layoffs associated with this carrier's bankruptcy and demise. In a case brought by the Air Line Pilots Association ("ALPA"), however, this decision has been reversed and remanded by the U.S. Court of Appeals, District of Colum-

---

111. Airlines under the name of "Braniff" have gone bankrupt three times. Each such airline was a different corporate entity which acquired the name, but had no relationship to others of the same name.
Since Congress has never appropriated any funds for these benefits, it is not clear whether benefits will be paid if the Department of Transportation alters its policies and the courts approve.

**Industry Re-employment Rights**

Section 43 (D)(1) of the ADA provided an additional right to airline employees under the same restricted eligibility rules as in the benefits section. Such employees, if qualified, are accorded preferential right by any airline seeking new employees. This section was also delayed in implementation by litigation, but was finally implemented on June 9, 1986. Airlines were required to report openings to an office in the New York State Department of Labor, with which the U.S. Department of Labor has contracted to administer this requirement. The New York Department puts these orders on line daily and on microfiche regularly, and keeps the listings open from one month to one year. The U.S. Department of Labor determines whether laid-off employees are eligible for the preferential treatment. It has ruled, for example, that employees who have preferential hiring rights cannot displace an applicant hired under a consent affirmative action decree. Additionally, litigation has confirmed that rights established by the EPP do not go beyond preferential hiring, and that no such rights have been created for upgrading and other movements beyond hiring.

Neither the ADA nor the regulations require any public record keeping. There is, therefore, no maintained record of placements under the EPP. According to the personnel administering the EPP, some airlines report all vacancies faithfully, some leave the reporting to regional or local management which may or may not report, and some do no reporting at all. The ADA provides no authority for the Department to enforce, or to seek enforcement, of the reporting requirement. Anyone feeling aggrieved must, therefore, seek judicial enforcement. This course was pursued by flight attendants who were replaced after striking Trans World Airlines in 1986. They were ruled eligible for preferential treatment and consequent back pay because the carrier had refused to furnish notices of their right to such hiring at other carriers. Back pay was won in another case by a pilot, who lost his job in a bankruptcy, when

---

113. See supra note 1.
114. Information on this program, where not otherwise indicated, is based upon telephone interviews with U.S. and N.Y. labor departments personnel, August 15, 16, and 20, 1991.
Piedmont Air refused to hire him. In a third case, the court ruled that the Colorado two-year statute of limitations applied for bringing a case under the ADA rather than the six-month limitation of the National Labor Relations (Taft-Hartley) Act, as amended, and that hence, a laid-off pilot was wrongly denied preferential treatment for hiring by United Air Lines.

There have been other cases brought by individuals, but no other successful litigations were found. All such actions have apparently either been settled prior to any hearing, or dismissed for want of jurisdiction, timeliness, or other procedural reason.

In addition to the Trans World, Piedmont, and United litigants, those laid off as a result of Braniff's first bankruptcy, or as a result of Continental's first bankruptcy or replaced in that carrier's strike, and those formerly employed by some small carriers that ceased operations before October 1988, such as New England Air, are presumably eligible under the EPP preferential hiring requirement. Since those who lost jobs after October 1988 are not eligible, those who benefit from this provision are a diminishing number as time passes.

The Practical Effects on Labor of Repealing
American Cabotage Laws

C. Todd Jones*

TABLE OF CONTENTS
I. Introduction ............................................... 403
II. American Cabotage Laws .................................. 404
   A. Jones Act § 27 ........................................ 406
   B. The Passenger Ship Act of 1886 ....................... 412
   C. The Towing Act of 1940 ............................... 413
III. Legal Regimes Affected by Repeal of the Jones Act ... 415
    A. The Fair Labor Standards Act ......................... 415
    B. The National Labor Relations Act .................... 422
    C. Section 33 of the Jones Act ........................... 433
    D. Longshore and Harborworkers’ Compensation Act ... 441
    E. United States Immigration Laws ...................... 444
IV. Conclusion ................................................ 446

I. INTRODUCTION
American cabotage laws are part of a protectionist shelter for the
U.S. sea transport industry. In spite of subsidies, ownership restrictions,

* LL.M. (International and Comparative Law) Candidate, Georgetown University Law
Center; J.D., B.S.B.A., University of Denver. The author practices law in Washington, D.C. The
author would like to thank Allen Mendelsohn and Warren Dean for their comments and
suggestions.

403
flag requirements, and construction standards, American-flag merchant marine and domestic coastwise trade has withered over this century. These government measures, which were originally designed to promote and support a merchant marine for military purposes, have failed to create the thriving private sea carriage business which they sought. In fact, the industrial policy goal of supporting this U.S. industry has also clearly failed, with little intercoastal sea trade actually occurring at this time.

Assuming that there is an appropriate way to meet the defense needs of this country without resorting to economic protectionism, cabotage laws and shipbuilding subsidies have no more place in this economy than colonial land grants and Marxist management techniques. Unfortunately, they have become such an integral part of the transportation sector that they cannot be swept away by a simple repeal without doing great damage to parts of the country's economy. To eliminate the pre-industrial relic that is the American cabotage regime requires considering in advance the effects of doing so. The laws which generally guide commerce and enterprise in this nation must also be assessed.

This paper shall outline the American cabotage laws and briefly consider their limits on U.S. shipping. It will then analyze how their repeal would affect five American legal regimes: the Fair Labor Standards Act of 1938, the National Labor Relations Act of 1947, the Longshoreman and Harborworkers Act, Section 33 of the Jones Act, and United States immigration laws. With each, it recommends legislative amendments needed to accompany the Act's repeal to ensure as smooth a transition as possible between protectionism and economic growth.

II. AMERICAN CABOTAGE LAWS

Cabotage is a term used to describe government measures used to protect or foster a domestic shipping industry by reserving all or a portion of intranational sea commerce to ships which fly the national flag, are owned by local corporations or individuals, are built or repaired in local shipyards, or are staffed by the home country's seamen. The United States has historically sought to encourage growth of its merchant marine for military and economic purposes by limiting the coastwise trade to American ships. Congress sought to promote the domestic sea trade in its first session by prohibiting the states from imposing duties on U.S. vessels. This was followed by measures during the next two years exact-


ing heavy duties from foreign flag, foreign built vessels engaging in coastal trade.³

The first major cabotage law enacted in the United States was the Act of March 1, 1817.⁴ It required ships importing goods into the country to be U.S. flagged or owned by Americans if the foreign nation from which the goods came required the same of vessels that imported to it.⁵ Further, vessels engaging in the coastwise trade had to be flagged or owned in the same manner.⁶ The law created a long standing policy which has been extended and expanded under our modern cabotage restrictions.

The Federal government's policy of encouraging a domestic merchant marine was succinctly expressed in the opening section of this nation's most important cabotage law, the Merchant Marine Act of 1920,⁷ colloquially known as the Jones Act,⁸ which stated:

> It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is the declared policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, etc.⁹

To that end, Congress has enacted several cabotage statutes, each of which is discussed below.

---

³ Id. at 4, quoted in Report of the House Committee on Education and Labor Coverage of Certain Labor Laws to Foreign Flag Ships, H.R. Rep. No. 984, 1022 Cong., 2d Sess., pt. 1., at 6 (1992) (hereinafter 1992 House Report). Cabotage laws are not the only measures nations use to support a domestic merchant marine. Other protectionist and industry support actions include: duties and levies on foreign shippers; direct subsidies to domestic shippers and ship builders; cargo preferences, both bilateral and multilateral, which require a set percentage of foreign sea-trade to be on domestic carriers; and cargo preferences, requiring cargoes such as foreign aid, relief aid, and surplus agricultural commodity shipments to be on domestic carriers. See Ademuni-Odeke at 71-86.

⁴ Act of March 1, 1817, ch. 31, 3 Stat. 351 (repealed 1933).
⁵ Id. § 1.
⁶ Id. § 4.
⁸ The legislation is named after its sponsor, Senator Wesley L. Jones of Washington. The term "Jones Act" is used most used to refer to section 33 of the Act, which provides for the recovery for injury to, or death of a seaman. American Maritime Ass'n v. Blumenthal, 590 F.2d 1156, 1157 n.2, cert. denied 441 U.S. 943 (1978). See section II(C). For purposes of this article, however, the term will be used to refer to section 27 of the Act.
A. JONES ACT § 27

Section 27 of the Jones Act was designed to further the American merchant marine policy by limiting the ownership of ships engaging in coastal commerce to Americans and American corporations, reiterating the long-kept policy of excluding foreign vessels. The section states:

No merchandise . . . shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise (or a monetary amount up to the value thereof as determined by the Secretary of the Treasury, or the actual cost of the transportation, whichever is greater, to be recovered from any consignor, seller, owner, importer, consignee, agent, or other person or persons so transporting or causing said merchandise to be transported), between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States . . .

10. See Act of March 1, 1817, supra notes 4 - 6 and accompanying text.
11. The "via a foreign port" language was added to the predecessor statute, see supra note 4, after United States v. 250 Kegs of Nails, 52 F. 231 (S.D. Cal. 1892), aff'd, 61 F. 410 (9th Cir. 1894). The government had sought but did not obtain forfeiture of nails which had been shipped on a Belgian ship from New York to Antwerp, unloaded, reloaded to a British ship, and transported to California, because the original law did not contain the "directly or via a foreign port" language. See Act of Feb. 15, 1893, ch. 117, 27 Stat. 455. It is interesting to note that even a century ago the Jones Act's predecessor was burdening U.S. producers and consumers forcing them to use more expensive or less convenient domestic shippers. For a historical discussion of the case, the Act, and related issues, see McGeorge, United States Coastwise Trading Restrictions: A Comparison of Recent Customs Service Rulings With the Legislative Purpose of the Jones Act and the Demands of a Global Economy, 11 Nw. J. Int'l L. & Bus. 62 (1990).
12. 46 U.S.C. Sec. 883 (1993). The Act, less than a model of legislative drafting, is a single section amended by modifying provisos tacked on to the end of the original legislation. The most important portions of the law are quoted in the text above. Because of the amendments to the legislation, bracketed numbers have been added to distinguish provisos within the Act for purposes of this discussion but are not part of the Act. As amended, the remainder of the Act states:

[1] or vessels to which the privilege of engaging in the coastwise trade is extended by section 808 of this Appendix or section 22 of this Act; [2] Provided, That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry, shall hereafter acquire the right to engage in the coastwise trade: [3] Provided further, That no vessel which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States, its Territories (not including Trust Territories), or its possessions: [4] Provided further, That this section shall not apply to merchandise transported between points within the continental United States, including Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said Commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities: [5] Provided
further, That this section shall not become effective upon the Yukon River until the Alaska Railroad shall be completed and the Secretary of Transportation shall find that proper facilities will be furnished for transportation by persons citizens of the United States for properly handling the traffic: [6] Provided further, That this section shall not apply to the transportation of merchandise loaded on railroad cars or to motor vehicles with or without trailers, and with their passengers or contents when accompanied by the operator thereof, when such railroad cars or motor vehicles are transported in any railroad car ferry operated between fixed termini on the Great Lakes as a part of a rail route, if such car ferry is owned by a common carrier by water and operated as part of a rail route with the approval of the Interstate Commerce Commission . . . , now owned or controlled by any common carrier by rail and if such car ferry is built in and documented under the laws of the United States: [7] Provided further, That upon such terms and conditions as the Secretary of the Treasury by regulation may prescribe, and, if the transporting vessel is of foreign registry, upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that the government of the nation of registry extends reciprocal privileges to the vessels of the United States, this section shall not apply to the transportation by vessels of the United States not qualified to engage in the coastwise trade, or by vessels of foreign registry, of (a) empty cargo vans, empty lift vans, and empty shipping tanks, (b) equipment for the use with the cargo vans, lift vans, or shipping tanks, (c) empty barges specifically designed for carriage aboard a vessel and equipment, excluding propulsion equipment, for use with such barges, and (d) any empty instrument for international traffic exempt from the customs laws of the Secretary of the Treasury pursuant to the provisions of section 1322(a) of Title 19, if the articles described in clauses (a) through (d) are owned or leased by the owner or operator of the transporting vessel and are transported for his use in handling cargo in foreign trade; and (e) stevedoring equipment and material, if such equipment and material is owned or leased by the owner or operator of the transporting vessel, or is owned or leased by the stevedoring company contracting for the lading or unlading of that vessel, and is transported without charge for use in the handling of cargo in foreign trade: [8] Provided further, That upon such terms and conditions as the Secretary of the Treasury by regulation may prescribe, and, if the transporting vessel is of foreign registry, upon his finding, pursuant to information furnished by the Secretary of State, that the government of the nation of registry extends reciprocal privileges to vessels of the United States, the Secretary of the Treasury may suspend the application of this section to the transportation of merchandise between points in the United States (excluding transportation between the continental United States and noncontiguous states, districts, territories, and possessions embraced within the coastwise laws) which, while moving in the foreign trade of the United States, is transferred from a non-self-propelled barge certified by the owner or operator to be specifically designed for carriage aboard a vessel and regularly carried aboard a vessel in foreign trade to another such barge owned or leased by the same owner or operator, without regard to whether any such barge is under foreign registry or qualified to engage in the coastwise trade: [9] Provided further, That until April 1, 1984, and notwithstanding any other provisions of this section, any vessel documented under the laws of the United States . . . may, when operated upon a voyage in foreign trade, transport merchandise in cargo vans, lift vans, and shipping-tanks between points embraced within the coastwise laws for transfer to or when transferred from another vessel or vessels, so documented and owned, of the same operator when the merchandise movement has either a foreign origin or a foreign destination; but this proviso (1) shall apply only to vessels which that same operator owned, chartered or contracted for the construction of prior to November 16, 1979, and (2) shall not apply to movements between points in the contiguous United States and points in Hawaii, Alaska, the Commonwealth of Puerto Rico and United States territories and possessions. For the purposes of this section, after December 31, 1983, or after such time as an appropriate vessel has been constructed and documented as a vessel of the United States, the transportation of hazardous waste, as defined in section 6903(5) of title 42, from a point in the United States for the purpose of the incineration at sea of that waste shall be deemed to be transportation by water of merchandise between points in the United States: [10] Provided, however, That the provisions of this sentence shall not
Aside from the ownership and construction requirements, ships engaging in U.S. intercoastal trade must also never have been:

1) Foreign owned at any time;\(^1\)\(^3\)
2) Ever under a foreign flag;\(^1\)\(^4\) or
3) Rebuilt abroad.\(^1\)\(^5\)

Any cargo shipped in violation of the Jones Act can be seized by the United States government,\(^1\)\(^6\) although an injunction prior to shipment can be obtained by parties with appropriate standing.\(^1\)\(^7\)

\(^{13}\) See Jones Act § 27, proviso [2], supra note 12.
\(^{14}\) Id.
\(^{16}\) See Jones Act § 27, proviso [1], supra note 12.
\(^{17}\) American Maritime Association v. Blumenthal, 458 F. Supp. 849, aff'd Blumenthal, Pennsylvania R.R. Co. v. Dillon, 335 F.2d 292 (D.C. Cir.), cert. denied, 379 U.S. 945 (1964). In the latter case, Judge Berger upheld the dismissal of the complaints alleging that Customs' certification for Jones Act trade of a vessel whose midsection had been built overseas. The Act,
The Act is of broad application. It has been tailored through amendments and construed through judicial interpretation to include almost every conceivable type of coastal sea commerce. Going beyond the simple transportation of bulk goods and merchandise, the law includes the transportation of sludge dredged from shipping channels, waste to be incinerated at sea, and valueless materials. The phrase “between points in the United States” has been construed to have equal breadth. Aside from including transportation between two ports, it also includes off-shore ship-to-ship loading and lightering, but only within the three mile territorial limit. The Outer Continental Shelf Lands Act extended points in the U.S. to include drilling rigs and production platforms according to the decision, did not create a legal right of the plaintiff railroad company and shippers to be protected, and in fact was intended to stimulate domestic shipbuilding, not to insulate coastwise carriers from competition. Id. at 294-95.


19. Id. at proviso [10].

20. Id. at proviso [13]. The Act has been construed to exclude logs swept by a foreign tug into a towing boom. See United States v. 1500 Cords, More or Less, Jackpine, 204 F.2d 760 (7th Cir. 1953). The Court in that case found that, “the sweeping, drawing or bunting of the logs into the space between the towing booms... was not transportation... [M]ovement did not begin indeed could not have begun, until the [foreign flagged] tug had sealed the [end of the towing boom attached to shore].” Id. at 764.

21. Point-to-point shipment of merchandise does not include, however, merchandise which has been transported in one form, off-loaded, processed into another form, reloaded, and shipped, such as when oil is transported from Alaska, shipped to the U.S. Virgin Islands, processed at a plant there, and shipped in its new form to American mainland ports. See Blumenthal, 379 U.S. 945. The Customs Service has apparently not applied the processing distinction with any level of uniformity in light of the original purpose of the Jones Act. See McGeorge, supra note 11, at 71-74 (comparing the Customs Service’s treatment of processed crabs, which are not considered processed for purposes of the Act); Blumenthal, 379 U.S. 945.

22. Lightering is the process of off-loading oil from large tankers to smaller ones. Very large and ultra large crude carriers transport oil from overseas to the United States coast. Because they draw 70 to 90 feet of draft when fully laden, the tankers are unable to enter U.S. harbors, which cannot accommodate vessels drawing more than 40 feet of draft (Corpus Christi, Texas being able to handle 45 feet). Smaller tankers, independently contracted for individual jobs between longer voyages, load crude from the larger vessels for transport to shore. United States Congress, Office of Technology Assessment, Competition in Coastal Seas, 17-18 (1989) (hereinafter “OTA, Competition”).

23. For that reason, most lightering is excluded. Most lightering near the United States occurs forty to sixty miles off shore. While the United States has claimed jurisdiction over a 200-mile Exclusive Economic Zone (EEZ) extending from American shores, the zone is not considered subject to cabotage laws to the extent that it lays outside of the three mile limit. Id. at 7. See Executive Proclamation No. 5030, 3 C.F.R. 22 (1984), reprinted in 16 U.S.C. §1453 (1988). See also infra note 24.

The loading of goods onto a larger ship in U.S. territorial waters is also subject to the cabotage laws. See Michael S. Cessna, Coal Top-Offs: A Case History of the Failure of U.S. Maritime Policy, 17 J. MAR. L. & COM. 211 (1986) (discussing the U.S. Customs Service’s rejection of the application of a Canadian company to use its technologically advanced ship which, while anchored off shore, loaded coal from smaller ships for more economical transport to foreign
that are anchored to the seabed.\textsuperscript{25}

Although sweeping in its mission and goals, the Jones Act has been amended with legislative carve-outs to meet particular market and national security demands, with the former seeming to have greater importance than the latter. Permanent amendments have been created to:

1) Limit application of the Act on the Yukon River;\textsuperscript{26}
2) Allow Canadian transportation of merchandise between southeastern Alaska and other states where no U.S. flag carrier is available;\textsuperscript{27}
3) Where a foreign nation likewise permits, allow the transportation of empty cargo containers, shipping tanks, LASH and Seabee barges, and similar equipment;\textsuperscript{28}
4) Permit merchandise in foreign commerce to be transported on foreign-flag barges to foreign-flag ships where other nations permit reciprocal privileges;\textsuperscript{29} and
5) Exempt certain foreign built, American owned, ocean-going incinerators.\textsuperscript{30}

Congress has also created temporary exemptions to meet particular short term needs. These have included enactments to:

1) Permit the shipment of lumber to Puerto Rico for one year;\textsuperscript{31}
2) Allow the transportation of coal from Ogdensburg, New York, iron ore from U.S. ports, and grain on the Great Lakes in Canadian vessels;\textsuperscript{32} and


- the subsoil and seabed of the Outer Continental Shelf and to all artificial islands, and
- all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . . .


\textsuperscript{26} The Act does not include points where there is presently no contact with the seabed, such as when drilling rigs or other structures are first shipped to the point on the sea above their ultimate destination. OTA, COMPETITION, at 20.

\textsuperscript{27} Jones Act § 27, proviso [5], supra note 12.


\textsuperscript{29} Jones Act § 27, proviso [8], supra note 12.


\textsuperscript{32} Act of Aug. 7, 1956, Pub. L. No. 1019, 70 Stat. 1090, ch. 1028 (1956); see, e.g., Act of
3) Test for a five year period the use of hovercraft between Alaskan ports.  

Congress had enacted another, separate cabotage law for dredge operators, less restrictive than the Jones Act, as the Foreign-Built Dredge Act of 1906, which required all foreign built dredges working in American waters to be under U.S. flag. That legislation was subsumed into the Jones Act through Subtitle V of the Coast Guard Authorization Act of 1992. The new law extended the requirements of Section 27 to dredge operations, stating:

[A] vessel may engage in dredging in the navigable waters of the United States only if (1) the vessel meets the requirements of [Jones Act § 27] and [the Shipping Act of 1916] for engaging in the coastwise trade; [and] (2) when chartered, the charterer of the vessel is a citizen of the United States under [the Shipping Act of 1916] for engaging in the coastwise trade . . . .  

Similar to the Jones Act, the penalty section of the law states: When a vessel is operated in knowing violation of this section, that vessel and its equipment are liable to seizure by and forfeiture to the United States Government.  

The protectionist and security effects of the Jones Act are accentuated by American citizenship and Naval Reserve requirements. All licensed seamen on U.S. flagged vessels as well as all masters, chief engineers, radio officers, officers in charge of a deck watch or engineering watch must be U.S. citizens or lawfully admitted aliens. Further, seventy-five percent of all unlicensed seamen must also meet such requirements. For vessels whose construction costs were subsidized, the seamen must all

---

34. Foreign-built Dredge Act of 1906, Pub. L. No. 185, § 1, 34 Stat. 204, ch. 2566 (1906). As originally drafted and codified until last year, the law read: "[A] foreign-built dredge shall not, under penalty of forfeiture, engage in dredging in the United States unless documented as a vessel of the United States."  
35. The law was originally passed in response to the use of several foreign units in the repair of damage done in Galveston, Texas by the hurricane of 1900. Mark D. Aspinwall, Coastwise Trade Policy in the United States: Does it Make Sense Today?, 18 J. MAR. L. & COM. 243, 245 (1987).
be U.S. citizens. For passenger vessels, 90% of the total complement must be citizens. Finally, deck or engineer officers employed on U.S. owned vessels or those for which an operating differential subsidy is paid must be members of the Naval Reserve. The penalty for violation of any of these provisions is $500 per individual, although the President is allowed to waive these provisions in the interests of national defense or commerce.

B. THE PASSENGER SHIP ACT OF 1886

Passenger transportation vessels have been under cabotage restrictions for more than a century. The Act of June 19, 1886, referred to in this article at the Passenger Ship Act of 1886 ("PSA"), has remained essentially unchanged since its enactment. It currently states: "No foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under a penalty of two hundred dollars for each passenger so transported and landed." There are three statutory exemptions to the law for particular routes: one for travel between Rochester and Alexandria Bay, New York, which can be authorized on a yearly basis by the Customs Service for Canadian vessels until an American carrier enters the market; a second for transport between southern Alaska and other U.S. states for Canadians until a U.S. vessel creates the service; and a third between Puerto Rico and the mainland which allows any nation's vessel to engage in the passenger trade between those points so long as the route is not served by a U.S. carrier.

One important distinction between the PSA and Section 27 of the

---

44. The fine was raised from $2 to $200 in 1898. Act of Feb. 17, 1898, ch. 26 § 2, 30 Stat. 223 (codified at 46 U.S.C. § 289 (1988)).
Jones Act is “directly or by a foreign port” language of the PSA.48 While the Jones Act’s “transportation . . . between points in the United States . . . either directly or via a foreign port” language was added to correct a defect in the predecessor statute which allowed goods to be sailed to a foreign port, transferred to another ship, and then sent to another American port,49 PSA’s similar terms do not restrict the transportation of passengers from a U.S. city to a foreign location for ultimate transportation to another United States locale. The D.C. Circuit in Autolog Corp. v. Regan50 considered the case of a Bahamian-flag vessel owned by Scandinavian World Cruises, Ltd. (“SWC”) which transported passengers and their cars from New York to Freeport, Grand Bahama for transfer to other SWC ships for ultimate transport to Florida.51 Plaintiffs, U.S.-flag carriers and the Seafarers International Union, sought an injunction to prohibit SWC’s carriage.52 The court determined that the law applied only to the transport of individuals on a single vessel on a continuous voyage, and not on separate ships hubbing through a foreign port.53 Following the historic interpretation of the PSA by the U.S. Attorney General and Customs Department, and the legislative history of the Act, the decision refused to reject the position of the Federal government and construe the statute as having its plain meaning.54

C. THE TOWING ACT OF 1940

Congress extended the principles of the Jones Act’s predecessor to the tug trade in the mid-Nineteenth Century, and reenacted them with the Act of June 4, 1940 (referred to in this paper as the Towing Act of 1940).55 Essentially encompassing all towing within the territorial waters of the United States, the Act in its relevant part states:

It shall be unlawful for any vessel not wholly owned by a person who is a citizen of the United States within the meaning of the laws respecting the documentation of vessels and not having in force a certificate of documentation . . . to tow any vessel other than a vessel in distress, from any port or

51. Id. at 31. Its interesting to note that a larger operation in a similar form would bear a striking resemblance to the hub-and-spoke system utilized by airlines today.
52. Id. at 26-27.
53. Id. at 32.
54. Id. at 33. Obviously another circuit could reach the opposite conclusion; doing so, however, would not have any effect on the issues ultimately considered in this paper.
place in the United States, its Territories or possessions, embraced within the coastwise laws of the United States, to any other port or place within the same, either directly or by way of a foreign port or place, . . . or to tow any vessel transporting valueless material or any dredged material . . . from a point in the United States or a point or place on the high seas within the EEZ\(^5\) to another point or place in the United States or any point on the high seas within that EEZ.\(^6\)

If the owner or master of any vessel violates this section, each shall be liable for, "a fine of not less than $250 nor more than $1,000, which fines shall constitute liens upon the offending vessel enforceable through the district court of the United States."\(^7\) The vessel shall be further liable for a penalty of "$50 per ton on the measurement of every vessel towed in violation of this section, which sum may be recovered by way of libel or suit."\(^8\)

Limited in its exemptions, the Towing Act of 1940 contains special provisions to allow foreign railroads to transport their cars and the goods aboard them to the U.S., and to permit salvage operations off of American coasts.\(^9\)

Congress would not necessarily be obligated to repeal each of the cabotage laws or to eliminate all of their provisions. There are a number of policy options and combinations which would be available if the government sought to reduce the damage caused by the cabotage laws without wholly eliminating them, including:

1. Limiting the coastwise trade to U.S. owned ships;
2. Limiting the coastwise trade to U.S.-flag ships;
3. Limiting the coastwise trade to U.S. built ships;
4. Allowing Canadian owned, flagged, or built ships to engage in all Great Lakes trade;
5. Applying any or all of the first three cabotage restrictions to internal waterways only;
6. Applying any or all of the first three restrictions to passenger shipping, or dredging, or towing, or cargo transportation only;
7. Creating route preferences for ships meeting any or all of the first three cabotage requirements;
8. Allowing exceptions to the cabotage laws for ships which agree to abide by particular U.S. labor laws;
9. Requiring American crewmen for specific positions, such as master and pilot; or
10. Providing tax incentives to organizations contracting with vessels meeting any or all of the first three cabotage restrictions.

---

\(^5\) See supra note 23.
\(^7\) Id.
\(^8\) Id.
For ease of discussion, however, the changes in the various legal regimes discussed in this paper are predicated on the full repeal of Section 33 of the Jones Act, the Foreign-Built Dredge Act of 1906, as amended, the Passenger Ship Act of 1886, the Towing Act of 1940, and directly related statutory provisions. 61

III. LEGAL REGIMES AFFECTED BY REPEAL OF THE JONES ACT

A. THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act ("FLSA")62 is the central American statute regulating general labor conditions in the workplace. For purposes of this discussion, the Act contains two important substantive provisions; Section 6 establishes the national minimum hourly wage and Section 7 establishes the maximum hourly work week after which overtime wages must be paid. 63

Section 6 states:

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages [of] not less than $4.25 an hour . . . . 64

Section 7 declares:

[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. 65

With both sections, as with most federal labor laws, 66 Congress drew


63. Fair Labor Standards Act, §§ 6,7, 29 U.S.C. §§ 206, 207 (1988). Other important provisions such as those on child labor, 29 U.S.C. § 212 (1988), are not relevant to this discussion and are not considered here.


66. See, e.g., infra notes 117 and 170.
upon its powers under the Commerce Clause of the Constitution to enable it to regulate this aspect of American life. Yet within that power, Congress has the liberty of exercising only as much power as it deems necessary. In the case of FLSA, the legislature defined "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." Thus defined, Congress clearly intended to implicate trade with foreign nations with the Act, and include within the law's general subject matter jurisdiction all ships engaging in domestic or foreign trade.

As discussed in greater length below, the original FLSA excluded all seamen, with later amendments including only sailors on U.S. vessels. For that reason, cabotage trade in the modern era always meets the "in commerce" requirement of the Act. Although the "commerce" issue would seem to become more complicated in a post-cabotage environment, foreign owned and flagged vessels will be sufficiently in commerce to implicate the Act. While this would be a moot point if Congress follows this article's suggestions, the issue could easily be clarified should Congress chose to fall short of those recommendations.

_Cruz v. Chesapeake Shipping, Inc._ considered the case of Philippine seamen employed aboard Kuwaiti tankers that were reflagged by the United States during 1987. The plaintiffs claimed that they were entitled to minimum wages and benefits under the FLSA while employed aboard those ships. In considering whether the tankers, which never docked in the U.S., were owned and controlled by Kuwaitis, and only were connected to American commerce in that an isolated cargo of oil carried on board was eventually transshipped to the States, the Third Circuit rejected the sailors' claim. The Court stated that, "[a]lthough there is no de minimis requirement for application of the FLSA, the contact with interstate commerce must be regular and not an isolated incident." Although any foreign vessel regularly working American ports would certainly meet the _Cruz_ definition of "in commerce," a ship irregularly contracting in the spot market for single trips might not. Further, such a vessel would also probably not meet the "enterprise engaged in commerce or in the production of goods for commerce" (enterprise liabil-

---

67. "The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. Art I, § 8, cl. 3.
69. _Id._
70. See infra note 103 and accompanying text.
71. _Cruz v. Chesapeake Shipping, Inc._, 932 F.2d 218 (3d Cir. 1991).
72. _Id._ at 228.
73. _Id._ at 228. _But see_, _id._ at 235-39 (Alito, J., dissenting) (stating Congress intended for the FLSA's minimum wage provisions to apply to all seamen on all American-flag ships and that the literal language of the Act made trade among the several States subject to the FLSA).
Repealing American Cabotage Laws

Aside from general commerce considerations, the definition of "employ" under the Act established which employers and employees are subject to the FLSA. The Act defined "employ" as: "to suffer or permit to work." This constitutes an economic reality test, effectively subjecting seamen to the terms of the Act.

From its passage in 1938, the FLSA has included a number of specific statutory exclusions. Section 13 limited the reach of various provisions of the Act, allowing the market to determine the appropriate conditions of work in those areas. Among the many exemptions, the Act originally excluded all seamen both from Sections 6 and 7. That provision was modified, however, by the FLSA Amendments of 1961 ("FLSA 61"). As amended, sailors on foreign vessels continued to be exempt from both sections, but those on American vessels had to be paid the minimum wage under Section 6. Presently, "any employee employed as a seaman...

---

74. In an attempt to include certain groups of individuals in the retail trade within the terms of the Act, Congress amended the FLSA in 1961 by adding "enterprise liability." See, Fair Labor Standards Act Amendments of 1961, Sec. 2, § 3(r), 75 Stat. 1067 (1961) (codified as 29 U.S.C. § 203(r) (1988 and Supp. V. 1993). In Cruz, the panel considered whether the tanker reflagging operation led to enterprise liability. This was rejected in that case and would probably also be rejected in a post-cabotage environment. See, Cruz, 932 F.2d at 229-32. The Cruz panel stated that "seamen employed on vessels engaged in foreign operations entirely outside of the United States, its waters and territories do not become [FLSA] seamen [through reflagging]...

75. See infra note 107 and text accompanying note 107.


78. The Act has or presently excludes people employed in the following manors from coverage: bona fide executive, administrative, or professional capacity, outside salesmen, persons at a seasonal amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, those in the fishing industry, family members engaged in seasonal agricultural work, persons with disabilities and others employed under a special Department of Labor certificate, switchboard operators, telegraph employees, loggers, tobacco growers and harvesters, and casual babysitters, railway and airline employees, buyers of farm products, hotel and motel workers, announcers, news editors, and engineers in small market television stations, auto salesmen, delivery drivers, agricultural waterway and storage maintenance personnel, grain elevator employees, maple syrup processors, produce transporters, cabbies, restaurant employees, bowling alley workers, firemen, law enforcement personnel, live-in domestics, foster parents, workers engaging in ginning cotton or sugar processing, and movie theater employees. Fair Labor Standards Act, §§ 13(a)(1)-(15), 13(b)(1)-(29), 29 U.S.C. §§ 213(a)(1)-(15), 13(b)(1)-(29) (1988 & Supp. V 1993).


81. FLSA Amendments of 1961, Sec. 9, § 13(a)(b), 75 Stat. 65, 72-73 (1961) (codified as amended at 29 U.S.C. §§ 213(a)(14), 213 (b)(6) (1988)). It should be noted, however, that the
on a vessel other than an American vessel" is exempt from the minimum wage law. The Act defines the term "American vessel" as "any vessel which is documented or numbered under the laws of the United States." Thus, any individual employed as a seaman on an American flagged ship must be paid according to the provisions of FLSA Section 6. As more specifically applied, the amended Act includes seamen employed on Jones Act ships engaging in the coastwise trade and those American flagged ships, passenger and cargo, sailing to foreign lands.

FLSA 61 was adopted after the Conference Committee failed to agree on a suitable bill for passage during the previous sessions. Most of the provisions of the previous years' legislation remained the same, including the modification of the Section 6 seaman exemption. The final Conference Committee report settled on an interpretation of hours worked as allowing an employer to include only hours actually worked while the employee was on duty. The law has remained unchanged since passage of FLSA 61.

FLSA 61 was an attempt by the Congress and the Department of Labor to ensure that all American employees receive compensation commensurate with maintaining the minimum living standards necessary for their health, efficiency and general well-being. In 1959, when the Congress took up the question of amending the Act to close the exemption "loopholes," the Senate bill contained a provision which would extend both Sections 6 and 7 to seamen for all periods spent on duty aboard ship; a similar provision was contained in the two House bills in 1960.

Most of the witness testimony during the 1959 and 1960 hearings fo-
cused on the overtime provisions of the bills. Of the two union representatives who testified, one favored elimination of both exemptions,90 the other only opposed the overtime amendment.91 L. Dale Hilton, president of the Maritime Employees Union, stated that while he had no quarrel with striking the minimum wage exception, he believed that the unique vacation and leave structure of the maritime trade would make imposition of a forty-hour workweek detrimental to his members.92

Business representatives opposed both on economic grounds.93 They stated that a four-watch system, proposed by the unions advocating the repeal of the Section 6 exemption,94 would be impossible to operate aboard ships and would be unduly burdensome on the industry. The final bill in 1961, presumably on the basis of the industry and union opposition, kept the overtime exemption.

While comments on the minimum wage change were few, they were enlightening as to the parties' positions. The union advocate who supported the repeal and pressed Congress for passage of the legislation95 stated that he believed the amendment would "eliminate the threat to the seamen caused by the runaway American operators who register their ships in Liberia, Honduras, and Panama; the sole purpose of which is to lower the now existing working conditions of American seaman."96 The amendments would help non-union labor, who the witness claimed earned less than the minimum wage.97 The ship operators offered little resistance to it because those who testified generally employed seamen who earned more than the minimum wage, and viewed the legislation as unnecessary or superfluous.98 Statements that the adverse financial burden on small businessmen from operating and administrative costs caused by the measure would be the difference between operation or closure99

90. 1959 Senate Hearings, supra, note 88 at 700-09 (statement of Hoyt S. Haddock, Executive Secretary, United Maritime Unions' Legislative Committee).
92. Id.
94. 1959 Senate Hearings, supra note 88, at 704 (statement of Hoyt S. Haddock).
96. 1959 Senate Hearings, supra note 88, at 704 (statement of Hoyt S. Haddock).
97. Id. at 703.
98. 1960 House Hearings, supra note 87 at 942 (statement of George A. Peterkin, Jr., President, Dixie Carriers, Inc.).
99. Id. at 927 (statement of Braxton B. Carr). Another witness, Ralph E. Casey, President of the American Merchant Marine Institute, Inc., a trade association, made a particularly insightful comment about the future of the industry: "[T]he American merchant marine is today in a life-or-death struggle for survival. It is struggling with a wage structure that is four to five
were apparently dismissed, in light of the bill's ultimate passage.

The FLSA exemptions for foreign and domestic seamen clearly must be unified if the cabotage laws are repealed. Failure to do so would require ships engaged in American coastwise transportation to pay or not pay the American minimum wage, and to be subject to the administrative costs of Department of Labor oversight, based solely on the ship's registry. This would create a clear competitive advantage for foreign shippers which must be rectified either by eliminating the exemption for foreign flagged ships or reviving it for their American competitors. Although the amendment of the federal wage and hour law would certainly be a heated topic of debate in Congress during consideration of the cabotage laws discussed here, the best solution would be to take the FLSA back to the pre-1961 Amendment form, excepting all seamen from Sections 6 and 7 of the Act.

In 1992, Representative William Ford introduced language to expand the reach of the FLSA to foreign ships engaged in the foreign trade from U.S. ports. The bill would have subjected vessels lightering in international waters and passenger vessels which are found to be arranging their transport to avoid the Act (conceivably including cruises catering to Americans in the Caribbean which never enter U.S. waters, and ships sailing around Alaskan shores from Vancouver) to the jurisdiction of the FLSA. The minority portion of the House Education and Labor report on the legislation pointed out two problems with the bill which also times higher than that of any competing maritime nation in the world . . . Our messboys make more than the captains of some foreign freighters. Responsible leaders of maritime labor recognize this fact and realize all too well that any further spread in this labor differential could destroy the very jobs that they are obligated to protect. I am somewhat surprised, therefore, that labor itself, in good conscience, can support the portion of this bill which would remove the seaman exemption." Id. at 932.

101. Id. The bill would have added to the definition of "employer" the following:

"Effective [for 5 years from enactment of the bill, employer] includes:

(A) a foreign vessel if the vessel is regularly engaged in transporting passengers from and to a port or place in the United States, with or without an intervening stop or stops at a foreign port or ports, and such term shall include a vessel which is regularly engaged in transporting passengers only from or to a port or place in the United States if the Board determines that such transport is so arranged for the purposes of avoiding the consequences that would otherwise result under this sentence;

(B) a foreign vessel regularly engaged in transporting liquid or dry bulk cargo in the foreign trade of the United States if such vessel is owned or controlled, directly or indirectly, by a United States corporation; and

(C) a foreign vessel on which occurs the production or producing of goods or services for sale or distribution in the United States, and a vessel that engages in transporting cargo between vessels in international waters and a vessel, port, or place in the United States regardless of the ownership or control of the vessel."

Id. at 12-13.
would serve as criticisms for extending the FLSA in a post-cabotage environment.

The minority said that the extension of the FLSA to foreign ships would offend our trading partners. This would seem at first glance to be less of a problem with ships engaging in the coastwise trade, but the likely scenario for such commerce after the Jones Act is not necessarily vessels on continuous interstate voyages. While this might be true in some cases, especially with passenger ships, cargo and bulk vessels in intra-U.S. trade would probably be part of a spot market, contracting for shorter coastal trade trips between longer foreign work, as is the case now with most tankers engaged in American lightering operations. For that reason, extension of the FLSA to foreign ships after repeal of the cabotage laws would still cause concern among our trading partners.

The minority report noted further the practical difficulties associated with attempting to complete a Department of Labor investigation on ships which engage in foreign trade. "Since employees tend to be as transient as the vessels on which they are employed, ... labor would have to locate workers both in foreign countries and on the high sea for [any] investigations or if a worker [were] owed back wages.” These arguments would apply with equal force for ships only transiently sailing between U.S. ports and in U.S. commerce.

One of the basic reasons for repealing the cabotage laws would be to bring the cost of American sea transport in line with world market prices. Because labor costs constitute such a significant part of sea transport costs, raising the foreign flag seamen’s minimum wage will retard the end sought in changing the law. In light of the costs of extending the minimum wage and the issues raised in the 1992 bill minority report, returning to the pre-1961 exemption of seamen from the FLSA would be the best solution. Section 13(a)(12) of the Act would be amended to read as fol-

---

103. OTA, Competition, at 17.
105. The report also noted the difficulty in creating interpretive rules for the bill, such as how to treat the number of hours worked and whether employers could charge for room and board. For the coastwise trade, these are less severe problems because of the length of voyages but they could conceivably be avoided through careful legislative drafting, which H.R. 1126 lacked. Id. at 15. The minority favored greater enforcement of the International Labor Organization’s document on minimum standards for seafarers, ILO 147, to which the United States is a signatory. Id.
106. Labor costs include seamen, longshoremen, and stevedores.
107. In response to a bill introduced in 1993 by Representative Bill Clay, D-Mo., H.R. 1517, which would apply American labor laws to foreign flagged vessels, Alberto Gonzalez-Pita, a Miami admiralty attorney, stated that, “I do not believe any cruise line operating today will be able to make a reasonable return on investment if the labor provisions of the Clay bill were passed . . . . It is simply not possible for the cruise industry to raise its fares to a level that would offset the increased expenses mandated,” by the Clay bill. J. Comm., Mar. 22, 1993.


422

Transportation Law Journal

[Vol. 22:403

allows: "The provisions of Sections 6 ... and 7 shall not apply with respect to any employee employed as a seaman."108 This language would return the Act to its original form and ensure that the wage and hour laws do not disadvantage American carriers in a post-cabotage environment.

B. THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act ("NLRA")109 is the legal foundation of labor-management relations in the United States. Its provisions are colloquially known by the acts which created them. The original law, known as the National Labor Relations Act of 1935 (known as the Wagner Act),110 guaranteed employees the right to organize and collectively bargain through representatives of their own choosing.111 Wagner also created a list of unfair labor practices in which employers could not engage,112 and the National Labor Relations Board ("NLRB"), to which the Congress delegated administrative powers.113 A later amendment, known colloquially as the Taft-Hartley Act,114 redesignated the law as the Labor Management Relations Act, and added a group of unfair practices for unions.115


110. National Labor Relations (Wagner) Act, Pub L. No. 74-198, ch. 372, 49 Stat. 449, 452 (1935) (NLRA) amended and reenacted in Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, ch. 120, 61 Stat. 136, 140 (1947). This article will use the commonly used reference "NLRA" although the Act by its terms is known by its 1947 reenacted name and the section dedicated to the NLRB and unfair labor practices is declared in the legislation to be the NLRA.


115. Id. The Act's list of unfair labor practices by unions may be summarized as follows: coercing or restraining of employees or employers; coercing or attempting to coerce discrimination against an employee under union-shop contracts for reasons other than nonpayment of
Section 10 of the NLRA states that the NLRB is “empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce.” As used in that and other sections of the NLRA, “commerce” means “trade, traffic, commerce, transportation, or communication among the several States, Territories, and the District of Columbia, or between any foreign country and any State, Territory, or the District of Columbia,” and thus includes both domestic and foreign commerce. To be “affecting commerce,” the unfair labor practice must affect that which is, “in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.” The Supreme Court decided three decades ago, however, that Congress did not intend to extend the NLRA to relations between foreign seamen and the owners of their employing foreign flag ships who are engaged in activities “affecting commerce” in the United States despite the apparent intent of the law’s language.

In the determining precursor to its broad holding in McCulloch v. Sociedad Nacional de Marineros de Honduras (“McCulloch”), the high court explored the legislative history of the Act in Benz v. Compania Naviera Hidalgo, S.A. (“Benz”). In Benz, the German and British crew of a Liberian ship owned by a Panamanian corporation struck their vessel while it was docked in Portland, Oregon. The ship had originally sailed from Bremen, Germany under a British form of articles, which incorporated the conditions prescribed by the British Maritime Board into its terms, including the pay issues on which the crew struck.

In the fall of 1952, the sailors refused both to work and to leave the ship. After a court ordered them to do so, picket lines were erected by a
local union. When that group was enjoined, a second union formed a new picket line. A third union took its place shortly after the second was enjoined by a local court; the third group of picketers were later ordered to stop as well. The ship’s owner, Naviera Hidalgo, sued the individual non-crew strikers, including Benz, under a common-law theory that the picketing was for an unlawful purpose under Oregon law. The trial court rejected the defendant’s claim that the Taft-Hartley amendments had preempted these claims, a decision with which the Supreme Court agreed. 122

The Court concluded that, “[o]ur study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws.”123 Quoting the House Committee report presented by the bill’s co-author Chairman Hartley, the High Court noted that the bill was, “formulated as a bill of rights both for American workingmen and for their employers.”124 Citing previous amendments to the Seamen’s Act of 1915,125 the Court noted that if Congress had intended to apply Taft-Hartley to foreign seamen on foreign ships under foreign articles, it certainly could have done as it had done in previous legislation and created, “a ‘sweeping provision’ as to foreign applicability,” in the amended NLRA.126

Benz, unfortunately, did not state specifically whether it was through the NLRA’s definition of “commerce” and “affecting commerce,” or “employee,” or “employer” which prevented the Act’s application in the case.127 It merely noted that the law did not apply to foreign seamen on

---

122. Id. at 139-41, 147.
123. Id. at 143.
126. Benz, 353 U.S. at 146, citing Jackson v. S.S. Archimedes, 275 U.S. 463 (1928), which concerned payments under the Seamen’s Act amendments. The concept “that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States” was reaffirmed recently in EEOC v. Arabian Am. Oil, 499 U.S. 244, 248 (1992); Cruz, 932 F.2d at 224-26; Jose v. M/V Fir Grove, 801 F. Supp. 349, 355 (D. Or. 1991).
127. Benz, 353 U.S. at 142-44. The Court made a number of references to the foreign nature of the dispute but did not specifically state what foreign aspect of the case placed it outside of the jurisdiction of the NLRA. “The parties point to nothing in the Act itself or its legislative history that indicates in any way that Congress intended to bring such disputes within the coverage of the Act. Indeed the District Court found to the contrary, specifically stating that the Act does not ‘cover a dispute between a foreign ship and its foreign crew.’” Id. at 142-43. “Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. In fact, no discussion in either House of Congress has been called to our attention from the . . . legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here.” Id. at 143-44.
That important issue was clarified in *McCulloch*, which expanded the rationale of *Benz* to union organizing activities and the entire NLRA.129

*McCulloch* arose from a group of suits by the NLRB against the foreign holding companies owned by United Fruit Company, an American corporation, and by the Honduran union “representing” Honduran seamen against the NLRB. The National Maritime Union of America, AFL-CIO (“NMU”), filed a petition with the NLRB seeking certification under the Act as representatives of sailors aboard vessels owned by Em­pressa Hondurena de Vapores, S.A. (“Empressa”), a Honduran corporation owned by United Fruit.130 The seamen at issue were at the time represented by a Honduran union, Sociedad Nacional de Marineros de Honduras (“SNMH”). Agreeing with the petitioning NMU, the Board found that United Fruit’s sea operations constituted a single, integrated maritime operation, and that in light of the company’s substantial United States contacts (the test used at that time by the Board in such cases), Empressa was engaging in commerce under the Act. The NLRB ordered that an election be held to determine if the workers wished to be represented by the NMU.131

SNMH and Empressa filed suit to prevent implementation of the Board’s order and their claim was upheld by the Court in *McCulloch*. The Supreme Court, recognizing that Congress has the Constitutional power to apply the NLRA to foreign-flag ships with foreign workers in American waters,132 determined that it had not done so in the case of the Act. In its proceedings, the NLRB had determined that the foreign flagged ships’ activities had affected “commerce” under the Act based on the number of contacts which the operation had with the U.S.133 Justice Clark’s decision rejected the NLRB’s “ad hoc” substantial contacts method of determining which cases would come under the Act and which would not.134 Instead, the opinion reaffirmed its rationale in *Benz* that...
Congress did not intend for the NLRA to apply foreign workers on foreign flagged ships, even though the latter were effectively owned by American interests. The opinion explained that the U.S. had not intended to exert, "jurisdiction over and apply its laws to the internal management and affairs of [foreign] vessels."

The Court went further, however, and cited, "the well established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship," in explaining its further unwillingness to read into the statute an intent to regulate foreign vessels and their crews. In light of the custom and the "highly charged international circumstances" of the case, as well as the lack of expressed Congressional will, the Court found for the Honduran union and corporation, and upheld the injunction.

The companion case to McCulloch, Incres Steamship Co. v. International Maritime Workers Union reaffirmed the Benz and McCulloch principle in a case similar to Benz. In the decision upholding an injunction against union picketing, Justice Clark stated that "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of [the NLRA's definition of the term]."

The jurisdictional principle enunciated in these cases is clear. NLRA will not govern the relationship between seamen and their employer on foreign-flag ships, regardless of the nationality of the seamen or the owners. The Court's hesitancy to violate the law of the flag and to intrude into the internal management of the foreign-flag ship prevented the application of the Act to the cases. While the activities at issue in these cases clearly constituted commerce within any reasonable definition of the word, they were not "commerce" within the definition of the NLRA.

determination; that the ships were actually controlled by United Fruit Company as a charterer; that the bulk of the trade conducted by the ships was between Central and South American countries and the United States; and that, consequently, this shipping was essentially that of this nation, and an adjunct of the operations of a domestic corporation in international trade of the United States.


135. McCulloch, 371 U.S. at 19-20; See also supra note 124 and accompanying text.


137. Id. at 21 (citing Wildenhus's Case, 120 U.S. 1, 12 (1887)).

138. Id. at 678.


140. Id. at 27.

141. Dowd v. International Longshoremen's Ass'n, 975 F.2d 779, 788 (11th Cir. 1992), citing Windward, 415 U.S. at 112-13. Ironically, the ILA union in Dowd was attempting to claim that the Benz line excluded the activities at issue in Dowd, the opposite of the position in most of the Benz cases. But see International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982).
The Court defined what was not "maritime operations" under the Benz-McCulloch-Incro line seven years later in International Longshoremen's Local 1416 v. Ariadne Shipping Co. In that case, it was found that union longshoremen protesting the use of American non-union longshoremen was within the NLRA and was outside the Benz-McCulloch-Incro exception because the picketing was directed at on-shore employment (i.e., of longshoremen) and commerce within the meaning of the NLRA.

Unions changed their tactics between the early sixties, when they attempted to organize foreign seamen, and the early seventies, when they tried to convince shippers to pay foreign workers at American rates (and presumably, to increase the number of Americans seamen hired) by picketing foreign-flag ships docked in the U.S. Because dockworkers would not cross the seafarers' picket lines to unload the vessels, the ships would be effectively prevented from unloading unless they agreed to pay American rates. Suits by those adversely affected led to a new round of cases before the High Court.

A pair of cases reached the Supreme Court in 1974. In the first, Windward Shipping (London) Ltd. v. American Radio Ass'n ("Windward"), the ship owner and managing agent sought injunctive relief for tortious picketing under Texas state law. The decision rejected the local court's view that the NLRA pre-empted Texas law, finding that the claim could proceed because Benz-McCulloch-Incro placed labor relations between foreign ships and their crews outside of the federal law. Because the picketing placed "more than a negligible impact on the 'maritime operations' of these foreign ships", the unions were found to be engaging in conduct unprotected by the law.

---

143. Id. at 199-200; See Windward, 415 U.S. at 112.
144. Windward, 415 U.S. 104.
145. Id. at 114, quoted in Allied, 456 U.S. at 220-21. A District Court decision in 1990 stated Windward's conclusion that the NLRA did not apply to vessels engaged in foreign commerce dictated that the FLSA's "in commerce" requirement did not apply to foreign commerce. Cruz v. Chesapeake Shipping, Inc., 738 F. Supp. 809, 820-21 (D.Del. 1990), aff'd on other grounds, 932 F.2d 218 (3d Cir. 1991). While that District Court's ultimate conclusion in the case was correct, its determination that the breadth of the FLSA is necessarily less than the NLRA was incorrect. The Cruz District Court cited Schroepfer v. A.S. Abell Co., 48 F. Supp. 88, 96 (D.Md. 1942), aff'd, 138 F.2d 111 (4th Cir. 1943), cert. denied, 321 U.S. 763 (1944), which stated "[A]s has often been pointed out, the expression of congressional will is more broadly stated in the NLRA than in the FLSA." While as a general proposition the NLRA may be broader than the FLSA, as noted by the Court, that generalization does not necessarily lead to the conclusion that the NLRA is always broader than the FLSA.

Without considering the issues raised in this piece, the breadth of both "in commerce" provisions could be at issue in a post-cabotage marketplace. The clear Congressional intent of NLRA, as analyzed in the Benz line, demonstrates that foreign vessels will not be subject to that law because of such ships' failure to meet the commerce requirement. The same conclusion is
can Radio Ass'n v. Mobile Steamship Ass'n, Inc. ("Mobile Steamship")\textsuperscript{146} ten months later when the Court in a similar suit rejected on similar grounds a pre-emption claim by the union in a suit by stevedoring companies whose workers refused to cross picket lines in Alabama. The decision refused to distinguish the picketing in Windward and stated the "effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same whether it be complained of by the foreign-shipowners or by persons seeking to service and deal with the ships."\textsuperscript{147} By protesting "commerce" outside of the Act, the unions lost their LMRA protections and obligations.\textsuperscript{148} Because the effect on foreign maritime commerce was more than negligible, the petitioners were unable to bring the picketing and the suit within the commerce definition of the NLRA.\textsuperscript{149} not necessarily apparent from the history or the language of the FLSA. See supra notes 71-75 and accompanying text.


\textsuperscript{147} Mobile Steamship, 419 U.S. at 225.

\textsuperscript{148} Windward involved an attempt by the union to prove that the picketing was protected by the NLRA. In Mobile Steamship, the union claimed the same type of picketing was violative of the Act, and thus also within the jurisdiction of the NLRB. The Court alluded to this irony when it noted that the, "[p]etitioners' position in this respect contrasts markedly with their posture in the Windward litigation." Mobile Steamship, 419 U.S. at 230.

The Court also reaffirmed Ariadne, which Potter Stewart's four Justice dissent claimed must be reversed by Mobile Steamship. The majority noted specifically that the purpose of the picketing controlled the definition of "commerce," not the status of the plaintiffs or defendants. Mobile Steamship, 419 U.S. at 223, n.9. See Dowd v. International Longshoremen's Ass'n, 975 F.2d 779, 788-89 (11th Cir. 1992) (secondary boycott by Japanese unions at the request of U.S. longshoremen's union found to be "in commerce" because the actions were targeted by American unions to affect American non-union longshore companies).

\textsuperscript{149} One commentator has suggested that the rejection of the picketers claims in Windward and Mobile Steamship was in contravention of the announced policy of the United States to develop and encourage the maintenance of a merchant marine fleet in the Jones Act. Florian Bartosic, The Supreme Court, 1974 Term: The Allocation of Power in Deciding Labor Law Policy, 62 Va. L.R. 553, 569 (1975). Bartosic believes the two cases "tip the competitive scales in favor of owners of foreign vessels, contrary to congressional policy." Id. "At the very least, Congress should expressly consider whether the Court was correct in divining an inferred congressional intent to create this anomaly." Id. While clearly not even the most casual observer would be naive enough to believe that Congress creates entirely consistent policy when it makes law, Bartosic seems to say activities which would be excluded from the protection of one stated Congressional policy (the U.S. will not attempt to regulate the labor affairs of foreign ships or protect those who tortiously harm the interests of foreign-flag vessels) should become protected when they advance another Congressional policy (fostering a U.S. merchant marine).

Congress often considers the effects its actions will have on foreign interests when it is drafting legislation and was apparently doing so when it passed the Wagner Act and Taft-Hartley Act. Fortunately, the Supreme Court did not circumvent that apparent Congressional intent through the judicial fiat in those two cases by including foreign-flag ships within the jurisdiction of the Act. Bartosic believes Congress should change the law (which, to the benefit of U.S. international relations, it has not since the article was written sixteen years ago). At the same time, she believes Windward and Mobile Steamship were wrong. In either event, Bartosic was misguided.
The Supreme Court’s final interpretation of the *Benz-McCulloch-In­crets* principle was *International Longshoremen’s Ass’n v. Allied International, Inc.* American unionized longshoremen, protesting the Soviet invasion of Afghanistan, refused to unload ships or cargo from the U.S.S.R. American importer Allied sued the union under NLRA § 8(b)(4) and the private damages remedy action for secondary boycotts under Taft-Hartley. The decision declared that the NLRB had jurisdiction and that *Benz-McCulloch-Increts* trilogy and their progeny did not control. Finding that the refusal to unload the petitioner’s shipments did not affect the maritime operations of the foreign vessels, the previous decisions did not apply.

The legacy of these seven decisions could be confusing after the repeal of the cabotage laws. Eliminating the long standing legislation will lead to American and foreign seamen on foreign flagged ships transporting goods between American ports. Such a situation will reveal one of the basic presumptions in each of these cases and in Congress’ debates on the NLRA: transportation by foreign flagged ships under the Jones Act necessarily meant commerce between other nations and the U.S. because foreign-flag ships and alien companies could not engage in the coastwise trade.

Courts confronted by post-cabotage commerce law will be required to settle situations including what happens with an American owned foreign-flag ship regularly sailing between Galveston, Texas and New York with U.S. and foreign seamen under foreign articles. What happens when an American union seeks to organize the workers and during the course of their campaign, they engage in unfair labor practices (picketing), and the American company seeks redress under a Texas state law for tortious conduct?

The solutions available to these courts with an unamended NLRA will be to: 1) reject the entire *Benz* line and apply the NLRA to all sea trade with the U.S., even if conducted by foreign flag vessels; 2) reject the *Benz* line as it relates to U.S. domestic transportation; or 3) follow the *Benz* line. The third alternative would be the obvious selection.

As to the first alternative, displacing the *Benz-McCulloch-Increts* doctrine has a certain appeal, both to the judicial activist interested in

---

152. Allied, 456 U.S. at 221-22; See Dowd, 975 F.2d at 788-89.
153. Although the case could also result in foreign companies sailing American flagged ships, the *Benz-McCulloch-Increts* line of cases would control and the relations between the crew and the ship companies would be subject to the jurisdiction of the NLRA and NLRB. The High Court has noted that the nationality of the owner was irrelevant in determining whether the NLRA “commerce” exception would apply. *See Mobile Steamship*, 419 U.S. at 219, n.5, (citing *McCulloch*, 372 U.S. at 19).
spreading U.S. labor law across the planet and to the judge practicing judicial restraint by applying the plain meaning of the words in light of relevant precedent. Such a judge would, regardless, be well advised to follow the rationale of Benz. Although the U.S. has jurisdiction over any vessel voluntarily entering the territorial limits of this country, that jurisdiction is discretionary. Also, Congress “alone has the facilities necessary to make fairly such an important policy decision [as applying United States law to foreign seamen and ships] where the possibilities of international discord are so evident and retaliative action so certain.”

The second alternative, the judicial solution of rejecting Benz-McCulloch-Innes as they relate to domestic sea transportation on foreign ships, would also be unacceptable. Ships regularly engaged in U.S. coastwise trade and those transporting materials and persons between U.S. ports after arriving from a foreign shore would experience an affront to traditional international maritime law. By extending the NLRA, this country would be attempting to regulate the activity of foreign nationals on what has traditionally been viewed as foreign soil: foreign-flag vessels. As noted above, and by the court in McCulloch, foreign countries do not take lightly intrusions into matters that they view as solely and legitimately within their jurisdiction. This would be especially true given the international prevalence of labor laws, regulations, and unions (although their strengths obviously differ).

The Court in Benz recognized the great practical difficulty of attempting to engage in such regulation when it discussed the debate of proposals to extend the Seamen’s Act of 1915 to prohibit advancements made by foreign vessels in foreign ports. “A storm of diplomatic protest

154. The motivation to displace the precedents by a judicial activist would be obvious. With one bold stroke of judicial arrogance, a judge could apply progressive American work rules to the great unwashed whose governments did not have the foresight to create our seamless system of laws.

There is a simple beauty in applying the NLRA to all sea trade for the individual seeking to use the plain meaning as well. The definition of “commerce” under the Act appears to apply to international commerce: “trade, traffic, commerce, transportation, or communication . . . between any foreign country and any State, Territory, or the District of Columbia.” National Labor Relations Act § 2(6), 29 U.S.C. § 152(6) (1988) (emphasis supplied). Thus, simple analysis without consideration of precedent could result in application of the Act to trade on foreign-flag ships. Obviously, most judges with respect for precedent would attempt to apply the Benz line of cases as well, but that is another matter.

155. See supra text accompanying note 140.

156. Benz, 353 U.S. at 147. Today, retaliatory action could take as limited a form as diplomatic notes, but could be as broad as heavy trade sanctions by our G-7 trading partners. In this author’s view, bills such as Representative Clay’s, supra note 105, and Representative Ford’s, supra note 100, infra note 163, are inviting the latter retaliation.

157. See infra note 181.

158. See supra note 107.

159. See supra text accompanying note 138.
resulted. Great Britain, Italy, Sweden, Norway, Denmark, the Netherlands, Germany, and Canada all joined in vigorously denouncing the proposals.\footnote{160} Given the effect on other nations when Congress acts in such a manner, such an extension of U.S. law from the bench would be an even greater affront.\footnote{161} A post-cabotage court would be well advised to heed the analysis of the \textit{Benz} line and avoid such judicial activism.

As to the third alternative, a court facing an unamended NLRA case could also support the proposition that foreign ship, coastwise trade does not constitute "commerce," uphold the \textit{Benz} line, and maintain the integrity of the principle that the law of the flag will be respected unless specifically rejected by Congress. In the hypothetical case outlined above, a court would reject the union's claim that this constituted "commerce" within the jurisdiction of the NLRB. The essential holding of the \textit{Benz} line is that the internal management of a foreign ship's labor relations will not receive interference from U.S. law unless specifically directed by Congress.\footnote{162} That principle would not change simply because a vessel is engaging in the coastwise trade. Although U.S. domestic sea commerce appears to be "commerce" within the literal terms of the Act, \textit{Benz} made clear that the plain meaning of the words is not the meaning to which courts should give effect. Thus, post-Jones Act coastwise commerce on foreign-flag ships, though appearing to be within the literal meaning of the words, would not be "commerce" under the Act.

The 1992 proposal to extend the American FLSA to foreign-flag ships also sought to extend the NLRA in the same manner.\footnote{163} The mi-

\footnote{160} \textit{Benz}, 353 U.S. at 146.  
\footnote{161} \textit{See Cruz}, 932 F.2d at 231. "The purpose behind Congress' explicit exclusion of ships flying foreign flags [in the 1961 FLSA amendments] was presumably to avoid interference in the delicate field of international relations by imposing domestic labor law on foreign ships employing foreign nationals at foreign wages. . . . 'For [this court] to run interference in such a delicate field of international relations there must be present the affirmative intention of Congress explained.'" \textit{Id. (quoting Benz, 353 U.S. at 147).}  
\footnote{162} \textit{See supra} note 137.  
\footnote{163} The bill would have amended the definition of the term "employer," found in National Labor Relations Act § 2(2), to include:  
\begin{itemize}
\item[(A)] a foreign vessel if the vessel is regularly engaged in the United States, with or without an intervening stop or stops at a foreign port or ports, and such term shall include a vessel which is regularly engaged in transporting passengers only from or to a port or place in the United States if the Board determines that such transport is so arranged for the purpose of avoiding the consequences that would otherwise result under this sentence;  
\item[(B)] a foreign vessel regularly engaged in transporting liquid or dry bulk cargo in the foreign trade of the United States if such vessel is owned or controlled, directly or indirectly, by a United States corporation; and  
\item[(C)] a foreign vessel on which occurs the production and processing of goods or services for sale or distribution in the United States, and a vessel that engages in transporting cargo between vessels in international waters and a vessel, port, or place in the United States regardless of the ownership or control of the vessel.
\end{itemize}
nority arguments for the NLRA provisions also were persuasive. The arguments would apply to a post-cabotage situation as well as to an extension of the FLSA. The concerns of our trading partners would weigh heavily against labor relations regulation. The minority also noted problems with the bill could arise with foreign workers striking at sea, with balloting in a transient workforce, and with the NLRB conducting an investigation.

The same problem would exist for ships that take on single, coastwise contracts for transport between long haul jobs. Unions would attempt to organize foreign seamen or protest against their work, as they did in the Benz line of cases, and would prevent any foreign competition from penetrating the coastal trade, defeating a major reason for permitting foreign competition. The NLRB would also be forced to conduct investigations from all points on the globe, wasting taxpayer dollars to support the activities of domestic unions abroad.

Congress would have several options to address the NLRA questions raised by repeal of the cabotage laws to keep courts from having to face the three alternatives outlined above. The first would be to accept foreign legal regimes covering labor relations aboard ships, only giving the protections of the NLRA where the foreign law does not provide any regulation of labor relations. Because every nation has some sort of labor relations law, this solution would have no effect.

A second option would be to extend NLRB jurisdiction over foreign ships while engaging in domestic sea commerce. Amending NLRA Section 2(6), which defines “commerce” under the Act, the law could read (with additions in italics):

trade, traffic, commerce, transportation, or communication among the several States, [territories, and the District of Columbia] (including water borne trade, traffic, commerce, or transportation), or between any foreign country and any State, Territory, or the District of Columbia.

This option, at best, is inadequate. The cost of applying the NLRA to employers is certainly a major part of the labor costs which encourages the use of foreign-flag ships. This amendment would no more than maintain the NLRA for all coastwise trade and would not address the underly-

164. Id. at 14; See also supra note 156.
166. See, e.g., Brooks v. Hess Oil V.I. Corp., 809 F.2d 206 (3d Cir. 1987) (discussing a claim that an American company violated Liberian labor law in paying overtime wages to a merchant seaman on one of its ships engaged in lightering off of St. Croix, Virgin Islands); Cruz, 738 F.Supp. at 814-15 (discussing regulations promulgated by the Philippine Overseas Employment Administration controlling the overseas employment of Philippine citizens).
ing issue of the cost of American seamens’ labor inflated by collective bargaining.

The final option would be to leave the NLRA unamended. The implications of that solution are clearly represented in the third hypothetical judicial alternative discussed above. Congress would be well advised, however, to avoid amending the NLRA for the same reasons the Benz court refused to extend the Act without specific authority from the legislature—international outrage.\(^{167}\) Extending the NLRA to foreign ships in coastwise trade would create a second body of law purportedly over that created by the flag nation, which would lead to the same difficulties noted in Benz. It would also lead to the difficulties discussed above in the 1992 minority report. In the Congressional report of the bill repealing the cabotage laws, Congress should reaffirm that the Benz line is to be read as continuing to prevent application of the law to foreign ships.

Obviously, to believe that the cabotage laws could ever be repealed without consideration of its effects on the NLRA is folly. Organized labor would certainly pressure Congress to amend NLRA if the three flagging and ownership laws were to be repealed. Shippers and shipowners would similarly advocate maintaining the principles expressed in Benz. For those reasons, the NLRA will ultimately be one of the key stumbling blocks to repealing the cabotage laws, and with the exception of the one noted above, no alternative amendment to the Act which supports competition will be available.

C. Section 33 of Jones Act

The Merchant Marine Act of 1920 established another enduring piece of American law. Section 33 of the Act\(^{168}\) created a statutory right of recovery for seamen against their employer for injuries arising in the course of their employment, stating:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees [i.e., the Federal Employers’ Liability Act of 1908 (FELA)] shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action [FELA] shall be applicable.\(^{169}\)

\(^{167}\) See supra notes 105, 18-125 and accompanying text.


As incorporated by Section 33, FELA allows a seaman or his survivors to recover damages from his employer, who is a "common carrier . . . engaging in commerce between [American states, districts, and territories] while [the seaman] is employed by such carrier in such commerce," for personal injury or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its . . . appliances, machinery . . . boats, wharves, or other equipment."170

The terms used in the law did narrow the law's breadth. As to the seafarers, although the term "seaman" was not defined in the Act, courts have construed it as having its ordinary common law meaning, which has no regard to seaman nationality.171 While as a general rule employers can not withhold benefits under Section 33 from foreign seamen strictly on the basis of their citizenship,172 the 1982 amendments to the section made clear that aliens who are not permanent residents of the United States may not maintain an action under the Act where they are engaged in service aboard a foreign ship in foreign waters.173 Therefore, unless they are engaging in the work described in the 1982 amendments, foreign nationals can not be excluded from Section 33 simply because of their citizenship. Ship ownership or nationality are also not wholly determinative of the breadth of the Act through the law's "employer" definition. The apparent breadth of the term, based on its plain language, would


171. The test to be applied is whether the vessel in question was 1) in navigation, 2) whether there was a more or less permanent connection with the vessel, and 3) whether the individual was aboard primarily to aid in navigation. See Norris, Seamen, supra note 168, § 2:3 at 43. The first question goes to whether vessel is engaged in the process of sea transportation, which includes such activities loading and unloading of cargo, as distinguished from a ship in drydock or on land. The second issue is intended to distinguish seamen from visitors or passengers, while the third is given broad meaning, essentially including anyone hired to serve on board a ship during its voyage. Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952), reh'g denied, 342 U.S. 934 (1952). Some courts have gone as far as to read out the third requirement because "the test has been watered down until the words have lost their meaning." Cf. Barrett v. Chevron, 781 F.2d 1067, 1072 (5th Cir. 1986) (en banc) (quoting Offshore Co. v. Robinson, 266 F.2d 769, 780 (5th Cir. 1959); Johnson v. John F. Beasley Constr. Co., 742 F.2d 1054 (7th Cir. 1984) (cases reaffirming a two prong test for purposes of determining non-seaman status under LHWCA). For a description of the wide variety of tasks found to give rise to seaman status, see Norris, Seamen, supra note 168, §§ 23, 30:13.


include all sailors on all vessels, worldwide. The Supreme Court has determined, however, that is not the case.

In the landmark decision of *Lauritzen v. Larsen* ("Lauritzen"),\(^\text{174}\) the Supreme Court listed seven factors to be considered in determining whether there a nexus exists between U.S. law and a seaman’s claim, and whether the significance of that nexus, in light of the competing interests of other nations regulating the same conduct, warrants a United States courts’ taking jurisdiction over the case.\(^\text{175}\) In *Lauritzen*, a Danish seaman sought redress through Section 33 of the Jones Act for injuries suffered aboard a Danish flagged and owned vessel in Cuba. While the case is most often cited for its list of contacts relevant to the general determination of prescriptive jurisdiction,\(^\text{176}\) the factors in *Lauritzen* were used to decide whether an American court could specifically apply Section 33 to a foreign shipowner as an “employer.” Those factors are the:

1) place of the wrongful act;
2) law of the flag;
3) allegiance or domicile of the injured seaman;
4) allegiance of the defendant shipowner;
5) place where the contract of employment was made;
6) inaccessibility of a foreign forum; and
7) law of the forum.\(^\text{177}\)

In analyzing the seven points, the place of the act and the employment contract factors are of limited consequence, according to the Court in *Lauritzen*. The former is generally unfit for use in an enterprise such as shipping which occurs in the territory of so many nations.\(^\text{178}\) The latter should have great importance in a contract case but has lesser application


\(^{175}\) *Stewart*, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L.R. 1259, 1311 (1986).

\(^{176}\) *Id.* at 1312.


\(^{178}\) *Id.* at 583-84. “Although the place of injury has often been deemed determinative of the choice of law in municipal conflict of laws, such a rule does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of legitimate interests of foreign nationals.” *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 384 (1959), (rejecting the claim of a foreign sailor in circumstances similar to *Lauritzen* except that the individual was injured in U.S. waters and standing for the more general proposition that the *Lauritzen* doctrine and test extend to all federal maritime law), reh'g denied, 359 U.S. 962 (1959).

The “place of the act” factor will also probably have less importance for post-Jones Act commerce in any event. *See infra* note 180 and accompanying text; *see also* *Carlson, The Jones Act and Choice of Law*, 15 INT'L LAW. 49, 56 (1981).
in a Jones Act tort context. According to the Court, greatest consideration should be given to the more consistent law of the flag. "The weight of the ensign overbears most other connecting events in determining applicable law," and should prevail unless some heavy counterweight appears, a conclusion consistent with settled American case law and international jurisprudence.

Lauritzen recognized that traditionally the allegiance or domicile of the injured and the allegiance of the defendant shipowner were the same as the flag, but that in recent times, most often they differed. The decision noted, while these two factors were not at issue in the case at hand, future courts would be forced to confront both differing personal and shipowner nationalities. The final two considerations, the accessibility of the foreign forum and the law of the U.S. as compared to that of another country, were only to become issues where the foreign law would severely affect the injured worker's remedy; both of these factors are also generally of minor importance.

As a general matter, the seven factors should be applied liberally in light of the remedial purpose of the law. The Supreme Court remarked on that goal in Hellenic Lines, Ltd. v. Rhoditis ("Hellenic Lines"), where a Greek seaman signed aboard a Greek ship, owned by a Greek corporation, and was injured while his ship was docked in New Orleans. Although the plaintiff signed on board in Greece and ninety-five percent of the corporation's stock was owned by a Greek national, the owner had lived in Connecticut for twenty-five years and operated his line from New York, sailing primarily between the United States and other nations. The Court upheld the appeals decision affirming that the company was an "employer" under the Act. Discussing its philosophy on application of Section 33 to employers with foreign contacts, the majority stated:

We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this

179. Lauritzen, 345 U.S. at 588-89; See Carlson, supra note 178 at 56-57.
180. Id. at 585-86.
181. A ship "is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty." United States v. Flores, 289 U.S. 137, 155-56 (1932), cited by Lauritzen, 345 U.S. at 589; See The Lotus, P.C.I.J., Series A, No. 10 (1927).
182. Although rejected in cases where all other factors weigh in favor of a foreign nation, American courts have accepted that U.S. citizens, with at least one other Lauritzen factor, have enough contacts to meet the test of jurisdiction. See S. Friedell, Benedict on Admiralty, Jurisdiction and Principles, ¶ 128, n.5, at 8-38 to 8-40 (Matthew Bender ed. 1983); Carlson, supra note 176 at 58.
184. Id. at 589-92.
185. See Carlson, supra note 177, at 56-57.
country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act 'employer'. The flag, the nationality of the seaman, the fact that this employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts which this alien owner has with this country. If...the liberal purposes of the Jones Act are to be effectuated, the facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States.187

This language effectively created a new eighth "base of operations" factor for the Lauritzen test, turning on the "substantial and continuing contacts" of the defendant ship owner as either the practical "domicile of the defendant shipowner" or its base of operations.188 Given the general lack of importance of four of the Lauritzen factors,189 the post-Hellenic Lines eight part test essentially became a balancing of the allegiance of the seaman and three factors (law of the flag, allegiance of the shipowner, and defendant's base of operations) which ascertain whether the defendant is sufficiently "American" to warrant jurisdiction,190 although the Court in Hellenic Lines added that the list is not exhaustive "and there well may be other" factors.191

187. Id. at 310. The dissent in the case noted that the Court had found the substantial contacts test to be inappropriate for the NLRA in McCulloch v. Sociedad Nacional, and instead opted in that case to rely heavily upon the law of the flag, as it had in Lauritzen, 345 U.S. 571 (1953). The dissent found Hellenic Lines to be an attempt to override that concept based on the fact that the flagging was for convenience and, presumably, the broad remedial purpose of section 33. Hellenic Lines, 398 U.S. at 312-16, (Harlan, J., dissenting). The dissent noted that one of the majority's major reasons for overriding the flag was the "competitive advantage over American-flag vessels" which might accrue by avoiding section 33 liability but that in light of insurance, the potential exposure would be limited, Id. at 317. The dissent found both consideration of the economics of the section 33 liability and the ultimate results of such consideration to be immaterial, Id. Although this author believes the dissent reached the right conclusion, the ultimate effect of Hellenic Lines on the Lauritzen test after the repeal of the Jones Act would be minimal. See supra notes 207-08 and accompanying text. Contra Cruz v. Chesapeake Shipping, Inc., 738 F. Supp. 809 (D. Del. 1990)("Congress could not have been unaware of the necessity of construction imposed upon courts by such, see supra note 70, generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law.") (quoting Lauritzen, 345 U.S. at 581).

188. Hellenic Lines, 398 U.S. at 309; Stephen F. Friedell, Benedict on Admiralty § 128, at 8-37(7th ed. 1989); see Carlson, supra note 177, at 56, 63-65. "The Lauritzen factors were not rejected, but it was made quite clear that the base of operations could override any number of other factors." Note, Interest Analysis and Maritime Choice of Law, 13 Law. of the Ams. 547, 553-54 (1981).


190. Carlson, supra note 177 at 60.

191. 398 U.S. at 309. See Carlson, supra note 177, at 56 n. 39, citing Pavlou v. Ocean Traders
Contrary to one commentator’s conclusion in 1981, the *Lauritzen-Hellenic Lines* test is the sole test in all of the Circuits except the Second. In 1959’s *Bartholomew v. Universal Tankships, Inc.* ("Bartholomew") , the Second Circuit stated that the substantiality of the American contact should be of greatest importance with no “balancing” of foreign interests occurring. Two post *Lauritzen*, Second Circuit, decisions found that *McCulloch* overruled *Bartholomew*. After *Hellenic Lines*, however, the Second Circuit followed the *Bartholomew* doctrine in *Moncada v. Lemuria Shipping Corp.* ("Moncada"). *Moncada* viewed *Hellenic Lines* dicta as not only permitting *Bartholomew* but actually adopting the latter’s test. The decision stated that the *Lauritzen* factors should be used in determining the substantiality of the facts favoring jurisdiction instead of merely tallying the factors.

The *Bartholomew* doctrine, as interpreted by *Moncada*, has a significant distinction from *Lauritzen-Hellenic Lines*: If a case had substantial U.S. contacts, such as where the nationality of the sailor and the ship’s flag of convenience were American but where all other contacts were of another country, a *Bartholomew* court might find “substantial” enough U.S. contact warranting jurisdiction, while a *Lauritzen-Hellenic Lines* court might weigh the factors and find them favoring the foreign nation. The *Moncada* interpretation of *Bartholomew* has been consistently fol-
Thus, the Second Circuit has required a higher level of U.S. connection than Supreme Court's standard while giving no consideration to the weight or existence of competing foreign factors.

Because of *Lauritzen-Hellenic Lines* and *Bartholomew*, a difference in status between two vessels' ownership and flag could presently bring different results under Section 33, varying the breadth of law's jurisdiction. After repeal of the cabotage laws, however, these differences would in all likelihood not bring different results; and Congress could insure uniformity for all coastwise trade with a minor amendment.

Without a Section 33 amendment in the cabotage repeal legislation, the *Lauritzen-Hellenic Lines* test would have an inclusive effect for any foreign owned or flagged vessel involved in U.S. intercoastal trade. Any vessel regularly or irregularly sailing between American ports should have sufficient contacts by engaging in commerce between U.S. ports to fall within the jurisdiction of Section 33. First, the "base of operations" would weigh heavily in favor finding jurisdiction. *Hellenic Lines* made clear that business and operating contacts which effectively established the United States as a base of operations would merit the taking of jurisdiction. Transportation between domestic ports, given its historic value as a closely guarded domestic interest, could be construed as a matter of law as being a base of operations.

Second, regardless of whether the nationality and domicile of the defendant, i.e., the "allegiance," were foreign, or even whether the shipping company had absolutely no business operations in the U.S. other than the ship in commerce between U.S. ports (a fact which would nonetheless be highly unlikely), the simple fact that the vessel engaged in interstate transportation via the sea should tip the balance in favor of jurisdiction under the *Lauritzen-Hellenic Lines* test. Third, if the plaintiff was an

---


201. It could certainly be argued that it would be impossible to have "substantial" foreign factors outweighing "substantial" U.S. contacts, but that is a question for another article or a future case. It is sufficient here that the standards used appear to be different and could lead to differing results for cases in a post-Jones Act environment.

202. One commentator believed that *Hellenic Lines* rejected the dual "foreign" and "domestic" nexus test of *Lauritzen* which considered both foreign and domestic contacts, and instead focused on United States contacts alone. Stewart, supra note 174, at 1313-17.

203. See infra note 197.

204. In fact, this proposition is of sufficient importance that should the cabotage laws ever be repealed without amending Jones Act § 33, as discussed below, courts should consider as a 9th factor, "the domestic nature of the commerce."
American\textsuperscript{205} or a long-term American resident,\textsuperscript{206} as would most likely be the case for lines with extensive U.S. coastwise operations, the factor would weigh towards jurisdiction. Were the individual a foreigner, however, that fact would then weigh against the base of operations analysis.

Fourth, the law of the flag could quickly be rejected under \textit{Hellenic Lines} as controlling under American case law if it were a mere flag of convenience.\textsuperscript{207} Were it not a flag of convenience, however, and even if the other “minor” factors were in favor of a foreign nation, the contacts of the defendant through coastwise commerce should still be sufficient to place any employer engaging in coastwise trade within American jurisdiction under a \textit{Lauritzen-Hellenic Lines’} interpretation of Section 33.\textsuperscript{208}

This would be consistent with the basic policy of \textit{Lauritzen}. There, the Court rejected the assertion that the petitioner’s frequent and regular contacts and commerce with ports of the United States were sufficient, in and of themselves, to form a basis for applying American statutes aboard foreign ships.\textsuperscript{209} The nature of international seaborne commerce would favor a foreign court’s jurisdiction, according to the High Panel in that case. If every nation’s courts exercised their potential jurisdiction on ships with which it had contacts or commerce, chaos would result. \textit{Lauritzen} distinguished maritime law from domestic law, however, stating that international law “does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory.”\textsuperscript{210} This conclusion undoubtedly flowed from the fact that U.S. coastwise commerce at that time, like that of most nations, was conducted by domestic interests. The broader point, that local trade represents an area wholly within the jurisdiction of each country could also be made, with equal force, after the repeal of the cabotage laws.

The \textit{Bartholomew} and \textit{Lauritzen-Hellenic Lines} doctrines impose court-made jurisdictional limits, which are inherently subject to later review.\textsuperscript{211} Therefore, any change in the laws of coastwise trade could be

\begin{itemize}
  \item \textsuperscript{205} Carlson, suprano note 177, at 57 (citing Uravic v. F. Jarka Co., 282 U.S. 234 (1931)).
  \item \textsuperscript{206} Id. at 57-58 (citing Gambera v. Bergoty, 132 F.2d 414 (2d Cir. 1942)).
  \item \textsuperscript{208} Obviously, “place of the wrongful act” would favor application of the law with a coastwise incident, as would the other “minor” factors in some cases.
  \item \textsuperscript{209} Lauritzen, 345 U.S. at 581
  \item \textsuperscript{210} Id. at 582.
\end{itemize}
Repealing American Cabotage Laws

1995

blunted by future court decisions. Further, regardless of whether courts actually do modify these doctrines, their existence as separate case lines and the passage of new legislation could lead to a protracted round of court cases testing their viability. To prevent dilution of the value of repealing the cabotage laws and to limit the costs of drawn out and uncertain litigation on this subject, congress should amend Section 33 when Section 27 is repealed. An amendment which could effectuate that goal would redesignate Section 33(a),212 the Act's primary provision, as Section 33(a)(1) and insert the following:

(2) 'Any employer engaging in the coastwise trade of the United States shall be deemed an employer for purposes of this section, regardless of a vessel's flag, the allegiance or domicile of the injured seaman, the employer's domicile, or the place where the seamen contracted for employment, or any other fact."213

This text would ensure that all ships sailing between U.S. ports in commerce would always be within the jurisdiction of § 33 of the Jones Act.

The amendment would not burden U.S. commerce because ships doing significant domestic or foreign American business are most likely already covered by Section 33, and without the amendment, they probably still would be so covered. Also, corporations which engage in such trade presumably insure against such risks. Further, the benefits sought from repealing the cabotage laws, particularly reduced labor costs, would be unaffected by the new amendment for the same reason. The amendment would in fact provide greater certainty for foreign owned and flagged vessels seeking to provide competitive interstate service.214

D. Longshore and Harborworkers' Compensation Act

The Longshore and Harbor Workers' Compensation Act ("LHWCA"),215 originally enacted in 1927, was the final major expansion of workers' compensation laws into the American workplace during that time. Because the state workers' compensation laws failed to extend jurisdiction to shipboard laboring,216 LHWCA created a Federal regime to

212. Supra notes 167-68 and accompanying text.
214. Were costs still an issue, the only solution would be to repeal section 33. This involves a broader policy question and, in this author's view, an unwise decision.
216. Congress reacted to the famed decision in Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917), which dismissed a claim by the survivors of a stevedore killed on board a ship under New York workers' compensation law. Although the law specifically provided for longshore workers, the Supreme Court found that the statute violated the uniformity principle enunciated in The Lottawanna, 88 U.S. 558, 579 (1875). There the Court held that a state law must be rejected
provide generally no-fault medical, disability, and death benefits for injuries to seacoast workers on the job.

The Act provides that, "[e]very employer shall be liable for and shall secure the payment to his employees of the compensation payable" under the Act. LHWCA defines an "employee" as, "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include . . . a master or member of a crew of any vessel" (the "status" test). "Employer" means "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining [areas])" (the "situs" test).

Courts have uniformly found the term "employee" to exclude "seamen" as generally defined by Section 33 of the Jones Act, finding the latter term to be synonymous with "a master or member of a crew of any vessel," who are excepted under LHWCA. The construction of the laws as "mutually exclusive" by courts for purposes of an individual's "status" is buttressed by LHWCA § 3(e), which requires amounts paid under Section 33 of the Jones Act to be credited against any judgment under the Longshore Act. For that reason, repeal of the cabotage acts will probably not increase the number of persons who can avail themselves of the LHWCA because most of the additional foreign crewmen entering U.S. ports would be excluded under the status test.

It is possible, however, that American longshoremen could be injured while in the employ of foreign shipowners. The situs and status test would determine whether these individuals would need to utilize the remedies of the LHWCA. The foreign status of the shipowner or the

---

217. Unlike most state workers' compensation laws, LHWCA excludes "injur[ies] occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." LHWCA, 33 U.S.C. § 903(c)(1988).


222. See supra text accompanying note 169.


225. Either because the worker actually wished to use the LHWCA, or because the shipowner wished to shield itself from section 33 liability by citing its employer or the person's employee status under the Longshoremen's Act.
ship's flag should nonetheless have no effect on the outcome of the case.

Assuming that the American worker is an "employee" under the LHWCA status test, the situs of the injury could conceivably include a foreign owned or flagged ship engaging in the coastwise trade outside of the "navigable waters of the United States," i.e. on the high seas between U.S. ports.226 The availability to the worker of the remedy of the LHWCA should remain, however, unaffected by the foreign nature of the defendant.227 The decision of the Second Circuit in Cove Tankers Corp. v. United Ship Repair, Inc. ("Cove Tankers"),228 while involving a U.S. flagged tanker, provides guidance on the future application of the LHWCA to foreign owned and flagged vessels in the interstate commerce on the high seas.

In Cove Tankers, two employees of defendant United Ship Repair sailed with a ship from Philadelphia to New York. During the trip, the vessel deviated to a point 135 miles offshore where the boiler on which the two were working exploded, killing one, injuring the other.229 Although the Second Circuit refused to directly address whether the high seas can ever be considered part of the "navigable waters of the United States" for purposes of the Act.230 They did agree with the District Court; deciding that the Act can be applied when injury occurs on the high seas.231 The panel noted that the purpose of the original act was to prevent longshoremen from walking into and out of coverage based upon their location; instead, workers would be guaranteed coverage regardless of their location, whether on land, aboard a docked vessel, or at sea.232 To advance that comprehensive intent, the LHWCA should be construed as including American seamen in such a situation, according to the court.

Obviously, being on a foreign ship in international waters would complicate matters. Cove Tankers accepted the domestic nature of the facts of the case only stating whether such a location could be within U.S. jurisdiction.233 The District Court's decision in the case,234 however, noted that Congress had clearly intended through a number of provisions to include the high seas within the definition of U.S. navigable waters.

226. A foreign ship in U.S. waters employing a longshoreman would be within the literal terms of the Act's jurisdiction. See supra notes 218-19 and accompanying text.
227. This dilemma is not posed by U.S. ships engaged in the coastwise trade. See infra notes 228-36 and accompanying text.
228. Cove Tankers Corp. v. United Ship Repair, Inc., 683 F.2d 38, 41 (2d Cir. 1982).
229. Id. at 39.
230. Id. at 41.
231. Id.
232. Id. at 42.
233. Id.
The District Court rejected arguments supporting a three mile limit to LHWCA cases, citing the Act's legislative history and the evolution through reenactments of its provisions. The District Court concluded that the high seas should be included within the definition of navigable waters under the Longshoremens' Act.

In a post-cabotage case, the fact that an American covered by the LHWCA would have been injured aboard a foreign-flag ship owned by a foreign company on the high seas would not have changed the persuasive analysis of the District Court in Cove Tankers. Congress' explicit and implicit intent to extend remedial coverage in this case to longshore workers in American commerce should control. Thus the LHWCA would continue to apply to situations which might be implicated by repeal of the American cabotage laws, and no amendments to the Act would be necessary.

E. UNITED STATES IMMIGRATION LAW

Using its broad power to regulate immigration, Congress established that, "no immigrant shall be admitted into the United States unless at the time of the application for admission he (1) has a valid unexpired immigrant visa . . . , and (2) presents a valid unexpired passport or other suitable travel document . . . ." The term "immigrant" is defined under the Act as meaning, "every alien except an alien who is within one of the following classes of nonimmigrant aliens . . . ." Among the classes of aliens excluded are ship crewmen. The INA states under subsection D that aliens shall not include,

an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in Section 258(a) (other than a fishing vessel having its home port or operating base in the United States) who intends to land temporarily and solely in pursuit

---

235. The decision rejected the plaintiffs claim (citations omitted) that "navigable waters" and "high seas" are not mutually exclusive at a three mile limit, correctly noting that the latter is a more comprehensive term, embracing the former. Id. at 107, n.9.
236. Id. at 108.
237. Id. at 109-11.
238. A foreign vessel and employer would be unable to claim it was outside of the Act's "navigable waters" of the U.S. when the ship was docked in the United States, and would similarly be unable to so claim if the ship were at sea between two American ports.
242. The fishing vessel language was added when Congress realized that individuals seeking illegal entry into the United States were signing on as fishing vessel crewmembers, entering the U.S., and failing to leave. See CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 16.01[2], at 16-6 (rev ed. 1993) (citations omitted).
of his calling as a crewman and to depart from the United States with the vessel . . . on which he arrived or some other vessel . . . .

For such crewmen, with the exception of those with dangerous health conditions or criminal records, or those that are seeking entry to work as replacement labor during a strike, "a consular officer may issue . . . a non-immigrant visa, [specifying] the classification . . . of the nonimmigrant . . . ."

The definition of "crewmen" under the INA is as broad as the term "seamen" under Section 33 of the Jones Act or the LHWCA. The definition of employment simply require one to have the "capacity required for normal operation and service on board." Therefore, a ship includes traditional vessel crew members as well as doctors, beauticians, waiters, sales people, electricians, mechanics, and cooks. Regulations do exclude, however, individuals not required for the vessels' operation and service, or those listed on the documents submitted at the port or employed as a regular crew member in excess of the number normally required.

Congress specifically excluded longshore workers from the definition of "normal operation and service" in the Immigration Act of 1990. The law defined longshore work as "any activity relating to the loading or unloading of cargo, the operation of cargo-related equipment (whether or not integral to the vessel), and the handling of mooring lines on the dock when the vessel is made fast or let go . . . ." Exceptions exist, however, for tankers, where established industry practice is to use foreign crewmen to perform particular activities in particular ports, and for longshore

---

   (1) [N]o alien shall be entitled to nonimmigrant status described in [subsection D, excerpted above] if the alien intends to land for the purpose of performing service on board a vessel of the United States [defined in Title 46] . . . during a labor dispute where there is a strike or lockout in the bargaining unit of the employer in which the alien intends to perform such service, [unless the] (3) owner or operator of such vessel that employs the alien provides documentation that satisfies the Attorney General that the alien (A) has been an employee of such employer for a period of not less than 1 year preceding the date that a strike or lawful lockout commenced; (B) has served as a qualified crewman for such employer at least once in each of 3 months during the 12-month period preceding such date; and (C) shall continue to provide the same services that such alien provided as such a crewman.
247. See supra notes 171, 219 and accompanying text.
248. See Gordon & Mailman, supra note 242, at § 16.01[2], at 16-6.
249. 22 C.F.R. § 41.41(b) (1993); see also supra note 248.
crewmen of ships flagged in countries that allow similar privileges for U.S. crewmen.252

Repeal of the American cabotage legislation will do little to change immigration practices among the coastwise fleet because the provisions of the Act presently apply to American ships engaging in the coastwise trade.253 The only likely change with the elimination of the laws will be an increase in the number of individuals applying for D Class visas, since foreign owned and flagged ships are more likely to have foreign crewmen aboard. This upswing in applications and visa issuances would not affect the procedures or requirements of the immigration laws, and would not necessitate their change.

Foreign seamen who would seek long term but non-permanent residence in the U.S. after repeal of the cabotage laws, so as to work on ships engaging in the coastwise trade, would need to apply for an H Class temporary work visa instead of the short term, D Class crewman visa. Such crewman could only enter, however, if “seaman” became a specialty occupation under the statute, or became a skill in short supply as determined by the Department of Labor.254 Both of these being unlike events, revision of immigration laws need not be considered after elimination of the cabotage acts.

IV. Conclusion

As noted above, the cabotage laws represent only part of the intricate structure of government supports to the American merchant marine. These statutes and appropriations are designed to protect the American sea carriage industry, and to provide the infrastructure and hardware necessary for this country to conduct a war. Assuming that the naval and military needs of this nation no longer require what the cabotage laws and Federal supports provide, and that protectionist economic practices ultimately harm domestic consumers and producers, benefiting only the select workers and companies receiving this government largess, the appropriate solution is to dismantle the system.255

Purging our statute books of the cabotage laws is an integral part of

253. See Gordon & Mailman, supra note 242, at § 16.01[2], at 16-6 (citations omitted).
255. The need for ocean-going vessels to transport hardware and personnel during times of war or conflict is clear. What is less clear is whether those vessels are not presently under the command of the U.S. armed forces or whether the types of vessels needed are the same type as those used in the coastwise trade. This author wishes to make clear, however, that were there a clear need for additional ships of these types and it was determined that the most cost effective way to ensure a ready supply of these vessels was to subsidize their production and operation by American companies under American flag, subsidies would be appropriate to the extent neces-
this process. As explained above, however, other legislation is dependent on the concepts underlying these laws. Simply eliminating the protectionist provisions will not create the coherent, efficient policy sought in freeing the transportation market. Nonetheless, as is made clear from this paper's analysis, removing the Jones Act and the Foreign-Built Dredge Act, the Passenger Ship Act, and the Towing Act need not be a complicated process as it relates to our nation's labor laws. In fact, seeking a more competitive coastwise trade policy should not conflict with appropriate worker protection statutes.

American wage and hour laws, regardless of the rhetoric of Eisenhower era union officials, are burdensome to certain industries. Shipping is one of those. The elimination of the minimum wage law for seamen will not affect most seafarers, who are unionized, and will create greater job opportunities for those willing to work for small businesses that the competitive marketplace will encourage.

The repeal of the cabotage restrictions will also help correct the problems American shippers have with local unionized labor. Where market conditions support unions of U.S. workers, such as river traffic, labor will continue to take what the market appropriately bears. For routes where foreign liners might compete, such as with coastal transport, American consumers and producers will benefit from the billions of dollars in reduced transportation costs brought by competition in the water, rail, and road transport markets, just as they have with the American trucking and airline industries. Although unions will see their potential exclusion from foreign-flag ships in the coastwise trade as hurting American workers, the few American seamen left on these ships and routes today will not be excluded by necessity, but will merely lack the union muscle, strengthened by U.S. laws, to extract wages that are out of line with world norms. Congress could conceivably provide re-training funds or other supports for the seamen who lose jobs in the first few years. The temporary job dislocation of a few workers is a small price to pay for the increased commerce resulting from the reduction in shipping costs; and as importantly, the vast number of jobs created by the free market will more than offset the handful of positions lost to foreign workers and the wage reductions brought about by labor competition.

Workers' compensation acts for seamen and longshoremen which
protect the health of workers and appropriately allocate the costs of these dangerous industries to their customers, will be unaffected by the repeals if the amendment suggested above is added to the Jones Act regime. Change is also not necessary for immigration laws, as noted above.

Obviously opposition to a reduction of any sort of maritime industry protection will come from those whose interests are harmed by the change: the shipping lines who profit from the taxpayer subsidies; the ship builders who exist because of those subsidies; the maritime construction and seamen's unions whose power is derived from the concentration of high-skilled, well paying jobs in this sector; the seafarers whose hard working but extensively compensated lifestyle is preserved by the laws; and the railroads and railroad unions, and truck lines and truckers who will see a return of transportation competition.

Yet assuming that our national defense needs can still be met, the benefits will easily outweigh their interests. Tax dollars not spent supporting these enterprises will help reduce the budget deficit, and hopefully the U.S. tax burden, in their own small way. The jobs created and reduced priced products purchased by consumers and companies alike will benefit all Americans and be of far greater aggregate economic value to the country than maintaining these industries, as is always the case with subsidized jobs. Finally, the working conditions and policy goals supported by the five pieces of legislation analyzed in this paper, will still be fulfilled without offending our international neighbors and without shirking our international responsibilities and efforts.

Labor regulations do not represent a barrier to competitive sea transport. The short term political and focused but diffusable economic costs would certainly be a small price to pay for the ultimate benefit of a higher standard of living for all Americans.
The Effects of Unlawful Interference with Civil Aviation on World Peace and the Social Order

R.I.R. Abeyratne

TABLE OF CONTENTS

I. Introduction ........................................ 450
II. Unlawful Interference ................................ 453
   A. Elements of the Offence ........................... 455
   B. International Responses to the Offence .......... 456
   C. Nature of the Offence .............................. 458
III. Acts of International Terrorism .................... 462
   A. General Considerations ............................ 462
      2. Nonviolent Acts ................................. 464
      4. Acts Which Aid and Abet National Terrorism.... 465

* The author is a doctoral research scholar at the Institute of Air and Space Law, McGill University, Montreal, Quebec, Canada. He is also an aviation consultant who works as Air Transport Officer in the International Civil Aviation Organization (ICAO). He is a law graduate of the University of Colombo, Sri Lanka, and a masters graduate in law of Monash University, Victoria, Australia, where he specialised in international law and air law. After his graduation from Monash in 1982, he joined Air Lanka and worked as the airline's Chief Co-ordinator and Head of International Relations and Insurance, until he joined ICAO in 1990.

He has published numerous papers on international trade law and air law. He is a Fellow of the Chartered Institute of Transport and a member of the Royal Aeronautical Society, the British Association of Aviation Consultants, and the International Law Association (Headquarters) of which he is a Member of the International Trade Law Committee.

449
I. INTRODUCTION

Recent attempts made towards attaining peace in such areas as the Arab-Israeli conflict and the Northern Ireland issue have been thwarted by the proliferation of incendiary acts against the world at large, thus amply demonstrating the inherent difficulties attendant upon such peace processes. In the context, unlawful interference with international civil aviation has become a principal area of concern to the world community both as a recognised threat to world peace and security and as a grave social malady which needs a fast cure. The bombing of a PAN AM aircraft over the Atlantic in December, 1988 and the mortar attacks on London Heathrow Airport in March, 1994 are two events which occurred over a period of six years, graphically illustrating the effects of terrorism on international civil aviation and world peace. While the former incident caused diplomatic and legal ripples between Libya and the United States, leading to adjudication in the International Court of Justice, the latter caused a further widening of the gap between the British Government and the Irish Republican Army (IRA). This paper, while identifying the offence of unlawful interference in its many forms, will discuss international regulatory measures that have so far been taken against the offence and suggest effective measures that may be taken to dissuade terrorism against international civil aviation.

The maintenance of international peace and security is an important
The Effects of Unlawful Interference

objective of the United Nations,¹ which recognizes one of its purposes as being inter alia:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.²

It is clear that the United Nations has recognized the application of the principles of international law as an integral part of maintaining international peace and security and of avoiding situations which may lead to a breach of the peace.³ The first task of this paper is to examine the meaning and significance of the words “unlawful interference” in the context of civil aviation. “Unlawful interference” is clearly a generic term of the expression “[A]cts of aggression or other breaches of the peace” used in the United Nations Charter.⁴ The Chicago Convention of 1944 ⁵ — the seminal document which sets out the principles of international civil aviation — recognizes that the abuse of international civil aviation can lead to

¹. U.N. Charter art. 1 ¶ 1.
². Id.
³. See G.A. Res. 44/23, U.N. GAOR, 44th Sess., Supp. No. 49, at 31 U.N. Doc. A/44/49 (1989). On November 17, 1989 the United Nations General Assembly adopted Resolution 44/23 which declared that the period 1990-1999 be designated as the United Nations Decade of International Law (the full text of Resolution 44/23 is annexed as Appendix 1 at the end of the text of this thesis). The main purposes of the decade have been identified inter alia as:
   a) To promote acceptance of and respect for the principles of international law;
   b) To promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice;
   c) To encourage the progressive development of international law and its codification;
   d) To encourage the teaching, study, dissemination and wider appreciation of international law.

The four tasks of the Resolution have been predicated upon the fact that the purpose of the United Nations is to maintain peace and security.


"[A] threat to the general security" and that international civil aviation may be developed in a safe and orderly manner.\(^6\)

The Provisional International Civil Aviation Organization (PICAO), was formed as a consequence of the Chicago Conference of November 1944, later resulting in the Chicago Convention, and its interim agreement which was concluded so that PICAO could commence operations pending a permanent Convention being summoned.\(^8\) PICAO records the first official international response to aviation security. In preparation for the PICAO Assembly, the Council inserted an agenda item which called for "[C]onsideration of the action taken and to be taken by the Organization and Member States with respect to safety in the air."\(^9\)

At its 7th Session in 1947, mention was also made of safety of life in the air.\(^10\) By then, the Operational Studies Section of PICAO had already been charged with the task of studying *inter alia*, factors conducive to the provision of safe, regular and efficient air services.\(^11\) Although there is no direct reference to aviation security in the annals of PICAO meetings, it is reasonable to impute to the PICAO Council concern with the overall safety of human life in the air, whether it be ensured through mechanical efficiency of aircraft or the prevention of adverse human conduct. This intent was more clearly brought out in 1977 by the ICAO Council when, at its 92nd Session, the ICAO Council referred to UN General Assembly Resolution 32/8 on Safety of International Civil Aviation\(^12\) and referred *in contextu* to "Strengthening of measures to Suppress Acts of Unlawful Interference with Civil Aviation."\(^13\) The interaction between "safety," "security," and "unlawful interference with civil aviation" is now clearly established.

---

6. See Chicago Convention, *supra* note 5, at preamble:

WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.

7. *Id.*


12. See *app. 2*.

13. See ICAO Doc. C-WP/6635, at 1 (Nov. 8, 1977). See also Assembly Res. in Force, ICAO Doc. 9509, at V11-2 (Nov. 10, 1986)(incorporating Assembly Resolution 26-7 which consolidated ICAO Assembly Resolutions A22-16 and A22-17). See also *app. 3* (for Assembly Resolution 26-7).
ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference, appearing in ICAO Resolution A 26-7 now in force, resolves:

[T]he unlawful seizure of aircraft and other unlawful acts against the safety of civil aviation, particularly the threat of terrorist acts, have a serious adverse effect on the safety, efficiency and regularity of international air transport and undermine the confidence of the peoples of the world in the safety of international civil aviation;
Acts of unlawful interference with civil aviation continue to have an adverse effect on the safety and efficiency of international air transport and endanger the lives of aircraft passengers and crews engaged in air transport . . . 14

The concern of the international community would therefore lie in the fact that unlawful interference with international civil aviation erodes the safety and security of international civil aviation.

II. UNLAWFUL INTERFERENCE

Under general legal principles, unlawful interference of civil aviation can be regarded as a crime. A crime has been identified as: “a wrong which affects the security or well being of the public generally so that the public has an interest in its suppression.”15

The word “wrong” in this definition could be considered as presupposing an act that is perpetrated as being against the law. Since interference with civil aviation is in itself a wrong, and therefore definitively against the law, the question arises as to whether the word “unlawful” is tautological. Tautology in the phrase “unlawful interference” was judicially discussed in England in 1981 in a case which involved indecent assault on a mental patient. Hodgson, J. observed that “[I]t does not seem to me that the element of unlawfulness can properly be regarded as part of the definitional elements of the offence. In defining a criminal offence, the word "unlawful" is surely tautologous and can add nothing to its essential ingredients.”16 Lord Justice Lawton U., in a later case, analyzed Justice Hodgson’s reasoning and observed:

We have found difficulty in agreeing with this reasoning, even though the judge seems to be accepting that belief in consent does entitle a defendant to an acquittal on a charge of assault. We cannot accept that the word ‘unlawful’ when used in a definition of an offence is to be regarded as ‘tautologous.’ In our judgment the word ‘unlawful’ does import an essential element into the offence. If it were not there, social life would be unbearable . . . 17

14. See app. 3.
Lord Lane C.J., in the 1987 case of R. v. Williams,18 citing with approval Lord Justice Lawton's analysis went on to say: "[t]he mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more".19

Lord Lane C.J. seems to impute to the defendant a knowledge of going against applicable law, making the word "unlawful" *sui generis* and mutually exclusive from the term "interference."

This line of cases seems to suggest by analogy that "unlawful interference" constitutes an act whereby the perpetrator knows that his interference with an activity is clearly contrary to the law. Unlawful interference with civil aviation forms no conceivable exception to this logic.

Another significant rule emerged from the judgment of Lord Lane C.J. when His Lordship said:

What then is the situation if the defendant is labouring under a mistake of fact as to the circumstances? What if he believes, but believes mistakenly, that the victim is consenting, or that it is necessary to defend himself, or that a crime is being committed which he intends to prevent? He must then be judged against the mistaken facts as he believes them to be. If judged against those facts or circumstances the prosecution fail to establish his guilt, then he is entitled to be acquitted.20

By analogy therefore, if a person interferes with civil aviation, but does not believe he is contravening the law, he is not guilty of an offence. The mental element in the offence becomes as important as the physical element of the offence of unlawful interference with civil aviation. The criminal element21 that is thus infused into the offence of unlawful interference makes the offence, like any other, hinge on the criminal policy that is created in the jurisdiction to which it applies. In other words, an act of interference would be considered unlawful and thereby an offence only in jurisdictions whose criminal policies determine such acts to be unlawful. Although crime has so far not been coherently defined by any writer,22 the characteristics of a crime, i.e., the *actus reus* (physical act

---

19. *Id.* at 414. See also R. v. Abraham, 3 All E.R. 694, 696 (1973)(for further discussion of the term unlawful).
20. R. v. Williams, 3 All E.R. at 414.
22. C.K. Allen, *Legal Duties* 230 (1931) See *Kenny's Outlines of Criminal Law* § 1 (J.W. Cecil Turner ed. 18th ed. 1962) *See also Proprietary Articles Trade Association v. Canada* (A.G.) [1931] A.C. 31 (P.C) where it was held that the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes. A general definition of a crime is that it is "a violation or neglect of legal duty of so much public importance that the law, either common or statute, takes notice of and
forbidden by law) and the mens rea (the intention to commit the act and understanding the reasonable and natural consequences of the act), have been identified. The identification of these elements has given rise to the maxim Actus non facit reum (hominem) nisi mens sit rea, meaning that whatever deed a man may have done, it cannot make him criminally punishable unless his doing of it was activated by a legally blameworthy attitude of mind. Usually, each prohibited deed is legally specified and defined, and the legal definition identifies the essential facts which must be present to constitute the forbidden deed. As will be discussed later, the offence of unlawful interference with international civil aviation forms no exception to this practice.

A. ELEMENTS OF THE OFFENCE

The offence of the unlawful interference with international civil aviation broadly comprises: hijacking of aircraft; aviation sabotage such as causing explosions in aircraft on the ground and in flight; missile attacks against aircraft; armed attacks on airports, passengers and other aviation related property; and the illegal carriage of narcotics by air, and its criminal ramifications.

Often, the heart of the offence is dignified with a core of legitimacy on the grounds that the actions of the offender are justified. Some States have acquiesced to this approach by giving the offender a safe haven to conduct his activities and subsequent political refuge. Accordingly, there now exists a dichotomy in some minds that the need for a solution to the problem does not arise in the absence of a problem. Professor Michael Milde addresses this dichotomy and observes current trends: How did the international community respond to these acts? The applause and “hero’s welcome” for the perpetrators did not last too long beyond the first bizarre incidents and the international community realised that, in the dangerous game of unlawful seizure of aircraft and the acts of sabotage, there are no winners — the security of civil aviation is an overriding interest because international air transport is an indivisible part of international economy and co-operation which must be protected in the common interest.

punishes it." See generally JOHN WILDER MAY, LAW OF CRIMES, (Harry A. Bigelow, ed., 3d ed. 1905) (noting that 'intent' to commit a crime should appear either expressly or by implication). According to this definition and reasoning, the intent must be unlawful.


24. “An act does not make [the doer of it] guilty unless the mind be guilty; that is, unless the intention be criminal. The intent and the act must both concur to constitute the crime.” BLACK'S LAW DICTIONARY 36 (6th ed. 1990).

Despite this clear view, in a general sense, confusion has been confounded with the paucity of a clear definition of the offence itself and the lack of recognition of the principles of international law as universally enforceable laws against the offender. The blatant incompatibility between the heinous quality of the offence and the tepid judicial attitudes of some jurisdictions marks an insouciance that needs the urgent attention of the world community.

B. INTERNATIONAL RESPONSES TO THE OFFENCE

In January 1991, the Secretary General of the International Civil Aviation Organization (ICAO) addressed a State Letter to all ICAO contracting States, wherein he informed them that the ICAO Council had identified the major challenges facing international civil aviation. The subject of unlawful interference had been defined by the 27th Session of the ICAO Assembly as the overriding priority in ICAO’s work programme. The Secretary General requested that all contracting States provide their comments on the challenges, priorities, and action that they think ought to be taken to meet those challenges. The responses of States were consistent in that such measures as the implementation of ICAO policy on unlawful interference, worldwide enhancing of security measures, and the development of aviation security assistance programmes were unanimously acceptable as those most desirable to combat the challenge. In this context, one of the more significant decisions taken by the ICAO Council was to proceed, with the highest priority, with the development of a comprehensive and detailed ICAO aviation security training programme for world use. Accordingly, ICAO has been very active in the field of aviation security in the recent past. The Committee on Unlawful Interference held 17 meetings in 1990, and considered the review of the reports of the Ad Hoc Group of Specialists on the Detection of Explosives, the initial development of the

26. ICAO was created in 1944 to promote the safety and orderly development of civil aviation in the world. A specialized agency of the United Nations, it sets international standards and regulations necessary for the safety, security, efficiency and regulation of air transport and serves as the medium of cooperation in all fields of civil aviation among its 180 contracting States.


28. Id. at 1.

29. The other challenges to civil aviation as identified in the State Letter were: human factors in flight safety; environment; regulatory developments; commercial developments, airport and airspace congestion; legal issues; financial resources; and human resource development. Id.


31. See Annual Report of the Council, at VII-96, ICAO Doc. 9568 (1990). ICAO records that while acts of unlawful seizure increased from 8 in 1989 to 20 in 1990, the number of persons killed by violence against civil aviation actually decreased from 279 persons in 1898 to 137 in 1990; the number of acts of sabotage against civil aviation amounted to 1 in 1990 as against 2 in 1989. Id. at 97-99.
ICA0 Aviation Security (AVSEC) training programme, and inter alia, the comprehensive revision of the ICAO Security Manual. Aviation security is by no means a recent concern of ICAO. The President of the ICAO Council, Dr. Assad Kotaite, cautioned the world of this danger in 1985 when he said:

The last two decades witnessed the emergence of an alarmingly wide scale of a new type of danger to international civil aviation . . . This new type of danger is man made and is manifested in violent human acts against the safety of civil aviation, use of force or threat of force, unlawful seizure of aircraft and other forms of unlawful interference with civil aviation . . . These violent acts which constitute worldwide problem, are not limited by geographic or political boundaries and no nation and no airline of the world is immune to such acts . . .

Professor Michael Milde, Director of ICAO’s Legal Bureau (as he then was) focuses attention on the importance attributed by ICAO to the problem of aviation security when he said:

In 1980, the 23rd Session of the ICAO Assembly adopted what is considered to be a “landmark” decision concerning the General Work Programme of the Legal Committee: it decided that only subjects of sufficient magnitude and practical importance requiring urgent international action, should be included in that work programme . . . problems of aviation security have been predominant and have commanded overriding priority for several years, thus reflecting the highest priority accorded, by members of the Organisation, to problems of security against unlawful interference.

There are however, two major obstacles to the enthusiasm shown so far in taking concerted action in this field:

1) The implementation of measures taken relating to the threat against aviation security in the face of the absence of the acceptance of the principles of international law and respect therefor — a concern reflected in a) of UN Resolution 44/23; and,
2) The subject of aviation security is too vast for one organization to handle on its own.

---

32. Id. at 96.
While there have been various practical measures recommended to combat acts of unlawful interference such as the training of personnel to detect a threat beforehand, intensifying security on such susceptible targets as airports, and the surveillance of all persons who are seen in such areas, the threat against aviation security can only be effectively curbed if it is recognised in consensu by the international community as an offence against humanity. The lack of resources only makes the offence of interference of civil aviation subject to punitive sanctions of diverse municipal laws. World consensus on punitive sanctions against the offence and a more cohesive international structure to combat the offence are therefore necessary tools that would obviate this threat.

C. NATURE OF THE OFFENCE

The offence of unlawful interference with civil aviation, whether it be a direct attack on an airline, its passengers and crew or on other related properties, or an act of seizure of an aircraft for the illegal carriage of narcotics by air, is a criminal act and can be broadly identified as an act of terrorism. The term “terrorism” is seemingly of French origin and is believed to have first been used in 1798. “Terrorism” gave connotations of criminality to one’s conduct and was later explicitly identified with the “reign of terror” of the French Revolution. It is now generally considered a system of coercive intimidation brought about by the infliction of terror or fear. One interpretation of terrorism given by the courts is that terrorism does not violate international law. Accusations of terrorism are often met, not by a denial of the fact of responsibility, but by a justification of the challenged actions. This judgment clearly shows that there is

1) an international group to advise airports and countries on security;
2) an international group to investigate terrorist incidents after they occur and make recommendations;
3) an international military response team to resolve an incident, if need be, with force;
4) an international court for trial; and,
5) an international detention centre.
39. Dictionnaire, Supplement 775 (Paris, an VII (1978)).
40. Terrorism is defined as: “Government by intimidation as directed and carried out by the party in power in France during the Revolution of 1789-1794; the system of the ‘Terror.’” Oxford English Dictionary 216 (James A.H. Murray, 1919).
no consensus among the world community that terrorism is an offence
against established principles of law. It also infuses to the heart of the
offence a core of legitimacy that is often considered incontrovertible, giving rise to the dichotomy that the need for a solution does not arise in the absence of a problem.42

The most frustrating obstacle to the control of unlawful acts against
international civil aviation is the paucity of clear definition of the offence
itself. Many attempts at defining the offence have often resulted in the
offence being shrouded in political or national barriers.

In 1980, the Central Intelligence Agency of the United States
adopted a definition of terrorism which read:

Terrorism: The threat or use of violence for political purposes by individuals
or groups, whether acting for or in opposition to established governmental
authority, when such actions are intended to shock, stun or intimidate a tar-
get group wider than the immediate victims. Terrorism has involved groups
seeking to overthrow specific regimes, to rectify perceived national or group
grievances, or to undermine international order as an end in itself.43

This all embracing definition underscores the misapprehension that
certain groups which are etched in history, such as the French Resistance
of Nazi occupied France during World War II and the Contras in Nicaragua,
would fall within the definitive parameters of terrorism. In fact, this
formula labels every act of violence as being “terrorist,” engulfing in its
broad spectrum such diverse groups as the Seikigunha of Japan and the
Mujahedeen of Afghanistan, although their aims, modus operandi and
ideologies are different. James Adams prefers a narrower definition
which reads: “[a] terrorist is an individual or member of a group that
wishes to achieve political ends using violent means, often at the cost of
casualties to innocent civilians and with the support of only a minority of
the people they claim to represent.”44

Even this definition, although narrower than the 1980 definition
cited above, is not sufficiently comprehensive to cover the terrorist who
hijacks an airplane for his own personal gain.45 The difficulty in defining
the term seems to lie in its association with political goals as demonstrat-
ed by the definition that terrorism is really “terror-inspiring violence,
containing an international element that is committed by individuals or

44. Id. at 10.
groups against non-combatants, civilians, states, or internationally protected persons or entities in order to achieve political ends."46

The offence of terrorism has also been defined as one caused by:

any serious act of violence or threat thereof by an individual, whether acting alone or in association with other persons, which is directed against internationally protected persons, organizations, places, transportation or communication systems, or against members of the general public, for the purpose of intimidating such persons, causing injury to or the death of such persons, disrupting the activities of such international organizations, causing loss, detriment or damage to such places or property, or of interfering with such transportation and communications systems in order to undermine friendly relations among States or among the nationals of different States, or to extort concessions from States.47

It is time that terrorism is recognized as an offence that is *sui generis*, and one that is not always international in nature and motivated by the political aims of the perpetrator. If terrorism is regarded as the use of fear, subjugation and intimidation to disrupt the normal operations of humanity. However, once more analysis is carried out on the subject a more specific and accurate definition could be sought. One must always be mindful, however, that without a proper and universally acceptable definition, international cooperation in combating terrorism will be impossible.48

A terrorist act is one which is *mala in se* or evil by nature,49 and has been associated with the political repression of the French Revolution era

---

   
   The definition of "international terrorist offence" presented here is more comprehensive than the definitions which appear in the multilateral convention concluded in the past two decades and relating to the control of international terrorism. The term comprehends serious criminal acts, such as murder, assault, arson, kidnapping, extortion, sabotage and the use of explosives devices directed towards selected targets. These targets include internationally protected persons, places, and international civil aircraft which are already protected under the conventional or customary international law.

where, it is said, the word terrorism was coined. A terrorist is a *hostis humani generis* or common enemy of humanity. Generally, terrorist attacks that are calculated to interfere with civil aviation are five-fold:

a) Hijacking — which in the late 1960s started an irreversible trend which was dramatized by such incidents as the skyjacking by Shiite terrorists of the TWA flight 847 in June 1985. The skyjacking of Egypt Air flight 648 in November the same year and the skyjacking of a Kuwait Airways Airbus in 1984 are other examples of this offence;

b) Aviation sabotage — where explosions on the ground or in mid air destroy whole aircraft, their passengers and crew. Recent dramatizations of this type have been the Air India flight 182 over the Irish Sea in June 1985, the PAN AM flight 103 over Lockerbie, Scotland in 1988, and the UTA explosion over Niger in 1989;

c) Missile attacks — where aircraft are destroyed by surface to air missiles (SAM). The destruction of the two Viscount aircraft of Air Rhodesia in late 1978 and early 1979 are examples of this offence;

d) Armed attacks on airports and airline passengers where terrorists open fire in congested areas in the airport terminals. Examples of this type of terrorism are: the June 1972 attack by the Seikigunha (Japanese Red Army) at Ben Gurion Airport, Tel Aviv; the August 1973 attack by Arab gunmen on Athens Airport; and the 1985 attacks on Rome and Vienna Airports.) The illegal carriage by air of narcotics and other psychotropic substances and crimes related thereto such as the seizure of, or damage to, aircraft, persons and property.

International terrorism has so far not been defined comprehensively largely due to the fact that owing to its diversity of nature the concept itself has defied precise definition. However, this does not preclude the conclusion that international terrorism involves two factors. They are:

1. The commission of a terrorist act by a terrorist or terrorists: and,
2. The "international" element involved in the act or acts in question i.e., that the motivation for the commission of such act or acts or the eventual goal of the terrorist should inextricably be linked with a country other than that in which the act or acts are committed.

Perhaps the oldest paradigm of international terrorism is piracy which has been recognized as an offense against the law of nations and which is seen commonly today in the offense of aerial piracy or hijacking.

Acts of international terrorism that have been committed over the
past two decades are too numerous to mention. Suffice it to say that the most deleterious effect of the offense is that it exacerbates international relations and endangers international security. From the isolated incidents of the sixties, international terrorism has progressed to becoming a concentrated assault on nations and organizations that are usually susceptible to political conflict. Although, politics is not always the motivation of the international terrorist.

International terrorism has been recognized to engulf acts of aggression by one State on another, as well as by an individual or a group of individuals of one State on another State. The former typifies such acts as invasion, while the latter relates to such individual acts of violence as hijacking and the murder of civilians in isolated instances. In both cases, the duties of the offender State have been emphatically recognized. Such duties are to condemn the acts and take necessary action.

The United Nations gave effect to this principle in 1970 when it proclaimed that:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.52

The most pragmatic approach to the problem lies in identifying the parameters of the offense of international terrorism and seeking a solution to the various categories of the offense. To obtain a precise definition would be unwise, if not impossible. Once the offense and its parasitic qualities are clearly identified, it would become necessary to discuss briefly its harmful effects on the international community. It is only then that a solution can be discussed which would obviate the fear and apprehension we suffer in the face of this threat.

III. ACTS OF INTERNATIONAL TERRORISM

A. GENERAL CONSIDERATIONS

It is said that terrorism is a selective use of fear, subjugation, and intimidation to disrupt the normal operations of society.53 Beyond this statement, which stands both for national and international terrorism, any attempt at a working definition of the words "international terrorism"
The Effects of Unlawful Interference

would entail complications. However, in seeking a solution which would lead to the control of international terrorism, it is imperative that contemporaneous instances of the infliction of terror be identified in order that they may be classified either as acts of international terrorism, or as mere innocuous acts of self-defense. Broadly, acts of international terrorism may be categorized into two distinct groups. The first category may be included acts of oppression, such as the invasion of one state by another. The second category are actions which are deviously claimed to be acts of defense. While the former is self-explanatory, the latter, by far the more prolific in modern society, can be identified in four separate manifestations. They are:

(a) Acts claimed to be committed in self defense and in pursuance of self-determination to circumvent oppression;
(b) Nonviolent acts committed internationally which are calculated to sabotage and destroy an established regime;
(c) Random acts of violence committed internationally by an individual or groups of individuals to pressurize a State or a group of individuals to succumb to the demands of terrorists; and
(d) Acts committed internationally which aid and abet national terrorism.

With the exception of the first category of invasion, the others are \textit{prima facie} acts of international terrorism which are essentially extensions of national terrorism. That is to say that most acts of international terrorism are a species of the genus national terrorism.


Some States claim that internal oppression, either by foreign invasion or by an internal totalitarian regime, necessitates guerilla warfare for the achievement of freedom. With more emphasis, it has been claimed that one state must not be allowed to exploit and harass another, and that the physical manifestation of a desire to attain freedom should not be construed as terrorism.\textsuperscript{54} Often, such acts of self defense prove to take extreme, violent forms, and manifest themselves overseas, thus giving rise to international terrorism. Acts of defense, as they are called, are common forms of international terrorism and are categorized as political violence. These acts take the form of: acts of disruption, destruction, or injury whose purpose, choice of targets or victims, surrounding circumstances, implementation, and/or effects have political significance . . . .\textsuperscript{55}

Organized political groups plan strikes and acts of violence internally, while extensions of these groups carry out brutal assassinations, kidnappings and cause severe damage to property overseas. The retaliatory pro-

cess, which commences as a token of self defense, transcends itself to terroristic violence which is totally ruthless and devoid of moral scruples.56 Usually, a cause which originates as dedicated to self-defense and self-determination soon focuses toward gaining the support of the people, disarming the military strength of the regime against which it rebels, and above all seeking to strengthen itself in order to attain stability. In this instance, terrorist acts seek to carry out a massive propaganda campaign in the international community, while concentrating on individual instances of terrorism in populated urban areas, which attract more attention than those committed in isolated areas.57 Advertising a cause in the international community becomes an integral part of political terrorism of this nature.

Both the international community and the governments concerned should be mindful that acts of defense can be treated as such, only in instances where people defend themselves when they are attacked, not when retaliatory measures are taken in isolation to instill fear in the international community. To that extent, acts of defense can be differentiated from acts of terrorism.

2. Nonviolent Acts

There are instances where terrorism extends to destabilizing an established regime or a group of persons by the use of threats, calculated to instil fear in the international community. Typical examples are the spreading of false propaganda and the invocation of threats. Threats tend to unhinge both the nation or a group of persons against whom the threats are carried out and the nations in which such acts are said to be committed. There have been claims that export consumer commodities of a nation, such as food items, have been poisoned, precluding foreign trade between nations. Although such tactics are devoid of actual physical violence, they tend to unhinge the economic stability of a nation, particularly if such nation depends solely on the export of the item in question. In such instances, international terrorism assumes proportions of great complexity,58 and succeeds in at least temporarily disrupting the infrastructural equilibrium of the threatened nation. The concerned government is immediately placed on the defensive and attempts counter-propaganda.59 In spreading propaganda of this nature, the media is the

terrorist's best friend. Television and radio are symbolic weapons to in­still fear in the public and to cripple the persons or government against whom the attack has been aimed. The effect of publicity on people is truly tangible. Media terrorism creates an emotional state of apprehension and fear in threatened groups. It also draws world attention to the existence of the terrorists and their cause. In both instances, the terrorist succeeds in creating a credibility gap between his target and the rest of the world. Psychological terrorism of this nature is perhaps the most insidious of its kind. It is certainly the most devious.


A random act of violence is normally, although not necessary, a co­rollary to a threat. Often, the international community is shocked by a despicable act of mass murder and destruction of property which takes the world completely by surprise. Responsibility for the act is acknowledged later, though in many instances no responsibility is claimed. When this is the case, the offended nation and the world at large are rendered destitute of an immediate remedy against the offense. Even if motive is imputed to a particular terrorist group, the exercise of sanction becomes difficult as the international community will not condone sanctions without concrete and cogent evidence.

The difficulty lies largely in the fact that any terrorist act is usually carefully planned and executed. Often one observes that the terrorist cautiously retracts his steps obscuring all evidence, unless he seeks publicity. The average terrorist is a militant who employs tactics aimed at instilling fear in the minds of the international community. His acts are calculated to instill fright and paralyse the infrastructure of a state by totally exhausting the strength of his target.

4. Acts which Aid and Abet National Terrorism

The fourth facet of international terrorism pertains to activities which promote national terrorism and which are committed outside the State against which the terrorist cause exists. These acts manifest themselves in the maintenance of overseas training camps for terrorists where guerilla warfare, and techniques of assassination, destruction and sabotage are taught to terrorist groups. After sustained training, the terrorists return to their countries and practice what they have learned overseas. Such training camps usually are conducted by revolutionary groups and

mercenaries on the request of terrorist organizations. A natural corollary to this trend is the collection of funds overseas for the financing of such training programmes, the purchase of arms, ammunition and explosives and preparation of foreign propaganda.

These indirect acts of international terrorism, indicate clearly that although there is no identifiable definition of the word "terrorism", the word itself can no longer be associated only with violent acts of aggression. In fact, recent studies reflect that any organized campaign of international terrorism involves both direct and indirect acts in equal proportion.60

In a broad sense, international terrorism embitters humanity and pits one nation against another and one human being against another. The eventual consequence of the problem is aggression and even war. The main goal of the use of a psychological element by the international terrorist, which is by far the most obnoxious and objectionable ambition, is to polarize people and society. However, its immediate manifestation and future development are not without features sufficient to cause grave concern to the world.

Acts of international terrorism, whether in the form of violent or non violent acts, have clear and immediate international consequences. They are numerous in nature and warrant a separate study. However, in effect they obtain for the miscreant the same result of creating disharmony and disruption in society. The concept has grown in recent times to portend more serious problems to the international community. Those problems are worthy of comment.

Terrorism has so far not reached the proportions of being an international conspiracy, although one group identifies its objectives and purpose with another. We have not had the misfortune of seeing all terrorist groups band together to work as a composite element. This has not happened for the reason that diverse ideologies and religions have kept each group separate. Nevertheless, there is a strong identity bond between groups and even evidence that one helps the other with training and military aid, even though their causes are quite different. The link between terrorist groups is an important consideration for the world, as close association between groups could strengthen a weak force and nurture it to maturity. In addition, strong and established terrorist organizations, under cover of burgeoning groups, could carry out campaigns which would cover their tracks and make identification difficult. Investigations have revealed that a relatively unknown, small group was responsible for an act or acts, but later it was determined that a much stronger group had masterminded the offences for its own benefit.

60. U.N. GAOR 40th Sess., supra note 58, at 11.
Another important aspect of the growing incidence of international terrorism is the advancement of technology in communication, the manufacture of sophisticated weaponry, and the proliferation of nuclear armament. In today's context, terrorism has blown to unmanageable proportions with the use of advanced weapons of destruction. Arms control plays a vital role in the control of aggression. It naturally follows that terrorism benefits from the availability of new modes of aggression. The vulnerability of the international community has been caused by the paucity of adequate security measures to prevent nuclear theft. With the growth of the nuclear power industry, developed nations exposed themselves to the vulnerability of theft by power groups, in whose hands nuclear weapons act as threats of destruction. The most effective counter measure against the threat of nuclear theft is to take precautions necessary to protect the stored items, and to make known to the terrorist the high risk involved in an attempt to steal such material. Ideally, any hope of theft must be obviated. This can be achieved by strengthening governmental security.

5. Problems of Deterrence

The only deterrence that would be effective against terrorism of any nature is based on the success of convincing the terrorist that the risk he takes outweighs the benefits which may accrue to his cause. The futility of attempting to wipe out terrorism by the use of military force or the threat of general sanction on an international level is apparent. The terrorist has to be shown that any attempt at terrorist activity would cause him and his cause more harm than good. Deterrence in this context attains fruition when effective punitive sanctions are prescribed and carried out, whilst simultaneously denying the terrorist his demands. In both instances, the measures taken should be imperatively effective. It is not sufficient if such measures are merely entered into the statute books of a State or incorporated into international treaty. The international community has to be convinced that such measures are forceful and can be effectively carried out.

However, deterrence does not stop at the mere imposition of an effective sanction, nor does it complete its task by the denial of terrorist demands. Perhaps the most effective method of countering terrorism is psychological warfare. The terrorist himself depends heavily on psychology. His main task is to polarize the people and the establishment. He

61. See Alexander L. George & Richard Smoke, Deterrence In American Foreign Policy: Theory and Practice, 48, 59-60. The George Smoke formula, introduced in the United States of America in the early 1970's, argued that if the cost and risk involved in a terrorist operation outweighed the benefit gained by such operation, deterrence could be successfully gained.
wants popular support and a sympathetic ear. He wants a lot of people listening and watching, not a lot of people dead. Counter measures taken against a terrorist attack, be it a hostage taking, kidnapping, or threat of murder, should essentially include an effective campaign to destroy the terrorist's credibility and sincerity in the eyes of the public. Always, the loyalty of the public should be won over by the target and not by the terrorist. It is only then that the terrorist's risk outweighs the benefits he obtains. To achieve this objective, the terrorist must receive detrimental publicity, showing the public that if the threatened person, group of persons or State comes to harm, the terrorist alone is responsible. Therefore, the most practical measures that could be adopted to deter the spread of terrorism can be accommodated in two chronological stages:

1) Measures taken before the commission of an offense such as the effective imposition and carrying out of sanctions and the refusal to readily comply with the demands of the terrorist;
2) Measures taken after the commission of the act such as the skilful use of the media to destroy the credibility of the terrorist cause and to convince the people that the responsibility for the act devolves at all stages solely upon the terrorist.

One difficulty in exercising deterrence against general and international terrorism is that often the measures taken are not effective enough to convince the terrorist that in the end, more harm would be caused to him than good. Negotiation with the terrorist in particular has to be done by professionals specially trained for the task. A fortiori, the media has to be handled by specialists with experience. Things would be much more difficult for the terrorist if this were done. The greatest problem of deterrence is the pusillanimity of the international community in the face of terrorism, and the feeble response offered by States as a composite body. The reasons for this hesitation on the part of the international community to adopt effective measures against international terrorism is by no means inexplicable. When one state supports a revolutionary cause which is aimed against another, it is quite natural that the terrorist is aware of the support he is capable of obtaining from at least one part of the already polarized world. Therein lies the problem.

6. The Solution

The primary objective of international peace and security is the en-

---
The Effects of Unlawful Interference

deavour to preserve the right to life and liberty. This right is entrenched in Article 3 of the Universal Declaration of Human Rights of 1948, and is accepted today as constituting an obligation on all member States to recognize the legally and morally binding nature of the Declaration.\(^{63}\) Therefore, the destruction of human life and the restriction of liberty are acts committed against international law and order. International terrorism destroys both life and liberty. Indeed there need be no doubt in our minds that international terrorism is illegal. To begin with, there should be more awareness in the world today that every human being has the inherent right to life\(^{64}\) and that the right is protected by law.\(^{65}\) Any act of terrorism being illegal, becomes subject to law and its punitive sanctions. However, in this instance, unlike in a simple instance of murder where sanction itself may act as a deterrent, the two forces of law and sanction are not sufficient to curb terrorism. The international community should realize that the solution to terrorism lies rather in its prevention than in its cure. Therefore, the problem has to be approached solely on the basis that the terrorist on the one hand has to be persuaded that his act may not succeed. On the other hand, he has to be convinced that even if he succeeded in committing the act of terrorism, it would not achieve the desired results. The philosophy of warfare against terrorism is therefore based on the single objective of convincing the terrorist that any attempt at committing a terrorist act would be fruitless and would entail unnecessary harm. This simple philosophy should be adopted gradually in stages with the sustained realization that each measure taken is as important as the next. All measures should be adopted as a composite element, not as mutually exclusive.

A potential terrorist can therefore be attacked in two ways:

1. By the adoption of practical measures to discourage the commission of the act;
2. By the adoption of such effective measures as would impose severe punitive sanctions if the act is committed.

In the first instance, measures of self-help are imperative. They should be adopted with careful planning and the terrorist should be made aware that the community at large is afforded the full protection of these measures. They are:

---


a) The establishment of a system of intelligence which would inform the state concerned of an impending terrorist attack;66
b) The establishment of counter-terrorism mechanisms which would effectively preclude such catalysts as the collection of arms, ammunition, and weaponry;67
c) The adoption of such practical measures of self-help and counter-attack as are necessary in an instance of an attack;68
d) The existence of the necessary machinery to retain the confidence and sympathy of the public at all times;69
e) The persuasion necessary to convince the public that terrorism of any kind is evil and should not be condoned, whatever its cause is.70

The second instance is concerned with measures taken in the event a terrorist act is committed. If strongly enforced with unanimity, measures such as the imposition of laws which bind all nations to view terrorist acts as crimes against humanity can be an effective deterrent. A fortiori, sanctions would further discourage the terrorist.

7. Practical Measures

The first step that should be taken to deter terrorism is for states to be equipped with the expertise to detect a potential threat beforehand and to be prepared for an attack. The next is to intensify security in all susceptible areas, particularly in such places as airports, subway terminals, etc. Surveillance of all people in such areas perceived as targets of terrorist acts, is imperative. There should be more awareness of the threat of terrorist activity, particularly in international airports, and bus and train terminals where travel documents should be checked and passengers double-checked.71 Electronic surveillance of passports and other documents has proved to be an effective method of deterrence in this context. Perhaps the most important facet of surveillance is the use of personnel who do not reveal their identity to the public, but unobtrusively mingle with the crowds. These individuals can easily detect an irregularity without arousing suspicion and without alarming the average person. There should be trained personnel who work with the security forces in such instances. Another significant requirement is the support of the people. The media should be used to the maximize education of the citizen about how to react in an emergency, as well as to be totally distrustful of the terrorist whose acts are calculated to evoke sympathy.

66. See Alona E. Evans & John F. Murphy, Legal Aspects of International Terrorism 541 (1978).
67. See Id. at 546-47.
68. See Id. at 547-48.
69. See Id. at 636-37.
70. See Id.
71. See Id. at 539.
The victims of the terrorist attack should at all times, use the media to convince the public that responsibility for any destruction or harm devolves totally to the terrorist.

8. Legal Measures

Terrorism is usually the genus of the species of political discord between nations. The terrorist is well aware of this situation and usually exploits political disharmony among nations. Laws that have been enacted are rendered destitute of effect because they cannot be enforced with uniformity. Political asylum is a product of this anomaly and remains by and large the greatest catalyst to the proliferation of terrorism in the world today.

In the recent past, the United Nations General Assembly has made sustained efforts to adopt collective measures to prevent terrorism. Various recommendations have been placed before the United Nations urging all nations to contribute collectively to the progressive elimination of the causes of terrorism at national and international levels. The United Nations has successfully focused the attention of its member nations on the increasing problems of terrorism and its natural corollaries such as the proliferation of arms and the emergence of mercenaries.

However, the efforts of the international community to enter into treaties have been rendered nugatory due to two reasons, the first being the aura of ambiguity that shrouds the nature and force of an international agreement, and the second being the lack of enthusiasm on the part of most States to label terrorism as an offense against humanity. The latter, if recognized, would immediately entail the mandatory punishment of the terrorist by all States concerned. The question raising much debate has been whether international law upon which international treaties are based has the nature and force of law. Although Nineteenth century Austinian thinking did not consider international law to be endowed with the attributes of law, there is a strong view to the contrary. The theory that international law is not enforceable law was based on the thinking that laws emanate from a sovereign authority which was politically superior to those on whom such law was imposed. International law, it was claimed, did not emanate from such authority. The contrary view, which is persuasive, holds that if international law had mere force of morality, such authorities as precedents and opinions of jurists would not be cited in instances of adjudication. In addition, certain judicial decisions

---

74. Starke, supra note 74, at 18-21.
have expressly recognized the fact that international law is enforceable and has all the attributes of law.\textsuperscript{75}

Once it is accepted that international law is enforceable, the question arises whether treaties in general have the necessary obligatory force to demand adherence from their signatories. Although treaties are founded upon the expectancy of the observance of good faith under the principles of the \textit{pacta sunt servanda}, the emergence of competent courts and tribunals and the increasing dependence upon precedent and scholastic opinion in this field are sufficiently compelling factors in support of the enforceability of treaties. Legislative measures, like practical measures, can be effectively adopted. The first step is for all States to recognize that terrorism of any nature is a crime against humanity. The second is for all States to reach agreement either to punish a terrorist or to deport him to a country which has sufficient interest in the offence to punish him. The treatment of the offense by all States should be devoid of political ideology and the tendency to offer political asylum to terrorists. It may not be possible for all States to sign one agreement on this issue. However, States could negotiate bilaterally or in groups and enter into treaties, the provisions of which could accrue to other States as well, on the principle of the most-favoured-nation-treatment clause.\textsuperscript{76} The most important factor is to involve all States one way or another to form a composite force and not to isolate them in the face of terrorism.

The threat of terrorism can be curbed only if terrorism is collectively recognized as an offense against humanity by the international community. The lack of consensus leads to the situation where acts of terrorism can be prosecuted only if they fall within the purview of municipal law and are categorized as crimes within these laws.\textsuperscript{77} Once consensus is reached, cooperation between individual States could be enforced by treaty. An international institution such as the United Nations should coordinate the liaison between States and initiate the establishment of interest groups, thereby assisting practically any State facing the threat of terrorism. The creation of a powerful and vigilant anti-terrorist squad, and the establishment of a trust fund to finance anti-terrorist campaigns

\textsuperscript{75} See Murray v. Schooner The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J., cited Art. VI, para. 2 of the United States Constitution which gives constitutional validity to international law). See also The Paquette Habana, 175 U.S. 677, 700 (1900) (Gray, J., who stated that international law must be ascertained and administered by the courts of justice of appropriate jurisdiction).

\textsuperscript{76} First introduced in 1947 by the General Agreement on Tariffs and Trade (GATT), the most-favoured-nation-treatment clause ensures that certain benefits accrue to nations other than the signatory States in instances that apply to those non-signatory States.

in less affluent nations are two measures which would be positive steps towards establishing mutual help and understanding in this context. Above all, what is required is a synthesis of practical and legal measures that uniting the world against this crime and discouraging the terrorist.

B. HIJACKING

1. Hijacking Defined

Sixty-two years have lapsed since the first recorded instance of a hijacking in Peru in 1930. Before this incident any idea of crimes pertaining to aircraft was purely imaginary. Since then, hijacking has become the most significant area of international civil aviation law, causing the greatest concern and producing sustained research on its possible control.

The offence has been identified primarily as the seizure by force or control of an aircraft in flight by a person on board. It has also been called “aircraft piracy,” “aircraft hijacking,” and more recently, “skyjacking” or “aerial hijacking,” an act of terror-violence. The offence has been distinguished from the general term “piracy” — the latter being a universal crime and implying inter alia the robbery at sea for personal enrichment.

Although the first effective countermeasures against hijacking were introduced in 1970, it was not until 1973, when airlines introduced passenger and cabin baggage searches, that the incidents of hijacking decreased. Unfortunately, this progressive counter-measure by the airlines succeeded only in spurring the hijacker towards developing more sophisticated methods of smuggling arms and explosives into aircraft. The diligent work of the terrorist was rewarded in 1985, when the world’s worst rate of hijackings was recorded. In response to the hijacker’s tena-

---

ity, the world reacted by tightening aviation security globally. 1986 saw a sharp decrease in the incidents of hijackings.

Infrequently, hijacking has also been recognized as a separate norm, differentiating it from the broad rubric of political terrorism. Thieves wrote a new chapter in the annals of aviation by hijacking a helicopter on August 11, 1992, attempting to take off from a Corsican airport, swooping down on a passenger jet and stealing a shipment of currency and passenger baggage that was in the aircraft's cargo hold.

An internationally acceptable definition of terrorism and hijacking can be achieved only if all nations unanimously agree to prosecute any act of undue influence which takes advantage of and affects the integrity and interests of any nation. Such an act has to be universally recognized as punishable and free from the restrictions imposed by national laws and other jurisdictional fetters. A universal definition of terrorism is not meant to create a universal political ideology. Nor is it realistic to expect such an eventuality. States can, however, effectively control instances of terrorism such as hijacking if it is made known that the offence would be treated on the same basis, with the same punitive measures attached to it throughout the world. To attain this objective, the subjectivity and hypocrisy with which the concept of terrorism is viewed should be totally eschewed. Furthermore, the meaning, purpose and function of international law should also be seriously reviewed.

2. International Conventions

The Tokyo Convention of 1963 on Offenses and Certain Other Acts Committed Onboard Aircraft, referred to any offence committed or act done by a person on board any aircraft registered in a contracting State, while the aircraft is in flight or on the surface of the high seas or of any


1) the disgruntled national who unlawfully seizes the aircraft and expresses his defiance by directing its flight to a country whose political ideology he shares and admires;
2) the “flying commando” who has taken his _casus belli_ to the air. This type of person is particularly dangerous, as he is liable to cause death or injury to his hostages and destruction of the aircraft and other property so as to focus attention upon his cause;
3) the mentally deranged individual who has chosen hijacking either as a device to gain recognition and notoriety or as a mode of escape from intolerable psychological pressures;
4) the common criminal, who uses the aircraft as a vehicle of escape from pending prosecution or incarceration; and,
5) the extortionist, who uses the hijacking as a gateway to acquiring instant wealth.


The Effects of Unlawful Interference

other area outside the territory of such State. The aircraft is considered to be in flight from the moment power is applied for the purpose of take off, until the moment when the landing run ends. In addition, the Tokyo Convention mentions acts of interference, seizure of, or other wrongful exercise of control of an aircraft, implying its concern over hijacking.

The Hague Convention of 1970 identifies in Article 1, any person on board an aircraft in flight, who unlawfully by force or threat or by any other form of intimidation, seizes or takes control of such aircraft, or even attempts to perform such an act, as an offender. Anyone who aids such an act is an accomplice, and is included in the category of the former. It is clear that the Hague Convention, by this provision, has neither deviated from Article 11 of the Tokyo Convention, nor offered a clear definition of the offence of hijacking. It merely sets out the ingredients of the offence as being the unlawful use of force, threat, or any other form of intimidation and taking control of the aircraft. The use of physical force, weapons or firearms or the threat to use such modes of force are imputed to the offence in this provision. The words force, threat or intimidation indicate that the element of fear would be instilled in the victim.

It is an interesting question whether these words would cover a situation where the hijacking was implemented through non-coercive measures such as the drugging of food or beverages taken by the passengers or crew. The Hague Convention does not ostensibly cover such instances. In this context, many recommendations have been made to extend the scope of its Article 1. It is also interesting that the Convention does not envisage an instance where the offender is not on board the aircraft but remains on the ground directing operations from there after planting a dangerous object in the aircraft. According to Article 1, the offence has to be devoid of a lawful basis, albeit that the legality or illegality of an act is not clearly defined in the Convention.

It is also a precondition in Article 1 that the offence has to be committed in flight, that is while all external doors of the aircraft are closed after the embarkation of the passengers and crew. The mobility of the

87. Id. at ch. 1, art. 1(2).
88. Id. at ch. 1, art. 1(3).
89. Id. at ch. 4, art. 11.
91. Id. at art. 1(a).
92. Id. at art. 1(b).
aircraft is immaterial. Furthermore, Article 1 is rendered destitute of effect if an offence is committed while the doors of the aircraft are left open.

The Convention for the Suppression of Unlawful Acts Against The Safety of Civil Aviation signed at Montreal on 23 September 1971,95 also fails to define, in specific terms, the offence of hijacking, although it circumvents barriers placed by Article 1 of the Hague Convention.96 For instance: it includes instances where an offender need not be physically present in an aircraft; instances where an aircraft is immobile; instances where the doors of the aircraft are open; and even draws into its net any person who disseminates false information which could endanger an aircraft in flight.97 None of the three conventions have, however, succeeded in identifying the offence of hijacking or advocating preventive measures against the offence itself.

The failure of all attempts at identifying the offence of hijacking and formulating a cogent system of preventive criteria attains its culmination in political terrorist acts. Such offenses underscore the significant fact that not only is political terrorism treated subjectively under different social and political contexts, but also that so far the only attempts at recognizing the threat of terrorism have been made on an intrinsic approach, which seems more to condemn the offence than to find a cure for the deep seated social and political factors which form the permanent breeding grounds for terrorism. The inevitable continuity of the commission of this offence cannot be stopped if the following are not considered:

a) the reasons for the perpetration of terrorist acts;
b) the universal definition of such acts;
c) the fact that such acts transcend national boundaries and affect the entirety of the civilized world; and,
d) the fact that every act of terrorism brings a political advantage to certain nations.

The most obvious and the primary stage at which the offence of hijacking can be controlled is at the time of check-in, when a comprehensive search of all passengers and their baggage for concealed weapons would greatly alleviate the problem.98 The United States of America has adopted this measure by introducing electronic screening of all passengers by statute in 1973. The results of this measure were almost immediately visible with the sudden drop in the incidents of hijackings in the

96. Id. at art. 1.
97. Id.
United States in 1973.\textsuperscript{99} In addition to these measures, direct criminal sanction on a national level, by each of the States who enter into international agreement on the prevention and control of hijacking has been recommended.\textsuperscript{100} It is an enlightened view that:

Violence, terrorism, assassination and undeclared wars all threaten to destroy the restraint and moderation that must become the dominant characteristic of courage. Unless we establish a code of international behaviour in which the resort to violence becomes increasingly irrelevant to the pursuit of national interests, we will crush the world's dream for human development and full flowering of human freedom.\textsuperscript{101}

Based on this thinking, a universal statutory proposal has been recommended.\textsuperscript{102} This proposal extends the scope of the three international Conventions only slightly, but does not change their structure radically. For instance, Section 2 of the recommended statute covers acts of violence perpetrated on an aircraft in flight or those which endanger the safety of an aircraft in service.\textsuperscript{103} However, the proposed statute does not envisage all possibilities of hijacking.

On a different note, it is strongly felt that the modern age has left us with the almost irrefutable concept that political offenders need not as a rule be extradited, thus making the element of political asylum almost a mandatory doctrine for most of the international community.\textsuperscript{104} In this context, the following observation on the threat of hijacking was made in early as 1973.

Potential criminals, and hijackers in particular, will be discouraged from committing acts only if there is no country in which they can find refuge. This requires international agreement among the States, followed by legislation in each State, providing either for the punishment of persons committing such crimes, or for their extradition to another State where they will be punished.\textsuperscript{105}

The above view is consistent with the approach that agreement should be reached by as many States as possible, if not all, either to provide for the punishment of a guilty person on a universally agreed basis or to extradite him to a country which has sufficient interest to punish him. In this instance, what is known as the freedom of political expression

\textsuperscript{100} Fed. Aviation Admin. Info. (March 19, 1969).
\textsuperscript{101} 77 Dep't St. Bull. 547 (Oct. 24, 1977).
\textsuperscript{102} Friedlander, supra note 83, at 288.
\textsuperscript{103} Id. at 290-291.
\textsuperscript{105} Dr. P.P. Helen, 37 New Zealand and South Pacific Aviation Digest 6 (1973).
should give way to the blending of international law enforcement and security of the passenger. The crime itself has to be viewed as a common one which erodes all norms of fundamental human rights.\textsuperscript{106}

With the increasing recurrence of the offence of hijacking, it becomes apparent that more cooperation is needed among nations to review the remedial measures that have been adopted to counteract the threat. Such measures should be viewed under four broad areas. They are:

a) A wider definition of the offence itself to cover every possible exigency of the safety of aircraft, passengers and goods;
b) More liberal attitudes towards the extradition of offenders and the total abstinence of States from encouraging the concepts of political asylum and political havens;
c) More worldwide awareness of the need to strengthen internal security and individual checking of passengers and travel documents;
d) Total agreement between states that the offence of hijacking, once identified, be viewed on a singular basis devoid of any political differences which would encourage the commission of the offence. Punitive measures should be similar if not identical to preclude a potential offender from choosing his alternatives.

The proliferation of dangerous weapons and the rapidity of scientific advancement, coupled with increasing political discord among nations, show that the offence of hijacking should not be viewed subjectively as a sporadic occurrence any more. It is more a planned inversion of socio-political values and the erosion of human rights.

It can no longer be viewed simply as the illegal diversion of an aircraft to a destination other than that which was envisaged in the original flight plan or more simplistically as the seizure by force of an aircraft in flight.\textsuperscript{107} It is even more than the mere seizure or exercise of control by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.\textsuperscript{108} It should be viewed as an extortion-oriented act, committed against the international order and world peace which is calculated to take advantage of the most susceptible human quality of the endeavour to protect human life at any cost. This broad attitude would engulf and cover even the rare instance of a demented offender who perpetrates the offence for no apparent reason. In the ultimate analysis, any attempt at hijacking involves more than one nation, thereby immediately transcending all national boundaries and exposing the sensitivities of the nations involved. The offence, therefore,

\textsuperscript{106} See supra Abeyratne, note 83, at 612-13.
\textsuperscript{107} SHAWCROSS & BEAUMONT, supra note 81, para. 620 at 521.
becomes an immediate threat to world peace and should be treated as such. It is needless to say that any nation which views the offence differently encourages universal discord. It is submitted that in the light of the increasing incidence of hijacking, the offence should be defined and accepted by the world as any willful act calculated to endanger the safety of an aircraft or any passenger in service or in flight. The words “in service” in this context should mean any period of time when a serviceable aircraft, which is used for air transportation, is left standing in a hangar. The words “in flight” should cover the period of time when an aircraft is taken out of the hangar until it returns to the hangar. In this event, the offence would not be mere “aerial piracy,” but an offence against the safety of air travel.

As for the need for a more flexible approach to the extradition of offenders, the establishment and recognition of a universal offence against the safety of aircraft would almost automatically nurture mutual cooperation between nations. Often, if a hijacker imputes politics to the committed offence, he is granted political asylum by the host nation merely because the latter sympathizes with the alleged motive for the offence as represented by the hijacker. Once this takes place it no longer remains the commission of an offence universally condemned, but becomes an altercation between nations on political beliefs and convictions.109

International and internal security are also major areas of importance in the prevention and control of hijacking. Quite apart from the growing need for the establishment of a separate international anti-terrorist squad under the auspices of the United Nations, the need is visible on a national basis for an adoption of more stringent security measures against possible offenders. There should be more awareness of the threat at the airport itself, prior to passenger boarding. In this context, investigation could include checks of police records, including details of suspicious passengers who may be previous offenders; the use of magnetic cards on passports; and rigid inspection of all travel documents at the airport. Electronic surveillance, wherever it has been carried out, has proven to be an effective measure of prevention of the offence.

In addition to the need for a cogent definition of the offence, a universal sanction is also needed for the prevention of the offence. It is noteworthy that as far back as 1971, an attempt was made by the United States and Canada to draft a multilateral Convention to establish rigid sanctions for the offence of hijacking on a multilateral basis. This was to have been under the auspices of the International Civil Aviation Organization. The draft recommended powers of arbitration and intervention

109. See generally, McGrane, supra note 83, at 91-95.
by ICAO in instances of dispute with regard to extradition. The draft did not attain fruition.

In July 1978, leaders of seven nations\textsuperscript{110} met in Bonn and adopted what was later to be called the Bonn Declaration. The Declaration, in essence, proclaimed that heads of States and Governments would ensure the cessation of all flights into a country which refuses the extradition or prosecution of a person or persons who perpetrates the offence of hijacking. The Bonn Declaration attempted to achieve two goals: first, to implicitly recognize the fact that States are often accomplices after the fact of hijacking; and second, to develop a universal consensus on and action against the offence of hijacking. The rationale of the Declaration is primarily deterrence, and secondarily, consensus against the offence.\textsuperscript{111}

C. ACTS OF SABOTAGE

The most recent major incident involving acts of sabotage against civil aviation was the explosion of PAN AM Flight 103 over Lockerbie, Scotland, on 21 December 1988. The explosion is believed to have been caused by the detonation of a plastic explosive concealed in a portable cassette player/radio. The substance used was Semtex, a plastic explosive having its origin in Semtin, Pardubice, Czechoslovakia. Earlier in 1986, a TWA Boeing 727 aircraft had also been blown up by a plastic explosive just before the aircraft landed in Athens. As Professor Michael Milde stated: "[t]he brutal tragedy of PAN AM 103 focused the attention of ICAO on the need to tighten the preventive security measures in particular in the field of detection of explosive substances."\textsuperscript{112}

Accordingly, an \textit{ad hoc} group of specialists on the detection of explosives was established by the ICAO Council. This group met in Montreal in March 1989. The United Nations Security Council, in June of the same year, adopted Resolution 635, which, \textit{inter alia}, urged the International Civil Aviation Organization to intensify its work aimed at preventing all acts of terrorism against international civil aviation, and in particular its work on devising an international regime for the marking of plastic sheet

\begin{itemize}
\item \textsuperscript{110} Canada, France, the Federal Republic of Germany (as it then was), Italy, Japan, The United Kingdom of Great Britain and Northern Ireland, and the United States of America. See Mark E. Fingerman, \textit{Skyjacking and the Bonn Declaration of 1978: Sanctions Available to Recalcitrant Nations}, 10 Cal. W. Int'l L. J. 123, 139 n.125 (1980).
\item \textsuperscript{111} Mark E. Fingerman states: [T]he Bonn Declaration focuses on sanctions designed to deter nations from encouraging the commission of the offence. In effect, the spirit of the Declaration is a recognition of the fact that States are frequently de facto accomplices to acts of skyjacking...The rationale of the Declaration would appear to be the foreclosing of the possibility of a skyjacker finding refuge which reduces the attractiveness of the offence. See Id. at 142-43.
\item \textsuperscript{112} Milde, \textit{supra} note 25, at 159.
\end{itemize}
explosives for the purpose of detection.\textsuperscript{113} At the twenty-seventh Session of the ICAO Assembly in September/October 1989, the delegations of Czechoslovakia and the United Kingdom presented to the Executive Committee a paper which contained a Draft Resolution on the marking of sheet explosives for the purpose of detection.\textsuperscript{114}

The international conference on air law held in Montreal under the aegis of ICAO unanimously adopted a Convention on the Marking of Plastic or Sheet Explosives for the Purpose of Detection.\textsuperscript{115} The Preamble to the Convention extended the scope to other means of transport, and the definition of explosives was enlarged to include explosive products commonly known as "plastic explosives," including explosives in flexible elastic sheet form, as described in the Technical Annex to the Convention.\textsuperscript{116} Each State Party is obligated to take the necessary measures to prohibit and prevent the movement of unmarked explosives into and out of its territory,\textsuperscript{117} while exercising strict and efficient control over the possession and transfer of explosives referred to in the Technical Annex to the Convention.\textsuperscript{118} While it is popularly felt that the Convention is a spectacular and impressive achievement which was very quickly accomplished,\textsuperscript{119} the new Convention is by no means the only and ultimate solution to the problem of sabotage of civil aviation. It is merely one more step in the long line of legal and practical measures.\textsuperscript{120}

\textbf{D. SURFACE-TO-AIR MISSILE ATTACKS}

There have been a few reported incidents of serious damage caused by surface-to-air missiles (SAM) against civil aviation. In early 1979, two Air Rhodesia aircraft were destroyed by SAM missiles. There were heavy casualties. There were reports of the Mujahedeen of Afghanistan obtaining and using SAM equipment on aircraft over Afghanistan.\textsuperscript{121}

\textsuperscript{114} Executive Committee Paper A 27 - WP/115, Ex. 37. See also, Milde \textit{supra} note 113, at 4-9 (for an elaborate discussion on the chronological sequence of activities in this regard).
\textsuperscript{116} \textit{Id.} at art. 1.1.
\textsuperscript{117} \textit{Id.} at art. 11.
\textsuperscript{118} \textit{Id.} at art. IV.5.
\textsuperscript{120} See Milde, \textit{supra} note 25, at 96. Professor Milde observed:
[T]he new convention on the marking of plastic explosives will not be a panacea but only a small addition to the general mosaic of the general legal measures. The Convention will become useful, not when all plastics are properly marked for the purpose of detection, but only when affordable and efficient detection equipment will become available at all international airports and other critical areas of the world.
There have also been many reports of unsuccessful attacks launched by terrorists against aircraft in flight over Europe, particularly over Rome and Paris. Unlike other types of terrorism, this particular species of offence can be controlled to a large extent owing to the difficulty of trans-border transport of surface to air missiles.

E. ARMED ATTACKS AGAINST AIRPORTS AND PERSONS

Armed terrorist attacks are a common form of terror in the world of aviation. The first recorded armed attack in an airport was in June 1972, when Japanese Red Army guerillas opened fire with automatic weapons and threw grenades in Tel Aviv's Ben Gurion Airport. Since then, there have been incidents in Athens Airport in August 1973, in Rome and Vienna in 1985, and numerous later attacks on airports and aviation-related properties worldwide. Armed terrorist attacks have led to sustained litigation over claims for damages from the airlines, on the basis that passengers in an airport are under the control of the air carrier they are flying with. In the recent case of Buonocore v. Trans World Airlines, Inc., where the plaintiffs' son, John Buonocore III, was killed during a terrorist attack on Leonardo da Vinci Airport, Rome, on December 27, 1985. The court held that the plaintiffs could not claim damages from the airline for their son's death, since the airline did not exercise control over the activities of the deceased. Be that as it may, a sustained cursus curiae reflects numerous instances where armed terrorist attacks against persons and property at airports, airline offices, and other aviation-related locations have led to litigation in courts and the subsequent award of compensation to the plaintiff.

F. NARCO-TERRORISM

The illegal carriage by air of narcotics and other psychotropic substances and its various corollaries of violence or narco-terrorism as it is popularly known, has become an intractable problem in recent years. Narco-terrorism is considered an offence on two grounds: the fact that the illicit trafficking of drugs is an offence against public health; and the illicit carriage by air of these substances leads to other crimes against international civil aviation, such as the unlawful seizure of aircraft and the infliction of damage on persons and property related to international civil
The problem has blown into unmanageable proportions owing to the rapid proliferation of air travel. ICAO records that 9350 turbo jet aircraft were active in commercial air transport in 1990; Boeing's estimation of the world jet fleet was very similar. It is not difficult, therefore, to figure out the tremendous encouragement given to the drug trafficking trade by the numerous aircraft movements that would be spread out by these aircraft over the 14,488 land airports in the world. Thus, it is not surprising that there have been numerous instances where aircraft have been seized by governmental authorities owing to the presence of narcotic drugs.

Narco-terrorism in international civil aviation has its genesis in the illicit trafficking of drugs, which has been the focus of attention of the world community in general and the United Nations in particular. Professor Michael Milde, describing the efforts of the United Nations and its specialized agencies to curb the problem of illicit drug trafficking observes that an international campaign against traffic in drugs" was launched as a matter of "highest priority" and contemplated the convening of a specialized international conference dealing specifically with illicit drug trafficking, characterized as an "international criminal activity." Another resolution directly linked drug abuse and illicit trafficking with "international criminal activities such as the illegal arms trade and terrorist practices," and considered them to be a "threat to the well being of peoples, the stability of democratic institutions and the sovereignty of States."

Narco-terrorism involves two facets: the transportation of drugs and narcotics by aircraft across national boundaries; and the process of loading and unloading them at aerodromes and airports. The two acts are claimed to be integrally linked to one another. As Antonio Francoz Rigalt observes:

128. Boeing World Jet Airplane Inventory 1990, at 31 (where the figure given by Boeing is 8936 aircraft, which is a figure compatible with the ICAO statistics).
130. Donald Bunker says:
The trafficking and illicit use of drugs has affected peoples' lives throughout the world, and the aviation industry has not escaped the disease. Leaving aside the problem of drug use by air crews, the problem of drug trafficking is starting to have a worrisome effect on aviation and the financial community which supports it.
In actual fact, the essential elements of the unlawful act, i.e. 'transport by air' and 'trafficking' are inseparable. Nevertheless, there is a distinction to be made between them. Air transport involves carrying the drugs from one place to another by aircraft, and this may be done either lawfully or unlawfully. It is lawful when carried out for medicinal purposes and with the permission of the appropriate authorities. It is unlawful when these requirements are not fulfilled; and another characteristic here is the element of continuity because the transport, be it by land, sea, or air is carried out with a single criminal intent and a plurality of actions which together violate the same legal rule and which, in addition, may be 'continuous' when it takes some time to complete, involving, as it always does, frequent trips by air.\footnote{132}

Rigalt also points out that the illegal transportation of drugs and narcotics encompass other criminal acts that come within the purview of offenses against public health. He claims further that narco-terrorism could give rise to heinous offenses, such as: the destruction of aircraft, unlawful use of traffic installations, damage to private and public property, theft, and robbery.\footnote{133}

Taking note of the outcome of the United Nations International Conference on Drug Abuse and Illicit Trafficking, held in Vienna from June 17-26, 1987, the ICAO, at the Twenty-seventh Session of its Assembly in September-October 1989, adopted Resolution A 27-12. This resolution recognized the deleterious effects on international civil aviation of the illegal carriage of narcotics and psychotropic substances. Additionally, it urged the ICAO Council to continue its efforts to prevent the illicit transport of narcotic drugs and psychotropic substances by air\footnote{134} and to propose necessary action and measures to combat the threat, including the preparation of guidance material on the problem.\footnote{135} The Assembly, by the same Resolution, called upon contracting States to continue their efforts to prevent the illicit trafficking of drugs by air.\footnote{136}

Pursuant to Resolution A 27-12, the ICAO Secretariat issued a State Letter\footnote{137} to the United Nations, to other relevant international organizations\footnote{138} and to contracting States to provide information and seek their views on possible action to be taken. More than half the replies to the State Letter indicated that States were taking necessary action and measures to enact municipal legislation to curb the threat.\footnote{139}

\footnotesize{\textsuperscript{132}} Rigalt, \textit{supra} note 127, at 18.

\footnotesize{\textsuperscript{133}} \textit{Id.} at 20.


\footnotesize{\textsuperscript{135}} \textit{Assembly Resolutions}, \textit{supra} note 135, at 5.

\footnotesize{\textsuperscript{136}} \textit{Id.} at 6.

\footnotesize{\textsuperscript{137}} Letter from ICAO Secretariat, to the U.N. and other organizations (Dec. 6, 1989) ICAO Doc. E2/2/7-89/109.

\footnotesize{\textsuperscript{138}} ICAO Doc. C-WP/9235, Para. 9 (Feb. 6, 1991).

\footnotesize{\textsuperscript{139}} \textit{Id.} at Para. 12.
Earlier, the Tenth Session of the ICAO Facilitation Division, held in September 1988, had recommended numerous amendments to Annex 9 to the Chicago Convention to reflect narcotics control requirements in the Annex. The objective of these amendments was to ensure that a balance is achieved between the interests of facilitation and those of narcotics control.140

G. A COMMON THREAD

Terrorism is a risk that accompanies air travel141 and may be aimed at achieving several objectives. Acts of terrorism may be aimed at: extracting specific concessions, such as the release of prisoners or payment of ransom; gaining publicity; attracting attention of the international press to the terrorist cause; causing widespread disorder in a society to demoralise and breakdown the existing social order; provoking repression, reprisals, and counter-terrorism; enforcing obedience and cooperation; and punishing the victim of the terrorist attack. Often the terrorist does not discriminate between his actual target and innocent bystanders.142

Although as Dr. Bockstiegel once said, there are no perfect solutions, legal or otherwise, for the problems relating to aviation security.143 The terrorist is often aided by the lack of supervision and vigilance on the part of the victim. This was found to be so by the committee of inquiry that looked into the security situation relating to the Air India disaster144 and the more recent PAN AM disaster.145 A fortiori, therefore, the aviation industry is a high-profile, soft target that remains highly susceptible as an easy prey on account of its weakness in security.146

142. For example, the victims of the Lod Airport Massacre in 1972, most of whom were Christians, had used Israeli visas as tourists in Israel and therefore were guilty in the eyes of the terrorists who carried out the massacre.
144. International Herald Tribune 15, 1985, cited in IATA Current Information Summary No. 3583 (Nov. 15, 1985) (where it was revealed that baggage on board the Air India flight was not subject to x-ray inspection prior to departure from Toronto).
145. International Herald Tribune (March 2 1990), cited in IATA Current Information Summary No. 4642, Geneva (which revealed serious security lapses by PAN AM security divisions that were in charge of the flight).

It is the disease of the militarily weak, the politically frustrated, and the religiously
IV. INTERNATIONAL REGULATORY MEASURES

A. THE CHICAGO CONVENTION

The Convention on International Civil Aviation \(^{147}\) signed at Chicago on December 7, 1944, serves as the main repository of principles relating to the development of international civil aviation. The Chicago Convention states in its Preamble that the abuse of international civil aviation can become a threat to the general security, and recognizes the desirability of developing international civil aviation in a safe and orderly manner. ICAO derives its legitimacy and legal sustenance from the Chicago Convention which provides that one of ICAO’s objectives is to ensure the safe and orderly growth of international civil aviation throughout the world. \(^{148}\) The Chicago Convention also stipulates two other objectives of ICAO:

a) That ICAO promotes safety of flight in international aviation; \(^{149}\) and,

b) That ICAO, through the development of its Standards and Practices, meets the needs of the peoples of the world for safe, regular, efficient, and economical air transport. \(^{150}\)

The latter aim devolves upon ICAO the responsibility of developing Standards and Recommended Practices to ensure both the safety and efficiency of air transport. The two attributes of safety and efficiency are considered complementary and not mutually exclusive. Accordingly, ICAO has drawn attention to the importance of aviation security in Annex 9 to the Chicago Convention \(^{151}\) while at the same time conversely providing in Annex 17 to the Chicago Convention dealing with aviation security: “each contracting State should whenever possible, arrange for the security measures and procedures to cause a minimum of interference with, or delay to the activities of international civil aviation.” \(^{152}\)

This approach makes both security and facilitation equally important to the development of international civil aviation. Annex 17 to the Chicago Convention impels each contracting State to establish a national civil aviation security programme \(^{153}\) whose objective is to ensure the safety, regularity, and efficiency of international civil aviation by providing, through regulations, practices, and procedures, safeguards against

---

\(^{147}\) Hereafter referred to as the Chicago Convention.

\(^{148}\) Chicago Convention, supra note 5, at art. 44(a).

\(^{149}\) Id. at art. 44(h).

\(^{150}\) Id. at art. 44(d).

\(^{151}\) Annex 9, supra note 141, at standard 5.1, note 1.


\(^{153}\) Id. at 3.1.1.
acts of unlawful interference. The theme of the Annex is international cooperation in aviation security matters in such areas as the prevention of the usage of dangerous weapons, explosives, or any other dangerous devices within their territory, and the provision of facilities for air services so as to ensure safety of flight of all aircraft.

B. INTERNATIONAL CONVENTIONS

The Tokyo Convention was perhaps the first major attempt at curtailing the menace of hijacking. Not only did it deal solely with jurisdiction over offenses committed in an aircraft in flight, but it also did not exclude any criminal jurisdiction which would have been exercised according to the provisions of any law. The element of nationality underlines the parochial nature of the treatment of the offence and the obstinate refusal of the international community to infuse a universality to the treatment of the offence. Perhaps, as one commentator observed, the international community was not prepared in 1963 to address this problem on a collective basis.

The subsequent Hague Convention emphasises that each contracting state undertakes to impose severe penalties without defining what these penalties should be. Furthermore, the geographic limitations set out in Article 1 curtails the punitive measures recommended in the Convention significantly. The Convention makes a further serious omission in stating that it applies only if the place of take-off and place of landing is outside the state of registration of the aircraft. This gives rise to a serious anomaly, in that if an aircraft with a destination outside its territory of nationality is seized in mid-air prior to leaving its airspace and is brought back to the place of take off, the Convention would not apply even to scheduled flight.

The Montreal Convention which followed in 1971, although extending the period in which the offence could be committed to a period beginning with pre-flight preparation and ending twenty four hours after landing, does not cover acts of sabotage, destruction, or any damage effected before or after the designated period. The Montreal Convention, however, is the best attempt so far at controlling or curb the offence of hijacking on an international level. Even so, the three attempts so far at

154. Id. at 3.1.2.
155. Id. at 4.1.1.
156. See generally ch. 5 of Annex 17, supra note 153.
157. Tokyo Convention, supra note 87, at art. 3(3).
159. Hague Convention, supra note 91, at art. 2.
160. Id. at art. 1(4), 3, 7.
international accord fail to cover certain gaps which still exist in this area of prevention and control of hijacking. For example:

a) The conventions do not provide for and guarantee the trial of an offender, and do not specify adequate punitive measures;
b) No obligation is cast on contracting states for the extradition of an offender;
c) No provision is made for the universal adoption of standards of precaution and safety; and,
d) The initial attempt, albeit somewhat unsophisticated, of the Tokyo Convention at a remedial approach has been thwarted by the repressive attitude of the two subsequent conventions.

The Bonn Declaration of 1978 was yet another attempt by the international community to combat terrorism related to international civil aviation. The major economic powers such as: Canada, France, Federal Republic of Germany (as it then was), Italy, Japan, the United Kingdom, and the United States—collaborated to intensify efforts to combat terrorism. The seven signatory States pledged to take immediate action to cease all flights to a country which refuses to extradite hijackers or return hijacked aircraft, and to halt all incoming aircraft from that country or from any airlines of that country. The view has, however, been forwarded that under the principles of the Bonn Declaration, retaliatory action in the nature of self preservation by third states against an offending state are subjectively assessed, and that action taken should be commensurate with the gravity of the infringement of the provisions of the Declaration. 161 Be that as it may, the Bonn Declaration was a clear demonstration that positive action can be taken against the threat of interference with international civil aviation if there is international cooperation. The signatories to the Bonn Declaration were the largest manufacturers of aircraft, and their airlines covered more than half the world’s scheduled passenger kilometres. They obviated the insurmountable difficulty of obtaining all the signatures of the ICAO contracting states, while amply demonstrating that agreements of this nature are effective tools against the terrorist. 162

At a United Nations Conference in Vienna on November 25, 1988, delegates from 100 States adopted a Convention against illicit trafficking in narcotic Drugs and Psychotropic Substances. 163 The new convention was intended to supplement the two major international drug control

162. Taylor, supra note 122, at 36.
treaties\textsuperscript{164} in meeting the challenges posed by the upsurge in illicit drug trafficking and associated organized criminal activities. The Convention provides for: sanctions for offenses relating to drug trafficking; the tracing, freezing, and forfeiture of proceeds derived from drug trafficking; extradition for offenses relating to drug trafficking; mutual legal assistance in the investigation and presentation of drug trafficking offenses; and measures to eradicate illicitly cultivated narcotic plants.

From a legal standpoint, it would be best to assess the problem fully by collecting data and statistics extensively and reviewing current methodology used in combating drug trafficking, before establishing an aviation-related legal regime on a conclusive basis. It is also necessary to ensure the implementation of the legal regime that is established, by introducing sustained training programmes in the control of narcotics trafficking, and monitoring trends of abuse. It would therefore be prudent to establish a global legal regime that would ensure full awareness of the problem on the basis of priority.

C. Emerging Trends

Dr. H.A. Wassenbergh points out that there is a protective imperative that governs human life in modern society. "Man's primary concern intellectually speaking, is his safety, then his health and relative position in his society and only then his (relative) freedom in his society, i.e. the wish to be master in his own 'territory'".\textsuperscript{165} The primary aim of man is to preserve life and liberty.\textsuperscript{166} This right, which is entrenched in Article 3 of the Universal Declaration of Human Rights,\textsuperscript{167} makes the destruction of human life and the restriction of liberty, acts committed against law and order. International terrorism destroys both life and liberty and, therefore, is incontrovertibly illegal. There should be more awareness in the world today that every human being has the inherent right to life\textsuperscript{168} and that the right is protected by law.\textsuperscript{169} Any act of terrorism, being illegal, becomes subject to law and its punitive sanctions, if any exist. In this instance however, unlike in a direct instance of murder where sanction itself may act as a deterrent, the two forces of law and sanction are not


\textsuperscript{167} Id.


\textsuperscript{169} European Convention on Human Rights, Art. 2(1) (1953).
sufficient to curb terrorism. The international community should realize that the solution to terrorism lies rather in its prevention than its cure.

Therefore, the problem has to be approached solely on the basis that the terrorist, on the one hand, has to be persuaded that his act may not succeed. On the other, he has to be convinced that even if he succeeded in committing the act of terrorism, it would not achieve the desired results.

The philosophy of warfare against terrorism is therefore based on one single approach, that of convincing the terrorist that any attempt at committing a terrorist act would be fruitless and would result in unnecessary personal harm. The simple philosophy should be adopted in gradual stages, with the sustained realization that each measure taken is as important as the next, and that all measures should be adopted as a composite element, not as those that are mutually exclusive.

A potential terrorist can therefore be attacked in two ways:

1. By the adoption of practical measures to discourage the commission of the act;
2. By the adoption of such effective measures as would impose severe punitive sanctions if the act is committed.

In the first instance, measures of self-help are imperative. They should be adopted with careful planning, and the terrorist should be made aware that the community at large is afforded the full protection of these measures. They are:

a) A wider definition of the offence itself to cover every possible exigency of the safety of an aircraft, passengers and goods;
b) More liberal attitudes towards the extradition of offenders and the total abstinence of States from encouraging the concepts of political asylum and political havens;
c) More worldwide awareness of the need to strengthen internal security and individual checking of passengers and travel documents;
d) Total agreement between States that the offence of hijacking, once identified, be viewed on a singular basis devoid of any political differences which would encourage the commission of the offence. Punitive measures should be similar, if not identical, in order that a potential offender be precluded from choosing his alternatives;
e) The establishment of a system of intelligence that would inform the State concerned of an impending terrorist attack;
f) The establishment of counter-terrorism mechanisms that would effectively preclude such catalysts as the collection of arms, ammunition and weaponry;
g) The adoption of such practical measures of self-help and attack as are necessary in the instance of an attack;
h) The existence of the necessary machinery to retain the confidence and sympathy of the public at all times; and
The persuasion necessary to convince the public that terrorism of any kind is evil and should not be condoned, whatever its cause.

If strongly enforced with unanimity, measures such as the imposition of laws, which bind all nations to view terrorist acts as crimes against humanity can be an effective deterrent. *A fortiori*, sanctions would further discourage the terrorist.

**D. Some Recommended Practical Measures**

The first step that should be taken to deter terrorism is to become equipped with the expertise to detect a potential threat beforehand and to be prepared for an attack. The next is to intensify security in all susceptible areas, particularly airports, and subway terminals. Surveillance of all people who are viewed as potential targets of terrorist attacks, is imperative. There should be more awareness of the threat of terrorist activity, particularly in international airports, and international bus and tram terminals, where travel documents should be checked and passengers double-checked. Electronic surveillance of passports and other travel documents have proven to be effective methods of deterrence in this context.

Perhaps the most important facet of surveillance is the use of trained personnel, who could unobtrusively mingle with the crowds and detect an irregularity without arousing suspicion and, more importantly, without alarming the travellers. It is recommended that these specially trained personnel work together with the armed security forces as necessary.

Another significant requirement is the support of the people. The media should be utilized to educate citizens so they know how to react in an emergency, and are also totally distrustful of the terrorist, whose acts are calculated to evoke sympathy. The State or persons against whom the terrorist attack is launched should, at all times, use the media to convince the public that responsibility for any destruction or harm resulting from a terrorist act devolves totally on the terrorist.

**E. Relevant Legal Issues to Be Examined**

Terrorism is usually the genus of the species of political discord within and between nations. The terrorist is well aware of this situation, and usually exploits political disharmony among nations. Any laws that are enacted are rendered ineffective, as they cannot be enforced with uniformity. Political asylum is a product of this anomaly, and remains by and large the greatest encouragement to the proliferation of terrorism in the world today.

In the past, the United Nations General Assembly has made sus-
tained efforts to adopt collective measures to prevent terrorism at national and international levels. In its efforts, the United Nations has succeeded in focusing the attention of its member States to the increasing problems of terrorism and its natural corollaries such as the proliferation of arms and the emergence of mercenaries. The efforts of the international community, however, in entering into treaties, have been rendered nugatory due to two reasons: first, the aura of ambiguity that shrouds the nature and force of an international agreement; and second, the lack of enthusiasm on the part of most States to label terrorism as an offence against humanity. The latter, if recognized, would immediately entail the mandatory punishment of the terrorist by all States concerned.

The question of whether international law upon which international treaties are based has the nature and force of law has aroused much debate, and indeed the concern of the United Nations and its members. This concern can be seen in the United Nations Resolution 44/23 which was discussed at the introduction to this thesis. Although 19th Century Austinian thinking did not consider international law to be endowed with the attributes of law, there is a strong view to the contrary. The theory that international law was not enforceable law was based on the theory that law should emanate from a sovereign authority which was politically superior to those on whom such law was imposed. International law, it was claimed, did not emanate from such authority. The contrary view, which is more persuasive, holds that if international law had mere force of morality, such authorities as precedent and opinion of jurists would not be cited in instances of adjudication. In addition, certain judicial decisions have expressly recognized the fact that international law is enforceable law and has all the attributes of law.

Once it is accepted that international law is enforceable law, the second issue is whether treaties in general have the necessary obligatory

---


172. W. L. Morrison, John Austin 78 (1982).


Moreover, modern international law is now, probably to a greater degree than ever before, a universal juridical language.

Id. at 526.


175. See Murray, supra note 76. See also The Paquette Habana, supra note 76.
The Effects of Unlawful Interference

force to demand adherence from their signatories. Although treaties are founded upon the expectancy of the observance of good faith under the principles of the *pacta sunt servanda*, the emergence of competent courts and tribunals and the increasing dependence upon precedent and scholastic opinion in this field are sufficiently compelling factors in support of the enforceability of treaties.

There is no doubt that legislative measures, like practical measures, can be effectively adopted. All States must recognize in their legislation that terrorism is a crime against humanity and that they should punish a terrorist or deport him to a country which has sufficient interest in the offence to punish him. The treatment of the offence by all States should be devoid of political ideology and the tendency to offer political asylum to terrorists. States should at least negotiate bilaterally or in groups and enter into treaties, and the provisions of these treaties should apply to third nations as well, on the basis of the most-favoured-nation treatment clause. The most important factor is to involve all States, one way or another, to form a composite force and not to isolate them in the face of terrorism.

Interference with civil aviation should be viewed as an extortion-oriented act committed against the international order and world peace, which is calculated to take advantage of the susceptible human quality of seeking personal security as a priority. The offence is an immediate threat to world peace and should be treated with the utmost care. It is needless to say, that any nation which views the offence differently encourages world discord. Any willful act calculated to endanger the safety of an aircraft, its passengers, or any aviation related property, should be collectively regarded as an offence against the safety of air travel.

As for the need for a more flexible approach to the extradition of offenders, the establishment and recognition of a universal offence against the safety of aircraft would almost automatically nurture mutual cooperation between nations. Often, if an offender imputes politics to the offence committed by him, he is granted political asylum by the host nation merely because the latter sympathises with the alleged motive for the offence as represented by the offender. Once this takes place, the terrorism no longer remains the commission of an offence universally

---

176. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26., U.N. Doc. A/CONF. 39/27 (in its Preamble, notes that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized. The *pacta sunt servanda* rule is incorporated in Article 26, of the Vienna Convention on the Law of Treaties, where it is said that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).


178. First introduced in 1947 by the General Agreement on Tariffs and Trade, the most-favoured-nation treatment clause ensures that certain benefits accrue to nations other than the signatory States in instances that apply to those non-signatory States.
condemned, but becomes an altercation between nations on political beliefs and convictions.

V. Conclusion

At the Aviation Security Conference of January 1987 held at the Peace Palace in the Hague, Professor Andreas F. Lowenfeld courageously observed: "I start with a simple, unambiguous statement. The complications and nuances can come later. Terrorism is a violation of international law. It violates the sovereignty of states, and human rights of individuals. A state that supports terrorism is responsible for violation of international law." It is submitted that all acts of terrorism need not necessarily be violations of international law. While acts of international terrorism may violate both international and national laws, acts of national terrorism per se would usually violate only national laws. For the offense to be recognized as a violation of international law, the first step is to inquire whether unlawful interference with civil aviation is an international crime. In answer to the question of what constitutes an international offense, it has been said: "An offence is 'international' if national laws punish it irrespective of the place where the criminal act has been committed or if the courts of all States are competent to prosecute the presumed perpetrator of the offence, without regard to the place where the offence was committed." According to this definition, either of the two elements would constitute an international offence. Be that as it may, in Professor Lowenfeld's rather simplistic statement lies considerable wisdom. If terrorism were to be universally accepted as a violation of the principles of international law, and if international law were to be identified as a jus cogens or mandatory law, it would not be difficult to identify the legal aspects of the unlawful interference with international civil aviation and develop credible and workable solutions.

Notes

Who Pays Detention Costs When Aliens Seek Asylum at the Borders of the U.S.? Relief May Be in Sight for the Transportation Industry

Kathleen T. Beesing*

Table of Contents

I. Introduction .......................................................... 496
II. Historical Background and Statutory Basis ......................... 497
III. Recent Litigation .................................................... 499
   A. Dia Navigation Co. v. Reno ......................................... 499
   B. Aerolineas Argentinas v. United States ........................ 500
   C. Argenbright Security v. Ceskoslovenske Aeroline ............. 500
   D. Linea Area Nacional de Chile v. Sale ........................... 500
IV. Analysis ............................................................... 501
V. Conclusion ............................................................ 507

* Kathleen T. Beesing currently works for the law firm of Anderson, Campbell & Laugesen and is completing an internship with the Honorable Jack F. Smith, Eighteenth Judicial District. Formerly she was employed as a training specialist for the Department of Defense, United States Air Force. Ms. Beesing is an Articles Editor of the Transportation Law Journal; B.A. University of Denver (1971); M.A. University of Colorado (1978); J.D. University of Denver College of Law expected May, 1995.
I. INTRODUCTION

The United States is bound by international agreements as well as domestic statutes, to afford certain protections to aliens who reach her borders and then request asylum. The United Nations Protocol Relating to the Status of Refugees,1 signed by the United States in 1967, prohibits the deportation of a refugee to the "frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion."2 The Refugee Act,3 passed in 1980, mandates that any passenger who arrives at the borders of the United States has the right to request political asylum, and the right to have this request fully considered.4 Aliens who apply for asylum cannot be deported until their applications have been processed and denied.5

While the right to such consideration is fully accepted, the question of costs associated with the process is yet to be definitively settled. Air Transport Ass'n of America v. McNary,6 pending in District Court in Washington, D.C., focuses on the financial responsibility of the carriers who brought the aliens to the borders of the United States.7 The Air Transport Association of America claims that costs associated with the detention of aliens seeking asylum at the borders of the United States should be covered by funds generated under the Immigration User Fee Statute (User Fee Statute) of the Immigration and Nationality Act (INA).8 The government disagrees with this position, claiming that the relevant statutes of the INA, as well as contract application, absolve the Immigration and Naturalization Service (INS) of this responsibility.9

Air Transport, filed January 22, 1992, was only the first of several suits to raise the issue of carrier liability in light of the User Fee Statute. Dia Navigation Co. v. Reno,10 Aerolineas Argentinas v. United States,11 Argenbright Security v. Ceskoslovenske,12 Dia Navigation Co. v. Pomeroy,13 and Linea Area Nacional de Chile v. Sale,14 have also addressed

---

2. Id.
4. Id.
8. Id.
9. Id.
this issue. It appears the critical distinction has become whether the alien seeking asylum is considered automatically excluded in which case the carrier retains responsibility, or is merely excludable, which confers responsibility on the INS. Although Air Transport is still pending, the other recent decisions offer an indication of the possible outcome of this important debate.

II. HISTORICAL BACKGROUND AND STATUTORY BASIS

Courts have recognized the plenary power of Congress to set immigration policy since Chae Chan Ping v. United States\textsuperscript{15} was decided in 1889. Requirements for admission to the United States have been determined, and classifications of individuals who will be denied entry have also been established. Aliens refused entry at the border must be returned to their country of origin as quickly as possible. The carrier transporting an inadmissible alien has traditionally been required to ensure that the return trip occurs, and to pay any associated costs.

Current statutes support this policy to some extent. Section 1227 of Title \textsuperscript{16} deals specifically with the maintenance expenses involved in the deportation of any alien denied admission, placing all costs on the owner of the vessel or aircraft in which the alien arrived.\textsuperscript{17}

Similarly, subsection (a) of 8 C.F.R. 235.3,\textsuperscript{18} which addresses detention and deferred inspection, specifies that when admissibility of an alien is questioned, the carrier will be notified and is expected to assume responsibility for detention, and, if necessary, for transportation expenses to the alien's last foreign port of embarkation.\textsuperscript{19} Subsection (d) specifies that the INS will not assume custody of an alien presented as a transit without visa passenger (e.g., a passenger scheduled to merely pass through the United States, and therefore travelling without a visa to the United States.)\textsuperscript{20}

Section 1323 of the Code\textsuperscript{21} also assesses a $3,000 fine on carriers who bring aliens (other than transit without visa passengers) lacking proper documentation to the United States.\textsuperscript{22}

Prior to 1986, 8 U.S.C. §1223 provided that carriers bear financial responsibility for detaining those aliens temporarily removed for exami-

\textsuperscript{15} 130 U.S. 581 (1889).
\textsuperscript{17} Id.
\textsuperscript{18} 8 C.F.R. 235.3(a) (1994).
\textsuperscript{19} Id.
\textsuperscript{20} 8 C.F.R. 235.3(d) (1994).
\textsuperscript{21} 8 U.S.C 1323 (1994).
\textsuperscript{22} Id.
nation and inspection. However, Congress repealed this statute when it passed The Department of Justice Appropriation Act of 1986, which established the "User Fee Statute."

The User Fee Statute imposes a $6 fee (raised from $5 by a 1993 amendment) to be collected by airlines or other transportation providers, and then remitted to the government "for the immigration inspection of each passenger arriving at a port of entry in the United States, or for preinspection of a passenger in a place outside of the United States prior to such arrival, aboard a commercial aircraft or commercial vessel." These fees, along with civil fines imposed on transportation companies who bring excludable aliens into the United States, are kept in a separate account within the general fund of the U.S. Treasury. Funds are to be used to reimburse the Attorney General for costs incurred in connection with the inspection and preinspection of aliens, and for costs associated with their detention and deportation.

However, the enactment of the User Fee Statute did not result in the repeal of 8 U.S.C. §1227(a), which provides, in part, that the cost of maintaining an "excluded" alien prior to his or her departure remains the responsibility of the carrier in which the alien arrived.

Traditionally, courts have deferred to agency expertise and upheld fairly strict application of the Immigration and Nationality Act statutes. For example, fines imposed as an administrative penalty on carriers who failed to detain or deport stowaways were upheld in a string of cases, in spite of arguments that shipowners had taken all possible precautions, and had reported stowaways at the earliest opportunity.

Likewise, carrier responsibility for detention expenses has been upheld. In United States v. Aero-Mexico, the airline was found to have the responsibility of providing adequate security for an alien awaiting an exclusion hearing (the alien escaped and was never recaptured). In Public Health Trust v. United Safeguard Security Agency, the court ordered the carrier and its agent to pay $46,518 in medical expenses for a stowaway.

---

30. Id.
32. United States v. Aero-Mexico, 650 F.2d 1062 (9th Cir. 1981).
(the alien was injured while attempting to escape from a seventh floor hotel room where he was being detained).

The issue of asylum, arising with increasing frequency, adds another expensive dimension to the question of detention costs. The hearing process for an asylum detainee can take months or longer. In its suit, Dia cited a General Accounting Office report indicating that from 1986 to 1989 the average amount of time required to process an asylum application ranged from 5.8 months in San Francisco, to 31.2 months in Chicago.\(^{34}\) Expenses, which often include not only housing and food, but also security, medical needs, interpreters and other services, can be enormous. The stakes in the outcome of this debate are obviously high.

### III. Recent Litigation

The concerns of the aviation industry over rising detention expenses are clearly expressed in *Air Transport Ass'n of America v. McNary*.\(^{35}\) The Air Transport Association (totaling 19 passenger and cargo lines) brought suit against the Immigration and Naturalization Service in January, 1992, seeking a declaratory judgment shifting liability for the detention of aliens seeking asylum from the airlines to the INS. Interpretation of the User Fee Statute was the primary issue.\(^{36}\)

Other recent decisions, however, provide some clarification of the issue and predictions on how the District court in *Air Transport Ass'n of America v. McNary* may hold.

#### A. *Dia Navigation Co. v. Reno*\(^{37}\)

Dia filed a declaratory judgement action in March, 1993, seeking to have an INS policy requiring ocean carriers to detain stowaways who have applied for asylum, and also to pay their detention costs, declared unlawful and void.\(^{38}\) The company also sought reimbursement for $127,580 it incurred for 54 days of detention of four stowaways who sought asylum. Dia Navigation's primary argument was that the User Fee Statute requires the INS to pay for such costs.\(^{39}\)

In August, 1993, the court denied Dia's motion in all respects, and granted the government's motion for summary judgment.\(^{40}\) On appeal,\(^{41}\) the Third Circuit reversed the dismissal of the complaint, and remanded

---

34. Dia Navigation Co. v Pomeroy, 34 F.3d 1255, 1257 (3d Cir. 1994).
36. *Id.*
38. *Id.* at 363.
39. *Id.*
40. *Id.* at 380.
the case to the District Court with an order to award a declaratory judgment to Dia on its claim that the INS policy was invalid for failure to comply with the notice and comment procedure of the Administrative Procedures Act (APA). The dismissal of the claims for monetary relief, however, was upheld.42

B. **Aerolineas Argentinas v. United States**43

Both Aerolineas Argentinas and Pakistan International Airlines (the Co-Plaintiff) sought to recover costs of detaining transit without visa (TWOV) aliens who sought political asylum in the United States. Aerolineas filed suit in January, 1992, Pakistan International Airlines (PIA) in July, 1992. Upon written order from the INS, both airlines had provided hotel rooms, food, security, and other services for various asylum applicants. Aerolineas had incurred $222,000 in expenses over a two-year period; PIA sought reimbursement for more than $452,445. The Defendant's motion to dismiss was granted in March, 1994.

In finding for the airlines court found that the airlines could not recover for payments made to third parties; that the User Fee Statute did not mandate payment to airlines; that a regulatory taking had not occurred; and that the transit contract was not amenable to suit in the Court of Federal Claims.44

C. **Argenbright Security v. Ceskoslovenske Aeroline**45

In September, 1992, Argenbright, the agency providing security for a detained stowaway pending his political asylum application, filed suit against Ceskoslovenske. The airline, in turn, filed a third party action against the INS.

In April, 1994, the court held that illegal stowaways are “excluded aliens” within the meaning of the INA, and thus carriers must bear financial responsibility when such aliens apply for political asylum.46

D. **Linea Area Nacional de Chile v. Sale**47

In June, 1993, Linea Area Nacional de Chile (Lan-Chile) filed suit seeking a declaration that INS policies holding the airline responsible for detention costs of TWOVs seeking asylum exceed the INS’s statutory authority, and were in violation of the APA. The airline claimed that such

---

42. *Id.* at 1265-1267.
44. *Id.*
46. *Id.* at 280.
policies were arbitrary and capricious, and that the INS should reimburse Lan-Chile $620,678.78 for costs incurred in connection with the detention of aliens seeking asylum.\textsuperscript{48} The Plaintiff's motion for summary judgment was granted on September 14, 1994, and reimbursement by the INS ordered.\textsuperscript{49}

IV. Analysis

The results in these cases are not as disparate as they might seem. Examined chronologically, it appears that courts have evolved to an approach that shows less than the traditional deference to INS interpretations of the INA, and that the transportation industry may ultimately prevail on the issue of financial responsibility, at least with regard to TWVO aliens.

\textit{Dia Navigation Co. v. Reno} was a case of first impression.\textsuperscript{50} The key "fact" the \textit{Dia} court relied upon in its decision was that stowaways, by definition of the INA, are "excluded" from admission to the United States, rather than being merely "excludable."\textsuperscript{51}

The Immigration and Nationality Act\textsuperscript{52} lists as excludable aliens that lack proper documentation; suffer from a communicable disease; have committed certain crimes; may be a security threat; may become a public charge; or may be immigration violators or illegal entrants. An alien who falls into one of the six excludable categories is generally subject to an exclusionary hearing before a special inquiry officer.

Stowaways are expressly listed as "excludable" aliens.\textsuperscript{53} However, they are further considered to be a disfavored category of alien, and, unlike other classes of excludable aliens, have no right to an exclusion hearing by a special inquiry officer, or to an appeal to the Attorney General.\textsuperscript{54} Stowaways, consequently, are considered to be automatically excluded from admission, and subject to immediate deportation. Expenses incurred in the detention of an excluded alien must, therefore, be borne by the carrier.\textsuperscript{55}

Although \textit{Dia} argued that the User Fee Statute requires the INS to assume these costs, the court reasoned that because Congress neither repealed nor amended those statutes that assessed carrier liability for detention of stowaways, Congress demonstrated the intent to continue to

\textsuperscript{48} \textit{ld.}
\textsuperscript{49} \textit{ld} at 999.
\textsuperscript{51} \textit{ld.} at 366-367.
\textsuperscript{52} 8 U.S.C. §1182(a) (1994).
\textsuperscript{54} 8 U.S.C. 1323(d) (1994).
treat stowaways as immediately excluded aliens, and to maintain carrier responsibility for both the physical detention of stowaways and for the associated costs as well.\textsuperscript{56} Summary judgment was granted to the Defendants.\textsuperscript{57}

A similar result was reached seven months later in \textit{Aerolineas Argentinas v. United States},\textsuperscript{58} where the United States Court of Federal Claims dismissed the claims made by the airlines for reimbursement of expenses associated with the detention of aliens seeking asylum. Like Air Transport, the focus here was on TWOV passengers. Both airlines had entered into a Form I-426 Immediate and Continuous Transit Agreement, which, the court noted, required the carrier, "without expense to the government of the United States, [to] remove to the foreign port from which the alien embarked . . . any alien . . . found by the proper officials not to be eligible for passage through the United States in immediate and continuous transit."\textsuperscript{59}

The airlines conceded that the transit agreements contemplated payment of delay-on-return expenses, but contended that detention for asylum processing was not contemplated.\textsuperscript{60} They noted that 8 U.S.C. §1356(h)(2)(A)(v) calls for the user fees to be used for detention and deportation services, relieving the transportation line of any responsibility for such services.\textsuperscript{61}

The court, noting that it "must defer to an agency's reasonable interpretation of the statute it is charged with administering,"\textsuperscript{62} did not address the User Fee Statute, but instead focused solely on the issue of jurisdiction. The airlines argued jurisdiction could be based on either illegal exaction\textsuperscript{63} or the right to payments from the Treasury.\textsuperscript{64} The court disagreed, finding that no money or property was taken directly from the airlines\textsuperscript{65} and that there was no entitlement to treasury funds found within the statutory language.\textsuperscript{66}

Applying the three factors from \textit{Atlas Corp. v. United States},\textsuperscript{67} the court also held that no regulatory taking occurred. Requiring the airlines

\textsuperscript{56} Dia Navigation Co. v Reno, 831 F. Supp. 360, 369.
\textsuperscript{57} \textit{Id.} at 379.
\textsuperscript{58} Aerolineas Argentinas v. United States, 31 Ct. Cl. 25 (1994).
\textsuperscript{59} \textit{Id.} at 28.
\textsuperscript{60} \textit{Id.} at 29.
\textsuperscript{61} \textit{Id.} at 29-30.
\textsuperscript{62} \textit{Id.} at 30, n.6. (Citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984)).
\textsuperscript{63} \textit{Id.} at 30.
\textsuperscript{64} \textit{Id.} at 31.
\textsuperscript{65} \textit{Id.} at 31.
\textsuperscript{66} \textit{Id.} at 32.
\textsuperscript{67} Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir. 1990).
to pay for detention services did not invade or appropriate their property. "At most, it merely interferes with their property rights pursuant to a public program intended to promote the public good . . . ."68 The court found that it was not clear that a "right" to bring TWOV passengers to the United States was a even a recognized "property right".69

Further, the Plaintiffs did not contend that they had been completely deprived of their economic right to conduct their business profitably, nor did they deny that detention costs could be minimized by more stringent precautions by airlines upon enplanement of such passengers.70 The court rather unsympathetically noted the airlines had "made a business decision to risk incurring costs of such detention as the price of carrying passengers without visas."71

The arguments advanced under contract theory were equally unsuccessful for the airlines. Finding no basis for jurisdiction, the Court of Federal Claims therefore dismissed all claims by the airlines.72

Just a month later, the U.S. District Court in New York essentially reiterated the approach taken by the Dia court and dismissed the third party complaint filed against the INS in Argenbright Security v. Ceskoslovenske Aeroline.73 Like Dia, this case focused on application of the INS user fee policy to stowaways.

The court affirmed that pursuant to the Refugee Act, courts have uniformly held that stowaways have a right to political asylum,74 and that INS regulations provide that, pending adjudication of the claim, the INS may parole the stowaway into the custody of the carrier.75

While the court noted that the User Fee Statute shifted the financial responsibility for detention and deportation of excludable aliens to the INS,76 under 8 U.S.C. §1227(a), "the cost of maintaining an 'excluded' alien prior to deportation, including detention expenses, remains upon the carrier responsible for transporting such alien into this country."77

Ceskoslovenske Aeroline (CSA) argued that the statutory language (providing that "[a]ny alien who is a stowaway is excludable")78 indicates that the INA treats stowaways merely as excludable rather than excluded, and that its claim for detention expenses was thus not barred by 8 U.S.C.

68. Id. at 34.
69. Id.
70. Id. at 34, n.12.
71. Id. at 35.
72. Id. at 36.
74. Id. at 278.
76. Id. at 280.
77. Id.
The court disagreed with this interpretation, finding that, construing the INA in its entirety, stowaways are a "disfavored" category. Thus, despite the availability of an asylum hearing, stowaways remain "excluded" aliens, and, as such, the expenses incident to their detention must be borne by carriers pursuant to section 1227(a)(1).

Like the Dia court, this court concluded that because section 1227(a)(1) and 1323(d) were unaffected by passage of the User Fee Statute, Congress had no intent to alter the treatment of stowaways. The court also ruled that carrier liability is not limited to the $3,000 administrative penalty authorized by section 1323(d). The fine is a sanction, and has no bearing on the responsibility for costs.

CSA also claimed that the INS policy constituted arbitrary and capricious agency action in violation of the Administrative Procedures Act, arguing that the policy was a legislative or substantive "rule" and should have been promulgated through the APA's notice and comment procedures. This argument was unsuccessful. The court found that INS policy merely tracked the language of the INA, and was therefore interpretive in nature, not requiring the notice and comment procedure.

However, the Third Circuit was less deferential to the INS when it considered Dia on appeal, and reached the opposite conclusion. On September 13, 1994, the Dia decision was remanded, based on the determination that the INS policy was a "legislative rule" rather than an "interpretive rule," and therefore could only be promulgated pursuant to notice and comment procedures of the APA. The court noted a fundamental tension in the statutory framework which requires immediate deportation of stowaways (a responsibility of the carrier), but seems to contemplate custody for only the short period between the issuance of the deportation orders and the deportation itself—not for the duration of the hearing process. The court also noted that the "backdrop" for the present statutory scheme was a legislative history strongly evincing congressional desire to place responsibility for detention on the INS, and the repeal of §1223, which had placed the burden of paying for detention on

80. Id at 280; see also Yiu Sing Chun, 708 F.2d at 875 n.21 (2d. Cir. 1983) (referring to stowaways as highly disfavored class); Haitian Refugee Center v. Gracey, 809 F.2d 794, 839 n.129 (D.C. Cir. 1987) (citing Yiu Sing Chun).
82. Id. at 281.
83. Id. at 281.
84. Id. at 282.
85. Id.
87. Id. at 1267.
88. Id. at 1262.
carriers.\textsuperscript{89} The Court of Appeals did not find a clear answer to the question of responsibility for detention in either the statute or the rules, but did determine that because of statutory ambiguity, the INS had not conformed with the requirements of the APA in establishing its detention costs policy.\textsuperscript{90} The court did find, however, that the monetary reimbursement Dia sought was properly categorized as money damages, and was therefore appropriately denied in the original suit under the doctrine of sovereign immunity. Further, denial of Dia’s claim under the Tucker Act was also appropriate because the district court lacked subject matter jurisdiction.\textsuperscript{91} So while the Third Circuit was willing to at least question the INS interpretation of the User Fee Statute, very little actually changed for carriers.

The situation improved dramatically for the transportation industry a day later when the United States District Court in New York decided 

\textit{Linea Area Nacional de Chile v. Sale.}\textsuperscript{92} Like Dia and Ceskoslovenske in previous cases, Lan-Chile argued that the INS policy regarding detention responsibility was in violation of the APA, and sought reimbursement for amounts paid, or to become due, in connection with the detention of aliens.\textsuperscript{93} The result for Lan-Chile was more satisfactory.

This court focused primarily on two areas: the legislative history of the User Fee Statute, and the specific wording of the statutes and regulations authorizing the transit of TWOVs through the United States.

The court noted that legislative reports “unambiguously” demonstrate congressional intent to shift the financial and physical responsibility of “excludable” aliens to the INS, even if they do not specifically address the unique situation of either TWOVs, or stowaways who seek political asylum.\textsuperscript{94}

The INS argument relied on certain regulations passed after the User Fee Statute which indicated the INS would not assume custody of aliens presented as TWOV passengers,\textsuperscript{95} and that nothing contained in the User Fee Statute should be deemed to waive the carrier’s liability for detention, transportation, and other expenses incurred in bringing aliens to the United States under the terms of the section.\textsuperscript{96} However, the court stated that, read and construed in their entirety, the statutes and regulations “compel the conclusion” that the transportation line was intended to be

\textsuperscript{89} Id.
\textsuperscript{90} Id. at 1265.
\textsuperscript{91} Id. at 1267.
\textsuperscript{93} Id. at 975-976.
\textsuperscript{94} Id. at 982.
\textsuperscript{95} 8 C.F.R. Sec. 235.3(d) (1994).
\textsuperscript{96} 8 C.F.R. 238.3(c)(1994).
responsible for the custody of a TWOV only so long as necessary "to insure such immediate and continuous transit through, and departure from, the United States en route to a specifically designated foreign country." 

The court reasoned that once an alien applies for political asylum, the conditions upon which the TWOV privilege was granted have been breached, and that the alien's status as a TWOV has then been forfeited, making him nothing more than an excludable alien. "If the privilege granted to transportation lines is on condition that the alien will continue in transit and not apply for extension of temporary stay and the carrier accepts the privilege on that condition, imposing custodial responsibility upon the carrier when the alien breaches the condition is hardly defensible." 

Lan-Chile claimed that the INS policy regarding carrier responsibility exceeded statutory authority, and was in violation of the APA. The court agreed:

Given the fact that the Act was designed to relieve carriers of the physical and financial responsibility of detaining aliens . . . it follows that an INS policy . . . which results in imposing on the carriers custodial responsibility for those excludable aliens, is in clear contravention of the plain meaning of the Act and is in violation of Congressional intent, and hence is unreasonable and in violation of the APA.

The court further noted that it would be inequitable to hold the carriers physically and financially responsible for detaining those particular TWOV aliens because (1) it would be impossible to screen aliens before they board to determine which aliens plan to seek asylum; (2) there are no guidelines on how long a carrier must detain the alien before his application is processed; and (3) it is inconsistent with the statutory and regulatory basis which merely contemplates allowing TWOVs to transit through the country.

The court concluded that the INS's interpretation of the User Fee Statute was "seriously flawed" because the INS continued to believe that it could hold private carriers responsible for jailing those aliens indefinitely, and pursuant to any conditions the agency deemed appropriate. Although the legislative history of the User Fee Statute did not specifically discuss the issue of TWOVs who request political asylum, the possible negative ramifications of turning private corporations into jailers was

98. *Id.*
99. *Id.*
100. *Id.* at 986-987 (citing *Osorio v. Immigration and Naturalization Serv.*, 18 F.3d 1017, 1031 (2d Cir. 1994)).
101. *Id.* at 987.
102. *Id.* at 988.
a concern noted by the House Appropriations Committee.103 The court stated that the INS interpretation was "unreasonable, and hence not worthy of the traditional deference usually accorded agency interpretation."104

Lan-Chile also argued that by contract carriers are responsible for "passengers." The court agreed that aliens waiting months for asylum hearings are no longer passengers.105 The forfeiture of that status terminates the carrier's custodial obligation. By imposing obligations extending beyond this passenger status, the court found that the INS exceeded the authority conferred on it by 8 U.S.C. §1228(c), in violation of the APA.106

In addition, Lan-Chile claimed that the INS's policy requiring carriers to assume the physical and financial burden of detention expenses was arbitrary and capricious, and in violation of 5 U.S.C. §706(2)(A). The court agreed, finding it unreasonable and illogical to compel private corporations to be the jailers of excludable aliens for unlimited amounts of time when there is a fund established by Congress for reimbursing the Attorney General for these same expenses.107

Perhaps most important, the court also agreed with Lan-Chile on the issue of reimbursement. While previous decisions had equated recovery of costs with money damages barred by the doctrine of sovereign immunity, the complaint here was viewed as one for equitable relief—a return of expenditures.108 Although there is no statutory entitlement to funds in the case of stowaways, the User Fee Statute provides the entitlement in the case of TWOVs.109 Accordingly, the court ordered the INS to reimburse Lan-Chile $620,678.78, plus interest.110

V. Conclusion

Undoubtedly, the Lan-Chile decision will be appealed. But in light of the apparently changing perspective of the courts, the decision may be upheld. The courts have shown signs of moving away from the deference that has traditionally been shown the INS.

Although the INS prevailed, at least monetarily, in most of the recent decisions, the courts also, with the exception of the Federal Claims Court, showed a willingness to examine the congressional intent behind

103. Id.
104. Id. at 988, n.24.
105. Id. at 992-993.
106. Id. at 993.
107. Id. at 994.
108. Id. at 996.
109. Id.
110. Id. at 999.
the passage of the User Fee Statute, and also to consider the equity of the results.

It seems clear that a distinction is to be made between responsibility for stowaways (who are excluded from entry to the United States), and from TWOVs (who are merely excludable).

In supporting the INS interpretation of the User Fee Statute on the basis of this distinction, as the Dia and Argenbright courts did, it appears that the door was opened for the Linea court to find that responsibility for TWOV “passengers” does indeed fall on the INS.

Such a result seems fair. As the Linea court noted:

   It is reasonable to place responsibility upon the carrier for a careful inspection of all the spaces of its vessel or aircraft to assure that those spaces are not occupied by persons who have not been cleared for boarding. It is not reasonable to place responsibility upon the carrier for the state of mind of a person properly cleared to occupy its spaces.111

This issue is far from settled. The stakes in the debate are high, and there is still the notable tendency among courts to treat federal agencies with deference. But if these recent decisions are an accurate indication, there is a good possibility that the Air Transport Association will prevail in its pending suit. Responsibility for the detention of TWOV aliens during the asylum process may be shifted to the INS, which the transportation industry has insisted was the intent of the User Fee Statute.

111. Linea Area Nacional de Chile, 865 F. Supp. at 995.
Stopping the Tailspin: Use of Oligopolistic and Oligopsonistic Power to Produce Profits in the Airline Industry

James C. Lanik*

Table of Contents

I. Introduction ........................................... 510
II. History of the Industry .................................. 510
    A. Deregulation Arrives .................................. 510
    B. The Post-Deregulation Condition of the Industry ... 512
III. The Economics of the Industry ........................... 513
    A. Costs as the Culprit .................................. 513
    B. Economic Nature of the Industry ....................... 514
    C. Oligopoly Theory and Predicting Oligopolist's
       Behavior .............................................. 516
       1. Oligopoly Pricing .................................... 517
       2. The Herk Model ..................................... 520
    D. Monopsony Theory ..................................... 523
       1. The All-or-None Approach ............................ 527
IV. Conclusion ............................................... 529
V. Epilogue .................................................. 530

* James C. Lanik obtained his B.A. in Economics from Lawrence College in 1992. He expects to graduate from the University of Denver College of Law in May of 1995.
I. INTRODUCTION

The worldwide airline industry employs over 21 million people and accounts for $740 billion or 4% of the world's economic production. The continued economic viability of a nation depends on a healthy transportation infrastructure, however, the condition of the United States' airline industry is not healthy. Halfway through the second decade of airline deregulation, U.S. carriers face huge debt to capital ratios, excess capacity, rising costs, and non-existent profits. If the industry does not recover, one of two "unthinkables" will occur: the federal government will step in and re-regulate or free-marketeers will call for open skies with added competition from foreign carriers.

Both options present equally distasteful options for American airlines. Re-regulation brings about stability, but at what cost? Before deregulation, only the wealthy could afford travel by air. Under re-regulation the middle class may again be kept from the skies. Where foreign carriers to have open access to all U.S. markets, domestic airlines would face difficulty competing with carriers subsidized by foreign governments.

To survive, the industry must drastically reduce costs, extract more money from the consumer per seat mile, or both. Presented here is a possible strategy for achieving those ends. This paper provides a history of the airline industry under regulation and discusses the present situation. Following this the theories of oligopoly and monopsony and their application to the U.S. airline industry are outlined.

II. HISTORY OF THE INDUSTRY

A. Deregulation Arrives

Senator Edward Kennedy's words as Chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedure were the first drops of the deluge that would wash away regulation. In 1975 Kennedy's subcommittee found that increased competition in the airline in-

1. Paul S. Dempsey, The Prospectus For Survival & Growth in Commercial Aviation, 23 Transp. L.J. (forthcoming summer 1995) (manuscript at 1, on file with author)(hereinafter Dempsey). If the industry were a country, in terms of economic production, it would rank higher than Canada. Id.

2. Incidentally, Senator Kennedy's committee did not have proper subject matter jurisdiction over deregulation. That power vested in the Senate Commerce Committee. PAUL S. DEMPSEY ET AL., AVIATION LAW AND REGULATION, 1-13 n.63 (abridged student ed. 1992) [hereinafter DEMPSEY ET AL., AVIATION LAW]

3. Kennedy opened the hearings by stating, "Regulators all too often encourage or approve unreasonably high prices, inadequate service, and anticompetitive behavior. The cost of regulation is always passed on to the consumer. And that cost is astronomical." Id. at 1-13 to 1-14.
industry would not lead to predatory pricing, destructive competition, monopolization, as many had feared.\(^4\)

With Jimmy Carter’s entrance into the oval office in 1977, deregulation had a new champion. Carter felt he could win a quick political victory by advocating deregulation for all transportation, not just the airlines.\(^5\) He appointed Alfred Kahn, a staunch deregulationist,\(^6\) to chair the Civil Aeronautics Board (“CAB”). Kahn felt that deregulation: 1) caused higher fares than would otherwise exist; 2) misallocated resources; 3) promoted carrier inefficiency; 4) denied consumers their preferable range of prices and services; and 5) tended to motivate the industry to provide excess capacity.\(^7\)

To fight these perceived evils, Kahn instituted a number of initiatives that loosened entry requirements and liberalized pricing. His efforts in the late 1970’s appeared immediately successful as carriers offered lower fares, filled excess capacity, and recorded great profits.\(^8\) Congress passed the Airline Deregulation Act of 1978 to further the trend of deregulatory success. The Act provided for the elimination of price regulation and most entry controls\(^9\) as well as for the demise of the CAB.\(^10\)

Deregulation opponents thought the Act would lead to destructive competition and ultimately to nationwide oligopoly or even monopoly.\(^11\) Proponents countered, asserting concentration was unlikely because of low barriers to entry, the apparent lack in the industry of economies of scale, and contestable markets.\(^12\) Kahn dismissed oligopoly fears stating that even though the natural market structure could support only a few carriers, those few would provide enough competition if the government would refrain from interfering.\(^13\) Even if a firm could monopolize the industry, Kahn theorized, the lack of both barriers to entry and economies of scale would permit new entrants to share in the monopoly rents

\(^4\) Id. at 1-14. The subcommittee also examined fears that increased competition would lead to reduced service to small communities, destruction of the existing air service network, reduced safety standards and greater financing difficulties. Id.


\(^6\) Kahn, as Chairman of the New York Public Utilities Commission, advocated deregulation to the Kennedy Subcommittee. Id. at 1-16.

\(^7\) Id.

\(^8\) Id.

\(^9\) Applicants were still required to be “fit, willing, and able” to commence air service. Id. at 1-18.

\(^10\) The CAB was the first major federal agency to be “sunsetted.” Id.

\(^11\) Id.

\(^12\) Id.

\(^13\) Id. at 1-20.
earned by the lone firm.\textsuperscript{14} In a presentation to the Aviation Subcommittee of the House Public Works and Transportation Committee, Kahn voiced his optimism: "I am confident that...consumers will benefit; that the communities throughout the nation — large and small — which depend upon air transportation for their economic well being will benefit, and that the people most closely connected with the airlines — their employees, their stockholders, their creditors — will benefit as well."\textsuperscript{15}

B. THE POST-DEREGULATION CONDITION OF THE INDUSTRY

Many would feel after a statement like that, Mr. Kahn should stay out of the soothsaying business. The airline industry stands today perilously close to the brink of ruin. In the first fifteen years of deregulation, the net profit of the worldwide industry equalled 0.6% of revenue.\textsuperscript{16} The industry has performed even more poorly over the last four years: in 1991, the industry lost $6.7 billion, $8.4 billion in 1992, $2 billion in 1993 and $1.5 billion in 1994.\textsuperscript{17}

The United States' airline industry has fared little better. Since deregulation in 1978, the losses of the major U.S. airlines equal $7.7 billion, with a $1 billion loss in 1993 alone.\textsuperscript{18} The most disturbing statistic is that of the debt owed by U.S. carriers; their combined debt of $35 billion totals more than eight times the entire accumulated profit of the industry from 1920 to 1988.\textsuperscript{19}

With such a high debt, many analysts feel that the airlines need operating profit of 4% just to service that debt, and 6% if they wish to modernize their fleets.\textsuperscript{20} In addition to huge capital outlays required to bring fleets into the twenty-first century, the industry must pay between $250

\begin{enumerate}
\item[14.] This essentially is the theory of contestability. \textit{Id.} at 1-19.
\item[15.] \textit{Id.} at 1-21.
\item[16.] Gross revenue equalled $2 trillion, and operating expenses equalled $1.96 trillion; operating profit was just 2% of revenue. Dempsey, \textit{supra} note 1, manuscript at 2.
\item[17.] The figures for 1993 and 1994 are estimates. \textit{Id.} at 2.
\item[18.] The airlines may break even in 1994. \textit{Id.}
\item[19.] \textit{Id.} Wall Street analysts have downgraded the airlines' debt to junk status, and would probably go lower except no lower rating exists. Julius Maldutis has noted that the federal government would put the airlines into receivership and liquidate them if they were savings and loans. \textit{Id.} at 8. Total debt to capital ratios equal about 70% for most major airlines. \textit{Id.} For a firm-by-firm listing of debt to capital ratios, see DEMPSEY ET AL., AVIATION LAW, \textit{supra} note 2, at 2-32.
\item[20.] Dempsey, \textit{supra} note 1, manuscript at 7. The United States has the oldest fleet in the world. DEMPSEY ET AL., AVIATION LAW, \textit{supra} note 2, at 2-5. Manufacturers intended for their airframes to last about 20 years or 60,000 cycles. In 1989, 32% of the U.S. fleet exceeded 20 years. \textit{Id.} The General Accounting Office predicts that by 2000, 64% will exceed 20 years of age. Boeing predicts by 2000 the world's airlines will take delivery of $380 billion worth of new aircraft and another $500 billion in the decade after that. \textit{Id.}
billion and $350 billion for airport infrastructure improvements.21

III. THE ECONOMICS OF THE INDUSTRY

A. COSTS AS THE CULPRIT

High input costs stand out as the main reason the U.S. airline industry has performed so poorly.22 Overall, the industry’s operating expenses rose 94% from 1978 to 1984.23 Equipment rentals and travel agent commissions rose the most from 1980 to 1990.24 As in most service industries,25 labor costs still make up the bulk of operating expenses, although their share of the total has fallen.26 Fuel costs and interest payments will not stay as favorable as they are now.27 Airlines also probably will not see any of the beneficial tax reforms they have recommended to Congress.28

Low labor costs do not ensure success. Even though Continental and TWA broke the unions they faced, they could not avoid bankruptcy.29 Analysts classify the airline industry into thirds based on cost to profit ratio; the bottom one third is low-cost.30 The expenditures of the low-cost portion of the industry are only 5% lower than the high-cost carriers. Lowering labor and travel agent commission costs, could drop the high-cost upper two-thirds into the realm of low-cost carriers.

---

21. Dempsey, supra note 1, manuscript at 2. Some of that money will come from taxpayers, concessions, parking, and other sources, but the bulk will come from the airlines in the form of gate, counter and hanger leases, landing fees, air control fees, passenger facility charges, fuel and other taxes, and ground service fees. Id.

22. Many other factors combine to produce industry anemia, but the airlines can exert the most control over costs. Some other problems the industry faces are: 1) overcapacity as a result of schedule frequency, high fixed costs, and product perishability; 2) flat domestic demand growth; and 3) schizophrenic price structure, including price wars. For an in depth discussion of these factors, see Dempsey, supra note 1, manuscript at 3-7.

23. Dempsey et al., Aviation Law, supra note 2, at 2-37.

24. Rentals went from 1.8% of total operating expenses to 7.1% of the total. In their effort to buy more and more traffic, the airlines bid up the cost of travel agent commissions which made up 10.0% of operating expenses in 1990, up from 3.4% in 1980. Id. See also Dempsey, supra note 1, manuscript at 11.

25. Dempsey, supra note 1, manuscript at 25.

26. In 1980, labor costs accounted for 37.3% of operating costs. In 1990, that figure had fallen to 33.8%. Dempsey et al., Aviation Law, supra note 2, at 2-38. Former United States Secretary of Transportation Samuel Skinner blames the airlines’ woes on these high labor costs. A view with which the three authors mentioned above disagree with. Id.

27. See Dempsey, supra note 1, manuscript at 6.

28. The National Commission to Ensure a Strong Competitive Airline Industry recommended tax reform for the benefit of the airlines. Congress, worried about its own debt problems, probably will not enact any of these proposals. Dempsey, supra note 1, manuscript at 11.

29. Id. at 23. Continental’s seat per mile cost is 8.35 cents, the lowest in the industry, but the airline has been through Chapter 11 bankruptcy twice. Id. at 23 n.97.

30. Id.
B. ECONOMIC NATURE OF THE INDUSTRY

A pure monopoly is rare. Most markets fall somewhere along the continuum between perfect competition and pure monopoly; imperfect competition results.31 The airline industry, while made up of more than one product provider,32 exhibits a number of monopolistic characteristics. First, airlines can sell tickets on other airlines.33 While this practice does not occur as much as it once did, one airline will often sell a consumer a competitor’s product, a seat on a particular flight, in order to give the customer a more convenient time or connection to a city unserved by the first airline.34

Second, consumers see the airlines’ product as basically fungible and inevitably choose the cheapest fare between A and B.35 Additionally, each airline sells most of its tickets through travel agents who also sell for other airlines.36 To facilitate this practice, the airlines developed computer reservation systems (“CRS”) allowing travel agents instantaneous access to the fares, schedules and seat availability of the entire industry.37 These factors result in one group of sellers handling essentially the same product at the same price.38 Thus, what at first blush appears an industry with some competition in it, suddenly looks like a monopoly.39 See

31. Professor Samuelson summed it up best: “[W]e are not saying that the owner of an imperfectly competitive firm is of poor character, that he beats his wife, or fails to pay his bills. Nor does the fact that a firm is an imperfect competitor mean that it is not keenly seeking to outsell and out advertise its rival. Intense commercial rivalry and ‘perfect competition’ are not at all the same thing.” Samuelson at 485.

32. The first danger of monopoly is defining the relevant product. Here, the product is defined as a seat on an aircraft flying from A to B at time T, arriving at T’.


34. Id.

35. This practice makes airlines reluctant to raise prices above the market rate, due to loss of business that will surely result. Id. at 550.

36. Id.

37. Id. For a more thorough review of Computer reservation systems (CRS), see DEMPSEY ET AL., AVIATION LAW, supra note 2, at 2-31.

38. See infra, part II.C. for a discussion of oligopolies.

39. A brief recap of basic economics is in order at this point. Perfect competition is found in an industry where no producer has control over the selling price. Each firm within the industry faces a horizontal demand curve, along which it can sell as much or as little as it chooses. See PAUL A. SAMUELSON, ECONOMICS 484 Fig. 1(a)(1985) (hereinafter SAMUELSON). A monopoly, as mentioned above, has some control over the price it sets. Thus, in economic terms, a monopolist faces a downward sloping demand curve. See id. at Fig. 1(b). As the monopolist sells more, the price falls. For maximum profit, the monopolist should sell each product unit at a prices based on how much each individual consumer is willing to pay. See also, Figures 3 and 4(a) and (b). ROBERT L. HEILBRONER & LESTER C. THURLOW, UNDERSTANDING MICRO-ECONOMICS 175 (1975) (hereinafter HEILBRONER & THUROW). See Figure 2.

However, this practice amounts to an auction and can be difficult to accomplish unless the seller has the ability to change the price for each buyer. Enter the CRS. Through travel agents,
Yet this conclusion begs the questions: how does one characterize the airline industry and how one may one predict the behavior of the individual participants in such an industry? Economists classify the airline industry as an oligopoly. An oligopoly may be of two types. The first consists of a few selling an identical product. The second has a few sellers selling a differentiated product.

Oligopolists tend to compete with one another through advertising, product differentiation and service rather than price. The oligopolist
views competition by price as self-destructive, while other economic models allow a firm to shift its demand curve to the right.43

C. OLIGOPOLY THEORY AND PREDICTING OLIGOPOLIST'S BEHAVIOR

The oligopolist does not face the traditional downward sloping demand curve. Instead, the oligopolist faces a "kinked" demand curve,44 resulting from a highly elastic demand when prices are raised and an inelastic demand when prices are lowered. The curve bends exactly at the point of the equilibrium price.45 When an oligopolist raises price even slightly many of the oligopolist's customers shift to new suppliers who have not raised their prices.46 Conversely, if an oligopolist lowers price, other market participants also lower their prices to keep their custom-

43. Id. Price competition affects not only the individual oligopolist's revenues, but also the entire industry's. Occasionally, however, price wars do occur. During the time of the Robber Barons, the Vanderbilts and the Drews would cut and recut prices on their parallel rail lines. SAMUELSON, supra note 39, at 505. Witness the frequent fare wars in which airlines today engage.

44. HEILBRONER & THUROW, supra note 39, at 180. See also SAMUELSON, supra note 39, at 514-15.

45. HEILBRONER & THUROW, supra note 39, at 180.

46. Id. See also SAMUELSON, supra note 39, at 515.
Stopping the Tailspin

1. Oligopoly Pricing

In a perfectly competitive world, firms maximize short run profits. Those that fail to do so exit the market. However in an oligopoly, large firms need not make every dollar possible to survive. Game theory developed to predict the way oligopolists behave absent the assumption of short-run profit maximization. Noncooperative game theory states

47. HEILBRONER & THUROW, supra note 39, at 180. “After experience with disastrous price wars, each of the few rivals who dominate a given market is almost sure to recognize that price cutting begets price cutting. So the typical oligopolist will estimate his demand curve . . . by assuming other will be charging similar prices . . . [and] will settle for sizable markup of [price] over [marginal cost].” SAMUELSON, supra note 39, at Fig. 26-1 514.

48. HEILBRONER & THUROW, supra note 39, at 180-81.

49. Figure 2 may help to explain the discontinuity of the marginal revenue curve. “Notice that our oligopolist has two demand curves, one above and one below the kink. Call them AR1 and AR2, and their respective marginal revenue curves, MR1 and MR2. Suppose our firm is selling a quantity OX just to the left of the kink. It will be working on AR1 and will enjoy the marginal revenue BX from its output. Now suppose it shifts to an output just to the right of the kink and sells output OZ. It has shifted from AR1 to AR2, and its marginal revenue curve is now MR2. Notice that this marginal revenue is ZC. You can see that at the point of the kink there will be a sudden shift from MR1 to MR2 with a discontinuous drop. What this means is that if our oligopolist went below the kink (which would mean that he dropped his price and that all his competitors followed suit), his marginal revenue would no longer sink slowly, but would suddenly plummet to a new lower level.” HEILBRONER & THUROW, supra note 39, at 180.

One must note that the airline industry faces two distinct demand curves: an inelastic one for the business traveller and an elastic one for the discretionary traveller. Exploring these demand curves and their inherent kinks and discontinuities is best discussed elsewhere.

50. Id. at 181-82.

51. Economists base their work on assumptions; they comprise the backbone of economics. The world contains far too many variables for the human brain to handle. In order to simplify the theories, economists introduce assumptions.

52. Id. at 182.

53. The term “game theory” may sound frivolous, but it has become one of the most important tools for predicting the behavior of oligopolists. Samuelson, supra note 43, at 505. John von Neumann, Hungarian-born mathematician and co-inventor of the United States’ hydrogen bomb, did much of the development of game theory. See JOHN VON NEUMANN & OSKAR MORGENSEN, THE THEORY OF GAMES AND ECONOMIC BEHAVIOR (1953). No one has yet arrived at a single theory to explain all oligopolistic behavior, each model having applications to particular industries. Dennis A. Yao & Susan S. DeSanti, Game Theory and the Legal Analysis of Tacit Collusion, 38 ANTITRUST BULL. 113, 122 n.1 (1993)(hereinafter Yao & DeSanti).

54. Cooperative game theory “allows participants to make binding agreements that restrict their feasible strategies . . . and is not generally used to analyze oligopoly games.” Yao & DeSanti, supra at 122. See generally J.W. FREIDMAN, OLIGOPOLY AND THE THEORY OF GAMES (1977).
that a manager, "in solving his or her own problem, ... solves what he or she understands to be the other managers' strategic problems." The theory assumes every manager adopts the best strategy based on predictions of competitors' best strategies; it is not merely that managers take likely behavior into account. This approach offers insights into how market participants act against each other in an interdependent world.

**Figure 3**

<table>
<thead>
<tr>
<th></th>
<th>$P_2 = 2$</th>
<th>$P_2 = 1$</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>$P_1 = 2$</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A</td>
<td>6</td>
<td>9</td>
</tr>
<tr>
<td>B</td>
<td>-2</td>
<td>0</td>
</tr>
<tr>
<td>C</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>D</td>
<td>0</td>
<td></td>
</tr>
</tbody>
</table>

To illustrate the operation of game theory in a price war, assume two players face the profit-payoff matrix as shown in Figure 3. Orange selects its price strategy by picking a row, Brown by picking a column. The number in the lower left of each cell represents Orange's profit-payoff.

---

55. Yao & DeSanti, supra note 53, at 122.
56. Id. at 123.
57. Samuelson, supra note 39, at 514 n.3. Professor Samuelson offered some examples: "[a] teacher picks quiz questions at random from a book; a watchman makes his rounds at random, not in a discernible pattern. Facing you as a smart rival, I shall work hard to maximize my most vulnerable defense, knowing that you will find out the weakest link in my chain. I bluff at poker, not simply, as some think, to win a pot with a weak hand, but rather to ensure that all players do not drop out when I bet high on a good hand." Id.
58. The following scenarios are single-shot games and do not take into account history (as would repeated games). See Yao & DeSanti, supra note 39, at 122-23. Assume that the players have imperfect information about the other.
off, and the number in the upper right of each cell represents Brown's profit-payoff. The most mutually beneficial position lies in Cell A, where both players make $6 and both charge $2. Each realizes that by undercutting the other's price it can raise profits for itself while driving the other out of business (cells B and C). When they both do this, neither makes any money, and they reach an equilibrium in cell D.59

A different outcome may result in constant sum games60 where the Brown and Orange payoffs are the same amount for each cell. See Figure 4: In (a) the game starts in cell A with each achieving a $1 profit-payoff. Undercutting the player's price and seeking to move to cells B or C changes maximum individual profit to $2. This strategy leaves the players

59. This outcome assumes a lack of collusion (which may fit into American jurisprudence regarding antitrust law). See Samuelson, supra note 39, at 506. Von Neumann developed a theory of collusion involving more than two participants. "Trivial example: Given three sadists, we can assume some two will gang up on the third. More profound example: Given universal suffrage, the majority will legislate in some degree against the minority of plutocrats — who in turn can be expected to use their financial power to try to limit this redistribution." Id. at 507. Those readers with backgrounds in the social sciences may recognize this example as a variation on the prisoners' dilemma. See id.

60. In a constant sum game, the sum of the gains or losses for each player remains the same, regardless of the choices made by each participant. The most familiar type is the zero sum game. Whatever one player wins, the other loses.
at the stable saddlepoint in cell D.  

In (b), again assume a starting point in cell A, the players revolve counterclockwise around the matrix. The difference here lies in the fact that the constant sum now equals zero. Since one player in each cell has an incentive to shift price, they oscillate forever.

2. *The Herk Model*  

The model selected to illustrate behavior in the airline oligopoly comes from a duopoly model created by Leonard F. Herk applying Cournot behavior theories. This model has two distinct stages. In the

---

61. A saddlepoint gives maximum orange numbers in its row and minimum orange (and maximum brown) numbers in its column. *Samuelson, supra* note 39, at 506 n.5.

62. "Von Neumann proves this remarkable theorem about (b); namely, each player should introduce randomized strategies: thus, if each picks [$1 or $2] with equal and independent probabilities, neither can then gain in average payoff by departing from this stable, minimax saddlepoint solution. Using probabilities, each constant sum matrix has a saddlepoint." *Id.*


64. See *Id.* A duopoly market contains only two sellers. It is a specific type of oligopoly, much in the same way a square is a specific type of rectangle. It seems that Herk's conclusions regarding duopolies hold true for the airline oligopoly. Unfortunately, a full discussion of Cournot behavior is beyond the scope of this article.
first, the participants choose their output capacities and incur their production costs.65 In the second, they engage in price competition where each firm sets independent prices but considers the aggregate capacity of the first stage.66 Firms produce up to their specified output capacity without cost, but cannot produce more than this.67 Total sales for the firm equal the lesser of residual demand or capacity.68

Residual demand is a function of a firm’s price and capacity in relation to other firms’ prices and capacities.69 Consumer selections between firms that set different second stage prices affect residual demand.70 Herk theorizes that consumers first attempt to purchase all of the quantity demanded from the lowest cost firm; the unsuccessful consumer then tries to purchase at the higher priced firms until either the producers fulfill all demand or capacity becomes exhausted.71 Under this model, the residual demand of the high-priced firm equals the industry demand minus the low-priced firm’s capacity.72 Such a parallel shift demand specifica-

65. Here, capacity is defined as the number of seats that an airline has available between a certain city pair at a certain time. This model assumes that all participants face the same cost function for the capacity chosen. Herk, supra note 63, at 402.

66. Each firm will attempt to maximize profits. Thus, under Cournot competition, “firm i’s profit from choosing \( k_i \) units of capacity, given \( k_j \) units of capacity at firm \( j \), is \( k_i P^* (k_i + k_j) - c(k_i) \)” where \( k^* \) equals capacity, \( P^*(\cdot) \) equals the market inverse demand function (price), and \( c(\cdot) \) equals the capacity cost function. Id. at 402.

67. Id. at 399. For other economists’ views on capacity constrained markets, see M. J. Osborne and C. Pitchik, Price Competition in a Capacity-Constrained Duopoly, 38 J. Econ. Theory 238 (1986).

68. Herk, supra note 63, at 402.

69. Id. at 399, 402.

70. Id. at 399.

71. Id. at 399-400. This model of consumer behavior assumes that the low-price firm efficiently allocates its capacity between those consumers that value the product more and those that value it less. Id. This assumption lends itself well to the airline industry. With the CRS, an airline may almost perfectly price discriminate consumers.

72. Id. at 400. This efficient rationing results in a “parallel shift” residual demand specification. However, most sellers cannot efficiently discriminate between consumers. Instead, they ration their goods on a first-come, first-serve basis. Id. This rationing approach causes the low-price producer to sell some goods to consumers that would not have demanded goods from the high-priced producer. Residual demand at the high-priced firm then exceeds what it would be under efficient rationing. This template neatly overlays the airline industry. Most consumers consider a seat on an aircraft flying to a specific destination at a specific time fungible. Let’s assume that 225 people want to fly from Denver to Cedar Rapids on Monday at 11:15 in the morning. Seventy-five people would pay $300 dollars for a seat, 75 people would pay $250 for a seat, and 75 people would pay $200 for a seat. Airline A offers 100 seats to Cedar Rapids on Monday at 11:15 for $200 per seat and Airline B offers 100 seats to Cedar Rapids on Monday at 11:15 for $250 per seat. With efficient rationing, the 75 people willing to pay $300 for a seat (those with the highest valued demand units) all successfully purchase seats on Airline A. Of those people willing to pay $250, 25 will get seats on Airline A and the other 50 will fly on Airline B for $50 more. Airline B still has 50 seats to sell but will not sell them. The remaining 75 people who wish to go to Cedar Rapids do not value the trip enough to make the journey. Airline B will fly to Cedar Rapids only half full.
cation leads firms to choose Cournot capacity at the first stage and name Cournot prices at the second.73

Residual demand leads to a limited number of outcomes in the market.74 Certainly, a firm that underprices its rivals sells the lesser of its capacity or market demand. The firm that overprices its rivals sells only that the capacity remaining after those firms with lower prices have sold their capacity.75 If all firms state the same price, they will share market demand. If aggregate capacity exceeds market demand, then each firm has unsold capacity.76 If a firm refuses to overprice the rival firms who name the market clearing price, that firm will also not overprice the rivals setting a higher price.77 Thus, if the residual demand at the high price firm is equal to or less than it would be under a parallel shift specification, the market ends in equilibrium.78

These outcomes assume consumers face no switching costs. That is, there is no cost for a consumer to shift purchases between the products of different firms. Switching costs in the airline industry include frequent flyer programs, brand loyalty and familiarity, and convenience.79 Switch-

---

73. Id. Herk bases this conclusion on another study. See D.M. Kreps and J.A. Scheinkman, Quantity Precommitment and Bertrand Competition Yield Cournot Outcomes, 14 BELL J.ECON. 326 (1983). If participants repeat the second stage sub-game indefinitely using the parallel shift demand specification, the firms will maintain excess capacity and earn profits higher than the Cournot profit rate. Herk, supra note 63, at 400 n.1. Airlines select capacity by choosing what size aircraft to use on a given flight. After they make their selections, they engage in price competition until the flight depar.

74. Id. at 404.

75. The residual demand at the high-price firm does not depend on its own capacity and decreases as its rival's capacity increases. Id.

76. All the airlines set the same price and have excess capacity. The price they set is above the market clearing price, but they still do not make any money because their cost function \( c(\cdot) \) is too large. Since the demand for air travel is basically elastic, any attempt to increase price to increase revenue will fail. In any other industry, participants would, at the next time the first stage rolls around merely decrease capacity. Such behavior is more difficult in the airline industry. If United sets capacity at 100 seats going from Denver to Cedar Rapids, and only 50 people fly there, United has 50 seats of excess capacity. If United knows that only 50 people will fly to Cedar Rapids, it should reduce capacity to 50 in the next first-stage. United may not be able to do that because aircraft have a (more or less) fixed number of seats. If excess capacity is 5 seats, taking those 5 seats out at the next first-stage really doesn't make any difference. Marginal cost for each passenger is minuscule, except for one passenger. In this example, the 101st person who wants to fly to Cedar Rapids creates a huge marginal cost for United: they must get another aircraft fill it with fuel, staff it, feed the passenger, etc. Every passenger after that again has low marginal costs.

77. Herk, supra note 63, at 404.

78. Id. at 407.

79. To illustrate convenience, assume that someone wants to fly from Chicago to Dallas. That person could fly United from O'Hare into Dallas-Fort Worth Airport, or he or she could fly Southwest from Midway into Dallas Love. Both Midway and Dallas Love are located far away from their respective city's center. The added inconvenience of long travel time may discourage a traveller from selecting the lower priced seat. Many travellers, especially those accustomed to
ing costs affect the derivation of a firm's residual demand.\textsuperscript{80}

To see how these costs affect residual demand, assume the second stage subgame consists of a number of trading periods.\textsuperscript{81} Essentially, in every period each firm conducts an all-or-nothing lottery for its product. Absent switching costs, consumers that do not win the lottery and do not purchase the product may, without cost, try again at the high-priced firms. However, with switching costs, some consumers do not attempt to purchase from a high-priced firm where the cost of the product plus the switching cost exceeds the amount that the consumer would pay.\textsuperscript{82} High switching costs for all or most consumers result in stable consumer allegiances to individual firms.\textsuperscript{83}

D. MONOPSONY THEORY\textsuperscript{84}

A monopsony occurs when only one buyer exists in a particular market.\textsuperscript{85} By exercising monopsony power, the buyer has the ability to affect the offering prices of sellers.\textsuperscript{86} This is not to say that the monopsonist has the power to set the price at which it may buy the goods, but rather that

\textsuperscript{80} Herk, supra note 63, at 401.
\textsuperscript{81} That is, assume that the firms have established their capacity and engage only in price competition. \textit{Id.}
\textsuperscript{82} Take another look at the person wishing to go from Chicago to Dallas. Assume that the would-be traveller has many frequent flyer miles with United lives near O'Hare but far away from Midway, and desires to go to a place near Dallas-Fort Worth but distant from Dallas Love. Even though a ticket from Chicago to Dallas on Southwest may be hundreds of dollars cheaper than a comparable flight on United, the added costs to the particular traveller of flying Southwest may outweigh the dollar benefits.
\textsuperscript{83} Herk, supra note 63, at 401. Remember that the second stage can consist of many different trading periods. Herk assumed that switching costs would be sufficiently high to preclude consumers from switching producers during the second stage. \textit{Id.} at 408. This assumption does not mesh perfectly with the airline industry. Business travellers tend to have very inelastic demand curves. If they can not get the lowest fare, they will usually try again until they get a seat on a flight going where they want at a time they want. Their switching costs are low. The discretionary traveller, if unable to secure the lowest fare, may not try to obtain another flight on a higher priced carrier. In effect, the discretionary traveller is locked out of the second-stage trading periods. Only when the first-stage comes around again can they reenter the market.
\textsuperscript{84} While the airline industry seems to more closely represent an oligopsony, monopsony theory is discussed in this section because monopsonies more easily lend themselves to graphic representation. Further, the results may be generalized to an oligopoly.
\textsuperscript{85} While the buyer can be at any stage of production, for the purposes of this paper, the buyer purchases intermediate goods to use for the production of a finished product. Jonathan M. Jacobson and Gary J. Dorman, \textit{Joint Purchasing, Monopsony and Antitrust}, 36 ANITRUST BULL. 1 (1991)(hereinafter Jacobson & Dorman). The tobacco market regulation and the National Collegiate Athletic Association's (NCAA) regulation of athletic competition and scholarships during the early part of this century are examples of oligopsony and monopsony, respectively.
\textsuperscript{86} \textit{Id.} at 5.
the amount of the goods the monopsonist purchases affects the price the buyer pays.\textsuperscript{87}

Ignoring the effect of purchases on the prices paid for the product, the monopsonist buys at the point the supply and demand curves intersect.\textsuperscript{88} In Figure 5, those amounts are shown as Q1 and P1. This intersection represents the point of maximum social welfare, or the sum of the consumer and producer surpluses.\textsuperscript{89} Producer surplus is the entire area above the supply curve and below P1; consumer surplus is the area under the demand curve and above P1.\textsuperscript{90}

The monopsonist likely considers the effect of its purchases on the price of the input. Through this consideration, it knows that its profit maximization point does not lie at the intersection of the supply and demand curves. Instead, it buys where the total increase in costs resulting from the purchase of at least one unit of the product\textsuperscript{91} intersects the demand curve.

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{figure5.png}
\caption{Figure 5}
\end{figure}

\begin{itemize}
\item \textsuperscript{87} Assume that the supply curve for the goods slopes upward. If the monopsonist restricts purchases, price paid goes down; if the monopsonist expands purchases, price goes up. \textit{Id.} The monopsonist may be able to push the sellers into an all-or-none supply case.
\item \textsuperscript{88} Roger D. Blair and Jeffrey L. Harrison, \textit{Antitrust Policy and Monopsony}, 76 Cornell L. Rev 297, 301 (1991)(hereinafter Blair & Harrison, \textit{Antitrust}). This outcome results from a perfectly competitive market. \textit{See also} Jacobson & Dorman, \textit{supra} note 85, at 6.
\item \textsuperscript{89} “Consumer surplus represents the difference between what consumers are willing to pay for a good and what they have to pay in the market. Producer surplus analogously represents the difference between the price that producers are willing to accept and what they receive in the market.” (emphasis in original) Blair & Harrison, \textit{Antitrust}, \textit{supra} note 88, at 301-02 n.37.
\item \textsuperscript{90} \textit{Id.} at 302.
\item \textsuperscript{91} This additional cost is referred to as the marginal factor cost (MFC). \textit{Id.} at 303. This amount is more than just the amount paid for the additional unit. If the input were labor, for example, the hirer (monopsonist) could not pay the higher wage only to the additional worker, but would have to pay it to all its workers. Arbitrage would destroy any attempt at wage discrimination by forcing all other employees to quit and then be rehired at the higher wage. \textit{See}
\end{itemize}
mand curve. The monopsonist now pays $P_2$ and buys $Q_2$ of the good. Due to private profit maximization, the monopsonist employs too few resources at a price higher than what is socially optimal.\textsuperscript{92} The shaded area represents the loss of social welfare.\textsuperscript{93}

**Figure 6**

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{figure6.png}
\caption{Demand and Supply Curves}
\end{figure}

For a firm to exert monopsony power, two conditions, in addition to the upward sloping supply curve, must exist in the market:\textsuperscript{94} 1) the buyer or group of buyers represent a substantial part of the purchases in the market,\textsuperscript{95} and 2) there are some barriers to market entry. The first condition indicates sufficiently few buyers exist such that each buyer is not a price-taker. If a buyer can not affect the price of the good, then the monopsony and competitive outcomes are equal.\textsuperscript{96} See Figure 6. In the sec-

---


\textsuperscript{92} The monopsonist forgoes potential beneficial trades that would occur between $Q_2$ and $Q_1$. Blair & Harrison, *Antitrust*, supra note 88, at 303.

\textsuperscript{93} One may be tempted to assume that because the monopsonist pays lower prices for its inputs, it will pass those savings onto the consumer in the form of lower prices for the finished output. This assumption does not hold because the monopsonist will price where marginal cost equals demand, and marginal cost does not change. Id. at 303-04. The Sixth Circuit was guilty of this mistake when it concluded that a movie theater monopsony would result in lower ticket prices for consumers. See *Balmoral Cinema v. Allied Artists Pictures*, 885 F.2d 313, 316 (6th Cir. 1985).

\textsuperscript{94} Jacobson & Dorman, *supra* note 85, at 10. Nothing stops a monopsonist from exerting power in market that has a downward sloping supply curve. To lower price, the monopsonist merely buys more. This paper does assumes this situation away since the downward sloping supply curve exists only in the short-run in excess capacity cases or in the long-run when significant economies of scale result in a bilateral monopoly. Neither of these cases present real world problems. Id. at 10 n.16. This paper examines the airline industry as a bilateral oligopoly, but economies of scale do not exist to an extent that would lead to a downward sloping supply curve.

\textsuperscript{95} This condition is easily satisfied for only one buyer.

\textsuperscript{96} Jacobson & Dorman, *supra* note 89, at 10.
ond condition, difficult entry precludes other firms from entering the market to reap monopsony profits; a flood of new entrants eventually brings the market to competitive equilibrium. 97

Consider Blair and Harrison’s example of a textile mill in North Carolina. 98 The mill has only a small portion of the textile market, but retains monopsony power in the local labor market. 99 The mill produces textiles with only the labor and machinery given the following production function: 100

\[ T = T(L, M) \]

where:

- \( T \) = the amount of textiles produced;
- \( L \) = the amount of labor employed; and
- \( M \) = the amount of machinery used. 101

Since the mill has monopsony power in the labor market, the wage paid (\( w \)) relates to the amount of labor employed:

\[ w = w(L). \]

The firm hires an amount of labor to maximize profits (\( \pi \)) : 102

\[ \pi = P \cdot T - w(L)L - p \cdot M \]

where:

- \( P \) = the price of textiles;
- \( M \) = the fixed amount of machinery; and
- \( p \) = the price of machinery.

The firm continues to add labor until adding one more unit does not affect profit. 103 The upward slope of the supply curve demands that the firm pay a higher wage to that worker and to every other worker. The added cost 104 to the firm equals the wage of the new employee (\( w(L) \)).

---

97. *Id.* at 10-11.
101. The firm fixes the number and configuration of machines in the short run. This simplifies the example, but does generalize to the long run. *Id.* at 137. This assumption fits well into the proposition here the airline oligopoly is subject to capacity constrained games.
102. *Id.*
103. \( dp/dL = P \cdot dT/dL - (w(L) + L \cdot dw(L)/dl) = 0 \). The change in output given a one unit change in labor (\( dU/dL \)) is known as the marginal product of labor (MPL). Multiplying the output price (\( P \)) times the MPL gives the value of the marginal product of labor (VMPL). *Id.* at 137-38.
104. This added cost is known as the marginal factor cost of labor (MFCL).
plus the increase in compensation to all the other employees. Therefore, the firm maximizes its profits when the cost of adding one more unit of labor (the MFCL) equals the added revenue that the change will bring (the VMPL).

The value of the marginal factor cost curve, lying above the supply curve, exceeds that of the supply curve for all values. See Figure 6.

The monopsonist employs the number of units of labor and pays the wage associated with the supply curve point. The firm employs Q2 and pays w2. The monopsonist’s profit maximization is a cost to the social welfare by employing insufficient labor at an insufficient wage.

1. The All-or-None Approach

To induce lower prices, the monopsonist must usually reduce purchases. The monopsonist prefers to purchase the same amount and pay a lower price. To accomplish this, the monopsonist forces its suppliers to the all-or-none supply curve. Whereas the normal supply curve provides the amount that supplied at a fixed price, the all-or-none supply curve provides the maximum amount supplied at a fixed price when the alternative is providing nothing at all.

Given the supply curve shown, see Figure 7, consider a group of firms that produces widgets. At equilibrium, the firms produce Q1 and sell the widgets at P1. If the buyers collude and exert their collective monopsony power, they probably buy less and depress the price of widgets. The buyers might also press the suppliers off the traditional supply curve to the all-or-none supply curve. To do this, the buyers threaten not to

---

105. The additional cost of higher wages can be represented as:

\[ L \frac{dL}{dL} \]

Thus,

\[ MFCL = w(L) + L \frac{dL}{dL} \]

Since

\[ VMPL = P \frac{dP}{dL} \]

the profit maximization equation simplifies to:

\[ VMPL - MFCL = 0 \]

106. Blair & Harrison, Monopsony, supra note 91, at 138. By differentiating the VMPL over the range of possible number of units of labor employed (cad166)n\( \frac{dP}{dL} \)) provides the demand curve.

107. Id. at 140.


109. Id.

110. Id. at 316-17.

111. See Id. at 317-20, for a discussion of all-or-none supply cases.

112. The all-or-nothing supply curve lies below the supply curve and shows the minimum price that the sellers will accept to provide the given amount of widgets. Id. at 317 n.109 (citing P. Richard G. Layard & Alan A. Walters, Microeconomic Theory 244 (1978)).
buy at all unless given their desired price.113

The all-or-none scenario affects only the distribution of wealth in the market. Consumers reap the benefits paid for solely by the producers.114 The airlines find this type of monopsony power the most attractive but very expensive. To successfully force its members to the all-or-none supply curve,115 airlines must break the unions they face.116 This type of action helped put Continental Airlines into Chapter 11 reorganization twice.117

The industry finds the all-or-none option attractive because it does not lead to short run output decreases. Unlike the traditional model of oligopsony, where input price falls only when there is a decrease in}

---

113. The sellers must perceive as credible the buyers' threat to purchase nothing. If many sellers exist in the market, the threat carries more force since the buyers could easily go elsewhere. The threat loses its impact if only one seller exists or many sellers form an organization. Blair & Harrison, Antitrust, supra note 88, at 317 n.112. In the labor market, the airline industry may have a difficult time making credible threats. Many airline workers belong to unions, and those who do not also receive some unionization benefits.

114. The noncollusive consumer surplus is the area APB1, and the producer surplus is CBP1. After imposing all-or-none conditions upon its suppliers, the collusive monopsonists increase their consumer surplus by the rectangular area P1BEF2. This comes at the expense of producers, whose producer surplus has been reduced by the same area. [T]he area above the supply curve and below P2 (i.e. area CFP2) is equal to area EFB, and therefore, producer surplus is zero. Blair & Harrison, Antitrust, supra note 88, at 318.

115. Recall that threats to purchase nothing have little effect when made to a group of organized sellers.

116. The pilots, machinists, flight attendants and ramp rats all have unions representing them.

117. Frank Lorenzo's successful attempt to break the unions was not the only reason Continental went under two times. Mr. Lorenzo brought a huge amount of debt to the company in his leveraged buyout and liquidated many of its assets to finance the buyout.
monopsonist purchases, the all-or-none scenario allows the airlines to continue the same production level at a lower cost.

The harm from the all-or-none option emerges in the long term.118 Labor producers leave the market when their wages continually remain below average total costs.119 The long term results harm the monopsonist through the exit of suppliers; the exodus ceases to serve the monopsonist's interests. As the number of suppliers falls, bargaining power shifts to those who remain.120 The industry must discount to present value all benefits and costs of this process. Industry costs incurred in the distant future ought to be discounted more heavily than the immediate benefits.121 Though such analysis exceeds the scope of this discussion, the last hope of survival for the airlines may lie in just such an approach.

IV. CONCLUSION

Following deregulation, the airline industry became increasingly concentrated. Proponents of deregulation did not believe that this would happen as there were no economies of scale in the industry.122 Without falling costs, however, there is no incentive to grow larger and create a monopoly (or oligopoly).123 The industry concentrated into a few remaining firms, but has failed to earn oligopoly rents due to the destructive price competition in which it engages. To survive, the industry must use its oligopsony power and drive input prices down.

A joint oligopoly/oligopsony needs to exert power in only one market where it has power.124 Firms may use their power to either increase price in the output market or decrease price in the input market. Thus, collusion on either of the two prices would be sufficient to set the single rate of [output] production and [input] purchase. With one price setting the rate of activity, the second price gravitates without collusion to the level required to simply clear the other market. Thus, oligopoly power and oligopsony power are unified in setting the single rate of

118. John Maynard Keynes once said, “In the long run we are all dead.” The same may be true for the airline industry.
120. Id. at 319. Such an outcome could eventually lead to a bilateral monopoly. Bilateral monopolies present a host of additional issues and will not be addressed in this paper. See generally Richard Friedman, Antitrust Analysis and Bilateral Monopoly, 1986 Wisc. L. Rev. 873 (1986).
123. Monopolies and oligopolies require falling costs over a large range of the demand curve before they can successfully exist. SAMUELSON, supra note 39, at 484.
If airlines collude\textsuperscript{126} to exert monopsony power in the input markets, especially labor and travel agent commissions, costs are dramatically reduced and prices are brought into line. Such actions would undoubtedly arouse the interest of the either the Justice Department or the Federal Trade Commission antitrust watchdogs.

From the infancy of the industry as a mail carrier, to the years of regulation, to the unfettered market of today, the airlines have undergone many changes. Unfortunately, not all of these changes have brought prosperity to U.S. carriers. Many are near the brink of disaster and desperately need assistance.

While the industry exhibits traits of both oligopoly and monopsony, those factors have not saved it. Only by exerting the market power it wields, especially in the labor and travel agent commission markets, can the U.S. airlines recover from the tailspin in which they currently find themselves. If the industry fails, the U.S. economy and every American citizen will be poorer for it. The industry must determine how best to save itself. Should the industry be permitted to exercise its market power, free of antitrust liability and essentially practicing self-regulation, or shall the specter of federal regulation be revived? Such a dilemma is left to politicians to decide, but neither government regulation nor deregulation have produced the desired results. Maybe it is time to try again, before it is too late.

V. EPILOGUE

As the editors of this journal prepared this article for publication, the airline industry took a bold first step towards utilizing the oligopsony power it wields over an industry providing an essential factor input: travel agencies. On February 10, 1995, Delta Airlines announced its decision to cap the commission it pays to travel agents at $50 per round ticket and $25 per one-way ticket.\textsuperscript{127} By February 13, all the other major U.S. carriers had announced they would follow suit.\textsuperscript{128} This commission cap plan could save the industry approximately $400 million.\textsuperscript{129}

In following Delta's lead, the other carriers have neutralized the

\textsuperscript{125} Id.

\textsuperscript{126} Any collusion between competitors raises antitrust issues, due to space limitations this paper does not address them. See generally Roger D. Blair and Jeffrey L. Harrison, \textit{Cooperative Buying, Monopsony Power, and Antitrust Policy}, 86 Nw. U. L. Rev. 331 (1992).


\textsuperscript{128} Prior to the announcement, the industry wide practice was to pay 10\% of the ticket price as commission; that scheme will remain in effect for tickets costing less than $500. Id.

\textsuperscript{129} Id.
agents ability to shift bookings away from Delta.\textsuperscript{130} The fact that agents do not have such power suggests that the airline industry truly is oligopolistic.\textsuperscript{131} Had the market for travel agents' services been competitive, no purchaser of travel agents' services could effect the price the market sets. In a competitive market, the purchasers buy all they can use at the market price, and could not use any more even if they wished to, thereby eliminating any motivation to bid up the price. Likewise, the suppliers sell all they produce, and will not sell anything to a purchaser offering less than market price. Only when perfect competition does not exist can the participants have the power to effect price. When sellers can effect the price at which consumers buy, an oligopoly exists; when buyers can effect the price at which producers sell, an oligopsony exists.

By applying their oligopsony power, the airlines are pushing travel agents into the all-or-nothing supply curve. Unfortunately, one travel agent's "all" price is another agent's "nothing" price. Many smaller agencies have announced they will close their doors under such a commission plan announced by the airline industry.\textsuperscript{132}

The existence of the airline oligopsony and the use of such power could very well allow industry accountants to throw away their red pens. In the words of airline consultant James O'Donnell, "[a]ll the other airlines should be sending Delta a very big thank you note."\textsuperscript{133} Consumers may not have the same sentiments. Many travel agents, especially those facing extinction, as well as larger firms including American Express Co., plan to let consumers make up the lost commissions by charging use fees, resulting in higher ticket prices.\textsuperscript{134} However, this will be a small price to pay for a healthy, and solvent, airline industry, and much less painful than re-regulation.

\textsuperscript{130} Id.
\textsuperscript{131} Were Delta to stand alone on this move, travel agents would likely skip over Delta listings on their CRS screens.
\textsuperscript{133} Hirsh, supra note 127.
\textsuperscript{134} Id.
Book Notes


Wendy Katherine von Wald*

To this writer's knowledge, no treatise like THE LAW OF COMMERCIAL TRUCKING: DAMAGES TO PERSONS AND PROPERTY has ever been published. Unlike many other treatises, this text discusses areas of tort, contract, warranty, repairs, damages, insurance and federal regulation in single volume. Rather than focusing on any one legal area, the treatise provides a comprehensive overview of this "long-overlooked area of law".1 Nissenberg contends that while the industry may not have received the scholarly attention it deserves in the past, its size and importance to the national economy demands it receive attention now.2

Nissenberg is no stranger to the trucking industry. The author graduated from Brown University and the University of Miami Law School and has since established a substantial trucking law practice in the Southern California area. He has authored many columns for various national trucking magazines. Nissenberg also founded the La Jolla Bar Association and served as its president from 1984-1986.

The treatise is divided into seven parts. Parts I through III are discuss the Uniform Commercial Code (U.C.C.); relating to truck acquisition, warranties, and maintenance and repair. Part IV completes a thorough discussion of negligence, strict products liability, employer's liability and governmental liability. Part V discusses insurance issues and their implications for drivers, owners and employers, and Part VI provides an overview of damage issues for interstate and intrastate cargo. The author concludes in Part VII with an examination of the liabilities involved in carrying abnormally hazardous materials, including discussion of applicable federal regulations. The treatise leads the researcher

---

* Wendy Katherine von Wald graduated from Denison University in 1990 with a B.A. in English. Ms. von Wald is an Associate Articles Editor for the TRANSPORTATION LAW JOURNAL and expects to graduate in May of 1996.

2. Id. at v.
through each area of law; providing examples and citations to recent cases.

Part I addresses the purchase and sale of commercial trucks and trailers, specifically the rights and obligations of each party. Chapters one and two of this part cover the sections of Article 2 of the Uniform Commercial Code dealing with most every aspect of the acquisition of a truck or trailer. Framed by a discussion of the applicable sections of the Code, the reader is introduced to contract formation, indefiniteness, a buyer's right to reject, seasonable notice, revocation of acceptance, and risk of loss, as each applies to commercial trucking. While not a complete guide to the Code, the author does an excellent job of giving the reader a clearer definition of terms such as "seasonable notice" and "reasonable time," as commonly understood within the industry. The chapter concludes with a brief introduction to damages.

Chapter two addresses damage issues arising out of the purchase of a nonconforming truck or trailer. Tracking the developing law in this area, Nissenberg presents the reader with insight into the courts' interpretation of the Code specific to this industry, as well as the code's effects on these transactions. Under the applicable sections of Article 2, the chapter outlines the appropriate standards for: rejection of a nonconforming vehicle, revocation of acceptance, the buyer's obligations under the Code to notify the seller, and the seller's right to cure and damages. This chapter concludes by addressing the issue of redhibitory actions, their elements and obligations placed on the buyer, and damages in the case of a successful action.

Given the importance of secured transactions to the industry, Nissenberg devotes all of chapter three to discussing Article 9 of the U.C.C., Secured Transactions. Nissenberg leads the reader through the Article, illustrating the importance of the obligations of each party, and the significant power held by the secured party. The secured party's ability to repossess without action of law so long as there is no breach of peace,3 that party's responsibility for third party repossession's actions, conversion of property, and the debtor's rights responding to these acts are presented clearly and concisely. As disputes over secured transactions in the trucking industry have generated over 30 years of case law,4 Nissenberg devotes appropriate attention to the issue.

Warranties are the subject of Part II which outlines the various protection afforded under the U.C.C., as well as the Magnuson-Moss Warranty Federal Trade Commission Improvement Act.5 Nissenberg defines

3. Id. at 62-64.
4. Id. at 58.
the Code sections within the context of the commercial trucking industry, and provides specific examples. The chapter concludes by addressing warranty damages.

Part III focuses the reader on issues relating to the maintenance and repair of commercial trucks and trailers. As with any other industry relying on its ability to transport cargo, the trucker’s livelihood is often dependent on the maintenance of his truck. Individuals who repair commercial trucks also present relevant issues to this area of law. Nissenberg offers numerous examples of cases where conflicts arose between owner and mechanic, and finds most are resolved through the application of bailment, contract or negligence law, and often include the interpretation of statutory lien laws.6

Tort law is a major concern for the trucking industry. As such, Nissenberg devotes Part IV of the treatise to an examination of negligence issues. As the size of commercial trucks creates greater potential for accidental injuries and damage, truckers, employers, and truck owners face uncommon liability situations.7 Accordingly, courts are more likely to arrive at an inference of negligence when an accident involves a commercial truck.8 Whether the concern is an employer’s liability for its employee’s actions, or an individual’s failure to act with reasonable care on his own behalf, the area of negligence has resulted in a substantial body of law for commercial trucking. The strength of the treatise continues in Part IV as Nissenberg draws broad concepts of negligence down to specific situations and explanations.

Nissenberg appropriately follows his section on negligence with one devoted to insurance issues. Part V focuses on providing the practitioner with a clearer view of inclusion and exclusion clauses, the construction of “use” clauses, loading and unloading clauses, and “arising out of” clauses. As these terms often determine whether coverage will be afforded an injured party involved with a commercial trucker, their importance is obvious. Courts use many tests to define these terms, and Nissenberg directs considerable attention to these definitions and their application within the courts.

Part VI provides a comprehensive overview of the Carmack Amendment to the Interstate Commerce Act9 and an examination of carrier liability where transported property is damaged or lost. The chapter answers questions regarding the obligation of the carrier to establish proof of delivery, provide sufficiently safe equipment, and duty to prove a lack of negligence.

6. Nissenberg, supra note 1, at 172.
7. Id. at 208.
8. Id.
As damage from a hazardous substance spill or the explosion of a flammable material is often catastrophic, property loss and personal injury issues are greater than with the transportation of standard cargo. This reality provides the basis for the text's final pages. While Nissenberg admits this part does not provide an exhaustive look at the federal legislation regulating the transportation of hazardous substances, it does provide an overview of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA)10, and the Hazardous Materials Transportation Act11. Refusing to limit his coverage to federal regulation, Nissenberg also provides the reader with discussion centering around what constitutes an “abnormally dangerous activity”. Providing examples where carriers were held liable due to injury occurring during repair to the truck, or during loading and unloading of a hazardous material, Nissenberg is careful to point out the split in the courts and specifics leading to liability.

The Law of Commercial Trucking: Damages to Persons and Property succeeds in presenting a general overview of the many areas of law affecting this industry. Demonstrating the manner in which the Uniform Commercial Code, various federal regulations and areas of tort law apply specifically to this industry, Nissenberg provides the researcher with a single volume text addressing the complex and emerging area of commercial trucking law.

10. 42 U.S.C. §§ 9601 et seq.

Christopher R. Eng*

The Transportation Safety Law Practice Manual, is a two volume set fully updated in October of 1994. The manual addresses most major issues in surface transportation law from tort liability of common carriers, to federal regulations concerning hazardous substance transport. The author, William E. Kenworthy, is a member of Rea, Cross & Auchincloss in Washington D.C. and specializes in transportation law. In addition, Mr. Kenworthy served as counsel for a major common carrier and a motor carrier rate bureau. Drawing from his experiences, the author has compiled an extensive look at the major issues involved in ground transportation safety law.

The manual is a comprehensive compilation of law regarding major ground transportation carriers. The reader can easily browse through either volume and quickly pinpoint a topic. From beginning to end the manual provides a clear, concise road map through transportation safety law.

Volume I focuses on motor carriers and the railroad industry, emphasizing federal and state regulations. Each chapter gives the reader an overview of the law and, in certain areas, advice on how to proceed should litigation arise. The volume begins by comparing the common law approach to transportation law with affirmative regulation. With regard to common law, the manual only covers the areas of common carriers and personal injury, however, the coverage is extensive. Chapter Two addresses sources of indemnity and contribution. The reader is reminded that as plaintiff or defendant, highway agencies may be liable for accidents. In addition, an agencies' duty to the public is described in areas ranging from highway design to notice of defective conditions.

Consideration of motor carrier safety begins in chapter Four. The chapter provides a history of motor carrier regulation from the Motor Carrier Act of 1935, to the 1966 Department of Transportation Act, to

---

* Chris Eng is a graduate of Augustana College, South Dakota. He is currently a staff member of the Transportation Law Journal and expects to graduate from the University of Denver College of Law in May 1996.
the Motor Carrier Safety Act of 1990. Chapter Eight addresses enforcement of motor carrier regulations by the Department of Transportation (DOT). The chapter highlights the DOT's power in areas including civil enforcement remedies, criminal penalties, and enforcement proceedings.

Railroad safety is examined in much the same way as motor carrier safety beginning with chapter Five's assessment of Federal Railroad Regulations. Besides covering a wide variety of federal regulations such as, the Safety Appliance Acts, Hours of Service Acts, and the Federal Railroad Safety Act, attention is also paid to the effects of regulations on states. Chapter Nine furnishes an overview of the DOT's Rail Enforcement Powers including emergency orders, injunctive relief, criminal penalties, and rule making authority.

A concern for public safety runs throughout the manual. Chapters Ten and Eleven touch on alcohol and drug policies and transportation of hazardous materials respectively. Mr. Kenworthy examines DOT drug and alcohol testing procedures, and the possible criminal sanctions accompanying failed tests. In chapter Eleven, the regulation of transporting hazardous materials is characterized as a high priority. Focus is given to the Hazardous Materials Transportation Act and other applicable laws including: the Federal Water Pollution Control Act, the Occupational Safety and Health Act, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Volume I also focuses on the Commerce Clause and its authoritative powers, the DOT's historical background, motor carrier safety fitness ratings, transportation equipment and the leasing of such, employee qualifications for motor carriers and railroads, and general safety regulations. Each chapter contains a brief table of contents enabling the reader to quickly find specific topics.

While Volume I offers the reader a textual format with historical contexts, Volume II provides charts, forms, and statutes to guide the practitioner. In conjunction with Volume I, Volume II examines motor carrier and railroad related areas. This second volume offers enough forms, charts, and statutes to give the reader a sense of what action to take in various situations. Each respective form or chart is a reproduction of those used by practitioners or by agencies when filing accident, inspection, or other reports. As with Volume I, Volume II allows the reader to quickly locate a specific section and offers clear and concise language about given topics.

Two of the appendices in this volume discuss discovery procedures for interrogatories and requests for production of documents for motor carrier and railroad litigation. Other appendices cover various topics such as: accident investigation procedures of the National Transportation Safety Board, worker's compensation, hazardous and toxic materials, the
policy statement of the Federal Railroad Administration, accident reporting forms, a checklist for compliance with federal motor carrier safety regulations, safety regulations, fine schedules, truck sizes for motor carriers, and the handling and storage of different types of materials.

The **Transportation Safety Law Practice Manual** covers major ground transportation issues except for the areas of tort liability for freight loss and damage. Mr. Kenworthy, nevertheless, informs the reader of the absence and offers two texts pertaining to freight loss and damage claims in footnotes. Unfortunately, the manual does leave a major transportation area uncovered—aviation. By not including aviation law in the manual Kenworthy can be accused of using a slightly misleading title. A more appropriate title might have been, the **GROUND TRANSPORTATION SAFETY LAW PRACTICE MANUAL**. The exclusion of aviation law does not, however, subtract from the excellent coverage of motor carriers and railroads. This two volume set would be a practical compliment to any business or law practice facing ground transportation law issues.
ERRATUM

In Michael Libonati, The Law of Intergovernmental Relations: IVHS Opportunities and Constraints, 22 Transp. L.J. 225, the following information should appear at the bottom of the page:

This paper was prepared under FHWA Contract DTFH61-93-C-00087. The views expressed in this paper do not necessarily reflect the views of the U.S. Department of Transportation.
# TABLE OF CASES

## A

<table>
<thead>
<tr>
<th>Case</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A Aerial Advertising Banners, Inc. v. City of Boulder</td>
<td>285-287</td>
</tr>
<tr>
<td>Ackerman v. Port of Seattle</td>
<td>258</td>
</tr>
<tr>
<td>Adkins v. Seaboard System R.R. Co.</td>
<td>189</td>
</tr>
<tr>
<td>Aerolíneas Argentinas v. United States</td>
<td>496, 500, 502</td>
</tr>
<tr>
<td>Air Transp. Ass'n v. City of Los Angeles</td>
<td>304</td>
</tr>
<tr>
<td>Air Transp. Ass'n v. Crotti</td>
<td>265</td>
</tr>
<tr>
<td>Airline Pilots Ass't v. Dep't of Transp.</td>
<td>401</td>
</tr>
<tr>
<td>Airline Pilots Ass'n v. Quesada</td>
<td>267</td>
</tr>
<tr>
<td>Air Transp. Ass'n of Am. v. McNary</td>
<td>496, 499</td>
</tr>
<tr>
<td>Alaska Airlines, Inc. v. Brock</td>
<td>400</td>
</tr>
<tr>
<td>Alaska Airlines, Inc. v. City of Long Beach</td>
<td>283-284</td>
</tr>
<tr>
<td>Albert v. Lavin</td>
<td>453</td>
</tr>
<tr>
<td>Allegheny Airlines, Inc. v. Village of Cedarhurst</td>
<td>261-262</td>
</tr>
<tr>
<td>Aloha Airlines v. Director of Taxation of Hawaii</td>
<td>294</td>
</tr>
<tr>
<td>Amendola v. Kansas City Southern Ry. Co.</td>
<td>189</td>
</tr>
<tr>
<td>American Airlines, Inc. v. North</td>
<td>91</td>
</tr>
<tr>
<td>American Airlines, Inc. v. Town of Hempstead</td>
<td>262</td>
</tr>
<tr>
<td>American Maritime Ass'n v. Blumenthal</td>
<td>405</td>
</tr>
<tr>
<td>American Radio Ass'n v. Mobile Steamship Ass'n, Inc.</td>
<td>427</td>
</tr>
<tr>
<td>Appeal of Radnor Township Sch. Auth.</td>
<td>238</td>
</tr>
<tr>
<td>Argenebright Sec. v. Ceskoslovenske Aeroline</td>
<td>496, 500, 503, 504</td>
</tr>
<tr>
<td>Armour v. Wantlock</td>
<td>417</td>
</tr>
<tr>
<td>Association of Flight Attendants v. Delta Airlines</td>
<td>117, 118</td>
</tr>
<tr>
<td>Asson v. City of Burley</td>
<td>243</td>
</tr>
<tr>
<td>Atchison, Topeka &amp; Santa Fe Ry. Co. v. Buell</td>
<td>187, 188, 192, 193</td>
</tr>
<tr>
<td>Atchison, Topeka &amp; Santa Fe Ry. Co. v. Lennen</td>
<td>380</td>
</tr>
<tr>
<td>Atkinson v. Bernard, Inc.</td>
<td>262</td>
</tr>
<tr>
<td>Atlas Corp. v. United States</td>
<td>502</td>
</tr>
<tr>
<td>Autolog v. Regan</td>
<td>413</td>
</tr>
</tbody>
</table>

## B

<table>
<thead>
<tr>
<th>Case</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Balmoral Cinema v. Allied Artists Pictures</td>
<td>525</td>
</tr>
<tr>
<td>Barrett v. Chevron</td>
<td>434</td>
</tr>
<tr>
<td>Bartholomew v. Universal Tankships, Inc.</td>
<td>438-40</td>
</tr>
<tr>
<td>Bertrand v. International Mooring &amp; Marine, Inc.</td>
<td>442</td>
</tr>
<tr>
<td>Blue Sky Entertainment, Inc. v. Town of Gardiner</td>
<td>262</td>
</tr>
<tr>
<td>Bluestein v. Skinner</td>
<td>128, 216, 217</td>
</tr>
<tr>
<td>Bluto v. Department of Employment Security</td>
<td>27, 28</td>
</tr>
<tr>
<td>Board of Supervisors v. Massey</td>
<td>240</td>
</tr>
<tr>
<td>Board of Supervisors v. Massy</td>
<td>240</td>
</tr>
<tr>
<td>Bowdry v. United Airlines, Inc.</td>
<td>402</td>
</tr>
<tr>
<td>British Airways Bd. v. Port Auth.</td>
<td>265</td>
</tr>
<tr>
<td>Brooks v. Hess Oil V.I. Corp.</td>
<td>432</td>
</tr>
<tr>
<td>Brunwasser v. Trans World Airlines, Inc.</td>
<td>92, 93</td>
</tr>
<tr>
<td>Buenecore v. Trans World Airlines, Inc.</td>
<td>482</td>
</tr>
<tr>
<td>Bullard v. Central Valley Ry.</td>
<td>188</td>
</tr>
<tr>
<td>Burch v. Amsterdam Corp.</td>
<td>56</td>
</tr>
<tr>
<td>Burlington N.R.R. v. Cosby</td>
<td>374-76</td>
</tr>
<tr>
<td>Burns v. Penn Central R.R.</td>
<td>193</td>
</tr>
<tr>
<td>Buzynski v. Luckenbach Steamship Co.</td>
<td>434</td>
</tr>
</tbody>
</table>

## C

<table>
<thead>
<tr>
<th>Case</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>California v. ARC America Corp.</td>
<td>101</td>
</tr>
<tr>
<td>California Fed. Sav. &amp; Loan Ass'n v. City of Los Angeles</td>
<td>233</td>
</tr>
<tr>
<td>California v. Ciraolo</td>
<td>219, 220</td>
</tr>
<tr>
<td>Carpet Remnant Warehouse Inc. v. Department of Labor N.J.</td>
<td>26</td>
</tr>
<tr>
<td>Central Am. S.S. Agency, Inc.</td>
<td>437</td>
</tr>
<tr>
<td>Chae Chan Ping v. United States</td>
<td>497</td>
</tr>
<tr>
<td>City and County of Denver v. Continental Air Lines and United Air Lines</td>
<td>298-299</td>
</tr>
<tr>
<td>City of Burbank v. Lockheed Air Terminal</td>
<td>262, 264, 282-283, 285-286</td>
</tr>
<tr>
<td>City of Cleveland v. City of Shaker Heights</td>
<td>232</td>
</tr>
<tr>
<td>City of Miami Beach v. Fleetwood Hotel, Inc.</td>
<td>231</td>
</tr>
<tr>
<td>City of Romulus v. County of Wayne</td>
<td>270</td>
</tr>
<tr>
<td>City of Oakland v. Williams</td>
<td>244</td>
</tr>
<tr>
<td>Coats v. Penrod Drilling Corp.</td>
<td>438</td>
</tr>
<tr>
<td>Cogswell v. Sherman County</td>
<td>243</td>
</tr>
<tr>
<td>Commercial Motor Freight v. Elbright</td>
<td>26</td>
</tr>
<tr>
<td>Consolidated Rail Corp. v. Gottshall</td>
<td>183-187, 190-91, 193-94, 197</td>
</tr>
<tr>
<td>Coolidge v. New Hampshire</td>
<td>207</td>
</tr>
<tr>
<td>Cosby v. I.C.C.</td>
<td>374-76, 383</td>
</tr>
<tr>
<td>Country Aviation, Inc. v. Tinicum Township</td>
<td>262, 284-285</td>
</tr>
<tr>
<td>Cove Tankers Corp. v. United Ship Repair, Inc.</td>
<td>443-44</td>
</tr>
<tr>
<td>Coyle v. Smith</td>
<td>228</td>
</tr>
<tr>
<td>Crain Enterprises Inc. v. Mound City</td>
<td>232</td>
</tr>
<tr>
<td>Cruz v. Chesapeake Shipping, Inc.</td>
<td>416-17, 424, 427, 431-33</td>
</tr>
<tr>
<td>CSX Transp., Inc. v. Lizzie Beatrice Easterwood</td>
<td>48</td>
</tr>
<tr>
<td>CSX Transp., Inc. v. Public Utilities Comm'n</td>
<td>57</td>
</tr>
<tr>
<td>Davis v. Hix</td>
<td>16</td>
</tr>
<tr>
<td>Day v. Trans World Airlines</td>
<td>482</td>
</tr>
<tr>
<td>DeMateos v. Texaco, Inc.</td>
<td>438</td>
</tr>
<tr>
<td>Department of Labor and Indus. v. Aluminum Cooking Utensil Co.</td>
<td>26</td>
</tr>
<tr>
<td>Desper v. Starved Rock Ferry Co.</td>
<td>434</td>
</tr>
<tr>
<td>Dia Navigation Co. v. Pomeroy</td>
<td>496, 499, 504</td>
</tr>
<tr>
<td>Dia Navigation Co. v. Reno</td>
<td>496, 499, 501, 502</td>
</tr>
<tr>
<td>Dial-A-Messenger, Inc. v. Arizona Dep't of Econ.</td>
<td>20</td>
</tr>
<tr>
<td>Director of Employment Security v. Pre-Fab Transit</td>
<td>32</td>
</tr>
<tr>
<td>Dow Chemical Co. v. United States</td>
<td>218, 219</td>
</tr>
<tr>
<td>Dowd v. International Longshoremen's Ass'n</td>
<td>426, 428</td>
</tr>
<tr>
<td>Dracos v. Hellenic Lines, Ltd.</td>
<td>438</td>
</tr>
</tbody>
</table>

**E**

| EEOC v. Arabian American Oil | 424 |
| Ellison, Inc. v. Bd. of Rev. of Indus. Comm'n of Utah, Dep't of Employment Sec. | 30 |
| Erspamer Advertising Co. v. Dep't of Labor | 26 |
| European Parliament v. Council | 63 |
| Evangelinos v. Trans World Airlines, Inc. | 482, 485 |
| Evansville-Vanderbrugh Airport Auth. Dist. v. Delta Air Lines | 293-294, 299, 302, 305 |
| Ex Parte Young | 96 |

**F**

| Ferebee v. Chevron Chemical Corp. | 56 |
| Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta | 100 |
| Finn v. Consolidated Rail | 188 |
| First Nat'l Bank Ben. Soc. v. Sisk | 26 |
| Fisher v. City of Berkeley | 231 |
| Flores v. Central Am. S.S. Agency, Inc. | 439 |
| Florida v. Bostick | 204 |
| Florida v. Riley | 220 |
| Florida v. Royer | 205 |
| Fogleman v. ARAMCO | 438 |

**G**

| Gallose v. Long Island R.R. Co. | 192, 193 |
| Gambera v. Bergoty | 439 |
| Garcia v. San Antonio Metro. Transit Auth. | 245 |
| Garden State Farms, Inc. v. Bay | 260 |
| Gardner v. Smith | 16 |
| Gaston v. Flowers Transportation Co. | 196 |
| Gazis v. John S. Latsis (USA), Inc. | 439 |
| Goreham v. Des Moines Metro. Area Solid Waste Agency | 243 |
| Graebel Moving & Storage of Wis. v. Labor and Indus. Rev. Comm'n | 29 |
| Grammona v. Metro-North Commuter R.R. Co. | 189, 195 |
| Griggs v. Allegheny County | 257-258 |
| Groves v. Universe Tankships, Inc. | 440 |
| Gustarson v. City of Lake Angelus | 285 |
| Gutierrez v. Diana Investments Corp. | 438 |
**Table of Cases**

<table>
<thead>
<tr>
<th>Page</th>
<th>Case Name</th>
</tr>
</thead>
</table>
| 543  | Kuntz v. Werner Flying Serv., Inc.  
Kyriakos v. Gouladris | 262  
434 |
| 196  | Hagerty v. L&L Marine Services |
| 504  | Haitian Refugee Ctr. v. Gracey |
| 188  | Hammond v. Terminal R.R. Ass’n of St. Louis |
| 193  | Harrison v. Missouri P.R.R. |
| 32   | Hart v. Johnson |
| 193  | Hartel v. Long Island R.R. Co. |
| 435-40 | Hellenic Lines, Ltd. v. Rhoditis |
| 19   | Hudson v. Industrial Comm’n and Pfeiffer |
| 401  | Hulsey v. USAir Inc. |
| 229  | Hunter v. City of Pittsburgh |
| 93   | In Re: Air Crash at Stapleton International Airport |
| 120, 121 | In Re: American Provision Co. |
| 28   | In Re: Bargain Busters, Inc. |
| 16   | In The Matter of Janet B. Watson |
| 426, 429-30 | Inces Steamship Co. v. International Maritime Workers Union |
| 60   | Indiana Harbor Belt R.R. v. American Cynamid Co. |
| 297-299, 301, 303-304, 307 | Intake Water Co. v. Yellowstone River Compact Comm’n |
| 244  | Interface Group v. Massachusetts Port Auth. |
| 293  | International Fruit Co. v. Produktcas spoor voor Groenten en Fruit |
| 70   | International Longshoremen’s Ass’n v. Allied Int’l, Inc. |
| 426  | International Longshoremen’s Local 1416 v. Ariadne Shipping Co. |
| 427  | In Re: American Airlines |
| 424  | Jackson v. S.S. Archimedes |
| 424  | Jose v. M/V Fir Grove |
| 94   | Kansas ex. rel. Stephan v. Trans World Airlines, Inc. |
| 377-78 | Kansas City S. Indus., Inc. v. I.C.C. |
| 202, 203, 219 | Katz v. United States |
| 189, 190 | Lancaster v. Norfolk & Western Ry. Co. |
| 435-40 | Lauritzen v. Larsen |
| 193  | Little v. Thompson |
| 496, 500, 505-6, 507, 508 | Linea Aera Nacional de Chile v. Sale |
| 35   | Loeb v. United States |
| 401  | Long v. Trans World Airlines |
| 441  | Lottawanna, The |
| 35   | M.F.A. Mut. Ins. Co. v. United States |
| 202  | Marbury v. Madison |
| 202  | Marine Cooks & Stewards v. Panama S.S. Co. |
| 425  | McCulloch v. Sociedad Nacional de Marineros de Honduras |
| 423-24, 429-30 | McDonald v. Piedmont Aviation Inc. |
| 402  | Meredith Publishing Co. v. Iowa Employment Sec. Comm’n |
| 26   | Merriam v. Moody’s Executor |
| 215  | Michigan Dep’t of State v. Sitz |
| 374  | Missouri-Kansas-Texas R.R. v. United States |
| 376-77 | Missouri P. Truck Lines, Inc. v. United States |
| 438-39 | Moncada v. Lemuria Shipping Corp. |
| 188  | Moody v. Maine Cent. R.R. |
| 192, 193 | Moore v. Chesapeake & Ohio R.R. Co. |
| 124  | Murname v. American Airlines |
| 26, 28 | Murphy v. Davmit |
| 90-92 | Nader v. Allegheny Airlines |
| 412  | National Marine Eng’rs. Beneficial Ass’n, AFL-CIO v. Burnley |
| 213, 214, 217 | National Treasury Employees Union v. VonRaab |
| 25   | New Deal Cab Co. v. Fahi |
| 245  | New York v. United States |
New York Dock Ry. v. United States 368
Nordman v. Calhoun 26
Northern Oil Co. v. Ind. Comm'n 28
Northwest Airlines v. County of Kent, Michigan 291-307
Northwest Airlines v. County of Kent 298-301
Northwest Airlines v. County of Kent, Michigan (Grand Rapids) 292-293, 295, 298-307

O
Offshore Co. v. Robinson 418
Olmstead v. United States 201, 221, 223
O'Shea v. Littleton 96
Osorio v. INS 506
Overlook Terrace Management Corp. v. West New York Rent Control Bd. 237

P
Pacific Merchant Shipping Ass'n v. Aubry 418
Paity Cab Co. v. United States 25
Park Cab Co. v. Annunzio 32-33
Pavlou v. Ocean Traders Marine Corp. 437-38
Pazan v. Michigan Unep. Comp. Comm'n 31
Pennsylvania R.R. v. Dillon 408
People v. Western Airlines, Inc. 93-95
Pilot Life Ins. Co. v. Dedeaux 102
Pirolo v. City Of Clearwater 262
Public Health Trust v. United Safeguard Sec. Agency 498

R
Railway Labor Exec. Ass'n v. United States 368
Richard v. Celebrizze 16
Rives v. I.C.C. 378-80
Rochester Dairy Co. v. Christgau 26
Rogers v. Missouri Pac. R.R. 193
Romero v. International Terminal Operating Co. 435
Rutherford Food Corp. v. McComb 25
Rylands v. Fletcher 54

S
Salem College and Academy, Inc. v. Employment Div. 34
Santa Monica Airport Ass'n v. City of Santa Monica (I) 264
Santa Monica Airport Ass'n v. City of Santa Monica (II) 264-265
Schneckloth v. Bustamonte 204
Schneider v. National R.R. Passenger Corp. 193
Schroepfer v. A.S. Abell Co. 427
Shaw v. Delta Air Lines, Inc. 100
Sigalas v. Lido Maritime, Inc. 438
Sinclair Refining Co. v. Unemployment Comp. Comm'n 16
Sinkler v. Missouri Pacific R.R. 193
Skinner v. Railway Labor Executives' Ass'n 213-215
Smallwood v. United Airlines 124, 125
Smith v. County of Santa Barbara 259-260, 266
Sneed v. County of Riverside 258-259
Sociedad Nacional de Marineros de Honduras v. McCulloch 426
Software Assocs., Inc. v. State Dep't of Employment 26
Soldal v. Cook County 202, 203
Solor Age Mfg., Inc. v. Employment Sec. Dep't 28-29
South Dakota v. Dole 245
Southern Pac. Co. v. Jensen 441
Southern Pac. Transp. Co. v. I.C.C. 378
Stafford Trucking, Inc. v. State Dep't of Indus., Labor, and Human Relations 26
State By Job Serv. N.D. v. Dionne 33
State Dep't of Labor v. Medical Placement Serv., Inc. 25
State of Illinois v. Butterfield 270
Steward Machine Co. v. Davis 34

T
Tachick Freight Lines, Inc. v. State Dep't of Labor 25
Tarasenko v. Cardigan Shipping Co. 439
Taylor v. Burlington Northern R.R. 188
Terry v. Ohio 207, 220, 221
Times-Argus Ass'n, Inc. v. Dep't of Employment and Training 27
### Table of Cases

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Toscano v. Burlington Northern R.R.</td>
<td>188</td>
</tr>
<tr>
<td>Trans World Airlines, Inc. v.</td>
<td></td>
</tr>
<tr>
<td>Mattox</td>
<td>95-96, 100</td>
</tr>
<tr>
<td>Trinity Bldg. Corp. v. Rhode Island</td>
<td>26</td>
</tr>
<tr>
<td>Unemployment Comm'n Bd.</td>
<td></td>
</tr>
<tr>
<td>Tsakonites v. Transpacific Carriers Corp.</td>
<td>438</td>
</tr>
<tr>
<td>Unemployment Comp. Comm'n v. Collins</td>
<td>26</td>
</tr>
<tr>
<td>United Airlines, Inc. v. Hart</td>
<td>402</td>
</tr>
<tr>
<td>United States v. 250 Kgs of Nails</td>
<td>406</td>
</tr>
<tr>
<td>United States v. 1500 Cords, More or Less, Jackpine</td>
<td>409</td>
</tr>
<tr>
<td>United States v. A &amp; F Materials Co.</td>
<td>50</td>
</tr>
<tr>
<td>United States v. Aceto Agric. Chemicals Corp.</td>
<td>51</td>
</tr>
<tr>
<td>United States v. Aero Mexico</td>
<td>498</td>
</tr>
<tr>
<td>United States v. Bell</td>
<td>209, 210</td>
</tr>
<tr>
<td>United States v. Berry</td>
<td>205</td>
</tr>
<tr>
<td>United States v. Carroll</td>
<td>211</td>
</tr>
<tr>
<td>United States v. Causby</td>
<td>254-257</td>
</tr>
<tr>
<td>United States v. Chem-Dyne Corp.</td>
<td>50</td>
</tr>
<tr>
<td>United States v. City of Blue Ash</td>
<td>262</td>
</tr>
<tr>
<td>United States v. Davis</td>
<td>206</td>
</tr>
<tr>
<td>United States v. Epperson</td>
<td>208</td>
</tr>
<tr>
<td>United States v. Fleet Factors Corp.</td>
<td>50</td>
</tr>
<tr>
<td>United States v. Flores</td>
<td>436</td>
</tr>
<tr>
<td>United States v. Gorman</td>
<td>207</td>
</tr>
<tr>
<td>United States v. Herzburn</td>
<td>208, 209</td>
</tr>
<tr>
<td>United States v. I.C.C.</td>
<td>372</td>
</tr>
<tr>
<td>United States v. Kroll</td>
<td>210</td>
</tr>
<tr>
<td>United States v. Legato</td>
<td>210</td>
</tr>
<tr>
<td>United States v. Lopez</td>
<td>208, 209</td>
</tr>
<tr>
<td>United States v. Lowden</td>
<td>368</td>
</tr>
<tr>
<td>United States v. Maryland Bank &amp; Trust Co.</td>
<td>50</td>
</tr>
<tr>
<td>United States v. Mendenhall</td>
<td>204, 205</td>
</tr>
<tr>
<td>United States v. Monsanto Co.</td>
<td>50</td>
</tr>
<tr>
<td>United States v. Montoya de Hernandez</td>
<td>212, 213</td>
</tr>
<tr>
<td>United States v. Moreno</td>
<td>210</td>
</tr>
<tr>
<td>United States v. Nigro</td>
<td>209</td>
</tr>
<tr>
<td>United States v. Place</td>
<td>207</td>
</tr>
<tr>
<td>United States v. Silk</td>
<td>25</td>
</tr>
<tr>
<td>United States v. Skipwith</td>
<td>209</td>
</tr>
<tr>
<td>United States v. Sokolow</td>
<td>211</td>
</tr>
<tr>
<td>United States v. United States (I.C.C.)</td>
<td>372</td>
</tr>
<tr>
<td>United States Steel Corp. Multistate Tax Comm'n</td>
<td>244</td>
</tr>
<tr>
<td>Uravic v. F. Jarka Co.</td>
<td>440</td>
</tr>
<tr>
<td>Villar v. Crowley Maritime Corp.</td>
<td>438</td>
</tr>
<tr>
<td>Virginia v. Tennessee</td>
<td>244</td>
</tr>
<tr>
<td>Virginia Employment Comm'n v. A.I.M. Corp.</td>
<td>33</td>
</tr>
<tr>
<td>Virginians for Dulles v. Volpe</td>
<td>270</td>
</tr>
<tr>
<td>Wallace v. Annunzio</td>
<td>32</td>
</tr>
<tr>
<td>West v. Northwest Airlines, Inc.</td>
<td>93-94</td>
</tr>
<tr>
<td>Western Oil &amp; Gas Ass'n v. Monterey Bay Unified Air Pollution Control</td>
<td>234</td>
</tr>
<tr>
<td>Wilkinsburgh-Penn Joint Water Auth., v. Borough of Churchill</td>
<td>238</td>
</tr>
<tr>
<td>Wildenhaus's Case</td>
<td>426</td>
</tr>
<tr>
<td>Windward Shipping (London) Ltd. v. American Radio Ass'n</td>
<td>424, 426-27</td>
</tr>
<tr>
<td>Witt v. United States</td>
<td>211, 212</td>
</tr>
<tr>
<td>Yiu Sing Chun</td>
<td>504</td>
</tr>
</tbody>
</table>
# TOPIC INDEX

## A

- **ABC Test** ........................................... 24-30, 32
- **Accidents Reports Act** ...................... 43, 48
- **Ad Coelum Doctrine** .......................... 255-56
- **Administrative Search** ..................... 199, 206
- **Aerial Investigation** ....................... 199, 218
- **Aerial Surveillance** .......................... 219
- **Age Discrimination Employment Act**  
  (ADEA) ........................................ 17, 124
- **Air Transport Association**  
  (ATA) ........................................ 1, 129, 131, 304, 342
- **Air Line Pilots Association**  
  (ALPA) ........................................ 117, 215-18, 223
- **Air Travel Enforcement Guidelines** .......... 95
- **Air Traffic Control (ATC)** .................. 252, 279-82
- **Air Route Traffic Centers** .................. 252, 280
- **Air Defense Identification Zones** ........ 279
- **Aircraft Ownership** ........................... 182
- **Aircraft Leasing** ................................ 3-4, 7-13, 182
- **Aircraft Piracy** ................................ 473, 479
- **Airline Capitalization** ...................... 1-13
- **Airline Pilots Association** ................. 342, 352
- **Airline Deregulation Act of 1978**  
  (ADA) ........................................ 87-132, 253, 296, 370, 387, 400
- **Airport Capital Development** ............... 297
- **Airport Planning** ................................ 252, 265-71
- **Airport Regulation** ............................ 181
- **Airport Rates and Charges** ................. 306
- **Airport and Airway Improvement Act** ........ 306
- **Airport Security Checkpoints** ............ 208-09, 221
- **Airport and Airway Trust Fund** ........... 268-69
- **Airport-Airline Lease and Use Agreement** .. 295
- **Airspace Allocation** .......................... 252, 271-79
- **Aliens** ........................................ 444-46, 495-508
- **All Cargo Operations** ....................... 349
- **American Public Transit Association** ...... 140
- **American Trucking Association** ............ 16-17
- **American Association of State and Highway Transit Officials** 141
- **Amtrak** ........................................ 282
- **Anticompetitive Practices** .................. 347
- **Antitrust Regulation** ....................... 444-46, 495-508
- **Antitrust, European Community** .......... 116, 181
- **Association of American Railroads** ....... 43, 47, 49
- **Association of Flight Attendants (AFA)** .... 117
- **Assumption of Risk** .......................... 193
- **Asylum** ....................................... 495-508
- **Aviation Security** ............................. 182, 457
- **Aviation Sabotage** ............................ 461
- **Aviation Security Conference (1987)** ...... 494
- **Bankruptcy** .................................... 119-25, 182
- **Bermuda I** ..................................... 65, 73
- **Bilateral** ....................................... 329-31, 340-41, 352-53
- **Bill of Rights** ................................ 200-02, 223
- **Bona Fide Occupational Qualification (BFOQ)** 124-25
- **Bonn Declaration of 1978** ................... 480, 488
- **Border Search** .................................. 208-09, 221
- **Break-even Costs** .............................. 300-02
- **Buckley Method** ................................. 298-99
- **Bullet Train** .................................... 311
- **Cable Television** ............................... 227-28
- **Cabotage** ....................................... 61-85, 125-27, 403-405
- **Central Flow Control** ....................... 252, 281
- **Centralization Mode** ......................... 226, 245
- **Chicago Convention on International Civil Aviation** 65-73, 83, 451-52, 485-86
- **Cities Program** ................................ 329-32, 339-45
- **Civil Aeronautics Act** ...................... 256, 369
- **Civil Aeronautics Board (CAB)** .......... 3, 7, 88-92, 99, 114, 369, 400, 511
- **Civil Aeronautics Board Sunset Act** ........ 115
- **Civil Reserve Air Fleet (CRAF)** ............ 126
- **Class Airspace** ................................ 252, 272-75, 279
- **Clean Water Act** ............................... 51-52
- **Coast Guard Authorization Act** ........... 411
- **Code-sharing** .................................. 358-59
- **Collective Bargaining Agreements** ........ 119-21
- **Compensatory (pricing)** .................... 295-96
- **Comprehensive Environmental Response, Compensation & Liability Act** .......... 45, 48-52

547
Computer Reservations Systems (CRS) .................. 101, 344
Concealed Weapons .................. 476
Consumer Protection .................. 182
Control Towers .................. 252, 280
Coordination Without Hierarchy
Model .................. 226, 248
Cost per Passenger .................. 300
Cost-recovery Rates .................. 304, 307
Council of Economic Transport
Ministers .................. 64
Cross-subsidy .................. 300
Customs, User-fee Agreements .................. 350
Customs Service .................. 349

D
Deceptive Advertising Laws .......... 87-103
Department of Justice (DOJ) ........ 116, 118
Detention .................. 199, 210-13
Deterrents to Terrorism ........... 467
Dillon's Rule of Interpretation .... 228, 232, 235, 240-44
Doing-business Problems ........ 339, 351, 358
Drug Courier Profile ........ 199, 204, 209
Drug Testing, Airline ........ 127-29, 199, 201, 213-18
Drug Trafficking ........ 483, 488-89

E
Economic Development Plan ........ 327-64
Electronic Surveillance ........ 470-79, 491
Emergency Railroad Transportation
Act of 1933 ........ 367
Emergency Vehicles ........ 228
Eminent Domain ........ 251, 254-57, 266-67
Employee Stock Ownership Plans (ESOP) ........ 112, 119
Employee Retirement Income Security Act (ERISA) ........ 17, 97-102, 109
Entry Obstacles ........ 339
Environmental Damage ........ 52-60
Environmental Impact Statements ........ 270
Environmental Protection Agency (EPA) ........ 43, 49, 218-19
Environmental Regulation ........ 182
European Commission ........ 62, 63
European Court of Justice (ECJ) ........ 63
European Economic Community (EEC) ........ 61-85

F
European Community Aviation ........ 182
Fair Labor Standards Act ........ 17, 404, 415-22, 431-32
Federal Accounting Standards Board ........ 6, 11
Federal Aid Road Act of 1916 ........ 245
Federal Aviation Act ........ 92-97, 115, 256, 271, 339
Federal Aviation Administration (FAA) ........ 107, 124-31, 213, 261-75, 285-92, 303-07
Federal Aviation Administration Authority Act (FAAAA) ........ 306
Federal Aviation Regulations ........ 267
Federal Employers Liability Act (FELA) ........ 183-97, 376, 433-34
Federal Insecticide, Fungicide, & Rodenticide Act ........ 51
Federal Preemption ........ 252
Federal Railroad Administration (FRA) ........ 42-48, 315
Federal Railroad Safety Act ........ 43
Federal Trade Commission Act ........ 91
Fifth Freedom Rights ........ 62, 68-76
Flight Service Stations ........ 252, 281
Flight Attendants ........ 129
Flux-gate Magnetometer ........ 208
Foreign-Built Dredge Act ........ 411, 415, 447
Fourth Amendment ........ 127, 199-223
 Freedoms of the Air ........ 65
Fuel Flowage Fee ........ 295
Fundamental Human Rights ........ 478

G
Game Theory ........ 517-18
General Agreement on Trade in Services (GATS) ........ 77-84
General Agreement on Trade and Tariffs (GATT) ........ 75-84
German Transrapid ........ 312
German Federal Rail ........ 311
Great Depression ........ 366-67
Guerrilla Warfare ........ 463, 465

H
Hague Convention of 1970 ........ 475-76, 487
Hazardous Materials, Transport ........ 42-60
Hazardous Materials Transportation Uniform Safety Act ........ 44
Hazardous Materials Transportation Act ........ 43-44
<table>
<thead>
<tr>
<th>Topic Index</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head Tax</td>
<td>293</td>
</tr>
<tr>
<td>Height Zoning</td>
<td>252, 258-59, 265-66</td>
</tr>
<tr>
<td>Herfindahl-Hirschman Index (HHI)</td>
<td>116</td>
</tr>
<tr>
<td>Herk Model</td>
<td>520-29</td>
</tr>
<tr>
<td>High Speed Rail Development Act</td>
<td>310, 317-23</td>
</tr>
<tr>
<td>High Speed Ground Transportation (HSGT)</td>
<td>310-14</td>
</tr>
<tr>
<td>Hijacking</td>
<td>473-79</td>
</tr>
<tr>
<td>Home Rule</td>
<td>225-39</td>
</tr>
<tr>
<td>Hub and Spoke Systems</td>
<td>181</td>
</tr>
<tr>
<td>Immigration</td>
<td>444-46</td>
</tr>
<tr>
<td>Immigration Act of 1990</td>
<td>445</td>
</tr>
<tr>
<td>Immigration and Nationality Act (INA)</td>
<td>496-505</td>
</tr>
<tr>
<td>Immigration and Naturalization Service (INS)</td>
<td>349, 496-505</td>
</tr>
<tr>
<td>Immigration User Fee Statute</td>
<td>496, 498, 500-02</td>
</tr>
<tr>
<td>Industrial Curtilage</td>
<td>219</td>
</tr>
<tr>
<td>Injunctions Against Airports</td>
<td>252, 262-63</td>
</tr>
<tr>
<td>Intelligent Vehicle Highway System (IHVS)</td>
<td>225-49</td>
</tr>
<tr>
<td>Intercity Express (ICE)</td>
<td>312</td>
</tr>
<tr>
<td>Intergovernmental (relations)</td>
<td>226-30, 235, 241, 245-48</td>
</tr>
<tr>
<td>Intermodal Transportation Efficiency Act (ISTEA)</td>
<td>246-48, 310, 314-15, 320, 325</td>
</tr>
<tr>
<td>Intermodal Transportation</td>
<td>352</td>
</tr>
<tr>
<td>Intermodalism</td>
<td>314</td>
</tr>
<tr>
<td>Internal Revenue Code</td>
<td>17</td>
</tr>
<tr>
<td>International Air Service</td>
<td>327, 341</td>
</tr>
<tr>
<td>International Air Transport Association (IATA)</td>
<td>65</td>
</tr>
<tr>
<td>International Association of Machinists (IAM)</td>
<td>106</td>
</tr>
<tr>
<td>International Association of Machinists and Aerospace Workers</td>
<td>110</td>
</tr>
<tr>
<td>International Aviation Conference (ICAC)</td>
<td>329</td>
</tr>
<tr>
<td>International Brotherhood of Teamsters</td>
<td>366, 373, 376, 387-88, 390, 394-95</td>
</tr>
<tr>
<td>International Civil Aviation Organization (ICAO)</td>
<td>65-75, 452-56, 479-86</td>
</tr>
<tr>
<td>International Court of Justice (ICJ)</td>
<td>73</td>
</tr>
<tr>
<td>International Responses to Terrorism</td>
<td>456</td>
</tr>
<tr>
<td>International Terrorism</td>
<td>461, 462</td>
</tr>
<tr>
<td>Interstate Commerce</td>
<td>293, 303</td>
</tr>
<tr>
<td>Interstate Commerce Act</td>
<td>376-79, 397</td>
</tr>
<tr>
<td>Interstate Commerce Commission</td>
<td>21, 138, 368-401</td>
</tr>
<tr>
<td>Jones Act</td>
<td>196, 404-48</td>
</tr>
<tr>
<td>Labor Relations</td>
<td>105-32, 182</td>
</tr>
<tr>
<td>Labor Management Relations Act</td>
<td>422, 428-29</td>
</tr>
<tr>
<td>Labor Protection Provisions (LPPs)</td>
<td>114-17, 365-402</td>
</tr>
<tr>
<td>Laissez faire</td>
<td>132</td>
</tr>
<tr>
<td>Land Use Zoning</td>
<td>252, 259-60, 265-66</td>
</tr>
<tr>
<td>Landing Fees</td>
<td>295, 298, 300</td>
</tr>
<tr>
<td>Less-Than-Truckload Motor Carriers</td>
<td>383-85</td>
</tr>
<tr>
<td>Local Government “substantial deference”</td>
<td>300</td>
</tr>
<tr>
<td>Locomotive Inspection Act</td>
<td>48</td>
</tr>
<tr>
<td>Longshore and Harbor Workers’ Compensation Act</td>
<td>404, 441-45</td>
</tr>
<tr>
<td>Magnetic Levitation (Maglev)</td>
<td>312, 314</td>
</tr>
<tr>
<td>Maritime Employees Union</td>
<td>419</td>
</tr>
<tr>
<td>Maritime Jurisdiction</td>
<td>434-41</td>
</tr>
<tr>
<td>Maritime Labor Practices</td>
<td>422-33</td>
</tr>
<tr>
<td>Market Rate</td>
<td>295</td>
</tr>
<tr>
<td>Market-based Fees</td>
<td>302</td>
</tr>
<tr>
<td>Mendocino Coast Labor Protection Provisions</td>
<td>368, 396-98</td>
</tr>
<tr>
<td>Mercenaries</td>
<td>466, 471</td>
</tr>
<tr>
<td>Merchant Marine Act</td>
<td>404-48</td>
</tr>
<tr>
<td>Mergers</td>
<td>114-16</td>
</tr>
<tr>
<td>Military Airlift Command (MAC)</td>
<td>127</td>
</tr>
<tr>
<td>Military Training Routes</td>
<td>252, 278</td>
</tr>
<tr>
<td>Military Operations Areas</td>
<td>277</td>
</tr>
<tr>
<td>Monopsony Theory</td>
<td>523-29</td>
</tr>
<tr>
<td>Montreal Convention of 1971</td>
<td>487</td>
</tr>
<tr>
<td>Most Favored Nation (MFN)</td>
<td>79-82</td>
</tr>
<tr>
<td>Motor Carrier Act of 1980</td>
<td>383-86, 394</td>
</tr>
<tr>
<td>Motor Carriers, as Independent Contractors</td>
<td>16-38</td>
</tr>
<tr>
<td>National Air Carriers Association</td>
<td>342</td>
</tr>
<tr>
<td>National Air Traffic Controllers Association (NATCA)</td>
<td>108</td>
</tr>
<tr>
<td>National Association of Attorneys General (NAAG)</td>
<td>95-99</td>
</tr>
<tr>
<td>Topic</td>
<td>Pages</td>
</tr>
<tr>
<td>------------------------------------------------------------------------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>National Environmental Policy Act</td>
<td>70</td>
</tr>
<tr>
<td>National Labor Relations Act (NLRA)</td>
<td>17-76, 402-04, 422-23, 427-33</td>
</tr>
<tr>
<td>National Labor Relations Board</td>
<td>422, 432</td>
</tr>
<tr>
<td>National Master Freight Agreement</td>
<td>373, 388-89</td>
</tr>
<tr>
<td>National Mediation Board (NMB)</td>
<td>117-18</td>
</tr>
<tr>
<td>National Transportation Safety Board (NTSB)</td>
<td>43, 108, 130</td>
</tr>
<tr>
<td>Navigable Airspace</td>
<td>219</td>
</tr>
<tr>
<td>Negligent Infliction of Emotional Distress</td>
<td>183-94</td>
</tr>
<tr>
<td>New York Dock Type Labor Protection Provisions</td>
<td>368, 396-98</td>
</tr>
<tr>
<td>Nonairline Revenue</td>
<td>298-99</td>
</tr>
<tr>
<td>Nonstop Single-plane</td>
<td>343-54</td>
</tr>
<tr>
<td>Norfolk and Western Labor Protection Provisions</td>
<td>368, 396-98</td>
</tr>
<tr>
<td>North East Rail Service Act</td>
<td>374</td>
</tr>
<tr>
<td>North American Free Trade Agreement (NAFTA)</td>
<td>136</td>
</tr>
<tr>
<td>Occupational Safety &amp; Health Administration (OSHA)</td>
<td>43</td>
</tr>
<tr>
<td>Oil Pollution Act</td>
<td>51-52</td>
</tr>
<tr>
<td>Oligopolistic Power</td>
<td>509-31</td>
</tr>
<tr>
<td>Omnibus Transportation Employment Act of 1991</td>
<td>128</td>
</tr>
<tr>
<td>One-stop Single-plane</td>
<td>343-49</td>
</tr>
<tr>
<td>Ordinance Rates</td>
<td>299</td>
</tr>
<tr>
<td>Outer Continental Shelf Lands Act</td>
<td>409</td>
</tr>
<tr>
<td>Passenger Ship Act</td>
<td>412-15, 447</td>
</tr>
<tr>
<td>Pension Benefit Guaranty Corporation (PBGC)</td>
<td>109</td>
</tr>
<tr>
<td>Physical Impact Test</td>
<td>185-87, 194</td>
</tr>
<tr>
<td>Police Power</td>
<td>251-52, 258-64</td>
</tr>
<tr>
<td>Political Asylum</td>
<td>472, 477, 496, 506</td>
</tr>
<tr>
<td>Port-of-entry</td>
<td>350</td>
</tr>
<tr>
<td>Powers of Immunity and Initiative</td>
<td>229-33</td>
</tr>
<tr>
<td>Preemption</td>
<td>99-100</td>
</tr>
<tr>
<td>Privacy Interest</td>
<td>203</td>
</tr>
<tr>
<td>Pro-competitive Agreement</td>
<td>344</td>
</tr>
<tr>
<td>Professional Air Traffic Controllers (PATCO)</td>
<td>107</td>
</tr>
<tr>
<td>Program for Airport Capacity Efficiency</td>
<td>303</td>
</tr>
<tr>
<td>Prohibited Areas</td>
<td>252, 276</td>
</tr>
<tr>
<td>Proprietary Restrictions on Airport Use</td>
<td>252, 264-65</td>
</tr>
<tr>
<td>Public Purpose Doctrine</td>
<td>226-28, 239</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>R</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rail Passenger Services Act</td>
</tr>
<tr>
<td>Rail Revitalization and Regulatory Reform Act (4R Act)</td>
</tr>
<tr>
<td>Rail-truck Freight Agreement</td>
</tr>
<tr>
<td>Railcar Leasing</td>
</tr>
<tr>
<td>Railcar Manufacturers</td>
</tr>
<tr>
<td>Railroad Retirement Tax Act</td>
</tr>
<tr>
<td>Railroad Safety Act of 1970</td>
</tr>
<tr>
<td>Railroad Unemployment Insurance Act</td>
</tr>
<tr>
<td>Railway Labor Act</td>
</tr>
<tr>
<td>Reasonable Rental Charges</td>
</tr>
<tr>
<td>Refugee Act</td>
</tr>
<tr>
<td>Refugees</td>
</tr>
<tr>
<td>Regional Rail Reorganization Act of 1973 (3R Act)</td>
</tr>
<tr>
<td>Regulatory Preemption</td>
</tr>
<tr>
<td>Relative Bystander Test</td>
</tr>
<tr>
<td>Residual</td>
</tr>
<tr>
<td>Resource Conservation &amp; Recovery Act</td>
</tr>
<tr>
<td>Restatement (Second) of Torts</td>
</tr>
<tr>
<td>Road Sensors</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>S</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sabotage</td>
</tr>
<tr>
<td>Safety Appliances Act</td>
</tr>
<tr>
<td>Safety, Airline</td>
</tr>
<tr>
<td>Scandinavian Airlines System (SAS)</td>
</tr>
<tr>
<td>Seafarer's International Union</td>
</tr>
<tr>
<td>Seamen's Act</td>
</tr>
<tr>
<td>Search and Seizure</td>
</tr>
<tr>
<td>Seventh Freedom</td>
</tr>
<tr>
<td>Single European Act</td>
</tr>
<tr>
<td>Skyjacking</td>
</tr>
<tr>
<td>Social Security Act</td>
</tr>
<tr>
<td>Special Use Airspace</td>
</tr>
<tr>
<td>Staggers Rail Act of 1980</td>
</tr>
<tr>
<td>State Sovereignty</td>
</tr>
<tr>
<td>Stowaways</td>
</tr>
<tr>
<td>Superfund Authorization &amp; Recovery Act</td>
</tr>
<tr>
<td>Surface-to-Air-Missiles (SAMs)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>T</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taft-Hartley Act</td>
</tr>
</tbody>
</table>
Takeoff Fee ........................................ 295
Temporary Flight Restrictions .......... 252, 278
Terminal Rents ................................. 295
Terrorism ......................................... 462-85
Terrorist Acts of Defense ............... 463
Terrorist Acts of Oppression ............ 463
Third-country Traffic ....................... 344
Title VII .......................................... 17
Tokyo Convention ....................... 474-75, 487-88
Towing Act ................................. 413-14, 447
Toxic Substances Control Act .......... 51
Trade secret law ................................ 219
Train a Grande Vitesse (TGV) ........ 311-13
Transit Without Visa (TWOV) ........... 500-08
Transport and General Workers
   Union .......................................... 126
Transportation Act of 1920 .............. 367
Transportation Act of 1940 .............. 368
Treaty of Rome ................................ 62, 71
Truckload Motor Carriers ................. 383-84
U.S. Airports for Better International
   Air Service (USA-BIAS) ........... 329-32, 339-42
U.S. Constitution, art I, § 8, cl. 3
   (Commerce Clause) ............... 244-45, 255, 284, 391
U.S. Constitution, art I, § 10, cl. 3
   (Compact Clause) ....................... 244
U.S. Constitution, amend. V (Takings
   Clause) ........................................ 256
U.S. Constitution, art VI, cl. 2
   (Supremacy Clause) .................... 261-62
U.S. Constitution, amend. X ............. 245
U.S. States Constitution, amend. X .... 246
U.S. Department of Labor ................. 371, 386-88, 421, 446
Unemployment Compensation ............. 16-17
Uniform Motor Vehicle Code ............. 246
United Nations Security Council .......... 480
Universal Declaration of Human
   Rights ........................................ 469, 489
Unlawful Interference ...................... 453-61
Unrestricted Capacity ..................... 344
Urban Mass Transportation Act ......... 370, 397
Uruguay Round ................................ 78, 84
Warning Areas .................................. 252, 276
Warrantless Aerial Search ............... 219-20
Washington Agreement of 1936 .......... 357-69
Zone of Danger ............................. 183-97
Zoning Regulation ......................... 237-38